RESOLVED, That the American Bar Association urges federal, state, local, territorial and tribal governments, and courts and court rule-making entities, to provide courts with discretion to allow defendants to remain released pending sentencing following a guilty plea or conviction as long as the court finds that the defendant is not likely to flee or pose a danger to the safety of any other person or the community if released, such as by amending 18 U.S.C. § 3143 or similar statutes in other jurisdictions.
This resolution is intended to make clear that judges in federal, state, local, tribal and territorial jurisdictions should have discretion to allow defendants to remain on bond prior to sentencing after a plea of guilty or conviction if the court finds that the defendant is not likely to flee or pose a danger to the safety of the public.

Presently, statutes exist that remove this discretion from the Courts. These statutes require detention even when a defendant has not violated the terms of his/her release and will likely be sentenced to probation. These statutes assist in the over-incarceration of individuals, are unnecessary and should be amended or repealed.

**Giving courts discretion to release or detain defendants prior to sentencing as well as before trial is consistent with existing policy.**

In August 2017, the ABA enacted policy to encourage the use of pretrial released not dependent upon cash bail and limit the use of detention for those who cannot afford to post cash bail or secure bond.1 This policy builds upon the Criminal Justice Standards for Pretrial Release that were enacted in 2002.2 In accordance with longstanding practice, it is presumed that once released by the Court, a defendant will continue on release status unless the conditions of release are violated or the Court orders him or her into custody following a plea of guilty, a conviction after trial, the imposition of a term of imprisonment at sentencing, or the denial of relief upon appeal.3 Statutes that require automatic detention of defendants without due process should be amended and/or repealed to relieve the over-incarceration of individuals and prevent personal hardships of detention, such as loss of employment, income and family stability.

18 U.S.C. § 3143(a)(2) should be amended to allow judges to continue a defendant on bond pending sentencing unless it finds by clear and convincing evidence that the defendant is likely to flee or poses a danger to the community.

18 U.S.C. § 3143 requires unnecessary mandatory detention of a defendant pending sentencing in a federal district court.4 18 U.S.C. § 3143(a)(2) provides that a defendant be detained awaiting the imposition of sentencing unless, “(A)(i) the judicial officer finds there is a substantial likelihood that a motion for acquittal or new trial will be granted; or (ii) an attorney for the government has recommended that no sentence of imprisonment be imposed on the person, and (B) the judicial officer finds by clear and convincing

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1 2017 AY 112C
3 Supra, Standard 10.4-3 (e), noting in the commentary that a record should be made at first appearance because decisions made at that time, including bail, may be reviewed at a later pretrial proceeding, at trial or sentencing, and pending appeal, and citing See 18 U.S.C. § 3145 (1984) (providing for review and appeal of a release or detention order); see also United States v. Dominguez, 783 F.2d 702, 705-06 (7th Cir. 1986) (noting that district courts are required to review magistrates' detention orders under § 3145 (b)).
4 18 U.S.C. § 3143(a)(2)
evidence that the person is not likely to flee or pose a danger to any other person or the community. [emphasis added]"

Under the current language of this statute, a defendant who pleads guilty to a federal drug or violent offense and is eligible to serve a term of probation or supervised release, rather than jail or prison, is subject to mandatory detention pending sentence if the offense to which he or she pleads carries a maximum sentence of ten years or more. This statute requires detention pending sentencing regardless of the fact that they are eligible to serve a sentence of probation or supervised release and are not flight risks or threats to the public.

Further, the section limits judicial discretion by requiring an attorney for the government to make a recommendation that no term of imprisonment be imposed in order to permit the judge to exercise bail status discretion after the guilty plea is entered. Even where the court would find that a defendant poses no danger to the community and is no risk of flight, the court is bound to detain a defendant under the statute unless the government recommends a sentence with no prison or jail. In most districts, such a recommendation by the government is outside the standard authority of the assigned prosecutor. Therefore, as a practical matter, a guilty plea or conviction after a jury trial triggers mandatory detention in a facility pending sentence. The period of detention is largely dictated by the time required for the Probation Department to conduct a presentence investigation – on average, at least three months. Thus, the defendant will be warehoused for three months or more at taxpayer expense until the presentence investigation is completed and a report is submitted to the court.

While the legislative purpose underlying the section has a rational basis, to wit: the acceptance of a guilty plea or conviction after a jury trial to a serious felony charge is a significant change in circumstances for bail purposes, a requirement of mandatory detention is excessive and unnecessarily restrictive when imposed in every case.\(^5\)

In practice, the problem presented by the statute appears to be sidestepped in some federal districts where courts seem to simply ignore it. In many other districts, the statute creates a serious problem and extra steps are sought by defense counsel to avoid unnecessary incarceration of their client.\(^6\) One such technique to circumvent the statutory

\(^5\) An example illustrating the problem with the statute as currently worded is as follows. The defendant has committed a low-level drug trafficking crime. She has no prior criminal record. The offense charged by indictment or negotiated information has a ten-year maximum but no mandatory minimum. Based on the United States Sentencing Guidelines, such a defendant might be at an adjusted advisory guideline level permitting straight probation or probation with home confinement as a sentence. Even though the defendant was unlikely to be sentenced to any federal prison time at all, the law currently mandates that she be detained in a facility until sentence – effectively, warehousing her for three months only to then impose a sentence of probation. Clearly, the current statute as written burdens taxpayers, unnecessarily fills prison beds, and flies in the face of modern principles of criminal justice reform.

\(^6\) *Should Congress Amend 18 USC § 3143*, Bloomberg Law, (Aug. 18, 2018). Attorney Mark Cohen noted that members of the National Association of Criminal Defense Lawyers listserv responded to the article by relating their experiences in the Districts in which they practice. The range of implementation or avoidance
requirement is, through assistance of the court, ordering the presentence report before a plea is even taken and then scheduling the plea and the sentence on the same day. Alternatively, in order to avoid potentially unnecessary incarceration between plea and sentence, District Judges may refer the guilty plea to a United States Magistrate Judge and defer the acceptance of the guilty plea until the date of sentencing, or District Judges may hear a guilty plea and choose to defer acceptance of the guilty plea until the date of sentencing. The need for such legal and judicial machinations urges a legislative fix.

One way to effectuate change is to amend the statute to restore judicial discretion and meet the ends of justice and fairness. The statute could be amended by changing the work “and” after (A)(ii) to “or” and changing (B) to (A)(iii); it would then read in relevant part: 18 USC § 3143(a)(2) provides that a defendant be detained awaiting the imposition of sentencing unless, “(A)(i) the judicial officer finds there is a substantial likelihood that a motion for acquittal or new trial be granted; or (ii) an attorney for the government has recommended that no sentence of imprisonment be imposed on the person, or (iii) the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to any other person or the community. [emphasis added]”

This amendment would effectively allow a defendant to remain at liberty without detention in any of three circumstances: if there is a substantial likelihood that a motion for acquittal or new trial will be granted; or if an attorney for the government recommends that no sentence of imprisonment be imposed; or if the court finds by clear and convincing evidence that the person is not likely to flee or pose a danger. In any one of those three circumstances, the defendant would remain at liberty without detention.

The proposed amendment to the statute would not change the provision that defendants who are flight risks or threats to the public would be detained while they await imposition of sentence. The proposed amendment would only apply to defendants who are NOT flight risks or threats to the public. The proposed amendment would simply allow judicial discretion to consider permitting these defendants to remain on the same bail conditions as before the plea or conviction after trial if deemed appropriate by the court.7

of the statute demonstrates that enforcement is inconsistent from district to district, and within districts as well. A colleague in the District of New Mexico indicated that the courts there strictly enforce the statute and mused that when a judge in the Western District of Texas tried to buck the mandatory incarceration statute, “…there was a revolt.” Other defense practitioners in the Middle District of Georgia, the Western District of North Carolina, the Eastern District of Kentucky and the District of South Carolina advised that the mandatory detention provision is strictly enforced. Attorneys in the Southern District of West Virginia and the Eastern District of Michigan observed that enforcement varies on a judge-by-judge basis and that one District Judge simply accepts guilty pleas on the date of sentence to avoid practical operation of the statute. Judges in the Middle District of North Carolina have “with[e]ld a factual basis” finding on a guilty plea, i.e. have not accepted a guilty plea until the date of sentence, as “…an end around,” as reported by another colleague. A District of New Jersey defense attorney advised that the statute was regularly not enforced (I have found the same to frequently be true in my own practice in the Eastern District of New York). One Georgia practitioner observed: “I will also say that my subjective impression is that the judges aren’t particularly fond of [the statute] at times.”

7 On April 3, 2019, the Criminal Justice Section of the New York State Bar Association adopted the Resolution Regarding Mandatory Detention Pending Sentence Under 18 USC §3143 recommending this
All governmental jurisdictions and court rule-making entities should review their statutes and rules, respectively, to give courts discretion to allow defendants to remain free on bond pending sentencing following a guilty plea or conviction as long as the court finds that the defendant is not likely to flee or pose a danger to the safety of any other person or the community.

Respectfully submitted,

Kim T. Parker  
Chair, Criminal Justice Section  
February 2020

change for two reasons: first, the Southern District of New York enforces §3143 as written and will not consider alternatives to avoid mandatory incarceration, and; second, New York state law, also requires mandatory detention following the entry of a guilty plea and before sentencing in certain felony cases.
1. Summary of Resolution(s).

This resolution urges federal, state, local, territorial, and tribal governments, and court rule-making entities to provide courts with discretion to allow defendants to remain on bond pending sentencing following a guilty plea or conviction as long as the court finds that the defendant is not likely to flee or pose a danger to the safety of any other person or the community if released.

2. Approval by Submitting Entity. This resolution was passed by the Criminal Justice Council approved this resolution at the Fall Meeting in Washington, DC, on November 10, 2019.

3. Has this or a similar resolution been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

The Criminal Justice Standards for Pretrial Release states courts should use the least restrictive alternative when considering whether a defendant may be released upon conditions, the posting of cash bail or a secure bond. In 2017, the ABA also enacted policy that courts should limit their reliance on the use of cash bail or bond in order to prevent the unnecessary incarceration of defendants prior to trial. 2017 AY 112C

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

Not applicable.

6. Status of Legislation. (If applicable)

Not applicable.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.
This policy will be used as a basis of advocacy in federal, state, local, territorial and tribal legislation.

8. Cost to the Association. (Both direct and indirect costs)

No cost to the Association.

9. Disclosure of Interest. (If applicable)

Not applicable

10. Referrals. Concurrent with the filing of this resolution and Report with the House of Delegates, the Criminal Justice Section is sending the resolution and report to the following entities and/or interested groups:
- Center for Human Rights
- Coalition on Racial and Ethnic Justice
- Commission on Disability Rights
- Commission on Hispanic Legal Rights & Responsibilities
- Young Lawyers Division
- Commission on Homelessness and Poverty
- Commission on Immigration
- Commission on Racial and Ethnic Justice
- Commission on Youth at Risk
- Government and Public Sector Lawyers Division
- Judicial Division
- Law Practice Division
- Section on Civil Rights and Social Justice
- Section on Health Law
- Section on International Law
- Section of Litigation
- Section on Science and Technology

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution urges federal, state, local, tribal and territorial governments and court rule-making entities to provide courts with discretion to allow defendants to remain on bond pending sentencing following a guilty plea or conviction as long as the Court finds that the defendant is not likely to flee or pose a danger to the safety of any other person or the community if released.

2. Summary of the Issue that the Resolution Addresses

The resolution addresses the unnecessary requirement in federal and state statutes to incarcerate defendants between a plea of guilty or trial and sentencing when they are unlikely to flee from the court’s jurisdiction and do not pose a threat to public safety. Certain laws, e.g., 18 U.S.C. §3143, require mandatory detention of a defendant between a plea of guilty and sentencing for certain offenses even when the defendant is likely to receive a probationary sentence or home confinement. These statutes remove discretion from the Court to continue pretrial release orders and create unnecessary incarceration of defendants.

3. Please Explain How the Proposed Policy Position Will Address the Issue

The proposed policy can be used by Governmental Affairs to advocate to Congress that 18 U.S.C. §3143 should be amended by the change of “and” to “or” after (A) (ii) and renumbering (B) to (A)(iii). Likewise, state bar associations can review their own statutes or rules for amendment.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified.

None have been identified.