

## Pretrial Preventative Detention in North Carolina

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“In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”

United States v. Salerno, 481 U.S. 739, 755 (1987)

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## Introduction

In conversations about bail reform occurring in North Carolina and around the nation, one issue that regularly arises is: How should we handle defendants who are too dangerous or who present too great a flight risk to be released pretrial?<sup>1</sup> Inevitably, the discussion turns to pretrial preventative detention. In fact, a number of jurisdictions already allow for such detention. At least twenty-two states, the District of Columbia and the federal system provide for pretrial preventative detention through constitutional or statutory provisions.<sup>2</sup> Although neither the state constitution nor the General Statutes expressly provide a procedure for it, pretrial preventative detention occurs in North Carolina in two ways. First, the General Statutes allow defendants charged with capital murder to be held in jail without conditions.<sup>3</sup> Second, due to concerns about public safety, flight, and obstruction of justice, other defendants are intentionally detained pretrial through the imposition of unattainably high bonds.<sup>4</sup> The use of a secured bond for preventative detention is an imperfect solution for this simple reason: if a high risk defendant has sufficient resources, he or she can pay the bond or bail bondsman’s fee and walk out of jail with no supervision.<sup>5</sup> But for many defendants, when a judicial official sets what is meant to be an unattainably high bond for the purpose of holding a defendant pretrial, that goal is achieved: the defendant remains in detention.<sup>6</sup> Preventative detention—whether implemented through a statute or through the use of unattainably high detention bonds—must comply with the constitution.<sup>7</sup> In this paper, I explore the constitutional parameters of preventative detention schemes, provide guidance to policymakers and

<sup>1</sup> See, e.g., 4 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 12.3(a) (4th ed., 2015) [hereinafter LAFAVE].

<sup>2</sup> HARVARD LAW SCHOOL CRIMINAL JUSTICE POLICY PROGRAM, MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM 25 & n.210 (2016) [hereinafter MOVING BEYOND MONEY] (citing statutes), <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf>.

<sup>3</sup> G.S. 15A-533(c) (“A judge may determine in his discretion whether a defendant charged with a capital offense may be released before trial.”).

<sup>4</sup> Cf. JOHN CLARK ET AL., UPGRADING NORTH CAROLINA’S BAIL SYSTEM: A BALANCED APPROACH TO PRETRIAL JUSTICE USING LEGAL AND EVIDENCE-BASED PRACTICES 36 (Pretrial Justice Institute 2016) [hereinafter PJI REPORT] (Report to the Criminal Investigation and Adjudication Committee of the North Carolina Commission on the Administration of Law and Justice), [https://nccalj.org/wp-content/uploads/2017/pdf/nccalj\\_criminal\\_investigation\\_and\\_adjudication\\_committee\\_report\\_pretrial\\_justice.pdf](https://nccalj.org/wp-content/uploads/2017/pdf/nccalj_criminal_investigation_and_adjudication_committee_report_pretrial_justice.pdf).

<sup>5</sup> PJI REPORT at 35 (“[N]o matter how high the amount [of bail], any particular extremely dangerous defendant might still be able to pay it, leading to the potential for some horrific yet avoidable crime during the pretrial period.”).

<sup>6</sup> MOVING BEYOND MONEY at 24 (“One of the most significant pathologies of money bail is its use as a subterranean mode of preventative detention; judges address perceived risk to the community by setting bond at a level that will be presumptively out of reach to a defendant.”); see also Brook Hopkins & Colin Doyle, *The Pathways of Pretrial Reform*, 57 JUDGES’ JOURNAL 31 (Summer 2018) (noting that “money bail has become a method of sub rosa pretrial detention”).

<sup>7</sup> PRETRIAL JUSTICE CENTER FOR COURTS, PREVENTIVE DETENTION 3 (2017) [hereinafter PREVENTIVE DETENTION BRIEF] (“Jurisdictions that institute preventative detention measures, whether through constitutional amendment, legislation, or court rule, should require explicit safeguards that provide defendants meaningful exercise of their due process rights as articulated by the U.S. Supreme Court in *United States v. Salerno*.”), <https://www.ncsc.org/~media/Microsites/Files/PJCC/Preventive%20Detention%20Brief%20FINAL.ashx>.

stakeholders on the core components of a constitutionally compliant scheme, present several model preventative detention schemes, and discuss related issues.

### *United States v. Salerno: Guidance from the U.S. Supreme Court*

The best guidance on the constitutional parameters of a preventative detention scheme comes from the United States Supreme Court's decision in *United States v. Salerno*.<sup>8</sup> In *Salerno*, the Court upheld the constitutionality of the preventative detention provisions of the federal Bail Reform Act ("the act") over a facial challenge. Defendants Salerno and Cafaro were arrested and charged in a 29-count indictment alleging various Racketeer Influenced and Corrupt Organizations Act (RICO) violations, mail and wire fraud offenses, extortion, and criminal gambling violations.<sup>9</sup> The RICO charges included fraud, extortion, gambling, and conspiracy to commit murder.<sup>10</sup> At a hearing on the Government's motion to detain the defendants pretrial, the Government's evidence showed that Salerno was the "boss" of the Genovese crime family of La Cosa Nostra and that Cafaro was a family "captain."<sup>11</sup> It further showed that the defendants participated in wide ranging conspiracies to aid their criminal enterprises through violent means, and witnesses would assert that Salerno participated in two murder conspiracies. After hearing from the defense, the trial court granted the Government's motion, concluding, by a standard of clear and convincing evidence, that no condition or combination of conditions of release would ensure the safety of the community or any person. The defendants appealed to the Second Circuit, arguing that to the extent the act permits pretrial detention on the basis that a defendant is likely to commit future crimes, it is facially unconstitutional.<sup>12</sup> The Second Circuit agreed. The Supreme Court granted certiorari and reversed.

At the Supreme Court, the defendants asserted two grounds for invalidating the act's provisions allowing pretrial detention on the basis of future dangerousness: That they violate the Due Process Clause of the Fifth Amendment; and that they violate the Eighth Amendment's excessive bail provision.<sup>13</sup> On the due process issue, the defendants argued that the act violates substantive due process because the detention constitutes impermissible punishment before trial.<sup>14</sup> The Court rejected this argument, finding the detention is regulatory, not penal. To determine whether a restriction on liberty is an impermissible punishment or permissible regulation, the Court first looks to legislative intent. The Court explained: unless lawmakers expressly intended to impose punitive restrictions, the punitive versus regulatory distinction turns on whether an alternative purpose to which the restriction may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose. Applying this analysis, the Court held that the act's detention scheme was regulatory. It found that the law's legislative history clearly indicates that Congress did not conceive of pretrial detention as punishment. Rather, Congress saw pretrial detention as a potential solution to a pressing societal problem; the Court added, "[t]here is no doubt that preventing danger to the community is a legitimate regulatory goal."<sup>15</sup> The Court went on to find that the incidents of pretrial detention were not excessive in relation to Congress' regulatory goal. It noted:

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<sup>8</sup> 481 U.S. 739 (1987).

<sup>9</sup> *Id.* at 743.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> A facial challenge to a statute requires the challenger to establish that "no set of circumstances exists under which the Act would be valid." *Id.* at 745.

<sup>13</sup> *Id.* at 746.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 747.

- the act “carefully limits the circumstances under which detention may be sought to the most serious of crimes[;]”
- the defendant is entitled to a prompt detention hearing; and
- the maximum length of detention is limited by the Speedy Trial Act’s stringent time limitations.<sup>16</sup>

Moreover, the act’s conditions of confinement provisions reflect its regulatory purposes; specifically, they require that detainees be housed in facilities separate, to the extent practicable, from defendants awaiting or serving sentences or in custody pending appeal. Thus, the Court held that the permitted detention is regulatory and does not constitute punishment before trial in violation of the Due Process Clause.<sup>17</sup>

Continuing with the due process analysis, the Court rejected the argument that the Due Process Clause categorically prohibits pretrial detention on the ground of danger to the community as a regulatory measure, explaining that it has repeatedly held that the government’s regulatory interest in community safety can, in appropriate circumstances, outweigh liberty interests.<sup>18</sup> The Court went on to find that “[t]he government’s interest in preventing crime by arrestees is both legitimate and compelling.”<sup>19</sup> It continued, noting that in *Schall v. Martin*,<sup>20</sup> it upheld a New York statute allowing for pretrial detention of any arrested juvenile on a showing that the juvenile might commit some undefined further crimes. The federal act, by contrast, “narrowly focuses on a particularly acute problem in which the Government interests are overwhelming,” operating “only on individuals who have been arrested for a specific category of extremely serious offenses.”<sup>21</sup> Moreover, the act is not a “scattershot attempt to incapacitate those who are merely suspected of these serious crimes.”<sup>22</sup> In this respect, the Court noted that not only must the Government demonstrate probable cause that the arrestee committed the charged crime, but also at “a full-blown adversary hearing, the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person.”<sup>23</sup> Balanced against the government’s interest is the individual’s liberty interest. This right, however, “may, in circumstances where the government’s interest is sufficiently weighty, be subordinated to the greater needs of society.”<sup>24</sup> The Court concluded:

We think that Congress’ careful delineation of the circumstances under which detention will be permitted satisfies this standard. When the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, we believe that, consistent with the Due Process Clause, a court may disable the arrestee from executing that threat. Under these circumstances,

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<sup>16</sup> *Id.* With respect to the length of detention, the Court noted: “We intimate no view as to the point at which detention in a particular case might become excessively prolonged, and therefore punitive, in relation to [lawmakers’] regulatory goal.” *Id.* at n.4.

<sup>17</sup> *Id.* at 748.

<sup>18</sup> *Id.* (citing cases).

<sup>19</sup> *Id.* at 749.

<sup>20</sup> 467 U.S. 253 (1984).

<sup>21</sup> *Salerno*, 481 U.S. at 750

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 750-51.

we cannot categorically state that pretrial detention offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.<sup>25</sup>

The Court went on to quickly dispose of the defendant's facial challenges to the act's procedures, noting that the procedures for evaluating the likelihood of future dangerousness are designed to further the accuracy of that determination. Specifically:

- defendants have a right to counsel at the detention hearing;
- defendants may testify in their own behalf, present evidence, and cross-examine witnesses;
- the judicial officer is guided by statutorily enumerated factors;
- the government must prove its case by clear and convincing evidence;
- the judicial officer must include written findings of fact and a written statement of reasons for the detention decision; and
- the act provides for immediate appellate review of the detention decision.<sup>26</sup>

These extensive safeguards, the Court concluded, are sufficient for the act to withstand a facial challenge.<sup>27</sup>

The Court also rejected the defendants' argument that the act violates the Eighth Amendment's excessive bail clause. The defendants had argued that the excessive bail clause grants them a right of bail calculated solely upon considerations of flight. The Court rejected the notion that the Eighth Amendment categorically prohibits the government from pursuing other admittedly compelling interests through regulation of pretrial release.<sup>28</sup> It found that nothing in the text of the bail clause limits permissible government considerations solely to questions of flight, and that the only substantive limitation in that clause is that the conditions may not be "excessive" in light of the perceived evil.<sup>29</sup> Thus, when the government has admitted that its only interest is in preventing flight bail must be set at an amount designed to ensure that goal, and no more. But the Court concluded "when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here, the Eighth Amendment does not require release on bail."<sup>30</sup>

The Court concluded, noting that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception," but holding that the act's provisions for pretrial detention fall within that carefully limited exception.<sup>31</sup>

#### Core Components of a Constitutional Preventative Detention Scheme Based on *Salerno*

Although the *Salerno* Court did not fully define the constitutional parameters of a preventative detention scheme, it held that the federal statute "fully comports with constitutional requirements."<sup>32</sup> Thus, a detention scheme that tracks that statute is likely to be on solid constitutional ground, at least

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<sup>25</sup> *Id.* at 751 (quotation omitted).

<sup>26</sup> *Id.* at 752.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 753.

<sup>29</sup> *Id.* at 754.

<sup>30</sup> *Id.* at 754-55.

<sup>31</sup> *Id.* at 755.

<sup>32</sup> *Id.* at 741.

with respect to the issues addressed in *Salerno*.<sup>33</sup> That is not to say, however, that a scheme that deviates in some way from the federal statute would not also be constitutional. But the most conservative path is to track procedures and parameters that the Court has upheld.<sup>34</sup> Those procedures and parameters include:

#### Regulatory purpose for detention

This was a core issue in *Salerno*, where the defendants argued that the federal act violated substantive due process because the authorized detention constituted impermissible punishment before trial. The Court however found that the act was constitutional, in part, because the pretrial detention it authorized was regulatory not penal.<sup>35</sup>

#### Prompt detention hearing

Upholding the federal act against due process challenge, the *Salerno* Court relied, in part, on the fact that it provides defendants with “a prompt detention hearing.”<sup>36</sup>

#### Right to testify, present evidence & cross-examine witnesses

The *Salerno* Court’s due process holding also relied on the fact that the federal act affords defendants a “full-blown” hearing at which they can “testify in their own behalf, present information by proffer or otherwise, and cross-examine witnesses.”<sup>37</sup> Commentators have suggested that an adversarial hearing is a fundamental requirement of a *Salerno*-compliant preventative detention procedure.<sup>38</sup>

#### Right to counsel

Upholding the federal act, the *Salerno* Court also found it significant that defendants have a right to counsel at the preventative detention hearings.<sup>39</sup> Commentators suggest that this protection is a fundamental feature of a constitutionally-compliant preventative detention scheme,<sup>40</sup> noting that many of the other safeguards found to be significant by the *Salerno* Court--the ability to testify, present evidence, and cross-examine adverse witnesses--typically require the presence of counsel to ensure that they are meaningful.<sup>41</sup>

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<sup>33</sup> For a discussion of other constitutional objections that may be asserted as to preventative detention schemes, see LAFAVE at § 12.3(d).

<sup>34</sup> LAFAVE at § 12.3(b) (noting that where state provisions are not as elaborate as the provisions under federal law, state courts are likely to judicially engraft such protections on to the applicable state provisions to forestall invalidation on federal due process grounds).

<sup>35</sup> *Salerno*, 481 U.S. at 747.

<sup>36</sup> *Id.* at 747; see also PREVENTIVE DETENTION BRIEF at 2 (noting that an adversarial hearing within a reasonably short time after arrest is a key element of the required procedural safeguards).

<sup>37</sup> *Salerno*, 481 U.S. at 751; see also *Aime v. Commonwealth*, 611 N.E.2d 204, 214 (Mass. 1993) (holding unconstitutional a Massachusetts preventative detention statute in part because it failed to afford defendants a right to testify or cross-examine witnesses).

<sup>38</sup> MOVING BEYOND MONEY at 26 (“[T]he Court’s reasoning assumes an adversarial hearing to be an essential component of a constitutional preventative detention framework.”).

At least one case rejected the argument that a provision stating that the rules of evidence do not apply renders a preventative detention statute invalid. *Mendoza v. Commonwealth*, 673 N.E.2d 22, 31-32 (Mass. 1996) (deciding the issue under the Massachusetts Declaration of Rights).

<sup>39</sup> *Salerno*, 481 U.S. at 751.

<sup>40</sup> PREVENTIVE DETENTION BRIEF at 3 (noting that the right to counsel is an “essential element” of the key safeguards required in a preventative detention scheme); MOVING BEYOND MONEY at 26 (“[T]he right to counsel is an indispensable safeguard.”; “[A] right to counsel . . . should be regarded as a bedrock requirement in any system allowing preventative detention.”).

<sup>41</sup> MOVING BEYOND MONEY at 26.

### Limited detention “net”

Holding that the incidents of pretrial detention under the federal act were not excessive in light of Congress’ regulatory goal, the *Salerno* Court noted, in part, that the act “carefully limits the circumstances under which detention may be sought to the most serious of crimes.”<sup>42</sup> Specifically, it noted that the act allows for detention in cases involving crimes of violence, offenses for which the sentence is life imprisonment or death, serious drug offenses, or certain repeat offenders.<sup>43</sup> The Court returned to the act’s limited application when rejecting the lower court’s determination that due process prohibits pretrial detention on the ground of danger to the community as a regulatory measure. It noted that the act “narrowly focuses on a particularly acute problem in which the Government interests are overwhelming,” explaining that the act “operates only on individuals who have been arrested for a specific category of extremely serious offenses.”<sup>44</sup> Citing this language, some commentators suggest that policymakers should carefully limit the entry points to preventative detention.<sup>45</sup> Some also suggest that a preventative detention scheme that allows for bail to be denied upon a finding of dangerousness with respect to *all* arrestees, without regard to the seriousness of the charge, cannot be upheld.<sup>46</sup> Some commentators are, however, careful to clarify that this “is not to suggest that the list of predicate offenses in state legislation must match that in the federal statute” and that it is sufficient if those offenses are defined differently but also are limited to serious crimes.<sup>47</sup>

### Relevant factors are enumerated

Upholding the federal act, the *Salerno* Court noted that under its framework, the decision to release or detain must be rooted in statutorily enumerated factors.<sup>48</sup> Relying on this language, some commentators suggest that preventative detention schemes should provide judicial officers with clear criteria to apply in weighing preventative detention decisions.<sup>49</sup>

### Individualized determination

The *Salerno* Court stated: “When the Government proves by clear and convincing evidence that *an arrestee presents an identified and articulable threat* to an individual or the community, we believe that, consistent with the Due Process Clause, a court may disable the arrestee from executing that threat.”<sup>50</sup> A conservative reading of this language is that the preventative detention scheme should not automatically require preventative detention for defendants charged with certain crimes. Thus, in *Hunt v. Roth*,<sup>51</sup> the Eighth Circuit held unconstitutional a provision in Nebraska’s constitution providing that all persons “shall be bailable . . . except for . . . sexual offenses involving penetration by force or against the will of the victim . . . where the proof is evident or the presumption is great.” The court held that the “fatal flaw” in this provision is that it creates an irrebuttable presumption that every individual charged with this offense is incapable of assuring his appearance by conditioning it upon reasonable bail or is too

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<sup>42</sup> *Salerno*, 481 U.S. at 747.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 750.

<sup>45</sup> MOVING BEYOND MONEY at 27.

<sup>46</sup> LAFAVE at § 12.3(f) (citing *Aime v. Commonwealth*, 611 N.E.2d 204 (Mass. 1996) (holding unconstitutional a Massachusetts law allowing for preventative detention in part because it allowed for the detention of any arrestee)).

<sup>47</sup> LAFAVE at § 12.3(f) (going on to discuss *Mendoza v. Commonwealth*, 673 N.E.2d 22 (Mass. 1996) (upholding a state preventative detention statute that applies to a broader list of offenses than the federal act; “[T]hat these potentially lethal domestic offenses may sometimes be characterized as misdemeanors is of no significance.”)).

<sup>48</sup> *Salerno*, 481 U.S. at 751-52.

<sup>49</sup> MOVING BEYOND MONEY at 28.

<sup>50</sup> *Salerno*, 481 U.S. at 751 (emphasis added).

<sup>51</sup> 648 F.2d 1148 (8th Cir. 1981), *judgment vacated for mootness*, 455 U.S. 478 (1982).

dangerous to be granted release.<sup>52</sup> It continued: “The state may be free to consider the nature of the charge and the degree of proof in granting or denying bail but it cannot give these factors conclusive force.”<sup>53</sup> Although that court ruled on Eighth Amendment grounds, some commentators suggest that its reasoning also would be relevant to a due process or equal protection analysis.<sup>54</sup> And in fact, the Arizona Supreme Court recently found a similar provision in the Arizona constitution and statutes to violate due process.<sup>55</sup> This is not to say that bail cannot be denied in a capital or other serious case; the suggestion is that the scheme may be subject to attack if, instead of requiring an individualized determination, it creates an irrefutable presumption that such defendants are not entitled to bail.

#### Finding of probable cause

In upholding the federal statute, the *Salerno* Court relied on the fact that it requires the Government to “demonstrate probable cause to believe that the charged crime has been committed by the arrestee[.]”<sup>56</sup>

#### Proof by clear & convincing evidence

Upholding the federal statute, the *Salerno* Court found it significant that the law requires the Government to “convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person.”<sup>57</sup>

#### Limited length of detention

Finding that incidents of pretrial detention under the federal act were not excessive in relation to Congress’ regulatory goal, the *Salerno* Court noted, in part, that the maximum time of pretrial detention was limited by the stringent time limitations of the Speedy Trial Act.<sup>58</sup> Although the Court declined to express a “view as to the point at which detention in a particular case might become excessively prolonged, and therefore punitive, in relation to Congress’ regulatory goal,”<sup>59</sup> a conservative approach to preventative detention would limit the length of detention.<sup>60</sup> Some jurisdictions that have implemented preventative detention require trial within a certain period of time. For example, the District of Columbia statute requires that a person who is preventatively detained must be put on an expedited calendar and, consistent with the sound administration of justice, the trial must commence within 100 days.<sup>61</sup>

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<sup>52</sup> *Id.* at 1164.

<sup>53</sup> *Id.* at 1164-65.

<sup>54</sup> LAFAVE at § 12.3(e).

<sup>55</sup> *State v. Wein*, 417 P.3d 787 (Ariz. 2018) (state constitutional and statutory provisions categorically prohibiting bail for all persons charged with sexual assault if “the proof is evident or the presumption great” that the person committed the crime, without considering other facts that may justify bail in an individual case, on their face, violate the Fourteenth Amendment’s Due Process Clause).

<sup>56</sup> *Salerno*, 481 U.S. at 750.

<sup>57</sup> *Id.*; see also *Aime*, 611 N.E.2d at 213-14 (holding unconstitutional a Massachusetts preventative detention statute in part because it failed to impose any burden of proof on the Commonwealth).

<sup>58</sup> *Salerno*, 481 U.S. at 747.

<sup>59</sup> *Id.* at 747 n.4.

<sup>60</sup> PREVENTIVE DETENTION BRIEF at 4. The question of whether pretrial detention has continued so long as to be unconstitutional, continues to be litigated. LAFAVE at § 12.3(d), at n.97 (citing federal cases).

<sup>61</sup> D.C. Code § 23-1322(h); MOVING BEYOND MONEY at 27 (also discussing a provision in Vermont law that requires a trial within 60 days).

### Conditions of confinement

In upholding the federal act, the *Salerno* Court emphasized the statute’s limited reach and detailed safeguards, noting that it requires defendants to be “housed in a facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal.”<sup>62</sup>

### Order states findings of fact & reasons

Upholding the federal act, the *Salerno* Court also relied, in part, on the fact that the act’s provisions require the judicial officer to make written findings of fact and give a written statement of reasons for the detention decision.<sup>63</sup>

### Right to appeal

Finally, the *Salerno* Court upheld the federal act, in part, noting that it provides for immediate appellate review of the detention decision.<sup>64</sup>

### The Right to Bail & Preventative Detention

If defendants have a constitutional right to bail, a jurisdiction could not implement a statutory pretrial preventative detention scheme absent a constitutional amendment. In *Salerno*, the Court resolved the issue of whether the Eighth Amendment to the federal Constitution, made applicable to the states through the Fourteenth Amendment’s due process clause, confers a right to bail which would render all preventative detention schemes unconstitutional: It does not.<sup>65</sup>

Turning to the state Constitution, North Carolina eliminated the right to bail provision in its constitution of 1868.<sup>66</sup> North Carolina’s existing constitutional bail provision tracks almost verbatim the Eighth

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<sup>62</sup> *Salerno*, 481 U.S. at 748 (quotation omitted).

<sup>63</sup> *Id.* at 752; see also PREVENTIVE DETENTION BRIEF at 3 (noting that a pretrial detention order that clearly states the specific reasons for detention is a key component of a preventative detention scheme).

<sup>64</sup> *Salerno*, 481 U.S. at 752; see also PREVENTIVE DETENTION BRIEF at 3 (noting that an opportunity for appeal or review of the detention order is a key element of a preventative detention statute).

<sup>65</sup> *Salerno*, 481 U.S. at 753-55; see also LaFave § 12.3(c); *United States v. Edwards*, 430 A.2d 1321, 1325-31 (D.C. 1981) (pre-*Salerno* case upholding the District of Columbia’s preventative detention statute over an Eighth Amendment right to bail argument).

<sup>66</sup> The state’s 1776 Constitution contained two provisions on bail. First, section XXXIX provided: “All prisoners shall beailable by sufficient sureties, unless for capital offences when the proof is evident or the presumption great.” N.C. CONST. § XXXIX (1776). This provision created a right to bail in all cases except the specified capital cases. Second, section X of the Declaration of Rights, which was part of the Constitution, *id.* at § XLIV, provided: “That excessive bail should not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.” N.C. CONST. DECL. OF RIGHTS § X.

The Constitution of 1868 retained the excessive bail clause almost verbatim. Specifically, Article I, section 14 provides: “Excessive bail should not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.” N.C. CONST. art. I, § 14 (1868). However the right to bail provision in the 1776 Constitution was not carried forward into the 1868 Constitution.

Section 27 of the state’s current constitution retains the excessive bail provision from the 1868 Constitution, with one small tweak—the word “should” is changed to “shall”; that section provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.” N.C. CONST. § 27. Like the 1868 Constitution, the current Constitution contains no right to bail provision.

Amendment.<sup>67</sup> As such it contains no right to bail provision, and is unlikely to be interpreted as presenting a barrier to implementation of a preventative detention scheme.<sup>68</sup>

Although a statutory right to bail provision would not pose the type of barrier presented by a constitutional right to bail provision, if such a statutory right existed, new preventative detention legislation would require its repeal.<sup>69</sup> This section thus continues with a review of the relevant state statutes.

Most of the relevant statutory bail provisions are in Articles 24 and 26 of Chapter 15A (Criminal Procedure Act) of the North Carolina General Statutes. Article 24, entitled “Initial Appearance,” contains one provision: G.S. 15A-511. That statute provides that at the initial appearance the magistrate must:

- inform the defendant of “[t]he general circumstances under which he may secure release under the provisions of Article 26, Bail[;]”<sup>70</sup> and
- that in circumstances other than when the magistrate finds no probable cause, the magistrate “must release him [or her] in accordance with Article 26 of this Chapter, Bail, or commit him [or her] to an appropriate dentation facility pursuant to G.S. 15A-521[.]”<sup>71</sup>

G.S. 15A-521 (in Article 25, Commitment) in turn provides, in relevant part, that “[e]very person charged with a crime and held in custody who has not been released pursuant to Article 26 of this Chapter, Bail, must be committed by a written order of the judicial official who conducted the initial appearance as provided in Article 24 to an appropriate detention facility[.]”<sup>72</sup>

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<sup>67</sup> The Eighth Amendment to the United States Constitution provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII. Article I, Section 27 of the North Carolina Constitution mirrors this language almost verbatim, providing: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.” *See State v. Green*, 348 N.C. 588, 603 (1998) (noting that the provisions differ only in that Section 27 prohibits cruel *or* unusual punishments and that such claims have been analyzed the same under the state and federal constitutions).

<sup>68</sup> PJI REPORT at 32 (concluding: “North Carolina is thus like eight other states and the federal system, all of which operate without a constitutional right to bail, which means that certain changes to the system of release and detention will not be hindered by constitutional right to bail hurdles.”); *see also* LAFAVE at § 12.3(b) (noting that in states “in which the constitutional bail provision is like the Eighth Amendment in not expressly declaring a right to bail, it seems likely that these provisions may be interpreted as presenting no greater bar to preventative detention schemes than does the Eighth Amendment itself”).

In their treatise on the state Constitution, authors Orth and Newby suggest that “[a]lthough no right to bail is spelled out [in the current constitution], it is widely assumed.” JOHN V. ORTH & PAUL M. NEWBY, *THE NORTH CAROLINA STATE CONSTITUTION* 77 (2d ed. 2013). They thus concur that the current constitution contains no right to bail. However, they offer no authority to support the assertion that a right to bail “is widely assumed.” That statement seems to be undermined by the historical account of the constitutional provisions presented here; the statutes, discussed below, providing that in certain circumstances there is a rebuttable presumption that no conditions will reasonably assure appearance and safety (and thus that the person may be detained), allowing for detention of capital defendants in the discretion of the judge, and providing for temporally limited detention in other circumstances; and practice in the trial courts in other cases of intentionally using unattainably high bonds to detain.

<sup>69</sup> Additionally, existence of a statutory right to bail arguably would preclude local preventative detention policies and practices. The propriety of such policies and practices is discussed *infra* at p. 12.

<sup>70</sup> G.S. 15A-511(b)(3).

<sup>71</sup> G.S. 15A-511(e).

<sup>72</sup> G.S. 15A-521(a).

Article 26 (Bail) includes G.S. 15A-533, entitled “Right to pretrial release in capital and noncapital cases.” It provides that:

- persons who have escaped from involuntary commitment and have committed crimes are not entitled to release, but must be returned to the treatment facility;
- non-capital defendants “must have conditions of pretrial release determined” in accordance with G.S. 15A-534;
- a judge has discretion as to release of capital defendants; and
- in certain specified circumstances there is a rebuttable presumption that no conditions “will reasonably assure the appearance of the person as required and the safety of the community” and that such persons only may be released when a judge finds “that there is a reasonable assurance that the person will appear and release does not pose an unreasonable risk of harm to the community.”<sup>73</sup>

Other provisions in Article 26 require a temporally limited detention in other circumstances, including domestic violence cases,<sup>74</sup> impaired driving cases,<sup>75</sup> situations where communicable disease testing is required,<sup>76</sup> and where detention is necessary to protect public health.<sup>77</sup>

Article 26 also contains G.S. 15A-534. That section is focused—in its entirety—on procedures for determining conditions, a separate issue from whether a person has a right to bail in the first instance. Additionally, G.S. 15A-534 provides that in granting pretrial release, the judicial official must impose a written promise, custody release, or unsecured bond “unless he determines that such release will not reasonably assure the appearance of the defendant as required; will pose a danger of injury to any person; or is likely to result in destruction of evidence, subornation of perjury, or intimidation of potential witnesses.”<sup>78</sup> Because a secured bond is not forfeited for any reason other than failure to appear, imposition of a secured bond cannot function to protect against injury or prevent the destruction of evidence, subornation of perjury or intimidation of witnesses, unless it is used to detain. G.S. 15A-534 also provides that “[f]or good cause shown” a judge “may at any time revoke an order of pretrial release.”<sup>79</sup>

Finally, G.S. 15A-605 (in Article 29, First Appearance Before District Court Judge), merely provides that at the first appearance the judge must “[d]etermine or review the defendant’s eligibility for release under Article 26[.]”

Based on these provisions, the strongest argument in favor of a statutory right to bail in non-capital cases seems to be the title of G.S. 15A-533<sup>80</sup> and its provisions that certain escapees are not entitled to release, that a judge has discretion with respect to release for capital defendants, and that non-capital

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<sup>73</sup> G.S. 15A-533(d)-(g). Other provisions in Article 26 create similar rebuttable presumptions. *See, e.g.*, G.S. 15A-534.6 (rebuttable presumption in cases involving manufacture of methamphetamine).

<sup>74</sup> G.S. 15A-534.1.

<sup>75</sup> G.S. 15A-534.2.

<sup>76</sup> G.S. 15A-534.3.

<sup>77</sup> G.S. 15A-534.5.

<sup>78</sup> G.S. 15A-534(b).

<sup>79</sup> G.S. 15A-534(f).

<sup>80</sup> *State v. Jones*, 358 N.C. 473, 482-83 (2004) (considering a provision’s title in statutory interpretation).

defendants must have conditions determined in accordance with G.S. 15A-534. On the other hand, it may be argued that when read in their totality, the statutes do not contemplate a general right to bail. Those in this camp may assert that the statutes (1) provide only for a right for non-capital defendants to have conditions determined according to prescribed statutory procedure, not a right to release; (2) speak generally to release on bail or commitment; (3) require temporally limited detention in several circumstances; (4) seem to contemplate the use of secured “detention bonds”; (5) create rebuttable presumptions that no release is appropriate, suggesting both that detention is permissible and may be allowable in a broader set of cases to which the presumptions do not apply;<sup>81</sup> and (6) allow a judge to revoke pretrial release and thus detain the defendant. The issue, however, does not appear to have been decided in any published appellate case. But as noted, even if such a right has been created by statute, a preventative detention statute could be implemented with a conforming repeal of any provision creating such a right.

### Preventative Detention in the Absence of Statutory Authorization

This paper focuses on the constitutional requirements of a preventative detention scheme. A uniform statewide preventative detention system would require state legislation. Even without that legislation, anecdotal evidence indicates that judicial officials are intentionally setting unattainably high bonds to achieve pretrial preventative detention and that these “detention bonds” typically are imposed without affording defendants the type of procedural protections understood to be necessary for imposition of preventative detention. As noted above, preventative detention schemes—whether implemented through a statute or otherwise—must comply with the constitution. Thus, if judicial officials are imposing detention bonds, they must afford defendants appropriate procedural protections, as they have in other instances where current procedures conflicted with constitutional requirements. Consider for example the state’s post-*Blakely* litigation in which the North Carolina Supreme Court approved of judicially-created procedures designed to comply with the United States Supreme Court’s 2004 decision in *Blakely v. Washington*.<sup>82</sup> In *Blakely*, the high Court held that any fact other than prior conviction that increases a sentence beyond the prescribed statutory maximum must be submitted to the jury and proved beyond a reasonable doubt. This decision made certain provisions in North Carolina sentencing law unconstitutional. The General Assembly enacted legislation to cure those constitutional infirmities, but that legislation did not become effective until June 30, 2005. That timing issue created a question of whether or not trial courts could craft a procedural remedy to the constitutional infirmities in state sentencing law for cases subject to *Blakely* but not subject to the General Assembly’s corrective legislation. In *State v. Blackwell*, the North Carolina Supreme Court held that they could.<sup>83</sup>

Even if detention bonds were imposed with appropriate procedural protections, some have questioned whether it is constitutionally permissible to use secured bonds to detain.<sup>84</sup> This issue, however, does not appear to have been squarely addressed either by the North Carolina appellate courts or the United States Supreme Court. A preventative detention statute could provide a constitutionally compliant

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<sup>81</sup> PJI REPORT at 33.

<sup>82</sup> 542 U.S. 296 (2004).

<sup>83</sup> 361 N.C. 41, 46-49 (2006) (noting that the trial court could have made use of a special verdict to submit aggravating factors to the jury to ensure compliance with *Blakely*).

<sup>84</sup> See, e.g., PJI REPORT at 34 n.96 (“Using money to detain defendant’s pretrial . . . can also lead to claims concerning substantive and procedural due process, equal protection, and excessive bail.”); see also *Bandy v. United States*, 81 S. Ct. 197, 198 (1960) (Justice Douglas, denying an application for reduction of bail, stated in dicta: “It would be unconstitutional to fix excessive bail to assure that a defendant will not gain his freedom.”).

vehicle to detain defendants pretrial and the issue of detention bonds can be addressed with a companion provision providing that bonds may not be used to detain.<sup>85</sup>

### Pretrial Detention Because of Inability to Pay

This paper focuses on pretrial preventative detention—when a defendant intentionally is detained pretrial because of an acceptably high risk of non-appearance or to public safety, either pursuant to a statutory preventative scheme or an unattainably high detention bond. It does not directly address the separate issue of wealth-based pretrial detentions due to the defendant’s inability to pay an appearance bond. It should be noted, however, that such wealth-based detentions are being challenged as violating equal protection and substantive and procedural due process, and it has been asserted that all pretrial detentions—including wealth-based detentions on appearance bonds—must be accompanied by the procedural protections required for preventative detention.

### Other Considerations

In addition to the issues discussed above, policy issues may be relevant to the question of preventative detention. As a preliminary matter, there is the issue of whether pretrial detention ever should be authorized. Assuming that policy makers decide that question in the affirmative, other policy issues may inform the structure of the preventative detention scheme. For example, if a jurisdiction decides as a policy matter that it wants to reduce unnecessary pretrial detention and the negative consequences that flow from those detentions,<sup>86</sup> that policy goal will inform the structure of the preventative detention scheme, perhaps leading the jurisdiction to limit the use of preventative detention to a narrow set of cases. Another factor that might be relevant when crafting a preventative detention scheme is the jurisdiction’s existing culture. As detailed below, although the District of Columbia and the federal system have similar preventative detention schemes, detention rates in DC are dramatically lower than in the federal system (6% versus 76%). Seriousness of charged offenses may explain some of that difference. But it is asserted that another reason for it is culture: that DC has a culture of release whereas the federal system has a culture of detention. Jurisdictions that desire relatively low rates of pretrial preventative detention but have an existing culture of detention may need to be more careful about the scope of the preventative detention net, the role of judicial discretion, and the robustness of the accompanying procedural protections in order to achieve their desired outcome.

Another issue is that creation of a well-crafted preventative detention statute cannot by itself prevent decisionmakers from resorting to old practices of using high secured bonds without attendant constitutional protections to cause preventative detention.<sup>87</sup> This issue can, however, be addressed by enacting a statute providing that judicial officials may not impose a financial condition that results in pretrial detention, as was done in the federal bail statute.<sup>88</sup>

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<sup>85</sup> Such a provision exists, for example in the federal statute. See 18 U.S.C. § 3142(c)(2) (“The judicial officer may not impose a financial condition that results in the pretrial detention of the person.”).

<sup>86</sup> See, e.g., Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711 (2017), <https://www.stanfordlawreview.org/print/article/the-downstream-consequences-of-misdemeanor-pretrial-detention/>.

<sup>87</sup> PREVENTIVE DETENTION BRIEF at 1 (noting that many jurisdictions that have authorized preventative detention continue to use high money bonds to keep defendants detained).

<sup>88</sup> 18 U.S.C. § 3142(c)(2) (“The judicial officer may not impose a financial condition that results in the pretrial detention of the person.”).

Finally, policy makers who favor evidence-based decision making may wish to require short, intermediate, and long term reporting on the impact of preventative detention with respect to key pretrial and other measures, such as detention rates, cost-benefit, and racial disparities.

### Preventative Detention Models

As noted above, twenty-two states, the District of Columbia and the federal system authorize preventative detention in some circumstances. However, a briefing paper prepared by the National Center for State Courts' Pretrial Justice Center for Courts asserts that many state provisions do not articulate sufficient constitutional safeguards or guidance for implementation.<sup>89</sup> That briefing paper goes on to highlight three jurisdictions that have crafted good rules for preventative detention: the District of Columbia, New Jersey and New Mexico.<sup>90</sup> In fact, the District of Columbia statute has been used by many jurisdictions as a model to begin conversations about statutory reform.<sup>91</sup> This section discusses the detention schemes in place in those jurisdictions. It also provides detail on the federal bail statute and the recommended procedures promulgated by the American Bar Association's (ABA) Criminal Justice Standards.

#### District of Columbia

##### *Generally*

The District of Columbia preventative detention law, which took effect in 1971,<sup>92</sup> allows for preventative detention in certain cases and circumstances.<sup>93</sup> The judicial officer must, on the government's motion, hold a hearing to determine whether any conditions will reasonably assure appearance and safety.<sup>94</sup> If the judicial officer finds, by clear and convincing evidence, that no conditions can do that, the judicial officer must order the defendant to be detained pretrial.<sup>95</sup> Certain rebuttable presumptions apply.<sup>96</sup> The hearing must be held immediately upon the defendant's first appearance unless a continuance is sought.<sup>97</sup> Except for good cause, a continuance on the defendant's motion cannot exceed five days; a continuance on the government's motion may not exceed three days.<sup>98</sup> At the hearing, the defendant has a right to counsel and must be given an opportunity to testify, present witnesses, cross-examine witnesses, and present evidence.<sup>99</sup> The rules of evidence do not apply at the hearing.<sup>100</sup> In making its determination, the judicial officer must take into account specified factors, such as the nature and circumstances of the offense, the weight of the evidence, and the defendant's history and

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<sup>89</sup> PREVENTIVE DETENTION BRIEF at 1.

<sup>90</sup> *Id.* at 2.

<sup>91</sup> PJI REPORT at 33 n.93.

<sup>92</sup> LAFAVE at § 12.3(a).

<sup>93</sup> This section discusses the procedure applicable to offenses other than first-degree murder, second-degree murder, and assault with intent to kill while armed. A defendant charged with those offenses also is subject to the procedure described in this section, though a judicial officer sometimes may order the detention of such a defendant even in the absence of a motion by the government for a detention hearing. See D.C. Code Ann. § 23-1325.

<sup>94</sup> D.C. Code Ann. § 23-1322(b)(1).

<sup>95</sup> D.C. Code Ann. § 23-1322(b)(2).

<sup>96</sup> D.C. Code Ann. § 23-1322(c).

<sup>97</sup> D.C. Code Ann. § 23-1322(d)(1).

<sup>98</sup> *Id.*

<sup>99</sup> D.C. Code Ann. § 23-1322(d)(2)-(4).

<sup>100</sup> D.C. Code Ann. § 23-1322(d)(4).

characteristics.<sup>101</sup> If the defendant is detained pretrial, the detention order must, among other things, include written findings of fact and a written statement of the reasons and direct that the person be detained, to the extent practicable, separately from defendants who have been convicted.<sup>102</sup> Defendants who are detained pretrial must be placed on an expedited calendar, and “consistent with the sound administration of justice,” the indictment must be issued within 90 days and trial must begin within 100 days.<sup>103</sup> Extensions of time are permitted in certain circumstances.<sup>104</sup> See Appendix A for the relevant statutory provisions.

The District of Columbia preventative detention scheme has been held to pass constitutional muster.<sup>105</sup>

#### *Detention Rates*

The District of Columbia’s Pretrial Services Agency reports that over 94% of defendants are released pretrial.<sup>106</sup>

#### *New Jersey*

##### *Generally*

In 2014, New Jersey voters approved an amendment to the state constitution to, in part, allow for preventative detention.<sup>107</sup> The amendment authorized the legislature to enact new statutory provisions governing pretrial detention.<sup>108</sup> The new law, which went into effect on January 1, 2017,<sup>109</sup> allows for the preventative detention of defendants on the prosecutor’s motion and after a hearing at which the court finds that no pretrial conditions would reasonably assure the defendant’s appearance, the safety of any other person or the community, and that the defendant will not obstruct the criminal justice process.<sup>110</sup> The hearing must be held no later than the first appearance, unless a party seeks a continuance, which is limited in time.<sup>111</sup> Certain rebuttable presumptions apply. At the hearing, the defendant has the right to be represented by counsel and must be afforded an opportunity to testify, present and cross-examine witnesses, and present information.<sup>112</sup> The rules of evidence do not apply.<sup>113</sup> Where there is no indictment, the prosecutor must establish probable cause.<sup>114</sup> As a general rule, the standard for the detention decision is by clear and convincing evidence.<sup>115</sup> In making the detention decision, the decisionmaker must take into account a variety of factors such as the nature and circumstances of the offense and the weight of the evidence.<sup>116</sup> A pretrial detention order must include written findings of fact and a statement of reasons.<sup>117</sup> As a general rule, the indictment must be

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<sup>101</sup> D.C. Code Ann. § 23-1322(e).

<sup>102</sup> D.C. Code Ann. § 23-1322(g).

<sup>103</sup> D.C. Code Ann. § 23-1322(h)(1).

<sup>104</sup> *Id.*

<sup>105</sup> *United States v. Edwards*, 430 A.2d 1321 (D.C. 1981).

<sup>106</sup> PREVENTIVE DETENTION BRIEF at 2.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> N.J. Stat. Ann. § 2A:162-18.a.(1).

<sup>111</sup> N.J. Stat. Ann. § 2A:162-19.d.(1).

<sup>112</sup> N.J. Stat. Ann. § 2A:162-19.e.(1).

<sup>113</sup> *Id.*

<sup>114</sup> N.J. Stat. Ann. § 2A:162-19.e.(2).

<sup>115</sup> N.J. Stat. Ann. § 2A:162-19.e.(3).

<sup>116</sup> N.J. Stat. Ann. § 2A:162-20.

<sup>117</sup> N.J. Stat. Ann. § 2A:162-21.

returned within 90 days and trial must begin 180 days thereafter.<sup>118</sup> The statute allows for appeals of pretrial detention orders, which must be held in an expedited manner.<sup>119</sup> The relevant statutes are provided in Appendix B.

#### *Detention Rates*

For 2017, the rate of pretrial release was 81.3%; the rate of pretrial detention was 18.1%.<sup>120</sup>

### New Mexico

#### *Generally*

In 2016, New Mexico voters approved a state constitutional amendment allowing for preventative detention.<sup>121</sup> In 2017, the New Mexico Supreme Court issued procedural rules for pretrial detention and release; the rules became effective July 1, 2017.<sup>122</sup> Under the rules, detention is allowed only for defendants charged with felonies.<sup>123</sup> The prosecutor must file a motion for detention and prove, by clear and convincing evidence, that no release conditions will reasonably protect the safety of any other person or the community.<sup>124</sup> Detention only is warranted after a finding of probable cause.<sup>125</sup> The detention hearing must be held within five days of the filing of the motion or the defendant's arrest as a result of the detention motion, although extensions are allowed in certain circumstances.<sup>126</sup> The state must provide the defendant with materials relevant to the motion.<sup>127</sup> At the hearing, the defendant has the right to be present, to counsel, to testify, to present witnesses, compel the attendance of and cross-examine witnesses, and to present information by proffer or otherwise.<sup>128</sup> The evidence rules do not apply at the hearing.<sup>129</sup> If the court orders detention, it must issue a written order, with findings of facts justifying the detention.<sup>130</sup> Detained defendants must be provided expedited priority scheduling for trial.<sup>131</sup> Either party may appeal a ruling on a detention motion.<sup>132</sup> The relevant court rules are provided in Appendix C.

#### *Detention Rates*

New Mexico has not yet released detention rates under the new statute.

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<sup>118</sup> N.J. Stat. Ann. § 2A:162-22.

<sup>119</sup> N.J. Stat. Ann. § 2A:162-18.c.

<sup>120</sup> NEW JERSEY COURTS, 2017 REPORT TO THE GOVERNOR AND THE LEGISLATURE 4 (2018), <https://www.njcourts.gov/courts/assets/criminal/2017cjrannual.pdf>.

<sup>121</sup> PREVENTIVE DETENTION BRIEF at 3.

<sup>122</sup> *Id.*

<sup>123</sup> NM R. DIST. CT. RCRP Rule 5-409 A.

<sup>124</sup> *Id.*

<sup>125</sup> NM R. DIST. CT. RCRP Rule 5-409 C & D.

<sup>126</sup> NM R. DIST. CT. RCRP Rule 5-409 F (1).

<sup>127</sup> NM R. DIST. CT. RCRP Rule 5-409 F (2).

<sup>128</sup> NM R. DIST. CT. RCRP Rule 5-409 F (3).

<sup>129</sup> NM R. DIST. CT. RCRP Rule 5-409 F (5).

<sup>130</sup> NM R. DIST. CT. RCRP Rule 5-409 G.

<sup>131</sup> NM R. DIST. CT. RCRP Rule 5-409 J.

<sup>132</sup> NM R. DIST. CT. RCRP Rule 5-409 L.

## Federal Statute

### *Generally*

The federal Bail Reform Act of 1984 includes a preventative detention scheme. The federal law allows for preventative detention for certain crimes and in certain circumstances after a hearing and upon a finding, by clear and convincing evidence, that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community.<sup>133</sup> Rebuttable presumptions apply in certain circumstances. The hearing must be held immediately upon the defendant's first appearance unless the defendant or the government seeks a continuance.<sup>134</sup> Except for good cause, a continuance on motion by the defense may not exceed five days, and a continuance on motion of the Government may not exceed three days.<sup>135</sup> At the hearing, the defendant has the right to counsel and must be given an opportunity to testify, present witnesses, cross-examine witnesses, and to present information by proffer or otherwise.<sup>136</sup> The rules of evidence do not apply at the hearing.<sup>137</sup> The statute specifies the factors that must be considered by the judicial officer in determining whether there are conditions of release that will reasonably assure appearance and safety. These factors include, among other things, the nature and circumstances of the charged offense, the weight of the evidence, and the defendant's history and characteristics.<sup>138</sup> If a detention order is issued, it must include, among other things, written findings of fact and a written statement of the reasons for the detention and direction that the person be confined in a facility separate, to the extent practicable, from defendants awaiting or serving sentences or being held in custody pending appeal.<sup>139</sup> Detained defendants have the right to appeal detention orders. The federal statute is reproduced in Appendix D.

### *Detention Rates*

Although the federal preventative detention scheme is quite similar to the scheme in place in the District of Columbia, the two jurisdictions have dramatically different detention rates. As noted above, only a small percentage of defendants are detained pretrial in the District of Columbia. However, in the federal system the majority of defendants are detained, and that number has been increasing over time. Specifically, a report from the U.S. Department of Justice states that from 1995 to 2010, the percentage of federal defendants who are detained pretrial increased from 59% to 76%.<sup>140</sup> However, the percentage of defendants released varies widely across and within offense and other categories:

69% of property offenders were released, compared with only 18.8% of immigration offenders. Among violent offenders, 12.6% of those charged with robbery were released, compared to 40.1% of those charged with assault. 32.3% of all drug defendants were released. 37.4% of all black defendants were released, as compared to 29.8% of white defendants and 19.7% of Hispanic defendants. Those without any

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<sup>133</sup> 18 U.S.C. § 3142(e).

<sup>134</sup> 18 U.S.C.A. § 3142(f).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> 18 U.S.C.A. § 3142(g).

<sup>139</sup> 18 U.S.C.A. § 3142(i).

<sup>140</sup> THOMAS H. COHEN, PRETRIAL DETENTION AND MISCONDUCT IN FEDERAL DISTRICT COURTS, 1995-2010 (US Department of Justice special report, February 2013), <https://www.bjs.gov/content/pub/pdf/pdmfcdc9510.pdf>.

conviction or arrest record were released 41.5% of the time, while those with a prior violent felony conviction were released only 17.6% of the time. Of all defendants released prior to trial whose cases were terminated [within twelve months], 84.9% had no violation of the terms of their release, while 9.9% had violations resulting in revocation of their release.<sup>141</sup>

## ABA Standards

### *Generally*

The ABA has adopted standards for pretrial detention. Under those standards, detention may be ordered for certain offenses and in certain circumstances after hearing and either an indictment or a showing of probable cause and if the government proves, by clear and convincing evidence, that no conditions will reasonably ensure appearance or safety. The decisionmaker must consider enumerated factors, such as the nature and circumstances of the offense. Certain rebuttable presumptions apply. The hearing must be held immediately upon the first appearance, though continuances are allowed. At the hearing the defendant has the right to counsel, to testify, confront and cross-examine witnesses, and present evidence. The prosecution must disclose exculpatory evidence. The rules of evidence do not apply to the hearing. If detention is ordered, findings of fact must be made and reasons for the detention must be explained. Detention orders are immediately appealable and detained defendants are entitled to accelerated trial. The ABA Standards are reproduced in Appendix E.

## Appendix A: District of Columbia Preventative Detention Statute

### **D.C. Code § 23-1322. Detention prior to trial.**

(a) The judicial officer shall order the detention of a person charged with an offense for a period of not more than 5 days, excluding Saturdays, Sundays, and holidays, and direct the attorney for the government to notify the appropriate court, probation or parole official, or local or state law enforcement official, if the judicial officer determines that the person charged with an offense:

(1) Was at the time the offense was committed, on:

- (A) Release pending trial for a felony or misdemeanor under local, state, or federal law;
- (B) Release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence, for any offense under local, state, or federal law;
- or
- (C) Probation, parole or supervised release for an offense under local, state, or federal law; and

(2) May flee or pose a danger to any other person or the community or, when a hearing under § 23-1329(b) is requested, is likely to violate a condition of release. If the official fails or declines to take the person into custody during the 5-day period described in this subsection, the person shall be treated in accordance with other provisions of law governing release pending trial.

(b) (1) The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in § 23-1321(c) will reasonably assure the appearance of the person as required and the safety of any other person and the community, upon oral motion of the attorney for the government, in a case that involves:

- (A) A crime of violence, or a dangerous crime, as these terms are defined in § 23-1331;
- (B) An offense under section 502 of the District of Columbia Theft and White Collar Crimes Act of 1982, effective December 1, 1982 (D.C. Law 4-164; D.C. Official Code § 22-722);

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<sup>141</sup> LAFAVE at § 12.1(a) (reporting statistics for criminal cases processed in 2009 and 2010).

(C) A serious risk that the person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate a prospective witness or juror; or

(D) A serious risk that the person will flee.

(2) If, after a hearing pursuant to the provision of subsection (d) of this section, the judicial officer finds by clear and convincing evidence that no condition or combination of conditions will reasonably assure the appearance of the person as required, and the safety of any other person and the community, the judicial officer shall order that the person be detained before trial.

(c) There shall be a rebuttable presumption that no condition or combination of conditions of release will reasonably assure the safety of any other person and the community if the judicial officer finds by probable cause that the person:

(1) Committed a dangerous crime or a crime of violence, as these crimes are defined in § 23-1331, while armed with or having readily available a pistol, firearm, imitation firearm, or other deadly or dangerous weapon;

(2) Has threatened, injured, intimidated, or attempted to threaten, injure, or intimidate a law enforcement officer, an officer of the court, or a prospective witness or juror in any criminal investigation or judicial proceeding;

(3) Committed a dangerous crime or a crime of violence, as these terms are defined in § 23-1331, and has previously been convicted of a dangerous crime or a crime of violence which was committed while on release pending trial for a local, state, or federal offense;

(4) Committed a dangerous crime or a crime of violence while on release pending trial for a local, state, or federal offense;

(5) Committed 2 or more dangerous crimes or crimes of violence in separate incidents that are joined in the case before the judicial officer;

(6) Committed a robbery in which the victim sustained a physical injury;

(7) Violated § 22-4504(a) (carrying a pistol without a license), § 22-4504(a-1) (carrying a rifle or shotgun), § 22-4504(b) (possession of a firearm during the commission of a crime of violence or dangerous crime), or § 22-4503 (unlawful possession of a firearm); or

(8) Violated [subchapter VIII of Chapter 25 of Title 7, § 7-2508.01 et seq.], while on probation, parole, or supervised release for committing a dangerous crime or a crime of violence, as these crimes are defined in § 23-1331, and while armed with or having readily available a firearm, imitation firearm, or other deadly or dangerous weapon as described in § 22-4502(a).

(d) (1) The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the government, seeks a continuance. Except for good cause, a continuance on motion of the person shall not exceed 5 days, and a continuance on motion of the attorney for the government shall not exceed 3 days. During a continuance, the person shall be detained, and the judicial officer, on motion of the attorney for the government or *sua sponte*, may order that, while in custody, a person who appears to be an addict receive a medical examination to determine whether the person is an addict, as defined in § 23-1331.

(2) At the hearing, the person has the right to be represented by counsel and, if financially unable to obtain adequate representation, to have counsel appointed.

(3) The person shall be afforded an opportunity to testify. Testimony of the person given during the hearing shall not be admissible on the issue of guilt in any other judicial proceeding, but the testimony shall be admissible in proceedings under §§ 23-1327, 23-1328, and 23-1329, in perjury proceedings, and for the purpose of impeachment in any subsequent proceedings.

- (4) The person shall be afforded an opportunity to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing.
- (5) The person shall be detained pending completion of the hearing.
- (6) The hearing may be reopened at any time before trial if the judicial officer finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue of whether there are conditions of release that will reasonably assure the appearance of the person as required or the safety of any other person or the community.
- (7) When a person has been released pursuant to this section and it subsequently appears that the person may be subject to pretrial detention, the attorney for the government may initiate a pretrial detention hearing by ex parte written motion. Upon such motion, the judicial officer may issue a warrant for the arrest of the person and if the person is outside the District of Columbia, the person shall be brought before a judicial officer in the district where the person is arrested and shall then be transferred to the District of Columbia for proceedings in accordance with this section.
- (e) The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account information available concerning:
- (1) The nature and circumstances of the offense charged, including whether the offense is a crime of violence or dangerous crime as these terms are defined in § 23-1331, or involves obstruction of justice as defined in § 22-722;
  - (2) The weight of the evidence against the person;
  - (3) The history and characteristics of the person, including:
    - (A) The person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and
    - (B) Whether, at the time of the current offense or arrest, the person was on probation, on parole, on supervised release, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under local, state, or federal law; and
  - (4) The nature and seriousness of the danger to any person or the community that would be posed by the person's release.
- (f) In a release order issued under § 23-1321(b) or (c), the judicial officer shall:
- (1) Include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the person's conduct; and
  - (2) Advise the person of:
    - (A) The penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;
    - (B) The consequences of violating a condition of release, including immediate arrest or issuance of a warrant for the person's arrest; and
    - (C) The provisions of § 22-722, relating to threats, force, or intimidation of witnesses, jurors, and officers of the court, obstruction of criminal investigations and retaliating against a witness, victim, or an informant.
- (g) In a detention order issued under subsection (b) of this section, the judicial officer shall:
- (1) Include written findings of fact and a written statement of the reasons for the detention;

- (2) Direct that the person be committed to the custody of the Attorney General of the United States for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal;
- (3) Direct that the person be afforded reasonable opportunity for private consultation with counsel; and
- (4) Direct that, on order of a judicial officer or on request of an attorney for the government, the person in charge of the corrections facility in which the person is confined deliver the person to the United States Marshal or other appropriate person for the purpose of an appearance in connection with a court proceeding.
- (h) (1) The case of the person detained pursuant to subsection (b) of this section shall be placed on an expedited calendar and, consistent with the sound administration of justice, the person shall be indicted before the expiration of 90 days, and shall have trial of the case commence before the expiration of 100 days. However, the time within which the person shall be indicted or shall have the trial of the case commence may be extended for one or more additional periods not to exceed 20 days each on the basis of a petition submitted by the attorney for the government and approved by the judicial officer. The additional period or periods of detention may be granted only on the basis of good cause shown, including due diligence and materiality, and shall be granted only for the additional time required to prepare for the expedited indictment and trial of the person. Good cause may include, but is not limited to, the unavailability of an essential witness, the necessity for forensic analysis of evidence, the ability to conduct a joint trial with a co-defendant or co-defendants, severance of co-defendants which permits only one trial to commence within the time period, complex or major investigations, complex or difficult legal issues, scheduling conflicts which arise shortly before the scheduled trial date, the inability to proceed to trial because of action taken by or at the behest of the defendant, 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 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 the 100-day period no longer exists. If the time within which the person must be indicted or the trial must commence is tolled or extended, an indictment must be returned at least 10 days before the new trial date.
- (2) For the purposes of determining the maximum period of detention under this section, the period shall begin on the latest of:
- (A) The date the defendant is first detained under subsection (b) of this section by order of a judicial officer of the District of Columbia after arrest;
  - (B) The date the defendant is first detained under subsection (b) of this section by order of a judicial officer of the District of Columbia following a re-arrest or order of detention after having been conditionally released under § 23-1321 or after having escaped;
  - (C) The date on which the trial of a defendant detained under subsection (b) of this section ends in a mistrial;
  - (D) The date on which an order permitting the withdrawal of a guilty plea becomes final;
  - (E) The date on which the defendant reasserts his right to an expedited trial following a waiver of that right;
  - (F) The date on which the defendant, having previously been found incompetent to stand trial, is found competent to stand trial;
  - (G) The date on which an order granting a motion for a new trial becomes final; or
  - (H) The date on which the mandate is filed in the Superior Court after a case is reversed on appeal.

(3) After 100 days, as computed under paragraphs (2) and (4) of this section, or such period or periods of detention as extended under paragraph (1) of this section, the defendant shall be treated in accordance with § 23-1321(a) unless the trial is in progress, has been delayed by the timely filing of motions, excluding motions for continuance, or has been delayed at the request of the defendant.

(4) In computing the 100 days, the following periods shall be excluded:

(A) Any period from the filing of the notice of appeal to the issuance of the mandate in an interlocutory appeal;

(B) Any period attributable to any examination to determine the defendant's sanity or lack thereof or his or her mental competency or physical capacity to stand trial;

(C) Any period attributable to the inability of the defendant to participate in his or her defense because of mental incompetency or physical incapacity; and

(D) Any period in which the defendant is otherwise unavailable for trial.

(i) Nothing in this section shall be construed as modifying or limiting the presumption of innocence.

## Appendix B: New Jersey Preventative Detention Statute

### **N.J. Stat. C.2A:162-18 Pretrial detention for certain eligible defendants ordered by court; appeal.**

4. a. (1) The court may order, before trial, the detention of an eligible defendant charged with any crime, or any offense involving domestic violence as defined in subsection a. of section 3 of P.L.1991, c.261 (C.2C:25-19), enumerated in subsection a. of section 5 of P.L.2014, c.31 (C.2A:162-19), if the prosecutor seeks the pretrial detention of the eligible defendant under section 5 of P.L.2014, c.31 (C.2A:162-19) and after a hearing pursuant to that section the court finds clear and convincing evidence that no amount of monetary bail, non-monetary conditions of pretrial release or combination of monetary bail and conditions would reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, and that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process. The court may also order the pretrial detention of an eligible defendant when the prosecutor moves for a pretrial detention hearing and the eligible defendant fails to rebut a presumption of pretrial detention that may be established for the crimes enumerated under subsection b. of section 5 of P.L.2014, c.31 (C.2A:162-19). (2) For purposes of ordering the pretrial detention of an eligible defendant pursuant to this section and section 5 of P.L.2014, c.31 (C.2A:162-19) or pursuant to section 10 of P.L.2014, c.31 (C.2A:162-24), when determining whether no amount of monetary bail, non-monetary conditions or combination of monetary bail and conditions would reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, or that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process, the court may consider the amount of monetary bail only with respect to whether it will, by itself or in combination with non-monetary conditions, reasonably assure the eligible defendant's appearance in court when required.
- b. Regarding the pretrial detention hearing moved for by the prosecutor, except for when an eligible defendant is charged with a crime set forth under paragraph (1) or (2) of subsection b. of section 5 of P.L.2014, c.31 (C.2A:162-19), there shall be a rebuttable presumption that some amount of monetary bail, non-monetary conditions of pretrial release or combination of monetary bail and conditions would reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, and that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process.
- c. An eligible defendant may appeal an order of pretrial detention pursuant to the Rules of Court. The appeal shall be heard in an expedited manner. The eligible defendant shall be detained pending the disposition of the appeal.
- d. If the court does not order the pretrial detention of an eligible defendant at the conclusion of the pretrial detention hearing under this section and section 5 of P.L.2014, c.31 (C.2A:162-19), the court shall order the release of the eligible defendant pursuant to section 3 of P.L.2014, c.31 (C.2A:162-17).

### **N.J. Stat. C.2A:162-19 Pretrial detention for certain eligible defendants requested by prosecutor.**

5. a. A prosecutor may file a motion with the court at any time, including any time before or after an eligible defendant's release pursuant to section 3 of P.L.2014, c.31 (C.2A:162-17), seeking the pretrial detention of an eligible defendant for:
  - (1) any crime of the first or second degree enumerated under subsection d. of section 2 of P.L.1997, c.117 (C.2C:43-7.2);

- (2) any crime for which the eligible defendant would be subject to an ordinary or extended term of life imprisonment;
- (3) any crime if the eligible defendant has been convicted of two or more offenses under paragraph (1) or (2) of this subsection;
- (4) any crime enumerated under paragraph (2) of subsection b. of section 2 of P.L.1994, c.133 (C.2C:7-2) or crime involving human trafficking pursuant to section 1 of P.L.2005, c.77 (C.2C:13-8) or P.L.2013, c.51 (C.52:17B-237 et al.) when the victim is a minor, or the crime of endangering the welfare of a child under N.J.S.2C:24-4;
- (5) any crime enumerated under subsection c. of N.J.S.2C:43-6;
- (6) any crime or offense involving domestic violence as defined in subsection a. of section 3 of P.L.1991, c.261 (C.2C:25-19); or
- (7) any other crime for which the prosecutor believes there is a serious risk that:
  - (a) the eligible defendant will not appear in court as required;
  - (b) the eligible defendant will pose a danger to any other person or the community; or
  - (c) the eligible defendant will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure or intimidate, a prospective witness or juror.

b. When a motion for pretrial detention is filed pursuant to subsection a. of this section, there shall be a rebuttable presumption that the eligible defendant shall be detained pending trial because no amount of monetary bail, non-monetary condition or combination of monetary bail and conditions would reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, and that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process, if the court finds probable cause that the eligible defendant:

- (1) committed murder pursuant to N.J.S.2C:11-3; or
- (2) committed any crime for which the eligible defendant would be subject to an ordinary or extended term of life imprisonment.

c. A court shall hold a hearing to determine whether any amount of monetary bail or non-monetary conditions or combination of monetary bail and conditions, including those set forth under subsection b. of section 3 of P.L.2014, c.31 (C.2A:162-17) will reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, and that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process.

d. (1) Except as otherwise provided in this subsection, the pretrial detention hearing shall be held no later than the eligible defendant's first appearance unless the eligible defendant, or the prosecutor, seeks a continuance. If a prosecutor files a motion for pretrial detention after the eligible defendant's first appearance has taken place or if no first appearance is required, the court shall schedule the pretrial detention hearing to take place within three working days of the date on which the prosecutor's motion was filed, unless the prosecutor or the eligible defendant seeks a continuance. Except for good cause, a continuance on motion of the eligible defendant may not exceed five days, not including any intermediate Saturday, Sunday, or legal holiday. Except for good cause, a continuance on motion of the prosecutor may not exceed three days, not including any intermediate Saturday, Sunday, or legal holiday.

(2) Upon the filing of a motion by the prosecutor seeking the pretrial detention of the eligible defendant and during any continuance that may be granted by the court, the eligible defendant shall be detained in jail, unless the eligible defendant was previously

released from custody before trial, in which case the court shall issue a notice to appear to compel the appearance of the eligible defendant at the detention hearing. The court, on motion of the prosecutor or sua sponte, may order that, while in custody, an eligible defendant who appears to be a drug dependent person receive an assessment to determine whether that eligible defendant is drug dependent.

- e. (1) At the pretrial detention hearing, the eligible defendant has the right to be represented by counsel, and, if financially unable to obtain adequate representation, to have counsel appointed. The eligible defendant shall be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. The rules concerning admissibility of evidence in criminal trials shall not apply to the presentation and consideration of information at the hearing.
- (2) In pretrial detention proceedings for which there is no indictment, the prosecutor shall establish probable cause that the eligible defendant committed the predicate offense. A presumption of pretrial detention as provided in subsection b. of this section may be rebutted by proof provided by the eligible defendant, the prosecutor, or from other materials submitted to the court. The standard of proof for a rebuttal of the presumption of pretrial detention shall be a preponderance of the evidence. If proof cannot be established to rebut the presumption, the court may order the eligible defendant's pretrial detention. If the presumption is rebutted by sufficient proof, the prosecutor shall have the opportunity to establish that the grounds for pretrial detention exist pursuant to this section.
- (3) Except when an eligible defendant has failed to rebut a presumption of pretrial detention pursuant to subsection b. of this section, the court's finding to support an order of pretrial detention pursuant to section 4 of P.L.2014, c.31 (C.2A:162-18) that no amount of monetary bail, non-monetary conditions or combination of monetary bail and conditions will reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, and that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process shall be supported by clear and convincing evidence.
- f. The hearing may be reopened, before or after a determination by the court, at any time before trial, if the court finds that information exists that was not known to the prosecutor or the eligible defendant at the time of the hearing and that has a material bearing on the issue of whether there are conditions of release that will reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, or that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process.

**N.J. Stat. C.2A:162-20 Information considered in determination of pretrial detention.**

6. In determining in a pretrial detention hearing whether no amount of monetary bail, non-monetary conditions or combination of monetary bail and conditions would reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, or that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process, the court may take into account information concerning:
- a. The nature and circumstances of the offense charged;
  - b. The weight of the evidence against the eligible defendant, except that the court may consider the admissibility of any evidence sought to be excluded;
  - c. The history and characteristics of the eligible defendant, including:

- (1) the eligible defendant's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and
  - (2) whether, at the time of the current offense or arrest, the eligible defendant was on probation, parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under federal law, or the law of this or any other state;
- d. The nature and seriousness of the danger to any other person or the community that would be posed by the eligible defendant's release, if applicable;
  - e. The nature and seriousness of the risk of obstructing or attempting to obstruct the criminal justice process that would be posed by the eligible defendant's release, if applicable; and
  - f. The release recommendation of the pretrial services program obtained using a risk assessment instrument under section 11 of P.L.2014, c.31 (C.2A:162-25).

**N.J. Stat. C.2A:162-21 Contents of pretrial detention order; temporary release.**

- 7. a. In a pretrial detention order issued pursuant to sections 4 and 5 of P.L.2014, c.31 (C.2A:162-18 and C.2A:162-19), the court shall:
  - (1) include written findings of fact and a written statement of the reasons for the detention; and
  - (2) direct that the eligible defendant be afforded reasonable opportunity for private consultation with counsel.
- b. The court may, by subsequent order, permit the temporary release of the eligible defendant subject to appropriate restrictive conditions, which may include but shall not be limited to pretrial supervision, to the extent that the court determines the release to be necessary for preparation of the eligible defendant's defense or for another compelling reason.

**N.J. Stat. C.2A:162-22 Eligible defendant subject to pretrial detention, release; conditions.**

- 8. a. Concerning an eligible defendant subject to pretrial detention as ordered by a court pursuant to sections 4 and 5 of P.L.2014, c.31 (C.2A:162-18 and C.2A:162-19) or an eligible defendant who is detained in jail due to the inability to post the monetary bail imposed by the court pursuant to subsection c. or d. of section 3 of P.L.2014, c.31 (C.2A:162-17):
  - (1) (a) The eligible defendant shall not remain detained in jail for more than 90 days, not counting excludable time for reasonable delays as set forth in subsection b. of this section, prior to the return of an indictment. If the eligible defendant is not indicted within that period of time, the eligible defendant shall be released from jail unless, on motion of the prosecutor, the court finds that a substantial and unjustifiable risk to the safety of any other person or the community or the obstruction of the criminal justice process would result from the eligible defendant's release from custody, so that no appropriate conditions for the eligible defendant's release could reasonably address that risk, and also finds that the failure to indict the eligible defendant in accordance with the time requirement set forth in this subparagraph was not due to unreasonable delay by the prosecutor. If the court finds that a substantial and unjustifiable risk to the safety of any other person or the community or the obstruction of the criminal justice process would result, and also finds that the failure to indict the eligible defendant in accordance with the time requirement set forth in this subparagraph was not due to unreasonable delay by the prosecutor, the court may allocate an additional period of time, not to exceed 45 days, in which the return of an indictment shall occur. Notwithstanding the

court's previous findings for ordering the eligible defendant's pretrial detention, or if the court currently does not find a substantial and unjustifiable risk or finds unreasonable delay by the prosecutor as described in this subparagraph, the court shall order the release of the eligible defendant pursuant to section 3 of P.L.2014, c.31 (C.2A:162-17).

(b) If the eligible defendant is charged or indicted on another matter resulting in the eligible defendant's pretrial detention, the time calculations set forth in subparagraph (a) of this paragraph for each matter shall run independently.

- (2) (a) An eligible defendant who has been indicted shall not remain detained in jail for more than 180 days on that charge following the return or unsealing of the indictment, whichever is later, not counting excludable time for reasonable delays as set forth in subsection b. of this section, before commencement of the trial. If the trial does not commence within that period of time, the eligible defendant shall be released from jail unless, on motion of the prosecutor, the court finds that a substantial and unjustifiable risk to the safety of any other person or the community or the obstruction of the criminal justice process would result from the eligible defendant's release from custody, so that no appropriate conditions for the eligible defendant's release could reasonably address that risk, and also finds that the failure to commence trial in accordance with the time requirement set forth in this subparagraph was not due to unreasonable delay by the prosecutor. If the court finds that a substantial and unjustifiable risk to the safety of any other person or the community or the obstruction of the criminal justice process would result, and also finds that the failure to commence trial in accordance with the time requirement set forth in this subparagraph was not due to unreasonable delay by the prosecutor, the court may allocate an additional period of time in which the eligible defendant's trial shall commence. Notwithstanding the court's previous findings for ordering the eligible defendant's pretrial detention, or if the court currently does not find a substantial and unjustifiable risk or finds unreasonable delay by the prosecutor as described in this subparagraph, the court shall order the release of the eligible defendant pursuant to section 3 of P.L.2014, c.31 (C.2A:162-17). Notwithstanding any other provision of this section, an eligible defendant shall be released from jail pursuant to section 3 of P.L.2014, c.31 (C.2A:162-17) after a release hearing if, two years after the court's issuance of the pretrial detention order for the eligible defendant, excluding any delays attributable to the eligible defendant, the prosecutor is not ready to proceed to voir dire or to opening argument, or to the hearing of any motions that had been reserved for the time of trial.
- (b) (i) For the purposes of this paragraph, a trial is considered to have commenced when the court determines that the parties are present and directs them to proceed to voir dire or to opening argument, or to the hearing of any motions that had been reserved for the time of trial.
- (ii) The return of a superseding indictment against the eligible defendant shall extend the time for the trial to commence.
- (iii) If an indictment is dismissed without prejudice upon motion of the eligible defendant for any reason, and a subsequent indictment is returned, the time for trial shall begin running from the date of the return of the subsequent indictment.
- (iv) A trial ordered after a mistrial or upon a motion for a new trial shall commence within 120 days of the entry of the order of the court. A trial

ordered upon the reversal of a judgment by any appellate court shall commence within 120 days of the service of that court's trial mandate.

(c) If the eligible defendant is indicted on another matter resulting in the eligible defendant's pretrial detention, the time calculations set forth in this paragraph for each matter shall run independently.

- b. (1) The following periods shall be excluded in computing the time in which a case shall be indicted or tried:
- (a) The time resulting from an examination and hearing on competency and the period during which the eligible defendant is incompetent to stand trial or incapacitated;
  - (b) The time from the filing to the disposition of an eligible defendant's application for supervisory treatment pursuant to N.J.S.2C:36A-1 or N.J.S.2C:43-12 et seq., special probation pursuant to N.J.S.2C:35-14, drug or alcohol treatment as a condition of probation pursuant to N.J.S.2C:45-1, or other pretrial treatment or supervisory program;
  - (c) The time from the filing to the final disposition of a motion made before trial by the prosecutor or the eligible defendant;
  - (d) The time resulting from a continuance granted, in the court's discretion, at the eligible defendant's request or at the request of both the eligible defendant and the prosecutor;
  - (e) The time resulting from the detention of an eligible defendant in another jurisdiction provided the prosecutor has been diligent and has made reasonable efforts to obtain the eligible defendant's presence;
  - (f) The time resulting from exceptional circumstances including, but not limited to, a natural disaster, the unavoidable unavailability of an eligible defendant, material witness or other evidence, when there is a reasonable expectation that the eligible defendant, witness or evidence will become available in the near future;
  - (g) On motion of the prosecutor, the delay resulting when the court finds that the case is complex due to the number of defendants or the nature of the prosecution;
  - (h) The time resulting from a severance of codefendants when that severance permits only one trial to commence within the time period for trial set forth in this section;
  - (i) The time resulting from an eligible defendant's failure to appear for a court proceeding;
  - (j) The time resulting from a disqualification or recusal of a judge;
  - (k) The time resulting from a failure by the eligible defendant to provide timely and complete discovery;
  - (l) The time for other periods of delay not specifically enumerated if the court finds good cause for the delay; and
  - (m) Any other time otherwise required by statute.
- (2) The failure by the prosecutor to provide timely and complete discovery shall not be considered excludable time unless the discovery only became available after the time set for discovery.

## Appendix C: New Mexico Court Rule on Preventative Detention

### **NM R. DIST. CT. RCRP Rule 5-409. Pretrial detention.**

**A. Scope.** Notwithstanding the right to pretrial release under Article II, Section 13 of the New Mexico Constitution and Rule 5-401 NMRA, under Article II, Section 13 and this rule, the district court may order the detention pending trial of a defendant charged with a felony offense if the prosecutor files a written motion titled “Expedited Motion for Pretrial Detention” and proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community.

**B. Motion for pretrial detention.** The prosecutor may file a written expedited motion for pretrial detention at any time in both the court where the case is pending and in the district court. The motion shall include the specific facts that warrant pretrial detention.

- (1) The prosecutor shall immediately deliver a copy of the motion to
  - (a) the detention center holding the defendant, if any;
  - (b) the defendant and defense counsel of record, or, if defense counsel has not entered an appearance, the local law office of the public defender or, if no local office exists, the director of the contract counsel office of the public defender.
- (2) The defendant may file a response to the motion for pretrial detention in the district court, but the filing of a response shall not delay the hearing under Paragraph F of this rule. If a response is filed, the defendant shall promptly provide a copy to the assigned district court judge and the prosecutor.

**C. Case pending in magistrate or metropolitan court.** If a motion for pretrial detention is filed in the magistrate or metropolitan court and a probable cause determination has not been made, the magistrate or metropolitan court shall determine probable cause under Rule 6-203 NMRA or Rule 7-203 NMRA. If the court finds no probable cause, the court shall order the immediate personal recognizance release of the defendant under Rule 6-203 NMRA or Rule 7-203 NMRA and shall deny the motion for pretrial detention without prejudice. If probable cause has been found, the magistrate or metropolitan court clerk shall promptly transmit to the district court clerk a copy of the motion for pretrial detention, the criminal complaint, and all other papers filed in the case. The magistrate or metropolitan court’s jurisdiction to set or amend conditions of release shall then be terminated, and the district court shall acquire exclusive jurisdiction over issues of pretrial release until the case is remanded by the district court following disposition of the detention motion under Paragraph I of this rule.

**D. Case pending in district court.** If a motion for pretrial detention is filed in the district court and probable cause has not been found under Article II, Section 14 of the New Mexico Constitution or Rule 5-208(D) NMRA, Rule 5-301 NMRA, Rule 6-203 NMRA, Rule 6-204(B) NMRA, Rule 7-203 NMRA, or Rule 7-204(B) NMRA, the district court shall determine probable cause in accordance with Rule 5-301 NMRA. If the district court finds no probable cause, the district court shall order the immediate personal recognizance release of the defendant under Rule 5-301 NMRA and shall deny the motion for pretrial detention without prejudice.

### **E. Detention pending hearing; warrant.**

- (1) Defendant in custody when motion is filed. If a detention center receives a copy of a motion for pretrial detention, the detention center shall distribute the motion to any person designated by the district, magistrate, or metropolitan court to release defendants from custody under Rule 5-401(N) NMRA, Rule 5-408 NMRA, Rule 6-401(M) NMRA, Rule 6-408 NMRA, Rule 7-401(M) NMRA, or Rule 7-408 NMRA. All authority of any person to release a defendant pursuant to such designation is terminated upon receipt of a detention motion until further court order.
- (2) Defendant not in custody when motion is filed. If the defendant is not in custody when the motion for pretrial detention is filed, the district court may issue a warrant for the defendant’s arrest if the motion establishes probable cause to believe the defendant has committed a felony offense and alleges sufficient facts that, if true, would justify pretrial detention under Article II,

Section 13 of the New Mexico Constitution. If the motion does not allege sufficient facts, the court shall issue a summons and notice of hearing.

**F. Pretrial detention hearing.** The district court shall hold a hearing on the motion for pretrial detention to determine whether any release condition or combination of conditions set forth in Rule 5-401 NMRA will reasonably protect the safety of any other person or the community.

(1) Time.

(a) Time limit. The hearing shall be held promptly. Unless the court has issued a summons and notice of hearing under Subparagraph (E)(2) of this rule, the hearing shall commence no later than five (5) days after the later of the following events: (i) the filing of the motion for pretrial detention; or (ii) the date the defendant is arrested as a result of the motion for pretrial detention.

(b) Extensions. The time enlargement provisions in Rule 5-104 NMRA do not apply to a pretrial detention hearing. The court may extend the time limit for holding the hearing as follows: (i) for up to three (3) days upon a showing that extraordinary circumstances exist and justice requires the delay; (ii) upon the defendant filing a written waiver of the time limit; or (iii) upon stipulation of the parties.

(2) Discovery. At least twenty-four (24) hours before the hearing, the prosecutor shall provide the defendant with all evidence relating to the motion for pretrial detention that is in the possession of the prosecutor or is reasonably available to the prosecutor. All exculpatory evidence known to the prosecutor must be disclosed. The prosecutor may introduce evidence at the hearing beyond that referenced in the motion, but the prosecutor must provide prompt disclosure to the defendant prior to the hearing.

(3) Defendant's rights. The defendant has the right to be present and to be represented by counsel and, if financially unable to obtain counsel, to have counsel appointed. The defendant shall be afforded an opportunity to testify, to present witnesses, to compel the attendance of witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. If the defendant testifies at the hearing, the defendant's testimony shall not be used against the defendant at trial except for impeachment purposes or in a subsequent prosecution for perjury.

(4) Prosecutor's burden. The prosecutor must prove by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community. 2

(5) Evidence. The New Mexico Rules of Evidence shall not apply to the presentation and consideration of information at the hearing.

**G. Order for pretrial detention.** The court shall issue a written order for pretrial detention at the conclusion of the pretrial detention hearing if the court determines by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community. The court shall file written findings of the individualized facts justifying the detention as soon as possible, but no later than two (2) days after the conclusion of the hearing.

**H. Order setting conditions of release.** The court shall deny the motion for pretrial detention if, on completion of the pretrial detention hearing, the court determines that the prosecutor has failed to prove the grounds for pretrial detention by clear and convincing evidence. At the conclusion of the pretrial detention hearing, the court shall issue an order setting conditions of release under Rule 5-401 NMRA. The court shall file written findings of the individualized facts justifying the denial of the detention motion as soon as possible, but no later than two (2) days after the conclusion of the hearing.

**I. Further proceedings in magistrate or metropolitan court.** Upon completion of the hearing, if the case is pending in the magistrate or metropolitan court, the district court shall promptly transmit to the magistrate or metropolitan court a copy of either the order for pretrial detention or the order setting conditions of release. The magistrate or metropolitan court may modify the order setting conditions of

release upon a showing of good cause, but as long as the case remains pending, the magistrate or metropolitan court may not release a defendant who has been ordered detained by the district court.

**J. Expedited trial scheduling for defendant in custody.** The district court shall provide expedited priority scheduling in a case in which the defendant is detained pending trial.

**K. Successive motions for pretrial detention and motions to reconsider.** On written motion of the prosecutor or the defendant, the court may reopen the detention hearing at any time before trial if the court finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on whether the previous ruling should be reconsidered.

**L. Appeal.** Either party may appeal the district court order disposing of the motion for pretrial detention in accordance with Rule 5-405 NMRA and Rule 12-204 NMRA. The district court order shall remain in effect pending disposition of the appeal.

**M. Judicial discretion; disqualification and excusal.** Action by any court on any matter relating to pretrial detention shall not preclude the subsequent statutory disqualification of a judge. A judge may not be excused from presiding over a detention hearing unless the judge is required to recuse under the provisions of the New Mexico Constitution or the Code of Judicial Conduct.

## Appendix D: Federal Preventative Detention Statute

### **18 U.S.C. § 3142. Release or detention of a defendant pending trial**

(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.

*[Subsections (b), Release on personal recognizance or unsecured appearance bond, (c), Release on conditions, and (d), Temporary detention to permit revocation of conditional release, deportation, or exclusion are not reproduced here]*

(e) Detention.--

(1) If, after a hearing pursuant to the provisions of subsection (f) of this section, the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial.

(2) In a case described in subsection (f)(1) of this section, a rebuttable presumption arises that no condition or combination of conditions will reasonably assure the safety of any other person and the community if such judicial officer finds that--

- (A) the person has been convicted of a Federal offense that is described in subsection (f)(1) of this section, or of a State or local offense that would have been an offense described in subsection (f)(1) of this section if a circumstance giving rise to Federal jurisdiction had existed;
- (B) the offense described in subparagraph (A) was committed while the person was on release pending trial for a Federal, State, or local offense; and
- (C) a period of not more than five years has elapsed since the date of conviction, or the release of the person from imprisonment, for the offense described in subparagraph (A), whichever is later.

(3) Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed--

- (A) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46;
- (B) an offense under section 924(c), 956(a), or 2332b of this title;
- (C) an offense listed in section 2332b(g)(5)(B) of title 18, United States Code, for which a maximum term of imprisonment of 10 years or more is prescribed;
- (D) an offense under chapter 77 of this title for which a maximum term of imprisonment of 20 years or more is prescribed; or
- (E) an offense involving a minor victim under section 1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, or 2425 of this title.

(f) Detention hearing.--The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of such person as required and the safety of any other person and the community--

- (1) upon motion of the attorney for the Government, in a case that involves--
  - (A) a crime of violence, a violation of section 1591, or an offense listed in section 2332b(g)(5)(B) for which a maximum term of imprisonment of 10 years or more is prescribed;
  - (B) an offense for which the maximum sentence is life imprisonment or death;
  - (C) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46;
  - (D) any felony if such person has been convicted of two or more offenses described in subparagraphs (A) through (C) of this paragraph, or two or more State or local offenses that would have been offenses described in subparagraphs (A) through (C) of this paragraph if a circumstance giving rise to Federal jurisdiction had existed, or a combination of such offenses; or
  - (E) any felony that is not otherwise a crime of violence that involves a minor victim or that involves the possession or use of a firearm or destructive device (as those terms are defined in section 921), or any other dangerous weapon, or involves a failure to register under section 2250 of title 18, United States Code; or
- (2) upon motion of the attorney for the Government or upon the judicial officer's own motion, in a case that involves--
  - (A) a serious risk that such person will flee; or
  - (B) a serious risk that such person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.

The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of such person may not exceed five days (not including any intermediate Saturday, Sunday, or legal holiday), and a continuance on motion of the attorney for the Government may not exceed three days (not including any intermediate Saturday, Sunday, or legal holiday). During a continuance, such person shall be detained, and the judicial officer, on motion of the attorney for the Government or sua sponte, may order that, while in custody, a person who appears to be a narcotics addict receive a medical examination to determine whether such person is an addict. At the hearing, such person has the right to be represented by counsel, and, if financially unable to obtain adequate representation, to have counsel appointed. The person shall be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing. The facts the judicial officer uses to support a finding pursuant to subsection (e) that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence. The person may be detained pending completion of the hearing. The hearing may be reopened, before or after a determination by the judicial officer, at any time before trial if the judicial officer finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue whether there are conditions of release that will reasonably assure the appearance of such person as required and the safety of any other person and the community.

(g) Factors to be considered.--The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning--

- (1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence, a violation of section 1591, a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device;
- (2) the weight of the evidence against the person;
- (3) the history and characteristics of the person, including--
  - (A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and
  - (B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and
- (4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release. In considering the conditions of release described in subsection (c)(1)(B)(xi) or (c)(1)(B)(xii) of this section, the judicial officer may upon his own motion, or shall upon the motion of the Government, conduct an inquiry into the source of the property to be designated for potential forfeiture or offered as collateral to secure a bond, and shall decline to accept the designation, or the use as collateral, of property that, because of its source, will not reasonably assure the appearance of the person as required.

*[Subsection (h), Contents of release order, is not reproduced here]*

(i) Contents of detention order.--In a detention order issued under subsection (e) of this section, the judicial officer shall--

- (1) include written findings of fact and a written statement of the reasons for the detention;
- (2) direct that the person be committed to the custody of the Attorney General for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal;
- (3) direct that the person be afforded reasonable opportunity for private consultation with counsel; and
- (4) direct that, on order of a court of the United States or on request of an attorney for the Government, the person in charge of the corrections facility in which the person is confined deliver the person to a United States marshal for the purpose of an appearance in connection with a court proceeding.

The judicial officer may, by subsequent order, permit the temporary release of the person, in the custody of a United States marshal or another appropriate person, to the extent that the judicial officer determines such release to be necessary for preparation of the person's defense or for another compelling reason.

(j) Presumption of innocence.--Nothing in this section shall be construed as modifying or limiting the presumption of innocence.

#### **18 U.S.C. § 3145. Review and appeal of a release or detention order**

*[Subsection (a), Review of a release order, is not reproduced here.]*

(b) Review of a detention order.--If a person is ordered detained by a magistrate judge, or by a person other than a judge of a court having original jurisdiction over the offense and other than a Federal appellate court, the person may file, with the court having original jurisdiction over the offense, a motion for revocation or amendment of the order. The motion shall be determined promptly.

(c) Appeal from a release or detention order.--An appeal from a release or detention order, or from a decision denying revocation or amendment of such an order, is governed by the provisions of section

1291 of title 28 and section 3731 of this title. The appeal shall be determined promptly. A person subject to detention pursuant to section 3143(a)(2) or (b)(2), and who meets the conditions of release set forth in section 3143(a)(1) or (b)(1), may be ordered released, under appropriate conditions, by the judicial officer, if it is clearly shown that there are exceptional reasons why such person's detention would not be appropriate.

## Appendix E: ABA Standards for Preventative Detention

### **Standard 10-5.8. Grounds for pretrial detention**

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

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

- (i) the nature and circumstances of the offense charged;
- (ii) the nature and seriousness of the danger to any person or the community, if any, that would be posed by the defendant's release;
- (iii) the weight of the evidence;
- (iv) the person's character, physical and mental condition, family ties, employment status and history, financial resources, length of residence in the community, including the likelihood that the defendant would leave the jurisdiction, community ties, history relating to drug or alcohol abuse, criminal history, and record of appearance at court proceedings;
- (v) whether at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense;
- (vi) the availability of appropriate third party custodians who agree to assist the defendant in attending court at the proper time and other information relevant to successful supervision in the community;
- (vii) any facts justifying a concern that a defendant will present a serious risk of flight or of obstruction, or of danger to the community or the safety of any person.

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

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

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

- (i) upon motion of the prosecutor in a case that involves:
  - (A) a crime of violence or dangerous crime; or
  - (B) a defendant charged with a serious offense on release pending trial for a serious offense, or on release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence; or on probation or parole for a serious offense involving a crime of violence, a dangerous crime; or
- (ii) upon motion of the prosecutor or the judicial officer's own initiative, in a case that involves:
  - (A) a substantial risk that a defendant charged with a serious offense will fail to appear in court or flee the jurisdiction; or
  - (B) a substantial risk that a defendant charged in any case will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate a prospective witness or juror.

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

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

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

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

- (i) be present and be represented by counsel and, if financially unable to obtain counsel, to have counsel appointed;
- (ii) testify and present witnesses on his or her own behalf;
- (iii) confront and cross-examine prosecution witnesses; and,
- (iv) present information by proffer or otherwise.

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

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

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

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

(f) In pretrial detention proceedings, the prosecutor should bear the burden of establishing by clear and convincing evidence that no condition or combination of conditions of release will reasonably ensure the defendant's appearance in court and protect the safety of the community or any person.

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

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

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

(iii) The court's order for pretrial detention should include the date by which the detention must be considered de novo, in most cases not exceeding [90 days]. A defendant may not be detained after that date without a pretrial detention hearing to consider extending pretrial detention an

additional [90 days] following procedures under Standards 10-5.8, 10-5.9 and this Standard. If a pretrial detention hearing to consider extending detention of the defendant is not held on or before that date, the defendant who is held beyond the time of the detention order should be released immediately under reasonable conditions that best minimize the risk of flight and danger to the community.

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

(h) A pretrial detention order should be immediately appealable by either the prosecution or the defense and should receive expedited appellate review. If the detention decision is made by a judicial officer other than a trial court judge, the appeals should be de novo. Appeals from decisions of trial court judges to appellate judges should be reviewed under an abuse of discretion standard.

**Standard 10-5.11. Requirement for accelerated trial for detained defendants**

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

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

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

(b) The pretrial services agency, prosecutor, jail staff or other appropriate justice agency should be required to report to the court as to each defendant, other than one detained under Standards 10-5.8, 10-5.9 and 10-5.10, who has failed to obtain release within [24 hours] after entry of a release order under Standard 10-5.4 and to advise the court of the status of the case and of the reasons why a defendant has not been released.

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

*[Standard 10-5.13, Trial, Standard 10-5.14, Credit for pre-adjudication detention, and Standard 10-5.15, Temporary release of a detained defendant for compelling necessity, are not reproduced here]*

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

Defendants detained pending adjudication should be confined in facilities separate from convicted persons awaiting sentencing or serving sentences or held in custody pending appeal. The rights and privileges of defendants detained pending adjudication should not be more restricted than those of convicted defendants who are imprisoned. Detained defendants should be provided with adequate means to assist in their own defense. This requirement includes but is not limited to reasonable

telephone rates and unmonitored telephone access to their attorneys, a law library, and a place where they can have unmonitored meetings with their attorneys and review discovery.

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