Pretrial Standards: Revised 2024

National Association of Pretrial Services Agencies
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Acknowledgment

This 2024 revision to the National Association of Pretrial Services Agencies' (NAPSA) *Pretrial Standards* were developed by NAPSA's Standards Committee:

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Part 2: Essential Elements of a Pretrial Justice System 19

Standard 2.1: An array of options should be available to law enforcement before the initial court appearance to facilitate release of lower-risk individuals or as alternatives to traditional arrest and case processing when appropriate. 19

Standard 2.2: Bail statutes should include: a presumption for nonfinancial release with a progression from release on one's own recognizance to nonfinancial release conditions to reasonably assure court appearance and public safety; the exclusion of financial conditions; and pretrial detention for the limited number of individuals who present an unmanageable risk to commit a dangerous or violent crime while on pretrial release or to willfully fail to appear at scheduled court appearances 20

Standard 2.3: Jurisdictions should not establish restrictions on pretrial release that are not contained in state statute. 24

Standard 2.4: An experienced prosecutor should review all cases before the initial court appearance. This review should include decisions to file or decline to file charges, the consideration of appropriate charge(s), the defendant's eligibility for diversion, and recommendations for bail. 25

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Standard 3.1: Release Before the Initial Court Appearance 40

3.1(a): Jurisdictions should develop guidelines that authorize law enforcement or criminal justice agencies to release individuals before the initial court appearance. These guidelines should identify the criteria for determining that release. 40

3.1(b): Prior to the initial pretrial court appearance, pretrial services agencies should: 41

(i) collect and verify background and criminal history information on all bail-eligible individuals; 41

(ii) assess the individual's likelihood of future court appearance and arrest-free behavior while on pretrial release, using a pretrial outcome assessment that utilizes factors shown by research to predict the likelihood of these outcomes; and 41

(iii) as part of an adjusted actuarial approach, use factors found during the background investigation to help formulate appropriate recommendations. 41

Standard 3.2: Initial Court Bail Determination 42

3.2(a): Individuals who have not been released pursuant to 3.1(a) should be brought immediately before a judicial officer for an initial bail determination. 42

3.2(b): At the initial bail hearing, the court should determine if there is probable cause to believe the individual committed the crime charged before setting bail, ordering conditions of pretrial release or ordering the individual's temporary detention. 43

3.2(c): At the initial bail determination, after a finding of probable cause, the court may 44

(i): release the individual on their own recognizance with the conditions to appear for all scheduled court appearances and not commit any new criminal offense; or 44

(ii): order additional conditions of release designed to address individualized factors related to future court appearance or to public safety; or 44

(iii): temporarily hold an individual pursuant to Standard 3.4(b), pending a formal pretrial detention hearing pursuant to Standard 3.4. 44

3.2(d): Individuals should be represented by counsel at the initial pretrial court appearance. If the individual does not have counsel, the judicial officer should appoint or provide counsel. Defense counsel should have the opportunity to consult with their client prior to the initial pretrial court appearance. 45

3.2(e): At the initial court appearance, the Court should ensure that the individual receives a copy of the charging document and is informed of the charge(s). Unless waived by defense counsel, the Court should advise that the individual: 46

(i) is not required to say anything and that anything said may be used against them; . 46

(ii) has a right to counsel at all court proceedings, and that if the individual cannot afford a lawyer, one will be appointed; 46

(iii) may communicate with his or her attorney; 46

(iv) if necessary, has the right to an interpreter at all proceedings; and 46

(v) if not a United States citizen, may be affected adversely by collateral consequences of the charge, such as deportation, and has the right to contact their respective embassy or consulate. 46

3.2(f): The Court should provide the individual with written notice of the nature, time and place of the next scheduled court proceeding. 47

3.2(g): The initial pretrial court appearance should be in a court of record, and open to the public. Prosecution or law enforcement should make a reasonable effort to notify victims of the hearing's time and location. 47

Standard 3.3: Release Decisions 48

3.3(a): All persons should have a statutory presumption of release on personal recognizance with the requirement that they attend all court proceedings and not commit any criminal offense while released. This presumption may be rebutted by evidence of a substantial risk of failure to appear for scheduled court appearances or risk to public safety warranting a greater level of monitoring or supervision. In these cases, courts may impose conditions of supervision to address these specific risks. Conditions must be the least restrictive needed to address the identified risk. 48

3.3 (b): In setting conditions of release, the court should consider information in the charging document and information provided by the pretrial services agency, prosecution, defense counsel, and victim, if obtained. Courts should not deny release solely because the individual declined to provide information to the pretrial services agency, as it is the individual's right to decline to provide information. 49

3.3(c): Release orders should include, in writing, all court-imposed conditions of bail in a manner clear enough to serve as a guide for the individual's conduct. Release orders also should advise the person of: 49

(i) the consequences for failure to appear for scheduled court events; 49

(ii) the consequences of rearrests while on release; 49

(iii) the possible consequences for noncompliance with court-ordered conditions; 49

(iv) the prohibitions against threats, force, or intimidation of witnesses, jurors and officers of the court, obstruction of criminal investigations and retaliation against a witness, victim or informant; 49

(v) the date, time and location of the next scheduled court appearance ; 49

(vi) the authority the pretrial services agency may have to modify the initially established conditions of release, consistent with the laws and rules governing the exercise of judicial authority in the jurisdiction; and 49

(vii) acknowledgement of the individual's understanding and receipt of conditions of release and next scheduled court appearance. 49

Standard 3.4: Detention Decisions 50

3.4(a): Jurisdictions should define and justify the criteria for legal pretrial detention, keeping in mind that "liberty is the norm and detention should be the carefully limited exception." Detention without bail should target a limited and carefully defined population and require the government to show by clear and convincing evidence that an individual fitting detention eligibility poses an unmanageable risk to commit a dangerous or violent offense or to willfully fail to appear for court proceedings. 50

3.4(b): At the initial pretrial court appearance, the Court may order temporary detention pending a formal pretrial detention hearing if: 51

(i) the Court finds probable cause for the crime charged; 51

(ii) the individual meets the jurisdiction's detention eligibility criteria; and 51

(iii)the Court finds by a preponderance of the evidence that the individual poses an unmanageable risk to commit a dangerous or violent offense or to willfully fail to appear for scheduled court appearances. 51

In making these determinations, the court may consider the charging document, information obtained from the pretrial services agency, and arguments presented by prosecution and defense counsel. 51

3.4(c): Unless a continuance is requested by the defense, the formal pretrial detention hearing should be held within five working days of the initial pretrial court appearance. For good cause shown, the Court may grant the prosecution an additional two working-day continuance. 52

3.4(d): At the formal pretrial detention hearing, individuals have the right to: 52

(i) be present and be represented by counsel; 52

(ii) testify and present witnesses on their behalf; 52

(iii) confront and cross-examine prosecution witnesses; 52

(iv) present information by proffer or otherwise. 52

3.4(f): The prosecution must provide defense counsel with exculpatory evidence reasonably within its custody or control prior to and at the formal pretrial detention hearing. 53

3.4(g): At the pretrial detention hearing, the Court must make the following findings to detain the individual: 53

(i) probable cause to believe that the person committed the alleged offense; 53

(ii) the individual meets the jurisdiction's criteria for pretrial detention; and 53

(iii) by clear and convincing evidence, the individual poses an unmanageable risk to commit a dangerous or violent offense or to willfully fail to appear for scheduled court appearances 53

3.4(h): The Court should state in writing within three working days of the formal pretrial detention hearing the factual basis for its finding that, by clear and convincing evidence, the individual poses an unmanageable risk to commit a dangerous or violent offense or to willfully fail to appear for scheduled court appearances. 54

3.4(i): Detained individuals should have their cases placed on an accelerated calendar. Jurisdictions should establish a finite time period from the detention order to the start of trial. The time period may be extended, based on a motion by the prosecutor or defense and good cause found by the Court. Good cause may include, but not be limited to: 55

(i) the unavailability of an essential witness; 55

(ii) the necessity for forensic analysis of evidence; 55

(iii) the ability to conduct a joint trial with a co-defendant or co-defendants, 55

(iv) severance of co-defendants that permits only one trial to commence within the time period; 55

(v) complex or major investigations or complex or difficult legal issues; 55

(vi) the inability to proceed to trial because of action taken by or at the individual's behest; 55

(vii) an agreement between the government and the defense to dispose of the case by a guilty plea on or after the scheduled trial date; or 55

(viii) the breakdown of a plea on or immediately before the trial date and allowing reasonable time to prepare for an expedited trial after the circumstance giving rise to a tolling or extension of time no longer exists. 55

Accelerated time limitations should be shorter than current speedy trial time limitations applicable to individuals on pretrial release. Failure to try a detained individual within such accelerated time limitations should result in the individual's immediate release from detention under reasonable conditions that best minimize the risk of flight and danger to the community pending trial unless the delay is attributable to or agreed to by the individual. 55

3.4(j): If requested by the prosecution or defense, the court with an appellate jurisdiction should perform an expedited review of a pretrial detention order. If the detention order is made by a judicial officer other than a trial court judge, the appeals should be de novo. Appeals from decisions of the trial court judges to the court with appellate jurisdiction should be reviewed under an abuse of discretion Standard. 56

3.4(k): Nothing in these Standards should be construed as modifying or limiting the presumption of innocence. 56

Standard 3.5: Subsequent Review of Release and Detention 57

3.5(a): The judicial officer may at any time modify the individual's bail status to address the individual's conduct pretrial or changes in the individual's likelihood to

appear in court as required or to remain arrest free if released. Court orders setting or modifying conditions of release should be in writing and provided to the individual. Only the Court can add or remove a condition but may permit the pretrial services agency discretion to modify the terms of a release condition to conform to individual behavior. 57

3.5(b): The prosecutor, defense or the pretrial services agency may request a hearing to consider changes to an individual's release or detention status, including modification to supervision levels or conditions based on the individual's behavior on supervision, willful failure to appear in court, or an arrest on a new offense. 58

3.5(c): The Court's response to noncompliance with bail requirements may include modification of release conditions, revocation of release, an order of detention, or prosecution on new criminal charges. In making its ruling, the court should consider the seriousness of the violation, whether it appears to have been willful or if it increased the risk to public safety or of failure to appear for scheduled court appearances 58

3.5 (d): Before revoking a person's release status, the judicial officer should determine that there is: 59

(i) probable cause to believe that the person committed a crime while on release; or 59

(ii) clear and convincing evidence that the person willfully failed to appear for a scheduled court appearance; or 59

(iii) clear and convincing evidence that the person violated any other condition or conditions of release; and 59

(iv) clear and convincing evidence there is no condition or combinations of conditions that would reasonably assure future court appearance or public safety. 59

3.5(e): In any court proceeding involving possible modification or revocation of conditions of release, the individual should be represented by counsel. 59

3.5(f): A designated justice agency should identify to the court any individual that has failed to obtain release within 72 hours of a release order or whose pretrial detention exceeds the limit outlined by statute or court order. 60

3.5 (g): Upon a showing by defense counsel of compelling necessity, including for matters related to preparation of the individual's case, a judicial officer may permit the temporary release of a pretrial detained person, subject to appropriate conditions of temporary release. 60

Commentary: 60

Part 4: Pretrial Services Agencies 61

Standard 4.1: Purpose, Functions, and Management of a Pretrial Services Agency 61

4.1(a): The purposes of a pretrial services agency are to: 61

(i) assist judicial officers make prompt, fair, and informed bail decisions that encourage pretrial release, promote future court appearance, and enhance public safety; and..... 61

(ii) provide the Court with practical, individualized monitoring, supervision, and support options for persons that require oversight while on pretrial release. 61

(iii)track and report pretrial outcome and performance measures to gauge the behavior of persons released pretrial and identify areas for improvement in the pretrial system. 61

4.1(b): A pretrial services agency should adopt the following core functions to support its purposes: 62

(i): collect and verify individual background and criminal history information for all individuals eligible for pretrial release; 62

(ii): assess an individual's likelihood of future court appearance and crime-free behavior while on pretrial release, using validated outcome assessments shown by research to predict the likelihood of pretrial success;..... 62

(iii): use an individual's background interview and investigation, criminal history, outcome assessment results, and other information to: recommend appropriate conditions of pretrial release..... 62

(iv): monitor and supervise released individuals, in accordance with court-imposed conditions. Those options may include voluntary behavioral health services ; 62

(v): notify the Court, prosecution, and defense of an individual's compliance with release conditions and recommend appropriate changes to pretrial release status and conditions; and..... 62

(vi): review the status of detained individuals to determine their eligibility for pretrial release..... 62

Standard 4.2: Pretrial Services Agency Organization and Management..... 64

4.2(a): The pretrial services agency should have a governing and organizational structure designed to meet its mission and objectives. To enable neutral performance of its functions, the agency should be structured to ensure independence in the adversarial process. Agency operations should be consistent with maximizing release rates, court appearance, and public safety. 64

4.2(b): The pretrial services agency should have policies and procedures that enable it to function as an effective institution in its jurisdiction's criminal justice system. The agency should: 65

(i) establish goals for effectively assisting in pretrial release decision-making, monitoring and supervision of individuals on pretrial release, and the pretrial services agency's operations;..... 65

(iii) develop and regularly update strategic plans designed to enable the accomplishment of established goals;..... 65

(iv) develop and regularly update written policies and procedures describing the performance of key functions; 65

(v) develop and maintain financial management and accounting systems, prepare and monitor an operating budget, and provide the financial information to support operations and funding requests; 65

(vi) develop and operate a management information system to support individual identification, outcome assessment, identification of release conditions, compliance monitoring and supervision, detention review functions, outcome and performance measurement, and research essential to an effective pretrial services agency; 65

(vii) establish procedures to measure the performance of the jurisdiction and of the pretrial services agency in relation to the goals set; 65

(viii) identify strategies that ensure that the agency can work with individual populations that have special needs, such as hearing impairment, language barrier, and mental health and disability; 65

(ix) meet regularly with community representatives to ensure agency practices meet the needs of the community served; and 65

(x) develop, in collaboration with the court, other justice system entities, and community groups, policies to manage the risks posed by released individuals, including strategies for use of voluntary behavioral health treatment (including substance disorder treatment and mental health services), employment and other social services. 65

4.2 (c): The pretrial services agency should develop and implement appropriate policies and procedures for staff recruitment, selection, and retention. 67

Standard 4.3 Background Investigations 68

4.3(a): The pretrial services agency should conduct background investigations that obtain demographic, criminal history, and other information relevant to the court's bail decision. At minimum, the investigation should include a check of the individual's criminal history, an interview with the individual, verification of interview information, and application of a validated outcome assessment. The investigation should occur prior to the first formal court hearing for individuals still in custody and upon request of the Court for those released prior to that hearing. 68

4.3(b): Before conducting an interview, pretrial services agency staff should inform individuals of the staff's agency affiliation and advise them that: 69

(i) interviews are voluntary, and the individual can decline the interview or not answer specific questions; 69

(ii) the interview will not include questions about the current charge or the circumstances of the individual's arrest 69

(iii) interview information will be shared with the Court, prosecution, and defense for the purpose of pretrial decision-making; 69

(iv) the pretrial services agency will use interview information to help develop its bail recommendation to the court and the court may use the information to inform its pretrial release decision; 69

(v) opting out of the pretrial interview or declining to answer specific questions will not preclude the individual from release consideration by the agency; 69

(vi) penalties may be imposed for false statements made during the interview to include prosecution for perjury or impeachment; and 69

(vii) of any other purposes for which the information may be used. 69

If statute or local court rule law does not provide parameters for sharing pretrial services agency information, agencies should secure informed written consent from individuals before sharing interview information with other stakeholders. 69

4.3(c): Pretrial interviews should not include questions relating to the current offense, arrest or the individual's alleged guilt or innocence, except questions about the individual's residence upon release and relationship to the complaining witness..... 70

4.3(d): The pretrial services agency should corroborate individual-provided information independently. 70

Standard 4.4: Validated Pretrial Outcome Assessment 71

4.4(a): The pretrial services agency's validated pretrial outcome assessment should use information available to the pretrial services agency at the time of the initial bail decision and be easily defined and quantified. 71

(i) The assessment must classify individuals into distinct categories of likelihood of pretrial success based on the assessment's scoring. 71

(ii) Pretrial services agencies should have clear policies on how staff may make a recommendation that does not match an individual's assessed outcome level. 71

4.4(b): The pretrial services agency should have a clear policy ensuring consistency and reliability of assessment scoring and results among assessment users. 72

4.4(c): The pretrial services agency should review its outcome assessment routinely to verify its validity to the local pretrial population. 72

Standard 4.5: Pretrial Recommendations 73

4.5(a): The pretrial services agency should prepare for the Court, prosecution, and defense counsel a written report that summarizes results from its background investigation, criminal history search, and validated pretrial outcome assessment. The report should include a recommendation for appropriate conditions to address identified court appearance and public safety-related risk factors..... 73

4.5(b): The pretrial services agency's recommendation should reflect the individual's likelihood of court nonappearance and new arrests during the pretrial stage, based on the results of the pretrial investigation. The agency's recommended supervision level and conditions should be individualized and the least restrictive necessary to address identified risks..... 74

4.5 (c): The pretrial services agency may not deny a recommendation because an individual declined to participate in the agency's screening procedures..... 75

Standard 4.6: Monitoring and Supervision..... 75

4.6(a): The goal of pretrial monitoring and supervision is to promote court appearance, public safety, and compliance with court-ordered conditions. Monitoring, supervision, and support should include: 75

(i): the least restrictive interventions needed to promote pretrial success; 75

(ii): notification of upcoming court appearances; 75

(iv): oversight of an individuals' compliance with court-ordered conditions, including addressing initial compliance or infractions of court-ordered conditions administratively; 75

(v): informing the court of new arrests or conduct that may warrant a modification of bail; 75

(vi): if statute or local rules allow, recommending lower or higher levels of supervision when appropriate; and..... 75

(vii): facilitating the return to court of individuals who miss scheduled court dates. ... 75

4.6(b): The pretrial services agency should offer alternatives to in-person contact whenever possible and appropriate to promote pretrial success. 78

4.6(c): The Court, through its release order or a comprehensive administrative order, may authorize the pretrial services agency to modify release conditions to conform to individual behavior. The agency may modify conditions within the range set by the Court and under the jurisdiction's laws and rules governing the exercise of judicial authority. The pretrial services agency should notify the court, the prosecutor, and the individual's attorney promptly of any modifications and the reason(s) for them. The pretrial services agency should keep a record of all condition modifications. 79

4.6(d): The pretrial services agency may refer supervised individuals to behavioral health and social services. However, the agency should not recommend these referrals as conditions of supervision unless it determines that the need being addressed heightens an individual's likelihood of missing a scheduled court appearance or being arrested pending adjudication. 79

4.6(e): The pretrial services agency should coordinate supervision by other agencies or individuals that serve as third party custodians, and advise the Court about the third

party's availability, reliability, and capacity according to approved court policy relating to pretrial release conditions. 80

4.6(f): The pretrial services agency should assist other jurisdictions by providing courtesy supervision for released individuals who reside in its jurisdiction. 81

4.6(g): Individuals who violate a condition of release, including failing to appear in court, may be subject to a warrant for arrest, modification of release conditions, an order of detention, or prosecution on criminal charges. In considering what actions to recommend to the court when an individual appears to have violated conditions of release, pretrial services agencies should take account of the seriousness of the violation, whether it appears to have been willful, and the extent to which the individual's actions resulted in impairing the effective administration of court operations or caused an increased risk to individual or public safety. 81

Standard 4.7 Workload and caseload ratios 82

4.7(a): The pretrial services agency should establish workload and caseload ratios to help ensure adequate staffing of critical operational functions 82

Standard 4.8: Confidentiality of pretrial services agency information 83

4.8(a): The pretrial services agency should have written policies regarding access to individual information contained in the agency's files. These policies should mandate that information obtained during the pretrial investigation, monitoring, and supervision should remain confidential and not be subject to disclosure, except in limited, defined circumstances. Subject to applicable legal requirements, policy should provide for disclosure to: 83

(i) the Court, the prosecutor, and defense for bail determination, review of compliance with conditions of pretrial release, and sentencing; 83

(ii) other agencies or programs to which the individual has been referred by the Court or the pretrial services agency; 83

(iii) a corrections department or jail to classify individuals in custody; 83

(iv) law enforcement agencies, upon a reasonable belief that the information will help apprehend an individual for whom a warrant has been issued or when there is reasonable articulable suspicion that the individual is involved in new criminal behavior; 83

(v) a probation department or other criminal justice supervisory agency for a court-ordered investigation or following a new criminal arrest; and 83

(vi) persons or agencies designated by the individual upon their specific written authorization 83

4.7(b): Agency information may not be used to determine an individual's guilt or innocence 86

4.7(c): The individual or their attorney should have access to information in the individual's file upon request, but the pretrial services agency may provide for exceptions to such disclosure, including denial of access to information secured upon a promise of confidentiality or information which, if disclosed, could endanger the life or safety of any person or would constitute an unwarranted invasion of privacy. 87

4.7(d): Individual information generated, collected or maintained by a third party under contract or agreement with the pretrial services agency shall be the sole property of the pretrial services agency. Information generated under contract or agreement may only be released to other parties by the pretrial services agency. 87

(i) Entities receiving information from a pretrial services agency may not disclose that information to another entity unless the disclosure meets the purpose for which such information was disclosed by the pretrial services agency. 87

(ii) Information from a pretrial services agency's files may be provided for research to qualified personnel, under a written agreement that sets forth the terms of the research and addresses: 87

(a) the purpose of the research; 87

(b) the type of data sought and how the agency or researcher will select cases for research; 87

(c) the specific data sought from the agency's files; and 87

(d) procedures to ensure that individuals' identities are not disclosed to research investigators or other parties. 87

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About NAPSA

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

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

Introduction

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

This 2024 Edition of the National Association of Pretrial Services Agencies' (NAPSA) *Pretrial Standards* includes several revisions to the 2020 Edition. These include:

1. Updates to the literature detailing the empirical basis for best and promising practices in the pretrial field.
2. Inclusion of changes in bail laws and case law related to bail that have occurred since the last Edition that continue to evolve the legal definition and requirements of a pretrial justice system.
3. Value-neutral language to describe persons involved in the criminal justice system (such as "individual" and "person" instead of "defendant") and system processes (such as "pretrial outcome assessment" instead of "risk assessment").
4. New Standards on:
   a. alternatives to in-person court appearances that owe to the "lessons learned" from the COVID-19 pandemic's effect on America's justice systems.
   b. the appropriateness of behavioral health and social services referrals and interventions as elements of pretrial supervision.
   c. the importance of identifying appropriate work- and caseload ratios for critical pretrial services agency functions.
   d. a preference under pretrial supervision for telephone or virtual reporting over in-person reporting requirements.
5. Clarification that tracking and reporting outcome and performance measures is a critical function of pretrial services agencies.

What continues from previous Editions is the mandate to describe the components of an effective, legal, and evidence-based bail system. These include:

1. A systems approach to improving bail decision making, with well-defined roles for the court, prosecution, defense, and pretrial services.
2. Pretrial services agencies as an essential element of effective bail systems.
3. A ban on money as a type of bail, a requirement of pretrial supervision or a means of detention.
4. Empirically developed and validated pretrial outcome assessments to help predict the likelihood of return to court and arrest-free pretrial behavior.
5. Conditions of pretrial release tied to identified, individualized factors that promote successful pretrial outcomes.

This Edition also continues to define what is expected of jurisdictions to create equitable and fair bail practices. This perhaps is best illustrated in Standard 1.5's continued call for a

[1] National Association of Pretrial Services Agencies. (2004). *Standards on Pretrial Release, Third Edition*. Washington, D.C.: National Association of Pretrial Services Agencies, at 3 and 7.

prohibition on financial conditions of bail and the state of Illinois' passage of the Safety, Accountability, Fairness and Equity-Today (SAFE-T) Act.[2] Among the law's many reforms, its *Pretrial Fairness Act* eliminates all financial releases as bail options.[3] Illinois joins jurisdictions such as Washington, D.C., New Jersey, and New Mexico that have effectively eliminated or reduced money from the bail decision with no reduction in release, appearance or safety rates.[4] These examples prove that effective and fair options exist besides an antiquated money bail system to ensure that appropriate individuals are released and detained pretrial.

This Edition continues NAPSA's advocacy of pretrial services agencies as necessary components of high functioning bail systems and its endorsement of independent pretrial services agencies with control over their mission, budgets, staffing, and structure. Even pretrial agencies under "parent" organizations should function independently enough to fulfill the pretrial agency's mission statement and strategic objectives.

Finally, this Edition continues NAPSA's system-based approach to improving bail practices. NAPSA's primary focus will always be to advocate best and promising practices for pretrial services agencies. However, we recognize that minimizing unnecessary and unjust pretrial detention, enhancing public safety and court appearance, and administering the bail process fairly all require collaboration among pretrial services agencies, the judiciary, prosecution, defense, law enforcement, and corrections. This systemic focus acknowledges that for most of America's justice systems, real bail reform requires a holistic change in local culture and attitudes about pretrial release, the rights of individuals, and what truly is needed to reasonably assure court appearance and public safety. Proper implementation of this reform must include all elements of an effective pretrial justice system, properly defined, properly resourced, and functioning well.[5]

Standards Outline

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

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[2] Illinois, HB 3653.

[3] 725 ILCS 195/2 (pg. 447).

[4] For example, data from the Cook County Courts show that since the *Pretrial Fairness Act* went into effect (September 2023), 90 percent of individuals charged with felonies made all scheduled court appearances and 89 percent remained arrest-free pretrial. These are consistent with outcome metrics recorded before the Act went into effect. https://www.cookcountycourt.org/court-reports-statistics. Also see Craigie, T. and Grawert, *A. Bail Reform and Public Safety: Evidence from 33 Cities*. August 15, 2024. Brennan Center for Justice at the New York University School of Law. https://acrobat.adobe.com/id/urn:aaid:sc:VA6C2:4eb80e60-30ff-49bb-882c-e5908bc0a89c.

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

PART I: Guiding Principles for Pretrial Decision Making

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

PART II: Essential Elements of a Pretrial Justice System

- Options for law enforcement to facilitate release or alternative options for individuals likely to appear at their initial court appearance.
- Bail statutes that include a presumption of non-financial release, exclusion of financial conditions, and preventive detention with full due process protections for a limited and well-defined category of people.
- No local requirements for bail that are more restrictive than allowed by state statute.
- Prosecutor's review of all cases prior to initial appearance to consider if filing charges is warranted and, if so, appropriate charges to file, an individual's eligibility for diversion, and recommendations for bail.
- Representation at initial appearance by active and engaged counsel.
- Regular review of release and detention decisions throughout adjudication.
- Dedicated pretrial services agencies.
- Validated pretrial outcome assessments to assist the court in making bail decisions.
- Pretrial supervision individualized and tailored to a person's assessed risk level and geared to promoting court appearance and public safety.
- Alternatives to in-person court appearance and supervision to help promote successful pretrial outcomes.
- Performance measurement and feedback of pretrial system practices.

PART III: Pretrial Release and Detention Decisions

- Guidelines for releasing persons before the initial court appearance.
- Procedures for pretrial services agencies prior to the initial court appearance, including transparency of proceedings.
- An initial appearance to determine bail within 24 hours of arrest.

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

PART IV: Pretrial Services Agencies

- Purposes, management and functions of a pretrial services agency.
- Pretrial services agency organization and management.
- Procedures for conducting background investigations on individuals accused of a crime.
- Procedures for applying validated outcome assessments, making bail recommendations to court, and monitoring and supervising released individuals.
- The proper role of behavioral health and social services in pretrial supervision.
- Proper workload and caseload ratios to assure critical agency functions.
- Confidentiality and release of information guidelines.

Part 1: Guiding Principles for Pretrial Decision Making

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

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

Commentary:

This Standard defines bail as the least restrictive pretrial release option needed to reasonably assure an individual's appearance at future court hearings and the public's safety. This definition conforms to the consensus in federal and state statutes and case law that describes the function of bail.[6] Where bail is allowed, maximizing release for bail-eligible individuals and providing reasonable assurance of future court appearance and public safety are its only legitimate goals.

Maximizing release: Justice systems should maximize release for bail-eligible individuals. As articulated by the United States Supreme Court, "in our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[7] As this principle has been reinforced in present statutory language and court opinions related to bail, this Standard emphasizes that bail decisions inherently are *release* decisions, outlining the terms and conditions the court believes are the least restrictive needed to reasonably assure court appearance and public safety. The United States Supreme Court noted in *Stack* v. *Boyle* (342 U.S. 1): "This traditional right to freedom before conviction permits the unhampered preparation of a defense and serves to prevent the infliction of punishment prior to conviction. Unless the right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."[8]

Maximizing appearance: Historically, the objective of bail was to provide a reasonable assurance of a defendant's appearance at future court proceedings.[9] As noted in *Stack*:

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

"fixing of bail for any individual defendant must be based upon Standards relevant to the purpose of assuring the presence of that defendant."[10]

Maximizing public safety: The concept of public safety as a legitimate concern in bail decision-making was first introduced in 1970 under the *Court Reform and Criminal Procedures Act for the District of Columbia* and later upheld by the District of Columbia Court of Appeals.[11] Subsequent revisions to bail statutes at the Federal[12] and state levels established public safety nationally as a legitimate goal of bail. Today, 36 states and the Federal system recognize that "preventing danger to the community is a legitimate regulatory goal"[13] in bail decision-making.

Standard 1.2: Bail should be set based on an individual's specific likelihood of future court appearance and arrest-free behavior pretrial.

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

Commentary:

Terms and conditions of bail must be appropriate for the individual for whom they are set. Courts should only impose conditions that address an individual's specific circumstances that may heighten the likelihood of a missed court appearance or the threat to public safety. Bail should not be set based on a single factor—i.e.; the arrest charge under a bail schedule or the score on a pretrial outcome assessment—while ignoring other lawful individualizing factors.[14] The Supreme Court noted the following in *Stack*:

> *Each defendant stands before the bar of justice as an individual…defendants do not lose their separateness or identity…Each accused is entitled to any benefits due to his good record, and misdeeds or a bad record should prejudice only those who are guilty of them. The question when application for bail is made relates to each one's trustworthiness to appear for trial and what security will supply reasonable assurance of his appearance.*[15]

come back to court to ensure a fair trial); *United States v. St. Clair*, 42 F.2d at 28. ("Bail is to procure release of a prisoner by securing his future attendance.").
[10] *Stack,* 342 U.S at 5.
[11] District of Columbia Court Reform and Criminal Procedure Act Pub. L. 91-358, July 29, 1970, *United States v. Edwards*. 430 A.2d 1321 (D.C. App. 1981), cert. denied, 455 U.S. 1022 (1982)).
[12] See the Bail Reform Act of 1984 Pub. L. No. 98-473, 98 Stat. 1976 (1984) (codified at 18 U.S.C. §§ 3041-3043, 3062, 3141-3150, 3154, 3156, 3731, 3772, 4282 (1985)).
[13] See *Salerno*, 481 U.S. 739.
[14] As of the drafting of these Standards, the body of case law on the topic of individualized bail decisions has upheld the general principle that bail must address the individual's aggravating and mitigating factors. See, *e.g*., *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978); *Pierce v. City of Velda City*, 2015 WL 10013006, (E.D. Mo. June 3, 2015); *Jones v. City of Clanton*, 2015 WL 5387219, (M.D. Ala. Sept. 14, 2015); *United States v. Vujnovich*, No. 07-20126-01, 2008 WL 687203, (D. Kan. Mar. 11, 2008); *United States v. Arzberger*, 592 F. Supp. 2d 590, 601 (S.D.N.Y. 2008).
[15] *Stack*, 342 U.S. at 9.

While striking down the cash-based bail system for misdemeanor offenses in Harris County (Houston), Texas, the United States Court of Appeals for the Fifth Circuit noted that "the results of this flawed procedural framework demonstrate the lack of individualized assessments when officials set bail."[16] The court further noted how uniform schemes of bail can lead to disparate results among similarly situated individuals:

> *"In sum, the essence of the district court's equal protection analysis can be boiled down to the following: take two misdemeanor arrestees who are identical in every way—same charge, same criminal backgrounds, same circumstances, etc.—except that one is wealthy, and one is indigent. Applying the County's current custom and practice, with their lack of individualized assessment and mechanical application of the secured bail schedule, both arrestees would almost certainly receive identical secured bail amounts. One arrestee is able to post bond, and the other is not. As a result, the wealthy arrestee is less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration. The poor arrestee, by contrast, must bear the brunt of all of these, simply because he has less money than his wealthy counterpart. The district court held that this state of affairs violates the equal protection clause, and we agree."*[17]

This Standard also opposes the use of bail schedules which set bail based solely on an arrest charge. As noted by the United States Department of Justice in its December 2015 Statement of Interest in the case of *Varden v. City of Clanton* (Case No. 2:15-cv-34-MHT-WC). In that statement, the Department of Justice asserted a system that fixed bond amounts based on charges, without considering individual characteristics and financial means, should be found unconstitutional. It added that "[n]ot only are such schemes offensive to equal protection principles, they also constitute bad public policy."[18]

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

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

Commentary:

Release of an individual on their own recognizance has been a fundamental principle of these Standards since their inception in 1978 and is consistent with the legal tenets of the presumption of release pretrial and the presumption of innocence. Moreover, favoring

[16] *See O'Donnell, et al. v. Harris County,* No. 17-20333 at 5 (5th Cir. Feb. 14, 2018).
[17] *Id.* at 21.
[18] Statement of Interest of the United States, *Varden* v. *City of Clanton*, No. 2:15-cv-34-MHT-WC (M.D. Ala., Feb. 13, 2015); U.S. Department of Justice Dear Colleague Letter Regarding Law Enforcement Fines and Fees (Mar. 16, 2016).

release on recognizance as the first consideration in bail setting allows jurisdictions to maximize release as prescribed in Standard 1.1. As noted in the NAPSA Standards (2004) "The presumption in favor of release implies detention of as few defendants as possible**."**[19]

Individuals who are released on their own recognizance should have no other requirements to effectuate their release.[20] Requiring individuals to appear for all scheduled court dates and not to commit new offenses are acceptable conditions of bail because "neither condition imposes any restriction on the defendant's legal liberties."[21]

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

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

Commentary:

All individuals should be released under the least restrictive bail option that reasonably assures court appearance and public safety. The Eighth Amendment and similar state provisions provide a constitutional safeguard against excessive bail, which is usually equated to money bail. For example, in *State v. Brown* (338 P.3d 1276, 1288 (N.M. 2014)), Brown received a money bond (in addition to several nonfinancial conditions) that resulted in his prolonged detention. In its opinion, The New Mexico Supreme Court noted: "the district court failed to explain in the record any rational connection between the facts in the record and the ruling of the court" and the court found "the district court unlawfully failed to release defendant pending trial on the least restrictive of the bail options and release conditions necessary to reasonably assure defendant's appearance and the safety of the community."[22]

Bail conditions should neither be punitive[23] nor rehabilitative in nature. Both of these objectives are inconsistent with the "two constitutionally valid purposes for limiting

[19] NAPSA (2004). Standard 1.2.
[20] An unsecured appearance bond allows an individual to avoid posting money to be released but imposes a financial penalty for a missed court date or noncompliance with release conditions. Due to the financial penalties that may incur, NAPSA does not recognize "unsecured" bond as a release on recognizance.
[21] National Association of Pretrial Services Agencies. (1978). *NAPSA Release and Diversion Standards*. Washington, D.C.:NAPSA. (Citing commentary for Standard III(F)).
[22] See *State v. Brown*, 338 P.3d 1276, 1288 (N.M. 2014).
[23] See *Roberts* v. *State*, 123 S.E. 151 (Ga. 1924). The purpose of a pretrial bond is to prevent punishment before a conviction and to secure the appearance of the person in court for trial.

pretrial freedom—court appearance and public safety."[24] Courts may offer rehabilitative programming voluntarily but cannot order these conditions unless they are specifically and reasonably tied to the individual's risk of missed court appearances or to public safety.[25]

Standard 1.5: Financial conditions of bail should be prohibited. Pretrial services agencies should not recommend financial conditions of bail.

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

Commentary:

Research shows the inequities and negative outcomes associated with money bail.[26] For example, a study of 23,115 bail investigations from September 2022 to mid-August 2024 in Allegheny County, Pennsylvania found that individuals released on monetary bond had worse rates of court appearance, new criminal activity, and overall pretrial success than any other release type. Conversely, pretrial supervision performed better than cash bail for individuals with similar assessed risk levels and all other bail types overall.[27]

Litigation and court rulings also have challenged the constitutionality of secured financial bail conditions that result in the detention of an otherwise bailable individual.[28] Any allowance for money bail only perpetuates the inequalities and disparities it promotes. For these reasons, NAPSA has returned to its original position under the first edition of these Standards: "The use of financial conditions of release should be eliminated."[29] This

[24] Schnacke, T.R. (2014). *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform*. Washington, D.C.: National Institute of Corrections. NIC Accession Number: 028360. Besides excessive bail, the requirement for least restrictive conditions also is tied to the Due Process and Equal Protection Clauses, which require an examination of alternatives to survive certain levels of legal scrutiny.
[25] See *U.S. v. Scott*, 450 F.3d 863, 872 (9th Cir. 2006) ("The government in this case has relied on nothing more than a generalized need to protect the community and a blanket assertion that drug-testing is needed to ensure Scott's appearance at trial. Both are insufficient.").
[26] The Council of State Gov'ts, Pretrial Criminal Justice Research (2013), https://csgjusticecenter.org/courts/publications/pretrial-criminal-justice-research/. Sawyer, W. (2022). All profit, no risk: How the bail industry exploits the legal system. https://www.prisonpolicy.org/reports/bail.html. Financial conditions of release include the payment of cash bonds, the use of charge-based bond schedules, and the use of property as collateral.
[27] See *Monetary Bond Outcomes Compared to Pretrial Supervision. Allegheny County Results*. Presented at the 2024 National Association of Pretrial Services Annual Conference, New Orleans, Louisiana.
[28] See *Varden v. City of Clayton*, No. 2:15-cv34-MHT-WC (M.D. Ala. Feb. 13, 2015); *O'Donnell v. Harris*, 4:16-cv-01414 (S.D. Tex. May 19, 2016). *Galen v. County of Los Angeles*, 477 F.3d 652 (9th Cir. 2007) ("The court may not set bail to achieve invalid interests.") (citing *Wagenmann v. Adams*, 829 F.2d 196, 213 (1st Cir. 1987) (affirming a finding of excessive bail where the facts established the state had no legitimate interest in setting bail at a level designed to prevent an arrestee from posting bail)); *State v. Brown*, 338 P.3d 1293. ("Neither the New Mexico Constitution nor our rules of criminal procedure permit a judge to set high bail for the purpose of preventing a defendant's pretrial release.").
[29] NAPSA (1978). p. 25.

conforms to the views held by several national associations—including the American Bar Association (ABA) and the National Association of Counties (NACo)—that recommend the elimination of secured financial release in favor of bail systems that utilize validated outcome assessment and community-based supervision.[30]

Many jurisdictions have successfully adopted practices, either through state law or court rule, that restrict or effectively eliminate the use of money in the bail decision. These practices increased the number of bailable individuals released without reductions to court appearance or public safety rates. In 2023, Illinois became the first state to prohibit all forms of secured financial bail.[31] The rationale to shift to a "bail/no bail" pretrial system, was explained by the Illinois Supreme Court's Commission on Pretrial Practices stating:

> *The Commission agrees that the use of cash bail as a means of preventive detention is antithetical to the constitutional guarantees of due process and the presumption of innocence. An effective pretrial system instead relies on validated, evidence-based decision-making, combined with adequately staffed and risk-based pretrial supervision strategies designed to minimize danger to the public and maximize court appearance. When these elements are in place, cash bail serves little purpose and is rarely used.*[32]

In confirming the legality of the new bail system, the Illinois Supreme Court noted: "…the trial court correctly recognized that the bail clause strikes a finely constructed balance between the interests of criminal defendants in pretrial release and the interest of the State "obtaining the greatest possible assurance" that the defendant will appear for trial (*People ex rel. Gendron v. Ingram*, 34 Ill. 2d 623, 626 (1966)), as well as the State's interest in public safety, but the court incorrectly assumed that abolishing monetary bail undermines the State's interests. The court appeared to believe that monetary bail is the only way to assure a defendant's presence and to protect the public. In doing so, the court elevated the system of monetary bail over the plain language of the bail clause. While the clause establishes an individual constitutional right to bail, that right is not absolute (see *Hemingway*, 60 Ill. 2d at 80) but conditioned by "sufficient sureties" and, more importantly, by exceptions intended to keep the most serious, and potentially dangerous, offenders in custody after a hearing to establish they pose a real and present threat."[33] Following passage of the Pretrial Fairness Act removing financial bail options, data from the Cook County (Chicago, IL) Court show that 90 percent of felony-charged individuals made all scheduled court dates and 89 percent remained arrest-free pending trial.[34] Within the Act's first year in effect, for all other Illinois jurisdictions reporting data, 88 percent of released individuals made all

[30] Pretrial Justice Institute (2011). *Responses to Claims About Money Bail for Criminal Justice Decision-Makers*. Washington, D.C.: Pretrial Justice Institute.
[31] Pretrial Fairness Act 725 ILCS 195/2 (pg. 447).
[32] Illinois Supreme Court Commission on Pretrial Practices. *Final Report: April 2020*. Springfield, IL: Illinois Supreme Court.
[33] *Rowe, et al. v. Raoul*, Illinois Supreme Court. 2023 IL 129248 (July 18, 2023).
[34] Circuit Court of Cook County Model Bond Court Dashboard (Oct.-Dec. 2018), http://www.cookcountycourt.org/Portals/0/Chief%20Judge/Model%20Bond%20Court/Q4%202018/2018%20Q4%20MBC%20Public%20Facing%20Dashboard%2002.15.19.pdf

scheduled court appearances and 86 percent were not charged with a new offense pretrial.[35]

Besides Illinois, Kentucky,[36] Oregon,[37] and Wisconsin[38] ban for-profit bail. Kansas's bail laws state as their purpose "… to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges… when detention serves neither the ends of justice nor the public interest."[39] Bail laws for the Federal courts and Washington, D.C. forbid financial conditions that result in pretrial detention. Under the D.C. statute:

> *(3) A judicial officer may not impose a financial condition under paragraph (1)(B)(xii) or (xiii) of this subsection to assure the safety of any other person or the community but may impose such a financial condition to reasonably assure the defendant's presence at all court proceedings that does not result in the preventive detention of the person, except as provided in § 23-1322(b).*
> *(4) A person for whom conditions of release are imposed and who, after 24 hours from the time of the release hearing, continues to be detained as a result of inability to meet the conditions of release, shall upon application be entitled to have the conditions reviewed by the judicial officer who imposed them. Unless the conditions of release are amended, and the person is thereupon released, on another condition or conditions, the judicial officer shall set forth in writing the reasons for requiring the conditions imposed.*[40]

In 2011, Kentucky passed HB 463, which requires the state pretrial services division to use an empirically validated pretrial outcome assessment instrument to assess individuals' likelihood of returning for trial without threatening public safety. In the first two years after HB 463 passed, the number of individuals released on unsecured bonds increased from 50 percent to 66 percent while the court appearance rate rose from 89 percent to 91 percent.[41]

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

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[35] See Pretrial Fairness Act (PFA) Weekly Dashboard September 18, 2023 – September 14, 2024 at https://ocj-web-files.s3.us-east-2.amazonaws.com/documents/2024%2009%2014%20OCJ%20Public%20PFA%20Dashboard%2024.09.20%20FINAL.pdf?VersionId=.QNd6dMIA6FPr_6InBuHI9yEVq1BWo6X. These data do not include information from Cook County (Chicago), Illinois.
[36] Ky. Rev. Stat. Ann. § 431.510 (2019).
[37] Or. Rev. Stat. §§ 135.255, .260, .265 (2019).
[38] Wis. Stat. § 969.12(2) (2019).
[39] Conditions of Release, Kan. Stat. Ann. Kansas Statutes, § 22-801 (2019).
[40] D.C. Code § 23-1321(c)(3)-(4) (2019).
[41] Administrative Office of the Courts Kentucky Court of Justice, *Pretrial Reform in Kentucky* 16–17 (2013). Available at https://www.acluga.org/sites/default/files/pretrial-reform-in-kentucky-kentucky-pretrial-services-2013.pdf.

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

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

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

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

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

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

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

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

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

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

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

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

Regrettably, most courts still rely on financial bail to detain otherwise releasable individuals. For example, in 1990, 60 percent of felony-charged persons in large urban counties secured own recognizance or conditional release pretrial. By 2009, that figure dropped to 23 percent.[46] This practice of "intentionally setting bail so high as to be unattainable is simply a less honest method of unlawfully denying bail altogether."[47] The imposition of money bail is a release decision and therefore should never be used to detain an individual who poses a risk to flee or to public safety. This *sub rosa* preventive detention practice does not carefully limit the use of pretrial detention as described in Standard 1.6, nor safeguard against the release of a perceived dangerous individual. In fact, money bail does little to protect the public. For example, while nearly all states allow bail forfeiture after a missed court appearance, few prohibit forfeiture due to a new arrest during the pretrial period.[48]

Pretrial supervision or conditions that impose a cost on individuals (such as supervision fees and costs for drug testing or electronic monitoring[49]) lead to the same unfair and inequitable results as financial bail. Jurisdictions that impose fee-based pretrial supervision

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[45] *In re Humphrey*, 228 Cal. Rptr. 3d at 534.
[46] Subramanian, R., Delaney, R., Roberts, S., Fishman, N., and McGarry, P. (2015). *Incarceration's Front Door: The Misuse of Jails in America*. New York, NY: Vera Institute of Justice at pp. 29-30.
[47] *State v. Brown*, 338 P.3d at 1290.
[48] See https://www.ncsl.org/civil-and-criminal-justice/pretrial-release-violations-bail-forfeiture.
[49] See, for example, Hiskett v. Lambert (No.1 CA-SA 19-0119) where the Arizona Court of Appeals ruled that individuals on pretrial supervision could not have the cost "electronic location monitoring" imposed upon them.

or release conditions should re-examine these practices. A person's continued release or compliance with release conditions should not depend on their socioeconomic status.

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

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

Commentary:

Certain individuals may pose too great a risk to public safety or to abscond from court proceedings to be released under any set of conditions.[50] However, given the strong liberty interest at the pretrial stage, detention is allowable only if the government establishes a compelling reason to justify detention and demonstrates that the individual's detention is necessary to further that purpose.[51] In *Salerno*, the Supreme Court upheld the constitutionality of the Bail Reform Act of 1984 and wrote in favor of the following procedural due process protections found within that act:

1. A finding that the individual meets the carefully limited detention-eligible population.
2. A finding of probable cause that the individual committed the alleged offense.
3. A prompt detention hearing, with the maximum length of pretrial detention limited by stringent speedy trial provisions.
4. Before detention, an adversarial hearing in which the government must convince a neutral decision maker by clear and convincing evidence that no condition or combination of conditions suffice to mitigate the high risk.
5. A right to counsel, to testify or present information by information or proffer, and to cross-examine government witnesses.
6. Statutory enumerated factors to guide judicial discretion, and a requirement that judges include written findings of fact and reasons for detention.
7. Immediate appellate review.[52]

Individuals retain the right to active and effective counsel at the detention hearing and may testify on their own behalf, present information, and cross-examine witnesses. If detention is ordered, the court must provide written findings of fact and a written statement of reasons for a decision to detain.

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

This Standard reiterates the position that detention due to inability to post secured financial bail does not meet the legal requirements for such detention. Money-based detention fails to meet the due process requirements outlined in *Salerno* and other case opinions. Further, research has found that financial-based detention "ultimately may serve to compromise public safety" and undermines the legitimacy of the justice process by encouraging guilty pleas, regardless of actual guilt or innocence.[53] For example, a well-resourced individual who may pose a risk of flight or to public safety may be able to pay their way out of detention in spite of this risk.

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

Related Standards:
NAPSA (2020) Standard 2.5

***Commentary*:**

Besides the right to non-excessive bail and a liberty interest, individuals retain other constitutional rights and protections pretrial, including the right to counsel and to a fair trial,[54] the right against unreasonable searches and seizures (including arrests and pre-

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

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

arrest drug testing),[55] and the right against self-incrimination.[56] These rights apply to state and local courts through the Fourteenth Amendment.[57]

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

Commentary:

The bail decision is one of the most important in case processing. Bail decisions resulting in inappropriate detention can increase the likelihood of conviction and the length of an imposed sentence[58] as well as increase the likelihood of future recidivism.[59] Therefore, it is crucial that bail decisions not allow disparate treatment of individuals based on arbitrary or inappropriate factors, such as race, ethnicity, gender, sexual identity, disability, religious identity/affiliation, or socioeconomic status.

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[55] U.S. Const. amend. IV: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. See USA V Scott, No. 04-10090 (9th Cir. 2006). The court affirmed the district court's order suppressing evidence obtained as the result of a drug test (unsupported by probable cause) by Nevada state officers and the ensuing search of the house of an individual who was on release while awaiting trial on drug possession charges. The court held that the fact that the defendant consented to the drug test and home search as a condition of his pre-trial release did not by itself render the test and the search constitutionally valid, and that the consent to any search is only valid under the Fourth Amendment if the search (taking the fact of consent into account) was reasonable.

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

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

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

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

Bail setting can vary widely even among judges within the same jurisdiction. Court rules often list specific factors that a judicial officer should consider but provide little guidance on how those factors should be defined or weighted. At bail setting, many judicial officers lack objective information about a person's likelihood of court appearance or arrest-free behavior to make a fully informed decision. Thus, decision makers here must rely on subjective factors and observations of the individual that can be influenced by implicit bias, (attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner). For example, numerous studies detail how bail practices can lead to disparate outcomes for minorities.[60] One author concluded; "[w]hether the racial divide documented in these studies is the product of racial animus or subtle implicit bias by bail officials, the pattern of disadvantage suffered by minority defendants in bail determinations should be addressed with reforms to the bail determination process."[61]

The bail decision can be made more equitable and effective with the inclusion of a validated pretrial outcome assessment that can "predict pretrial misconduct and risk of re-offense more effectively than professional judgement alone."[62] Standards 2.8 and 4.4(c) discuss these assessment instruments in more detail.

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

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

Commentary:

Victim safety is enhanced, and victim's concerns better addressed when victims:

- are apprised promptly of a case's progression;
- are notified when an individual with a pending case secures pretrial release; and
- can obtain adequate protection orders with processes to follow if an individual with a pending case violates these orders.

[60] Jones, C.E. (2013). "Give Us Free: Addressing Racial Disparities in Bail Determinations." *Journal of Legislation and Public Policy*, 16: 919-961. Kang., J. et al., Implicit Bias in the Courtroom, 59 UCLA L. REV. 1125, 1146 (2012). Rachlinski, J.J. et al., Does Unconscious Racial Bias Affect Trial Judges?, 84 NOTRE DAME L. REV. 1195, 1221 (2009). Gottredson, S. and Moriarty, L. "Statistical Risk Assessment: Old Problems and New Applications," 52 *Crime & Delinquency* 178, 178-200 (2006); Andrews, D.A. Bonta, J. and Wormith, J. "The Recent Past and Near Future of Risk and/or Need Assessment," 52 *Crime & Delinquency* 7, 7-27 (2006).
[61] Jones (2013). at p. 944.
[62] Center for Effective Public Policy et al. (2010). *A Framework for Evidence-Based Decision Making in Local Criminal Justice Systems: Third Edition.* Washington, D.C.: National Institute of Corrections.

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

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

Related Standards:
ABA (2007) Standard 10-1.9

Commentary:

The justice system has the responsibility to uphold constitutional guarantees—a responsibility that supersedes potential budgetary constraints imposed by the executive or legislative branches. To ensure the constitutional guarantee of reasonable bail, justice systems must prioritize funding of activities that are central to maximizing pretrial release, court appearance, and public safety. These should include:

- options for law enforcement besides arrest for appropriate arrestees;
- bail decisions made within 24 hours of arrest for persons detained following arrest;
- pretrial outcome assessment of these individuals before the initial court appearance;
- prosecutorial screening of cases before the initial court appearance;
- defense appointment and representation at or before the initial court appearance; and
- pretrial monitoring and supervision strategies.

For many jurisdictions, developing the system called for by these Standards will require expenditures in new information technology and in the personnel needed to support effective pretrial proceedings and community supervision. However, jurisdictions that follow this approach could realize substantial cost avoidance[63] and reinvestment opportunities through better front-end decision-making. While there are real costs involved in the supervision of large numbers of individuals with pending cases, over the long term these costs pale when compared to the human cost of unnecessary and potentially unconstitutional secure detention.[64]

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

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

Part 2: Essential Elements of a Pretrial Justice System

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

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

Commentary:

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

1. *Citation in Lieu of Arrest*: A citation (or summons) is a written order issued by law enforcement that requires a person to appear in court at a designated date and time. [65] Law enforcement has long used citations instead of physical arrest for minor offenses and misdemeanors not involving a victim. A 2016 study by the International Association of Chiefs of Police found that nearly 87 percent of law enforcement agencies used some form of citation release.[66]
2. *Non-arrest options*: Many law enforcement agencies have options besides arrest for individuals with severe mental health, substance abuse or other issues.[67] For example,

[65] As of the writing of these Standards, 19 states have legislation authorizing law enforcement to issue citations after arrest. Louisiana, California, and Oregon permit citations for some felonies. Colorado also allows for summons in certain felony cases. Laws in 10 states create a presumption that citations be issued for certain crimes and under certain circumstances. *See* National Conference of State Legislatures, *Citation in Lieu Arrest*, http://www.ncsl.org/research/civil-and-criminal-justice/citation-in-lieu-of-arrest.aspx (last visited Sept. 15, 2019).

[66] International Association of Chiefs of Police. *Partnerships in Pretrial Justice,* https://www.theiacp.org/sites/default/files/2018-08/IACP_ParnersinPretrialJustice_Final.pdf (last visited Sept. 15, 2019).

[67] Jurisdictions considering options here should consider the Sequential Intercept Model (SIM) recommended by the Substance Abuse and Mental Health Services Administration. SIM details how individuals with mental and substance use disorders come into contact with and move through the criminal justice system. The SIM helps communities identify resources and gaps in services at each intercept and develop local strategic action plans. The SIM mapping process brings together leaders and different agencies and systems to work together to identify strategies to divert people with mental and substance use disorders away from the justice system into treatment. More information about the SIM model can be found at: https://www.samhsa.gov/criminal-juvenile-justice/sim-overview#:~:text=The%20Sequential%20Intercept%20Model%20(SIM)%20details,from%20the%20justice%20system%20into%20treatment.

crisis intervention teams include law enforcement officers trained to recognize and respond to individuals with severe mental health issues and make referrals to community-based mental health and social services in lieu of arrest. Law Enforcement Assisted Diversion (LEAD) is one example of pre-booking diversion or deflection programs that address low-level drug and prostitution crimes.[68]

3. *Delegated release authority*: Courts can grant other justice or law enforcement agencies delegated release authority to screen and release individuals before or after a formal booking. Staff of these agencies determine release based on criteria developed with other stakeholders and/or with the use of a validated outcome assessment.[69]

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

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

Commentary:

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

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

All three components are interrelated and must be present within a legal framework to achieve maximized rates of release, appearance, and public safety.[70] Courts are far less likely to utilize formal and legal preventive detention with the necessary accompanying due process hearings and findings when the option exists to set high money bail to achieve

[68] More about LEAD programs can be found at https://nicic.gov/lead-law-enforcement-assisted-diversion.
[69] Examples of delegated release authority orders can be found at: https://www.ncsc.org/~/media/Microsites/Files/PJCC/23BPretrialLegalBrief82315.ashx.p.10 and www.kycourts.gov/Courts/Supreme-Court/Supreme%20Court%20Orders/202340.pdf.
[70] Pilnick, et al. (2017). p. 11.

sub rosa detention. Presumptive nonfinancial release tied to real and practical supervision options discourages courts from applying pretrial detention to an overly large population.

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

> *If a proper bail/no bail balance is not crafted through a particular state's preventive detention provisions, and if money is left as an option for conditional release, history has shown that judges will use that money option to expeditiously detain otherwise bailable defendants. On the other hand, if the proper balance is created so that high-risk defendants can be detained through a fair and transparent process, money can be virtually eliminated from the bail process without negatively affecting public safety or court appearance rates.*[71]

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

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

> ***(a) IN GENERAL. —****Upon the appearance before a judicial officer of a person charged with an offense, the judicial officer shall issue an order that, pending trial, the person be—*
> ***(1)*** *released on personal recognizance or upon execution of an unsecured appearance bond, under subsection (b) of this section;*
> ***(2)*** *released on a condition or combination of conditions under subsection (c) of this section;*
> ***(3)*** *temporarily detained to permit revocation of conditional release, deportation, or exclusion under subsection (d) of this section; or*
> **(4)** *detained under subsection (e) of this section.*[72]

Restrictions or prohibition on the use of secured financial conditions of release: Since the beginning of the 20th century, secured financial bail—money or collateral that an individual, their family or a private surety must pay prior to release—has been the

[71] Schnacke (2014). *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform.* Washington, D.C.: National Institute of Corrections. at. p. 52.
[72] Release or detention of a defendant pending trial, 18 USCS § 3142.

predominant form of bail.[73] The reliance on secured financial conditions has led to significant issues within America's justice systems, including:

1. *Detention due to an inability to pay bail:* The overuse of secured financial conditions has fueled the over incarceration of individuals pretrial. Nationally, 70 percent of jail detainees are un-convicted persons, mostly on pretrial status.[74] The percentage of unconvicted detainees increased from 61 percent to 70 percent over the last 10 years.[75]
2. *The diminishing of judicial authority in bail setting:* Secured financial conditions diminish judicial discretion by allowing a private commercial surety to determine release or detention. Often, judges set low money amounts, assuming these will facilitate release. However, a 2013 report on New Jersey's jail population found that 12 percent of pretrial detainees in the state were held on bonds of $2,500 or less.[76] A Bureau of Justice Statistics data series on felony case filings in America's largest urban counties found "on any given day, five out of six defendants provided with a financial release condition are unable to make the bond amount set by the court."[77]
3. *The inability to guarantee detention of truly dangerous individuals:* Historically, secure financial conditions have been tied exclusively to court appearance. Also, under most legal foundations, bonds cannot be forfeited after a new arrest, nor do sureties have a responsibility or an incentive to provide supervision or support to reduce the likelihood of new arrests. Research shows that nearly half of individuals most likely to miss court appearances or to be rearrested are released on money bail. Just as it is detrimental to incarcerate lower risk individuals who cannot afford money bond, it can be harmful to the community when higher risk individuals buy their freedom without oversight.[78]
4. *The collateral consequences of unnecessary detention:* Individuals held in jail before trial, even for short periods of time, have worse outcomes than those released pretrial, including higher risk of unemployment,[79] sentencing disparity,[80] recidivism,[81] and other

[73] Schnacke, T. R. (2014). *Money as a Criminal Justice Stakeholder: The Judge's Decision to Release or Detain a Defendant Pretrial*. Washington, D.C.: National Institute of Corrections.
[74] Zeng, Z. *Jail Inmates in 2022 – Statistical Tables* (December 2023). https://bjs.ojp.gov/document/ji22st.pdf.
[75] *Id.* at 1.
[76] Lowenkamp, VanNostrand, and Holsinger. (2013).
[77] Cohen, T. H. and Reaves, B. A. (2008). *Pretrial release of felony defendants in state courts*. Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics.
[78] Pretrial Justice Institute (2017). *Pretrial Justice: How Much Does It Cost*? Washington, D.C.: Pretrial Justice Institute. (Citing Laura and John Arnold Foundation (2013). "Research Summary: Developing a National Model for Pretrial Risk Assessment," New York, NY: Laura and John Arnold Foundation).
[79] Schönteich. (2010).
[80] Leipold (2005). pp. 1123-1165. Wrigley, V.R. and Schumacher, T. 2023. "The Effects of Pretrial Detention Length on Sentencing Guideline Departures in Two Pennsylvania Counties." *Criminology, Criminal Justice, Law & Society* 24 (3): 11–33. https://doi.org/10.54555/CCJLS.8495.90808.
[81] Lowenkamp, VanNostrand, and Holsinger. (2013). Silver, I., Walker, J., DeMichele, M., and Labrecque, R., Does Jail Contribute to Individuals Churning in and Out of the Criminal Legal System? A Quasiexperimental Evaluation of Pretrial Detention on Time Until New Arrest (July 7, 2023). Available at SSRN: https://ssrn.com/abstract=4503725 or http://dx.doi.org/10.2139/ssrn.4503725. Arnold Ventures. The Hidden Costs of Pretrial Detention Revisited. (March 21, 2022). https://craftmediabucket.s3.amazonaws.com/uploads/HiddenCosts.pdf.

results.[82] For example, a study by Arnold Ventures looked at 153,407 individuals pending adjudication in Kentucky and found that longer stays in pretrial detention increased the likelihood that a person would fail to appear in court, engage in new criminal activity, and recidivate after disposition. Even a small amount of time in jail had a significant effect: "When held 2-3 days, low-risk defendants are almost 40 percent more likely to commit new crimes before trial than equivalent defendants held no more than 24 hours."[83] Generally, outcomes were worse for low-risk individuals, and the foundation noted a hypothesis of failures occurring due to increased periods of a person being separated from their communities.

5. *Racial disparities from the use of secured financial bail*: Pretrial incarceration based on secured financial bail has been shown to affect persons of color disproportionately related to their representation in a jurisdiction's population or in a local criminal justice system.[84]

Preventive detention: A limited subset of individuals pending adjudication may present an unmanageable risk of rearrests on dangerous or violent offenses or court nonappearance.[85] In these narrow circumstances, preventive detention—detention without bail—is both appropriate and necessary. An effective pretrial justice system provides limited authority for preventive detention accompanied by proper due process safeguards.[86]

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

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[82] Holsinger, A.M. (2016). *Analyzing Bond Supervision Survey Data: The Effects of Pretrial Detention on Self-Reported Outcomes. Research Brief*. Boston. MA: Crime and Justice Institute. Available at http://www.crj.org/assets/2017/07/13_bond_supervision_report_R3.pdf.

[83] *Ibid.*

[84] DeMuth, S. and Steffenmeier, D. *The Impact of Gender and Race-Ethnicity in the Pretrial Release* Process 222-242 (Society for the Study of Social Problems, Inc. 2004); Arnold, D., Dobbie, W., and Yang, C.C. *Racial Bias in Bail Decisions*, The Quarterly Journal of Economics, Nov. 2018, at 1885–1932; Wooldredge, J. *Distinguishing race effects on pretrial release and sentencing decisions,* Justice Quarterly, Feb. 2012, at 41-75.

[85] Less than one percent of felony-charged individuals in Cook County (Chicago,), IL. were charged with a new violent offense while in the community. http://www.cookcountycourt.org/Portals/0/Chief%20Judge/Model%20Bond%20Court/Q4%202018/2018%20Q4%20MBC%20Public%20Facing%20Dashboard%2002.15.19.pdf. Between 2009 and 2015, one percent of individuals pending adjudication in Federal court were rearrested for a violent offense. (Cohen, et. al. at p. 25). From Fiscal Years 2013-2017, 1.6 percent of individuals pending adjudication in Washington, D.C. were rearrested for a violent charge. Pretrial Services Agency for the District of Columbia. (2018). *Congressional Budget Justification and Performance Budget Request Fiscal Year 2019*. Washington, D.C.: Pretrial Services Agency for the District of Columbia. at p. 25. Downloaded from https://www.psa.gov/sites/default/files/FY2019%20PSA%20Congressional%20Budget%20Justification.pdf

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

Preventive detention, when used properly and with extreme care, provides justice systems with a transparent and rational means to address high-risk individuals. Jurisdictions that use or contemplate preventive detention must significantly limit its application and adopt the safeguards emphasized by the U.S. Supreme Court in *Salerno*. For example, to satisfy substantive and procedural due process, preventive detention must occur only after a full adversarial hearing where the defense may rebut the government's assertion of dangerousness and the government must demonstrate by clear and convincing evidence that no conditions or condition combinations "will reasonably assure" public safety or court appearance.[87]

Standard 2.3: Jurisdictions should not establish restrictions on pretrial release that are not contained in state statute.

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

Commentary:

Jurisdictions should not limit a person's eligibility for screening, assessment or bail beyond what is statutorily allowable. This includes denying bail or restricting the types of bail for bail-eligible individuals based on charge, crime classification or other arbitrary factors. The NIC publication *A Framework for Pretrial Release, Essential Elements of an Effective Pretrial System and Agency* supports this concept with Essential Element #4: "Defendants eligible by statute for pretrial release are considered for release, with no locally imposed exclusions not permitted by statute." It warns jurisdictions that local administrative orders, policy decisions or other practices that exclude or detain defendants based on charge may violate state or federal law. The New Mexico Supreme Court underscored this point in *State v. Brown*: "Neither the constitution nor our rules of criminal procedure permit a judge to base a pretrial release decision solely on the severity of the charged offense."[88]

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

[87] *Ibid.*
[88] *State v. Brown*, 338 P.3d at 1292.

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

Related Standards:
National District Attorneys Association (2023) *National Prosecution Standards*, Fourth Edition, Standard 4-5.2
ABA (2015) *Criminal Justice Standards for the Prosecution Function* 3.1-9

Commentary:

Experienced and well-trained prosecutors should screen arrest filings before initial appearance to determine the most appropriate charges or action.[89] Screening outcomes can range from dismissing or lowering an arrest charge, offering individuals a referral to a diversion program or problem-solving court or preparing an appropriate bail recommendation at the initial court appearance. Early screening can help:

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

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

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

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

Commentary:

In *Rothgery* v *Gillespie County*, *Texas,*[90] the Supreme Court established the right to legal representation at initial bail hearing, stating "…a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel."[91] Nonetheless, states have responded to this mandate differently, with some guaranteeing a right to counsel at initial appearance and others appointing counsel at this stage, but not requiring their actual presence.[92]

Research shows that individuals with counsel at bail hearings have higher levels of pretrial release with less restrictive conditions of bail.[93] Using the ABA's *Pretrial Release Standards* (2007) as a guide, jurisdictions should ensure through statute or court rule that all individuals are appropriately represented by counsel, either private or publicly funded and assigned, at all hearings, including the initial appearance hearing.[94] As noted by the ABA's *Ten Principles of a Public Defense Delivery System*,[95] defense counsel must be assigned immediately after arrest, detention, or a request for counsel is made.

Representation at the initial court appearance should be fully active and engaged, with defense counsel able to advocate for the least restrictive nonfinancial release needed to assure a client's court appearance and the public's safety. This requires defense counsel to have access to clients prior to the hearings in order for consultation to occur.[96]

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[90] 554 U.S. 191 (2008).
[91] 554 U.S. at 213.
[92] See Snarr, H. The Right to Counsel: When Does an Attorney Appear in the Courtroom? Updated October 30, 2023 at https://www.ncsl.org/civil-and-criminal-justice/the-right-to-counsel-when-does-an-attorney-appear-in-the-courtroom.
[93] Worden, A.P., Davies, A.L.B., Shteynberg, R.V., and Morgan, K.A. (2015). EARLY INTERVENTION BY COUNSEL: A MULTI-SITE EVALUATION OF THE PRESENCE OF COUNSEL AT DEFENDANTS' FIRST APPEARANCES IN COURT FINAL SUMMARY REPORT. Washington, D.C.: Office of Justice Programs' National Criminal Justice Reference Service. Metzger, P. R., Hoeffel, J. C., Meeks, K. M., & Sidi, S. (2021). Ending injustice: Solving the initial appearance crisis. Deason Center. https://www.smu.edu/-/media/Site/Law/DeasonCenter/Publications/Public-Defense/Initial-AppearanceCampaign/Ending-Injustice-Solving-The-Initial-AppearanceCrisis-FINAL.pdf. Mrozinski, M., & Buetow, C. (2020). Access to counsel at first appearance: A key component of pretrial justice. National Legal Aid and Defender Association. nlada.org/node/34531.Anwar, S., Bushway, S.D., and Engberg, J. The Impact of Defense Counsel at Bail Hearings. Science Advances, Volume 9, Issue 18 (May 2023). doi: 10.1126/sciadv.ade3909. https://www.rand.org/pubs/external_publications/EP70066.html.
[94] American Bar Association (2007). Standard 10-4.3(b) ("ABA policy, however, clearly recommends that provision of counsel at first appearance should be Standard in every court."). See also ABA (1992). *Providing Defense Services,* Standard 5-6.1 (recommending that counsel be provided "as soon as feasible and, in any event, after custody begins, at appearance before a committing magistrate, or when formal charges are filed, whichever occurs first.").
[95] American Bar Association, *Ten Principles of a Public Defense Delivery System* (August 2023): https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_ defendants/ls-sclaid-603-public-def-principles-2023.pdf.
[96] See American Bar Association (2017). *Criminal Justice Standards for the Defense Function, 4th Edition*. Washington, D.C.: American Bar Association. Standard 4-2.3 Right to Counsel at First and Subsequent

Additionally, defense counsel should be provided with and review all charging affidavits, pretrial outcome assessment results, and any other information available to the judicial officer to make a bail determination. Finally, defense counsel should use the information provided to them to make a vigorous defense of the accused's rights. To support active and engaged representation, the ABA recommends a "vertical representation" system where "the same defense lawyer should continuously represent the client from assignment through disposition and sentencing…".[97]

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

Related Standards:
ABA (2007) Standard 10.5-12

Commentary:

When the court sets bail, it should ensure the individual's timely release.[98] To facilitate this function, the pretrial services agency—or other designated agency—should notify the court no later than three days after the initial court appearance when conditions of bail result in an individual's continued detention.[99] The agency also should provide the judicial officer at the bail review with:

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

Pretrial services agencies should facilitate a process where defense counsel and/or the prosecutor's office can notify the agency of any change in circumstances that would affect an individual's bail status. Information such as a withdrawal or reduction of a charge or a

Judicial Appearances: "A defense counsel should be made available in person to a criminally accused person for consultation at or before any appearance before a judicial officer, including the first appearance." See also Judicial Conference of the United States Committee on Defender Services Memorandum: RIGHT TO COUNSEL AT INITIAL APPEARANCE (INFORMATION). March 19, 2024.
https://www.fd.org/sites/default/files/cja_resources/dir24-038.pdf.

[97] American Bar Association, *Ten Principles of a Public Defense Delivery System* (August 2023).

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

[99] These include delays in installing electronic surveillance devices or post-release screenings of individuals for pretrial agency "eligibility." We would note that the pretrial services agency in Prince George's County, MD is currently being sued in Federal court for its similar practice of screening defendants for eligibility after a judicial order of release. Plaintiffs argue that this practice usurps judicial authority by an executive branch office (that county's pretrial agency is part of its department of corrections) and results in unreasonable delays in releasing defendants following a court order. *Butler, et al., v. Prince George's County.* No. 8:22-cv-01768.PJM.

new filed charge would precipitate a bail modification hearing. When this information is received, the pretrial agency should present this information to the court for consideration regarding the individual's bail status.

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

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

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

Commentary:[100]

Fair and effective bail decision-making requires an assessment of the likelihood of court appearance and arrest-free behavior, monitoring and supervision options that promote these behaviors, notification to courts about compliance, and performance measurement to gauge outcomes and improve processes.[101] These key elements function best when consolidated under a single organizational structure: a pretrial services agency.

The case for dedicated pretrial services agencies is grounded in organizational theory, the opinions of leading criminal justice organizations, and the law. Operationally, pretrial functions have an interdependent and reciprocal relationship—the results of one function affect or become the input of another. For example, outcome assessment results inform the agency's bail recommendations, which influence monitoring and supervision strategies. The input from these activities becomes the performance metrics needed to improve procedures. Organizational theory recognizes interdependent and reciprocal relationships as the most complex and difficult to manage, requiring the highest level of communication and coordination among those performing the tasks. [102] These are best achieved and managed under a single entity, with a single management mission and philosophy. A dedicated pretrial services agency ensures that these elements are operationalized and realistic. For example, courts can make bail decisions based on empirically validated factors and have real supervision options related to the likelihood of successful outcomes and that have been shown to help mitigate pretrial misconduct. These services and support are best done under a single organizational structure.

[100] Commentary here is based on Pilnik, et. al. (2017), pp. 31-33.
[101] These functions are described in more detail in Part 4: Pretrial Services Agencies.
[102] Thomas, J.D. (1967). *Organizations in Action*. New Brunswick, NJ: McGraw-Hill Publishing. Aiken, M. and Hage, J. (1968). "Organizational Interdependence and Intra-organizational Structure." *American Sociological Review*, 1968 Dec; 33(6): 912-930.

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

> *Every jurisdiction should establish a pretrial services agency or program to collect and present the necessary information, present risk assessments, and, consistent with court policy, make release recommendations required by the judicial officer in making release decisions, including the defendant's eligibility for diversion, treatment or other alternative adjudication programs, such as drug or other treatment courts. Pretrial services should also monitor, supervise, and assist defendants released prior to trial, and to review the status and release eligibility of detained defendants for the court on an ongoing basis.*[103]

Leading criminal justice organizations, such as the American Probation and Parole Association,[104] the American Jail Association,[105] the American Council of Chief Defenders,[106] the International Association of Chiefs of Police,[107] the Association of Prosecuting Attorneys,[108] and the Conference of Chief Justices[109] have drafted statements and resolutions supporting pretrial services agencies and recognizing their importance to effective justice systems. For example, the 2010 American Probation and Parole Association *Resolution on Pretrial Supervision* reads in part:

> *NOW THEREFORE BE IT RESOLVED, that the Board of Directors of the American Probation and Parole Association supports the role of pretrial supervision services to enhance both short-term and long-term public safety, provide access to treatment services and reduce court caseloads, and submit that such a role cannot be fulfilled as successfully by the bail bond industry.*[110]

Recognizing the importance of an independent pretrial services function, nearly half of states, the District of Columbia, and the federal system authorize or encourage pretrial services agencies through legislation.[111] These statutes generally describe pretrial services

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[103] ABA. 2007. Standard 10-1.10 (the role of the pretrial services agency).

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

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

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

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

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

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

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

[111] National Council of State Legislatures, Pretrial Release Laws: Recent State Enactments (June 30, 2014), http://www.ncsl.org/documents/cj/PretrialHandoutNCSL.pdf. Examples of legislation include: Organization and administration of pretrial services, 18 U.S.C. § 3153 (2019); Va. Code Ann. § 19.2-152.2 (2019)

agency missions as informing the judiciary on bail decisions—particularly identifying persons who can be released pretrial and those eligible and appropriate for detention—and providing supervision options that help promote successful pretrial outcomes. The Colorado statute notes the following:

> *"To reduce barriers to the pretrial release of persons in custody whose release on bond with appropriate conditions reasonably assures court appearance and public safety, all counties and cities and counties are encouraged to develop a pretrial services program in consultation with the chief judge of the judicial district in an effort to establish a pretrial services program that may be utilized by the district court of such county or city and county."*[112]

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

> *§ 19.2-152.2. Purpose; establishment of pretrial services and services agencies.*
> *It is the purpose of this article to provide more effective protection of society by establishing pretrial services agencies that will assist judicial officers in discharging their duties pursuant to Article 1 (§ 19.2-119 et seq.) of Chapter 9 of this title. Such agencies are intended to provide better information and services for use by judicial officers in determining the risk to public safety and the assurance of appearance of persons age 18 or over or persons under the age of 18 who have been transferred for trial as adults held in custody and charged with an offense, other than an offense punishable by death, who are pending trial or hearing. Any city, county or combination thereof may establish a pretrial services agency and any city, county or combination thereof required to submit a community-based corrections plan pursuant to § 53.1-82.1 shall establish a pretrial services agency.*[113]

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

> *The Illinois Supreme Court supports models of urban and rural pretrial practices that address the unique needs of our complex system of justice while maintaining public safety and defendant accountability. The models, however, are anchored in the principle that release decisions must be individualized and based upon a defendant's level of risk. This is the essence of due process.*[114]

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

- a clearly defined, pretrial service-related function as its purpose;
- staff assigned only to pretrial-related work with individuals pending adjudication; and

(discussing the purpose and establishment of pretrial services and services agencies); Pretrial Services Act, 725 ILCS 185/0.01 (2019).

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

[113] Code of Virginia, Title 19.2. Criminal Procedure, Chapter 9. Bail and Recognizances, Article 5. Pretrial Services Act, § 19.2-152.2. Purpose; establishment of pretrial services and services agencies.

[114] Illinois Courts Connect, *Illinois Supreme Court adopts statewide policy statement for pretrial services (*May 25, 2017), http://www.illinoiscourts.gov/Media/enews/2017/052517_SC_adopts_policy.asp.

- management that can make independent decisions on budget, staffing, and policy.

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

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

Commentary:

Since the first Edition of its *Release Standards*, NAPSA has recommended that pretrial services agencies use pretrial outcome assessments to guide appropriate bail recommendations.[115] Previous Standards also identified assessing the likelihood of future court appearance and arrest-free behavior as a major point for further research.[116] Since the drafting of the Third Edition Standards, the pretrial services field has generated a wealth of knowledge around the science of pretrial outcome prediction. These include the development of empirically derived pretrial outcome assessments[117] and a consensus about the factors most associated with future court appearance and public safety. Consistent with "fourth generation" assessments, these instruments also help pretrial services agencies match monitoring and supervision strategies to the results of the pretrial outcome assessment to promote pretrial success.

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

This Standard recommends that all justice systems incorporate validated pretrial outcome assessments into their bail decision-making protocols. Jurisdictions may develop a validated assessment based on research on their local pretrial populations or choose a validated pretrial outcome assessment available in the public domain.[118] These tools should distinguish individuals by clearly defined risk levels based on observed performance (i.e.; observed differences in court appearance and public safety rates) among the classified groups. However, jurisdictions should be mindful that a "higher risk" designation only identifies individuals that exhibit a lesser probability for success, not necessarily a likelihood of failure.[119]

There are several advantages to incorporating a validated pretrial outcome assessment into a pretrial services agency's bail recommendation procedures and a justice system's bail determination protocols.[120]

1. Actuarial assessments have been demonstrated in justice, business, social science, and medical settings to predict outcomes better than professional judgment alone.[121] Actuarial prediction involves an empirical selection of factors related to the observed outcome. These risk factors are weighted consistently in each assessment, according to their observed correlation to pretrial failure. This differs from decisions based on professional judgment, where factors and their influence may differ by decision maker

[118] See Commentary under Release Standard 4.4 a (i).

[119] For example, a study of individuals with pending criminal cases in federal courts found that nearly 85 percent of those designated as "high risk" made all scheduled court appearances and remained arrest free pretrial. VanNostrand, M. and Keebler, G. (2009). "Pretrial Risk Assessment in the Federal Court." *Federal Probation*, Vol. 72 (2).

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

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

or case. Lacking Standardized metrics, risk categorization may result in inconsistent, disparate, and potentially arbitrary recommendations.[122]

2. Validated pretrial outcome assessments help assure that calculations of pretrial outcomes are based on factors shown by research to be predictive of pretrial misconduct and consistent among staff and similarly situated defendants.
3. Assessment instruments can increase the standardization and transparency of bail setting, increasing the public's confidence in how bail decisions are made and their outcomes.[123] The legitimacy of criminal justice system is enhanced when stakeholders make consistent, reliable and accurate decisions, using unbiased and proven factors. Two authors noted: "Every day many thousands of predictions are made by parole boards, college admission committees, psychiatric teams, and juries…. To use the less efficient of two prediction procedures in dealing with such matters is not only unscientific and irrational, it is unethical."[124] Outcome assessments make clear to justice stakeholders and the public the significance of each factor used in the pretrial services agency's decision-making and recommendations. This is preferable to recommendations made by staff judgement, where factors used and how they are weighted may be vague or inconsistent.[125]
4. Pretrial outcome assessments can help maximize the rate of pretrial release—a central purpose of the bail decision—by increasing stakeholder confidence in pretrial release outcomes. Appearance and safety outcomes can be compared by risk levels and factors to ascertain the efficacy of the assessment. Assessments also can help systems identify defendants appropriate for early release options, such as citations and summonses.
5. Assessments can help pretrial services agencies and courts target monitoring, supervision, and support resources to persons less likely to succeed. Data from jurisdictions employing validated outcome instruments show that these assessments can distinguish assessed groups by the likelihood of court appearance, arrest-free behavior and even compliance with conditions of pretrial supervision.[126] Therefore, agencies can recommend—and the court can order—own recognizance or monitoring for lower-to-moderate risk individuals while focusing more intensive and costly conditions on higher-risk individuals.

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

6. Pretrial outcome assessments help reinforce the ideas of maximized pretrial release and carefully limited pretrial detention by illustrating pretrial "risk" is less prevalent than perceived in most justice systems.[127] This helps bail determinations to be based on empirical factors related to pretrial outcomes rather than a decisionmaker's perception of "risk."[128]
7. Since the current generation of outcome assessments are better at predicting court appearance and arrest-free behavior than traditional bail-setting methods, they can help jurisdictions move more easily from a money-based to an outcome-based bail system.
8. Validated pretrial outcome assessments can help minimize predictive bias based on an individual's race, gender, or ethnicity.

Acceptable pretrial outcome assessments are:

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

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

Of particular importance for any outcome assessment is the safeguard against racial, ethnic, and gender disparity.[129] Most pretrial outcome assessments use prior failures to appear, criminal convictions, and prior incarcerations as their main predictive factors and each of these factors has an historic and pervasive association with racial and ethnic

[127] Schnacke, T.R. (2018).
[128] See Slovic, P. "Perception of risk." *Science*. 17 Apr 1987, Vol. 236, Issue 4799, pp. 280-285 DOI: 10.1126/science.3563507.
[129] See Skeem, J.L. and Lowenkamp, C.T. *Risk, race, and recidivism: Predictive bias and disparate impact*, Criminology: An Interdisciplinary Journal, 2016, http://ssrn.com/abstract=2687339; Angwin, J. et al., *Machine Bias: There's software used across the country to predict future criminals. And it's biased against blacks,* (2016) ProPublica, https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing. *See also* McCoy, C. *Caleb Was Right: Pretrial Decisions Determine Mostly Everything*, 12 Berkeley J. Crim. L. 135 (2007) (discussing a New Jersey commission's finding that "one of the main factors accounting for the imprisonment rate disparities was that minority offenders had much longer prior criminal records than white offenders and linking it to aggressive enforcement of drug laws in urban centers.). *See also* Breaux, J. and Ho, H. *Could risk assessment contribute to racial disparity in the justice system?* Urban Institute: Urban Wire:: Crime and Justice (Aug. 11, 2014), https://www.urban.org/urban-wire/could-risk-assessment-contribute-racial-disparity-justice-system (making similar arguments in the context of sentencing and probation revocation).

bias.[130] Mitigating or aggravating factors considered by most pretrial services agencies and courts (such as residence and employment) also may have some degree of bias. However, a body of research on outcome assessments applied in other justice areas indicates that racial bias may not be as problematic as critics assert. For example, an evaluation of the Federal Post Conviction Risk Assessment—using data from 35,000 federal prisoners—found that the assessment predicted post-release arrests similarly across African American and White populations.[131] A 2010 meta-review of forensic outcome assessments found eight evaluations that examined race, ethnicity and the predictive accuracy of outcomes and need assessments. Five meta-analyses found the predictive accuracy did not vary by the race or ethnicity of the sample. Three remaining meta-analyses found predictive accuracy increased as the number of White individuals increased. However, the authors cautioned that these studies did not conduct pairwise comparisons between ethnic groups and that post hoc analyses were necessary to clarify these findings.[132]

A similar body of research is developing suggesting pretrial outcome assessments can be neutral on race and ethnicity.[133] For example:

- An evaluation of PSA results in Kentucky found no racial disparity in risk assessment results.[134]
- Multiple validations of the Virginia Pretrial Risk Assessment Instrument consistently have found the assessment to be racially neutral.[135]
- A revalidation of the Federal Pretrial Risk Assessment found that instrument neutral on race and outcomes.[136]
- An evaluation of the PSA in Yakima County, Washington found implementation of the assessment increased release rates of Latino, African American, and Native American defendants.[137]

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

[131] See Skeem and Lowenkamp (2016).

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

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

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

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

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

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

- A 2023 study by RTI showed that the presentation of outcome assessment results did not affect the decision to release an individual with or without conditions based on race.[138]
- A literature and research review from the NAPSA Board related to disparities and bias within pretrial assessments, showing a majority of these assessments were neutral on race and gender.[139]

The research suggests that while actuarial assessments do not fully eliminate racial and socio-economic bias, they can lessen that bias more effectively and consistently than clinical judgement.[140]

It is noteworthy that the single empirical source for claims of inherent racial/ethnic bias in assessments is a study by the organization ProPublica of the COMPAS assessment instrument in Broward County, Florida.[141] However, two subsequent independent studies have refuted ProPublica's results and found several methodological flaws in the organization's analysis.[142]

To help ensure race, gender, and ethnic neutrality, jurisdictions adopting pretrial outcome assessments must validate them on the local population on which they will be used. Validation should gauge the local correlation of race and ethnicity to pretrial outcomes. . The effective use of properly validated pretrial outcome assessments can help limit racial bias in decision making in the criminal justice system by providing an evidence-based assessment of likely pretrial outcomes.[143]

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[138] Zottola, S. A., Desmarais, S. L., Stewart, D. K., Duhart Clarke, S. E., & Monahan, J. (2023). Pretrial risk assessment, release recommendations, and racial bias. Criminal Justice and Behavior, 50(9), 1255-1278. https://doi.org/10.1177/00938548231174908.

[139] National Association of Pretrial Services Agencies (2024). *Pretrial Assessments- Bias & Disparities? Staying Grounded in the Research*. https://napsa.memberclicks.net/assets/Pretrial%20Assessments%20-%20Bias%20and%20Disparities_.pdf.

[140] See Kleinberg, J., Ludwig, J., Mullainathany, and S. Sunsteinz, C.R. Discrimination in the Age of Algorithms. Journal of Legal Analysis 2018: Volume 10 at p. 2.: "Our central claim here is that when algorithms are involved, proving discrimination will be easier—or at least it should be, and can be made to be. The law forbids discrimination by algorithm, and that prohibition can be implemented by regulating the process through which algorithms are designed. This implementation could codify the most common approach to building machine-learning classification algorithms in practice and add detailed recordkeeping requirements. Such an approach would provide valuable transparency about the decisions and choices made in building algorithms—and also about the tradeoffs among relevant values." Downloaded from https://academic.oup.com/jla/article-abstract/doi/10.1093/jla/laz001/5476086.

[141] Angwin, J., Larson, J., Mattu, S., and Kirchner, L. (2016).

[142] Flores, Bechtal, and Lowenkamp (2016). Dieterich, W., Mendoza, C. and Brennan, T. (2016). *COMPAS Risk Scales: Demonstrating Accuracy Equity and Predictive Parity*. Northpointe.

[143] Mayson, S.G. (2018). *Bias In, Bias Out* 128 Yale Law Journal (2019 Forthcoming); University of Georgia School of Law Legal Studies Research Paper No. 2018-35. Available at SSRN: https://ssrn.com/abstract=3257004. Goel, S., Shroff, R., Skeem, J.L. and Slobogin, C. (2018). *The Accuracy, Equity, and Jurisprudence of Criminal Risk Assessment*. Available at SSRN:https://ssrn.com/abstract=3306723 or http://dx.doi.org/10.2139/ssrn.3306723.

Stakeholders also should ensure that outcome assessments are used for their intended purposes. For example, recidivism-based assessments should not be used to predict failure to appear. Needs assessments for substance abuse and mental health needs should not be used as global assessments of new criminal arrests or condition compliance. Proper assessment use also requires training of staff who administer the instrument and stakeholders who use the results for decision making.

Pretrial services agencies should not use pretrial outcome assessments as the only determinant of bail recommendations nor should courts use them as the only factor in bail decisions or to replace judicial decision-making. Rather, as discussed in Standard 4.1(iii), pretrial outcome assessment results should be one of several pieces of relevant information used to determine the least restrictive means needed to maximize release, appearance and public safety rates.

Standard 2.9: Pretrial supervision should be individualized to a person's assessed likelihood of pretrial success and include the least restrictive conditions necessary to reasonably assure the individual's future court appearance and arrest-free behavior.

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

Commentary:

Pretrial supervision should adhere to the legal requirement of the least restrictive means needed to reasonably assure court appearance and public safety and the "risk principle" of matching supervision levels to individual assessed likelihood of pretrial success. Research indicates this practice improves supervision compliance and outcomes.[144] Additionally, the risk principle cautions against placing conditions more appropriate to higher-risk individuals onto low-risk individuals. This practice results in a waste of resources and can lead to higher rates of technical condition violations.

Evidence-based supervision practices such as court notification, response to an individual's conduct under supervision, and prompt notice to court of violations of release conditions can positively impact court appearance and public safety for medium to higher risk individuals. Drawing on data from two sites, Arnold Ventures studied the likelihood of new criminal arrest and failure to appear for persons released pretrial with and without supervision. The study found that moderate-and high-risk individuals under supervision were more likely to appear in court and that those supervised pretrial 180 days were more likely to remain arrest-free.[145] Multivariate statistical analysis, controlling for gender, race,

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

time at risk in the community, and risk level indicated that supervision significantly reduced the likelihood of failure to appear. The study also found that effects of pretrial supervision on appearance rates were consistent over differing time-to-disposition periods.

Standard 2.10: Courts should establish alternatives to in-person court appearance when appropriate.

A "lesson learned" from the 2020 COVID-19 pandemic is that practical and effective alternatives to traditional in-person court appearances exist. Thirty-eight states, Washington, D.C., and Puerto Rico mandate or encourage the use of virtual court hearings.[146] Though the research is developing, several jurisdictions adopting alternative appearance options have experienced significant reductions in missed court appearances. For example, in New Jersey, failures to appear dropped from twenty percent (20%) to less than one percent after courts began conducting virtual hearings.[147] Michigan's failure-to-appear rates dropped from eleven percent (11%) to half of one percent (0.5%) from April 2019 to April 2020.[148] Judicial officers in Texas reported benefits—including the convenience to defendants of not needing to take time off from work, locate transportation, or find childcare—from the use of remote hearings. Additionally, data from El Paso, Texas showed a sixty-eight percent (68%) reduction in missed court appearances from January 2019 to April 2021 (13.6% to 4.4%) following the introduction of remote court hearings. Remote hearings also expand access to courts for witnesses, victims, experts, and other court stakeholders who live in remote locations or who may have safety concerns with a live court appearance.[149]

Jurisdictions also have distinguished the court hearings that require an individual's physical presence. The consent decree issued in a federal court case overseeing bail practices in misdemeanor cases in Harris County (Houston), Texas[150] mandated misdemeanor courts to waive an individual's court appearance upon request by his or her defense counsel before or during that court hearing. A judicial officer also can waive appearance at any court appearances over which the judicial officer presides. Responding to the COVID-19 pandemic and a ruling by the State Court of Appeals that revised how and when defendants can appear in court,[151] Washington State revised its court rules so that individuals may appear in court "in person, by video or remote appearance, and through

[146] https://www.ncsc.org/newsroom/public-health-emergency.
[147] Quote from Peter McAleer, director of the New Jersey Administrative Office of the Courts' Office of Communications and Community Relations. From The National Center for State Courts, Will remote hearings improve appearance rates? (May 2020). https://www. ncsc.org/newsroom/at-the-center/2020/may-13.
[148] https://www. ncsc.org/newsroom/at-the-center/2020/may-13.
[149] Ostrom, B., Douglas, J., Tallarico, S., and Shannon, M.A. (2021) *The Use of Remote Hearings in Texas State Courts: The Impact on Judicial Workload. Final Report*. Williamsburg, VA: National Center for State Courts.
[150] UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION Consent Decree Case 4:16-cv-01414 Document 708 Filed on 11/21/19 in TXSD.
[151] 52 State v. Gelinas, 15 Wn. App. 2d 484, 478 P.3d 638 (2020).

counsel."[152] The rule also defined hearings requiring an individual's presence as "including arraignment, all stages of trial, the return of a verdict, and imposition of a sentence."[153]

Standard 2.11: Jurisdictions should engage in performance measurement and feedback of pretrial system practices.

Commentary:

Jurisdictions should establish strategic goals and objectives that reflect their mission, consistent with maximizing release rates, court appearance and public safety. To gauge the effectiveness of a jurisdiction's performance in relation to its goals, various metrics can be used. The NIC publication *Measuring What Matters: Outcomes and Performance Measures for the Pretrial Field (2nd Edition)*[154] lists recommended metrics for pretrial agencies and systems. Pretrial services agencies, at a minimum, should measure appearance rate, safety rate, concurrence rate, success rate and pretrial detainee length of stay.[155] Although the pretrial services agency should take the lead in collecting, compiling and reporting of data, not all the metrics are reflective solely of the agency's performance, but rather an indication of the jurisdiction's performance in relation to its goals concerning pretrial release. For instance, the concurrence rate is determined by how often a judicial officer adopts the recommendation made by pretrial services. The decision to adopt the recommendation is outside the direct control of the pretrial services agency and therefore not necessarily reflective of the agency's performance. Regardless, all metrics should be used to measure progress, track trends, and expose discrepancies between stated goals and actual practices. Performance measurements should be shared with stakeholders and used to inform decisions and drive policy.

[152] Washington State Court Rules: Criminal Rules for Courts of Limited Jurisdiction. Rule 3.4, Appearance of the Defendant.
[153] CrRLJ 3.4(a).
[154] National Institute of Corrections. (2021). *Measuring What Matters: Outcomes and Performance Measures for the Pretrial Field (2nd Edition).* Washington D.C.: National Institute of Corrections.
[155] *Ibid.*

Part 3: Pretrial Release and Detention Decisions

Standard 3.1: Release Before the Initial Court Appearance

3.1(a): Jurisdictions should develop guidelines that authorize law enforcement or criminal justice agencies to release individuals before the initial court appearance. These guidelines should identify the criteria for determining that release.

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

Commentary:

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

Delegated release can significantly reduce costs associated with unnecessary detention of individuals charged with minor offenses or who are deemed low risk. Release after booking also provides an opportunity to verify the individual's identity, obtain a criminal history and check for outstanding warrants. In developing delegated release policies, jurisdictions should identify specific criteria to be used for release eligibility, such as type of charge, existence of outstanding warrants, and/or pretrial outcome assessment score.

Jurisdictions should also identify a person or person(s) with the authority to veto the release of an individual for specific articulable reasons. Persons released before their first appearance should have a court date set promptly and receive written notification of that date. Jurisdictions should ensure that the court has the statutory authority to delegate release or that it is not expressly prohibited from doing so. Any policies regarding delegated release should be in writing through a memorandum of understanding, local administrative order, or other authorizing document.

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

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

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

(ii) assess the individual's likelihood of future court appearance and arrest-free behavior while on pretrial release, using a pretrial outcome assessment that utilizes factors shown by research to predict the likelihood of these outcomes; and

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

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

Commentary:

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

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

- A criminal history check (preferably national) noting adjudications and pending cases, the individual's status with the justice system (probation, parole, pretrial status, etc.), and previous willfully missed court appearances.
- Verification of information from the pretrial interview. At a minimum, information contributing to the outcome assessment calculation or final recommendation should be verified.

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

(iii) Based on the developing body of knowledge about pretrial outcomes—and the legal requirement for individualized bail decision-making—this Standard recommends that pretrial services agencies use an *adjusted actuarial approach* to gauge the likelihood of court appearance and arrest-free behavior pretrial.[156] After scoring the outcome

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

assessment, pretrial agency staff may adjust its recommendation based on factors identified outside the assessment instrument. To ensure that this approach does not take on the "subjective, impressionistic"[157] dimensions of decision-making based purely on clinical judgment, pretrial services agencies should limit deviations from outcome assessment results in its recommendations to specific and clearly defined circumstances approved by the agency and its stakeholder partners. For example, the agency's recommendation procedures may include an approved list of considerations that can raise or lower the supervision level identified by the outcome instrument.[158] Agencies also should set as a performance measure an annual cap on the number of recommendations that deviate from outcome assessment results as a percentage of assessments performed. This Standard recommends an appropriate range for recommendations that deviate from the pretrial outcome assessment, with overrides for lower and higher supervision levels being about equal.[159] Finally, all recommendations that deviate from the pretrial outcome assessment results must require a supervisor's review and approval.

Standard 3.2: Initial Court Bail Determination

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

Related Standards:
ABA (2007) Standard 10-4.1

Commentary:

Persons still detained after arrest or formal booking should be brought before a judicial officer for bail determination within 24 hours of arrest. If the hearing is the individual's initial appearance in court, pretrial services staff, prosecutor, and defense counsel should be present and engaged.

While the 24-hour period may seem ambitious, it is in fact already being met in many jurisdictions and is statutorily required in others.[160] A well-functioning criminal justice

Policy Perspective: The Science of Sex Offenders: Risk Assessment, Treatment, and Prevention: What Do We Know About Sex Offender Risk Assessment? 4 Psychol. Pub. Pol'y & L. 50, 53 (1998).

[157] Grove, W. and Meehl, P. (1996).

[158] Hanson, R.K. (1998) Predicting sex offender re-offense: Clinical application of the latest research. Presentation sponsored by Sinclair Seminars and given in Richmond, VA.

[159] Andrews, D., Bonta, J. and Hoge, R. (1990). *Classification for effective rehabilitation: Rediscovering psychology*. *Psychology*, Crim. Just. & Behav., Mar. 1, 1990*;* Austin, J. *The Proper and Improper Use of Risk Assessment in Corrections*, Fed. Sentencing Reporter, Feb. 2004 (recommending a 5-15 percent "override" range); Latessa, et al. (2009).

[160] See, for example, the descriptions of the operations of the Kentucky Pretrial Services Program, Pretrial Services Agency for the District of Columbia, the Monroe County (FL) pretrial services program, and the Philadelphia (PA) pretrial services program in *NIJ 2001 Report, supra* note 9, pp. 11-17. *See, e.g.*, Md. Rule 4-212 (Maryland requires by court rule that the first appearance [presentment] take place "without unnecessary delay and in no event later than 24 hours after arrest".); *People ex rel Maxian v. Brown,* 570

system should seek to make prompt and meaningful initial appearance a reality in all cases, as part of a process of continuing improvement.[161]

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

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

Commentary:

Consistent with the U.S. Supreme Court's decisions in *Gerstein v. Pugh*, 420 U.S. 103[162] and *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), the court should determine whether, based on the allegations made in the charging instrument and any supporting documents or other materials, there is probable cause to believe that the individual committed the crime charged. If the judicial officer determines probable cause, they should decide pretrial release or detention in accordance with these Standards. This Standard assumes that any condition other than for the individual to make all scheduled court appearances and refrain from criminal behavior pretrial qualifies as a "significant restraint of liberty" within the meaning of the Gerstein decision. In particular, these Standards regard commonly imposed conditions of pretrial supervision such as drug testing, regular reporting to a supervising authority, or electronic surveillance as significant restraints.

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

N.E.2d 223 (N.Y. 1991) (In New York, the State's highest court has held that the provision in the Code of Criminal Procedure that an arrested person is to be arraigned "without unnecessary delay" should be interpreted as meaning that a delay of arraignment of more than 24 hours is presumptively unnecessary.); Model Code of Pre-Arraignment Proc. § 310.1 (Am. Law Inst. 1975) (providing that the first appearance of an accused person should take place within a maximum period of 24 hours after the arrest); NIJ (2001) at 11-17 (providing the descriptions of the operations of the Kentucky Pretrial Services Program, the District of Columbia Pretrial Services Agency, the Monroe County (FL) pretrial services program, and the Philadelphia (PA) pretrial services program in.).

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

[162] "Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint of liberty." (420 U.S. at 114). "When the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty. Accordingly, we hold that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest." (420 U.S. at 114).

If, at the first appearance, the prosecutor requests the pretrial detention of a defendant under Standards 2.8 through 2.10 (see these revised Standards, sections 3.4, a-k), a judicial officer should be authorized, after a finding of probable cause to believe that a defendant has committed an offense as alleged in the charging document, to order pretrial detention following procedures under Standards 2.7 (revised in Standards 3.4 (b)) or to conduct a pretrial detention hearing under Standard 2.10 (revised in Standard 3.4 (g)).

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

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

(ii): order additional conditions of release designed to address individualized factors related to future court appearance or to public safety; or

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

Related Standards:
NAPSA (2004) Standards 1.2, 2.3 and 2.4
ABA (2007) Standard 10-1.4, 10-5.1, 10-5.2, 10-5.7
NDAA (2023) Standards 4-4.2 and 4-4.4

Commentary:

The "bail/no bail" dichotomy[163] requires a hierarchy of bail options available to the court to address the varying likelihoods that an individual may pose for missed court appearances or new arrests pretrial.

The court should always favor a presumption of release on recognizance. If the court finds this option will not reasonably assure an individual's court appearance or public safety, it may order nonfinancial conditions to mitigate pretrial failure. Lastly, the court may order temporary detention if it finds the individual detention-eligible by statute and the likelihood of pretrial failure posed by their release to be unmanageable by any condition or combination of conditions. Detention is the most restrictive bail option; therefore, bail laws and court rules should clearly identify the limited circumstances in which this option may be exercised and should include procedural requirements aimed at safeguarding due process and protecting against unwarranted pretrial detention.

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

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

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

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

Commentary:

NAPSA has advocated for the right to counsel at first appearance since its initial Release Standards in 1978 (Standards III.B and III.C). Since the release of the Third Edition Standards in 2004, the U.S. Supreme Court ruled in *Rothgery v. Gillespie County*, *Texas* 554 US 191 (2008) that the adversarial process begins at first appearance, thus triggering an individual's right to counsel under the Sixth Amendment. Providing defense counsel at first appearance protects the accused from self-incrimination and assures due process is observed. The *ABA Standards for Criminal Justice: Providing Defense Services*, 3d ed., 1992 also supports the assignment of counsel at first appearance. Standard 5-6.1 reads, in part, "Counsel should be provided to the accused as soon as feasible and, in any event, after custody begins, at appearance before a committing magistrate, or when formal charges are filed, whichever occurs earliest."

Attorneys who understand the importance of the bail decision on case outcomes, are knowledgeable about available release options and have an opportunity to consult with the defendant before the proceeding can more effectively advocate for their client. The impact of having defense counsel present at first appearance should not be underestimated. One study found significant differences in bail outcomes based on representation. Individuals represented by counsel at bail hearings were 2.5 times more likely to be released on recognizance, four times as likely to have their bail reduced, and almost two times as likely to be released within one day of their arrest.[164] Persons with attorneys spent an average of two days in jail, compared with nine days for those without attorneys.[165] Another study found that providing public defenders at bail hearings increased the probability of an individual receiving ROR or nonmonetary release at bail hearings by 21 percent, reduced the probability of detention beyond three days of arrest by 10 percent, and had no impact on court appearance rates or the probable cause determination at the preliminary hearing.[166]

[164] Colbert, D.L., Paternoster, R. and Bushway, S. "Do Attorneys Really Matter? The Empirical and Legal Case for the Right to Counsel at Bail."23 Cardozo L. Rev. 1719, 1721 (2002).
[165] Ibid.
[166] Anwar, et. al. (May 2023).

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

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

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

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

Commentary:

This Standard outlines the procedural requirements for a first court appearance before a judicial officer. Courts should ensure the individual knows the charge(s) and the potential consequences of a conviction and should advise them of the basic rights enumerated in this Standard. If the individual does not have defense counsel, the Court should assign one, at least for the purposes of the first appearance. The Court also should ensure the hearing is conducted in a language the individual understands or grant the individual access to a court-appointed interpreter.

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

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

Commentary:

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

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

Commentary:

Most states have laws providing for the initial court appearance on criminal cases to be open to the public and the U.S. Supreme Court has strongly reinforced the presumption of openness in its decisions.[167]

The initial appearance should be conducted so that interested parties, whether for the individual or the victim, can attend and observe the proceedings.[168] This should be held in a court of record, as having such a record enables review of the initial bail or detention decision during subsequent hearings or upon appeal. If the initial pretrial court appearance is conducted in a court of non-record, at a minimum the judicial authority must state in writing the reasons for pretrial detention and/or reasons for conditions of any release.

[167] See *Press-Enterprise Co. v. Superior Ct.,* 478 U.S. 1 (1986); *El Vocero de P.R.* v. *Puerto Rico,* 508 U.S. 147 (1993).
[168] Several states have passed "victim's rights laws"—such as "Marsy's Law" in California (The Victims' Bill of Rights Act of 2008) and Illinois' Rights of Crime Victims and Witnesses Act (Criminal Procedure Chapter 725 ILCS 120—that guarantee victims and witnesses adequate notice of upcoming court appearance.

Standard 3.3: Release Decisions

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

Related Standards:
ABA (2007) 10-5.1

Commentary:

The Federal Bail Reform Act of 1966 created a presumption in favor of release on recognizance for persons charged with non-capital federal crimes and a legal standard for the use of the least restrictive non-financial conditions of release in the event conditions were needed.[169] Since the Act's passage, most states have revised their bail laws to include a similar presumption of own recognizance release. In 1984, the Federal Bail Reform Act added community safety, to accompany appearance, as a legal purpose of bail in the federal courts.

A presumption of nonfinancial pretrial release is now a near universal feature of bail statutes nationwide. This presumption reflects foundational American principles [170] that require governments to assume release on recognizance as the first option to bail and impose further restrictions on liberty only with compelling justification that these are necessary to reasonably assure court appearance and public safety. It also is a practical recognition that unnecessary detention imposes major burdens on accused individuals and the public.

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

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

3.3 (b): In setting conditions of release, the court should consider information in the charging document and information provided by the pretrial services agency, prosecution, defense counsel, and victim, if obtained. Courts should not deny release solely because the individual declined to provide information to the pretrial services agency, as it is the individual's right to decline to provide information.

Commentary:

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

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

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

Commentary:

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

Since the release order is meant to clearly state the individual's obligations regarding court appearance, arrest-free behavior, and compliance with court-ordered conditions, the order should be written in the language the individual best understands. The Court should be alert to potential problems with reading comprehension and, when necessary, provide individuals with a person who can reliably interpret the contents of the order for the

individual. Courts also should develop release orders and other court instructions in the languages common to their pretrial population.

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

Standard 3.4: Detention Decisions

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

Related Standards:
ABA (2007) Standard 10-5.8

Commentary:

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

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

3.4(b): At the initial pretrial court appearance, the Court may order temporary detention pending a formal pretrial detention hearing if:
(i) the Court finds probable cause for the crime charged;
(ii) the individual meets the jurisdiction's detention eligibility criteria; and
(iii) the Court finds by a preponderance of the evidence that the individual poses an unmanageable risk to commit a dangerous or violent offense or to willfully fail to appear for scheduled court appearances.

In making these determinations, the court may consider the charging document, information obtained from the pretrial services agency, and arguments presented by prosecution and defense counsel.

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

Commentary:

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

(ii): State bail laws should describe the categories of detention-eligible persons, thus narrowing the universe that can be detained to categories where there are sound policy reasons for considering detention. For example, Illinois' *Pretrial Fairness Act* reserves detention only for persons charged with certain person felony and misdemeanors or gun charges, those meeting a "willful flight" standard, or those posing a real and present threat to the safety of any person or persons or the community.[171] This Standard recommends that detention eligibility begin with a probable cause finding that the individual committed a crime of violence as defined by statute. Detention also may apply to persons who are charged with a serious crime in the current case while on pretrial release in another case, but generally only if the prior release was in connection with a serious crime.[172] A third category of eligibility are those charged with a serious offense and higher risks of failure to appear.

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

[171] Standard (110-6.1(a)(1-7)), Willful Flight Standard – (110-6.1(a)(8)), and 725 ILCS 5/110-6.1(e)(2).
[172] An example of this would be multiple domestic violence cases involving the same complainant.

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

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

Commentary:

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

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

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

Commentary:

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

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

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

Commentary:

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

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

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

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

Commentary:

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

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

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

Commentary:

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

The requirement of "clear and convincing evidence that no condition or combination of conditions will provide reasonable assurance that the defendant will appear for court proceedings or protect the safety of the community or any person" is—deliberately—a high Standard. It reflects the high value placed in our justice systems on individual liberty and is identical to the Standard adopted by the ABA Third Edition *Pretrial Release Standards*.[173] However, this Standard goes further by requiring courts to consider the nature and severity of risk and its level and manageability in order to detain pretrial. This requirement better reflects the history of bail, fundamental legal principles, and current pretrial research, which has allowed us to assess and articulate better concepts surrounding risk as well as the type of risk necessary to trigger secure detention.

Factors for the Court's consideration include:

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

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

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

Commentary:

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

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

If the new pretrial hearing is not held on or before the date established in the original detention order, the individual should be released under conditions that best minimize the

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

risk of flight and danger to the community. The objective of this provision is to ensure continued attention to cases involving individuals in secure detention and protect the individual's right to a speedy trial.

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

Accelerated time limitations should be shorter than current speedy trial time limitations applicable to individuals on pretrial release. Failure to try a detained individual within such accelerated time limitations should result in the individual's immediate release from detention under reasonable conditions that best minimize the risk of flight and danger to the community pending trial unless the delay is attributable to or agreed to by the individual.

Related Standards:
ABA (2007) 10.5-11

Commentary:

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

These Standards do not prescribe a detention timeframe, but should be read as consistent with the ABA Standards that recommend a period of 90 days from arrest as a presumptive time limit for individuals in detention.[174] The sanction for failure to bring a detained

[174] *ABA Standards on Speedy Trial and Timely Resolution of Criminal Cases*, Standard 12-2.1 (b) (Aug. 2004). The same Standard provides for a presumptive limit of [180] days for persons on pretrial release. It should be

individual to trial or otherwise resolve the case within the time period should be release of the individual from detention under conditions that minimize the risks of nonappearance and dangerousness.[175]

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

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

Commentary:

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

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

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

Commentary:

The finding that an individual presents an unmanageable risk to public safety pretrial should not diminish nor negate the presumption that they are presumed innocent of the alleged offense. All stakeholders involved in the individual's adjudication should respect the presumption of innocence during all pretrial court proceedings.[176]

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noted that other provisions of these Standards provide for some extensions and exclusions of time in computing the allowable periods of time under some circumstances.

[175] *Id.* at Standard 12-2.7. (Under this ABA Standard, the consequence for failing to bring an individual to trial within the time allowed under the speedy trial rule or statute is dismissal of the charges with prejudice.).

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

Standard 3.5: Subsequent Review of Release and Detention

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

Related Standards:
ABA (2007) Standard 10-5.6

Commentary:

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

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

While only the Court may impose or retract conditions of bail,[177] it may allow the pretrial services agency discretion in how it monitors and supervises conditions. For instance, the court may set a condition of random drug testing, but the pretrial agency may determine the frequency and nature of the testing. Authorization may come through a Local Administrative Order (LAO), Memorandum of Understanding (MOU), or other written form of agreement.

[177] For example, in *People* v. *Rickman* 178 P.3d 1202 (Colo. 2008), the Supreme Court of Colorado wrote, "Absent statutory authorization, a court may not delegate its authority to set bond conditions." Statutory This may be done through a Local Administrative Order (LAO), Memorandum of Understanding (MOU), or other written agreement.

3.5(b): The prosecutor, defense or the pretrial services agency may request a hearing to consider changes to an individual's release or detention status, including modification to supervision levels or conditions based on the individual's behavior on supervision, willful failure to appear in court, or an arrest on a new offense.

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

Commentary:

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

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

Related Standards:
ABA (2007) 10-5.6

Commentary:

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

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

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

Commentary:

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

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

Related Standards:
NAPSA (2020) Standard 1.7

Commentary:

Individuals should be represented by counsel at any proceeding where there is potential for jail or loss of liberty.[178] Representation by counsel helps ensure that due process and procedural protections are observed for all individuals. Individuals may waive their right to counsel. However, the waiver must be found to be "knowing, voluntary and intelligent."[179]

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

3.5(f): A designated justice agency should identify to the court any individual that has failed to obtain release within 72 hours of a release order or whose pretrial detention exceeds the limit outlined by statute or court order.

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

Commentary:

A specified agency should notify the Court of individuals who fail to obtain release within 72 hours of issuance of a release order and individuals detained longer than allowed by statute or court order. While this Standard does not identify a particular agency for these tasks, these usually are functions assumed by high functioning pretrial services agencies.

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

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

Commentary:

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

Part 4: Pretrial Services Agencies

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

4.1(a): The purposes of a pretrial services agency are to:
(i) assist judicial officers make prompt, fair, and informed bail decisions that encourage pretrial release, promote future court appearance, and enhance public safety; and
(ii) provide the Court with practical, individualized monitoring, supervision, and support options for persons that require oversight while on pretrial release.
(iii) track and report pretrial outcome and performance measures to gauge the behavior of persons released pretrial and identify areas for improvement in the pretrial system.

Related Standards:
NAPSA (2020) Standard 1.1 and 2.7
NAPSA (2024) Standard 2.11

Commentary:

Pretrial services agencies should be structured to assist Courts in making informed bail decisions that promote pretrial release, future court appearance, and public safety and to provide practical non-financial release options consistent with assessed risk. These purposes help "reduce barriers to the pretrial release of persons in custody whose release on bond with appropriate conditions reasonably assures court appearance and public safety"[180] and allow justice systems to operationalize bail statute mandates. The agency's structure should include as operational areas, outcome assessment, monitoring and supervision strategies that promote successful pretrial outcomes, and integration of behavioral health treatment and other services that promote the functions of bail.

Consistent with Standard 2.11, pretrial services agencies should track and report to stakeholders outcome and performance metrics that, at the least, gauge rates of pretrial release, court appearance and arrest-free behavior. Metrics also should track how well the pretrial services agency and pretrial system operate. As noted in Standard 2.11, all metrics should be used to measure progress, track trends, and expose discrepancies between stated goals and actual practices.

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

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

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

(ii): assess an individual's likelihood of future court appearance and crime-free behavior while on pretrial release, using validated outcome assessments shown by research to predict the likelihood of pretrial success;

(iii): use an individual's background interview and investigation, criminal history, outcome assessment results, and other information to: recommend appropriate conditions of pretrial release

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

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

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

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

Commentary:

Enabling legislation for pretrial services agencies,[181] professional standards encouraging their adoption by criminal justice systems, and the consensus of justice system experts[182] typically describe the functions enumerated in Standard 4.1(b) as critical to a pretrial services agency's operation. These functions support the goals for pretrial services agencies described in Standard 4.1(a) and the mission statements and outcome measures of most high-functioning agencies.

(i): The pretrial services agency should complete investigations on all individuals charged with a criminal offense who are in custody at the time of their initial court appearance and eligible for bail consideration according to controlling statute.[183] Agencies should complete

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

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

[183] Pretrial services agencies also may interview individuals who have secured release, if ordered by the Court or requested by the prosecution or defense.

investigations before the initial appearance to ensure that the court has the information available to make an informed bail decision. At a minimum, the investigation should include a pretrial interview with the individual, verification of the information given in the interview, and a complete criminal history (national, state, and local) check.

Neither the agency nor the Court should limit an individual's access to a pretrial investigation. A pretrial services agency also should not deny a recommendation for release due to an individual's declining to participate in the pretrial investigation, as it is the individual's right to not participate in the interview.

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

(iii): While actuarial outcome assessments are the consensus best method to gauge the likelihood of future pretrial misconduct, these tools "cannot anticipate every possible case or scenario."[184] For some individuals, other factors than those used in the outcome assessment—for example, substance use disorder or addiction, mental health services need, residency requirements or individual factors that might impede future court appearance—may be significant mitigating or aggravating considerations to the pretrial services agency's recommendation and the Court's bail decision. To address these limited instances, pretrial services agencies should adopt an "adjusted actuarial" approach to drafting bail recommendations. Under this approach, staff may override outcome assessment results in limited and clearly defined circumstances. Recommendations that deviate from the outcome assessment results should come from a list of pre-selected considerations. To guard against overuse of these factors, agencies should set as a performance measure an annual cap on the number of recommendation deviations as a percentage of outcome assessments performed.

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

Pretrial supervision also must conform to the "risk principle," the community corrections evidence-based practice that supervision levels match an individual's assessed risk.

[184] Latessa, E., et al. (2009).

Research shows that matching supervision levels to risk greatly improves supervision compliance and outcomes. The risk principle warns against lower-risk individuals being ordered to comply with conditions more appropriate for higher-risk individuals (a waste of resources and potential cause of technical violations) and conversely, inadequate supervision of higher-risk individuals, which can lead to missed court appearances or new arrests pretrial.

Standard 4.2: Pretrial Services Agency Organization and Management

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

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

Commentary:

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

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

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

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

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

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

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

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

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

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

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

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

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

Commentary:

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

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

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

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

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

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

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

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

(viii): Pretrial agencies should work with the appropriate law enforcement authority to develop protocol for gaining access to, and interviewing individuals who may be segregated due to a disability. Pretrial agencies also should develop strategies to manage supervised individuals who require special accommodation. The National Center for State Courts has available on its website[185] numerous resources on the Americans with Disabilities Act, gender and racial fairness and language access. Pretrial agencies should use these resources to ensure that any policies or strategies developed are in accordance with state guidelines and federal law.

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

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

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

Commentary:

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

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

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

Standard 4.3 Background Investigations

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

Related Standards:
NAPSA (2004) Standard 3.3

Commentary:

This Standard defines background investigation as consisting of an interview of the individual, verification of interview information, criminal history check, and pretrial outcome assessment.

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

> *"The interview provides context to information found in an arrest record or provided by a screening tool or risk assessment instrument. The interview also provides an opportunity to gather essential facts such as contact information. Information obtained in an interview may also help identify opportunities for diversion/problem-solving courts, and an interview may be required by statute or as part of a specific risk assessment tool."*[186]

In a report describing its pretrial services agency, Allegheny County, Pennsylvania describes fundamentals in its pretrial investigation practices: "(u)sing a Standardized risk assessment tool has added objectivity to the process, but bail investigators must still make important judgments about aggravating, mitigating, or changing circumstances [not present in the actuarial risk assessment].[187]

A complete and accurate history of an individual's arrests, convictions, and status with the justice system is essential to informed bail recommendations and decision-making. Research has shown an individual's criminal history related to factors from a validated pretrial outcome assessment have a stronger correlation to pretrial misconduct than those unrelated to factors in a validated pretrial assessment. Therefore, it is imperative that pretrial services agencies make every attempt to obtain dispositions for all arrests and filed

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

cases contained in any criminal history report. Criminal history checks should include statewide as well as national (NCIC or III) databases. Pretrial services agencies must also be familiar with, and adhere to, any dissemination and disposal requirements for criminal justice information.

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

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

If statute or local court rule law does not provide parameters for sharing pretrial services agency information, agencies should secure informed written consent from individuals before sharing interview information with other stakeholders.

Commentary:

Before beginning the interview, the pretrial services officer should advise the individual about the nature of the interview (in particular, that it is voluntary and is intended to assist in the making of an appropriate bail decision) and about how interview information can be used (besides assisting the Court with the bail decision) and by whom. Other uses of interview information might include prosecution for perjury or to impeach the individual's future testimony.[188] Individuals also must be informed when state law allows pretrial

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

interview information to be used on the question of guilt in the current case or as possible sentencing enhancements.

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

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

Commentary:

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

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

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

Commentary:

Pretrial services agency staff should make every attempt to verify interview information. This verification may include telephone contact with family, friends, co-workers, or other references the individual gives voluntarily when interviewed.[189] Key information to be

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

Occasionally, individuals will not want pretrial services to contact their employer, fearing work-related discipline or job loss. However, verified employment is a risk factor under several pretrial outcome assessments. Employment also can be a significant mitigating factor when considering appropriate release types and supervision levels. Therefore, pretrial agency staff should make every attempt to verify employment status. For example, staff may call the employer and simply ask to speak with the interviewed individual. Staff also may contact an employer's human resource department, who can provide you with a date of hire, job title, full or part time status, pay rate, last day worked, and if the defendant is currently employed. If human resources asks for identification, staff should give their name and state that they work for the pretrial services agency.

verified include the individual's name, address, age, means of support (including the employer's name), marital and family status, and length of residence in the jurisdiction. Depending on the circumstances of the case, the staff also may verify an individual's potential needs, such as mental health services or substance abuse assessment or treatment.

Standard 4.4: Validated Pretrial Outcome Assessment

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

(i) The assessment must classify individuals into distinct categories of likelihood of pretrial success based on the assessment's scoring.

(ii) Pretrial services agencies should have clear policies on how staff may make a recommendation that does not match an individual's assessed outcome level.

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

Commentary:

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

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

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

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

3. Require a supervisor's approval for all recommendations that deviate from the assessment result.

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

Commentary:

This Standard stresses the need for pretrial services agencies to have policy and procedure prioritizing staff training and quality assurance for the completion of pretrial outcome assessments. Staff training on the outcome assessment should include not only regularly occurring training on the agency's specific assessment but also training on pretrial outcome assessment in general. This should include the latest research on assessments and the methodology used in creating the assessment.

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

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

Commentary:

Applied to pretrial outcome assessments, "validation" gauges how well the assessment predicts future missed court appearances or rearrests (particularly across racial and ethnic subgroups and risk levels), and which assessment factors are statistically significant to failure. More detailed validations may identify revisions that could eliminate or diminish possible biases against individual subgroups, and additional factors that may enhance the instrument's predictive power.[190]

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

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

pretrial services agencies conduct validations at least every two to three years.[191] The validation should address the following empirical questions:

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

Standard 4.5: Pretrial Recommendations

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

Commentary:

Upon completion of its investigation, the pretrial services agency should prepare a written report summarizing its findings. The extent of the information to be shared within the report should be discussed and agreed upon by all relevant parties.[192] Information contained within the report may be considered public information or subject to Freedom of Information Act (FOIA) requests depending on applicable state laws or statutes. Information also may be subject to other reporting restrictions such as those governing criminal history or protected health information. The written report should be made easily accessible to the court, the prosecution and defense counsel. Reports should contain the pretrial services agency's recommendation regarding the court's release decision.

The agency's recommended conditions of release should be the least restrictive needed to address an individual's identified and specific risk factors. For example, helping address concerns regarding future court appearance could be addressed through a progressive series of options from court reminders of upcoming appearances, check-in with the pretrial services agency before scheduled court appearances, to regular reporting. If agency staff believe the first option is sufficient to address the identified factor, the agency should not recommend any further conditions.

Recommended conditions must be within an individual's ability to perform. While this directive usually is associated with secured financial conditions, it may also be an appropriate consideration for conditions that require regularly occurring activities such as

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

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

reporting, urinalysis, or adhering to curfews. Pretrial services agencies should avoid recommending conditions that impose unnecessary restrictions on an individual's movements, conflict with employment, education, or home schedules, or require individuals to expend limited transportation resources better used for scheduled court dates.[193]

Pretrial services agencies should not recommend conditions based on an individual's status in a group (for example, drug testing for those charged with drug crimes or firearm prohibitions for weapons offenses) or universal conditions that apply to all supervised persons. These "blanket conditions" violate the principle of least restrictive conditions tied to specific and individualized risk factors.

While an agency should not recommend against release, it should note when it cannot address an individual's risk of court nonappearance and potential for new arrests. Instead, the agency's report to the court should identify the specific risk factors it believes cannot be addressed with current resources.

4.5(b): The pretrial services agency's recommendation should reflect the individual's likelihood of court nonappearance and new arrests during the pretrial stage, based on the results of the pretrial investigation. The agency's recommended supervision level and conditions should be individualized and the least restrictive necessary to address identified risks.

Commentary:

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

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

[193] Kennedy, S., Blair, T.B., and Wosje, R. (2022). *Promoting Pretrial Success A New Model for Pretrial Supervision*. Washington, D.C.: National Institute of Corrections. https://s3.amazonaws.com/static.nicic.gov/Library/033628.pdf.

4.5 (c): The pretrial services agency may not deny a recommendation because an individual declined to participate in the agency's screening procedures.

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

Standard 4.6: Monitoring and Supervision

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

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

Commentary:

Data from pretrial services agencies that maintain appearance and public safety rates show that most individuals appear for all scheduled court appearances and remain arrest-free pretrial.[194] Moreover, data from agencies that use validated pretrial outcome assessments

[194] See Cohen, Lowenkamp, and Hicks (2018). Pretrial Services Agency for the District of Columbia (2022). Congressional Budget Justification and Performance Budget Request: Fiscal Year 2023. (p. 33). Steven, D. and Olson, D. (2020). *Dollars and Sense in Cook County: Examining the Impact of General Order 18.8A on Felony Bond Court Decisions, Pretrial Release, and Crime.* Chicago, IL: John D. and Catherine T. MacArthur Foundation. Collins, K. (2018). *Allegheny County Pretrial Services Outcome Reports: 2018.* Pittsburgh, PA: Allegheny County Pretrial Services. Grant, G.A. (2019). *Criminal Justice Reform: Report to the Governor and the Legislature.* Trenton, NJ: Administrative Office of the Courts. p. 5-6.

suggest that most individuals score at a "lower" or "moderate" risk level.[195] Data also suggest that "pretrial failure" is not as severe as perceived. Frequently, failures to appear are not willful abscondences from court, but rather involve circumstances that can be resolved without significant change to an individual's bail status.[196] Most rearrests pretrial are on misdemeanor and low-level felony offenses, not dangerous or violent charges that would denote an individual's heightened threat to public safety.[197] Given the relatively low level of risk and high level of success found in most pretrial populations, the aim of monitoring and supervision interventions should be to promote an individuals' success pretrial.

(i): Release on the least restrictive conditions needed to reasonably assure court appearance and public safety is an express or implied mandate in the Federal bail statute and bail laws of most states and the District of Columbia. (See NAPSA (2020) Standard 2.2.). Further, the risk principle posits that monitoring, supervision, and support levels match an individual's assessed risk level. (See NAPSA (2020) Standard 2.9.). At a minimum, these Standards suggest that "pretrial monitoring" include court date reminders and reporting to the court new criminal arrests, bench warrants, and arrest warrants.

(ii): Notification to individuals of upcoming court appearances is a proven way to improve court appearance rates.[198] Notification may include telephone calls, email, or text messaging. If an agency employs multiple methods for court notification, the individual should determine the best method of contact. Regardless of the system used, court notifications should include the date and time of the next scheduled court appearance, the

[195] See Harris County Pretrial Services (2019) *Harris County Pretrial Services 2018 Annual Report*. Houston, TX: Harris County Pretrial Services. p. 12. Indiana Office of Court Services (2019). Debora and Meils (2019). https://www.in.gov/judiciary/iocs/files/pretrial-informative-handout.pdf (last visited Sept. 29, 2019).. VanNostrand and Rose (2009).

[196] Corey, E. and Lo, P. (2019). "The 'Failure to Appear' Fallacy." *The Appeal*. https://theappeal.org/the-failure-to-appear-fallacy/. Bernal, D. (2017). "Taking the Court to the People: Real World Solutions for Nonappearance." 59 Ariz. L. Rev. 547, 547 (2017). Bierie, D.M. (2014). *Fugitives in the United States*, 42 J Crim Just 327, 330. U.S. Department of Justice, *Investigation of the Ferguson Police Department* *55 (Mar 4, 2015). Cohen and Reaves. (2007). Gouldin, L.P. "Defining Flight *Risk*, 85 U. of Chicago L. Rev. 677 (2018).

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

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

court address, the judge's name and courtroom, and the consequences for missing the court date.

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

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

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

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

Additionally, the pretrial services agency, the court, and other appropriate stakeholders should agree on specific definitions of "infractions" that the agency can address in-house (for example, an initial missed in-person contact with a case manager) and individual conduct reaching the level of "violation" and requiring court action (for example, a person losing contact with the agency). Both parties also should define "success," or when a specific supervision condition or level of supervision may be reduced or eliminated. For example, individuals that successfully report in person a specific number of times may have that condition reduced to reporting by telephone. This helps ensure that conditions and levels of supervision continue to be the least restrictive needed to achieve the goals of court appearance and public safety.

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

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

If state statute or local rule allows the agency to make bail modification recommendations, the agency should consider the individual's history of court appearance and arrest-free behavior in that pending case. The pretrial services agency should recommend detention only if the individual has willfully failed to appear for court or has been rearrested and the agency believes the risk for future failure is unmanageable. The pretrial services agency should not recommend detention (revocation of pretrial release) or excessive supervision practices for individuals who have made all scheduled court appearances and have not been rearrested pretrial regardless of their compliance with other conditions of bail.

(vii): Several jurisdictions have enacted responses to missed court dates that do not assume that failures to appear are always acts of abscondence.[199] To help support these efforts, the pretrial services agency should make every attempt to facilitate the return of individuals who fail to appear for scheduled court dates. This may include attempts to contact the individual and advise their surrender to the court (or contact with defense counsel) to formal procedures within supervision protocols to address court nonappearance.

4.6(b): The pretrial services agency should offer alternatives to in-person contact whenever possible and appropriate to promote pretrial success.

Commentary:

A pretrial services agency's supervision protocol should prioritize telephone and virtual supervision contacts over in-person reporting. As much as possible, in-person contact should be reserved for individuals with a higher likelihood of missing a court date, individuals on electronic surveillance (as a means to check surveillance equipment and review supervision compliance), and for discussing individual conduct (both positive and negative) that may require a request to the court for lower or higher supervision levels.

[199] For example, in 2020, the Michigan Legislature established a rebuttable presumption against bench warrants issued for certain first-time failures to appear. The law created a 48-hour grace period for defendants to appear voluntarily. If the defendant still fails to show, the court must issue a warrant unless it believes there is good reason to schedule the case for further hearing. Michigan Compiled Laws, Section 764.3 - Failure to appear; rebuttable presumption for first failure; revocation of release order or forfeiture of bail; issuance of warrant; conditions and reasons. The O'Donnell consent decree created an "Open Hours Court" that is held at least weekly and where a misdemeanor defendant who missed a scheduled court appearance may reschedule that missed appearance. UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION Consent Decree Case 4:16-cv-01414 Document 708 Filed on 11/21/19 in TXSD at page 12.

However, an in-person reporting requirement should not impose on the individual's prosocial activities, particularly their attendance at work.

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

Related Standards:
NAPSA (2019) Standard 2.1

Commentary:

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

4.6(d): The pretrial services agency may refer supervised individuals to behavioral health and social services. However, the agency should not recommend these referrals as conditions of supervision unless it determines that the need being addressed heightens an individual's likelihood of missing a scheduled court appearance or being arrested pending adjudication.

Commentary:

Behavioral health issues and social services needs are common in most pretrial populations. However, for many individuals, these needs do not increase the risk of court nonappearances or new arrests pretrial. This makes treatment or service intervention for most individuals an inappropriate condition of pretrial release.[200]

[200] Moreover, the time and intensity needed for most treatment episodes often exceed the length of case processing for pretrial matters. See Substance Abuse and Mental Health Services Administration (2019). *Treatment Episode Date Set (TEDS): Admissions to Discharges from Publicly Funded Substance Use Treatment.* A lack of resources within pretrial agencies and jurisdictions also makes treatment and service provision at the pretrial stage a challenge. See Blair, T.B., Kennedy, S. and Wosje, R. (2022). *Incorporating Services and Support into Pretrial Supervision: Is There a Best Model?* Washington, D.C.: National Institute of Corrections. NIC Accession Number 033627.

Pretrial services agencies should offer referrals to behavioral health and social services to individuals wishing to voluntarily take advantage of these resources. However, treatment and services as conditions of pretrial release should be considered only when a clinical assessment indicates that the need heightens the likelihood of pretrial misconduct and identifies an appropriate level of care.[201] Treatment and services integration should apply only to high-risk/high-need individuals and when resources exist within the community to address the assessed need and can be accessed free of charge to the individual.

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

Commentary:

This Standard focuses on the coordination function that pretrial services agencies should play as the primary party responsible for the oversight of individuals on supervised release. There will be instances in which it may be appropriate to refer an individual to another agency for specialized services, for instance when an individual has a substance use disorder or mental health disorder. Pretrial staff should be knowledgeable about the capabilities and services of agencies to which it refers individuals. Understanding resource allocation, availability and eligibility will assist in making the most appropriate referral for the individual's specific situation. When individuals are released under conditions that include participation in such services, the pretrial agency should actively monitor the individual's compliance through periodic contacts with the agency providing the service. This will, in most cases, require a release of information to be signed by the individual. The pretrial agency should track aggregate data on the effectiveness of these programs/services as they relate to positive pretrial outcomes.

[201] These Standards favor treatment and behavioral health services as voluntary supports to pretrial supervision. While the Standards do not oppose substance use disorder and behavioral health treatment and services as conditions of pretrial release, they note potential problems when these interventions are court-ordered. Like other conditions of pretrial supervision, there is no research that links treatment or support services to improvements in pretrial outcomes. Further, case law on treatment as a pretrial release condition is mixed. In *Butler v. Kato* 154.P .3d.259.(Wash.App.2007), the Washington State Court of Appeals found conditions of substance abuse assessment and attendance at Alcoholics Anonymous sessions were unconstitutional. However, an appeals court in New York found that behavioral health-related conditions were permissible if they were regulatory (geared to encouraging positive pretrial outcomes) rather than punitive. (See *Halikipoulos v. Dillon*, 139 F.Supp.2d.312 (E.D.N.Y. 2001). Finally, not every state bail law is clear on whether treatment and other behavioral health services are legitimate release conditions. (See https://www.ncsl.org/civil-and-criminal-justice/pretrial-legislation-database). Vermont is one of only a few states whose bail law actually specifies drug treatment as a pretrial condition. (Vt.Stat.Ann.tit.13, § 7554, 2009).

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

Commentary:

In instances where an individual is arrested in a jurisdiction other than the one in which they reside, supervision should be provided by a pretrial agency near where the individual lives. Pretrial agencies should accommodate requests for courtesy supervision whenever possible and when resources are available. In these situations, the releasing court, the supervising agency in the court's jurisdiction, and the local pretrial services agency should understand their responsibilities through a memorandum of understanding or similar agreement. This should include the specific conditions of supervision, whether the supervising pretrial agency can supervise conditions adequately, and how the agency will report and address adherences and infractions. The pretrial services agency in the originating jurisdiction should also provide the supervising' agency with any information that may assist in the successful supervision of the individual. This may include the result of a pretrial outcome assessment or pretrial investigation. Care should be taken in maintaining the confidentiality of any information being shared, see Standard 4.8(c).

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

Commentary:

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

Standard 4.7 Workload and caseload ratios

4.7(a): The pretrial services agency should establish workload and caseload ratios to help ensure adequate staffing of critical operational functions.

Proper workload and caseload ratios are essential to the performance of critical work functions such as pre-initial appearance screening, individualized supervision and monitoring as well as in identifying the level of funding and resources the pretrial services agency needs to operate effectively. While these Standards do not recommend specific ratios—given the differences nationally in how pretrial agencies perform mission-critical tasks—they suggest that any calculation of staffing ratios include defining the following elements:

- *A "work unit" defined as a single pretrial investigation[202] (workload capacity for screener staff) or monitored/supervised individual (for supervision caseload ratios)*.
- *An estimate of the time needed to complete critical work functions, non-critical functions, and administrative work*. Workload assessments include a cataloguing of tasks and activities required for assessment and supervision as well as administrative and other types of activities that support these activities. This involves identifying the discrete tasks and activities required by supervision level, supervision agency policy, legal or statutory requirements and regulations, and suggested professional standards or recognized best practices.
- *The average time available per staff to complete these functions*. The analysis calculates the average amount of time for each task and activity for an individual staff person and unit supervisor to determine the total amount of work time and the average amount of time required per assessed or supervised individual, work product, and unit. [203]

[202] Which may include an interview with the arrested individual, verification of interview information, a criminal history search, application of a pretrial outcome assessment, and formulation of a release recommendation or detention request.

[203] Examples of pretrial agency work and caseload assessments include Justice Management Institute (2019). *Maricopa County Adult Probation and Pretrial Services Department: Final Report*. Arlington, VA: JMI. Bryant, K., Ostrom, B., Bailey, E., Douglas, J., and Roth, S. (2022). *Commonwealth of Virginia Department of Criminal Justice Services Pretrial and Local Probation Workload Study.* Williamsburg, VA: National Center for State Courts.

Standard 4.8: Confidentiality of pretrial services agency information

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

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

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

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

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

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

(vi) persons or agencies designated by the individual upon their specific written authorization.

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

Commentary:

The pretrial services agency must have written policies and guidelines that outline the confidentiality of agency individual-related data, when the agency may share this data with an outside entity, and the procedures the agency must follow when sharing this information. Optimally, these policies and guidelines are reinforced by statute or case law that provides for the confidentiality of pretrial services agency information.[204] This Standard suggests a basic approach that all individual-based information held by the pretrial services agency remain confidential and subject to disclosure only under very limited and well-defined circumstances. Agencies also should notify individuals verbally and in writing when personally identifying information is shared with another entity and how that information will be used. Notifications should include language that explains and ensures that information being shared includes individual consent.

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

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

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

(ii): The Court or the pretrial services agency may refer the individual to substance use disorder treatment, mental health services or other community services providers as a condition of supervision or as a complement to supervision requirements. In these instances, the information the pretrial services agency obtains from these organizations may be considered confidential under 42 CFR, Part 2,[205] Public Health and the Health Insurance Portability and Accountability Act of 1996 (HIPAA).[206] 42 CFR, Part 2 applies to any program receiving direct or indirect federal funding and is intended to ensure that a patient receiving treatment for a substance use disorder (SUD) does not face adverse consequences in relation to issues such as criminal proceedings and domestic proceedings such as those related to child custody, divorce or employment. Part 2 protects the confidentiality of SUD patient records by restricting the circumstances under which programs or other lawful holders can disclose such records. In general, Part 2 programs are prohibited from disclosing any information that would identify a person as having or having had a SUD unless that person provides written consent. This includes even individuals who may be a client/patient of an SUD program.

42 CFR, Part 2 specifies a set of requirements for consent forms, including but not limited to the name of the patient, the names of individuals/entities that are permitted to disclose or receive patient identifying information, the amount and kind of the information being disclosed, and the purpose of the disclosure.

HIPAA generally permits the disclosure of protected health information for certain purposes without patient authorization, including treatment, payment, or health care operations. HIPAA's "Privacy Rule" assures protection of individual health information while allowing the flow of health-related information to promote health care and to protect the public's health and wellbeing. The rule strikes a balance that permits important uses of information, while protecting the privacy of people who seek care and healing. Generally, this means that while data can be provided to the Court to inform on supervision compliance, it may not otherwise be made public. Central to the Privacy Rule is the principle of "minimum necessary use and disclosure." A covered entity must make reasonable efforts to use, disclose, and request only the minimum amount of protected health information needed to accomplish the intended purpose of the use, disclosure, or request.[207] Therefore, pretrial services agencies should consider the following when determining their obligation to identify, collect, and share HIPAA-protected data.

[205] https://www.ecfr.gov/current/title-42. 42 CFR protects patient records created by federally assisted programs for the treatment of substance use disorders (SUD). Part 2 has been revised to further facilitate better coordination of care in response to the opioid epidemic while maintaining its confidentiality protections against unauthorized disclosure and use.
[206] Summary of the HIPAA Privacy Rule (2003), https://www.hhs.gov/sites/default/files/privacysummary.pdf (last visited Sept. 28, 2019).
[207] See 45 C.F.R. § 164.502(a)(1) (2019).

- Who in the pretrial population is covered by the Policy Rule? This includes identified individuals, contracted health professionals, and identification of what pretrial records are covered.
- What are "required disclosures?" According to HIPAA, a covered entity must disclose protected health information in only two situations: (a) to individuals (or their personal representatives) specifically when they request access to, or an accounting of disclosures of, their protected health information; and (b) to HHS when it is undertaking a compliance investigation or review or enforcement action.[208]
- What constitutes a "permitted disclosure," or an "authorized disclosure" of protected health information?[209]

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

In general, State laws that are contrary to 42 CFR and HIPAA are preempted by the federal requirements.[210] The Privacy Rule provides exceptions to the general rule of federal preemption for contrary State laws that (1) relate to the privacy of individually identifiable health information and provide greater privacy protections or privacy rights with respect to such information, (2) provide for the reporting of disease or injury, child abuse, birth, or death, or for public health surveillance, investigation, or intervention, or (3) require certain health plan reporting, such as for management or financial audits.

Sometimes a court may issue a subpoena for protected health information. A HIPAA-covered health care provider or health plan may share protected health information if it has a court order. This includes the order of an administrative tribunal. However, the provider or plan may only disclose the information specifically described in the order. A subpoena issued by someone other than a judge, such as a court clerk or an attorney in a case, is different from a court order.[211]

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

- Notify the person who is the subject of the information about the request, so the person has a chance to object to the disclosure, or
- Seek a qualified protective order for the information from the court.[212]

[208] See 45 C.F.R. § 164.502(a)(2) (2019).
[209] See 45 C.F.R. § 164.502(a)(1) (2019).
[210] See 45 C.F.R. § 164.504(f) (2019).
[211] https://www.hhs.gov/hipaa/for-individuals/court-orders-subpoenas/index.html.
[212] See 45 C.F.R. § 164.512(e) (2019); Office of Civil Rights (OCR) Frequently Asked Questions.

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

The pretrial services agency should have a policy—preferably backed by statute—to prohibit re-disclosure of information by other stakeholders. Re-disclosure is permitted when necessary to achieve the purpose for which the information was originally disclosed (for example, if the pretrial services agency provides a law enforcement agency with information to execute a warrant, that law enforcement agency can share that information to help affect the arrest), but not otherwise. Re-disclosure should not become a vehicle for development of databases unrelated to the purposes of disclosing information.

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

Confidentiality guidelines should prohibit the use of agency information by the court, prosecutor or defense to determine the individual's guilt or innocence. Specifically, the prosecution should be barred from using information to establish guilt in the pending case.[213] Ensuring this confidentiality is essential to preserve the pretrial services agency's neutrality as related to other criminal justice stakeholders and encourage individuals to participate in pre-bail investigations and pretrial supervision.

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

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

An individual and their counsel should have open access to information in the individual's file upon request, except when disclosure would breach the confidentiality of the information provider. This exception protects against possible retribution against a person who provided information about the individual in the agency's initial investigation, post-release monitoring or supervision.[214]

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

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

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

(a) the purpose of the research;

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

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

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

Related Standards

NAPSA (2004) Standard 3.8(d)

Commentary

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

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

clear, that the agency knows how the research will be conducted and what information will be collected, and how the contractor/researcher will protect the security and confidentiality of the data.

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

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

- detail about how the data will be used;
- a guarantee that the use of the data will be limited to the stated purposes of the research or evaluation;
- the names and job titles of all staff members who will have access to the records;
- assurances of no secondary disclosure of the information provided without the express written consent of the pretrial services agency; and
- explanation of how the outside entity will protect data security and confidentiality (e.g., through passwords or other protections).

When records are provided through ongoing electronic transmissions, recipients must certify that they will not attempt to search for sealed records, and that unsealed records will not be copied or stored. In some cases, the data-sharing agreement may require that the data sharing will be time-limited; either the data given to the researcher will be destroyed after a certain time period, or the identifiers will be removed.[215] All data-sharing agreements should prohibit those who receive de-identified agency records from attempting to identify the records.

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

[215] Identifiers are information that can identify of an individual alone or when used with other data.

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