

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS' POLICY ON PRETRIAL RELEASE AND LIMITED USE OF FINANCIAL BOND

The National Association of Criminal Defense Lawyers believes pretrial liberty must be the norm and detention prior to trial the carefully limited exception.¹ “Unless [an accused’s] right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle would lose its meaning.”² To reinforce this standard, NACDL endorses the following policies regarding pretrial release. In conjunction with the right of all persons accused of crime to be effectively represented by counsel at the accused’s first appearance when a judicial officer informs the accused of the charges and orders pretrial release or bond,³ these policies ensure the consistent, fair and equal treatment of all accused individuals.

Guidelines on Pre-trial Release, Conditions and Detention

NACDL supports the establishment of concrete guidelines to govern the determination of whether and under what conditions an accused is released pretrial. These guidelines shall presumptively favor release on personal recognizance. Consistent with the current ABA Standards on Pretrial Release,⁴ these guidelines permit the denial of bail only when the judicial officer finds clear and convincing evidence the accused represents a significant risk of flight or imminent physical harm to others.

Pretrial Services

NACDL supports the creation of an independent pretrial services agency to conduct a pretrial investigation and make an evidence-based recommendation to the court on the advisability of release and bail conditions. The availability of a pretrial agency’s verified information and recommendation allows for more accurate decision-making. Should the court determine pretrial supervision is appropriate, the independent pretrial services agency shall supervise, monitor and assist the accused.

Terms of Release

A release decision should begin with consideration of personal recognizance release. An accused should be released on personal recognizance unless an evidentiary-based determination is made that personal recognizance will not reasonably assure the accused’s future appearance or that the accused represents a risk of imminent physical harm to others.

¹ *United States v. Salerno*, 481 U.S. 739, 755 (1987).

² *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

³ Resolution of the Board of Directors of the National Association of Criminal Defense Lawyers Urging the Recognition of the Right to Counsel at Initial Appearance (Feb. 19, 2012), available at <http://www.nacdl.org/resolutions/2012mm1/>.

⁴ Standard 10-1.2, ABA Criminal Justice Standards on Pretrial Release, 3rd Ed., 2002.

For those accused who do not qualify for release on personal recognizance, NACDL supports standards requiring judicial officers to order release on the least onerous conditions possible.

Use of Financial Conditions

Financial bond should be used as a last resort. NACDL acknowledges in a limited number of cases a monetary bond may be an appropriate condition of release to insure the accused's appearance and minimize risk of physical harm to others. But frequently a monetary bond creates an undue burden on individuals accused of crimes who have limited financial means and results in unnecessarily prolonged periods of pretrial detention. In most cases, pretrial supervision and less onerous conditions can serve to ensure the accused's appearance and public's safety without the discriminatory and disparate impact of financial bond.

NACDL endorses the view of the United States Attorney General, who recently addressed the situation of individuals being detained pretrial as a result of bond they cannot afford by stating, “[a]lmost all of these individuals could be released and supervised in their communities – and allowed to pursue and maintain employment and participate in educational opportunities and their normal family lives – without risk of endangering their fellow citizens or fleeing from justice.”⁵

For individuals with limited or no financial resources, judicial officers must take care to consider the applicability of non-financial conditions, such as unsecured bond or pretrial supervision, before requiring a “cash only” or “full bond” that frequently exceeds the accused's ability to post. When judicial officers deem money bail necessary, they must “reasonably calculate”⁶ the appropriate amount based on information about the accused's financial circumstances. Judicial officers should not use financial bail as a *de facto* order for pretrial detention. Nor should they use bail schedules that tie the amount of bail to any specific factor, such as the nature or the characteristic of the offense(s) charged, that is not predicated on an evidence-based determination of the individual risk of flight or the risk of imminent physical harm to others.

A monetary condition of bond which would almost certainly not deter flight or non-appearance, should never be imposed upon any person incapable of posting such bail.

Commercial Sureties

NACDL endorses the ABA's recommendation, first approved in 1968, calling for the abolition of commercial compensated surety – bail bondsman.⁷ NACDL endorses the use of the uncompensated surety, *e.g.*, the accused's parents, family and other parties with an interest in the accused's well-being.

⁵ Eric Holder, Bureau of Justice Assistance, National Symposium on Pretrial Justice: Summary Report of Proceedings (Washington, DC, 2012), at 30.

⁶ *Stack v. Boyle*, 342 U.S. at 5.

⁷ Standard 10-1.4(f), ABA Criminal Justice Standards on Pretrial Release, 3rd Ed., 2002.

Review of Detention Decision

NACDL supports the protection of an accused's right to a prompt and fair judicial determination of whether liberty should be curtailed after a criminal prosecution commences. If a defendant is not released within 24 hours following the entry of a release order, the court should review the detention and direct the independent pretrial services agency, or in the absence of such an agency, the department or agency who has custody of the accused, to determine the reason for the continued detention.⁸ The agency shall advise the court why the accused has not been released.⁹ If the reason is a condition or conditions of release imposed by the court, the court should review and reconsider the release plan in consultation with the prosecutor and defense counsel, or after a hearing in open court. If an accused remains in custody following the twenty four hour review, the court must review the accused's continued detention on a weekly basis.

If an accused is incapable of meeting the conditions set to obtain release after further review by the court, defense counsel should zealously pursue all available avenues for review of release conditions, including *habeas corpus* and appellate review.

Credit for Pre-trial Confinement

An accused under any significant pretrial restriction of liberty, including but not limited to home confinement, should be entitled to appropriate credit for such restriction against any future sentence.

⁸ Standard 10-5.12(b), ABA Criminal Justice Standards on Pretrial Release, 3rd Ed., 2002.

⁹ *Id.*