Children of Incarcerated Caregivers

MINNESOTA PRETRIAL RELEASE DEFENSE SUPPLEMENT



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Who We Are

Children of Incarcerated Caregivers (CIC) advocates for laws, policies, and programs that support the best interests of minor children with parents involved in the criminal legal system. This Defense Supplement demonstrates how courts can and should consider the impact on a defendant's children when the parent is facing pretrial detention. CIC recognizes that not every parent will be eligible for pretrial release and that it won't always be in a child's best interest to have their parent released/in the community. However, in the cases where imposing a community-based alternative to detention is within a judge's discretion and serves the best interests of the defendant's child/children, the information below provides a legal framework and social rationale for those decisions. CIC believes, and the research shows, that community-based alternatives to detention can support the needs of children while also benefiting society as a whole.

How to Evaluate Family Circumstances[1]

The following information is relevant for evaluating the client's relationship with his or her child or children and assessing the impact of pretrial detention on a child or children, and each topic is followed by relevant questions to ask the client or the client's family members.

- **How and the extent to which the caregiver is engaged with his or her child:**
    - *How often does the client see his or her child or children? What does that contact look like? When and where does that contact occur? How does the client typically interact with his or her child or children? Does the client live with his or her child or children?*
    - *For some specific examples, does the client help with rides to and from school or other extracurricular activities? Does the client help with homework? Does the client help his or her child or children with participation in extracurricular activities, such as practicing an instrument for band, preparing for an audition for theater, practicing a sport, etc.? Is the client involved with his or her child or children's religious beliefs or education, such as rides to religious education*

[1] The information in the following list of relevant considerations for evaluating the caregiver-child relationship is based on two reports. *See* BEKAH MUTA, CHILD. OF INCARCERATED CAREGIVERS, FAMILY IMPACT STATEMENTS 2–3 (2024), https://cicmn.org/wp-content/uploads/2024/11/Bekah-Muta-Family-Impact-Statement-Report-2024.pdf; Eleanor Bush, *Considering the Defendant's Children at Sentencing*, 2 FED. SENT'G REP. 194, 194–98 (Dec. 1989 – Jan. 1990), https://doi.org/10.2307/20639225.

classes, religious peer groups, or religious services or meetings at a church, mosque, synagogue, or temple?

- **Whether the caregiver is the child's primary caregiver.**

- **Whether the child has any special needs that the defendant assists in addressing:**

    - *Does the client's child have any learning, intellectual, or physical disabilities that the client helps to address? (For example, dyslexia, dyscalculia, dysgraphia, auditory processing disorder (APD), non-verbal learning disability (NVLD), down syndrome, fragile X syndrome, fetal alcohol spectrum disorders (FASD), autism spectrum disorder (ASD), etc.) If so, what are those disabilities, and how does the client assist in addressing them?*

    - *Does the client's child have any mental health disorders that the client helps to address? (For example, attention-deficit hyperactivity disorder (ADHD), generalized anxiety disorder (GAD), post-traumatic stress disorder (PTSD), bipolar disorder, obsessive-compulsive disorder (OCD), etc.) If so, what are those mental health disorders, and how does the client assist in addressing them?*

    - *Does the client's child have any other medical circumstances that the client helps to address? (For example, if the client's child has a terminal illness, cancer, autoimmune disorders such as Celiac disease, severe and life-threatening allergies that commonly occur in day-to-day activities, etc.) If so, what are those medical circumstances, and how does the client assist in addressing them?*

- **Information regarding the defendant's ability to fulfill his or her requirements and responsibilities for maintaining custodial rights:**

    - *In instances where a client's child or children may be placed in foster care, what access, if any, will the client have to caseworkers and his or her children?*

- **The number of minor children who will be impacted and their ages:**

    - *In addition to the client's child or children, will any other children be affected, such as the children of the caregiver who takes the client's child or children in? If*

so, include the number and ages of minor children who will be indirectly affected by the client's incarceration.

- **The child or children's current living situation(s):**
    - *How has/will this change as a result if the client is detained pretrial?*
- **The financial and emotional qualities of the caregiver-child relationship:**
    - *How does the client support his or her child or children financially?*
        - *For example, does the client consistently pay child support or pay for the child's participation or involvement in an extracurricular activity?*
    - *How does the client support his or her child or children emotionally?*
        - *For example, is the child experiencing bullying at school, grieving the loss of a family member, pet, friend, or friendship, struggling with social or school situations, etc.?*
- **The financial needs of the child or children:**
    - *For example, what are the child or children's expenses related to school, extracurricular activities, childcare/daycare, transportation to school and extracurricular activities, etc.?*
    - *Does the child have any specific conditions that require additional financial support? (For example, if the child has Celiac disease and is unable to eat gluten, so the child's food costs more for gluten-free alternative foods; if the child has diabetes, so the child's care requires additional money to cover insulin; if the child has a mental health condition that requires medication, so the child's care requires additional money to cover those medications; etc.)*
- **The location of the child or children's residence:**
    - *Where is this in relation to the facilities where the client could be detained?*

- **The economic costs relating to the loss of the caregiver's income or the financial status of the child or children's caregiver during the caregiver's pretrial detention:**
    - *How would the client's pretrial detention affect the total income of the household?*
    - *Will the client no longer be eligible for welfare programs that will in turn affect the client's child or children?*
- **The loss of care and support resulting from the separation of the caregiver and child or children:**
    - *Will the client's pretrial detention affect the child or children's routine? If so, how?*
- **The potential impact on the child or children's mental health, social behavior, and educational prospects:**
    - *How might the client's child or children's schooling be affected by the client's pretrial detention?*
    - *Has the client's child or children experienced any negative mental health consequences, such as depression or increased anxiety, concurrent to the client's arrest? How might the client's child or children experience any negative mental health consequences, such as depression or increased anxiety, concurrent to the client's pretrial detention?*
    - *Has the client's child or children demonstrated any behavioral problems or presented any behavioral concerns concurrent to the client's arrest? How might the client's child or children demonstrate any behavioral problems or present any behavioral concerns concurrent to the client's pretrial detention?*
- **The structural changes that the child or children may experience as a result of the client's pretrial detention:**
    - *Will the client's child or children change schools?*
    - *Will the client's child or children have to move to a different city or state?*

- *Will the client's child or children be separated from siblings or other family members?*
- *Will the client's child or children experience any trauma related to the client's pretrial detention?*
- *How might the client's child or children experience the negative stigma of parental incarceration?*

- **The child or children's upcoming events, experiences, and/or milestones that may be impacted by the client's pretrial detention:**
  - *Will the client's child or children experience any of the following upcoming events, experiences, or milestones that the client's absence will affect directly or indirectly?:*
    - *Learning to drive and getting a learner's permit or driver's license;*
    - *Graduation from any grade;*
    - *Upcoming sports games or tournaments;*
    - *Upcoming competitions or tournaments, such as mock trial, talent shows, spelling bees, debate competitions, etc.;*
    - *Birthdays;*
    - *Important tests or exams, either for school or for college applications;*
    - *College tours;*
    - *Important presentations for school;*
    - *Religion-affiliated events, such as a bat or bar mitzvah, confirmation or other sacramental milestones, etc.*

- **The living and care arrangements for the child or children in the event of the client's detention and subsequent unavailability:**
  - *Who will be the primary caregiver for the client's child or children?*

    - *Who will the client's child or children live with, including other relatives in the home?*
    - *Where will the client's child or children live? What city and state? What type of home or residence?*

- **The quality of the connection between the child or children and their prospective "stand-in" caregiver, such as a relative or friend, in the event of the client's detention:**
    - *What kind of relationship, if any, exists between the client's child or children and their caregiver in the event of the client's detention?*
- **The financial and care resources and stability of the child or children's alternative care arrangements in the event of their caregiver's incarceration:**
    - *Does the caregiver have stable housing and a consistent income?*
    - *If something were to happen to the client's child or children's caregiver, where will the child or children go? Who will they live with?*
- **Proposed conditions of release that would be in the best interest of the child or children:**
    - *Are there any conditions that could be imposed that would allow the client to be released pretrial term while also promoting the best interests of the client's child or children?*

How to Consider Potential Family Ties

The following information is relevant for assessing whether the client's potential family ties with his or her child or children may be beneficial to introduce and discuss at pretrial detention hearings:

- **The number of minor children the client has;**
- **The age(s) of the client's child or children;**
- **Where the client's child or children reside;**

- **The relationship(s) the client has with his or her child or children's caregiver(s);**
- **The client's historical relationship(s) with his or her child or children;**
- **The client's interest in having a relationship or relationships with his or her child or children;**
- **The client's ability to have a relationship or relationships with his or her child or children;**
- **The client's willingness to provide financial, emotional, or other support to his or her child or children.**

How to Investigate Family Circumstances, Ties, and Responsibilities

To investigate family circumstances, defense counsel can ask the client, the client's family members (including the client's child or children, if they are old enough to understand), and/or community members who have a relationship with the client or the client's child or children for information related to family circumstances or potential family ties as outlined above. Defense counsel can collect this information through interviews, requesting written letters of support, or other relevant records or documentation. For example, recent pictures of a client's child or children with the client doing an extracurricular activity can demonstrate the client's involvement in his or her child's or children's lives. It also may be beneficial to seek additional consultation, such as seeking an expert to consult on the impact of parental incarceration or a mitigation specialist to discuss how family circumstances relate to mitigation at sentencing. If the client's child or children are involved in any open child protection cases, consider contacting the social worker(s) involved in the proceedings.

How to Argue Family Circumstances at Pretrial Detention Hearings

In Minnesota, the presumption is that criminal defendants will be released at first appearance, and the burden is on the government to show that conditions of release or pretrial detention are necessary.[2] In other words, Minnesota law requires pretrial release *unless* the government can prove conditions of release or pretrial detention are

[2] Minn. R. Crim. P. 6.02, subd. 1 (emphasis added).

necessary. At first appearance, a defendant "*must* be released on personal recognizance or an unsecured bond *unless* a court determines that release will endanger the public safety or will not reasonably assure the defendant's appearance."[3] Even if the court makes this finding, the court can only impose a limited number of conditions of release to fulfill the purpose of either public safety or future appearance.[4] Note, however, that one of the four conditions courts can impose is "conditions necessary to assure appearance," which could encompass a wide range of conditions.[5]

When setting the conditions of release, courts are required to consider a list of factors. Family ties are one of these required considerations.[6] The consideration of these factors is for the purpose of determining which, if any, conditions of release to set - not for justifying pretrial detention.[7] It might be necessary to remind the court of this at times. Conditions must be imposed on a case-by-case basis and be justified by the particular facts.[8] For example, the court cannot have a standard practice of imposing a condition of drug testing for any defendant with a history of drug use; this would violate Rule 6.02. Instead, the court needs to make a specific finding that the facts of *this* case support the need for a condition of drug testing, such as if the defendant had a recent history of drug use.[9] Additionally, the Minnesota Supreme Court outlined four factors for consideration in setting the bail amount, including a determination of the likelihood of the defendant's appearance if released on bail based on four factors, one of them being the defendant's relationship to the community at the time of arrest.[10] It is important to note that, unlike information obtained through the pretrial investigation, any evidence obtained by independent investigation, including witness testimony, may be used against a defendant at trial.[11]

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[3] Minn. R. Crim. P. 6.02, subd. 1 (emphasis added).
[4] Minn. R. Crim. P. 6.02, subd. 1(a)-(d) (emphasis added).
[5] Minn. R. Crim. P. 6.02, subd. 1(d).
[6] Minn. R. Crim. P. 6.02, subd. 2(c).
[7] State v. Martin, 743 N.W.2d 261 (Minn. 2008) (discussing whether the court had properly considered the particular facts of the case in relation to these factors when imposing a drug-testing requirement as a condition of release); State v. Mastrian, 266 Minn. 58, 122 N.W.2d 621 (1963) ("The purpose of arrest and confinement of a person charged with a crime is to assure his presence at the time fixed for his trial. The purpose of bail in cases such as this is to permit his release if appearance at trial can otherwise be guaranteed.").
[8] *Martin*, 743 N.W.2d at 267.
[9] "Because Rule 6.02, subdivision 2, requires the district court to "take into account the nature and circumstances of the offense charged" when determining the reasonable likelihood of the defendant's appearance, the "use of unlawful substances" is more appropriately considered on a case-by-case basis as a factor under the rule. Here, it appears that the basis for imposing the condition that Martin comply with drug testing was the fact that imposing such a condition was the district court's standard practice. Such a practice violates the rule." *Id.*
[10] *Mastrian*, 266 Minn. at 59.
[11] Minn. R. Crim. P. 6.02, subd. 3.

The purpose of bail is to assure the defendant will be present at future court proceedings.[12] Release should be permitted if appearance at trial can be otherwise guaranteed.[13] Rule 6.02 of the Minnesota Rules of Criminal Procedure can be read to allow judges to consider public safety when determining conditions of pretrial release. This reading, however, would undermine Minnesota's constitutional right to pretrial release.[14] Other right-to-bail states have held that pretrial detention cannot be justified by public safety.[15] Because bail is an absolute right of the defendants, due process of law is required in determining bail and conditions of release.[16] Defendants have the right to call witnesses at a bail hearing if the district court determines that the witness testimony will lead to the defendant's release.[17] Persuasive authority does suggest, however, that this is only applicable when bail is set for public safety reasons, not when it is set for appearance reasons.[18]

Finally, attorneys can request that the court review the defendant's conditions of release, and the court must do so upon request.[19] The text of this Rule does not require the defense to have uncovered new information in order to make this request, but case law suggests that new information, not available at the time of the original bail hearing, must have

[12] *See Mastrian*, 266 Minn. at 59; State v. Brooks, 604 N.W.2d 345, 50 (Minn. 2000).
[13] *Mastrian*, 266 Minn. at 59.
[14] *See* United States v. Salerno, 481 U.S. 739, 762-67 (1987) (Marshall, J., dissenting) (explaining that constitutional right to pretrial release is subject to the government's compelling interests to prevent flight or obstruction of justice, but is not subject to the government's general interest in crime prevention); State v. Sauve, 621 A.2d 1296, 1301 (Vt. 1993); People ex rel. 2 Hemingway v. Elrod, 322 N.E.2d 837, 840–41 (Ill. 1975); *see also* United States v. Bigelow, 544 F.2d 904, 907–08 (6th Cir. 1976) (holding that the right to bail under the Federal Bail Reform Act of 1966 is subject to the court's inherent power to deny bail "when the court's own processes are jeopardized as by threats against a witness").
[15] While many state bail statutes provide that money bail can be based on public safety considerations, several courts in right-to-bail states (i.e., states with constitutions having a right to pretrial release) have recognized that money bail cannot be used to detain a defendant for public safety purposes. *See* State v. Pray, 346 N.W.2d 227, 229 (Vt. 1975); Ex Parte Harris, 733 S.W.2d 712, 714 (Tex.App.-Austin 1987); Harp v. Hinkley, 410 So.2d 619 (Fla.App. 1982); *contra* State v. Anderson, 127 A.3d 100 (Conn. 2015); *see also Salerno*, 481 U.S. at 762–67, 107 S.Ct. at 2109–12 (Marshall, J., dissenting) (describing the scope of a constitutional right pretrial release that he would have recognized in the federal constitution). In Vermont and Florida following the aforementioned cases, the state constitutions were amended to eliminate the right to bail for at least some offenses.
[16] *See* State v. LeDoux, 770 N.W.2d 504, 514 (Minn. 2009) (holding that the due process required at a bail hearing is similar as that at a probable cause hearing).
[17] *LeDoux*, 770 N.W.2d at 514.
[18] *See* Aime v. Commonwealth, 611 N.E.2d 204 (Mass. 1993) (holding that the procedural due process requirements of the Federal Bail Reform Act of 1984 - the right to testify, present witnesses, and cross examine witnesses - are applicable to a defendant whose bail has been set for public safety reasons); Querubin v. Commonwealth, 795 N.E.2d 534 (Mass. 2003) (holding that the evidentiary hearing granted to defendants by *Aime* is not applicable to a defendant whose bail had been set to reasonably assure his appearance in court).
[19] "The court must review conditions of release on request of any party." Minn. R. Crim. P. 6.02, subd. 4.

become available in order to make this request.[20] If there is no new information, however, it may still be possible to request a review of a pretrial detention decision if the court that set the conditions of release failed to consider the required factors in Rule 6.02, since such a failure is an abuse of discretion in setting the conditions of release, potentially rendering the conditions unenforceable.[21]

How to Present Family Circumstances Information to the Court

As mentioned, family ties are a required consideration at bail hearings. When bringing this evidence to the court, attorneys should always start with the case-specific facts. For more information on gathering these relevant facts, see "How to Evaluate Family Circumstances" at the beginning of these materials. Research on the harms of parental incarceration, however, can provide further support for an argument that a defendant's parental responsibility makes them more amenable to pretrial release or that the defendant's release is in the best interest of the child. For example, if a client indicates that he or she is primarily responsible for getting his or her child to and from school, then the argument should be based around that case-specific fact, but the research below indicated that having an incarcerated parent is associated with decreased education attainment can be used as support.

These arguments are only relevant when the parent facing incarceration has a positive relationship with or impact on their children. The best interest of the child should be the focus, and the research on protective factors and the harms of parental incarceration would be irrelevant, and thus unpersuasive, if the parent was absent or was negatively having a negative impact on the child prior to receiving criminal charges. Since the purpose of bail is to prevent flight or assure community safety, defense attorneys should first frame a defendant's parental responsibilities as a protective factor contributing to his or her likelihood of success on pretrial release. For information on the research regarding the harms of parental incarceration and family circumstances serving as a protective factor, see "Parental Incarceration and Family Circumstances" in CIC's Minnesota Pretrial Release Toolkit, which can be found on our website.

[20] State v. Powers, No. A23-0837, 2024 WL 1713894 at *3 (Minn. Ct. App. Apr. 22, 2024) ("As a result, implied in the language of subdivision 4 is the authority of a district court to modify the conditions of bail, in accordance with the purposes of bail, upon request of either party when new information is available.").
[21] State v. Rasmussen, No. A14-2043, 2015 WL 7693357 (Minn. Ct. App. Nov. 30, 2015) (appealing a denial of a motion to suppress evidence found during a warrantless search unlawfully prescribed as a condition of release).

Release Plans

When arguing for pretrial release, it can be helpful to present the court with a plan for the client's release.[22] It is worth reemphasizing, however, that arguments should always start with the law and the presumption of release. Only when the court has found that more than the minimal conditions are necessary should the defense present conditions to the court. Additionally, these plans should always be tailored to help with barriers to success on pretrial release that have been identified for a specific defendant and care should be taken to ensure that the conditions will not unduly burden the defendant.

In addition to the information above, it may also be beneficial to seek additional consultation, such as considering a consultation with an expert on the impact of parental incarceration. If the child is involved in any open child protection cases, consider contacting the social worker(s) involved in the proceedings.

It is also important to discuss factors important to maintaining the child-caregiver relationship in the event that the caregiver is unable to be released on bail. For example, ensure that your client has clear expectations about necessary steps for maintaining custody while in custody.

Conclusion

We appreciate you taking the time to learn more about the harms of parental incarceration and how you can take into account the best interests of the minor children of your clients. If you utilize any of the arguments or resources from this primer, please contact us to share your outcomes. Additionally, please reach out if you are aware of any other resources on the harms of parental incarceration of which we have not included here.

[22] *See generally* Marie VanNostrand & Gena Keebler, *Pretrial Risk Assessment in the Federal Court*, 73 FED. PROB. 2.

Publicly Accessible Minnesota Bail Materials

- Ben Johnson, *Bail and Pretrial Release in Minnesota*, Minn. House Rsch. Dept. (Aug. 2024), https://www.house.mn.gov/hrd/pubs/ss/ssbailmn.pdf.

- *Bail Bond Procedures*, Minn. Jud. Branch, https://www.mncourts.gov/mncourtsgov/media/scao_library/Bail%20Bonds/Bail-Bond-Procedures.pdf (Jan. 2022).

- Pretrial Release Initiative Resources page, Minn. Jud. Branch, https://www.mncourts.gov/GovernmentPartners/Pretrial-Release-Initiative.aspx (last visited July 1, 2025).

- *Pretrial Release Evaluation*, Minn. Jud. Branch, https://www.mncourts.gov/mncourtsgov/media/Judicial_Council_Library/Policies/500/524-Pretrial-Release-Evaluation.pdf (Nov. 15, 2018).

- *Minnesota Pretrial Release Evaluation Form and Assessment Tool-Revised (MNPAT-R)*, Minn. Jud. Branch, https://www.mncourts.gov/mncourtsgov/media/Pretrial-Release/Form-MNPAT-R.pdf (last visited July 1, 2025).

- *Minnesota Pretrial Questionnaire (Revised)*, Minn. Jud. Branch, https://www.mncourts.gov/mncourtsgov/media/Pretrial-Release/Questionnaire-MNPAT-R.pdf (last visited July 1, 2025).

- *Pretrial Release Process and Programs: Minnesota Judicial Branch*, Sen. Judiciary & Pub. Safety Fin. & Pol'y Comm. (Feb. 10, 2021), https://assets.senate.mn/committees/2021-2022/3099_Committee_on_Judiciary_and_Public_Safety_Finance_and_Policy/Pretrial%20Release%20Process%20and%20Programs%20MN%20Judicial%20Branch.pdf.