

**8 GCA CRIMINAL PROCEDURE**  
**CH. 40 RELEASE**

**CHAPTER 40**  
**RELEASE**

**NOTE:** References to Director of Public Safety and Director changed to *Chief of Police* pursuant to P.L. 17-78:1, which repealed § 5102 GC providing for the Department of Public Safety, and reenacted § 5102 establishing the Guam Police Department.

**NOTE:** Release - continues parts of Criminal Rule 46 and of Penal Code Title IX, Chapter 1 of Part 2 -- "Bail." This Chapter incorporates much of the substance of the Federal Bail Reform Act of 1966 (18 U.S.C., Chapter 207). The change in title reflects a change from release only upon bail to release subject only to those conditions required by the circumstances of the case -- a practice now followed by the Superior Court in a different form.

No provision is made for "station-house bail" - never used on Guam although authorized - because it is expected that a citation will be used where such bail may have been used. Compare Cr. Rule 46(a) with Chapter 25. See § 20.60, but also § 15.50 where the court may fix conditions of release in the warrant.

Title 18 U.S.C. §3149 provides for release of material witnesses. See Cr. Rule 46(b) - bail for witnesses; § 75.40, CPC.

This Chapter does not limit the Judicial Council from providing bail in traffic cases, and for a "forfeiture of bail" in lieu of fine. See § 1.09, CPC.

- § 40.10. Release on Bail Generally Permitted.
- § 40.15. Release on Own Recognizance Defined: When Permitted.
- § 40.20. Bail Conditions; Defined, When to be Used.
- § 40.25. Solvency of Sureties to be Assured; Procedure.
- § 40.30. Procedure Where Surety Loses Worth.
- § 40.35. How Surety May be Exonerated; Deposit Sum With Clerk.
- § 40.40. Procedure for Handling Cash Bail.
- § 40.45. Bail Bondsman May Arrest Person.
- § 40.50. Bail Redetermination Hearing; When; Procedure.
- § 40.55. Statement to Arrestee Upon Release With Conditions.
- § 40.60. Additional Restrictions may be Applied; Application by Prosecutor; Additional Restrictions Listed.
- § 40.65. Retaking of Defendant Upon Violation of Conditions.
- § 40.70. Warrant Upon Failure to Appear.
- § 40.75. Actions Allowed Upon Violation of Conditions or Failure to Appear.
- § 40.80. Appeal of Conditions Allowed.
- § 40.85. Release After Conviction Pending Appeal; Conditions.

**8 GCA CRIMINAL PROCEDURE**  
**CH. 40 RELEASE**

- § 40.90. Penalty for Wilful Failure to Appear: Felony if Underlying Offense is Felony; Misdemeanor if Misdemeanor.
- § 40.95. Procedure Upon Forfeiture of Bail.

**§ 40.10. Release on Bail Generally Permitted.**

At his first appearance before a judge of the Superior Court, every person charged with an offense shall be ordered released pending trial in the manner and subject to the conditions provided by §§ 40.15 and 40.20.

**NOTE:** Section 40.10 is an introductory provision comparable to the first sentence of former Rule 46. “Excessive bail” is proscribed by the 8th Amendment of the U.S. Constitution as incorporated into the Organic Act by §§ 1421b(h) and 1421b(u). (48 U.S.C.A. § 1421b).

**§ 40.15. Release on Own Recognizance Defined; When Permitted.**

(a) As used in this Section, ‘release on own recognizance’ means release of the person charged without bail and upon his written agreement to appear in court at all required times and places and to fully comply with any other court-ordered conditions and restrictions.

(b) The judge *shall* order the person charged to be released on recognizance, unless the judge determines, in his discretion, on the basis of available information, that such a release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.

(c) In determining whether there is a substantial risk of nonappearance by the person charged or that the person charged will endanger the safety of any other person or the community, the judge *shall* consider the following factors:

- (1) the nature of the offense charged, the apparent possibility of conviction and the likely sentence;
- (2) the history and characteristics of the person charged, including:
  - (A) length of his/her residence on Guam;
  - (B) his/her employment status and history, and financial condition;
  - (C) his/her family ties and relationships;

**8 GCA CRIMINAL PROCEDURE**  
**CH. 40 RELEASE**

(D) his/her reputation, character, and mental and physical condition;

(E) his/her prior criminal record, if any, including any record of prior release on recognizance or on bail;

(F) his/her history relating to drug or alcohol abuse;

(G) the identity of the reasonable members of the community who will vouch for his/her reliability;

(H) whether, at the time of the current offense or arrest, he/she was on probation, on parole, or on other release pending trial, sentencing, appeal or completion of sentence of an offense under federal, state or local law; and

(I) his/her history of compliance with other court orders;

(3) the nature and seriousness of the danger the person would pose to the community or to any individual member thereof if released;

(4) statements of the alleged victim or others as to previous incidences of violence and threats made to the alleged victim;

(5) lethality risk assessments or other risk assessments deemed appropriate by the Judiciary of Guam; and

(6) any other factors which bear on the risk of willful failure to appear or the danger the person would pose to the community or to any individual member thereof if released.

(d) Nothing in this Section shall be misconstrued as modifying or limiting the presumption of innocence.

**SOURCE:** Section 40.15 amended by P.L. 20-111:1 (Oct. 19, 1989); P.L. 24-239:10 (Aug. 14, 1998), and P.L. 34-071:3 (Dec. 15, 2017).

**§ 40.20. Bail Conditions; Defined, When to be Used.**

Where the judge determines that release of the person charged on his/her own recognizance will not reasonably assure his/her appearance as required, or will endanger the safety of any other person or the community, the judge shall impose the least onerous of the following conditions which is reasonably likely to assure the person's appearance as required and the safety of any other person and the community, or, if no single condition gives that assurance, the least onerous combination of the following conditions:

**8 GCA CRIMINAL PROCEDURE**  
**CH. 40 RELEASE**

(a) placement of the person in the custody of a designated person or organization agreeing to supervise him/her and to assist him/her in appearing in court;

(b) placement of restrictions on the activities, movements, associations, and residence of the person;

(c) placement of the person under supervision by means of electronic monitoring, including electronic monitoring with alleged victim stay-away alert technology, if available, and subject to the payment of fees or the exemption of fees, and other rules established by the court for electronic monitoring;

(d) execution of a bond in an amount specified by the judge; such bond in the discretion of the judge to be either unsecured or secured in whole or in part by the deposit of cash or other property, or by the obligation of qualified sureties;

(e) release of the person during working hours, but with the condition that he/she return to custody at specified times;

(f) require the person charged with family violence or violation of a protective order to undergo a lethality risk assessment or other risk assessments deemed appropriate by the Judiciary of Guam; or

(g) any other condition reasonably necessary to assure appearance as required and the safety of any other person and the community.

**SOURCE:** Added by P.L. 13-186 (Sept. 2, 1976). Amended by P.L. 24-239:11 (Aug. 14, 1998) (*Family Violence Act of 1998*), and P.L. 34-071:4 (Dec. 15, 2017).

**NOTE:** Section 40.20 is new. It is based on 18 U.S.C. § 3146(a) and ABA, Project on Minimum, Standards for Criminal Justice Pretrial Release §§ 5.2, 5.3 (Approved draft 1968). See also former Rule 46(c), (d). Subsection (a) follows the basic form of § 3146 (a)(1). The ABA standards add a separate condition providing for the supervision of the accused by “a probation officer or other appropriate public official.” See § 5.2(b) (ii). Although not specifically so stated, Subsection (a) permits placing the accused under the supervision of any person, including a probation officer other public official. Subsection (c) deals with bonds generally and grants the court broad discretion to fashion the terms of the bond in whatever manner appears necessary. Unlike 18 U.S.C. § 3146(a), this Section makes no attempt to list the possible conditions in order of degree of onerousness. The impact of the different conditions on different persons will vary and the court should consider these differences as they apply in each case. For example, money bail to a very wealthy person would have little impact unless set extremely high. On the other hand, money bail even in a low amount to an indigent would preclude release.

**§ 40.25. Solvency of Sureties to be Assured; Procedure.**

(a) Where a bond secured by a surety is required pursuant to this Chapter, the judge may require the person seeking to be the surety to show by affidavit that he is worth the amount of the bond and is otherwise responsible. In the affidavit the person may be required to describe the property by which he proposes to justify and the encumbrances thereon, and to list all his other assets and liabilities. The judge may further examine the person under oath and may call and examine witnesses to determine whether the person is qualified.

(b) Nothing in this Section precludes the judge from allowing two or more sureties to justify severally in amounts less than that expressed in the bond, if the whole justification equals the amount required.

**NOTE:** Section 40.25 is based on former Rule 46(e) and §§ 1279-1280b. However, § 40.20 now provides the court greater flexibility in setting the terms of the appearance bond. The bond may be unsecured or secured, in whole or in part, by deposit or the obligation of sureties. Because of this flexibility no purpose would be served in requiring the surety to show more than sufficient solvency and responsibility. Hence, this Section eliminates some of the specificity regarding qualifications of the surety contained in the former sections. If, however, there is a fear that the surety's solvency or responsibility may be illusory or temporary the court can require actual deposit. See §§ 40.20, 40.30.

**§ 40.30. Procedure Where Surety Loses Worth.**

Where a person is released pursuant to this Chapter on an appearance bond secured by a surety, and it is thereafter shown, on noticed motion, that the surety is no longer worth the required amount or has become otherwise insufficient, the court may order the furnishing of such additional security as may be required to satisfy the condition imposed and may order the person detained until such security is furnished.

**NOTE:** Section 40.30 is based on a portion of former PC § 1310.

**§ 40.35. How Surety May be Exonerated; Deposit Sum With Clerk.**

A person released pursuant to this Chapter on the condition that an appearance bond secured by a qualified surety be furnished, may, at any time before declaration of forfeiture, deposit with the clerk of the court a sum equal to the amount of the bond, and upon the deposit being made the surety on such bond is exonerated.

**NOTE:** Section 40.35 continues the substance of former § 1296 and a portion of former Rule 46(g).

**§ 40.40. Procedure for Handling Cash Bail.**

Any deposit required or authorized as a condition of release may be made by the person released or by any other person. A receipt shall be issued in the name of the depositor. If the money remains on deposit at the time of a judgment for the payment of a fine, the clerk shall, under the direction of the court, if the defendant be the depositor, apply the money in satisfaction thereof, and after satisfying the fine, shall refund the surplus, if any, to the defendant. If the person to whom the receipt for the deposit was issued was not the defendant, the deposit shall be returned to him at any time after the court has ordered such return and upon the depositor's submission of his receipt.

**NOTE:** Section 40.40 continues the substance of former § 1297 but also authorized and provides for the disposition of a deposit made on behalf of the defendant by a third person. Compare Cal. Pen. Code §§ 1295, 1297. Return may be ordered under various circumstances. See § 40.45 (exoneration by surrender of the person released); 40.95 (order setting aside forfeiture of requiring remission); 120.18 (order following acquittal of the defendant).

**§ 40.45. Bail Bondsman May Arrest Person.**

Any person released pursuant to this Chapter on a deposit by a third person or an appearance bond secured by a surety, may be arrested by the depositor, surety, or his agent, and delivered to the custody of the Chief of Police. The depositor or surety shall at the same time deliver a copy of his deposit receipt or bond to the Director who shall acknowledge such delivery by a certificate in writing. The Chief of Police shall take custody of the person arrested and forthwith file the copy of the deposit receipt or bond and his certificate in the Court in which the action is pending and bring the depositor or surety exonerated, and shall, after notice to the prosecuting attorney, either release the person on such new conditions as are reasonably necessary to assure the person's appearance as required or the safety of any other person and the community or detain the person until he/she has furnished the necessary security.

**SOURCE:** Added by P.L. 13-186 (Sept. 2, 1976). Amended by P.L. 24-239:12 (Aug. 14, 1998).

**NOTE:** Section 40.45 is based on 18 U.S.C. § 3124, former §§ 1300-1301, and portion of former Rule 46(g). The section continues the generally recognized authority of the depositor or surety to surrender his principal and obtain exoneration. The section also makes clear the court must then review its release decision and either impose new conditions or detain the accused until a proper appearance bond is provided. For law did not permit deposits by a third person. This however, has been

**8 GCA CRIMINAL PROCEDURE**  
**CH. 40 RELEASE**

changed in conformity with a procedure authorized in California. Compare Cal. Pen. Code §§ 1295, 1300.

**§ 40.50. Bail Redetermination Hearing; When; Procedure.**

(a) A person for whom conditions of release are imposed pursuant to this Chapter, and who after twenty-four (24) hours from the time of release hearing continues to be detained as a result of his inability to meet the conditions of release, shall, upon application, be entitled to have the conditions reviewed by the Court. If the case has not yet been assigned to a particular Court, the conditions are to be reviewed by the judge who imposed them, or by the assigned ex-parte judge if the judge who imposed the conditions is not available. If the case has been assigned to a particular Court, the conditions are to be reviewed by the assigned judge. Unless the conditions of release are amended and the person is thereupon released, the judge shall set forth in writing the reasons for requiring the conditions imposed.

(b) A person who is ordered released pursuant to this Chapter on the condition that he return to custody after specified hours shall, upon application, be entitled to a review by the judge who imposed the condition. Unless the requirement is removed and the person is thereupon released on another condition, the judge shall set forth in writing the reasons for continuing the requirement.

(c) Notwithstanding the provisions of Subsections (a) and (b), if the judge who imposed conditions of release is not available, any other judge may review such conditions.

(d) *If* conditions of release are imposed by a magistrate pursuant to §4401, Title 7 of the Guam Code Annotated, any judge may review such conditions.

**SOURCE:** Added by P.L. 13-186 (Sept. 2, 1976). Subsection (a) amended by P.L. 24-239:13 (Aug. 14, 1998) (*Family Violence Act of 1998*). Subsection (d) added by P.L. 29-109:3 (Aug. 26, 2008).

**NOTE:** Section 40.50 is new. It is substantively the same as 18 U.S.C. § 3146(d). See also ABA, Project on Minimum Standards for Criminal Justice Pretrial Release § 5.9 (Approved draft 1968). Compare former Rule 46(h) and Cal. Pen. Code § 1320. For provisions relating to appeal from an adverse ruling by the judge, see § 40.80.

**§ 40.55. Statement to Arrestee Upon Release With Conditions.**

(a) Whenever a person is released pursuant to this Chapter, the judge authorizing such release shall issue an order which contains a statement of

**8 GCA CRIMINAL PROCEDURE**  
**CH. 40 RELEASE**

the conditions imposed, if any, informs the person of the penalties applicable to violations of the conditions of his release, and advises the person that a warrant for his arrest will be issued immediately upon any such violation.

(b) The person charged shall execute an agreement that he will appear as required and an acknowledgment that he understands the conditions of his release and the penalties and forfeitures applicable in the event that he violates any condition or fails to appear as required. A copy of the order shall be given to the person before he is released.

**NOTE:** Section 40.55 is new. It is based on 18 U.S.C. § 3146(c). § 40.55(b) has no federal statutory counterpart but reflects the actual practice under the federal statute. See Bail Reform Act Form No. 2, set forth in ABA, Project on Minimum Standards for Criminal Justice Pretrial Release, Appendix A, at 77.

**§ 40.60. Additional Restrictions May be Applied; Application by Prosecutor; Additional Restrictions Listed.**

(a) At the first appearance or at any time thereafter, upon the application of the prosecuting attorney and a showing that there exists a danger that the person charged will commit an offense or will seek to intimidate witnesses, or will otherwise unlawfully interfere with the orderly administration of justice, the judge may issue an order which:

(1) prohibits the person charged from approaching or communicating with particular persons or classes of persons, except that the order *shall not* be deemed to prohibit any lawful and ethical activity of the person's counsel;

(2) prohibits the person charged from going to certain described geographical areas or premises;

(3) prohibits the person charged from possessing any dangerous weapon, or engaging in certain described activities, or indulging in intoxicating liquors or in certain drugs;

(4) requires the person charged to report regularly to and remain under the supervision of an officer of the court;

(5) requires the person charged to undergo drug testing under the supervision of an officer of the court;

(6) requires the person charged to be placed under supervision by means of electronic monitoring, subject to the payment of fees or the exemption of fees, and subject to other rules established by the court for electronic monitoring; or



**8 GCA CRIMINAL PROCEDURE**  
**CH. 40 RELEASE**

(7) requires the person charged with family violence or violation of a protective order to undergo a lethality risk assessment or other risk assessments deemed appropriate by the court.

(b) For any person charged with family violence, a judge may issue an order for electronic monitoring or an order for risk assessment without application of the prosecuting attorney.

(c) The person charged *shall* execute an acknowledgment of the order and be given a copy of the order at that time.

**SOURCE:** Added by P.L. 13-186 (Sept. 2, 1976). Subsection (a)(5) added by P.L. 24-239:14 (Aug. 14, 1998) (*Family Violence Act of 1988*). Amended by P.L. 34-071:5 (Dec. 15, 2017).

**2018 NOTES:** Pursuant to P.L. 34-071:6:

**Section 6. Effective Date.** This Act *shall* become effective six (6) months from the date of enactment.

Prior to the amendment by P.L. 34-071:5, this section previously read as:

(a) At the first appearance or at any time thereafter, upon the application of the prosecuting attorney and a showing that there exists a danger that the person charged will commit an offense or will seek to intimidate witnesses, or will otherwise unlawfully interfere with the orderly administration of justice, the judge may issue an order which:

(1) prohibits the person charged from approaching or communicating with particular persons or classes of persons, except that the order shall not be deemed to prohibit any lawful and ethical activity of the person's counsel;

(2) prohibits the person charged from going to certain described geographical areas or premises;

(3) prohibits the person charged from possessing any dangerous weapon, or engaging in certain described activities or indulging in intoxicating liquors or in certain drugs;

(4) requires the person charged to report regularly to and remain under the supervision of an officer of the court.

(5) require the person charged to undergo drug testing under the supervision of an officer of the Court.

(b) The person charged shall execute an acknowledgment of the order and be given a copy of the order at that time.

**NOTE:** Section 40.60 is new. It is based on ABA, Project on Minimum Standards for Criminal Justice Pretrial Release § 5.5 (Approved draft 1968). It supplements the authority to impose conditions granted by § 40.20 and makes explicit the court's power

**8 GCA CRIMINAL PROCEDURE**  
**CH. 40 RELEASE**

to impose reasonable restrictions on the accused's activities pending trial. See also 18 U.S.C. § 3146(e). The purpose of this Section is to prohibit acts before they occur. The section is distinguished in this respect from § 40.75 which deals with a violation of the court's order or other changes in circumstances.

**§ 40.65. Retaking of Defendant Upon Violation of Conditions.**

(a) Upon the ex parte application of the prosecuting attorney and a showing that the person charged has willfully violated the conditions of his release, any judge may issue a warrant directing that the person be arrested and taken forthwith before the court in which the action is pending.

(b) Where it would be impracticable to secure a warrant pursuant to Subsection (a), any peace officer having reasonable grounds to believe that a person released pursuant to this Chapter has violated the conditions of his release may arrest the person and take him forthwith before the court in which the action is pending.

**COURT DECISIONS:** D.C. GUAM APP. DIV. 1979. Because there was no evidence before the Superior Court to support the revocation of appellate's release on bail in that the defendant had not violated any of his conditions of release, defendant's arrest for violation of bail was improper and defendant was ordered to be released on original conditions of bail with the additional condition that he observe a curfew at his parents house between the hours of 9:00 p.m. and 6:00 a.m. *People v. Ulloa*, Anthony, D.C.Guam 1979, Crim. #79-00065A.

**NOTE:** Section 40.65 is based on ABA, Project on Minimum Standards for Criminal Justice Pretrial Release § 5.6 (Approved draft 1968). General law has always permitted the arrest and surrender of a defendant by a surety who feared his principal was about to disappear. See § 40.45 and former § 1300. Under the procedures provided by this Chapter it is necessary to vest a similar authority in the proper public officers. It should be noted, however, that Subsection (a) merely authorizes a warrant to be issued, it does not require the court to do so. Where the showing is weak or the violations are insignificant, the court may refuse to issue a warrant and issue an order to show cause or require a noticed motion as a prerequisite to further judicial action. Similarly Subsection (b) is conditioned upon circumstances where securing a warrant would be impracticable. Arbitrary and unreasonable arrests are not authorized and should not be tolerated.

The purpose of this Section is to provide for arrest where there is a threat of nonappearance. Nothing in this Section is intended to limit the normal authority of a police officer to arrest the person without a warrant for a subsequent offense. See generally §§ 20.15 and 20.20 (arrest without a warrant). Separate authority for the issuance of a warrant where the person fails to appear as required is provided by § 40.70.

**§ 40.70. Warrant Upon Failure to Appear.**

**8 GCA CRIMINAL PROCEDURE**  
**CH. 40 RELEASE**

Upon the failure of a person released pursuant to this Chapter to appear as required, the court in which the action is pending may issue a warrant directing that the person be arrested and taken before it forthwith.

**COURT DECISIONS:** D.C. GUAM APP. DIV. 1979. Where there is no evidence that defendant would not subsequently appear, he may not be arrested under this Section for violation of bail. *People v. Anthony Ulloa*, D.C. Guam 1979, Crim. #79-00065A.

**NOTE:** Section 40.70 continues the substance of a portion of former § 1310. As to penalties for failure to appear, see § 40.90.

**§ 40.75 Actions Allowed Upon Violation of Conditions or Failure to Appear.**

(a) When a person is brought before the court pursuant to §§ 40.65 or 40.70, or, when after a noticed hearing, the court finds that a person released pursuant to this Chapter has willfully violated the conditions imposed on his release or that a change in circumstances or new evidence shows a need for the imposition of different or additional conditions upon the person's release, the court may order the imposition of such conditions as are reasonably necessary to assure the person's appearance as required (and his compliance with any conditions imposed pursuant to this Chapter).

(b) Notwithstanding Subsection (a), where the court finds that the person has willfully violated the conditions imposed on his release or that an indictment or information has been filed charging the person with the commission of an offense while released in the pending action, the court may revoke the person's release.

**COURT DECISIONS:** D.C. GUAM, APP. DIV. 1979. The fact that a defendant has been charged by police with an offense does not bring him within the provisions of Subsection (b), 8 GCA § 40.75. The defendant must have an indictment or information filed against him before Subsection (b) can be a ground for bail revocation. *People v. Anthony Ulloa*, D.C. Guam 1979, Crim. #79-00065A. This case may have been modified by the amendment of 8 GCA § 1.15 dealing when indictments, information and complaints may be brought.

SUPERIOR COURT 1980. The Superior Court has jurisdiction to determine revocation of defendant's release while the defendant's appeal is pending. *People v. James*, Sup. Ct. 1980, Cr. #18S-80.

**NOTE:** Section 40.70 is new. It is based on 18 U.S.C. § 3143 and ABA, Project on Minimum Standards for Criminal Justice Pretrial Release §§ 5.7, 5.8. (Approved draft 1968). See also 18 U.S.C. § 3146(e) and former § 1310. Under Subsection (a), the court is granted rather broad authority to modify its prior release order on a showing that such modification is needed. Subsection (b), on the other hand, is more limited in that the court must find either that there have been willful violations of his prior order

**8 GCA CRIMINAL PROCEDURE**  
**CH. 40 RELEASE**

or that a court or grand jury has found probable cause to believe that the person released has committed a subsequent crime while released on the pending charge. In the latter circumstances, preventive detention seems constitutionally permissible.

**§ 40.80. Appeal of Conditions Allowed.**

(a) In any case in which a person is detained or released on a condition requiring him to return to custody after specified hours, after review of his application pursuant to § 40.50, or in which a person's release is revoked pursuant to § 40.75, an appeal may be taken.

(b) Any order appealed pursuant to Subsection (a) shall be affirmed if it is supported by the proceedings below. If the order is not so supported, the court may remand the case for a further hearing, or may, with or without additional evidence, order the person released pursuant to either §§ 40.15 or 40.20.

(c) Any appeal pursuant to this Section shall be determined promptly.

**COURT DECISIONS:** D.C. GUAM APP. DIV. 1980. Pursuant to § 40.80 of this Title, the District Court of Guam has discretion to modify the conditions of release rather than to order a remand and direct that the Superior Court make such an order. *People v. Jones*, D.C. App. Guam 1980, D.C. Cr. #80-0013A.

**NOTE:** Section 40.80 is new. It is substantively the same as 18 U.S.C. § 3147 and provides an immediate appeal from a pretrial order detaining the appellant. See generally 9 Moore, Federal Practice ¶¶209.01-209.05 (1973).

**§ 40.85. Release After Conviction Pending Appeal; Conditions.**

(a) A person who has been convicted of an offense and is either awaiting sentence or has filed an appeal, shall be released pursuant to §§ 40.15 or 40.20 pending the imposition of sentence or the final determination of the appeal, by the court having jurisdiction of the case, unless the court 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 the community. If such a risk of flight or danger is believed to exist, or if it appears that an appeal is frivolous or taken for delay, the person may be ordered detained.

(b) The provisions of § 40.80 shall not apply to persons described in this Section. However, other rights to judicial review of conditions of release or orders of detention shall not be affected.

**NOTE:** Section 40.85 is new. It is substantively the same as 18 U.S.C. § 3148. Compare former Rule 46(a)(2) and former §§ 1272 and 1273. See also Fed. R. App. P.

**8 GCA CRIMINAL PROCEDURE**  
**CH. 40 RELEASE**

9(b). See generally B. Witkin, California Criminal Procedure Appeal §§ 673-680 (1963) (bail on appeal); 9 Moore, Federal Practice ¶¶209.06-209.08 (1973).

**§ 40.90. Penalty for Willful Failure to Appear: Felony if Underlying Offense is Felony; Misdemeanor if Misdemeanor.**

(a) Any person released pursuant to this Chapter who willfully fails to appear before any court or judge as required is:

(1) guilty of a felony, if he was released in connection with a charge of felony, or while awaiting sentence or pending appeal of any offense.

(2) guilty of a misdemeanor, if he was released in connection with a charge of any offense not a felony.

(b) If any person released pursuant to this Chapter fails to appear, without sufficient excuse, before any court or judge as required, such fact shall be noted by the court in which the person was to appear in its minutes and any security which was given or pledged for his release shall immediately be declared forfeited.

**NOTE:** Section 40.90 is new. It is based on 18 U.S.C. § 3150. See also ABA, Project on Minimum Standards for Criminal Justice Pretrial Release § 1.3 (Approved draft 1968). Compare former Rule 46(f)(1) and § 1305 and Cal. Pen. Code §§ 1305, 1319.4, 1319.6. Although Subsection (b) provides forfeiture, such forfeiture may be set aside. See § 40.95.

**§ 40.95. Procedure Upon Forfeiture of Bail.**

(a) Upon the declaration of a forfeiture pursuant to § 40.90, the clerk of the court shall mail notice of the forfeiture to any surety or depositor, other than the person required to appear. The clerk shall execute an affidavit of mailing and place it in the court's file in the case.

(b) The surety or depositor may, not later than thirty days after the mailing of the notice of forfeiture, apply by noticed motion to have the forfeiture set aside. After hearing, the court may set aside the forfeiture, upon such conditions as it may impose, if it appears that justice does not require enforcement of the forfeiture.

(c) If after thirty days from the mailing of the notice of forfeiture, the forfeiture has not been set aside and no motion to set aside is pending, the court shall on motion of the prosecution attorney enter a judgment of default and execution may issue thereon. Payments made in satisfaction of a judgment entered pursuant to this Section shall be deposited in the general

**8 GCA CRIMINAL PROCEDURE**  
**CH. 40 RELEASE**

fund of the Territory. By entering into a bond a surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability may served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail a copy to the surety to his last known address.

(d) Where money deposited with the clerk is declared forfeited pursuant to § 40.90, the clerk with whom it is deposited shall, upon entry of a judgment of default pursuant to this Section, pay the money deposited into the general fund of the Territory.

(e) At any time after entry of judgment pursuant to Subsection (c), the court may remit it in whole or in part upon application by the judgment debtor on noticed motion and a showing that justice does not require endorsement of the judgment.

**NOTE:** Section 40.95 is based on former Rule 46(f) and §§ 1305-1307. However, former Rule 46 provided no time limits for setting aside a forfeiture while former §§ 1305 and 1306 had very narrow limits (10 days). Section 40.95 increases the initial period to 30 days during which the surety or depositor may move to have the declaration of forfeiture set aside and, like the federal law, places no time limits on a motion seeking remission of a judgment. As under prior law, no attempt is made here to specify precise grounds for setting aside a forfeiture or remitting a judgment. Section 40.95 permits such action simply as justice requires. It should be noted, however, that unlike under former § 1305, there is no requirement that the person who was required to appear, actually appear. Reasons that the court might consider include death, illness, or detention by other authorities. Compare Cal. Pen. Code § 1305. However, these reasons are neither exhaustive nor necessarily compelling. Similarly, the effect, if any, of a dismissal of the charge after nonappearance is left to the judgment of the court. Compare former § 1306.

-----