

## **Model Pretrial Release Policies: Identification & Noncitizens**

December, 2009

Jessica Smith, UNC School of Government

### Defendants Who Refuse to Identify Themselves.

Sometimes defendants who are brought before a magistrate for an initial appearance will refuse to identify themselves. Without knowing a defendant's identity, it is almost impossible to determine what conditions of pretrial release should be imposed. A magistrate will not be able to determine, among other things, whether the defendant has a record, has previously failed to appear, or what connections the defendant has with the community that are relevant to flight risk. When this happens, the following procedures apply.

A magistrate [**may**] [**should**] delay the initial appearance so that a law enforcement officer can investigate the defendant's identity. If a magistrate delays the initial appearance to allow such an investigation and the officer's investigation is unsuccessful or cannot be done within [**Specify time period e.g., "X hours"**] *or* [**"quickly"**], the magistrate should proceed with the initial appearance as described below.

If a law enforcement investigation into identity is not feasible or is unsuccessful, proceed with the initial appearance and set [**Specify conditions to be set for defendants who refuse to identify themselves e.g., "secured bond no less than \$X"**] *or* [**"conditions, taking into consideration the fact that a refusal to identify oneself indicates a flight risk. When a defendant refuses to identify him or herself, a magistrate may set a bond above the (upper limit) (recommended guidelines) set out in these policies for the charged crime. The magistrate should note the reason for the higher bond in the file."**]. Additionally, include as a condition of pretrial release that either the defendant adequately identify him or herself or that there is an adequate identification of the defendant. Any reasonable form of identification may meet this condition, even if it is not a written form of identification—for example, a responsible member of the community may vouch for the defendant's identity. Because individuals may lawfully be in the country without a United States government-issued form of identification, a magistrate may not require a defendant to produce such identification as a condition of release.

### Questions Regarding Identity.

A person may use a fictitious name or someone else's name to avoid a record in their name, to avoid being held accountable for a prior record, or for other reasons. If a magistrate has reasonable doubt regarding the truth of a defendant's stated identity, the magistrate should take these doubts into account when setting conditions of pretrial release [, **and may set a bond above the (upper limit) (recommended guidelines) set out in these policies for the charged crime. The magistrate should note the reason for the higher bond in the file**].

## Noncitizens.

A magistrate has no authority to hold an arrestee simply because he or she is not a United States citizen. G.S. 162-62 provides that whenever a person is charged with a felony or an impaired driving offense and is confined to a jail or local confinement facility, the person in charge of the facility must attempt to determine if the prisoner is a legal resident and if the prisoner's status cannot be determined, make an inquiry through DCI to the Law Enforcement Support Center of United States Immigration and Customs Enforcement (ICE). However, this provision may not be construed to deny bond or prevent release from confinement when the person is otherwise eligible for release. Of course, citizenship status may be relevant in determining conditions of pretrial release, such as when the arrestee has no contacts in the community and was planning on returning to his or her home country shortly, thus creating a flight risk.

Sometimes an arresting officer will tell a magistrate that there is an ICE detainer in place for the defendant. An ICE detainer is an ICE-issued document asking the jailer to hold a person, for up to forty-eight hours, so that ICE can take custody of that person. For example, suppose a defendant is in jail on a \$5,000 secured bond. Normally, when the defendant is able to make bond, he or she must be released. However, if an ICE detainer is in place, the jailer will hold the defendant, for up to forty-eight hours after the defendant makes bond, so that ICE can take custody.

When an officer brings a defendant to a magistrate and an ICE detainer is in place, the magistrate should follow the normal procedure for conducting the initial appearance and setting conditions of pretrial release. There is no special hold to implement, nor is the magistrate authorized to hold the defendant. The detainer is in place and if the defendant meets his or her conditions of pretrial release, the jail will hold the defendant per the detainer. [**“However, the fact that a detainer is in place may affect the magistrate’s decision about appropriate conditions of pretrial release. For example, if the defendant is facing deportation, there may be a flight risk.”**] *or* [**“Because of the increased flight risk due to the detainer, a magistrate should impose a secured bond no less than \$X when a detainer is in place.”**]

When an officer brings a defendant to a magistrate and informs the magistrate that ICE is “interested” or is “investigating whether a detainer should issue,” the magistrate should follow the normal procedure for conducting an initial appearance and setting conditions of pretrial release. There is no special hold to implement, nor is the magistrate authorized to hold the defendant for this purpose. However, in this situation the magistrate may learn of facts that will be relevant to the determination as to appropriate conditions of pretrial release, and these facts should be taken into account when setting conditions.