CHAPTER 4 - BAIL PROCEDURES

I. INTRODUCTION

The Constitutions of the United States and of Virginia do not guarantee a defendant the right to bail in criminal cases. The only mention of bail in the Constitution of the United States occurs in Amendment VIII: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Likewise, Article I, Section 9 of the Constitution of Virginia provides:

> That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted; that the privilege of the writ of habeas corpus shall not be suspended unless when, in cases of invasion or rebellion, the public safety may require; and that the General Assembly shall not pass any bill of attainder, or any ex post facto law.

For many years, the philosophy of bail as set forth in the United States Supreme Court case Stack v. Boyles, 342 U.S. 1 (1951) guided the judiciary in Virginia in bail determination.

In that case, the United States Supreme Court opinion stated: "The practice of admission to bail...is not a device for keeping persons in jail upon mere accusations until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty."

The bail statutes have historically allowed judicial officers to hold a defendant without bail where the defendant posed a flight risk or a danger to the public. The 2000 session of the General Assembly imposed restrictions on the judicial officer's discretion in bail hearings with an amendment to Va. Code § 19.2-123. This amendment requires judicial officers to impose secure bonds as a condition of release under certain circumstances in felony cases.

Consequently, Virginia law has thus restricted the basic premise set forth in Stack, to cases in which the defendant does not pose a flight risk or a threat to public safety, cases not requiring a secure bond as provided for in Va. Code § 19.2-123, and to those cases not covered by the narrow no-bail requirement of Va. Code § 19.2-102.

With the exception of the restrictions noted in Va. Code §§ 19.2-102, 19.2-120, 19.2-123, and 19.2-130.1, a magistrate has discretion in deciding the issue of bail. In other words, the Code of Virginia does not impose a scale of dollar amounts tied to specific crimes. A magistrate may determine that conditions of release are not necessary and can release the defendant upon the defendant's written agreement to appear in court on a specific date and time. Should the magistrate determine that a bond is necessary, the magistrate sets the amount of bond and determines whether the bond is secured or unsecured by reviewing facts gathered in the bail hearing. The magistrate's bail decision is unique to each individual case.

A bail hearing is a judicial proceeding. The magistrate must hold the bail hearing in the presence of the accused to afford him or her due process under the law by providing an opportunity to ask questions and, of course, to answer those asked by the magistrate. No statute authorizes the magistrate to conduct a bail hearing over the telephone. Virginia Code § 19.2-3.1, however, does permit the magistrate to conduct a bail hearing through the use of a two- way electronic videoconference system. Regardless of the time of day or night, due process guarantees the defendant the right to appear before a magistrate for a bail hearing either in person or through a videoconference system. Although not specifically required by statute, the magistrate needs to administer an oath to the defendant and all others presenting testimony, prior to conducting a bail hearing. When the magistrate conducts the bail hearing under oath, the defendant is subject to a perjury prosecution for any false statements knowingly made in the hearing.

Nothing in the Code of Virginia addresses the confidentiality of bail hearings. On occasion, the defendant's attorney or the Commonwealth's attorney may request to be present during the bail hearing. If the attorney is present when the magistrate is ready to conduct the hearing, the magistrate must admit the attorney to the hearing. The magistrate is under no obligation, however, to delay a bail hearing until an attorney arrives. At times, the magistrate may receive requests from the media or general public to attend bail hearings. A recent decision from a federal court suggests that the magistrate should admit such people to the bail hearing upon receiving such a request. A magistrate, however, does not have to delay a hearing until the interested party arrives.

II. THE BAIL HEARING REQUIREMENT

A. Initiation of Hearing

Virginia Code §§ 8.01-508, 19.2-76, 19.2-80, 19.2-82, 19.2-150, 44-41.1, and 19.2-234 direct when a person must be brought before a judicial officer for a bail determination. There is a basic premise that runs throughout all of these statutes. That being, once an authorized officer has arrested an accused upon probable cause, or executed a warrant of arrest or capias, the officer must bring the accused forthwith before a judicial officer who then is required to conduct a bail determination hearing. Virginia Code §§ 19.2-76 and 19.2-80 set forth the procedures for arrests pursuant to an existing warrant or capias.

The last paragraph of Va. Code § 19.2-76 provides that:

> Whenever a person is arrested upon a warrant or capias in a county or city other than that in which the charge is to be tried, the law-enforcement officer or jail officer making the arrest shall either (i) bring the accused forthwith before a judicial officer in the locality where the arrest was made or where the charge is to be tried or (ii) commit the accused to the custody of an officer from the county or city where the charge is to be tried who shall bring the accused forthwith before a judicial officer in the county or city in which the charge is to be tried. The judicial officer before whom the accused is brought shall immediately conduct a bail hearing and either admit the

> accused to bail or commit him to jail for transfer forthwith to the county or city where the charge is to be tried. (Emphasis added).

The language of this statute authorizes the arresting officer to either take the accused before the magistrate in the locality where the arrest occurred, or to transfer custody of the accused to a law enforcement officer of the locality where the accused will be tried. This decision as to which locality's magistrate will conduct the bail hearing rests solely with the arresting officer. Pursuant to Va. Code § 19.2-131, a magistrate has the authority to admit to bail a juvenile taken into custody pursuant to Va. Code § 16.1-246 or an adult defendant, who is held in the magistrate's judicial district under charges originating from another district.

Should a law-enforcement officer or jail officer bring the defendant before the magistrate pursuant to Va. Code § 19.2-76, the magistrate must conduct the bail hearing. If the defendant were able to meet the conditions of release, the magistrate would prepare the DC-330, RECOGNIZANCE returnable to the court having trial authority over the underlying case. If the accused is unable to meet the conditions of bail, the magistrate will prepare a DC-352, COMMITMENT ORDER. At some later time, a law enforcement officer for the locality having trial authority will transport the defendant back to that locality. Since the defendant has already had a bail hearing, the accused will not appear before the magistrate once he or she arrives at the jail serving the locality having trial authority. The accused's next judicial proceeding will be an arraignment before a court.

The language of Va. Code § 19.2-80 pertinent to bail procedures for magistrates states:

> In any case in which an officer does not issue a summons pursuant to § 19.2-74 or § 46.2-936, a law-enforcement officer making an arrest under a warrant or capias shall bring the arrested person without unnecessary delay before a judicial officer. The judicial officer shall immediately conduct a bail hearing and either admit the accused to bail or commit him to jail. (Emphasis added)

Virginia Code § 19.2-82 sets forth arrest procedures applicable when a law enforcement officer arrests a person without a warrant. This statute directs that: "If a warrant is issued the case shall thereafter be disposed of … under the provisions of §§ 19.2-119 through 19.2-134, if the issuing officer is a magistrate or other issuing officer having jurisdiction."

In other words, the statute directs the magistrate to conduct a bail hearing if the magistrate has issued a warrant upon the conclusion of the probable cause hearing.

Virginia Code §§ 8.01-508, 19.2-150, 19.2-234, 44-41.1, 46.2-936 contain similar wording that directs a judicial officer to hold a bail hearing forthwith after the execution of a warrant or capias. These sections deal with warrants and capias issued in specific types of cases.

This chapter will outline procedures set forth by these statutes later.

B. Definitions

Virginia Code § 19.2-119 sets forth the definitions that apply throughout the bail statutes:

> "Bail" means the pretrial release of a person from custody upon those terms and conditions specified by order of an appropriate judicial officer.
>
> "Bond" means the posting by a person or his surety of a written promise to pay a specific sum, secured or unsecured, ordered by an appropriate judicial officer as a condition of bail to assure performance of the terms and conditions contained in the recognizance.
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> "Criminal History" means records and data collected by criminal justice agencies or persons consisting of identifiable descriptions and notations of arrests, detentions, indictments, informations or other formal charges, and any deposition arising therefrom.
>
> "Judicial Officer" means, unless otherwise indicated, any magistrate within his jurisdiction, any judge of a district court and the clerk or deputy clerk of any district court or circuit court within their respective cities and counties, any judge of a circuit court, any judge of the Court of Appeals and any justice of the Supreme Court of Virginia.
>
> "Person" means any accused, or any juvenile taken into custody pursuant to § 16.1-246.
>
> "Recognizance" means a signed commitment by a person to appear in court as directed and to adhere to any other terms ordered by an appropriate judicial officer as a condition of bail.

C. Criminal History Requirement

A magistrate should not conduct a bail determination hearing until the arresting officer has provided the accused's criminal history record to the magistrate, except in the rare circumstances of impossibility.

Virginia Code §§ 19.2-80.2, In lieu of the arresting officer, a pre-trial services agency may provide the criminal history to the magistrate. Virginia Code §§ 19.2-80.2. A proper bail hearing requires that the magistrate reviews the accused's criminal history information directly where possible, or review from a printed or faxed copy of the record provided by the arresting officer. The magistrate must consider the criminal history information in determining bail. Virginia Code § 19.2-121. Upon request a magistrate must fully and properly identify themselves, by first and last name, and their position title (if requested) to an agency providing the criminal history record for their purposes of VCIN dissemination logbook entry and audit trail.

At the conclusion of the bail hearing, the magistrate will see to it that the criminal history record is immediately and completely shredded/destroyed. Magistrates are responsible to ensure that criminal history information provided pursuant to Va. Code § 19.2-80.2 is only used for official purposes as authorized by their duties under Va. Code §19.2-120 and that there will be no unauthorized dissemination of the criminal history information so provided. If requested, a magistrate will also verify to the agency providing the record that the magistrate has completely destroyed the record after its official use is complete.

The importance of obtaining the copy of the accused's criminal history information is made more crucial given the circumstances that place limits upon the judicial officer's discretionary authority in determining bail. For example, the application of the requirement that an accused be released only upon a secure bond provided for in Va. Code § 19.2-123, would be nearly impossible to determine with accuracy absent a copy of the accused's criminal history information. In those rare cases where criminal history information is not available, it is recommended that the magistrate note that fact. The bail checklist is a convenient place to make such a notation.

D. Potential Outcomes

At the conclusion of a bail hearing, the magistrate is faced with four possibilities. In describing these four options, magistrates need to employ uniform terminology. Magistrates statewide consistently need to use the four terms listed below. Virginia Code § 19.2-123 sets forth the correct terminology for the first three options:

RECOGNIZANCE – A recognizance is simply the defendant's written promise to appear and to abide by any terms ordered by the judicial officer as a condition of release. A release on a recognizance is not based on a monetary pledge or secured by cash deposit, real estate, or property bail bondsman. The top portion of the DC-330, RECOGNIZANCE contains the recognizance.

UNSECURED BOND – This type of bond is what many courts and magistrates formerly called the "P.R. bond," "recognized on bond," "recognizance bond," or "personal recognizance bond." Under current statutory definitions, these terms are obsolete and misleading. Consequently, magistrates should not use these or other misleading terms, or should discontinue any use of such misleading terms if such has been used. Additionally, magistrates must recognize that other actors within the criminal justice system may still use such obsolete terms in discussing the law on bail or bail decisions. Therefore magistrates should take extra steps to ensure that when speaking with others about the law of bail, the terminology use on both sides of the communicative exchange is precise and in accordance with the statutory terminology so as to avoid or mitigate any future misunderstandings. In releasing a defendant on

an unsecured bond, the magistrate does not accept cash or require the surety to prove equity in any specific real or personal property. If the accused fails to appear in court, the court could revoke bail, forfeit the monetary amount on the bond, or any part thereof, and enter judgment.

SECURE BOND – In this type of bail bond the magistrate ensures that the bond amount is "secured" by a deposit of cash or by a solvent surety who agrees to enter into the obligations of the bail bond. The method by which the bond is to be secured is at the option of the accused. If a surety were utilized, the magistrate would need to determine whether the surety is acting as a licensed bail bondsman or simply as a third party surety. Any person not licensed as a bail bondsman desiring to act as a surety on a bail bond must demonstrate their solvency by a showing of sufficient equity in any interest in real or personal property they own that is adequate to satisfy the full amount of the bail bond. If the accused fails to appear in court, the court could revoke bail, forfeit the bond, or any part thereof, and enter judgment.

INELIGIBLE FOR BAIL - The fourth option available to a magistrate at the conclusion of a bail hearing is to determine that the defendant is ineligible for bail. In other words, the magistrate denies the defendant the possibility of being released on bail. The magistrate would jail the defendant and order the accused returned to court.

E. Right to Appeal

Virginia Code § 19.2-120(C) requires that the judicial officer inform the person of their right to appeal to the appropriate court (*See* Va. Code § 19.2-124) any order denying bail, or the amount of bond set, if the person believes it to be excessive, or any term or condition of the recognizance the person believes to be unreasonable.

III. BAIL DETERMINATION FACTORS (VIRGINIA CODE § 19.2-120 & 19.2-121)

The purpose of the bail hearing is to perform a risk assessment analysis of the accused. The risks that the magistrate assesses are whether the accused poses a danger to either himself or others (or both) during the period of pretrial release, and whether the accused will fail to appear in court as directed.

To assist the magistrate in conducting a thorough and complete bail hearing, the Committee on District Courts has adopted the DC-327, CHECKLIST FOR BAIL DETERMINATION form.

Virginia Code § 19.2-121 requires any magistrate conducting a bail hearing for a person arrested on a warrant or capias for a jailable offense to complete the DC-327, CHECKLIST FOR BAIL DETERMINATION. When completing the form, the magistrate must describe the information considered under subsection A of Virginia Code § 19.2-121 and must transmit the completed form to the court before which the warrant or capias is returnable. In subsequent bail hearings, the checklist provides information that may not be available to the court through other means.

Special requirements apply when a magistrate conducts a bail hearing for a person arrested on a warrant or capias for an act of violence as defined in Virginia Code § 19.2-297.1. If the person is not held without bail, the magistrate who made the bail decision must give "contemporaneous" notice to the attorney for the Commonwealth for the jurisdiction where the process of arrest is returnable. The notice requirement may be satisfied by transmitting a copy of the DC-327, CHECKLIST FOR BAIL DETERMINATION to the appropriate Commonwealth Attorney at the conclusion of the bail hearing. If the person is held without bail, a copy of the DC-327, CHECKLIST FOR BAIL DETERMINATION must be sent to the appropriate Commonwealth Attorney within 24 hours. The bail checklist may be transmitted by facsimile or other electronic means.

Acts of violence as defined in Virginia Code § 19.2-297.1 include:

CODE SECTION	DESCRIPTION
18.2-18	Any crime listed in this category as a principal in the second degree or accessory before the fact
18.2-22	The defendant is charged with conspiracy to commit any of the crimes listed in this category
18.2-31	Capital murder
18.2-32	First and second degree murder
18.2-32.1	Murder of a pregnant woman
18.2-33	Felony murder
18.2-35	Voluntary manslaughter
18.2-40	Lynching
18.2-41	Unlawful or malicious wounding by a mob
18.2-47	Abduction and kidnapping
18.2-48	Abduction with the intent to extort money or to defile, etc.
18.2-48.1	Abduction by a prisoner
18.2-49	Threatening, attempting, or assisting an abduction
18.2-49.1 (A)	Withholding a child out of state in violation of custody or visitation order.
18.2-51	Malicious wounding or malicious bodily injury
18.2-51.1	Malicious wounding or malicious bodily injury of a law enforcement officer or a firefighter
18.2-51.2	Aggravated malicious wounding or aggravated malicious bodily injury
18.2-51.7	Female genital mutilation
18.2-52	Malicious bodily injury by means of a caustic substance
18.2-52.1	Malicious bodily injury by means of an infectious biological substance or a radiological agent
18.2-54.1	Administering poison with the intent to kill or injure another
18.2-54.2	Adulterating food, drink, prescription, or over-the counter medicine or cosmetic with the intent to kill or injure
18.2-58	Robbery
18.2-58.1	Carjacking
18.2-61	Rape

CODE SECTION	DESCRIPTION
18.2-63*	Carnal knowledge without the use of force of a child 13 or 14 years of age; carnal knowledge without the use of force of a child 13 or 14 years of age where the child consents to sexual intercourse, the accused is a minor, and the consenting child is three years or more the accused's junior
18.2-64.1*	Carnal knowledge without the use of force by a person providing services under the purview of the J&DR District Court Law of a minor detained in a juvenile facility or a ward of the Department of Juvenile Justice, or one on probation, furlough, or leave or has escaped from detention or custody
18.2-64.2	Carnal knowledge of an inmate, parolee, probationer, detainee, or pretrial or post-trial offender
18.2-64.2	Carnal knowledge by bondsman/informant
18.2-67.1	Forcible sodomy
18.2-67.2	Object sexual penetration
18.2-67.2:1	Marital sexual assault
18.2-67.3*	Aggravated sexual battery
18.2-67.4:1	Infected sexual battery
18.2-67.5 18.2-61 18.2-67.1 18.2-67.2 18.2-67.3	Attempted rape (§ 18.2-61), attempted forcible sodomy (§ 18.2-67.1), attempted object sexual penetration (§ 18.2-67.2), or attempted aggravated sexual battery (§ 18.2-67.3)
18.2-67.5:1 18.2-67.4 18.2-67.5 18.2-130 18.2-371 18.2-387	The defendant is currently charged with the § 18.2-67.5:1 enhanced penalty version for sexual battery (§ 18.2-67.4), attempted sexual battery (§§ 18.2-67.4/18.2-67.5), peeping into dwelling, etc. (§ 18.2-130), consensual intercourse with a child (§ 18.2-371), or indecent exposure (§ 18.2-387) because he has two or more prior convictions of either sexual battery, attempted sexual battery, consensual intercourse with a child, or indecent exposure
18.2-67.5:2 18.2-63 18.2-64.1 18.2-67.3 18.2-361 18.2-366 18.2-370 18.3-370.1 18.2-22	Enhanced penalty second or subsequent offense for these offenses (the named offenses include an § 18.2-22 conspiracy charge to commit one of the enumerated offenses)

CODE SECTION	DESCRIPTION
18.2-67.5:3 18.2-61 18.2-67.1 18.2-67.2 18.2-48 18.2-22	Enhanced penalty second or subsequent offense for these offenses (the named offenses include an § 18.2-22 conspiracy charge to commit one of the enumerated offenses)
18.2-77	Arson of a structure, boat, etc., when such was occupied
18.2-79	Arson of a meeting house, church, etc. when such was occupied
* *See* Va. Code § 19.2-297.1. Certain crimes enumerated in Va. Code § 18.2-67.5:2 and Va. Code § 18.2-67.5:3 are excluded from Va. Code § 19.2-297.1 for the purpose of applying the enhanced penalty. The effect on the application of Va. Code § 19.2-120 is unsettled.	

Failure of the magistrate to conduct a meaningful bail hearing does not satisfy minimal Due Process Clause requirements. *See* McDonald v. Dunning, 760 F. Supp. 1156 (ED Va. 1991). Use of the DC-327, CHECKLIST FOR BAIL DETERMINATION form ensures that the magistrate consider all relevant factors mandated by the statute. The factors to be considered in every bail hearing are:

a. The nature and circumstances of the offense charged.

i. Was violence involved?

ii. Was there serious injury or death?

iii. Is there a serious threat to safety of others if accused is released?

iv. What facts does the DC-311, CRIMINAL COMPLAINT form contain?

v. Does the arresting officer have any knowledge of the facts of the case?

b. Was a firearm alleged to have been used in the offense?

How was the firearm used in the offense?

c. What is the weight of the evidence against the accused?

i. Did the accused confess?

ii. Is the evidence purely circumstantial?

iii. The magistrate often does not have access to any information relevant to this factor.

d. What are the financial resources of the accused?

i. What is the accused gross and net income per pay period?

ii. Does the accused own any real or personal property?

iii. What is the value of the property?

iv. Does the accused own a business?

v. What is the net worth of the accused?

vi. If the accused is unemployed, what are the accused's means of support?

e. What is the ability of the accused to pay bond?

i. The magistrate must take into consideration the financial resources of the defendant when setting a secured bond. Although the magistrate does not have to set a secured bond in an amount that the accused can meet, the bond cannot be unreasonable.

ii. The magistrate also should consider the financial resources of potential sureties when determining bail.

f. What information does the magistrate have about the character of the accused?

i. Does the magistrate have any general information about the general reputation of the accused in the community?

ii. What attitude is the accused projecting during the bail hearing?

g. What are the accused's family ties?

i. Is the accused married, divorced, single, widowed, or living with a domestic partner?

ii. Does the accused have any children or stepchildren? If so, where do these children live?

iii. Does the accused live with any family member or a domestic partner?

iv. Where do the close relatives of the accused live?

h. What is the employment history of the accused?

i. Is the accused presently employed?

ii. How long has the accused been working at his current employment?

iii. Where was the accused previously employed?

iv. If the accused is unemployed, what is the reason?

i. What is the accused's involvement in education?

i. Is the accused currently in school or college?

ii. How much education does the accused have?

j. What is the accused's length of residence in the community?

i. Is the accused a native, visitor, or migrant?

ii. Where is the accused a resident?

iii. How long has the accused been at his or her current address?

iv. Does the accused have any plans to move in the near future?

k. What is the accused's record of convictions?

i. Has the accused ever been convicted of a crime?

ii. Has the accused ever been convicted of a crime that requires the application of the presumption to hold without bail?

iii. Is the accused charged with a felony and is the accused currently on pretrial release on an underlying felony charge?

iv. Is the accused currently charged with any misdemeanors?

v. Is the accused on parole or probation?

l. What is the accused's record of appearance at court proceedings, flight to avoid prosecution, or failure to appear at court proceedings?

i. Has the accused always appeared in court as directed?

ii. Has the accused fled or attempted to flee the Commonwealth or the court's jurisdiction to avoid prosecution?

iii. Does the accused have a history of non-appearances in court as a defendant or witness?

iv. If the accused has ever failed to appear in court, what were the reasons?

m. Is the accused likely to obstruct justice, or threaten, injure, or intimidate, a prospective witness, juror, or victim?

i. Has the accused previously attempted to obstruct justice, or threaten, injure, or intimidate a witness, juror, or a crime victim?

ii. Based on past actions or current statements, is the accused likely to threaten or harm the complainant if released?

n. Is there any other information available to the magistrate that is relevant to the determination of whether the accused is likely to fail to appear in court?

i. What personal knowledge does the magistrate have of the accused?

ii. Does the arresting officer have any additional information regarding the accused?

iii. Did the accused provide the magistrate with any additional information which would reasonably assure the magistrate that the accused will or will not appear for court proceedings?

In addition to setting forth the factors that a magistrate must consider in every bail hearing, Va. Code § 19.2-121 allows a magistrate to reconsider bail set by another magistrate when circumstances bring to light new information that would warrant a new hearing. This statute further requires the magistrate to set terms of release that will reasonably assure the appearance and good behavior of the accused. When the accused has appeared and has met conditions of bail, the court may not use a bond secured by cash to satisfy fines and costs unless the person who posted the bond agrees. The reverse of the form DC-330, RECOGNIZANCE includes such a consent clause for this purpose. If the surety or accused wants the court to deduct fines and costs out of the cash bond upon conviction, the surety or accused must sign the consent statement. The magistrate, however, cannot require the defendant or surety to sign this consent as a condition of release. The magistrate needs to explain this to the defendant or surety at the time of the posting of a cash bond, and afford the party posting the cash to sign the consent statement should he or she choose to do so.

Only the person who posted the cash bond signs the consent statement.

IV. GRANTING BAIL (VIRGINIA CODE § 19.2-120)

A. General Principles of Bail

Basic Premise Favoring Admission to Bail.

The basic premise set forth in Va. Code § 19.2-120 is that the magistrate must set bail for a defendant. If, however, the magistrate finds probable cause to believe that one of two factors are present from the information gathered during the bail hearing, the magistrate then must hold the defendant without bail. The two

findings that will trigger the magistrate's decision to hold the defendant without bail are as follows:

The defendant will not appear in court for his or her trial or hearing. OR

The defendant's liberty will constitute an unreasonable danger to the defendant, family or household members or to the public.

B. Virginia Code § 19.2-120 Considerations

When determining whether to hold the defendant without bail pursuant to subsection A of Virginia Code § 19.2-120, a magistrate must consider all relevant information, including

(i) the nature and circumstances of the offense;

(ii) whether a firearm is alleged to have been used in the commission of the offense;

(iii) the weight of the evidence;

(iv) the history of the accused or juvenile, including his family ties or involvement in employment, education, or medical, mental health, or substance abuse treatment;

(v) his length of residence in, or other ties to, the community;

(vi) his record of convictions;

(vii) his appearance at court proceedings or flight to avoid prosecution or convictions for failure to appear at court proceedings; and

(viii) whether the person is likely to obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness, juror, victim, or family or household member as defined in § **16.1-228**.

(ix) any evidence the person provided indicating that such person (a) is currently pregnant, (b) has recently given birth, or (c) is currently nursing a child.

While these factors are similar to the ones enumerated in Virginia Code § 19.2-121 and included on the DC-327, CHECKLIST FOR BAIL DETERMINATION, the financial resources of the accused and his ability to pay bond is not an enumerated factor in Virginia Code § 19.2-120 (B.) As such, magistrates should be cautious to not consider the financial resources of the accused or his ability to post bond when determining whether to hold the accused without bail pursuant to Virginia Code § 19.2-120 (A.) Additionally the medical, mental health, or substance abuse treatment of the defendant must be considered when determining whether or not to hold the accused without bail.

C. Family Violence Factors

Family violence cases require the magistrate to consider additional factors in a bail hearing. Research has demonstrated that the there is a greater than normal potential for a person to use deadly force against a family or household member when certain factors are present.

These factors are:

- The accused has used a deadly weapon previously and currently has easy access to such weapons.
- The victim has ended a relationship with the accused, or the parties are in a period of separation.
- The accused has increased the frequency and severity of the violence.
- The accused has begun to commit acts of violence against the accused in public places.
- The accused has threatened to kill or harm the victim, children, other family members, or persons who have helped the victim.
- The accused controls the victim's activity, schedule, and choice of friends.
- The accused is stalking the victim or other family members.
- The accused is obsessively jealous.
- he accused is sexually abusing the victim.
- The accused has injured or killed family pets, or has threatened to harm pets to gain control over the victim.
- The accused has attempted suicide or has communicated a suicide threat to the victim or others.
- The accused has taken the victim, the victim's child or another family member hostage.

It is often difficult for the magistrate conducting the bail hearing to determine whether or not any of these factors exists from information the accused provides during the bail hearing. For this reason, the magistrate who conducts the probable cause hearing that involves family violence should question the victim if available to determine whether there is an indication of any of these factors. If one or more of these factors are occurring, the magistrate could have the complainant document this in the DC-311, CRIMINAL COMPLAINT form. Additionally, the magistrate conducting the probable cause determination could enter information the magistrate feels appropriate to the consideration of bail into the eMagistrate system for later use by the magistrate conducting a bail determination hearing.

The magistrate conducting the bail determination hearing involving family violence needs to review any attached criminal complainant before making the bail determination.

Additionally, the magistrate conducting the bail determination hearing should check for notations made in the eMagistrate system by the magistrate who conducted the probable

cause determination for relevant information regarding bail. Should the magistrate find from the evidence provided by the accused or the DC-311, CRIMINAL COMPLAINT form in the bail hearing that the accused is likely to harm the crime victim or another person, the magistrate should hold the accused without bail. The magistrate also should document the reason for this decision on a DC-327, CHECKLIST FOR BAIL DETERMINATION form. This will provide the court reviewing bail with information that might not otherwise be available.

V. SETTING TERMS OF BAIL OR CONDITIONS OF RELEASE (§ 19.2-123)

Once the magistrate determines that facts presented in the bail hearing do not require the magistrate to hold the accused without bail pursuant to Va. Code § 19.2-120, the magistrate must determine what conditions of release are appropriate. Virginia Code § 19.2-123 subsection A requires the judicial officer to set a secured bond when certain factors are present. The situations that trigger a mandatory secured bond as a condition of release are as follows:

The defendant is currently before the magistrate for a bail hearing after an arrest on a felony charge **AND**

- the defendant has previously been convicted of a felony, **OR**
- the defendant is presently on bond for an unrelated arrest (**NOTE:** a defendant released simply on a recognizance is not "on bond." A defendant who is on release on an unsecured or secured bond, is "on bond."); **OR**
- the defendant is presently on probation or parole.

The statute allows a magistrate, judge, or clerk to release a defendant qualifying for a secured bond on a simple recognizance or on an unsecured bond **only** with the concurrence of the attorney for the Commonwealth. Nothing, however, prohibits a magistrate from setting a secured bond in a nominal amount in those situations where the magistrate deems that the facts warrant the release of the defendant.

If the facts presented in a bail hearing do not trigger the mandatory secured bond, the magistrate needs to consider determining bail in the least restrictive terms tailored to the individual case. In other words, the terms should be only those necessary to guarantee the defendant's appearance in court and those necessary to ensure that the defendant does not constitute a danger to self or the public. If the magistrate believes that preprinted conditions of the DC-330, RECOGNIZANCE form are sufficient to ensure the accused's appearance and good behavior, the magistrate should impose only these minimal conditions. After weighing the evidence, should the magistrate feel that a bond and other conditions of release are necessary to ensure appearance in court and good behavior, the magistrate must require a bond or special conditions.

Virginia Code § 19.2-135 sets forth conditions that must be part of every recognizance. The conditions of release mandated by statute are as follows:

- the accused must appear to answer the charge before the court where the case is to be tried at such time as stated in the recognizance, and at any time or times which the proceedings may be continued;

- the accused may not depart from the Commonwealth unless the judge or magistrate specifically waives this provision in the DC-330, RECOGNIZANCE form;

- the accused must keep the peace and be of good behavior until final disposition of the case.

Since these conditions are mandatory, the language appears preprinted on the DC-330, RECOGNIZANCE form. However, magistrates must make a determination as to whether or not the accused will be permitted to leave the Commonwealth. The language of the statute makes it clear that the default position is that the accused may not depart from the Commonwealth during the period the accused is under the recognizance of the court.

However, the magistrate may specifically waive this provision if the magistrate finds the restriction is unnecessary.

In addition, Va. Code § 19.2-123 allows a judicial officer to impose any of the following additional conditions of release:

> "Place the person in the custody and supervision of a designated person, organization, or pretrial services agency."

By statute, the pretrial services agency does not include a court services unit that is established pursuant to Va. Code § 16.1-233.

This option is often used when a law enforcement officer has arrested the accused for being intoxicated in public or for driving under the influence. The magistrate should carefully assess whether the accused is a suitable candidate for custodial release in such a case. A custodian would have difficulty controlling an intoxicated person who is combative or violent, and therefore, the magistrate should not consider this option in such cases.

The term "organization" includes many different entities and the magistrate may interpret the term broadly. For example, a representative from the armed forces often acts as a custodian for an active duty military member in those jurisdictions having a military base. Pretrial services agencies serve many localities. The focus of these agencies is to provide supervision for defendants prior to their trials to ensure that they meet all court appearances and to ensure good behavior. Another function of pretrial services is set forth in Va. Code§ 19.2-152.2:

> "It is the purpose of this article to provide more effective protection of society by establishing pretrial services agencies that will assist judicial officers in discharging their duties pursuant to Article 1 (§ 19.2-119 et seq.) of Chapter 9 of this title. Such agencies are intended to provide better information and services for use by judicial

> officers in determining the risk to public safety and the assurance of appearance of persons age 18 or over or persons under the age of 18 who have been transferred for trial as adults held in custody and charged with an offense, other than an offense punishable as a class 1 felony, who are pending trial or hearing."

In many areas, magistrates will require entry into pretrial services as a condition of release in lieu of requiring a secured bond in appropriate cases. Procedures for assigning defendants to pretrial services vary by locality. Magistrates should seek guidance from the chief magistrate regarding what services are provided by each local pretrial program and which defendants are appropriate for referral.

Virginia Code § 19.2-123 allows those pretrial service agencies that offer a court-approved drug-testing program to request that the accused voluntarily give a urine sample, submit to a drug or alcohol screening, or take a breath test for presence of alcohol prior to the bail hearing. If the pretrial services agency decides to request the sample, screening, or test, the agency and the magistrate must inform the accused that the results can be used only to determine conditions of release. The statute requires the magistrate to set bail prior to learning of the results of the test. Should the accused test positive for drugs, the magistrate may then require the accused to refrain from use of alcohol or illegal drugs and require the accused to be tested on a periodic basis until final disposition of the case. The results of any sample, screening, or test are not admissible in any judicial proceeding other than for the imposition of sanctions for a violation of a condition of release. Drug and alcohol screenings conducted prior to bail hearings are very rare. Most judicial districts do not participate in such screenings.

> "Place restrictions on the travel, association or place of abode of the person during the period of release and restrict contacts with household members for a specified period of time."

The magistrate may restrict travel in a number of ways. For example, the magistrate may order the accused not to go into the Town of Goshen until final disposition of the case. The magistrate might place as a condition of release that the accused may not go upon the property of Valley View Mall until final disposition of the case. Another example would be for the magistrate to restrict the accused to travel within Lee County, Virginia, until final disposition of the case. In the Attorney General Opinion to Bryant, dated 2/20/98 (1998, page 61); the Attorney General stated, *"[i]t is my opinion that judges and magistrates currently have the discretion to order individuals charged with or convicted of drug or prostitution offenses … to stay out of certain geographical areas, such as drug-free and prostitution-free zones, as a condition of pretrial release, probation or suspended sentence*."

A restriction of association as a condition of release most often involves contacts with other people. Where the magistrate is conducting a bail hearing for a person arrested for assault and battery, the magistrate customarily will forbid the accused to have any contact whatsoever with John Doe until final disposition of the case.

As a condition of release, the magistrate may forbid the accused from returning to his or her house until final disposition of the case. That the accused may own the house has no bearing on the magistrate's ability to bar the accused from his or her residence. The magistrate also may require the defendant to live with a relative as a condition of release. Before including such a provision as a condition of release, the magistrate must ensure that the relative consents to this arrangement.

The term "household member" as used in Va. Code § 19.2-123 is not the same as the term "family and household member" as defined in Va. Code § 16.1-228. To qualify as a "household member" for purposes of Va. Code § 19.2-123, the accused and the other party must simply live in the same home.

- "Require the execution of an unsecured bond."

  In this type of bond, the defendant enters into the bond obligation by signing the bond portion DC-330, RECOGNIZANCE form. If the court or magistrate also requires a surety on the unsecured bond, the surety is not required to prove solvency through a showing of equity in real or personal property.

- "Require the execution of a secure bond…"

  The method in securing a bond is statutorily stated, as at the option of the accused. The secure bond is satisfied by either a sufficiently solvent surety or sureties, or by the deposit of cash in lieu thereof. Only the actual value of any interest in real estate or personal property owned by the proposed surety shall be considered in determining solvency. Solvency is found if the value of the proposed surety's equity in the real estate or personal property they own equals or exceeds the amount of the bond. Virginia Code § 19.2-123.

  This provision of Va. Code § 19.2-123 specifically prohibits two practices that have been common in the past – the setting of cash-only bonds, and not allowing the surety to prove solvency through a showing of equity in personal property.

- "Require the accused to do any of the following:"

  - maintain employment or, if unemployed, actively seek employment;
  - maintain or commence an educational program;
  - avoid all contact with an alleged victim of the crime and with any potential witness who may testify concerning the offense;
  - comply with a specified curfew;

- refrain from possessing a firearm, destructive device, or other dangerous weapon;

- refrain from excessive use of alcohol, or use of any illegal drug or any controlled substance not prescribed by a health care provider; and

- submit to testing for drugs and alcohol until the final disposition of his case

- "Place a prohibition on a person who holds an elected constitutional office and who is accused of a felony arising from the performance of his duties from physically returning to his constitutional office."

  The magistrate must be cautious before applying this condition of release. It will only be appropriate in certain limited sets of circumstances.

  - First, this condition could only become applicable to an individual who holds an elected constitutional office.

  - Secondly, the individual must be charged with a felony offense ***"arising from the performance of his duties"*** as that elected official.

    Example: The local County Treasurer is charged with Va. Code § 18.2-112 embezzlement of the County funds he received in trust by operation of his employment. This offense is designated as a Class 4 Felony and the accused is an elected constitutional officer. Requiring, as a condition of release, that the accused not physically return to his constitutional office per Va. Code § 19.2-123 (A)(3b) may be an appropriate requirement for the bail determination in this case.

    However, if that same County Treasurer were to take a vehicle that was parked in the parking lot at his workplace, with the keys in the ignition and the door unlocked at 4:45 p.m. on a Friday, simply because his car would not start and he needed to deposit public monies in the bank before 5:00 p.m. (a requirement in the performance of his duties) he could be charged with the felony violation of Va. Code § 18.2-102 regarding unauthorized use of an automobile. This same elected constitutional officer now stands before the magistrate for a bail hearing on that felony charge. Requiring as a condition of release that the accused not physically return to his constitutional office per Va. Code § 19.2-123 (A)(3b) would not be an appropriate requirement for the bail determination in this case because the felony charge was not a "felony arising from the performance of his duties" but was committed ancillary to his duties.

- "Require the accused to accompany the arresting officer to the jurisdiction's fingerprinting facility and submit to having his photograph and fingerprints taken prior to release."

- This provision allows magistrate to require fingerprinting and photographing as a condition of bail to facilitate compliance with Va. Code §19.2-390 for CCRE reportable offenses.

- A magistrate should not issue a commitment order for a defendant who is immediately able to meet the terms of bail for the sole purpose of fingerprinting and photographing. The purpose of the commitment order is to place the defendant in jail when he is not able to meet the conditions of release.

- "Impose any other condition deemed reasonably necessary to assure appearance as required, and to assure his good behavior pending trial, including a condition requiring that the person return to custody after specified hours or be placed on home electronic incarceration pursuant to § 53.1-131.2, or, when the person is required to execute a secured bond, be subject to monitoring by a GPS (Global Positioning System) tracking device, or other similar device."

  - The magistrate use of bail conditions requiring that the accused return to custody after specified hours is infrequently used and somewhat problematic due to monitoring and compliance.

  - The magistrate use of requiring the accused to be placed on home electronic incarceration is limited, in practical terms, due to the statutory requirements for the installation and monitoring of the subject. Courts use this term far more regularly than do magistrates in the court's orders for bail following review or appeal of the initial bail determination.

  - The magistrate use of GPS tracking device is limited, in practical terms, due to the requirements for the installation and monitoring of the device.

    Before the magistrate imposes one of these conditions, the magistrate should seek further guidance from the chief magistrate for the locality practices regarding these conditions.

- The magistrate may impose any other condition that is reasonable, and which relates to the purpose of assuring that the accused appears in court, and will keep the peace and be of good behavior pending trial.

VI. COURT ORDERED TERMS OF BAIL

A. Bail Terms Set by Court on a Capias to be Honored by Magistrate (Virginia Code § 19.2-130.1)

Virginia Code § 19.2-130.1 provides for the authority of a court to order terms of bail to be set by a magistrate when issuing a capias for an accused. The statute provides as follows: "A magistrate who is to set the terms of bail of a person arrested and brought before him pursuant to § 19.2-234 shall, unless circumstances exist that

require him to set more restrictive terms, set the terms of bail in accordance with the order of the court that issued the capias, if such an order is affixed to or made a part of the capias by the court."

Whenever an accused is arrested upon a capias issued by any court and brought before a magistrate for bail determination, the magistrate must take care to determine if the court has exercised the authority under this statute to order certain terms of bail to be set by the magistrate.

B. Orders Issued Pursuant to Va. Code § 19.2-130.1

a. In General

i. The order is binding upon the magistrate when the magistrate is the judicial officer that is setting bail pursuant to Va. Code §§ 19.2-234, 19.2-80.

ii. It is the court that issued the capias that may order bail terms to be set by the magistrate.

iii. The court's order for a term or for terms of bail may either be affixed to, or made a part of the capias by the court issuing the capias.

Whenever a law enforcement officer arrests a person upon a capias and brings the accused before a magistrate in accordance with those sections, the magistrate will conduct a bail hearing according to the requirements found within the Bail Reform Act.

The magistrate will be the judicial officer determining bail and must do so in accordance with an order of the court affixed to or made a part of the capias.

b. Appearance of an Order Issued Pursuant to Va. Code § 19.2-130.1

Court orders issued pursuant to the authority under Va. Code § 19.2-130.1 may appear in various formats. First the court order may be a separate attached order signed by the judge. Secondly, the judge of the court issuing the capias may sign the capias itself with the terms to be set by the magistrate made a part of that capias. Additionally, the court may order that the terms of bail to be fixed by the magistrate are to be made a part of the capias ordered by the court which is signed by the clerk, but the capias itself is a memorialized version of the court's orders.

i. The court order may be signed by the judge and affixed to the capias.

ii. The court order may be made a part of the capias and be signed by the judge.

iii. The court order may be made a part of the capias and the capias signed by the

See the following forms:

1. DC-361, CAPIAS: ATTACHMENT OF THE BODY
2. DC-361X, CAPIAS: ATTACHMENT OF THE BODY (MASTER)
3. DC-483, CAPIAS: ATTACHMENT OF THE BODY (CIVIL)
4. CC-1301, CAPIAS
5. CC-1356, CAPIAS TO SHOW CAUSE

C. Setting Terms "In Accordance" With the Court Order

a. Inclusion of Terms

After conducting the bail determination hearing the magistrate must set the terms of bail or commit the defendant to jail. Terms ordered by the court under the authority of Va. Code § 19.2-130.1 are to be included in the magistrate's order.

b. Additional Terms

A magistrate may set additional terms of bail other than what was ordered by inclusion with or affixed to a capias so long as the additional terms are still, "in accordance with" the ordered terms.

Other non-conflicting terms could be added to what term or terms included in the court order. – *See* Va. Code § 19.2-123

c. Specific Examples

If the included or affixed court order is an order for no bail admission, then a magistrate could not set any additional terms of bail, as that would conflict with the court order for no admission to bail on any terms. The magistrate would simply commit the person to jail.

If the order is for a particular term or group of particular terms (ex. $5,000 secure bond; or $1,000 unsecured bond and no contact) the magistrate would set those terms of bail. A magistrate would not lower the amount of the required bond, nor require a less restrictive type of bond. No conflicting terms would be included (i.e. in the second example above, "no contact except for telephone").

D. Magistrate Findings for More Restrictive Terms

a. Statutory Authority

The 2011 amendments to this statute provide for an exception to the mandatory setting of the court ordered terms. The statutory exception states, "A magistrate

… shall, unless circumstances exist that require him to set more restrictive terms, set the terms of bail in accordance with the order of the court …"

b. Findings

A magistrate may find during the course of the bail determination hearing that more restrictive terms of bail are necessary for the safety of the accused, the safety of the public, or the appearance of the accused (or a combination).

This statutory language reinforces the procedural necessity of conducting a full bail determination hearing as required by the general statutes on bail.

c. Procedures

- Upon the conclusion of the bail determination hearing, the magistrate would set the terms of bail in accordance with the order of the court as noted above, unless circumstances dictate more restrictive bail terms.
- Where more restrictive terms are required, the magistrate would inform the accused of the terms of bail the magistrate has set.
- The magistrate would then prepare the appropriate order (either a DC-330 RECOGNIZANCE form, or a DC-352, COMMITMENT ORDER form - depending upon whether or not the defendant may be released or is able to presently meet the terms of bail as set by the magistrate).

E. Considerations for Magistrates on Orders for Bail Terms

a. Court Orders Generally

When a court has "legal authority to render an order, then it must be obeyed even though it was erroneous or improvidently entered." Robertson v. Commonwealth, 181 Va. 520, 537, 25 S.E.2d 352, (1943) (citation omitted).

The Court in Robertson also stated that, "the power to decide includes the power to decide wrong, and an erroneous decision is as binding as one that is correct until set aside or corrected in a manner provided by law." *Id.* at 537.

b. Court Jurisdiction for Bail Term Orders

Circuit and district courts have subject matter jurisdiction in criminal cases. Likewise, when exercising criminal jurisdiction, circuit and district courts have subject matter jurisdiction over bail matters in general. *See* Va. Code § 19.2-120

More specifically, circuit and district courts have subject matter jurisdiction with authority to make orders in connection with a capias for bail terms to be set, *see* Va. Code § 19.2-130.1.

c. Disobedience to Court Orders

- The Court in Robertson (noted above) further stated:

  It is, of course, well settled that disobedience of, or resistance to a void order, judgment, or decree is not contempt. This is so because a void order, judgment, or decree is a nullity and may be attacked collaterally.

- But there is a vast difference between a judgment which is void and one which is merely erroneous ..... [A] void judgment should be clearly distinguished from one which is merely erroneous or voidable. There are many rights belonging to litigants — rights which a court may not properly deny, and yet if denied, they do not render the judgment void. Indeed, it is a general principle that where a court has jurisdiction over the person and the subject matter, no error in the exercise of such jurisdiction can make the judgment void, and that a judgment rendered by a court of competent jurisdiction is not void merely because there are irregularities or errors of law in connection therewith. This is true even if there is a fundamental error of law appearing upon the face of the record. Such a judgment is, under proper circumstances, voidable, but until avoided is regarded as valid.

  Id. at 536-537 (emphasis added) (internal citations omitted).

- In Epps v. Commonwealth, 47 Va. App. 687, 626 S.E.2d 912, (2006) (en banc), aff'd 273 Va. 410, 641 S.E.2d 77 (2007), a sheriff argued that he had no duty to obey a court's order because of the terms contained therein. In essence, the sheriff argued that the judge exceeded her authority concerning what she had ordered the sheriff to do. Although the Court of Appeals reversed his conviction on other grounds, it stated:

  > Clearly, the trial court has subject matter jurisdiction to address courtroom and courthouse security issues. Whether the trial court could order security when the court is not in session is not jurisdictional. The error, if any, would be as to whether the trial court had the authority to exercise its subject matter jurisdiction..... If the court lacks authority to exercise its subject matter jurisdiction, the order would be erroneous or voidable, not void, ...and appellant's remedy would be a direct appeal, not disobedience.
  >
  > Of course a party cannot be guilty of contempt of court for disobeying an order which the court had no authority of law to make, but if a court has

jurisdiction of the parties and legal authority to render the order, then it must be obeyed even though it was erroneous or improvidently entered.

When one subject to a court order disobeys that order contending the order is void, he does so at his peril, as appellant did here.

Id. 701-702 (emphasis added).

VII. BOND AS A CONDITION OF BAIL

A. Recognizance

A bond is a written contract signed by the defendant and a surety, if any, that obligates the defendant and the surety to pay a sum of money should the court forfeit the bond at a forfeiture hearing upon a finding that the defendant failed to appear as directed in the conditions of the recognizance. Not every release decision is dependent upon the accused signing a bond obligation. After analyzing the facts obtained in a bail hearing, the magistrate may decide that it is unnecessary to require a bond to ensure the appearance of the accused in court and to ensure his or her good behavior. If a bond is unnecessary, the magistrate simply requires the accused to sign only the front-page portion of the DC-330, RECOGNIZANCE form. By signing at the bottom of the first page, the accused promises to appear in court and abide by any other conditions of release that the magistrate imposes. However, there is no bond obligation to sign on the reverse of the form.

Consequently, a release on a recognizance is similar to a release on a uniform summons inasmuch as the accused simply signs a document promising to appear in court on the trial date. This procedure is known as releasing the defendant upon a recognizance. This type of release is the least restrictive of all release possibilities. Although there is no bond obligation, the court or magistrate may still revoke bail and commit the accused to jail upon a violation of any of the conditions of release. The court may also impose criminal sanctions against the accused after finding of contempt pursuant to Va. Code § 18.2-456, or after a criminal trial on a violation of the failure to appear offense. Virginia Code § 19.2-128.

B. Unsecured Bond

An unsecured bond is a type of condition that a magistrate may impose in addition to the conditions mandated in the recognizance. When setting an unsecured bond as a condition of release, the magistrate requires the accused to sign the obligations contained in the recognizance portion of the DC-330, RECOGNIZANCE form, and requires the accused and the surety, if any, to enter into a bond by signing the bond portion of the form. Although more restrictive than the mere signing of the recognizance, a release upon an unsecured bond does not require the magistrate to inquire into the accused's or the surety's solvency. In other words, the ability of the accused or surety to pay the bond obligation, should the accused default by failing to

appear in court as directed, is immaterial for purposes of release. Virginia Code § 19.2-143 sets forth the court's procedure when the defendant fails to appear:

> *When a person, under recognizance in a case, either as party or witness, fails to perform the condition of appearance thereof, if it is to appear before a court of record, or a district court, the court shall record the default therein, and shall issue a notice of default within five days of the breach of the condition of appearance. If the defendant or juvenile is brought before the court within 150 days of the findings of default, the court shall dismiss the default upon the filing of a motion by the party in default. After 150 days of the finding of default, his default shall be recorded therein, and if it is to appear before a district court, his default shall be entered by the judge of such court, on the case papers unless the defendant or juvenile has been delivered or appeared before the court.*

C. Secure Bond

A third type of release on bail involves a "*secure*" bond. Subparagraph (A)(3) of Va. Code § 19.2-123 sets forth the basic requirements of a secured bond:

> "Require the execution of a secure bond which at the option of the accused shall be satisfied with sufficient solvent sureties, or the deposit of cash in lieu thereof. Only the actual value of any interest in real estate or personal property owned by the proposed surety shall be considered in determining solvency and solvency shall be found if the value of the proposed surety's equity in the real estate or personal property equals or exceeds the amount of the bond…"

The statute gives the defendant two ways to meet the secure bond obligations. He can use cash to secure the bond, or he can use a surety to secure the bond. Neither a court, nor clerk, nor magistrate can dictate the defendant's choice. Subparagraph (A)(3) of Va. Code § 19.2-123 authorizes a judicial officer to impose the specific condition to "[r]equire the execution of a secure bond which at the option of the accused shall be satisfied with sufficient solvent sureties, or the deposit of cash in lieu thereof ...." That specific provision controls the ability of a judicial officer to order other general conditions. Subparagraph (A)(4) of Va. Code § 19.2-123 states that the judicial officer may "[i]mpose any other condition deemed reasonably necessary to assure appearance as required, and to assure his good behavior pending trial, including a condition requiring that the person return to custody after specified hours or be placed on home electronic incarceration pursuant to Va. Code § 53.1-131.2." Based on the rationale in Lewis v. Lewis, 53 Va. App. 528, 673 S.E.2d 888 (2009), the general authority to impose "any other condition" is limited to matters not specifically addressed elsewhere in the statute. The deposit of cash is specifically addressed in the statute and left to the option of the accused. Therefore, a judicial officer may not mandate a "cash only" bond. Citing Va. Code § 19.2-123, the Virginia Court of Appeals in Bretz v. Commonwealth, No. 0355-89-3 (Ct. of Appeals April 5, 1989) overturned a circuit court judge's order requiring a cash-only bond in a criminal case.

Although Va. Code § 19.2-123 (A)(3) calls this type of bond "secure" the bond is not "secured" in the legal sense of the word. If the defendant chooses to use a surety in a secure bond, the bond is not secured by the property in which the surety shows equity. The surety does not grant the Commonwealth or locality a security interest in specific real or personal property through a deed of trust or security agreement.

Virginia Code § 19.2-123 deems a bond "secure" once the surety shows that he has enough equity in real estate or personal property that equals or exceeds the amount of the bond. If the court forfeits such a bond, the court enters a judgment against the surety and defendant. This judgment is like any other civil judgment. The Commonwealth or locality must enforce a bond forfeiture judgment in the same. manner as a plaintiff would enforce any other type of civil judgment. A deposit of cash in lieu of a surety does secure the bond in a legal sense, however.

Virginia Code § 19.2-123 gives the surety a choice on how to show solvency. The surety can prove solvency by showing the value of his equity in either real estate or personal property. Virginia Code § 19.2-123 subparagraph (A)(3) unequivocally gives the surety the option to prove solvency through a showing of equity in real estate or personal property. Failure to allow an equity showing in personal property constitutes a direct violation of Canons 2A and 3B of the Canons of Conduct for the Virginia Magistrates.

VIII. PROVING SOLVENCY THROUGH REAL OR PERSONAL PROPERTY

Should the magistrate decide that a secured bond based upon facts considered during a bail hearing, he or she must inform the accused of the manner in which the accused or a surety may meet the secured bond obligations. As outlined earlier, the accused may use cash to secure the bond. In lieu of cash, the accused may also have a third party to act as a surety on the bond. The surety can either be a bondsman or a person who owns real or person property.

A person who is not a bondsman and who wants to act as a surety must prove solvency as outlined in Va. Code § 19.2-123. When determining solvency, the magistrate needs to be assured that the surety or sureties own the real or personal property in question, and the magistrates needs proof of the value of the property. There are no statutory guidelines as to what documentation is required to prove ownership or value. Generally, magistrates require the surety or sureties show a deed, a recent tax assessment, and a recent mortgage statement for real property. Magistrates usually require an appraisal or some other evidence of the value if the surety or sureties wish to prove solvency through equity in personal property. Sales receipts showing the value of the property give an indication of the value. For tax purposes, localities prepare tax assessments of vehicles and manufactured homes. Magistrates may use these assessments as evidence of value. Bank accounts, savings accounts, stocks, bonds, mutual funds, etc., all are types of personal property. For checking or savings accounts, a recent ATM printout of the status of the account should suffice as acceptable documentation of the account balance. To properly document ownership, value,

and encumbrances, the magistrate must require all sureties complete a DC-332, AFFIDAVIT OF SURETY form. Any false statement knowingly made on this form constitutes perjury since the surety swears or affirms that the information on the affidavit is correct.

Regardless of the amount of the secured bond, the magistrate should always require the DC-332, AFFIDAVIT OF SURETY form. It is important to apply bail procedures consistently. Requiring the affidavit in some cases, but not in others, invites just criticism from the public.

Sometimes several people may act as sureties for a defendant. For example, the magistrate sets a $40,000 secure bond as a condition of bail. Four brothers of the defendant each own a vehicle and each have $10,000 equity in each of the vehicles. Each of the four brothers agrees to act as a surety. In this case the magistrate should prepare four separate DC-330, RECOGNIZANCE forms in the amount of $10,000 – one for each of the four brothers. Each brother needs to sign the surety line on the form specific to him. The defendant must sign all four forms. Preparing the form in this fashion clarifies that each brother is obligated only for $10,000. If the magistrate prepared only one DC-330, RECOGNIZANCE form and had all four brothers to sign the one form, all four brothers would be liable for the entire $40,000, jointly and severally. Assume that the four brothers jointly own a bulldozer worth $45,000, and want to act as sureties in the above example. Since all four jointly own the item, the magistrate needs to prepare one DC-330, RECOGNIZANCE form with all four brothers and the defendant signing the one form. This is necessary since the personal property in which the brothers are showing equity is jointly owned. The jointly owned bulldozer is the asset against which the Commonwealth could enforce the forfeiture judgment in the case of a default.

An examination of the deed provides the easiest way to determining ownership of real property. In the deed, owners of the property are referred to as "Grantees." If the deed grants the property to the grantees as *tenants by the entirety with the right of survivorship*, the magistrate must ensure that both grantees sign the bond as surety. Otherwise, the real property is not an asset available to satisfy a judgment once the court enters it after the bond forfeiture hearing. Only spouses can be grantees in a deed granting title by tenants by the entirety with the right of survivorship. To enforce a judgment against real property jointly owned by spouses as tenants by the entirety, the judgment must be against both. If the deed transfers real property to the grantees as tenants by the entirety with right of survivorship, the surviving spouse owns the property outright at the death of the other spouse, regardless of the provisions of the will. In other words, the dead spouse's interest in the property passes through the deed, not through a will or the law of intestate succession.

A deed may transfer ownership of real property to grantees as *tenants in common*. This type of transfer may involve either married or unmarried individuals. A person who owns an interest in property as a tenant in common can transfer his interest to another party. A judgment can be enforced against the property of the judgment debtor who owns property as a tenant in common. The problem in these situations is to determine what percentage of the property to which the person is entitled. If the surety can show value of the equity in the portion in which he has an ownership interest, he may act as a surety on a bond without

the other tenant or tenants in common also acting as sureties on the bond. In other words, all owners of the property do not have to sign the recognizance form as sureties. Only the person who wishes to act as a surety must sign the bond portion of the form. If the deed transfers ownership of property to the grantees as *tenants in common*, and one of the grantees dies, the deceased person's interest in the property passes through the will. If there is no will, the interest passes through the law of intestate succession. The person who acquires this interest can act as a surety on a bond if he can prove to the magistrate's satisfaction that he has acquired the property interest and that he has sufficient equity.

A third type of tenancy is called *joint tenancy with the right of survivorship*. Unlike tenants by the entirety with the right of survivorship, this type of tenancy is not restricted to spouses. The joint tenancy also differs from a tenancy by the entirety because it does not give immunity to the joint tenants from the claims of their separate creditors. In this form of tenancy, upon the death of one tenant, his interest passes through the deed and not by will or intestate succession. Consequently, the property is not an asset of the deceased person's estate. For this reason, all parties who own real property as joint tenants with the right of survivorship must act in concert as sureties for the equity in the jointly held property to be considered in a criminal bond situation.

The transfer of personal property occurs either through a will or through the laws of intestate succession at the death of the owner. A surety can show ownership of personal property through titles and other records and document ownership of the same through the DC-332, AFFIDAVIT OF SURETY form.

If the surety wishes to show solvency through personal property, the magistrate does not take possession of the personal property. Rather the property's value is documented on the DC-332, AFFIDAVIT OF SURETY form. It is permissible for a surety to prove solvency through personal property such as bank accounts, stocks, and bonds. The surety agrees under the language of the DC-330, RECOGNIZANCE not to use, encumber, or dispose of property used to show solvency up to the amount of the secured bond. So, for example, the surety may deposit and withdraw funds from a checking account used to show solvency as long as the surety maintains sufficient funds in the account to meet the obligations of the bond the surety secured.

When a surety wishes to show equity in a vehicle, Va. Code § 8.01-419.1 allows the magistrate to use tabulated retail values set forth in the National Automobile Dealers' Association (NADA) "yellow/blue/black" books, or any vehicle valuation service regularly used and recognized in the automobile industry to establish the fair market value of the automobile or truck. In cases where the surety proves equity in a motor vehicle, it is a good practice for the magistrate to see the title and question the surety under oath as to the vehicle's condition and odometer reading.
The question arises whether the accused may show solvency through real or personal property that he solely owns. A thorough reading of Va. Code § 19.2-123 and the legal definition of a surety lead to the conclusion that the accused may not show solvency through real or personal property that he solely owns. A surety is a person who agrees to

pay money in the event that the principal (the accused) on the bond fails to perform the obligation on the bond. In simple terms, the surety co-signs the bond obligation.

A person who jointly owns personal property with the defendant may act as a surety if the value of the equity in the surety's share of the jointly owned property equals or exceeds the amount of the bond. Similarly, a person who owns real property with the defendant as tenants in common or joint tenants with the right of survivorship also may act as a surety if the amount of the surety's equity in the property equals or exceeds the amount of the bond. If the surety and defendant are married and own property as tenants by the entirety, the spouse of the defendant may act as a surety. The total value of the equity in the real property is used rather than a 50% share since each person who owns property as tenants by the entirety is deemed to own an undivided interest in the entire property.

In discussing the various options available in a secured bond, the magistrate should stress to the accused that if he or she chooses to use the service of a bondsman, the bondsman's fee is non-refundable. If however, the accused or a surety, posts cash with the magistrate, the court refunds all of that money at the conclusion of the case. Also, if a surety wishes to prove solvency through real or personal property, the surety may not dispose of such property until final disposition of the case under the terms of the bond contract. If a surety has posted cash with the magistrate and later wishes to substitute a showing of solvency in real or personal property, the surety can do so by seeking approval of the judge having trial authority. If the magistrate is unable to determine satisfactorily solvency or ownership, the magistrate should refuse to allow the person to act as a surety. The magistrate then must inform the person that he or she may appeal this decision to a judge who will re-examine the evidence.

If the magistrate accepts a cash bond in excess of $10,000.00, the magistrate may have to file an IRS form 8300. The magistrate must refer to the "Accounting and Prepayment" chapter of this manual to determine whether the cash bond in excess of $10,000.00 triggers the form 8300 filing requirement. If the accused or a surety posts cash, the magistrate should ask the person whether he or she wishes to allow the court to take fines and costs out of the bond should the court convict the defendant. If the accused or surety chooses to allow the court to take fines and costs out of the bond upon conviction, the magistrate then has the person posting the cash sign the reverse of the DC-330, RECOGNIZANCE form on the appropriate line. Neither a magistrate nor a court can require the person posting the cash bond to agree to this as a condition of release. Before taking any cash bonds, the magistrate needs to review carefully the "Accounting and Prepayment" chapter of this manual. The magistrate also should examine the currency tendered in a cash transaction, and should reject any suspicious bills. Bills in denominations of $100.00, $50.00, $20.00, $10.00, and $5.00 of the old design printed within the past ten years carry a plastic strip visible when held to the light. All bills of the new design carry a watermark that is also visible when held to the light.

IX. SURETIES AND BONDSMEN

A surety on a criminal bond falls into three distinct categories. The surety is a property bail bondsman, a surety bail bondsman, or a person who acts as a surety without compensation.

The preceding section explained the procedures concerning a surety who acts as such without compensation. Bail bondsmen are a unique type of surety.

The Criminal Justice Services Board has adopted a full regulatory scheme covering everything from general definitions to the training, licensure, activities, and discipline of bail bondsmen. The regulations adopted pursuant to Va. Code § 9.1-185.2 can be found in Title 6 Virginia Administrative Code Agency 20 Chapter 250 (6 VAC 20-250 et seq.). The regulations are authorized by statute and mirror the requirements found in Va. Code §§ 9.1-185 through 9.1-185.18, but also regulate bondsmen in other matters as well. These regulations as well as the Virginia Code authorize the Department of Criminal Justice Services to oversee the matters relating to bail bondsman that fall within the scope of the Criminal Justice Services Board's authority.

According to Va. Code § 9.1-185 and 6 VAC 20-250-10 of the Virginia Administrative Code, a "bail bondsman" is any person who is licensed by the Department of Criminal Justice Services to engage in the business of bail bonding and is authorized to conduct business in all the courts of the Commonwealth. If the individual does not engage in the business of bail bonding, in other words, "does not receive profit or consideration for his services" (Va. Code § 9.1-185.1) then that individual is not a bail bondsman and is not regulated by the provisions of Article 11 Chapter 1 of Title 9.1 of the Code of Virginia nor by the Regulations adopted by the Department of Criminal Justice Services.

Both the property bail bondsman and the surety bail bondsmen are people who act as sureties on secured bonds for a fee. A bondsman operates by guaranteeing the amount of the bond for the accused. The bondsman then charges a non-returnable fee, which pursuant to Va. Code § 9.1-185.8 can neither be less than 10 percent, nor more than 15 percent of the amount of the bond. A licensed bail bondsman cannot loan money with interest for the purpose of helping another obtain a bail bond. If the defendant fails to appear as directed, the court may enforce the bond against the property bail bondsman or, in the case of a surety bail bondsman, the insurance company for which the surety bail bondsman is an agent with power of attorney.

There is a distinction between a property bail bondsman and a surety bail bondsman. This difference affects how the magistrate handles the bond transaction. The surety bail bondsman is an agent of a guaranty, indemnity, fidelity, or security company registered to do business in Virginia. If the court forfeits the bond on which a surety bail bondsman is obligated, the insurance company is liable for the forfeited bond. The surety bail bondsman receives only a percentage of the fee charged for entering into the bond, since he or she is acting as an agent of the company. The insurance company retains the main portion of the bond premium. A property bail bondsman, on the other hand, is not an agent of an insurance company. If the court forfeits the bond on which the property bail bondsman is obligated, he or she is personally liable for the debt. The property bail bondsman, however, may have agents working for him or her.

The distinction between property bail bondsmen and surety bail bondsmen as defined in the statutes and regulations are these:

A "property bail bondsman" means a person licensed pursuant to the requirements found in the statutes and regulations who, for compensation, enters into a bond or does so through his agent and who pledges real property, cash or certificates of deposit issued by a federally insured institution, or any combination thereof as security for a bond as defined in § 19.2-119 of the Code of Virginia that has been posted to assure performance of terms and conditions specified by order of an appropriate judicial officer as a condition of bail.

A "surety bail bondsman" means a person licensed pursuant to the requirements found in the statutes and regulations who is also licensed by the State Corporation Commission as a property and casualty insurance agent, and who sells, solicits, or negotiates surety insurance as defined in § 38.2-121 of the Code of Virginia on behalf of insurers licensed in the Commonwealth, pursuant to which the insurer becomes surety on or guarantees a bond, as defined in § 19.2-119 of the Code of Virginia, that has been posted to assure performance of terms and conditions specified by order of an appropriate judicial officer as a condition of bail.

Both property bail bondsmen and surety bail bondsmen must obtain a license from the Department of Criminal Justice Services (DCJS). Article 11 of Chapter 1 (§§ 9.1-185 through 9.1-185.18) of Title 9.1Code of Virginia and Chapter 250 of Agency 20 (6 VAC 20-250 et seq.) of Title 6 of the Virginia Administrative Code set forth the statutory and regulatory requirements governing both types of bail bondsmen and their agents. To be licensed as a bail bondsman pursuant to Va. Code § 9.1-102 (43) the applicant must meet all of the statutory and regulatory requirements under Article 11 of Chapter 1 Title 9.1 Code of Virginia and of Part III of Chapter 250 under Agency 20 of Title 6 Virginia Administrative Code. The basic eligibility criteria require that the applicant:

a. Be a minimum of 18 years of age;

b. Be a United States citizen or legal resident alien of the United States;

c. Have received a high school diploma or GED;

d. Have successfully completed all the initial training requirements, pursuant to the compulsory minimum training standards in 6 VAC 20-250-130 et seq.;

e. Have successfully completed the bail bondsman exam required by the Board of Criminal Justice Services at a certified or licensed private security services training school with a minimum passing grade of 70%.

The legal and administrative licensing requirements for both property bail bondsmen and surety bail bondsmen are set forth in Va. Code § 9.1-185 et seq. and in 6 VAC 20-250-30 et seq., and are identical in many respects. Both types of bondsmen must apply for a license and undergo fingerprinting and a nationwide criminal history background check. They also have to successfully pass a bail bondsman examination and at least the minimal training

requirements for the basic license. Property bail bondsmen must show proof of collateral in

the amount of $200,000 and comply with other collateral-related requirements prior to licensure. Surety bail bondsmen must obtain a property and casualty insurance agent license from the State Corporation Commission. A surety bail bondsman must also prove that he is an agent for a fidelity and surety insurer. The insurance company for which he works must provide each agent with a qualifying power of attorney. This document creates the agency between the company and the bondsman. The insurance company must notify the State Corporation Commission when the company appoints an agent in Virginia. See Va. Code § 38.2-1833. Virginia Code § 9.1-185.5 also requires the surety bail bondsmen to furnish the qualifying power of attorney to the Department of Criminal Justice Services.

Many surety bail bondsmen act as attorneys-in-fact for more than one insurance company. In such cases, these bondsmen will have a qualifying power of attorney from each insurance company. Virginia Code § 9.1-185.8 in subsection G requires the surety bail bondsman to file a copy of every qualifying power of attorney with DCJS. The bondsman may only act as an agent for those insurance companies whose qualifying powers of attorney are on file with DCJS.

If the bondsman will carry or have access to a firearm while on duty they must obtain a valid license with a firearm endorsement as described under 6 VAC 20-250-90 and meet additional training and licensing requirements. If they will be carrying a handgun concealed, the person must also have a valid concealed handgun permit and the written permission of his employer, if any, pursuant to Va. Code § 18.2-308.

Once the Department grants either type of bail bondsman a license, Va. Code § 9.1-185.6 authorizes the bondsman to solicit business and enter into bonds statewide. Either soliciting bail bond business or acting as a surety for compensation without having obtained a bail bondsman license constitutes a criminal offense pursuant to Va. Code § 9.1-185.18. Since July 1, 2005, courts have no oversight authority over bail bondsmen.

Pursuant to Va. Code § 9.1-185.4 and 6 VAC 20-250-30 no person who is a convicted felon is eligible for a bail bondsman license. Also, any person who is an appointed a special conservator of the peace under Va. Code § 9.1-150.1 et seq., or any employee of a local or regional jail, a sheriff's office, a law enforcement agency, the Department of Corrections, the Department of Criminal Justice Services, a local criminal corrections agency, or an attorney for the Commonwealth is disqualified from being a bondsman. The spouse of such persons may not be a bail bondsman. Any person residing in the same household with a person who is disqualified from becoming a bondsman also is ineligible for licensure.

Virginia Code § 58.1-3724 authorizes localities to enact local ordinances requiring property bail bondsmen to obtain revenue licenses. A revenue license is completely different from the bail bondsman license granted by the Department of Criminal Justice Services. A licensed property bail bondsman must obtain a revenue license prior to acting as a bail bondsman in any locality that requires such a license. The property bail bondsman is required to obtain only one such revenue license, as the revenue license is valid statewide.

Many localities, however, do not require a bondsman to have a revenue license. If a locality does not require a revenue license, the property bail bondsman may conduct bail bonding business there regardless of whether he has a revenue license or not. A bondsman must obtain a new revenue license every year. Surety bail bondsmen do not have to obtain revenue licenses. The following examples illustrate how a magistrate determines whether a property bail bondsman who does not have a revenue license is eligible to act as a surety.

> **Example:** A deputy arrests the defendant in Grayson County on a capias returnable to Roanoke County. The Grayson County magistrate sets bail at $5,000 secured, and commits him to jail. A transportation officer transports the defendant from Grayson County to the New River Valley Regional Jail in Pulaski County. Prior to a Roanoke County deputy arriving to take custody of the defendant, George Gilmore, a licensed property bail bondsman, wishes to act as surety for this defendant. Mr. Gilmore does not have a revenue license. Roanoke County requires a revenue license. Pulaski County does not. In this case, Mr. Gilmore may properly act as surety since he is acting as a bail bondsman in Pulaski County.

> **Example:** A Richmond City police officer arrests the defendant in Richmond on a charge returnable to Pulaski County. The magistrate sets bail at $10,000. George Gilmore, a licensed property bail bondsman, drives to Richmond and wishes to act as a surety for this defendant. Mr. Gilmore has not obtained a revenue license. The City of Richmond requires a revenue license. Pulaski County does not. In this case, Mr. Gilmore may not act as a bondsman in the City of Richmond since Richmond requires such the revenue license. To act as a property bail bondsman in the City of Richmond, Mr. Gilmore must obtain a revenue license from any locality requiring a revenue license. Once Mr. Gilmore has done this, he may act as a surety anywhere in the Commonwealth.

Pursuant to Va. Code § 9.1-185.8 subsection E, the property bail bondsman may not enter into bond obligations if the total amount of the obligations exceed four times the true fair market value of the equity of the collateral on file with the Department of Criminal Justice Services as required by subsection C of Va. Code § 9.1-185.5. To document compliance with this statutory provision, subsection D of Va. Code § 9.1-185.14 requires each property bail bondsman to file a report with DCJS not later than the fifth day of each month a list of all outstanding bonds on which he was obligated as of the last day of the preceding month, together with the amount of the penalty of each such bond. This accounting reflects the status of the bondsmen only on the last day of each month. To ensure that property bail bondsman comply with the statutory requirement in each bond transaction, and are properly solvent to guarantee the bond, it is recommended that magistrates ask property bail bondsmen, under oath, if their obligation on the current bond would cause the bondsman to exceed the limit established by subsection E of Va. Code § 9.1-185.8.

As mentioned earlier, each surety bail bondsman must file the qualifying power of attorney for each insurance company for which he acts as an agent with DCJS. Some qualifying powers of attorney carry an expiration date, while others are valid until the insurance company revokes them. The magistrate must ensure that the qualifying power of attorney

authorizing the agent to enter into bonds is effective on the date the agent wishes to exercise the power. The qualifying power of attorney also notes the bonding limits for the agent.

Most qualifying powers of attorney restrict the agent from entering into a bond in excess of $200,000 per occurrence. Other qualifying powers of attorney restrict the agent from exceeding an aggregate limit. Others may have both a per-occurrence and an aggregate limit. If the qualifying power of attorney limits the surety bail bondsman to an aggregate limit, it is recommended that the magistrate ask the bondsman, under oath, whether the current bond would cause him to exceed the limits set by the insurance company.

The fidelity and surety insurer must obtain a license to conduct business in Virginia from the State Corporation Commission pursuant to Va. Code § 38.2-2402. Each April, that section requires the State Corporation Commission to furnish the clerk of each circuit court with a list of all fidelity and surety insurers licensed in Virginia. If the Commission revokes the insurance company's license or the surety bail bondsman's license, the Commission will notify the Department of Criminal Justice Services. If a bondsman's insurance company loses its Virginia license, the Department will suspend any surety bondsmen who act as an agent for that company.

The qualifying power of attorney authorizes the agent to enter into bonds up to a certain amount. Each time the surety bail bondsman enters into a bond, however, he must present a certificate to the magistrate. These certificates are called "powers," and are not the same as a qualifying power of attorney. The magistrate should read these certificates carefully.

Insurance companies normally issue "powers" certificates in varying amounts, and each certificate bears a face amount. The magistrate must require the bondsman to complete a certificate displaying an amount that either equal or exceeds the amount of the secured bond. The bondsman cannot use more than one of these certificates per bond. For example, if the magistrate sets a secure bond of $25,000, a bondsman may not use five $5,000 certificates to make the $25,000 total. Instead the bondsman must use one certificate valid for a bond of $25,000 or more.

Virginia Code § 9.1-185.8 and 6 VAC 20-250-250 set out the standards of conduct for bondsmen. Subsection B specifically states that a bondsman cannot:

f. Knowingly commit, or be a party to, any material fraud, misrepresentation, concealment, conspiracy, collusion, forgery, scheme or device whereby any other person lawfully relies upon the word, representation, or conduct of the bail bondsman.

g. Solicit sexual favors or extort additional consideration as a condition of obtaining, maintaining, or exonerating bail bond, regardless of the identity of the person who performs the favors.

h. Conduct a bail bond transaction that demonstrates bad faith, dishonesty, coercion, incompetence, extortion or untrustworthiness.

i. Coerce, suggest, aid and abet, offer promise of favor, or threaten any person on whose bond he is surety or offers to become surety, to induce that person to commit any crime.

j. Give or receive, directly or indirectly, any gift of any kind to any nonelected public official or any employee of a governmental agency involved with the administration of justice, including but not limited to law-enforcement personnel, magistrates, judges, and jail employees, as well as attorneys. *De minimis* gifts, not to exceed $50 per year per recipient, are acceptable, provided the purpose of the gift is not to directly solicit business, or would otherwise be a violation of Board regulations or the laws of the Commonwealth.

i. The commentary to Canon 4D of the Canons of Conduct for magistrates prohibits magistrates from accepting any gifts from bail bondsmen.

ii. Although a bondsman may legally give a *de minimis* gift to a magistrate, the canons of conduct for magistrates prohibit the magistrate from accepting the gift.

k. Fail to comply with any of the statutory or regulatory requirements governing licensed bail bondsmen.

l. Fail to cooperate with any investigation by DCJS.

m. Fail to comply with any subpoena issued by the DCJS.

n. Provide materially incorrect, misleading, incomplete or untrue information in a license application, renewal application, or any other document filed with the DCJS.

o. Provide bail for any person if he is also an attorney representing that person.

p. Provide bail for any person if the bondsman was initially involved in the arrest of that person.

Virginia Code § 9.1-185.8 (C) requires that a bail bondsman ensure that each recognizance on all bonds for which he signs contains the name and contact information for both the surety agent and the registered agent of the issuing company. Additionally, 6 VAC 20-250-250 (C) requires that each recognizance on all bonds for which the bondsman signs must contain his name, license number and contact information. The magistrate should ensure that the bondsman includes all required information, handwritten if necessary, on the DC-330, RECOGNIZANCE form returnable to the court.

Virginia Code § 9.1-185.9 and 6 VAC 20-250-260 sets forth the legal and administrative rules regarding the bondsman's solicitation of business. Only a licensed bail bondsman is authorized to solicit business. The bondsman may not use a non-licensed person to solicit

bonding business. Subsection B of both provisions when read together would prohibit a bail bondsman from:

q. soliciting bail bond business or have any person solicit on his behalf by directly initiating contact with any person in any court, jail, lock-up, or surrounding government property;

r. leaving any type of advertising material in any court, jail, lock-up, or surrounding government property;

s. loitering by any jail or magistrate's office unless there on legitimate business;

t. referring a client or a principal for whom he has posted bond to an attorney for financial profit or other consideration.

A magistrate who observes or has reason to believe a bondsman may have violated statutory or regulatory standard of conduct or rule regarding the solicitation of business may report violations to the Department of Criminal Justices Services. The Department of Criminal Justice Services has adopted a regulatory scheme for the handling of complaints, bondsmen discipline, and the adjudication of DCJS actions. The rules for bail bondsmen licensure, professional conduct, solicitation of business, handling of money and other collateral, or record keeping requirements, as well as other matters, may give rise to a complaint or disciplinary action that would require departmental action and/or adjudication. The rules under Part VII of Chapter 250 of Agency 20 under Title 6 of the Virginia Administrative Code (6 VAC 20-250-300 et seq.) provide for the manner in which these complaints may be submitted and by whom they may be submitted as well as provide for investigatory powers of the DCJS and what sanctions may be applied.

Complaints against bondsmen may be initiated by any aggrieved or interested person who alleges a violation of the law or regulations governing the bail bondsman services and submitted:

u. by a signed complainant in writing, or on a form provided by the department;

v. anonymously in writing, providing sufficient detailed information for the department to conduct an investigation; or

w. telephonically, providing the complaint alleges activities that constitute a life- threatening situation, or has resulted in personal injury or loss to the public or to a consumer, or that may result in imminent harm or personal injury, and that provides sufficient detailed information for the department to conduct an investigation.

Financial dealings between the bondsman and the defendant must not be conducted in the magistrate's office. The magistrate never recommends a specific bondsman. The Canons of Conduct specifically prohibit magistrates from accepting any pencils, pens, food, or any

other magistrates or bondsmen. It is also inappropriate for magistrates to retain bonds after

business cards in the office. The magistrate's office and waiting areas should be free of bondsmen's cards, calendars, and other forms of advertisement. Any financial transactions between the bondsman and defendant in the presence of the magistrate may give the impression of collusion between the magistrate and the bondsman. To avoid any appearance of impropriety, the magistrate must not allow the bondsman to remain in the magistrate's office except during the actual signing of the DC-330, RECOGNIZANCE form. The telephone in the magistrate's office is for magistrate's use only and is not to be used by bondsmen.

A. Summary of Bondsman Documentation Requirements

1. Property Bail Bondsman Requirements

   A valid, unexpired bondsman license issued by the Department of Criminal Justice Services. The magistrate should ensure that the license is not revoked or suspended. The Department maintains a list of licensed bail bondsman on its website at the following address: https://www.dcjs.virginia.gov/ps/directory/rocs/

   If the locality in which the bondsman is conducting business requires a Va. Code § 58.1-3724 local revenue license, documentation that the bondsman has obtained this license and the license is current. A revenue license is valid statewide.

2. Surety Bail Bondsman Requirements

   A valid, unexpired bondsman license issued by the Department of Criminal Justice Services. The magistrate should ensure that the license is not revoked or suspended. The Department maintains a list of licensed bail bondsman on its website at the following address: https://www.dcjs.virginia.gov/ps/directory/rocs/

   The surety bail bondsman will operate through powers granted to them by the surety insurance company through a qualifying power of attorney. The power of attorney is what gives the bondsman the authority to act as their agent to obligate the company as the surety for the bail bond. If the magistrate has question about the authority of the bondsman to act to obligate a specific surety insurer, the magistrate may request to review the power of attorney to see:

   a. When does the qualifying power of attorney expire?

   b. What bonding amount or other limits does the qualifying power of attorney impose upon the authority of the bail bondsman to act as an agent?

   A completed "powers" certificate in an amount that equals or exceeds the amount of the required secure bond will be necessary to attach to the bond agreement.

The magistrate should ensure that:

a. the insurance company issuing the "powers" matches the insurance company issuing the qualifying power of attorney.

b. the "powers" amount limit is sufficient to cover the amount of the bond. Some "powers" list exclusions on the face of the document, such as limitations on "stacking" or using multiple "powers" on the same bond.

B. Review of Virginia Criminal History Information by a Licensed Bail Bondsman

1. In General

Virginia Code §§ 19.2-120 and 19.2-389 were amended by legislation in 2010 to provide that if a judicial officer sets a secured bond and the accused engages the services of a licensed bail bondsmen, then the magistrate executing the recognizance for the accused shall, for a fee of $15 payable into the State Treasury to be credited to the Literary Fund, provide the licensed bail bondsman with a copy of the accused's Virginia criminal history record, if readily available, to be reviewed only by the bail bondsman on the premises, and then promptly returned to the magistrate.

§ 19.2-120 (D) reads as follows:

(D) If the judicial officer sets a secured bond and the person engages the services of a licensed bail bondsman, the magistrate executing recognizance for the accused shall provide the bondsman, upon request, with a copy of the person's Virginia criminal history record, if readily available, to be used by the bondsman only to determine appropriate reporting requirements to impose upon the accused upon his release. The bondsman shall pay a $15 fee payable to the state treasury to be credited to the Literary Fund, upon requesting the defendant's Virginia criminal history record issued pursuant to § 19.2-389. The bondsman shall review the record on the premises and promptly return the record to the magistrate after reviewing it.

Magistrates are only provided with criminal history information from a select few individuals in the criminal justice system, such as probation and parole officers, pretrial services officers, and law enforcement officials. The provision of this information by law enforcement officials is usually only for the purposes of accurate charging (as in enhanced penalty crimes), or for the fulfillment of their duty under Va. Code § 19.2-80.2 to provide the information for the judicial officer's use in bail determination proceedings. Use of criminal histories by magistrates is case and situation specific and limited in duration. Understanding the proper function of magistrates in regard to bail, criminal history record use, and paperwork processing is critical.

Virginia Code § 19.2-389 governs the use and dissemination of criminal history record information and the procedures for query to the Central Criminal Records Exchange depository. That Code section provides, in part, that only certain public, quasi-public, and other specific contracted persons or entities with a manifest need are to receive criminal history information from the CCRE. As excerpted below, that section includes both the magistrate, and the bail bondsman:

A. Criminal history record information shall be disseminated, whether directly or through an intermediary, only to:

- Authorized officers or employees of criminal justice agencies…
- 40. Bail bondsmen, in accordance with the provisions of § 19.2-120; and...

2. Pre-Requisites to Provision of Criminal History Record Review Services

   a. Secure Bond as Condition of Bail.

      Subsection (D) provides that the provision of the Virginia criminal history information review service will only be applicable in cases where a judicial officer has set a secure bond pursuant to those conditions that are available to the judicial officer under Va. Code § 19.2-123 (A)(3.)

   b. Surety Services Engaged.

      Subsection (D) further provides that the application of this service is where the accused has engaged the services of a surety to secure the bond.

   c. Compensated Sureties Only.

      The application of this service only applies if the surety services engaged by the accused are those of a licensed bail bondsman as defined in Va. Code § 9.1-185 and Virginia Administrative Code § 6VAC20-250-10.

3. Timing of Services to Provide Criminal History Review Services.

   a. Processing the Release of the Defendant.

      According to subsection (D), the timing of the requirement to provide the service to the bail bondsman is when the magistrate, the surety, and the accused are executing the recognizance for the accused.

      The execution of the recognizance for the accused normally occurs on the DC-330, RECOGNIZANCE form

   b. Upon Request by the Licensed Bail Bondsman.

The statute provides that the magistrate shall provide the bondsman, upon request a copy of the Virginia criminal history. Additionally, upon making the request the licensed bail bondsman is to submit the fee for processing the request. *See* the "Accounting and Prepayments" chapter of this manual for instructions on how to process and account for this fee payment.

c. Only When Readily Available.

According to the statute, providing a copy of the accused's Virginia criminal history information to the licensed bail bondsman upon his or her request and submission of the fee is dependent upon whether the record is readily available at the time of the execution of the recognizance.

4. Service of Criminal History Review Provided

a. Provide Copy of Criminal History Record.

When called upon to provide this service, the magistrate should only provide a copy of the person's Virginia criminal history record information for the licensed bail bondsman to review onsite. This record is not to leave the premises, nor is it to be kept by the bail bondsman. The magistrate should not attempt to interpret or elaborate on the recorded information. Additional copies are not to be made or the bondsman permitted to retain the record.

b. Collection of Fee Payable to State Treasury.

The bondsman shall pay a $15 fee payable to the state treasury to be credited to the Literary Fund upon requesting the defendant's Virginia criminal history record issued pursuant to Va. Code § 19.2-389. The magistrate is to collect this fee and process the fee according to the instructions included in the "Accounting and Prepayments" chapter of this manual. Though the fee is payable to the state treasury, the check or money order should be made out to the General District Court for the locality where the magistrate is located. *See* the "Accounting and Prepayments" chapter of this manual for more information.

c. Receive Back the Copy of Criminal History Record.

The requirements of the statutes dictate that the bondsman shall promptly return the record to the magistrate after reviewing onsite. The magistrate should ensure that the entire record is returned. The magistrate must ensure that the record remain onsite for the review period. The bondsman should be allowed an appropriate amount of time to review the record, but not permitted to utilize an inordinate amount of the magistrate's office time. After receiving back the record, the magistrate should ensure that the record is properly

disposed of and that no further dissemination or any unlawful dissemination occurs. *See* Va. Code § 19.2-389.

5. Use of Services

   a. Only by Licensed Bail Bondsman (DCJS Regulated Licensees)

      The use of this service (to provide a copy of the accused's Virginia criminal history information) is only available to a licensed bail bondsman.

      Magistrates should ensure that the surety is licensed by the Department of Criminal Justice Services, and that the surety's license is still valid. See the instructions in this chapter relating to Compensated Sureties for instructions on how to check the status of a regulated bail bondsman.

   b. Review of Virginia Criminal History Record.

      The use of this service by licensed bail bondsman is only for the purposes of determining what, if any, reporting requirements the licensed bail bondsman may deem to be appropriate to impose upon the accused upon the accused's release. This is a matter in which the magistrate has no involvement. It is for the determination of the surety as to what reporting requirements are appropriate for the accused.

      NOTE: These appropriate reporting requirements are distinct from the conditions of bail as previously set by a judicial officer. The bail bondsman is reviewing the copy of the Virginia criminal history record information to determine what might be the appropriate reporting requirements that the bail bondsman may wish to impose upon the accused when the accused is released on the conditions that have already been set.

X. COMMITMENT TO JAIL

If the magistrate determines that the accused should not be granted bail under to Va. Code § 19.2-120, is not eligible for bail on an extradition warrant pursuant to Code § 19.2-102, or is unable to meet the conditions of bail set pursuant to Va. Code § 19.2-123, the magistrate then completes the DC-352, COMMITMENT ORDER form. There are a number of scenarios where the accused would be unable to meet the conditions of release. For example, the magistrate sets a secured bond and the accused does not have the cash on hand to meet to bond obligations, or there is no surety present at the conclusion of the bail hearing. Another example involves a case where the magistrate has set an unsecured bond or a simple recognizance but has ordered special conditions that the accused cannot presently meet. Such is the case when the accused is charged with being intoxicated in public and is not a suitable candidate for release to a custodian, or there is no one to act as custodian. The magistrate would commit the accused to jail on a recognizance and set as a condition of bail that the accused is eligible to be released when no longer intoxicated or a responsible

custodian arrives. Sometimes the defendant is intoxicated to the point where he cannot meaningfully participate in a bail hearing. In other situations, the defendant refuses to participate in a bail hearing. In either situation, the magistrate should note on the DC-352, COMMITMENT ORDER form that the accused was unable or unwilling to participate in the bail hearing. Once the defendant sobers to the point he is able to knowingly participate in the bail hearing, or once the accused wishes to cooperate, he may reappear before the magistrate for a bail hearing.

Often the accused's condition or uncooperativeness will continue until his first court appearance. Generally, the court will conduct the bail hearing at that point.

Virginia Code § 19.2-158 requires that:

> Every person charged with an offense described in § 19.2-157, who is not free on bail or otherwise, shall be brought before the judge of a court not of record, unless the circuit court issues process commanding the presence of the person, in which case the person shall be brought before the circuit court, on the first day on which such court sits after the person is charged, at which time the judge shall inform the accused of the amount of his bail and his right to counsel. If the court not of record sits on a day prior to the scheduled sitting of the court which issued the process, the person shall be brought before the court not of record. The court shall also hear and consider motions by the person or Commonwealth relating to bail or conditions of release pursuant to Article 1 (§ 19.2-119 et seq.) of Chapter 9 of this title. Absent good cause shown, a hearing on bail or conditions of release shall be held as soon as practicable but in no event later than three calendar days, excluding Saturdays, Sundays, and legal holidays, following the making of such motion.

In those localities where the circuit and district courts do not convene every weekday, this statute requires a general district or a juvenile and domestic relations district court to conduct advisement/arraignment hearings for cases over which those courts do not have trial authority. Notwithstanding the dicta in the recent case of Stevens v. Commonwealth, 283 Va. 296 (2012), it is recommended that magistrates continue to follow the practices outlined herein in setting advisement dates.

> **Example:** Law enforcement arrests defendant on Friday in Clarke County on a charge returnable to the Clarke County General District Court. The general district court meets Wednesdays and Thursdays and the juvenile and domestic relations district court meets on Tuesdays in Clarke County. Since the juvenile and domestic relations district court meets prior to the general district court, the magistrate would note the Tuesday juvenile and domestic relations district court date on the DC-352, COMMITMENT ORDER form in order to comply with Va. Code § 19.2-158.

An exception to this rule occurs when the magistrate is conducting a bail hearing on a capias returnable to the circuit court. If the magistrate has committed the defendant to jail on a capias returnable to the circuit court, and the circuit court convenes prior to either the general district court or the juvenile and domestic relations district court, the magistrate must insert the next date that the circuit court convenes on the DC-352, COMMITMENT

ORDER form should the defendant be unable to meet the conditions of release set at the initial bail hearing.

The next example illustrates the proper commitment procedure if the magistrate conducts a bail hearing and commits the accused to jail on a circuit court capias with a district court meeting prior to the circuit.

> On Sunday May 2, a deputy arrests the accused in Floyd County on a capias returnable to the Smyth County Circuit Court. The Floyd magistrate conducts a bail hearing and holds the accused without bail. The Smyth County Circuit Court does not convene until Friday May 7. The Smyth County General District Court convenes every Wednesday, and the Smyth County Juvenile and Domestic Relations District Court convenes every Tuesday. In this scenario, the Floyd magistrate must insert Tuesday, May 4 on the DC-352, COMMITMENT ORDER form. The magistrate also would make the commitment returnable to the Smyth County Juvenile and Domestic Relations District Court.

Supreme Court Rule 7C:3 subparagraph (c) requires a magistrate or other judicial officer to issue a separate DC-312, WARRANT OF ARREST - FELONY, DC-314, WARRANT OF ARREST - MISDEMEANOR (STATE), DC-315, WARRANT OF ARREST - MISDEMEANOR (LOCAL), DC-319, SUMMONS, or DC-361, CAPIAS - ATTACHMENT OF THE BODY form for each charge as appropriate. When issuing DC-330, RECOGNIZANCE forms, DC-352, COMMITMENT ORDER forms, and DC-353, RELEASE ORDER where the accused is charged with multiple offenses, however, the magistrate lists all charges of state statutes returnable to the same court in the same jurisdiction at the same date and time on only one form.

If the defendant is unable to meet the conditions of release and remains in jail until the arraigning court convenes, the sheriff must transport him or her to the court for the arraignment. Upon conclusion of the arraignment, the clerk will prepare a DC-355, ORDER FOR CONTINUED CUSTODY form that documents the changes in bail ordered by the judge, and lists the defendant's next court date. If later the defendant was able to meet the bail conditions, the magistrate must then refer to the DC-355, ORDER FOR CONTINUED CUSTODY for information necessary to prepare the DC-330, RECOGNIZANCE form. If the arraigning court reconsiders bail at arraignment and changes the conditions so that the defendant is eligible for immediate release, the clerk is responsible for preparing the DC-330, RECOGNIZANCE form and the DC-353, RELEASE ORDER form.

Va. Code §§ 19.2-124 and 19.2-132 allow the court granting or denying bail to, upon appeal and for good cause shown, stay execution of such order for so long as reasonably practicable for the party to obtain an expedited hearing before the next higher court.

Information regarding the length of the stay will be located on the DC-355, ORDER FOR CONTINUED CUSTODY or other court order. The magistrate must be diligent in his review of the court paperwork to insure the length of the stay and the appropriate conditions of bail.

Example: A magistrate sets a $100,000 secured bond as a condition of bail on July 1, 2013. The General District Court Judge lowers the secured bond to $1,000 on July 3, 2013, but finds cause to stay the execution of such order until July 5, 2013 to allow the attorney for the Commonwealth time to obtain a hearing in Circuit Court. If a bail bondsman wishes to post bond for the defendant on July 4, 2013, he may do so, but the amount of the bond will be $100,000. Only the judge's order regarding bail has been stayed; the original conditions of bail set by the magistrate are still valid. Unless the attorney for the Commonwealth is successful in his appeal, the defendant may post bond in the amount of $1,000 on July 5, 2013 with no further order from the court.

There are certain occasions when a person is arrested pursuant to specific statutes that do not authorize the conducting of a bail hearing. This manual will discuss these situations later in this chapter. If the magistrate has no authority to conduct a bail hearing, the magistrate must take no action whatsoever. Occasionally, law enforcement officers inappropriately will request a DC-352, COMMITMENT ORDER form for various reasons. The magistrate, however, never should issue a DC-352, COMMITMENT ORDER form unless the magistrate has conducted a bail hearing, and unless the defendant was unable to meet the conditions of release within a short time after the conclusion of the bail hearing.

XI. BAIL PROCEDURES IN EXTRADITION

A. When Bail Not Permissible in Extradition Cases

1. The magistrate may not admit the accused to bail if the crime for which he is charged is punishable in the requesting state by life imprisonment.

2. The magistrate may not admit an accused to bail on a for a probation violation when the accused's probation is subject to the Interstate Compact for Adult Offender Supervision.

   a. The Interstate Compact for Adult Offender Supervision ((53.1-176.1, 53.1-
76.2 and 53.1-176.3)) facilitates and monitors the transfer of adult offenders' supervision between states. As a member of this Compact, all Virginia authorities must abide by the Compact rules.

   b. Rule 5.111 of the Interstate Compact states:

An offender against whom retaking procedures have been instituted by a sending or receiving state shall not be admitted to bail or other release conditions in any state.

c. The Interstate Compact only applies if the accused violates the terms of probation once the supervision of such probation has been transferred to Virginia. If the basis for the warrant of extradition is a violation of probation

in another state and the probation of the accused is still supervised by the original state, the Interstate compact is not applicable.

Example: John is on probation in Maryland and is still supervised by his probation officer in Maryland but is arrested in Virginia. The Compact does not apply and the magistrate may release the accused to bail in accordance with Va. Code § 19.2-102.

Example: John is arrested in Virginia and a warrant of extradition is requested based on a Maryland warrant for violation of probation. Eight months ago John's probation was transferred to Virginia and he has been supervised by a probation officer in Virginia Beach since that time. In this situation the Compact does apply and the magistrate must hold the accused without bail.

d. It is likely that the magistrate conducting the bail determination hearing will not have information that clearly states whether the probationer's supervision was transferred to Virginia. To make such a determination it is recommended that the magistrate:

1) check the notes in the miscellaneous field of the confirmation hit.

2) ask the arresting officer or dispatcher providing extradition details to confirm the location of the supervision of the accused's probation.

If the magistrate is unable to determine whether the Interstate Compact applies, it is recommended that he document such. The bail checklist is a convenient place to make such a notation.

B. When Bail is Permissible in Extradition Cases

1. If the crime with which the accused is charged in the other state carries a maximum penalty that is less severe than listed above, the magistrate conducts a bail hearing in accordance with Va. Code §§ 19.2-121 and 19.2-123.

2. Virginia Code § 19.2-102 allows the magistrate to admit the accused to "bail by bond with sufficient sureties." This language seems to eliminate the possibility of the magistrate releasing the accused on a recognizance.

a. A magistrate may, after examination, find that a proposed surety is sufficient and require that individual to execute the bond agreement to secure the bond.

b. Virginia Code § 1-205 states that: "Bond with surety" includes the payment in cash of the full amount of the required bond and, in such case, no surety shall be required.

o This would also allow the accused to post a cash bond in lieu of having a surety.

3. If the accused is unable to meet the bond requirements, the magistrate issues a DC-352, COMMITMENT ORDER

a. As the district courts and the circuit court have jurisdiction to conduct the extradition hearing, the magistrate should consult with the chief magistrate to determine to which court the magistrate should make the case returnable.

b. In the **OTHER CONDITIONS** space on the DC-352, COMMITMENT ORDER the magistrate must list as a condition that "the accused further promises to surrender for arrest upon the warrant of the Governor of this Commonwealth." The magistrate may impose any other conditions of release that he or she deems necessary.

4. If the accused is released on bail, the magistrate prepares a DC- 330, RECOGNIZANCE.

a. As the district courts and the circuit court have jurisdiction to conduct the extradition hearing, the magistrate should consult with the chief magistrate to determine to which court the magistrate should make the case returnable.

b. While there is no requirement to have an immediate court appearance for a fugitive released on bond, such an appearance is well advised. The magistrate should set the case for the next court date of the court to which the case is returnable.

c. In the **OTHER CONDITIONS** space on the DC- 330, RECOGNIZANCE, the magistrate must list as a condition that "the accused further promises to surrender for arrest upon the warrant of the Governor of this Commonwealth." Of course, the magistrate may impose any other conditions of release that he or she deems necessary.

5. The final phase of the extradition process begins with the Governor of Virginia issuing a Governor's warrant.

a. Once law enforcement arrests the defendant on the governor's warrant, bail is not available to the defendant. *See* Attorney General Opinion to Shockley, dated 12/6/95 (1995, page 141); *Court has no authority to admit individual to bail once governor's warrant of extradition issues*.

b. The law enforcement jails the defendant pursuant to the Governor's warrant, and neither a magistrate nor a judge conducts a bail hearing at the time of the defendant's arrest on this document.

c. Consequently, the magistrate neither conducts a bail hearing, nor prepares a DC-352, COMMITMENT ORDER in such a case.

XII. VIOLATIONS OF CONDITIONS OF RELEASE, PRETRIAL SERVICES CONDITIONS, AND LOCAL COMMUNITY-BASED PROBATION PROGRAM CONDITIONS

A. Violations of Conditions of Release

Pursuant to Va. Code § 19.2-123, the magistrate has the authority to issue a DC-361, CAPIAS – ATTACHMENT OF THE BODY or DC-360, SHOW CAUSE SUMMONS (CRIMINAL) for cases returnable to district courts or a CC-1355, RULE TO SHOW CAUSE or CC-1356, CAPIAS TO SHOW CAUSE for cases returnable to circuit court in those cases where the magistrate finds probable cause to believe that the defendant has violated a condition of release. Virginia Code § 19.2-123 subsection D states: "if any condition of release imposed ... is violated, the judicial officer may issue a capias or order to show cause why the recognizance should not be revoked."

Each magistrate's office should consider maintaining a file of the completed DC-330, RECOGNIZANCE forms that contain special conditions of release for a period of forty-five days after issuance of the recognizance. The magistrate then could use this file as a reference when processing cases in which the complainant alleges a violation of the conditions of release. When a complainant alleges that the accused has violated a condition of release, the magistrate should interview the complainant under oath to determine validity of the complaint, and have the complainant complete a DC-635, MOTION FOR SHOW CAUSE SUMMONS OR CAPIAS form for cases returnable to Juvenile and Domestic Relations Court or a DC-420, MOTION FOR SHOW CAUSE SUMMONS OR CAPIAS form for cases returnable to General District Court. If the complainant alleges that the violation of the conditions of release occurred after the date of the first court appearance, the magistrate then should attempt to contact the court to determine whether the judge modified the special conditions of release. If the court is closed, however, the magistrate must then use his or her best judgment in deciding whether to issue a process for the violation. The chief magistrates should work in conjunction with the clerk's offices to develop guidelines on how to inform the magistrate's office when a court has modified the special conditions of bail for the defendant. Some courts already routinely send all orders with modified bail terms to the locality's magistrate office.

If the magistrate finds probable cause that the accused violated the conditions of release, the magistrate then issues either a DC-360, SHOW CAUSE SUMMONS (CRIMINAL) form, or a DC-361, CAPIAS - ATTACHMENT OF THE BODY form, or a CC-1355, RULE TO SHOW CAUSE form, or a CC-1356, CAPIAS TO SHOW CAUSE form with the DC- 420, MOTION FOR SHOW CAUSE SUMMONS OR CAPIAS form (GDC) or the DC-635, MOTION FOR SHOW CAUSE SUMMONS OR CAPIAS form (J&DR) attached.

If the magistrate issues the CC-1356, CAPIAS TO SHOW CAUSE returnable to circuit court, the magistrate needs to insert language describing the reason for issuance in the space provided after the following: "**You are hereby commanded in the name of the Commonwealth to forthwith arrest the defendant and bring him/her before a judicial officer to show cause why he/she should not:_____.**"

If the magistrate issues a show cause summons, a law enforcement officer merely serves the summons on the accused and does not make a custodial arrest. The summons directs the accused to appear for a hearing to show cause why the judicial officer should not revoke the original recognizance. If the magistrate issues any of the three capias forms, a law enforcement officer arrests the accused and brings him or her before the magistrate. Normally, if the violation of the special conditions of release is serious enough to warrant the issuance of a criminal process, the magistrate will issue one of the capias forms rather than a show cause summons.

When an officer arrests the accused pursuant to a capias, Va. Code § 19.2-234 requires the officer to bring the accused before the magistrate. Once this occurs the magistrate has two options. The magistrate can conduct a bail hearing, and set the case for a revocation hearing before the court. Alternatively, the magistrate, rather than the court, may conduct the revocation hearing. *See* Attorney General Opinion to Vanover dated 3/5/81 (1980-81, page 235) which states: "*a magistrate has the authority to issue a show cause order pursuant to § 19.2-123(c) [now § 19.2-123(d)]; to hold a hearing based on such an order; and to revoke a bond previously set for an accused after hearing evidence*"

If the magistrate conducts a bail hearing, he or she would make a new determination and set the case for a revocation hearing. If the magistrate releases the respondent on bail, the magistrate would set the revocation hearing date on the DC-330, RECOGNIZANCE form. Should the magistrate hold the respondent without bail, or the respondent is unable to meet the terms of bail, the magistrate then prepares a DC-352, COMMITMENT ORDER form.

While the attorney general opinion indicates that the magistrate has the authority to revoke bail, it is recommended as best practice to allow the appropriate court to handle the actual bail revocation hearing. The magistrate has the authority to issue one of the capias forms, or a show cause summons for a violation of a condition of release at any stage of the case up to final disposition. While the magistrate may have the authority to revoke bail, he does not have the authority to forfeit the original bond. A hearing to revoke bail is completely separate and distinct from a hearing to forfeit bond. Only courts have the authority to conduct bail forfeiture hearings.

B. Violations of Pretrial Services Conditions

Virginia Code § 19.2-152.4:1 states:

> Every pretrial services officer who is an employee of a local pretrial services agency established by any city, county or combination thereof or operated pursuant to this article shall take an oath of office as prescribed in § 49-1 and to provide services pursuant to the requirements of this article before entering the duties of his office. The oath of office shall be taken before any general district or circuit court judge in any county or city which has established services for use by judicial officers pursuant to this article.
>
> In addition, any officer of a pretrial services agency established or operated pursuant to this article may seek a capias from any judicial officer for the arrest of any person under the agency's custody and supervision for failure to comply with any conditions of release imposed by a judicial officer, for failure to comply with the conditions of pretrial supervision as established by a pretrial services agency, or when there is reason to believe that the person will fail to appear, will leave, or has left the jurisdiction to avoid prosecution.

The statute improperly refers to a magistrate issuing a warrant under this section. The correct forms to be issued in this case are the DC-361, CAPIAS – ATTACHMENT OF THE BODY or the circuit court CC-1356, CAPIAS TO SHOW CAUSE form. For the statute to apply, the defendant must be under a pretrial services agency's custody and supervision. The magistrate may issue the capias if the pretrial services officer presents evidence sufficient for the magistrate to find probable cause that:

a. The respondent failed to comply with a condition of release set by a judicial officer; or

b. The respondent failed to comply with a condition of pretrial supervision; or

c. The evidence gives reason to believe that the respondent will:

   i. fail to appear; or

   ii. will leave, or has left the jurisdiction to avoid prosecution.

At the conclusion of the probable cause hearing, the magistrate should ask the pretrial services officer to reduce the violation to writing on a DC-420, MOTION FOR SHOW CAUSE SUMMONS OR CAPIAS form (GDC) or DC-635, MOTION FOR SHOW CAUSE SUMMONS OR CAPIAS form (J&DR). This will provide the magistrate who conducts the bail hearing with information that will assist the magistrate in determining whether to hold the respondent without bail or to set bail. The magistrate is able to prepare a capias returnable to district court by using the eMagistrate system. When preparing a circuit court capias, the magistrate needs to manually prepare the document and insert the applicable text below in the body of the circuit court capias:

d. have bail revoked for failing to comply with a condition of release set by a judicial officer; or

e. have bail revoked for failing to comply with a condition of pretrial supervision; or

f. have bail revoked because there is reason to believe that the respondent will fail to appear, or because there is reason to believe that the respondent will leave or has left the jurisdiction to avoid prosecution.

The magistrate also may wish to contact pretrial services directly for additional information prior to making a bail determination. Although not specifically provided for in the language of this statute, a law enforcement officer should bring the respondent forthwith before a judicial officer for a bail hearing after arrest upon a capias issued pursuant to this statute. After determining bail, the magistrate will either release the respondent on bail, or commit him or her to jail pending the revocation hearing before the appropriate court.

C. Violations of Local Community-Based Probation Program Conditions

Virginia Code § 19.2-303.3 allows a court to sentence a defendant to a local community-based probation program. Subsection C of this statute allows any judicial officer to issue a capias for the arrest of a person who fails to abide by the terms of the local community-based probation program based upon a complaint of a sworn officer of a local probation agency. The subsection states:

> Any sworn officer of a local community-based probation services agency established or operated pursuant to the Comprehensive Community Corrections Act for Local-Responsible Offenders (§ 9.1-173 et seq.) may seek a capias from any judicial officer for the arrest of any person on local community-based probation and under its supervision for (i) intractable behavior; (ii) refusal to comply with the terms and conditions imposed by the court; (iii) refusal to comply with the requirements of local community-based probation supervision established by the agency; or (iv) the commission of a new offense while on local community-based probation and under agency supervision.

Before a magistrate has the authority to issue a capias in this situation, the defendant must be under custody and supervision of a local probation program established or operated pursuant to the Comprehensive Community Corrections Act for Local-Responsible Offenders. *See* Virginia Code § 9.1-173, et seq. The magistrate must issue the capias if the officer for the local probation agency presents evidence sufficient for the magistrate to find probable cause that the defendant is:

a. exhibiting "intractable behavior";

i. "intractable behavior" is behavior that:

1. indicates a defendant's unwillingness or inability to conform his behavior to that which is necessary for successful completion of the program, or
2. is so disruptive as to threaten the successful completion of the program by other participants;

OR

refusing to comply with the terms and conditions imposed by the court;

OR

b. refusing to comply with the requirements of local probation supervision established by the program;

OR

c. the defendant committed new offense while on local probation and under program supervision.

At the conclusion of the probable cause hearing, the magistrate should ask the local probation officer to reduce the violation to writing on a DC-420, MOTION FOR SHOW CAUSE SUMMONS OR CAPIAS form (GDC) or DC-635, MOTION FOR SHOW CAUSE SUMMONS OR CAPIAS form (J&DR). This will provide the magistrate who conducts the bail hearing with information that will assist the magistrate in determining whether to hold the respondent without bail or to set bail. The magistrate is able to prepare a capias returnable to district court by using the eMagistrate system. When preparing one of the capias forms returnable to circuit court, the magistrate needs to manually prepare the document and insert the applicable text below in the body of the circuit court capias:

d. have (his) (her) suspended sentence and supervision revoked, and be required to serve whatever sentence was originally imposed by the court and fulfill such other terms and conditions of supervision as the court deems appropriate for exhibiting intractable behavior; or

e. have (his) (her) suspended sentence and supervision revoked, and be required to serve whatever sentence was originally imposed by the court and fulfill such other terms and conditions of supervision as the court deems appropriate for refusing to comply with the terms and conditions imposed by the court; or

f. have (his)(her) suspended sentence and supervision revoked, and be required to serve whatever sentence was originally imposed by the court and fulfill such other terms and conditions of supervision as the court deems appropriate for refusing to comply with the requirements of local probation supervision established by the program; or

g. have (his) (her) suspended sentence and supervision revoked, and be required to serve whatever sentence was originally imposed by the court and such other terms and conditions of supervision as the court deems appropriate because the respondent committed a new offense while on local probation and under program supervision.

The magistrate may wish to contact the local-responsible offender's probation program directly for additional information prior to making a bail determination. Although not specifically provided for in the language of Va. Code § 19.2-303.3 subsection C or, a law enforcement officer should bring the respondent forthwith before a judicial officer for a bail hearing after arrest upon a capias issued pursuant to this statute. *Cf.* Va. Code § 19.2-234. After determining bail, the magistrate will either release the respondent on bail, or commit him or her to jail pending the revocation hearing before the appropriate court.

XIII. RECOGNIZANCE TO KEEP THE PEACE

A. The "Peace Bond" Process

Though not often issued by courts, the recognizance to keep the peace can be a useful process in certain situations. A recognizance to keep the peace is sometimes called a "peace bond" in common parlance. Normally, the magistrate would only consider issuing a warrant of arrest to initiate the recognizance to keep the peace procedures if the magistrate feels that a situation might erupt into a violent confrontation, but neither party has committed a criminal act constituting a jailable offense. If someone has committed a criminal act the best course of action would be for the magistrate to issue a warrant of arrest charging the crime and checking the "**not permitted**" box if the charge is a misdemeanor. In this way, the magistrate is able to gain control of the situation through a proper bail decision. The primary function of the recognizance to keep the peace is to diffuse a situation before it escalates to criminal behavior.

Only a court may require someone to give a recognizance to keep the peace. If at the hearing the court finds that the allegations of the complainant are correct, the court may require the defendant and the surety, if any, to sign a DC-364, RECOGNIZANCE AND BOND TO KEEP THE PEACE form. If the defendant is unable to meet the terms of the recognizance and/or bond required to keep the peace, the court may commit the defendant to jail pursuant to Va. Code § 19.2-21.

B. Magistrate Procedures

Virginia Code §§ 19.2-19 through 19.2-22 set forth the procedures for the recognizance to keep the peace. Virginia Code § 19.2-20 describes the procedures for issuance of the warrant.

Pursuant to Va. Code § 19.2-22, a law enforcement officer has the authority to make a warrantless arrest if a person commits one of the three acts listed in Va. Code § 19.2-19. Upon arrest the officer must bring the accused before a magistrate. The procedures for a warrantless arrest are the same as those for a citizen complaint.

The statute directs the magistrate to hold a hearing to determine whether probable cause exists to believe that any of the grounds for issuance outlined in Va. Code § 19.2-19 has occurred. Virginia Code § 19.2-20 specifically requires the magistrate to

examine the complainant and any of the complainant's witnesses under oath, and also requires the complainant to reduce the complaint to writing. The magistrate must determine whether the person complained about has threatened to:

a. kill or injure another; or

b. commit violence or injury against another person or another's property; or

c. unlawfully trespass upon another's property.

Upon a probable cause finding that one of the three grounds for issuance exists, the magistrate must issue a warrant to begin the process. Once the defendant is before the magistrate for a bail hearing, the magistrate conducts the bail hearing. Again, the magistrate is only attempting to gain control of a potentially explosive situation by imposing conditions of release appropriate to that situation. The setting of bail is not the actual "peace bond" or recognizance to keep the peace. The magistrate's only function in the bail process is to set reasonable bail terms for the appearance of the accused at the actual court hearing and to ensure the good behavior of the accused pending that hearing. The court will determine if a recognizance to keep the peace is required and what terms, if any, for that recognizance may be imposed.

A summary of the procedures for warrants issued for a recognizance to keep the peace hearing are as follows:

d. Examine the complainant and any witnesses under oath.

e. Require the complainant to reduce the evidence to writing on DC-311, CRIMINAL COMPLAINT form.

f. Have the complainant sign the DC-311, CRIMINAL COMPLAINT form.

g. Determine whether probable cause exists that the accused made one or more of the threats listed in Va. Code § 19.2-19.

h. Issue a DC-314, WARRANT OF ARREST - MISDEMEANOR (STATE) form if probable cause exists. Make the warrant returnable to the appropriate district court.

i. When the arresting officer brings the accused before a magistrate, the magistrate then conducts a bail hearing in accordance with Va. Code § 19.2-123.

XIV. PERSONS CHARGED WITH NON-JAILABLE OFFENSES

The United States Supreme Court ruled in the case of Pulliam v. Allen, 466 U.S. 522, 104S. Ct. 1970, 80 L.Ed. 2d 565 (1984), that magistrates may not incarcerate an accused charged with a non-jailable offense merely because the accused cannot meet bond. In Pulliam, the defendants brought suit against a Culpeper, Virginia, magistrate alleging that she committed defendants, charged with public intoxication, to jail when the defendants were

not able to post a cash bond. The United States Supreme Court ruled that this practice was unconstitutional. The Court stated that:

> Any pretrial detention for persons arrested for Class 3 and Class 4 misdemeanors on the grounds that the person is lawfully deemed likely to be a danger to himself or others may last only so long as such danger persists and must cease when the condition which created the danger changes or abates, or arrangements are made for release of the person into third-party custody under circumstances which abate the danger.

The Court further stated that "The practice ... under which persons are confined prior to trial on offenses for which no jail time is authorized solely because they cannot meet bond is unconstitutional."

The holding of the Pulliam v. Allen, and Va. Code § 19.2-74 both provide that a magistrate may issue an arrest warrant for a person charged with public intoxication. The magistrate also may incarcerate a defendant arrested for public intoxication if the magistrate has probable cause to believe the accused is likely to be a danger to himself/herself or others, if the defendant is not a suitable candidate for release to a custodian, or a custodian is not available to take custody of the accused. The Court in Pulliam held that the magistrate must release defendants incarcerated for this offense when the reason for the incarceration is no longer present. Consequently, the magistrate must release the accused when the accused reaches a point of sobriety at which he or she is no longer a danger to himself or herself. Additionally, once a custodian safely can take custody of the defendant and can keep, in the judgment of the magistrate, the defendant from posing a danger, the magistrate must release him or her.

If an accused is charged with a traffic infraction or a non-jailable offense with the exception of public intoxication, the arresting officer must release the accused on a summons unless one of the exceptions listed in Va. Code §§ 19.2-74, 46.2-940, or 46.2-945 is present.

However, if an officer does arrest an accused charged with a non-jailable offense (except public intoxication) or a traffic infraction, or if a complainant desires to obtain a charge against an accused for a non-jailable offense, the magistrate should, upon a finding of probable cause, issue a DC-319, SUMMONS and not a DC-314, WARRANT OF ARREST - MISDEMEANOR (STATE) or DC-315, WARRANT OF ARREST - MISDEMEANOR (LOCAL).

Similarly, if a citizen acts as a complainant in a probable cause hearing concerning a non-jailable offense, the issuance of a summons in such situations precludes any possible detention of the accused, and thus complies with the directives of Pulliam v. Allen, *supra*.

XV. APPEAL BONDS

Preparation of appeal bonds requires special consideration from magistrates. The applicable language of Va. Code § 16.1-135 states:

> Any person who has been convicted of an offense in a district court and who has noted an appeal, either at the time judgment is rendered or subsequent to its entry, shall be given credit for any bond that he may have posted in the court from which he appeals and shall be treated in accordance with the provisions of Article 1 (§ 19.2-119 et seq.) of Chapter 9 of Title 19.2.

The magistrate must verify that the accused has filed a DC-370, NOTICE OF APPEAL - CRIMINAL form. The accused may not file this form with the magistrate. Instead, the accused must file the notice with the district court clerk's office that entered the conviction. Virginia Code § 16.1-132 provides that: "Any person convicted in a district court of an offense not felonious shall have the right, at any time within ten days from such conviction, … to appeal to the circuit court…"

Virginia Supreme Court Rule 7A:13 states: "All appeals shall be noted in writing. An appeal is noted only upon timely receipt in the clerk's office of the writing. An appeal may be noted by a party or by the attorney for such party…" (Emphasis Added)

Virginia Supreme Court Rule 8:20 states: "All appeals shall be noted in writing. An appeal is noted only upon timely receipt in the clerk's office of the writing. An appeal may be noted by a party or by the attorney for such party." (Emphasis Added)

Virginia Supreme Court Rule 3A:19 states: "The accused or his counsel shall advise the judge or clerk of the juvenile and domestic relations district court, within 10 days after convictions of his intention to appeal…"

The clerk or judge notes sentencing information, bail information, and the court date to which the defendant will be bonded on the DC-356, DISPOSITION NOTICE form. The clerk also notes on the form whether the defendant has filed the DC-370, NOTICE OF APPEAL - CRIMINAL form with the clerk's office. Therefore the DC-356, DISPOSITION NOTICE form should contain all the information necessary for the magistrate to complete the release of the defendant on bail.

Virginia Code §§ 16.1-135 and 19.2-125 state that if the defendant notes an appeal of a district court conviction, the court must give the accused credit for any bond already posted. If the magistrate is processing the release, he or she must determine how many days have passed since the defendant's conviction. The applicable language of Va. Code § 16.1-135 states:

> Whenever an appeal is taken and the 10-day period prescribed by §16.1-133 has expired the papers shall be promptly filed with the clerk of the circuit court.

If less than ten days have passed since the court convicted the accused, the magistrate needs to prepare the DC-330, RECOGNIZANCE form in which the accused would agree to appear before the circuit court on the date specified in the DC-356, DISPOSITION NOTICE form. Should the defendant or a surety post a cash bond, the magistrate would make the magistrate's check payable to the district court, not the circuit court. The magistrate then

forwards all paperwork to the district court from which the appeal was noted.

If ten or more days have passed since the court convicted the accused, the magistrate prepares the DC-330, RECOGNIZANCE form and forwards all paperwork to the appropriate circuit court. Should the defendant or a surety post a cash bond after the first ten days from the date of conviction, the magistrate would make the magistrate's check payable to the circuit court.

Virginia Code § 8.01-676.1 describes security costs associated with filing a notice of appeal to the Court of Appeals or the Supreme Court. Magistrates should not process these bonds. Virginia Code § 8.01-676.1 (F) states that:

> Each bond filed shall be executed by a party or another on his behalf, and by surety approved by the clerk of the court from which appeal is sought, or by the clerk of the Supreme Court or the clerk of the Court of Appeals if the bond is ordered by such Court.

See also Va. Code § 19.2-319.

XVI. BAIL PROCEDURES IN CONNECTION WITH SUPPORT CASES

To comprehend support cases, a magistrate must understand the distinction between civil contempt and criminal contempt. When a court finds a person in criminal contempt, the court will sentence the respondent to jail for a specific period of time for failure to make support payments. Upon a finding of civil contempt in support cases, the court will jail the respondent until he pays the support owed. In other words, the respondent has the "keys to the jail" in a civil contempt case because he can control when he is released by following the court's order. In a criminal contempt case, the respondent does not control his release, since payment of the support does not affect his jail sentence. In support cases where the judge finds the respondent in civil contempt, the judge usually orders the respondent jailed until such time that he pays a specific sum of money to the person owed the support. When the judge has jailed the respondent for civil contempt, the clerk or judge will note this on the DC-356, DISPOSITION NOTICE form. The clerk or judge also will specify to whom the respondent must pay the support payment. The magistrate does not become involved with collecting this money. The respondent, or someone on his behalf, must pay the party specified in the order directly. Once the respondent makes such payment, the court then releases him. The magistrate is not involved in the release process in civil contempt cases.

Virginia Code § 16.1-296 sets forth procedures for bail in appeal cases. Subsection H of this statute states:

> No appeal bond shall be required of a party appealing from an order of a juvenile and domestic relations district court except for that portion of any order or judgment establishing a support arrearage or suspending payment of support during pendency of an appeal. In cases involving support, no appeal shall be allowed until the party applying for the same or someone for him gives bond, in an amount and with

> sufficient surety approved by the judge or by his clerk if there is one, to abide by such judgment as may be rendered on appeal if the appeal is perfected or, if not perfected, then to satisfy the judgment of the court in which it was rendered. Upon appeal from a conviction for failure to support or from a finding of civil or criminal contempt involving a failure to support, the juvenile and domestic relations district court may require the party applying for the appeal or someone for him to give bond, with or without surety, to insure his appearance and may also require bond in an amount and with sufficient surety to secure the payment of prospective support accruing during the pendency of the appeal. An appeal will not be perfected unless such appeal bond as may be required is filed within 30 days from the entry of the final judgment or order. However, no appeal bond shall be required of the Commonwealth or when an appeal is proper to protect the estate of a decedent, an infant, a convict or an insane person, or the interest of a county, city or town.

There are three possible manifestations of a support arrearage case:

- The court establishes or sets a support arrearage.
- The court establishes or sets a support arrearage and finds the respondent in civil contempt.
- The court establishes or sets a support arrearage and finds the respondent in criminal contempt.

In any one of the three possible manifestations, there may also be an accrual bond required upon an appeal. This bond is for the purpose of covering additional support payments that will accrue during the pendency of the appeal of the case. See the discussion that follows below for appeals and the handling of bail and bond during an appeal.

The respondent may appeal the decision of the juvenile and domestic relations district court in all three situations. Appeal bond procedures differ according to the underlying type of case. In a case where the court sets or establishes support arrearage only, the respondent must "file" the appeal bond to secure the arrearage with the clerk of the juvenile and domestic relations district court within thirty days from the entry of the final judgment or order. If the respondent does not file this appeal bond for arrearage within the thirty-day time period, the appeal does not go forward to the circuit court. The magistrate is not involved in this appeal bond for arrearage.

As a result of the Courts' decisions in May v. Walker, 253 Va. 319 (1997) and Mahoney v. Mahoney, 34 Va. App. 63 (2000), the Attorney General opined that where the court sets or establishes a support arrearage and also finds the respondent in civil contempt, the respondent must file an appeal bond to secure the arrearage with the clerk within thirty days of the judgment to perfect the appeal on the issues of arrearage and civil contempt. *See* Attorney General Opinion to Lewis dated 4/11/02 (2002, page 127);

Court rulings in Commonwealth ex rel. May v. Walker and Mahoney v. Mahoney overrule Avery v. Commonwealth, Department of Social Services, which allows bifurcated appeal in case of father found guilty of civil contempt for failure to pay court-ordered child support. Requirement that, within 30 days of juvenile court civil contempt ruling, party post appeal bond based on amount of support arrearage to perfect appeal to circuit court for trial de novo.

If the respondent fails to file this arrearage appeal bond within the thirty-day time period, the appeal dies and the circuit court never gains jurisdiction to conduct the *de novo* trial on these issues. Since the respondent would be held in jail on the civil contempt, the juvenile and domestic relations district court also would either set bail in this case or hold the respondent, without bail, pending the circuit court trial. If the court requires a secured or unsecured bond for appearance, this bond is separate and distinct from the arrearage appeal bond. Although the magistrate does not have the authority to process the arrearage bond, the magistrate is authorized to release the respondent on the conditions that the court set for appearance.

Even though the respondent had not yet filed the arrearage appeal bond with the juvenile and domestic relations district court, he is eligible for release on bail for appearance in the circuit court. If at the time the magistrate prepares the DC-330, RECOGNIZANCE form for the appearance portion of the civil contempt appeal, and the respondent has not yet filed the arrearage appeal bond with the clerk, the magistrate must set a condition of release that requires the respondent to file the arrearage appeal bond with the clerk within thirty days of the date of the order establishing arrearage. The magistrate must explain to the respondent that if he does not file the arrearage bond with the court within thirty days, the court will issue a capias for his arrest, and that he will no longer have the ability to appeal the underlying arrearage establishment or the finding of civil contempt. Upon arrest on this capias, the magistrate must conduct a bail hearing for the bail revocation hearing. Unless the respondent has proof of the filing of the arrearage bond, the magistrate should be reluctant to release the respondent on bail. At the revocation hearing, if the judge finds that the respondent failed to timely file the arrearage bond with the court, the judge will reimpose the civil contempt finding and the respondent will remain in jail until he abides by the order of the court.

The case where the court sets or establishes an arrearage and also finds the respondent in criminal contempt requires different procedures. In criminal cases, a respondent does not have to meet the requirements of an arrearage bond in order to perfect the appeal to the circuit court. If the respondent fails to file the arrearage bond with the clerk, the appeal still goes forward but the court may incarcerate the defendant until the circuit court conducts the trial. For this reason, the appeal procedures for criminal contempt differ from civil contempt. In support arrearage cases where the court establishes arrearage and also finds the respondent in criminal contempt, the court will set an arrearage appeal bond as well as conditions of bail for appearance in circuit court. This is consistent with the civil contempt appeal process. A secured or unsecured bond likely will be made a condition of release.

The appeal of the criminal contempt is perfected at the time of filing of the notice of appeal, and if the respondent is unable to meet the obligations under the arrearage appeal bond or

the obligations of a bond set as part of the conditions of release, the circuit court still will conduct the trial on the issue of criminal contempt and arrearage. If the respondent is in jail pending the appeal of the establishment of the arrearage and criminal contempt, the respondent is eligible for release from jail even though he has not filed the arrearage bond with the clerk.

If at the time the magistrate prepares the DC-330, RECOGNIZANCE form for the criminal contempt appeal, the respondent has not yet filed the arrearage appeal bond with the clerk, the magistrate must set a condition of release that requires the respondent to file the arrearage appeal bond with the clerk within thirty days of the date of the order establishing arrearage. If the respondent fails to file the arrearage appeal bond, the court will issue a capias for the respondent's arrest for failing to abide by the conditions of release. This capias will initiate a bail revocation hearing. If the court revokes bail for failure to file the arrearage bond, the respondent remains in jail during the pendency of the appeal. The appeal continues, however, and the circuit court has jurisdiction to proceed to trial on the issue of criminal contempt and arrearage.

In addition to setting an arrearage appeal bond and setting bail for appearance in circuit court, the juvenile and domestic relations district court also may require the respondent to file a bond to secure the payment of prospective support that will accrue during the pendency of the appeal. Again this bond is separate and distinct from the arrearage appeal bond, and from a secured or unsecured bond set as a condition of release. Where the court establishes an arrearage only, the respondent must file this prospective bond with the clerk within thirty days of the order or judgment. If the respondent fails to file the prospective bond within the thirty-day period, the circuit court loses jurisdiction to try the case, and the appeal dies. If the appeal is from an order establishing arrearage and a finding of either civil or criminal contempt, the respondent is eligible for release from jail even though the respondent has not yet filed the arrearage or prospective bond with the clerk. If the respondent has not yet filed the prospective bond, should the court required one, the magistrate must set as a condition of release on the DC-330, RECOGNIZANCE form that the respondent file the prospective bond with the clerk within thirty days of the date of the date of the order and finding of criminal contempt. In civil contempt cases, if the respondent fails to file the prospective bond with the court within thirty days, the appeal dies. The juvenile and domestic relations district court then would conduct a bail revocation hearing for failure to abide by the conditions of release. If the court revokes bail, the respondent remains in jail until he obeys the initial court order. In criminal contempt cases, if the respondent fails to file the prospective bond with the clerk within the time specified, the respondent would violate the conditions of release and would be subject to having the court revoke bail during the pendency of the appeal. At the court would then conduct a bail revocation hearing. Regardless of whether the court revokes bail for failure to abide by the conditions of release, the respondent's appeal goes forward.

If the respondent fails to meet the conditions of bail for the thirty days following the finding of civil contempt, but has filed the arrearage bond (and the prospective bond if required), the magistrate may release the respondent if he is able to meet the bail conditions after the initial thirty-day period. If, however, the respondent failed to file the arrearage bond with the clerk within the thirty-day time period, the appeal dies and he is not eligible for release

on bail after that point. In criminal contempt cases, if the respondent fails to file the arrearage bond within the thirty-day period and still is in jail after that time period, the court, not the magistrate, must make any release on bail decisions, since the respondent then could not meet the bail condition of filing the arrearage bond with the clerk within thirty days. If the respondent fails to meet the conditions of bail for the thirty days following the finding of criminal contempt, but has filed the arrearage bond (and the prospective bond if required), the magistrate may release the respondent if he is able to meet the bail conditions after the initial thirty-day period.

The magistrate is to follow the accounting procedures set forth in the "Accounting and Prepayment" chapter of this manual, with the following exception. If the respondent posts a cash bond to satisfy the bail conditions set by the court, the magistrate must make the magistrate's check payable to the juvenile and domestic relations district court if the case is still within the thirty-day period after establishment of arrearage and the finding of either civil or criminal contempt. The magistrate must set the respondent's appearance, however, in the circuit court when preparing the DC-330, RECOGNIZANCE form. The magistrate transmits all documents to the juvenile and domestic relations district court if within the initial thirty-day period after the establishing arrearage and the finding of contempt.

XVII. SURETY'S CAPIAS AND BAILPIECE RELEASE

Virginia Code §§ 19.2-149 and 19.2-150 set forth the procedures whereby a surety may be relieved of the obligations of a bond. As stated earlier the accused is known as the "principal" when discussing the obligations of a bond. The DC-330, RECOGNIZANCE form is the bailpiece. There are several ways in which the surety may cause the arrest of the accused.

1. A bail bondsman or his licensed bail enforcement agent may arrest the principal and surrender him to the court in the locality in which the recognizance was taken or before which the appearance is required;

2. A bail bondsman or his licensed bail enforcement agent may arrest the principal and surrender him to the sheriff or jailer of the county or city where the court before which such principal's appearance is required is located; or

3. Any surety may apply to the judge, clerk, or magistrate, who must issue a capias for the arrest of such principal. This capias may be executed by the bail bondsman or his licensed bail enforcement agent, or a sheriff, sergeant, or police officer.

Pursuant to Va. Code § 19.2-149, upon the application of a surety, a magistrate shall issue a DC-331, SURETY'S CAPIAS AND BAILPIECE RELEASE. Va. Code § 19.2-149 requires the surety to state the basis for which the capias is being requested and space is provided on the DC-331, SURETY'S CAPIAS AND BAILPIECE RELEASE for this purpose. The reason provided by the surety has no effect on the magistrate's requirement to issue. As long as the court has not disposed of the case, the magistrate must issue the surety's capias upon the request of the surety.

Pursuant to subsection B of Va. Code § 19.2-149, when a bail bondsman makes application for a surety's capias, the bondsman shall deposit the greater of 10 percent of the amount of the bond or $50 unless bondsman's reason for seeking the surety's capias is that the principal failed to appear in any court. This requirement does not apply to non-compensated sureties. *See* the "Accounting and Prepayments" chapter of this manual for instructions on how to process and account such deposit.

Subsection B of Va. Code § 19.2-149 also describes the process by which the bondsman may petition the court to return the deposit:

> *The bondsman shall petition the court within 15 days from the surrender of the principal to show cause, if any can be shown, why the bondsman is entitled to the amount deposited. If the court finds that there was sufficient cause to surrender the principal, the court shall return the deposited funds to the bondsman. If the court finds that the surrender of the principal by the bondsman was unreasonable, the deposited funds shall be returned to the payer. Remission of funds shall not be issued by the court until the sixteenth day after the finding.*

The bail bondsman, his licensed bail enforcement agent, or any authorized law enforcement officer may execute the DC-331, SURETY'S CAPIAS AND BAILPIECE RELEASE. If the surety requesting the capias is a bail bondsman or a licensed bail enforcement agent and he wishes to execute the capias, the magistrate must give him the capias to execute. If the surety requests that law enforcement execute the capias or if the surety is not a bail bondsman or a licensed bail enforcement agent, the magistrate should deliver the capias to the appropriate sheriff's office or police department. The magistrate must also transmit a copy of the capias to the court before which the principal's appearance is required by the close of business on the next day that is not a Saturday, Sunday, legal holiday, or day on which the court is lawfully closed. The person executing the capias must deliver the principal and capias to the sheriff or jailer of the locality in which the appearance of the principal is required. Thereupon, the statute discharges the surety from liability for any act that the principal commits after the execution of the capias. Va. Code § 19.2-149 specifically requires the sheriff or jailer to deliver the capias to the clerk of the court with an endorsement acknowledging delivery of such principal to his custody.

Upon the arrest of the accused, Va. Code § 19.2-150 states that if the bail bondsman or a licensed bail enforcement agent surrenders the principal directly to the court, the court then enters an order documenting the accused's surrender and noting bail. If the bail bondsman or his licensed bail enforcement agent surrenders the principal to the sheriff or jailer, that officer then gives the surety a certificate of the fact. After such surrender, the statute states:

> After such surrender the person shall be treated in accordance with the provisions of Article 1 (§ 19.2-119 et seq.) of Chapter 9 of this title unless the court or judge thereof has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community.

Virginia Code § 19.2-5 provides: "The word 'judge' as used in this title, unless otherwise

clearly indicated by the context in which it appears, shall mean and include any judge, associate judge or substitute judge, or magistrate, of any court."

Virginia Code § 19.2-234 requires that: "officer who, under a capias from any court, arrests a person accused of an offense shall proceed in accordance with § 19.2-80 and Article 1 (§ 19.2-119 et seq.) of Chapter 9 of Title 19.2 regarding bail." These statutes require the sheriff or jailer to bring the accused before a magistrate or other judicial officer for a bail hearing at the time of the surety's surrender of the accused or upon the arrest of the accused pursuant to a DC-331, SURETY'S CAPIAS AND BAILPIECE RELEASE. The accused is eligible again for bail. At the bail hearing, the magistrate is determining bail on the charges that underlay the surety's capias. (The surety's capias is merely a document that brings the accused back into custody.) Normally, the magistrate will reinstate the bail conditions upon which the accused originally was released. If the magistrate believes, however, that the accused presents a flight or safety risk from new evidence presented in this bail hearing, the magistrate may increase the bond and/or impose new conditions of release, or alternatively, the magistrate may hold the accused without bail. If the defendant is able meet the original conditions of bail reinstated, or the new conditions of bail, if any, then the magistrate would prepare a DC-330, RECOGNIZANCE form. If the accused is unable to meet the original conditions of bail reinstated, the new conditions of bail, if any, or is held without bail then the magistrate would prepare a DC-352, COMMITMENT ORDER form.

XVIII. WITNESS RECOGNIZANCE

Whenever it appears that it will be impossible to compel a material witness to testify by issuance of a subpoena, then upon an affidavit alleging such, a judge pursuant to Va. Code§19.2-127 may inquire into the conditions that are necessary for release under the procedures of Article 1 of Chapter 9 (§ 19.2-119 et seq.) of Title 19.2 Code of Virginia. The court may conduct a bail hearing and set conditions of release for the witnesses. In the rare case where the magistrate is processing the release of a witness on bail, the magistrate must use the DC-329, RECOGNIZANCE (WITNESS) form instead of the criminal DC-330, RECOGNIZANCE form. This form is supplied as a printed version form and the magistrate should contact the chief magistrate to obtain the form if necessary.

XIX. ARREST UNDER MILITARY LAW

A. Arrest Under Virginia Military Law

For procedures related to a magistrate issuing a process under Title 44 relating to Virginia Military law *see* the section entitled, Virginia Arrest Warrants Issued Under Virginia Military Law in the "Adult Arrest Procedures" chapter of this manual.

If a law enforcement officer takes custody of a person named in a warrant issued pursuant to Va. Code §§ 44-41.1 , the officer will most likely bring the person before a magistrate for a bail hearing. As the violation is a Class 4 misdemeanor, the magistrate should consider releasing the accused on a recognizance or on an unsecured bond. Additional terms that could be considered appropriate would be to require the accused to report as ordered for active duty. Upon releasing the accused, the magistrate should forward the warrant and DC-330, RECOGNIZANCE form to the appropriate district court.

B. Absent Without Leave from the Federal Armed Forces

Federal law allows local law enforcement to take custody and hold a person who is absent without leave from any branch of the armed forces without bringing that person before a judicial officer. A person who is AWOL is not entitled to a bail hearing. Therefore, the magistrate must not conduct a bail hearing, and must not issue a DC-352, COMMITMENT ORDER form in such a case.

XX. ARREST UPON WARRANT OF PROBATION OR PAROLE OFFICER

Virginia Code § 53.1-149 authorizes probation officers to issue statements in cases where a probationer has violated a condition of probation. Likewise, Va. Code § 53.1-162 allows probation and parole officers to issue written statements when a parolee has violated the conditions of parole. Both statutes state if a probation or parole officer issues such a statement, the statement is "sufficient warrant for the detention of the probationer." These sections also give probation and parole officers the power to arrest probationers and parolees without a warrant. When the probationer or parolee is arrested pursuant to either statute, law enforcement should not bring the person before the magistrate. The magistrate is not authorized to conduct a bail hearing in such a case. *See* Attorney General Opinion to Quynn, dated 5/7/69 (1969, page 16A); *Parolee Arrested Pursuant to the Provisions of Sec. 53-258 or Sec. 53-259 — Not entitled to bail*. Consequently, the magistrate must not issue a DC-352, COMMITMENT ORDER form, since the magistrate did not conduct a bail hearing.

XXI. BAIL PROCEDURES FOR ILLEGAL ALIENS

A. Introduction

In many cases involving an illegal alien subject to Va. Code § 19.2-81.6, an officer will have arrested the defendant on Virginia criminal charges. In such situations, the normal bail procedures will apply. However, if the officer arrests the illegal alien pursuant to Va. Code § 19.2-81.6 and does not charge him with any Virginia crimes, different bail procedures are recommended

B. Accompanying Virginia Charges

If the magistrate conducts a bail hearing on Virginia charges in addition to the illegal alien warrant, the magistrate must direct in the DC-352, COMMITMENT ORDER that the defendant be brought before the appropriate court on a specified date and time for advisement. The fact that the defendant is an illegal alien falling within the purview of Va. Code § 19.2-81.6 does not alter the bail procedures that the magistrate must follow for the Virginia charges that the defendant faces. The magistrate merely lists Va. Code § 19.2-81.6 in the CHARGES(S) section of the DC-352, COMMITMENT ORDER along with the Virginia offenses for which the magistrate conducted the bail hearing.

C. No Accompanying Virginia Charges

If the officer arrests the illegal alien pursuant to Va. Code § 19.2-81.6 and does not charge him with any Virginia crimes, the following slightly different procedures are

recommended. The magistrate should calculate the expiration time and date of the illegal alien warrant. This seventy-two hour time period is calculated from the time the magistrate issued the illegal alien warrant. The magistrate should note the expiration time and date in the other conditions of bail space on the DC-352, COMMITMENT ORDER by reciting the following language: "The illegal alien warrant expires at (fill in time)___on (fill in dated)_____. If a federal official has not taken the defendant into custody by that time, the defendant must be released upon the expiration of the warrant." Once the illegal alien warrant expires, the jail may request a DC-353, RELEASE ORDER Since the warrant expires by operation of law, the DC-353, RELEASE ORDER technically is not necessary. There is nothing, however, that prohibits the magistrate from issuing the DC-353, RELEASE ORDER either at the end of the seventy-two hour period, or when a federal official takes custody of the alien.

XXII. MISCELLANEOUS STATUTES ON BAIL

Virginia Code § 8.01-508 states that a commissioner in chancery or a court may issue a capias for the arrest of a person who fails to appear and answer interrogatories or refuses to answer interrogatories. A commissioner in chancery is a lawyer whom a judge appoints to handle certain aspects of a civil case. At an interrogatory hearing, the court allows a judgment creditor (the winning party in a previous civil case) to ask the judgment debtor (the losing party) questions about the debtor's finances and other personal data so that the judgment creditor can go after assets of the debtor to satisfy the judgment.

Although a defendant in a civil action does not have to appear in court at trial, the defendant does have to appear at the interrogatory hearing. Failure to attend the hearing subjects the judgment debtor to arrest upon a capias and possible incarceration. In many cases, however, the judgment debtor does not realize that failing to appear at the interrogatory hearing may constitute contempt, since a failure to appear at the underlying civil trial carried no sanctions. Any person arrested on capias for failing to appear at the interrogatory hearing is entitled to bail pursuant to Article 1 (§ 19.2-119 et seq.) of Chapter 9 of Title 19.2 Code of Virginia if the arresting officer is unable to bring the accused promptly before the commissioner or court. Determination of bail should be guided by the nature of the case, and the specifics concerning the failure to appear. As most respondents are not aware that failing to appear for interrogatories is punishable by the court, the magistrate should use common sense in determining bail in this situation.

Virginia Code § 19.2-124 states that if a magistrate denies bail to an accused or juvenile, requires excessive bond, or fixes unreasonable terms of a recognizance, the accused may appeal the bail decision successively to the next higher court up to and including the Supreme Court of Virginia. The attorney for the Commonwealth may also appeal a bail decision. The court granting or denying such bail may, upon appeal thereof, and for good cause shown, stay execution of such order for so long as reasonably practicable for the party to obtain an expedited hearing before the next higher court. No such stay may be granted after any person who has been granted bail has been released from custody on such bail. The defendant is not required to pay any filing or service fees to perfect the appeal. The appeal from a magistrate's bail determination is first to the court where the case is initially returnable.

Virginia Code § 19.2-128 punishes a willful failure to appear in court as directed in violation of a summons or a release on bail pending trial, or a release on bail where the sentence or the execution of the sentence has been suspended on appeal or otherwise. Where the underlying offense is a misdemeanor, the punishment for a willful failure to appear is a class one misdemeanor. If the underlying charge is a felony, the statute punishes a willful failure to appear as a class six felony. Often a law enforcement officer will appear before a magistrate to present evidence of the willful failure to appear. If the magistrate finds probable cause that the accused willfully failed to appear, the magistrate would issue a warrant pursuant to Va. Code § 19.2-128. Virginia Code § 19.2-129 does not allow a court to sentence a person for contempt of court and for a violation of Va. Code § 19.2-128 for the same failure to appear.

Virginia Code § 19.2-130 states that any person admitted to bail by a judicial officer shall not be required to be admitted to bail in any subsequent proceeding arising out of the initial arrest unless the court deems the initial amount of bond or security inadequate.

Virginia Code § 19.2-131 – Pursuant to this statute a magistrate has the authority to conduct a bail hearing even though the defendant is charged with a crime returnable to a locality outside of the magistrate's district or region. Once the magistrate has made a bail decision, the statute requires the magistrate to forthwith forward the warrant and recognizance or commitment order to the clerk of the court having jurisdiction to try the case.

Virginia Code § 19.2-134 sets forth the form of a bail piece. The DC-330, RECOGNIZANCE form itself is the bail piece. This statute is antiquated in nature since the current Recognizance form is much more detailed than the bail piece language deemed legally sufficient under Va. Code § 19.2-134. If for some reason the accused or surety needs a copy of the DC-330, RECOGNIZANCE, this statute requires the clerk of court to provide one.

Virginia Code § 19.2-135 states that a recognizance must contain the following conditions:

a. that the accused must appear to answer the charge before the court where the case is to be tried at such time as stated in the recognizance, and at any time or times which the proceedings may be continued;

b. that the accused may not depart from the Commonwealth unless the judge or magistrate specifically waives this provision in the DC-330, RECOGNIZANCE form;

c. that the accused must keep the peace and be of good behavior until final disposition of the case.

This statute also allows the court to remand the accused to jail until the court finally disposes of the case if the accused violates any condition of release. The Due Process Clause, however, requires that the court conduct a hearing with the defendant present before the court can remand the principal to jail. The purpose of such a hearing is for the court to determine whether the accused actually violated the conditions of release without just cause. Virginia Code § 19.2-135 also requires that a witness who is under a recognizance must obtain permission from the court before leaving the Commonwealth. Virginia Code § 19.2-137 describes the language that must be contained in a court order when the court requires a recognizance from the accused or a witness. Courts throughout Virginia routinely use the DC-330, RECOGNIZANCE form to document orders regarding bail made in open court.

Virginia Code § 19.2-141 allows a person deemed suitable by the judicial officer to enter into the conditions of a recognizance for the accused who is a minor, insane, or mentally incapacitated. The person entering into the conditions of a recognizance must ensure that minor, insane, or mentally incapacitated defendant adheres to the conditions. In most cases even though the defendant is a minor has been declared insane or mentally incapacitated, he or she will be before the magistrate during the release phase of a bail hearing. In those rare cases where such defendant is not physically before the magistrate, the magistrate may rely on this statute to perfect a release if a suitable third party is present and willing to sign on behalf of the defendant.

Virginia Code § 19.2-142 states that a judicial officer taking a recognizance out of court must forthwith transmit it to the clerk of the court that has jurisdiction over the case. The statute also requires the clerk to keep the DC-330, RECOGNIZANCE forms on file.

Virginia Code § 19.2-143 sets forth the requirements to which a court must adhere when forfeiting a bond guaranteed by a surety. This section also sets forth specific procedures that a court must follow when the court wishes to forfeit a cash bond posted by the defendant.

Virginia Code § 19.2-144 sets forth the procedure for the courts to follow if the person alleged to be in default was prevented from complying with the condition of the bail by reason of having enlisted or been drafted in the army or navy. These provisions do not affect magistrate procedures.

Virginia Code § 19.2-145 gives the courts discretion to meet exigencies of a particular case by remitting any portion of a forfeited bond, and by rendering judgment on such terms and conditions it deems reasonable. This statute applies only to a pending action, not to a case where the court has already entered a final judgment for the amount of the bond forfeited. *See* Jordan v. Commonwealth, 135 Va. 560 (1923).

Virginia Code § 19.2-146 states that if a judicial officer takes a bond that is substantially sufficient, defects in the form of the bond will not affect its validity. In other words, if the magistrate makes a mistake in filling out the DC-330, RECOGNIZANCE form, this statute may cure such defects and allow the Commonwealth to pursue forfeiture of the bond if the accused fails to appear in court. There are some mistakes in completing the form that this

statute could not cure. For example, if the defendant or surety fails to sign document, the bond is unenforceable.

Virginia Code § 19.2-147 gives the procedure for docketing a judgment on a forfeited bond. This statute has no application to magistrate procedures. Virginia Code § 19.2-148 also has no impact on magistrate procedures. This statute states that after a default on a bond a surety may pay into the court the amount of the bond and any assessed costs and not incur any further obligation on the bond.

Virginia Code § 19.2-234 states, as noted above, that an officer who arrests a person under a capias from any court must bring the accused without unnecessary delay before a judicial officer for a bail hearing in accordance with the provisions of Va. Code § 19.2-119, et seq. This statute does not authorize a judge or clerk to determine bail at the time court or clerk issues the capias in the absence of the accused. In addition to the statutes governing bail, due process considerations require the presence of the accused during a bail hearing. If the magistrate has reason to believe that neither the defendant nor the defendant's attorney was present for a bail hearing at the time the court or clerk issued the capias, the magistrate must conduct a full bail hearing and make an independent determination based on information gathered in the magistrate's hearing.

Virginia Code § 53.1-116.3 sets forth the procedures when a prisoner is improperly released or discharged from custody. This statute requires the sheriff, or jail superintendent or designee to report the improper release to the court having jurisdiction. If the court finds good cause to support that the prisoner was improperly released, the court issues a capias.

Upon arrest, Va. Code § 19.2-234 requires that the arresting officer bring the defendant before the magistrate for a bail hearing. Virginia Code § 53.1-116.3 then requires the court to conduct a hearing to determine if the original release was improper.

Virginia Code § 19.2-97 states that once a law enforcement officer arrests a person on a Governor's warrant, the officer may confine him in the jail of any city or county through which the officer and accused may pass. The magistrate does not conduct a bail hearing when an officer arrests a person on a Governor's warrant. The Governor's warrant itself commits the accused to the jail, and the choice of the jail is left to the arresting officer. Normally, confinement will be in the locality of the arrest, or where the accused is currently held.

Virginia Code § 37.2-813 allows a district court judge or a special justice to set bail for an adult person awaiting a mental commitment hearing. The juvenile and domestic relations district court judge has the authority to release a juvenile to the juvenile's parent awaiting a mental commitment hearing. The director of a facility that is holding a person awaiting mental commitment hearings may release that person pending the commitment hearing after an evaluation conducted by the psychiatrist or clinical psychologist if the evaluator concludes that the person is not an imminent danger to himself or others. A magistrate lacks authority to release a person on bail pending a mental commitment hearing.

Virginia Code § 37.2-919 sets forth procedures for bail hearing for people committed to the Department of Behavioral Health and Developmental Services. If a law enforcement officer arrests a person for a felony or a Class 1 or 2 misdemeanor, who is already committed to the Department of Behavioral Health and Developmental Services, the statute requires the officer to take the person before a judicial officer for a bail hearing. If the judge or magistrate admits the person to bail, this statute requires that the person be transported immediately back into the custody of to the Department of Behavioral Health and Developmental Services.

Subsection A.3.d of Va. Code § 19.2-11.01 requires sheriffs and jail superintendents to notify crime victims when the defendant is released from jail on bail. The victim must provide his or her name, current address, and telephone number. The crime victim must submit this information along with the notification request to the sheriff or jail superintendent in writing. The statute does not involve the magistrate in this procedure. Subsection B of Va. Code § 19.2-11.01 defines "victim" as:

> (i) a person who has suffered physical, psychological or economic harm as a direct result of the commission of a felony or of assault and battery in violation of § 18.2-57 or § 18.2-57.2, stalking in violation of § 18.2-60.3, sexual battery in violation of § 18.2-67.4, attempted sexual battery in violation of § 18.2-67.5, maiming or driving while intoxicated in violation of § 18.2-51.4 or § 18.2-266, (ii) a spouse or child of such a person, (iii) a parent or legal guardian of such a person who is a minor, (iv) for the purposes of subdivision A 4 of this section only, a current or former foster parent or other person who has or has had physical custody of such a person who is a minor, for six months or more or for the majority of the minor's life, or (v) a spouse, parent, sibling or legal guardian of such a person who is physically or mentally incapacitated or was the victim of a homicide; however, "victim" does not mean a parent, child, spouse, sibling or legal guardian who commits a felony or other enumerated criminal offense against a victim as defined in clause (i).