EXECUTIVE SUMMARY

Handbooks on Decision-Making in Detention Control Hearings

DEPEN Departamento Penitenciário Nacional

UNODC Escritório das Nações Unidas sobre Drogas e Crime

PNUD

CNJ CONSELHO NACIONAL DE JUSTIÇA

SERIES FAZENDO JUSTIÇA

COLLECTION STRENGTHENING THE DETENTION CONTROL HEARING

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The full version of **Handbook on Decision-Making in Detention Control Hearings: General Standards** can be accessed by the QR code.

The full version of **Handbook on Decision-Making in Detention Control Hearings: Standards for Specific Crimes and Profiles** can be accessed by the QR code.

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Presentation

The Brazilian Constitution underpins our aspirations as a society grounded on the rule of law while promoting social advancement with respect to fundamental rights and human dignity. In this regarding, it is the indelible duty of the institutions, especially the judiciary as guardian of our Magna Carta in the last instance, to ensure that our actions point to this civilizing north, not only repelling deviations, but acting already to transform the present that we aim for.

In 2015, the Federal Supreme Court recognized that almost 1 million Brazilians within our prisons live outside the protection that the Constitution provides, with unfortunate effects on the degree of inclusive development to which we commit ourselves through the UN 2030 Sustainable Development Agenda. It is for the definitive overcoming of this scenario that the Programme Fazendo Justiça works, in a partnership between the National Council of Justice (CNJ) and the United Nations Development Programme (UNDP), with the support of the Ministry of Justice and Public Security, represented by the National Penitentiary Department.

Even during the Covid-19 pandemic, the Programme has been carrying out structuring deliverables from collaboration and dialogue between different institutions across the federal level. There are 28 actions developed simultaneously for phases and needs of the criminal cycle and the socio-educational cycle, which include the facilitation of services, strengthening of the normative framework and production and dissemination of knowledge. It is in the context of this latter objective that this publication is inserted, now an integral part of a robust listing that gathers advanced technical knowledge in the field of accountability and guarantee of rights, with practical guidance for immediate application throughout the country.

The volume is part of the collection Strengthening the Detention Control Hearing, prepared by the Criminal Proportionality hub of the Programme Fazendo Justiça (Hub 1) to ground the entry point to the prison system on national and international standards and in light of CNJ Resolution No. 213/2015 and recent changes in the Brazilian Code of Criminal Procedure. Through partnership with UNDP and the United Nations Office on Drugs and Crime (UNODC), the CNJ promotes the legality of detentions, proportionality in criminal responses and social inclusion, aiming at reducing overpopulation and prison overcrowding.

This Executive Summary presents the core of the **Handbook on Decision-Making in Detention Control Hearings: General Standards and the Handbook on Decision-Making in Detention Control Hearings: Standards for Specific Crimes and Profiles**, jointly published in 2020. The publications seek to contribute to the full realization of detention control hearings in a global way, with emphasis on the assessment of the arrest legality, the adoption of non-custodial measures, within the exceptional nature of the deprivation of liberty, as well as the various forms of vulnerability that socially mark the detainees. This summary also presents challenges and potentialities for the judicial action in face of recurrent criminal offenses in the *in flagrante delicto* arrest that lead to the detention control hearing: theft, robbery and drug trafficking.

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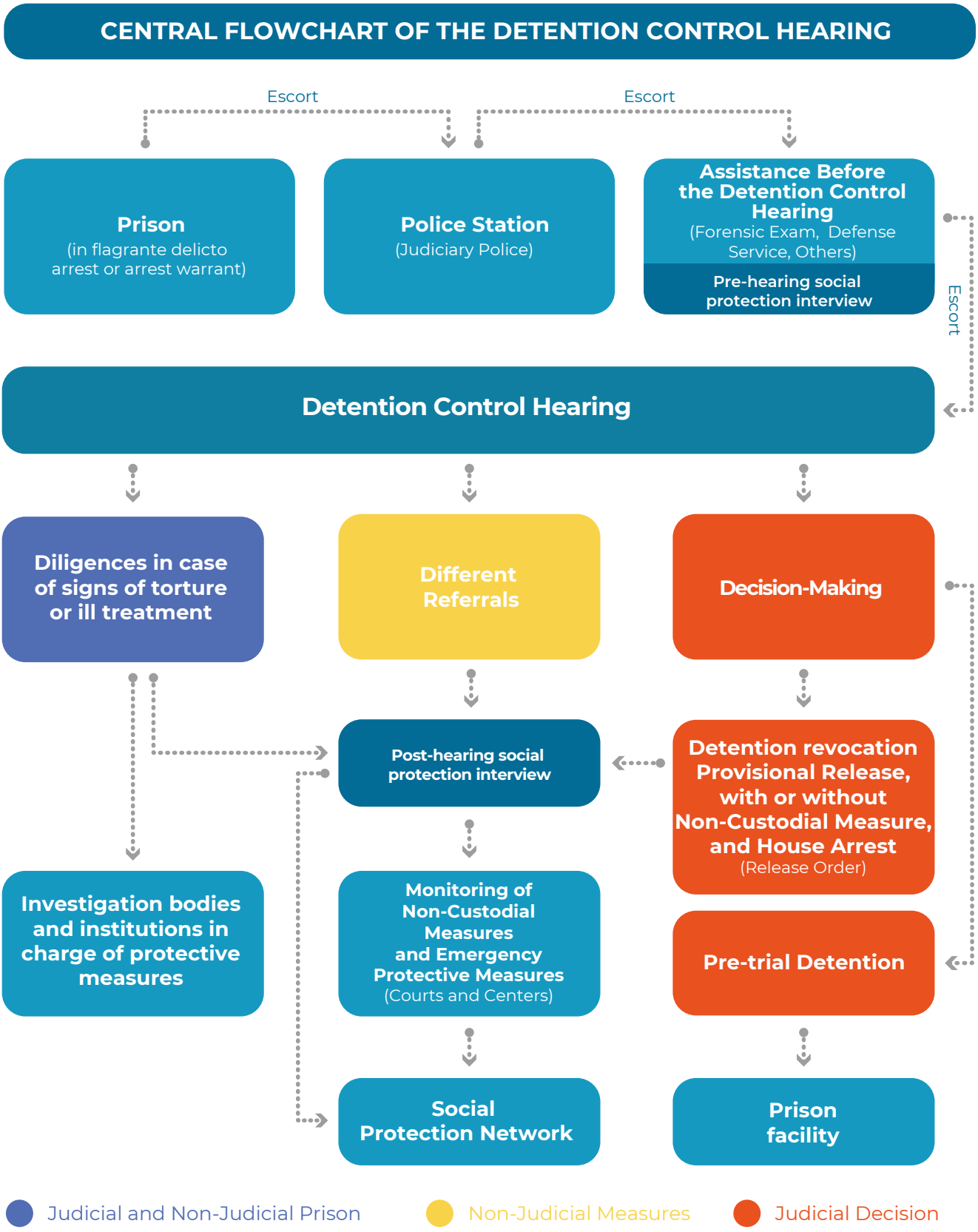
SUMMARY


CENTRAL FLOWCHART OF THE DETENTION CONTROL HEARING
Escort
Escort
Prison
(in flagrante delicto arrest or arrest warrant)
Police Station
(Judiciary Police)
Assistance Before the Detention Control Hearing
(Forensic Exam, Defense Service, Others)
Pre-hearing social protection interview
Escort
Detention Control Hearing
Diligences in case of signs of torture or ill treatment
Different Referrals
Decision-Making
Post-hearing social protection interview
Detention revocation Provisional Release, with or without Non-Custodial Measure, and House Arrest
(Release Order)
Investigation bodies and institutions in charge of protective measures
Monitoring of Non-Custodial Measures and Emergency Protective Measures
(Courts and Centers)
Pre-trial Detention
Social Protection Network
Prison facility
Judicial and Non-Judicial Prison
Non-Judicial Measures
Judicial Decision

INTRODUCTION

This Executive Summary composes a set of actions of the Project Strengthening Detention Control Hearings, implemented by the United Nations Office on Drugs and Crime (UNODC) under the Programme Fazendo Justiça, an initiative of the National Council of Justice of Brazil (CNJ) in partnership with the United Nations Development Programme (UNDP) and the National Penitentiary Department of Brazil (DEPEN). In order to strengthen the detention control hearings, the Programme develops a national action in collaboration with the United Nations Office on Drugs and Crime (UNODC).

Its purpose is to disseminate and disclose nationally and internationally, the content of the **Handbook on Decision-Making in Detention Control Hearings: General Standards**[1] and of the **Handbook on Decision-Making in Detention Control Hearings: Standards for Specific Crimes and Profiles**[2], from the collection Strengthening the Detention Control Hearings, which systematizes efforts and results of the Programme Justiça Presente, executed between 2019 and 2020 and whose initiatives since then, continue to be developed, expanded and deepened by the Programme Fazendo Justiça, with an important focus on strengthening detention control hearings.

Detention control hearing is the act in which the arrested person is presented before the judge for him/her to decide on the legality of the arrest, the need for non-custodial measures, to collect evidence of torture or ill-treatment committed against the person arrested and promote referrals related to social protection. Its rationale goes back to the American Convention on Human Rights (Pact of San José), the Covenant on Civil and Political Rights, the Code of Criminal Procedure and the CNJ resolutions, among which Resolution No. 213/2015 stands out.

The handbooks constitute highly qualified and up-to-date material, which addresses, in a comprehensive and detailed manner, the public services and the most relevant topics for the detention control hearing: judicial decision-making, social protection, prevention and fight against torture, and the use of handcuffs and other instruments of restraint, according to national and international standards.

1 https://www.cnj.jus.br/wp-content/uploads/2020/11/Handbook_juridico_1-web.pdf

2 https://www.cnj.jus.br/wp-content/uploads/2020/11/Handbook_juridico_2-web.pdf

Before the challenges that reality imposes, this Executive Summary is an invitation for the public to know the new standards of the detention control hearing and follow its institutional strengthening and its definitive establishment as an institute capable of guaranteeing the safeguards of due process of law and the rights of persons submitted to State custody.

The standard decision-making process in the proposed detention control hearing is organized in five stages and indicates decisions consistent with the objectives and values from CNJ Resolution No. 213/2015 and its protocols. The standards emphasize the cases of *in flagrante delicto* arrest, but can be applied, where appropriate, to hearings conducted by provisional or definitive arrest warrants. A quick-reading graphic representation of the five stages of the proposed decision-making process can be found at the end of this document.

This publication also introduces specific standards for decisions regarding the crimes of theft, robbery and drug trafficking, responsible for 53% of the cases brought to detention control hearings[3], and relating to nine specific groups: (i) mothers and pregnant women; (ii) fathers and other legal guardians; (iii) LGBTQI+ persons; (iv) persons living in the streets and in extreme vulnerability; (v) migrant persons; (vi) persons with serious diseases and other health issues; (vii) persons with hearing loss; (viii) people with drug use disorders and (ix) indigenous persons.

To structure the decision-making process and identify the stages and major issues that organize each of them, this document is based on decisions gathered by the project team, operating throughout Brazil. The gathering tool sought to access the recent decision-making standards (referring to the year 2019) and already existing in the country, the cognitive and operational barriers, as well as the legal solutions and strategies used by the Brazilian judiciary to make decisions consistent with CNJ Resolution No. 213/2015. The treatment of the material revealed non-custodial measures not foreseen, establishment of automatic arrest for non-compliance with non-custodial measures, competences and procedures not foreseen in the normative framework and also the application of the bail conditions autonomously. Nevertheless, the proposal of the Handbook is based on a set of decisions compatible with the current regulatory framework.

3 According to the survey, the most frequent charges are for robbery (22.1%), drug trafficking (16.9%) and theft (14%). BRAZILIAN PUBLIC SECURITY FORUM. Purposeful Analytical Report. Research Justice - Fundamental Rights and Safeguards: Detention Control Hearing, pre-trial detention and precautionary measures: institutional and ideological obstacles to the establishment of freedom as a rule. Brasilia: National Council of Justice, 2018. Available at: https://forumseguranca.org.br/wp-content/uploads/2018/10/FBSP_Direitos_Garantias_Fundamentais_CNJ_2018.pdf

1. LEGAL STANDARDS

The driving idea of each stage of the decision-making process is the appreciation of judicial independence. As proposed, this standard decision-making process is **for the judiciary** (and not against it), **to expand** the role it plays in managing and facing social problems brought daily to the courts, and finally, **to qualify and strengthen** the position of the Justice System.

It is essential that the role of the judiciary **differs from** the role of the police and the Public Prosecutor's Office. For this purpose, the judge must recognize his/her role of control (and not of approval) of the contents in the *in flagrante delicto* arrest record, enhancing what the detention control hearing provides – the presence of the person in custody, ensuring the full accomplishment of the steps involved in the detention control hearing.

Before analyzing the steps of the decision-making process, it is necessary to present in an introductory manner the crimes of theft, robbery and drug trafficking, the most frequent offenses in detention control hearings. In the course of the steps, the standards for such crimes will be presented in a specific way.

THEFT (ART. 155, Criminal Code - CC)

- Art. 155 of the Brazilian Criminal Code[4] provides as a crime of "simple theft" the action of "subtracting, for oneself or for others, third-party property", with an imprisonment sentence of one to four years and fine, increasing by 1/3 if it is committed at night. If it is a first-time offender and the stolen asset is of "small value", the theft is considered "**privileged**", and it is possible to reduce by up to 2/3 or apply only the fine (§2nd). In addition, it avoids the possibility of a pre-trial detention order before the application of a sentence of less than 4 years.

4 BRAZIL. Decree-Law No. 2.848 of December 7th, 1940. Criminal Code. Rio de Janeiro, DOU of 12.31.1940. 1940. Available at: http://www.planalto.gov.br/ccivil_03/decreto-lei/del2848compilado.htm

- According to a survey conducted in 2017[5], from 726.354 people arrested, 234.866 (32%) have been convicted or are awaiting trial for acquisitive offenses. From this number, 29.737 are accused of simple theft and 31.378 of qualified theft (art.155, § § 4th and 5th, CP).
- Because it is an acquisitive offense, it is often associated with persons in situation of **extreme vulnerability**, such as those living in the streets and with low income. Therefore, detention control hearings can and should fulfill the central role in connecting with the **social protection network.** It is important that the criminalization of poverty does not occur, including situations such as lack of fixed address, personal documents and regular work.

ROBBERY (ART. 157, CC)

- Robbery is provided for in art. 157 of the Criminal Code as the act "of subtracting, for oneself or for others, third-party property, by serious threat or violence to the person, or after having it, by any means, reduced to the impossibility of resistance", under penalty of imprisonment of four to ten years, with a fine. The same penalty applies to anyone who, immediately after subtracting the property, employs serious threat or violence against a person to ensure impunity for the crime or possession of the property (§ 1st)[6].
- According to a survey carried out in 2017, 42.987 people were imprisoned - with sentence or provisionally - for simple robbery (art.157), and 93,461 for qualified robbery (art. 157, § 2nd). Added to the amounts, robbery represents 26.2% of criminal occurrences[7].

5 BRAZIL. Ministry of Justice and Public Security, National Penitentiary Department - DEPEN. Infopen - National Survey of Prison Information, 2017. p. 87. Available at: https://www.gov.br/depen/pt-br/composicao/depen/sisdepen/infopen/relatorios-sinteticos/infopen-jun-2017-rev-12072019-0721.pdf. Access on Sept. 10th, 2019.

6 The penalty is increased by one-third to one-half, according to § 2nd, in cases of concurrence of persons (clause II), if the victim is in the business of transporting valuables and the offender is aware of this circumstance (clause III), if the robbery is of a motor vehicle that will be transported to another state or abroad (clause IV), if the offender keeps the victim in his possession, restricting its liberty (clause V), if the robbery involves explosive substances or accessories that, jointly or separately, allow their manufacture, assembly or use (item VI), if the violence or serious threat is carried out with the use of a melee weapon (clause VII). The increase becomes two-thirds (§ 2nd - A) if the violence or threat is exercised with the use of a firearm (clause I), or if there is destruction or disruption of an obstacle by the use of an explosive or similar device that causes common danger (clause II). If the violence or serious threat is exercised with the use of a firearm of restricted or prohibited use, double the penalty applies (§ 2nd - B). Finally, if violence results in serious bodily injury, the penalty is imprisonment from 7 to 18 years plus a fine (§ 3rd, I), and if it results in death, the penalty is imprisonment from 20 to 30 years, and a fine.

7 BRAZIL. Ministry of Justice and Public Security, National Penitentiary Department - DEPEN. Infopen - National Survey of Prison Information, 2017. p. 87 - Available at: https://www.gov.br/depen/pt-br/composicao/depen/sisdepen/infopen/relatorios-sinteticos/infopen-jun-2017-rev-12072019-0721.pdf. Access on Sept. 10th, 2019.

DRUG TRAFFICKING (ART. 33, Law No. 11.343/2006)

- The crime of drug trafficking is provided for in art. 33 of Law No. 11.343/2006[8], establishing a sentence of 5 to 15 years in prison for those who "import, export, send, prepare, produce, manufacture, acquire, sell, expose for sale, offer, store, transport, bring with them, keep, prescribe, administer, deliver for consumption or supply drugs, even if gratuitously, without authorization or in disagreement with legal or regulatory determination". The § 4th provides for the possibility of a **reduction from 1/6 to 1/3** of the penalty if the **agent is first-time offender**, has **a good background,** does **not** engage in **criminal activities** and does **not** join a **criminal organization.** It is "**privileged trafficking**", which, when recognized, implies a reduction in the penalty and indicates the possibility, based on the analysis of other legal requirements, of applying a deprivation of rights rather than deprivation of liberty.
- Such a crime is attributed to 28% of the imprisoned population[9]. In the case of women, it represents 62% of arrests[10], requiring special treatment in this publication.

8 BRAZIL. Law No. 11.343 of August 23rd, 2006. Federal Official Gazette from 8.24.2006. Brasilia: 2006. Available at: http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2006/lei/l11343.htm

9 BRAZIL. Ministry of Justice and Public Security, National Penitentiary Department - DEPEN. Infopen - National Survey of Prison Information, 2017. p. 87. Available at: https://www.gov.br/depen/pt-br/composicao/depen/sisdepen/infopen/relatorios-sinteticos/infopen-jun-2017-rev-12072019-0721.pdf. Access on Sept. 10th, 2019.

10 BRAZIL. National Penitentiary Department - DEPEN. National Survey of Prison Information: INFOPEN Women - 2nd edition. Organization: Thandara Santos; collaboration: Marlene Inês da Rosa [et al.]. Brasilia: Ministry of Justice and Public Security, 2018.

2. THE DECISION-MAKING PROCESS AT THE DETENTION CONTROL HEARING IN FIVE STEPS

GUARANTEES RELATED TO THE HOLDING OF THE DETENTION CONTROL HEARING

Even before starting the detention control hearing, some elements must be provided:

1. **Basic safeguards and emergency supplies**
   - adequate food and drinking water;
   - emergency supplies, including appropriate clothing, footwear, sanitary pads and access to bathing or grooming;
   - adequacy of hearing room temperature;
   - keeping and subsequent return of belongings and clothing to the person in custody;
   - means to ensure transportation after the hearing.
2. **Pre-hearing social protection interview**
   - According to the **Handbook of Social Protection in Detention Control Hearings: Standards for the Detainee Social Protection Service**[11], provided by the Detainee Social Protection Service, where there is one;
3. **Exceptional use of handcuffs** (in accordance with Binding Precedent No. 11 of the Supreme Court - STF and the **Handbook on Handcuffs and Other Instruments of Restraint in Court Hearings**[12]); and
4. **Prohibition of the presence** of police officers responsible for the arrest or investigation during the detention control hearing (art. 4th, sole paragraph, Res. No. 213/2015).

Having received the *in flagrante* arrest record, the judge must, at first, **analyze the formal aspects of the arrest** contained in art. 302 of the Code of Criminal Procedure (CCP), as well as the entire procedure for drawing up the records, from the moment of arrest until the transportation to the judicial unit, including material aspects and safeguards of the *in flagrante* arrest, homologating it in case of legality and revoking it in cases of illegality (art. 310, CCP).

11 https://www.cnj.jus.br/wp-content/uploads/2020/11/Handbook_de_protecao_social-web.pdf

12 https://www.cnj.jus.br/wp-content/uploads/2020/11/Handbook_de_algemas-web.pdf

Thus, Steps 0 (zero) and 1 (one) correspond to the investigation of the aspects of **legality and formality of the arrest** (arts. 302, 304 and 306 of the CCP), indicating those that could be redressed and those that would lead to nullity and therefore to the revocation of the *in flagrante* arrest.

STEP 0

REDRESS IRREGULARITIES OF THE *IN FLAGRANTE DELICTO* ARREST RECORD

Step 0 (zero) corresponds to the verification of defects that can be redressed by the Judiciary. **Once the irregularity is verified, effective actions must be taken to redress it**, especially with regard to the:

(i) communication of the arrest to the family of the detainee or to the person appointed by him/her and to the responsible authorities;
(ii) interrogation and listening of the person in custody, being communicated and assured the rights to silence, to receive medical attention and the presence of a lawyer;
(iii) guarantee of interpreters for indigenous people, people with hearing loss and migrants. In the case of migrants, guarantee of communication to the consular or diplomatic authority;
(iv) delivery of the notice of charge with the reason for the arrest, the name of the law enforcement officer in charge of the arrest and the witnesses, within the same period of 24 hours; and
(v) carrying out precautionary forensic medical evaluation without the presence of police officers. If it has not occurred or has occurred in a different way, the judge must determine a new forensic medical evaluation establishing questions.

STEP 1

CONFIRM THE LEGALITY AND REGULARITY OF THE *IN FLAGRANTE DELICTO* ARREST RECORD

At Step 1, the judge will have to answer questions that make up the requirements for the **legality** of the *in flagrante delicto* arrest, namely: was the police action carried out correctly? Was the presentation of the detainee to the competent court carried out within 24 hours? Were the conditions of the in flagrante arrest duly met?

Step 0

Redress Irregularities of the *in flagrante delicto* arrest record

Step 1

Confirm the legality and regularity of the *in flagrante delicto* arrest

Step 2

Frame the conduct based on the *in flagrante* arrest record and interview: maintaing or change the legal framework established in the record and, if appropriate, recognize the legality of the conduct and/or exclusion of illegality

Step 3

Verify the need to enforce any non-custodial measure

Step 4

Regular *in flagrante delicto* arrest, illegal conduct judicially framed, and robust elements indicating the need to enforce any non-custodial measure

Part 1

Confirm the suitability of the non-custodial measure enforcement

Part 2

Assess what non-custodial measure would be suitable

Step 5

Regular *in flagrante delicto* arrest, illegal conduct judicially framed and no measure other than detention is adequate and sufficient for the actual case: provisional detention order

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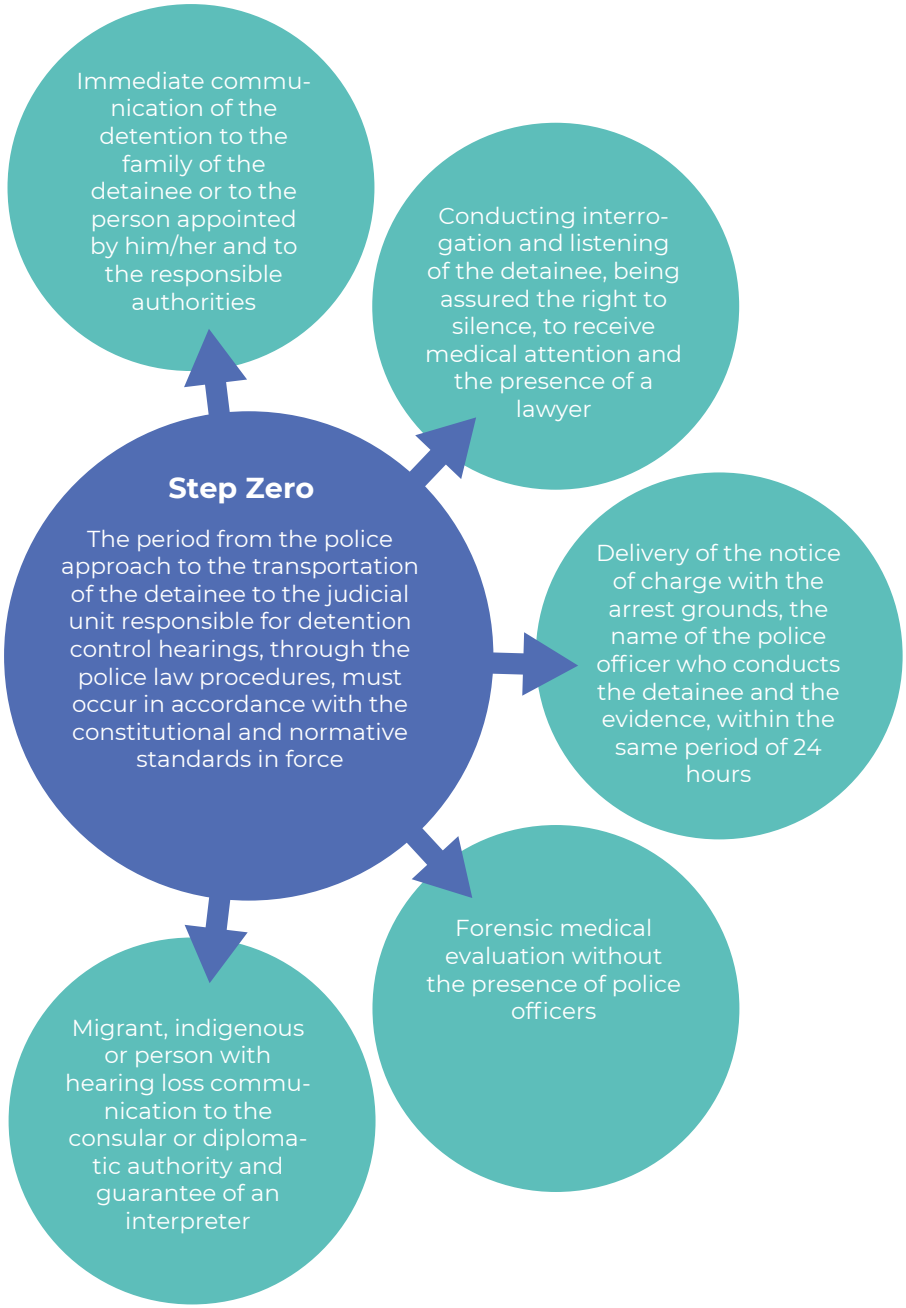
Assess substitution of pre-trial detention for house arrest



References

Migrants – Communication to consular or diplomatic authority and right to an interpreter - Items 5.2 and 5.3 of Part II of the Handbook with Standards for Specific Crimes and Profiles

Persons with hearing loss – Item 7 of Part II of

Indigenous persons – Item 9 of Part II of the Handbook with Standards for Specific Crimes and Profiles

If the judge answers **NO to any of the questions,** the consequence should be the revocation **of the *in flagrante delicto* arrest**. If the answer is **YES to all of them, he/she shall proceed to the next step**, in which the legal framework assigned to the crime by the police authority will be analyzed.

Was the police approach carried out correctly?

In general, the correct police approach includes: (I) **no violence/torture against the person**; (ii) **grounded on actual facts**; and (iii) **no home invasion**.

(i) Found signs of torture or ill-treatment[13] committed by the police authorities, through the information of the *in flagrante delicto* arrest record, precautionary forensic medical evaluation, presentation conditions of the detainee and, especially, the report at the detainee, **the arrest should be revoked**.

(ii) The judge must observe the evidence that **reveals a lack of objective grounds in carrying out police approaches or that indicate weaknesses in the reports contained in the records.** Particular attention to terms such as "suspicious attitude", "suspicious car", "suspicious person", "reasonable suspicion" and other generic elements, such as "anonymous reporting", which are used to justify the approach without pointing out the actual fact that underpins it, very common in cases of racial profiling. Body marks, such as clothing and tattoos, and the association of territories with criminality are also part of this process, which leads to overrepresentation of the black population in the prison system. In addition, it is necessary to contrast the version brought by the police to the version of the person in custody, especially in cases where there are no witness depositions present in the *in flagrante delicto* arrest record.

(iii) According to art. 5th, XI, of the Constitution, it is forbidden to enter and stay at homes without the consent of the resident or judicial authorization, except in cases of *flagrante delicto* offense, disaster, or to provide relief. In cases of judicial authorization, it must be fulfilled between 5 a.m. and 9 p.m. **If such entry and stay occur in disagreement with the law, it is necessary to release the person for unlawful detention,** and the action of the police authority may be considered a **crime of abuse of authority** (art.22 of Law 13.869/2019). Regarding the authorization of the resident, the account of the detainee should be considered with special attention.

13 See Handbook to Prevent and Combat Torture for Detention Control Hearings https://www.cnj.jus.br/wp-content/uploads/2020/11/Handbook_de_tortura-web.pdf

Was the presentation of the detainee to the competent court carried out within 24 hours?

In possession of the records, the judge must promote the detention control hearing within 24 hours after the arrest. If the **deadline** is **missed** without proper motivation, the ***in flagrante* arrest should be revoked.** In verifying compliance with the deadline, the date and time of arrest and time of stay in the vehicle before arriving at the police station should be considered.

In cases of serious illness and hospitalization of the person in custody, the situation should be considered as a "proper motivation" for deadline flexibilization. The detention control hearing in these cases will take place after the person's health or presentation condition is restored and, only after that, a possible arrest may occur. The judge should be attentive to the causes of hospitalization, since such situations may indicate occurrence of police violence.

Were the conditions of the in flagrante arrest duly met? What kind? The judge shall indicate on what grounds

In any of the *in flagrante delicto* arrest cases provided for in Art. 302 of the CCP, it is essential that the judge indicate which are the robust elements of perpetration and materiality of the alleged crime. The species of *in flagrante delicto* arrest are:

(i) Was the detainee committing the crime when approached?

(ii) Had the detainee just committed the crime when approached?

(iii) Was the detainee persecuted, soon after, "in such a situation that makes it inferable that he/she is the offender"?

(iv) Was the detainee found, soon after, with instruments, weapons, objects "that make it inferable that he/she is the offender"?

In all these cases, the argumentative construction that gathers the elements for arrest homologation must indicate the hypothesis by which the person was arrested, making clear the factual situation and the rationale of the arrest.

Legality of the *in flagrante delicto* arrest and hypotheses of impossible crime

THEFT

1. As for the hypothesis (i), in case of theft, the judge must be attentive to the situation of **impossible crime**. As provided in art. 17 of the Criminal Code, "an attempt is not punishable when, due to the absolute ineffectiveness of the mean or the absolute impropriety of the object, it is impossible to consummate the crime"[14].
2. **One cannot even speak of attempt, for lack of unlawfulness,** and the arrest must be **revoked**.
3. Example: when the person is approached by an employee before leaving the establishment with a commodity that could otherwise be considered the object of theft.

ROBBERY

1. The same notes for theft apply here.
2. Part of the traditional doctrine discusses the possibility of robbery as an impossible crime when there is no material object to be protected.
3. An example is the situation in which a person carrying a knife threatens another demanding money, but there is no money.

Legality of the *in flagrante delicto* arrest and invasive strip search

DRUG TRAFFICKING

If the judge finds that the person has been subjected, by a state agent, to a humiliating search, the arrest must be revoked. This is the case, for example, of people visiting prison institutions, who are forced to lie naked, crouch over a mirror and cough. In such cases, the judge must revoke the arrest resulting from such a practice.

14 BRAZIL. Decree-Law No. 2.848 of December 7th, 1940. Criminal Code. Rio de Janeiro, DOU of 12.31.1940. 1940. Available at: http://www.planalto.gov.br/ccivil_03/decreto-lei/del2848compilado.htm

Step 0

Redress Irregularities of the *in flagrante delicto* arrest record

Step 1

Confirm the legality and regularity of the *in flagrante delicto* arrest

Step 2

Frame the conduct based on the *in flagrante arrest* record and interview: maintaing or change the legal framework established in the record and, if appropriate, recognize the legality of the conduct and/or exclusion of illegality

Step 3

Verify the need to enforce any non-custodial measure

Step 4

Regular *in flagrante delicto* arrest, illegal conduct judicially framed, and robust elements indicating the need to enforce any non-custodial measure

Part 1

Confirm the suitability of the non-custodial measure enforcement

Part 2

Assess what non-custodial measure would be suitable

Step 5

Regular *in flagrante delicto* arrest, illegal conduct judicially framed and no measure other than detention is adequate and sufficient for the actual case: provisional detention order

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Assess substitution of pre-trial detention for house arrest

Judge in the face of the "situation" (= facts + detainee) from the in flagrante delicto arrest record + interview of the person at the detention control hearing + pleas from the Public Prosecutor and Defense

Requirement:

- Redressed in flagrante delicto arrest record irregularities

References

Drug trafficking – Strip search - Item 3.1 of Part I of the Handbook with Standards for Specific Crimes and Profiles

Was the police approach carried out correctly?

(i) no evidence of torture or ill-treatment against the person

(ii) grounded on the basis of actual facts

(iii) no home invasion

Was the detainee presented to the competent court within 24 hours?

Were the conditions of the in flagrante arrest duly met?

(i) Was the detainee committing the crime when approached? (art. 302.1, CCP)

(ii) Had the detainee just committed the crime when approached? (art. 302, II, CCP)

(iii) Was the detainee persecuted, soon after, "in a situation that makes it presume to be the offender"? (art. 302, III, CCP)

(iv) Was the detainee found, soon after, with instruments, weapons, objects "that make it inferable that he/she is the offender"? (art. 302, IV, CCP)

References

Theft – Impossible Crime - Item 1.1 of Part I of the Handbook with Standards for Specific Crimes and Profiles

Robbery – Impossible Crime-Item 2.1 of Part I of the Handbook with Standards for Specific Crimes and Profile

NEGATIVE FOR ANY OF THE QUESTIONS

NEGATIVE FOR ALL CASES

POSITIVE TO ALL THREE QUESTIONS

Next step

***In flagrante delicto* arrest revocation**

STEP 2

FRAME THE CONDUCT BASED ON THE *IN FLAGRANTE DELICTO* ARREST RECORD AND INTERVIEW: MAINTAIN OR CHANGE THE LEGAL FRAMEWORK ESTABLISHED IN THE RECORD AND, IF APPROPRIATE, RECOGNIZE THE LEGALITY OF THE CONDUCT AND/OR EXCLUSION OF ILLEGALITY

Frame the conduct based on the records and the interview:

At this moment, it is necessary for the judge to verify that the facts described in the records and reported by the detainee at the time of the hearing correspond to the legal framework assigned by the police authority, changing, if it is the case, to the appropriate article. The judge shall observe the elements that point to weaknesses in the crime materiality present in the records, such as the lack of objectivity in the police approach or the lack of witnesses other than police officers.

Listening to the version of the facts of the detainee cannot be confused with the production of evidence for investigation or criminal proceedings relating to the fact objects of the records. The "impossibility of merits analysis" cannot be an obstacle to the assessment of the crime materiality, legal framework and unlawful conduct. The contrary understanding prevents the discussion of elements relating to the purposes of the detention control hearing and is detrimental to the rights of the detainee.

PRIVILEGED THEFT (art. 155, §2nd, CP)

- It occurs in cases where the defendant is first-time offender and the subtracted asset is of "small value". Thus, pre-trial detention cannot be ordered, since the sentence becomes less than 4 years, and the principle of homogeneity must be applied.
- "**Commodity of small value**" is one that does not exceed the value of the **minimum wage** of the time[15]. In most of the thefts, the value of the goods is easy to measure, as in the case of products from shops and supermarkets. In cases of difficult measurement, in the absence of a report indicating the value, it is advocated that provisional release be prioritized, with subsequent presentation of the technical report.

15 BITENCOURT, Cezar Roberto. Código Penal Comentado. 9ª ed. São Paulo: Saraiva, 2015.

ROBBERY

- In the case of **robbery**, if it is verified that there was **no violence or serious threat**, the legal framework must be **changed** to **theft**.

DRUG TRAFFICKING

- To be considered a crime, it is necessary to have a **toxicological report**, albeit provisional, demonstrating the nature and quantity of the drug seized. Due to the short time for the holding of the hearing, it is not always possible to make the report on time. In the absence of a report, the arrest must be revoked for **lack of materiality**. If after drawing up the report the crime is confirmed, the need for non-custodial measures to ensure criminal investigation is assessed.

Change of legal framework from the crime of trafficking to the crime of drug use

Having found the presence of drugs, the judge should consider the possibility that the arrested person possessed them for its own use. Some factors indicate the need for reassessment, for example: not having actually witnessed the marketing; possible history of drug abuse or previous treatments; low amount of money seized; or the person's own version of the facts.

Recognition of privileged trafficking and its implications

Once the requirements are fulfilled, the judge must **recognize the privileged traffic.** In such cases, the application of the principle of homogeneity should **exclude the possibility of pre-trial detention.**

Provisional Release and Offense Severity

Although drug trafficking is considered a felony, its hideousness does not prevent the granting of provisional release[16].

Acknowledgement of material atypicality - the principle of insignificance: There are conducts that, although contrary to the law, do not significantly affect the legal asset protected by it. If it is the case, the arrest should be revoked, for material atypicality.

THEFT

In 2004, the STF[17] defined the criteria for recognizing material atypicality:

(i) minimal offensiveness of the perpetrator's conduct,

(ii) no social dangerousness of action,

(iii) reduced degree of disapproval of the behavior and

(iv) inexpressiveness of the legal harm.

It is important to emphasize that reoffending should not move the incidence away from the principle, since it refers to the fact, and not to the perpetrator, as decided by the Federal Supreme Court (STF)[18].

16 HC 104.339/SP, Rapporteur Justice Celso de Mello. Published on 12/06/2012.

17 HC 8441200/SP, Rapporteur Justice Celso de Mello. Published on 19/11/2004.

18 HC 155.920/MG, Rapporteur Justice Celso de Mello. Published on 10/07/2020.

ROBBERY

- It cannot be applied to the crime of robbery, according to the majority understanding, because violence and serious threat do not configure low relevance and harmfulness to the legal system.
- For some specialists, this principle applies when the subtracted property is of minimal value, hence the patrimonial nature of the conduct does not exist, given its irrelevance. Therefore, the crime of coercion or bodily injury remains configured, but not the crime of robbery.

Exclusion of Illegality: it is provided for in art. 23 of the Criminal Code, being: the state of necessity, self-defense, strict compliance with legal duty and regular exercise of law. If one of these hypotheses is found, there is a case of granting provisional release (art. 310, §1st of CCP and decision of the Supreme Court on Non-Custodial Measure in HC No. 186.421).

THEFT

Jurisprudence has recognized the state of necessity (art. 24, CC) on the basis of the following requirements, which must be proven by the defense:

(i) that the crime was **committed to alleviate hunger**;

(ii) that it was the **only and ultimate** resource of the perpetrator (inevitability of harmful behavior);

(iii) that there is the subtraction of thing capable of directly **avoid the emergency**; and

(iv) whether there are **insufficient resources** acquired by the perpetrator through work or **the impossibility of working**[19].

Possibility of police investigation dismissal: If the atypical conduct or the exclusion of illegality is found, the representative of the Public Prosecutor's Office may request the immediate dismissal of the police investigation.

19 CUNHA, Rogério Sanches. Direito penal: parte especial. 3ª Ed. Ver., atual. e ampl. São Paulo: Editora Revista dos Tribunais, 2010. See also: Appeal 20161610081735APR - TJDFT.

Step 0

Redress Irregularities of the *in flagrante delicto* arrest record

Step 1

Confirm the legality and regularity of the *in flagrante delicto* arrest

Step 2

Frame the conduct based on the *in flagrante arrest* record and interview: maintaing or change the legal framework established in the record and, if appropriate, recognize the legality of the conduct and/or exclusion of illegality

Step 3

Verify the need to enforce any non-custodial measure

Step 4

Regular *in flagrante delicto* arrest, illegal conduct judicially framed, and robust elements indicating the need to enforce any non-custodial measure

Part 1

Confirm the suitability of the non-custodial measure enforcement

Part 2

Assess what non-custodial measure would be suitable

Step 5

Regular *in flagrante delicto* arrest, illegal conduct judicially framed and no measure other than detention is adequate and sufficient for the actual case: provisional detention order

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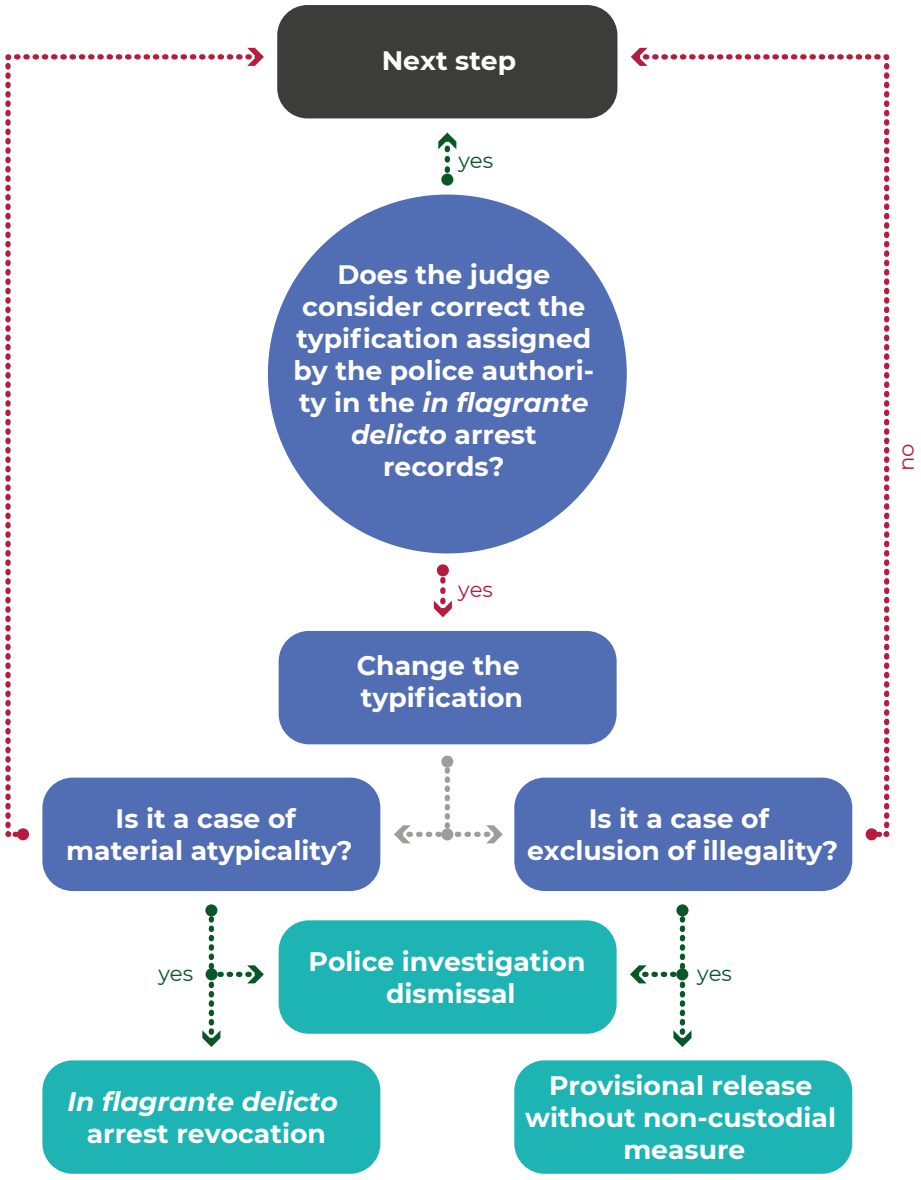
Assess substitution of pre-trial detention for house arrest

Judge in the face of the "situation" (= facts + person in custody) from the *in flagrante delicto* arrest record + interview of the person at the detention control hearing + pleas from the Public Prosecutor and Defense

Requirement:

- Legality and regularity of the in flagrante delicto arrest record



References

Theft - Item 1.2 of Part I of the Handbook with Standards for Specific Crimes and Profiles
Need for assessment report on the value of the res furtive (1.2.1)
Recognition of privileged theft (1.2.2)
Recognition of material atypicality: the principle of insignificance (1.2.3)
Exclusion of illegality: the state of necessity in the case of "famished theft" (1.2.4)
Robbery – Item 2.2 of Part I of the Handbook with Standards for Specific Crimes and Profiles
Violence, serious threat and characterization of robbery (2.2.1)
Principle of insignificance: enforcement possibilities in cases of robbery (2.2.2)
Drug trafficking - Item 3.2 of Part I of the Handbook with Standards for Specific Crimes and Profile
Need for provisional toxicological report (3.2.1)
Reframing from trafficking for drug use (3.2.2)
Recognition of privileged trafficking and its implications (3.2.3)
Classification as "association for trafficking" (Art. 35, Law n° 11.343/2016) (3.2.4)

STEP 3

ONCE THE *IN FLAGRANTE DELICTO* ARREST IS REGULAR, AND THE LEGAL FRAMEWORK IS JUDICIALLY DEFINED, VERIFY THE NEED TO APPLY ANY NON-CUSTODIAL MEASURE

After those steps, **the need for the application** of a non-custodial measure is **assessed**, **provided that there is a request to do so** (art. 282, § 2nd and art. 311, CCP), since it is not possible to order a non-custodial measure ex officio (without the request of the parties, the police authority or the Public Prosecutor's Office).

The non-custodial measure has a procedural nature, provisional and proportional character. Its purposes are always linked to the protection of the legal proceedings, and it cannot turn into anticipation of the penalty, as it would violate the presumption of innocence.

The application of the non-custodial measure has **two requirements** (art. 282, CCP):

I - **Need** for the application of criminal law, for investigation or evidence gathering and, in cases expressly provided for, to prevent the practice of criminal violations;

II - **Adequacy** of the measure to the crime severity, circumstances of the fact and personal conditions of the defendant or accused.

In step 3, the judge should assess whether there are actual **elements** indicating the **need** for the application of a non-custodial measure, in any of the aforementioned hypotheses of paragraph I.

The judge should answer the questions: "are **there actual elements** that indicate that the detainee will **frustrate** the application of the criminal law?" and "are there actual **elements** that indicate that the detainee will **jeopardize** the investigation or evidence gathering?". If the answer is **NO** to both questions, **provisional release shall be granted without any** non-custodial **measure**.

- **Risks of thwarting the application of criminal law** are the actual elements pointing to the **possibility of evasion**. That way, the enforcement of non-custodial measures is necessary "to avoid that, in the face of the probable **escape of the accused**, fearing conviction, the future execution of the punitive measure will be thwarted"[20].
- **Jeopardizing the investigation or evidence gathering** means engaging in acts that **put at risk elements important to the investigation (evidence).** For example: intimidating witnesses or experts, destroying, concealing or tampering with evidence[21]. Therefore, the application of non-custodial measures for this purpose seeks to preserve the means or instruments (evidence) so that such a result can be reached (conviction)[22].

It is important to note that having the right **address, lawful occupation** and **photo document** counts positively as indicators that the person **will not evade law enforcement**. However, the absence of these characteristics should not lead to the **criminalization** of situations of **poverty and other vulnerabilities**, especially of migrants and persons living in the streets.

With respect to the requirement "**in cases expressly provided for, to avoid the practice of criminal violations**", the Handbook proposes that it **should not function as an autonomous requirement capable of justifying the imposition of** non-custodial **measures**. That is, **it must be conditioned to the criterion of necessity** in order to be valid and adapt to the non-custodial supervionary nature of the measures brought in art. 319 of the CCP, in the same way as the criterion of "protection of public order", as detailed in Step 5.

Thus, it is reiterated that **all the criteria for the application of** non-custodial **measures must be linked to the procedural function**.

20 BADARÓ, Gustavo Henrique. Processo Penal. Op. Cit., 2015, p. 983.

21 BADARÓ, Gustavo Henrique. Processo Penal. Op. Cit., 2015, p. 982

22 TOURINHO FILHO, Fernando da Costa. Handbook de Processo Penal. Op. Cit., 2010, p. 674

Step 0

Redress Irregularities of the *in flagrante delicto* arrest record

Step 1

Confirm the legality and regularity of the *in flagrante delicto* arrest

Step 2

Frame the conduct based on the *in flagrante arrest* record and interview: maintaing or change the legal framework established in the record and, if appropriate, recognize the legality of the conduct and/or exclusion of illegality

Step 3

Verify the need to enforce any non-custodial measure

Step 4

Regular *in flagrante delicto* arrest, illegal conduct judicially framed, and robust elements indicating the need to enforce any non-custodial measure

Part 1

Confirm the suitability of the non-custodial measure enforcement

Part 2

Assess what non-custodial measure would be suitable

Step 5

Regular *in flagrante delicto* arrest, illegal conduct judicially framed and no measure other than detention is adequate and sufficient for the actual case: provisional detention order

---

Assess substitution of pre-trial detention for house arrest

Requirements

- Legality and regularity of the in flagrante delicto arrest record

- The conduct described in the in flagrante delicto arrest record is judicially recognized as illegal

- Existence of request for the enforcement of any non-custodial measure

References

Absence of fixed address, lawful occupation and photo documents does not justify the enforcement of non-custodial measure, at risk of criminalizing situations of poverty and other vulnerabilities, especially of persons living in the streets and migrants - Items 4 and 5.1 of Part II of the Handbook with Standards for Specific Crimes and Profile

Is there a need for non-custodial measure enforcement?

(i) Are there actual elements that indicate that the detainee will thwart criminal law enforcement?

(ii) Are there actual elements that indicate that the detainee will jeopardize the criminal investigation or evidence gathering?

YES FOR ANY OF THE ITEMS

NOT FOR BOTH ITEMS

Next step

Provisional release without non-custodial measure

STEP 4

REGULAR *IN FLAGRANTE DELICTO* ARREST, ILLEGAL CONDUCT JUDCIALLY FRAMED AND ROBUST ELEMENTS INDICATING THE NEED TO ENFORCE ANY NON-CUSTODIAL MEASURE

Considering the three criteria of paragraph II of Art. 282 of the CCP: "severity of the crime", "circumstances of the fact" and "personal conditions" of the person in custody, it is necessary to answer the questions: Which non-custodial measure should be applied to this person? Or what is it necessary to do, in the course of the legal proceedings, in relation to this person?

PART 1: DECIDE ON THE ADEQUACY OF THE NON-CUSTODIAL MEASURE BASED ON THREE CRITERIA

1. "Personal conditions of the defendant or accused"

Regarding this criterion, two profiles will be presented whose personal conditions can return the analysis to the Step 3 (provisional release). Such profiles have special protection given by the CCP and the jurisprudence, due to their vulnerabilities to the criminal justice system and the reduced chances of endangering evidence gathering, which is why provisional release should be prioritized.

After the presentation of these two profiles, it is addressed how to deal with cases in which the detainee had previous contact with the criminal justice system.

Profiles covered by art. 318, CPP

Art. 318 presents the possibility of substituting pre-trial detention by house arrest when the perpetrator is:

I. Over 80 (eighty) years;

II. Extremely weakened due to severe illness;

III. Essential to particular care of a person under 6 (six) years old or with disabilities;

IV and V. Pregnant woman and woman with child up to 12 (twelve) years old incomplete;

VI. Man, if he is solely responsible for the child care up to 12 (twelve) years of incomplete age.

First-time offenders and persons who have not had contact with the penitentiary system

If the detainee has never had contact with the penitentiary system, the analysis of personal conditions against the other conditions **should favor provisional release**. It should be considered, in decision-making, that the passage through prison leaves stigmas in person's lives, negatively and violently marking their trajectories, and that in the current context of collapse of the prison system the detention is responsible for inserting individuals in the context of violence and organized crime.

Previous contact with the justice system

In view of the need to strictly analyze previous contact with the Justice System, treatment standards are proposed for cases of reoffending and criminal background.

PREVIOUS CONTACT	WHAT IS IT?	WHAT ARE THE CONSEQUENCES?
Reoffending	It occurs when the individual commits a **new crime** after the preclusion claim of the sentence that, in the country or abroad, has **convicted** him/her for a previous crime, provided that no more than 5 years have elapsed after the date of the execution or termination of the sentence.	It does not lead to the automatic conversion of *in flagrante delicto* arrest into pre-trial detention.
Background	"It corresponds to the criminal history of the perpetrator that is not suitable for the purposes of reoffending"[23].	When verified, the bad background **cannot prevent the provisional release order** or application of non-custodial **measures** other than the detention. They should be weighed with other personal elements.

23 GRECO, Rogério. Código de Processo Penal Comentado. 12ª ed. Rio de Janeiro: Impetus, 2019. p. 166

Juvenile infractions and Socio-Educational Measures	Juvenile infractions are conduct described as a crime committed by a child or adolescent. Socio-educational measures are judicial measures applicable as a result of an infraction committed by an adolescent[24]. They have no sentence nature.	**They should not be counted as reoffending or background**. However, the Superior Court of Justice - STJ understands that they can justify pre-trial detention in adult life, provided that it is observed: (i) the analysis of the actual severity of the Juvenile infractions, (ii) the time elapsed between the infringing act and the crime; (iii) the effective proof of the occurrence of the infringing act
***In flagrante delicto* arrest simultaneous with non-compliance with previously applied non-custodial measure**	It is the case of a person who has already gone through a detention control hearing, had a non-custodial measure applied and then was arrested *in flagrante* for another crime and in breach of the non-custodial measure previously applied. Ex: Arrest for theft committed at night when the night house arrest measure is in force.	Except in the case of domestic violence, **it does not require the order of pre-trial detention, but rather requires a new analysis of the situation to apply the most appropriate measure**. It is necessary to understand the circumstances and reasons that led to the interruption or non-compliance with such measures.
Previous attendance at detention control hearing, and compliance with non-custodial measure	In compliance with the principle *in dubio pro reo*, it should **not** be taken as an **indication of bad background**, nor should it be the only element supporting the pre-trial detention or the imposition of more burdensome non-custodial measures.	

2. Different contexts of life

Then, in order to determine the most appropriate measure, the judge must consider the specificities of the different contexts of life of the persons in custody, such as: needs and possibilities of **displacement in the city**, **financial conditions, housing conditions**, periods of **work and study, health** conditions, **socioeconomic** factors, factors linked to **gender identity** and other indicators of **social vulnerability**.

For this purpose, the judge must ask questions that enlighten the reality of the person in custody, to **define which non-custodial measures he/she would** be **able to comply with**, so as to avoid that possible non-compliance leads to pre-trial detention

24 ZAPATER, Maíra Cardoso. Direito da Criança e do Adolescente. São Paulo: Saraiva Educação, 2019.

order or other more serious measure. The judge shall also consider the information gathered during the pre-hearing social protection interview.

3. "Crime severity" and "circumstances of the fact"

Due to the aforementioned procedural nature of non-custodial measures, a restrictive interpretation of the ideas of crime severity and circumstances of the fact should be made, assessing the specific circumstances of each case and observing how they relate to possible risks to the investigation, evidence gathering and application of criminal law. In situations where the severity of the fact is connected only with the abstract elements of the crime provided for by law, the interpretation in favor of provisional release should prevail.

THEFT

The elementary conduct of the type provided for in art. 155, both of the *caput* and of the factors that increase the degree of the crime (§4th), by itself, should not be considered as justification of its severity. It is the case of the use of a false key, destruction or breaking of an obstacle, concurrence of two or more persons, among others.

ROBBERY

In the case of robbery, for example, the concurrence of persons and use of a firearm alone do not necessarily amount to the specific severity provided by the law.

DRUG TRAFFICKING

Cases of concurrence of perpetrators (art. 69, CC), as well as arguments dissociated from the case, such as the harms that drugs cause in society, for example, should not be considered.

The principle of homogeneity

It follows from the principle of proportionality, and provides that **the severity of the non-custodial measure cannot be greater than the penalty applied in case of conviction**.

Thus, if it is verified that, by the principle of homogeneity, a possible conviction would have the replacement of the sentence by measures substituting imprisonment or the application of a milder sanction, the judge should not order the pre-trial detention.

It is noteworthy that, in the analysis of the possible penalty, extenuating circumstances (Art. 65 of the Criminal Code) should be considered, such as the perpetrator being under the age of 21 or over 70 years old, or having made reparation for the damage or attempt, such as the return of the stolen thing.

THEFT

The hypotheses of **simple theft** (art.155, *caput*), **attempted theft** (when the crime is not completed by circumstances beyond the perpetrator's control) and **privileged theft** (§ 2nd) should exclude the possibility of pre-trial detention, considering the likelihood that in the final trial the penalty will be replaced by non-custodial measures or even a fine.

Step 0

Redress Irregularities of the *in flagrante delicto* arrest record

Step 1

Confirm the legality and regularity of the *in flagrante delicto* arrest

Step 2

Frame the conduct based on the *in flagrante arrest* record and interview: maintaing or change the legal framework established in the record and, if appropriate, recognize the legality of the conduct and/or exclusion of illegality

Step 3

Verify the need to enforce any non-custodial measure

Step 4

Regular *in flagrante delicto* arrest, illegal conduct judicially framed, and robust elements indicating the need to enforce any non-custodial measure

Part 1

Confirm the suitability of the non-custodial measure enforcement

Part 2

Assess what non-custodial measure would be suitable

Step 5

Regular *in flagrante delicto* arrest, illegal conduct judicially framed and no measure other than detention is adequate and sufficient for the actual case: provisional detention order

---

Assess substitution of pre-trial detention for house arrest

Requirements:

- Legality and regularity of the in flagrante delicto arrest record

- The conduct described in the in flagrante delicto arrest record is judicially recognized as illegal

- Existence of request for the enforcement of any non-custodial measure

- Robust elements indicating the need to enforce any non-custodial measure

References

Part II of the Handbook with Standards for Specific Crimes and Profiles

Pregnancy and Maternity - Item 1

Parents and other dependent guardians – Item 2

People with serious and other diseases health conditions - Item 6

Part 1

Decide on the appropriateness of the non-custodial measure on the basis of three criteria (art. 282, II, CCP)

Personal conditions of the person investigated or accused

Severity of crime

Circumstances from the fact

- Restrictively analyze previous contact with the justice system

- Consider specificities of life contexts in relation to the adequacy of the measure to be enforced

- Impossibility of argumentation based on the abstract severity of the offense

- Criteria assessed on the basis of potential risks to the proceedings and not to support a unfavorable judgment

- Principle of homogeneity: non-custodial measure cannot be more burdensome than the applicable penalty

References

Theft – Item 1.3 of Part I of the Handbook with Standards for Specific Crimes and Profiles

Robbery – Item 2.3 of Part I of the Handbook with Standards for Specific Crimes and Profiles

Drug trafficking – Item 3.3 of Part I of the Handbook with Standards for Specific Crimes and Profiles

- Profiles covered by articles 318 and 318-A, CCP

- First-time offenders and persons who have not had contact with the penitentiary system

NO FOR BOTH ITEMS

YES FOR ANY OF THE ITEMS

Provisional release without non-custodial measure

STEP 4

PART 2: WHICH NON-CUSTODIAL MEASURE SHOULD BE APPLIED TO THIS PERSON? OR WHAT IS IT NECESSARY TO DO, IN THE COURSE OF THE LEGAL PROCEEDINGS, IN RELATION TO THIS PERSON?

The non-custodial measures are presented as **alternatives to each other,** in order to avoid their cumulative application, or in "combo". To better understand the monitoring of non-custodial measures other than imprisonment, see the **Handbook of Alternatives to Imprisonment Management**[25].

As decided by the Supreme Court in 2020[26], the judge may not apply non-custodial measures that are not provided for by law, and shall decide inside the frame of the measures provided for in arts. 319 and 320 of the Code of Criminal Procedure.

Considering a systematic interpretation of the criminal procedural law, non-custodial measures must be justified by the actual case and must observe the exceptionality of the restriction. In other words, **the more restrictive the measures, the more exceptional they are**.

The judge must decide **which one is most appropriate to achieve the purpose aimed,** always guided by **the principle of proportionality** - this understood as:

(i) **adequacy**: appropriate measure for its means and purposes;

(ii) **necessity**: measure cannot exceed the essential to obtain the result; and

(iii) **proportionality in the strict sense**: the fundamental rights at stake must be considered, guided by the dignity of the human person.

ESTABLISHMENT OF THE MOST APPROPRIATE NON-CUSTODIAL MEASURES FOR EACH ACTUAL SITUATION

In this Step, seeking to avoid the application of a set of measures disproportionate to the actual situation, **it is proposed that the measures compatible with the functions to be achieved are indicated as "alternatives" to each other**. The table below systematizes the correlations between the functions and the non-custodial measures.

25 https://www.cnj.jus.br/wp-content/uploads/2020/05/Handbook-de-gest%C3%A3o-de-alternativas-Penais_ARTE_web.pdf.

26 HC 186421. Rapporteur Justice Celso de Mello. Published on 17/11/2020.

Table 1. Various non-custodial measures rather than prison and its functions[27]									
	I. PCA	II. PAP	III. PCP	IV. PLR	V. NR	VI. SPF	VI.TH	VII.MB	IX. EM
Escape risk surveillance									
Evidence protection									
Ancillary measure (oversight)									

Thus, the following measures should be considered, one by one, in the phase order that follows[28].

Phase 1: Periodic court appearance

Because it is a measure that responds to the general functions of process protection and accountability of the detainee, the judge must first consider whether, solely, it is able to meet the needs of each particular case. In a positive circumstance, its application should be prioritized, always seeking to adapt it to the personal conditions of the person in custody.

It is worth mentioning that there is the possibility of the appearance being made directly in the Integrated Center of Non-custodial Measures, being the specialized assistance able to monitor the non-custodial measure(s) determined and its developments on the individual's life.

27 The non-custodial measures are found on the x-axis, in the initials: PCA - periodical court appearance (art. 319 (I); PAP – prohibition of access to or attendance at places (art. 319, II), PCP– prohibition of contact with a person; PLR – prohibition to leave the region (art. 319 (IV); NR – night reclusion (art. 319, (V), SPF – suspension from exercising a public function or activity of an economic nature (art. 319 (VI); TH – temporary hospitalization (art. 319, VII); MB - bail (art. 319, VIII) ; EM - electronic monitoring (art. 319, IX)

28 Temporary hospitalization measures (section VII) were excluded from the proposal - since they are incompatible to the medical assessment with the temporality of detention - as well as the night reclusion measure (section V), in view of the excessive burden it represents, as well as the difficulty of monitoring its compliance and the existence of other measures that satisfy the same function. In addition, the measure of "suspension of the exercise of public function or activity of an economic or financial nature" (section VI) is also excluded because of its specificity and the possibility of its application restricted to very limited circumstances.

Phase 2: Prohibition of contact with certain person and/or prohibition of access to certain places

In the second moment, the following question shall be asked: *Is it necessary to protect someone or to protect somewhere, to safeguard the investigation and evidence gathering?* If so, these measures move to the adequacy and proportionality verification phase. If not, they shall not be applied, as they will act as an instrument of social banishment, excessively onerous to the person in custody.

Phase 3: Prohibition to leave the district without judicial authorization

This measure is justified only in cases where there are actual and recent facts indicating the possibility of escape or absence from the district, evading the legal proceeding. Otherwise, the measure of periodic court appearance should be prioritized to achieve the function of accountability and binding to the legal proceeding.

Phase 4: Bail

Because of its multiple nature, the bail is considered more burdensome than the previous measures, which should be prioritized. If applied, the bail should not be accumulated with measures of periodic court appearance and prohibition to be absent from the district.

If its application is deemed necessary, especially for the obligations it generates (arts. 327 and 328 of the CCP), it is important to remember that this can happen without the establishment of financial burden, considering the socioeconomic profile of most people taken to detention control hearings. The detainee must be informed of his/her rights, including the possibility of restitution of the amount at the end of the process.

Phase 5: electronic monitoring

It is the gravest of all non-custodial measures and the one that represents the greatest burden. Its use should be exceptional and grounded on actual elements, and not as a form of criminal control over individuals.

It should only be applied after the judge, on the basis of actual evidence, indicates the reason why the other measures are not appropriate or suitable.

At the detention control hearing hearing, its imposition would only be applicable to “punishable intentional crime by a maximum deprivation of liberty of more than 4 (four) years or convicted for another intentional crime, in sentence claim preclusion” and to “persons under urgent protective measures accused of crimes involving domestic and family violence”.

If applied, the monitoring should be articulated with the social protection network, alleviating discriminatory, abusive and harmful practices, as well as ensuring access to work, education, health and the maintenance of social ties to the monitored people.

If, after the analysis of proportionality in the strict sense, going through all the phases, the judge finds that none of these measures is adequate, and there is a request in this regard, he/she shall proceed to Step 5, referring to pre-trial detention.

References

Proportionality analysis of the appropriateness of a non-custodial measure means that its enforcement must be guided by the personal conditions and life context of the detainee: Part II of the Handbook with Standards for Specific Crimes and Profiles

Part 2

Choose the measures compatible with the functions aimed, based on the principle of proportionality:

(i) adequacy - a measure suitable for its means and purposes

(ii) necessity - the measure should not exceed the essential to obtain the expected result

(iii) proportionality in the strict sense - weighing the impacted fundamental rights

Step 1: Periodic court appearance
Able to respond to several functions simultaneously

→ It is recommended: Provisional release with periodic appearance in court

Step 2: Prohibition of contact with a certain person and/or prohibition of access to certain places
If it is necessary to protect someone or to safeguard somewhere to protect the investigation and evidence gathering

→ It is recommended: Prohibition of contact with a certain person and/or prohibition of access to certain places

Phase 3: Prohibition to leave the district without judicial authorization
If there are concrete and recent facts that indicate the possibility of escape or absence from the district, evading the process

→ It is recommended: provisional release with prohibition to be absent from the district without judicial authorization

Step 4: Bail
If obligations generated make, in the actual case, more sense than those mentioned in Article 319, CCP

→ It is recommended: provisional release on bail with or without financial burden

NO FOR ALL PREVIOUS STEPS

Step 5: Electronic monitoring
The most severe and most onerous non-custodial measure for the detainee, applicable if the other non-custodial measures are inadequate

→ Provisional release with electronic monitoring with time limit for reassessment

→ Next step

NO FOR ALL ITENS

Step 0

Redress Irregularities of the *in flagrante delicto* arrest record

Step 1

Confirm the legality and regularity of the *in flagrante delicto* arrest

Step 2

Frame the conduct based on the *in flagrante arrest* record and interview: maintaing or change the legal framework established in the record and, if appropriate, recognize the legality of the conduct and/or exclusion of illegality

Step 3

Verify the need to enforce any non-custodial measure

Step 4

Regular *in flagrante delicto* arrest, illegal conduct judicially framed, and robust elements indicating the need to enforce any non-custodial measure

Part 1
Confirm the suitability of the non-custodial measure enforcement

Part 2
Assess what non-custodial measure would be suitable

Step 5

Regular *in flagrante delicto* arrest, illegal conduct judicially framed and no measure other than detention is adequate and sufficient for the actual case: provisional detention order

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Assess substitution of pre-trial detention for house arrest

STEP 5

PRE-TRIAL DETENTION – THE MOST EXCEPTIONAL MEASURE

After all the other Steps and having in mind the postulates of **(i) "existence of request"** and **(ii) "finding the inadequacy of the other measures to replace the detention, in a reasoned manner based on actual elements",** it shall proceed to the analysis of the pre-trial detention.

In accordance with art 313 of the CCP, pre-trial detention order is allowed only: (i) for crimes punishable by a **maximum sentence of more than 4 years in prison**; (ii) if the person, in the recent five years until his/her arrest, has been definitively sentenced for another crime; or (iii) if the crime involves **domestic and family violence** against women, children, adolescents, elderly, sick or person with disability, to ensure the execution of urgent protective measures. Having met these criteria, the material requirements contained in Art. 312 of the CCP are analyzed.

> Art. 312. Pre-trial detention may be ordered: as a guarantee of public order, economic order, for the convenience of evidence gathering or to ensure the application of criminal law, when there is evidence of the existence of the crime and sufficient evidence of authorship and danger generated by the state of freedom of the accused.

Based on this article and the gathered decisions, the focus is on the elements that make up the "guarantee of public order", since the element of "economic order" is rare and did not arise in the gathered material, and that the "convenience of evidence gathering" and the "application of criminal law" have already been presented in Step 3.

It is noteworthy that it is a crime to order pre-trial detention out of the legal bounds, as well as not to substitute it with an alternative measure when applicable (Art. 9th of Law No. 13.869/2019).

Speeches about the "order" as grounds for pre-trial detention

In the analysis of the decisions in detention control hearing, six axes of understanding about what would be "public order" were identified. They are:

i. Detention as a response to the "severity of the offense"

The use of the argument of "severity", even if based on actual elements, when dissociated from the criterion of **necessity**, ends up anticipating the rationale of applying a possible penalty. That is, it violates the non-custodial supervisory nature inherent in pre-trial detention.

ii. Detention as a way to avoid "criminal repetition"

It is based on predictions of the future, assuming the consummation of offenses that have not yet occurred. This understanding violates the principle of the presumption of innocence.

iii. Detention as segregation of individuals contrary to order and "prone to crime": the "social dangerousness"

Very common in the conceptualization of public order, this notion is used to determine whether or not people are able to remain in coexistence in society. Amounting to an anticipated enforcement of the sentence and a measure of social defense[29], this notion directly violates the presumption of innocence.

iv. Detention as a measure of "Public Security"

Similar to the other concepts, the notion of protection of public security has the nature of prevention and social defense against individuals considered dangerous[30], and violates the procedural function of pre-trial detention.

v. Detention as a mechanism for "restoring the credibility of institutions"

Often used, the justification of detention based on the credibility of institutions has already had its legitimacy removed by the Supreme Court, [31]because it is contrary to the Constitution.

vi. Detention as a response to society's desires: the "public outcry"

The use of public outcry gives the pre-trial detention nature of punishment anticipation, moving it away from the function of preserving the legal proceeding, provided for in Step 3.

Public order in relation to the non-custodial supervisory nature of pre-trial detention

In order to harmonize the understanding given to the criteria for the pre-trial detention order with the constitutional precept of protection to the presumption of innocence, it is proposed that the arrest by **"public order"** be **conditioned to the necessity analysis**

29 FERRAJOLI, Luigi. Diritto e ragione. Trad. port. de Ana Paula Zomer Sica, Fauzi Hassan Choukr, Juarez Tavares e Luis Flávio Gomes. 2ª ed. São Paulo: Revista dos Tribunais, 2006. p. 510.

30 CAMARGO, Rodrigo Tellini de Aguirre. Audiência de custódia e medidas cautelares pessoais. Op. Cit., 2019, p. 132

31 STF (2nd Chamber). HC 101.055/GO. Rapporteur Justice Cezar Peluso. Judged on 11/10/2009. DJ from 12/17/2009.

presented in Step 3. That is, that public order **does not function as an autonomous requirement** capable of justifying pre-trial detention and that it is **conditioned by the criterion of necessity** to be valid and to suit the non-custodial supervisory nature of pre-trial detention.

Possibilities of substituting pre-trial detention with house arrest

Pre-trial detention **may** be substituted by house arrest in the cases provided for in the aforementioned art. 318 (over 80 years old, person debilitated by serious illness, among others). With regard to pregnant women, mothers or guardians of children or people with disabilities, in 2018 the legislation was amended and house arrest became mandatory, except for two cases that will be dealt with in the following topic.

In the event of the substitution of pre-trial detention by house arrest, it is recommended that the judge make the measure flexible to allow the exercise of work, studies, medical treatment and care with children and dependents.

Finally, it should be noted that the order of electronic monitoring combined with house arrest is not recommended, since both measures are of high control and restriction, and the effects on the life of the detainee can be extremely serious.

Step 0

Redress Irregularities of the *in flagrante delicto* arrest record

Step 1

Confirm the legality and regularity of the *in flagrante delicto* arrest

Step 2

Frame the conduct based on the *in flagrante arrest* record and interview: maintaing or change the legal framework established in the record and, if appropriate, recognize the legality of the conduct and/or exclusion of illegality

Step 3

Verify the need to enforce any non-custodial measure

Step 4

Regular *in flagrante delicto* arrest, illegal conduct judicially framed, and robust elements indicating the need to enforce any non-custodial measure

Part 1

Confirm the suitability of the non-custodial measure enforcement

Part 2

Assess what non-custodial measure would be suitable

Step 5

Regular *in flagrante delicto* arrest, illegal conduct judicially framed and no measure other than detention is adequate and sufficient for the actual case: provisional detention order

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Assess substitution of pre-trial detention

Requirements:

- Legality and regularity of the in flagrante delicto arrest record

- Unlawful conduct judicially framed based on the in flagrante delict arrest record and interview

- Robust elements indicating the need to enforce any non-custodial measure

- No non-custodial measure other than imprisonment is adequate and sufficient for the specific case

- Justification based on the elements of the actual case, in an individualized way, on the non-appropriateness of the substitution of pre-trial detention for a non-custodial measure

- Existence of specific request for provisional detention warrant

Reminder

Need to be protected for precautionary purposes (step 3)

Caution when analyzing the requirements not suitable for prison as:

(i) response to the offence severity

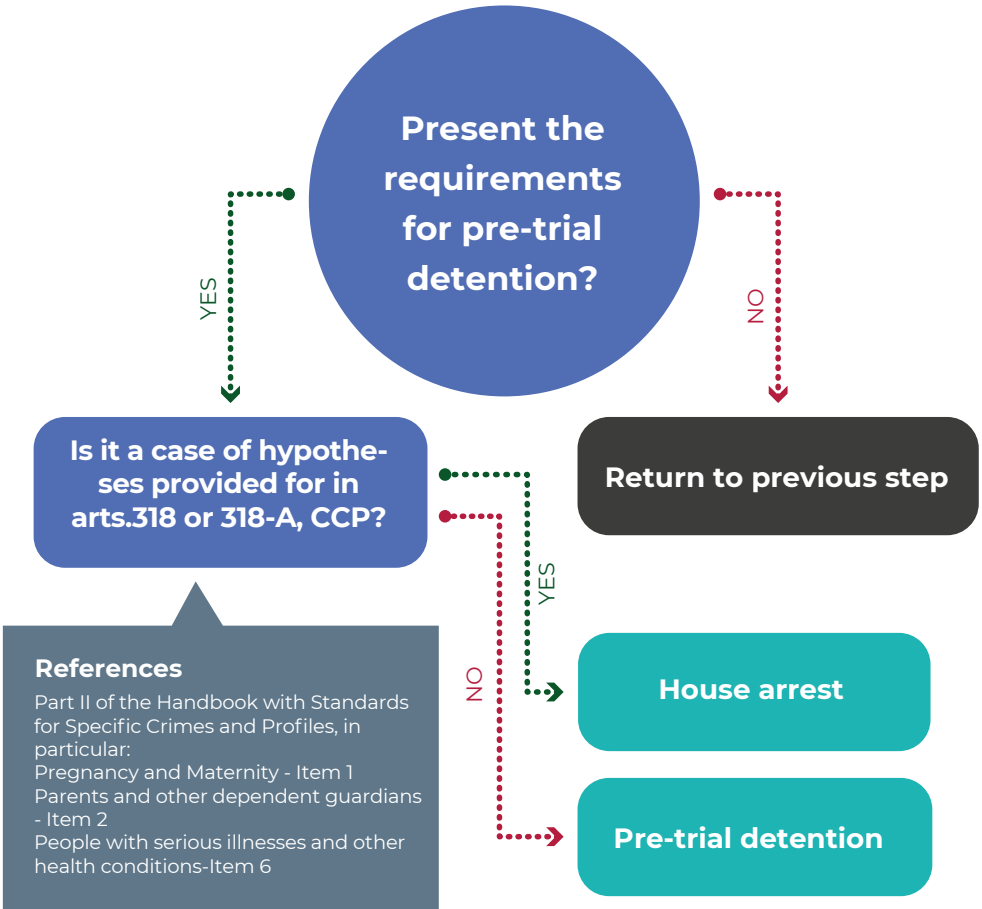
(ii) manner to avoid "criminal repetition"

(iii) segregation of individuals contrary to order and "prone to crime"

(iv) public security measure

(v) mechanism for restoring the institutions credibility

(vi) response to the "public outcry"



References

Part II of the Handbook with Standards for Specific Crimes and Profiles, in particular:
Pregnancy and Maternity - Item 1
Parents and other dependent guardians - Item 2
People with serious illnesses and other health conditions-Item 6

3. SPECIFIC STANDARDS FOR DETAINEE PROFILES

The presentation of specific standards on the decision-making process of certain social groups is justified according to the protection that the law itself presents, but also because different social variants, such as class, race, ethnicity, gender, sexuality, nationality, generation[32], inform heightened vulnerabilities about such profiles in relation to the criminal system, as well as specific violence that such groups may suffer. Thus, it is proposed to read this document in jointly with the Handbook of Social Protection in Detention Control Hearings and with the Handbook to Prevent and Combat Torture for Detention Control Hearings.

PREGNANCY AND MATERNITY

In 2018, a law was passed determining, as a rule, that the **pre-trial detention** imposed on the **pregnant woman, mother or guardian** of children or persons with disabilities **will be replaced by house arrest**, provided that: (i) she has not committed a crime with violence or serious threat to the person and (ii) she has not committed the crime against her child or dependent. This new law came to reinforce and expand another law approved in 2016[33] and a decision of the Supreme Court issued in 2018[34], ensuring the best interest of the child and the full exercise of maternity.

Questions and means of proving the exercise of maternity or pregnancy

The interpretation in greater conformity with CNJ Resolution No. 213/2015 is the one that gives **trustworthiness to the word of the woman**, with the possibility of later documentary proof.

32 Category of analysis referring to age. As mentioned in the Handbook, being elderly, for example, may indicate vulnerabilities.

33 Law No. 13.257/2016 amended the CCP by extending the possibility of pre-trial house arrest (art.318, CCP) for pregnant women, mothers of children up to 12 years old or those responsible for people with disabilities.

34 The decision of the Supreme Court in HC Nº 143.641 reinforced the applicability of the law, by determining the granting of house arrest for all women who fall under the conditions of the legal framework. Despite this, the decision placed new restrictions on the law, establishing hypotheses in which house arrest would not apply: (i) cases in which the crime was committed against descendants; (ii) crimes committed with violence or serious threat, as well as (iii) "very exceptional situations". HC 143.641. Rel. Min. Ricardo Lewandowski. Second Chamber, judged on 02/20/2019, DJe: 10/09/2018.

Referrals to the bodies of the system of guarantees of the rights of the child and the adolescent

In cases involving pregnant women and mothers, it is common to have decisions determining the referral to child and adolescent protection bodies **in order to question the exercise of motherhood** of the woman in custody. However, any such measure should be made based on the **integral protection** of the child, seeking to strengthen **family and community coexistence with the natural family** and an environment that values the integral development of the child.

The principle of best interest of the child cannot be thought of separately from the right to the full exercise of motherhood, housing and family coexistence. Therefore, it is necessary to think about a joint legal guardianship of motherhood and childhood, **avoiding the separation of mothers and children**. If there is a need for referrals, it is recommended that they be made aiming at social protection, with the support of the Detainee Social Protection Service to the detainee for the adoption of care and psychosocial assistance services.

House arrest conditions

Care for children is widespread, including, for example, inclusion in social protection records and work to support the family. Therefore, there must be individualized adjustments, according to the **context of each family**, to make **compliance with the measure effective**.

Finally, it should be emphasized that house arrest is strictly a substitute for pre-trial detention, not a measure of excellence for pregnant women and mothers.

FATHERS AND OTHER DEPENDENTS GUARDIANS

Treatment given to women who have children under 12 years old or who require special care should also be given to **other persons in a similar situation**. That is, uncles, aunts or grandparents responsible for their nephews or grandchildren; fathers responsible for children who depend on them (even if only financially); partners of pregnant women; adults responsible for the care of the elderly, among others.

In this sense, and in addition to the Handbook, we highlight the judgment issued recently by the 2nd Chamber of the STF[35], in which an order of collective *habeas corpus* was granted to determine the replacement of the pre-trial detention of parents and guardians of children and people with disabilities, observing the conditions indicated in it.

35 HC 165.704, Rapporteur Justice Gilmar Mendes. Published on 02/24/2021.

In these cases, the laws dealing with childhood and adolescence apply, which must be taken into account to prioritize provisional release or, in the case of pre-trial detention, conversion into house arrest.

LGBTQI+ PEOPLE

Regarding detention control hearings of LGBTQI + people, it is necessary that the judge observe especially 2 points: (i) the importance of using the **social name** of the person, when transsexual or transvestite; and (ii) in cases of arrest, that the decision on the place of deprivation of liberty be taken with the participation of the person in custody, considering their safety and protection.

In addition to the Handbook, it is also noted that the STF, in a recent decision[36], adapting to international standards on the subject, determined that it is "to transsexuals and transvestites with female gender identity the **right of option** for serving sentence: (I) in a **female prison facility**; **or** (ii) in a **male prison facility**, but in a **reserved area**, which guarantees their **safety**".

Finally, it should be noted that transsexual men can also be pregnant or lactating, and the same standards regarding women should be applied to them.

PERSONS LIVING IN THE STREETS AND IN SITUATION OF EXTREME VULNERABILITY

The prohibition of the criminalization of poverty is a principle provided for in CNJ Resolution No. 213/2015, which determines that "the situation of social vulnerability of the persons charged and brought to the detention control hearing cannot be a criterion of selectivity in their disadvantage in considering the conversion of *in flagrante delicto* arrest into pre-trial detention. (...)". Thus, it is necessary for the judge to understand that the **lack of a fixed address cannot** be used as a justification for **pre-trial detention**. Alternatives to serve persons a notice of a criminal action should be considered, such as using the address of social assistance bodies to send correspondence to them. Or, still, consider the point of the city where the person can normally be found.

The lack of documents, likewise, **should not be criminalized.** Despite the legal authorization[37], instead of ordering the arrest, the judge must consider the situation itself as an **indicator of vulnerability** and engage the **social protection network** to regularize the document situation.

36 MC na ADPF 527/DF. Rapporteur Justice Luís Roberto Barroso. Published on 03/22/2021.

37 Art. 313. (...) §1st pre-trial detention shall also be admitted when there is doubt about the civil identity of the person or when the person does not provide sufficient information to clarify it, and the detainee must be immediately released after identification, unless otherwise recommended to maintain the measure. BRAZIL. Code of Criminal Procedure. Decree Law No. 3.689, of 10/03/1941. Available at: http://www.planalto.gov.br/ccivil_03/decreto-lei/del3689compilado.htm.

It is common for the persons living in the streets to have **health problems** or other issues arising from the use of psychoactive substances, including addiction syndrome, which should not ground imprisonment or compulsory hospitalization.

It is also noteworthy that referrals to the social protection network must always preserve the autonomy, voluntariness and self-accountability of the person through the process. And non-custodial measures such as **bail, night reclusion and electronic monitoring** should be understood as **excessively onerous** or **impossible to be accomplished** by persons living in the streets. Even so, such difficulties for compliance with non-custodial measures should not ground pre-trial detention.

MIGRANT

Similar to the provision in the case of persons living in the streets, the absence of **formal work**, **documents** and **fixed address** of migrants **should not** be seen under the criminalizing rationale. According to the Migration Law[38], the guidelines of human rights protection, equal treatment, humanitarian welcoming, non-discrimination and non-criminalization must be followed.

Also similar to the case of persons living in the streets, depending on the circumstances, non-custodial measures such as bail, night reclusion and electronic monitoring should be understood as excessively onerous or impossible to comply with. Other important specifications regarding migrants, provided for in CNJ Resolution 213/2015, are **consular access** and **interpreter[39]** during the detention control hearing.

Consular notification must be made by the police authority at the time of arrest. However, if identified that it has not been made, **the judge** responsible for the detention control hearing **must communicate.**

Regarding the right to an interpreter at the time of the detention, this guarantee is provided for in CNJ Resolution 213/2015, which provides that:

> *"The foreign detainee must have the* **assistance of an interpreter** *and the deaf person the assistance of a LIBRAS (Brazilian Sign Language) interpreter* **granted***, an essential requirement for the full understanding of the questions and for the statement hearing, observing the need for (i) the detainee to be in agreement with the use of an interpreter, (ii) the interpreter to be informed of the information confidentiality (iii) the interviewer to maintain contact with the interviewed, avoiding addressing exclusively to the interpreter." (emphasis added)*

38 BRAZIL. Law No. 13.445 of May 24th, 2017. It establishes the Migration Law. Federal Official Gazette from 5.25.2017. Brasilia: 2017. Available at: http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2017/lei/l13445.htm

39 Article 193 of the Code of Criminal Procedure and Article 8 of the American Convention on Human Rights also provide for the guarantee of an interpreter.

In the absence of interpreters for migrant detainees, it is common for unofficial translators to be assigned to the hearing when qualified persons are present. However, this cannot be the standard. In judicial units where there is a greater flow of migrant population, the presence of official translators must be guaranteed, even if, exceptionally, videoconferencing is used.

PEOPLE WITH SERIOUS ILLNESSES AND OTHER HEALTH ISSUES

The individualization of the measures applied in detention control hearings should take into account serious illnesses or other health issues, which may concern, for example, elderly people:

(i) The difficulties of accessibility of these people for the fulfillment of possible non-custodial measures;

(ii) His/her dependence on others for daily activities;

(iii) The frequency of visits to a doctor and other health care, so that the measures are flexible in a manner consistent with the routine of the person in custody;

(iv) The existence of follow-ups and/or treatments and if he/she takes any medication regularly.

Finally, similar to the provisions in cases of pregnancy and maternity, if the person is not with the probative documentation of the health situation, the judge must grant time to add it to the legal proceeding file, without ordering the arrest in this period.

PEOPLE WITH HEARING LOSS

CNJ Resolution No. 213/2015 guarantees the assistance of a Brazilian Signs Language (LIBRAS) interpreter for people with hearing loss.

Thus, if it is not possible to carry out the hearing of the detainee for lack of interpreter, revocation of the detention **or provisional release** without the application of other non-custodial measures should be favored, so that their **right of defense** is not constrained or penalized for lack of court structure. Subsequently, **a new date may be designated** for the hearing with the presence of an interpreter.

PEOPLE WITH DRUG USE DISORDERS

As worked out in the Handbook of Social Protection in Detention Control Hearings: Standards for the Detainee Social Protection Service, the National Policy on Alcohol and Drugs - PNAD[40] has as guiding principles shared liability and cooperation among public services, private initiative, the third sector, and citizens.

In this sense, instead of increasing stigmas on people who use drugs, often placed in situations of **extreme vulnerability**, the judge should seek to build **articulation with the social protection network**, aiming at effective care solutions. Contact with the justice system shall grant **access to policies of social inclusion, income generation and work**, always respecting the autonomy of these individuals.

Although prohibited by the STF, the imposition of unusual non-custodial measures has been common, especially the imposition of hospitalization for treatment of psychoactive substance dependence syndrome as a non-custodial measure. It is necessary to reaffirm, therefore, that only the non-custodial measures provided for in Art. 319 of the CCP can be applied, and that referrals of this type affect the **autonomy and voluntariness** of the person to undergo treatment.

INDIGENOUS PEOPLE

In the case of Indigenous people, in 2019 the National Council of Justice published Resolution No. 287/2019, which establishes "procedures for the **treatment of Indigenous people** accused, defendants, convicted or deprived of their liberty, and gives guidelines to ensure the rights of this population in the criminal sphere of the Judiciary". Within the detention control hearings framework, the **following principles** stand out:

a) The recognition of the person as Indigenous occurs through **self-declaration** (art. 3rd, caput, and § 1st);

b) The judge should inquire about the ethnicity, the language spoken and the knowledge level of the Portuguese language (art. 3rd, § 2nd);

c) Information about his/her ethnicity, spoken language etc., shall appear in all acts of the legal proceedings (art. 4th);

d) The judge must ensure the **presence of an interpreter**, preferably a member of the same indigenous community (art. 5th, paragraph I);

40 BRAZIL. Decree No. 9.761, of April 11th, 2019. Approves the National Drug Policy. Federal Official Gazette from 04.11.2019. Brasilia: 2019. Available at: http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2019/decreto/D9761.htm. Accessed on July 9th, 2020.

e) Whenever possible, anthropological surveys may be carried out in order to provide subsidies for the establishment of the responsibility of the accused person (art. 6th);

f) In the event of the imposition of any alternative non-custodial measure rather than imprisonment, the judge must **adapt it** to the conditions and deadlines that **are consistent with the customs,** place of **residence** and **traditions** of the indigenous person (art. 8th).

These are some of the items to be covered in detention control hearings in the case of indigenous persons in custody, which can guide decision-making in this context, along with other rights and guarantees.

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