CRIMINAL LAW REVISION COMMISSION

Criminal Procedure Reference Paper

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PRETRIAL RELEASE

May 1972

SUMMARY

SUBJECT: ABA Standards Relating to Pretrial Release (Approved Draft, 1968)

I. GENERAL PRINCIPLES

1.1 The law favors release of the defendant pending trial. Deprivation of liberty works an economic and psychological hardship on the defendant and his family.

A defendant should only be deprived of his liberty if this is the only method that will prevent his flight from trial. Not every person arrested eventually serves time in prison as part of the sentence. A detained person is deprived the opportunity to work and support his family and to aid in his defense. The President's Commission on Law Enforcement and Administration of Justice reports that of 727,000 arrests made for serious crimes in 1965, 290,000 were released without charge or a minor charge; 260,000 were referred to juvenile authorities, and 177,000 were formally charged. Of those charged, 160,000 were convicted with 56,000 placed on probation.

1.2 Each jurisdiction should adopt procedures designed to increase the number of defendants released on an order to appear or on their own recognizance. Such non-monetary conditions as constitutionally may be imposed should be employed to assure the defendant's appearance at court. Reliance on money bail

should be reduced to minimal proportions and in those cases where required, a 10 percent deposit system should be instituted.

Even when the court feels bail is required, the requirement should be satisfied by a deposit roughly equivalent of a bond premium. Sureties should not be allowed to act for compensation.

1.3 Wilful failure to appear in court should be made a criminal offense.

The statute should expressly punish defendants who are released without bail and unambiguously apply to all forms of pretrial release. The range of penalties imposed should bear some relationship to the offense with which the defendant is initially charged. For fair and effective administration of such a statute is the need to make it inescapably clear to the defendant at the time of his release precisely what his obligations are and that his failure to fulfill them will result in an additional complaint.

1.4 Definitions of citation, summons, order to appear, release on own recognizance, release on bail, and first appearance are stated for clarity in interpretation. ROR is defined as a release of a defendant without bail upon his promise to appear at all appropriate times, sometimes referred to as personal recognizance.

II. RELEASE BY LAW ENFORCEMENT OFFICER ACTING WITHOUT AN ARREST WARRANT.

2.1 It should be the policy of every law enforcement agency to issue citations in lieu of arrest or continued custody to the maximum extent consistent with the effective enforcement of the law.

In all but minor traffic matters, the automatic response of the officer acting without a warrant is to arrest the person. Thought should be given to the more or less articulated notion that arrest itself has some punitive function. Arrest also commonly serves as a basis for certain kinds of investigation (searches and fingerprinting). Moreover, considerations of immediate public safety or the physical well-being of the accused may dictate arrest even in relatively minor matters. (i.e., intoxication). Finally, if the officer has reason to believe that the accused will refuse to appear, accused is transient or has skipped before, he will be unlikely to issue a citation.

The point is that while there are doubtless a number of legitimate reasons for arresting an accused rather than issuing him a citation, the act of arrest ought not to be committed unless an acceptable justification can be articulated.

2.2 The officer should be required to issue a citation if the accused commits one of the listed offenses; where the total imprisonment does not exceed six months; or he may arrest if the accused fails to identify himself or refuses to sign the citation. Also an arrest may be made where the accused does not have any ties with the community or has previously failed to appear in response to citations.

The standard requires to put together in one place a list of all the offenses so minor that no arrest should be made except in extreme circumstances. If a person commits a nonlisted offense but the sentence is less than six months, he may be released on citation after the booking and identifying procedures.

This section does not sanction "stationhouse bail" because it is the antithesis of an individualized assessment of the risk that the defendant will not appear and because it involves exclusive reliance on money bail, the deterrent effect of which is now in serious doubt.

2.3 Permissive authority to issue citations in all cases.

Citations should be used in all probable cause arrests to the maximum extent possible. Specific regulations designed to increase the use of citations should be promulgated by the respective law enforcement agency. The regulations should include: accused's place and length of residence, his family relationships, references, present and past employment, his criminal record, and other relevant factors.

This proposal is based on Illinois Statute chap 38 s. 107-12 which provides for a notice to appear. This authority is permissive and would probably not be exercised in felony cases. Experience indicates that the mere provision of statutory authority will not increase police issuance of citations. Explicit guidelines and procedures must be provided by appropriate agencies in order to encourage police officers to feel safe in issuing citations.

2.4 Lawful searches.

Nothing in these standards should be construed to affect a law enforcement officer's authority to conduct an otherwise lawful search even though a citation is issued.

An officer who has reasonable grounds for arrest should be able to conduct a reasonable search incident to such arrest.

2.5 Persons in need of care.

If a person appears in need of medical attention when he is arrested or cited, the police officer should take the person to an appropriate medical facility.

The President's Commission on Law Enforcement and Administration of Justice found that in 1965, one of every three arrests in America - a total of 2,000,000 - was for public drunkenness. The substitution of civil detoxification and care centers are recommended. Police agencies should have the explicit authority to transport them to the appropriate facility as an alternative to jail as a protective device.

III. ISSUANCE OF SUMMONS IN LIEU OF ARREST WARRANT.

3.1 Authority to issue summons.

All judicial officers should be given statutory authority to issue a summons rather than an arrest warrant.

In order to reduce unnecessary arrests, the authority of courts to issue a summons ought to be substantially broadened. If some felony defendants can be safely released without bail, no reason appears why they cannot be brought before the court initially on a summons, provided of course that the issuing courts are satisfied that they will respond.

3.2 Mandatory issuance of summons.

Issuance of a summons rather than an arrest warrant should be mandatory in all cases in which the maximum sentence for the offense charged does not exceed six months. A warrant can be issued if it appears necessary to subject the accused to the jurisdiction of the court.

3.3 Application for an arrest warrant or summons.

The policy of the court should favor the summons unless it appears the defendant will flee to avoid prosecution or fail to respond to a summons. The application for a warrant or summons shall contain the defendant's: residence, employment, family relationships, response to legal process, and past criminal record. The judicial officer should be required to issue a summons in lieu of an arrest warrant when the prosecuting attorney so requests.

The Manhattan and D. C. Bail Projects have demonstrated the need to create some mechanism for gathering facts relating to the defendant. Almost all the facts required will ordinarily be disclosed in the routine investigation leading to the filing of the complaint. The point simply is that the normal investigation should focus on the question of whether arrest is actually necessary.

3.4 Service of summons.

Statutes prescribing the methods of service of criminal process should include authority to serve a summons by certified mail.

No reason appears why service by mail should not suffice where it is clear to the issuing court that the accused will respond. The problem of establishing wilful failure to respond to the summons may be troublesome in some cases since a defendant may claim not to have received the process.

IV. RELEASE BY JUDICIAL OFFICER AT FIRST APPEARANCE OR ARRAIGNMENT.

4.1 Prompt first appearance.

Every arrested person should be taken before a judicial officer without unnecessary delay.

4.2 Appointment of counsel.

Determination of financial ability should be made before the first appearance and whether or not the accused desires representation. Counsel should be appointed no later than the time of first appearance.

Defense counsel can provide an essential adversarial ingredient in the proceedings for determination of pretrial release. Unless the defendant's claim to pretrial release is pressed at first appearance, it may not thereafter be adequately heard. Care must be taken also to ensure that there is no lapse of representation as the case progresses from one stage to the next.

4.3 Nature of first appearance.

The first appearance should take place in an unhurried manner and in quiet dignity. Clear and easily understandable language should be used to advise the defendant of his rights and the actions to be taken.

The accused should be informed of the charge and given a copy thereof. The accused should be advised of the right to silence and the effect of saying something (it may be used against him), his right to counsel, the right to free counsel if indigent, and the right (where applicable) to a preliminary hearing.

An appropriate record of the proceedings should be made; adequate time for counsel-accused conference should be given; and it should be the policy of prosecuting attorneys to encourage the release of defendants on their own recognizance.

The press of business in the courts results in the courtroom becoming crowded and noisy with the result in less respect for the administration of justice. Dissatisfaction with assembly line justice does not reflect solely concern for the defendant. Courts acting in haste frequently will fail to treat a case as seriously as it deserves. The public as well as the defendant suffers when the disposition of cases is a response to crowded calendars rather than a careful determination on the merits. The ideal of individualized justice must be preserved or recaptured in spite of the rising tide of criminal cases.

The explanation of the defendant's constitutional and statutory rights should be made in such a way as to ensure that the defendant, who often is frightened, confused and perhaps handicapped by a language barrier, clearly understands the nature of the proceedings, his rights, and the timing of future proceedings in his case.

The prosecutor should make known his intention of recommending release without bail sufficiently early in the proceedings to enable the appropriate agency to dispense with the pre-first appearance inquiry.

4.4 Release of defendants subject to one year maximum sentence.

A defendant should be released on his own recognizance without special inquiry if the maximum possible sentence is no

more than a year. The release should be made unless a law enforcement official gives notice to the judicial officer that he is opposed to such a release.

It is not proposed that all such defendants should be released automatically, but merely that a screening process take place as the case works its way through the police and prosecutorial system on its way to first appearance.

4.5 Pre-first appearance inquiry.

Where the maximum sentence is more than one year, an inquiry into facts relevant to release shall be made unless the prosecuting attorney states that he does not oppose recognizance release. The inquiry should be conducted by an independent agency or by an arm of the court and shall explore the following factors: employment history and status, family relationships, past and present residences, character and reputation, names of persons who agree to assist him in attending court, nature of the charge, criminal record, and any other factors tending to indicate that the defendant has strong ties to the community and is not likely to flee the jurisdiction. The agency, where appropriate, should make recommendations in regard to the defendant's release.

Some sort of background inquiry is an indispensable part of meaningful bail reform. The basic criticism of the administration of bail has been that magistrates were required to make decisions without having sufficient facts. The ideal system would involve the creation of an independent agency answerable directly to the court.

The interview should avoid delving into details of the current charges and the interviewer should never be called as a witness in a later trial. The general factors required to be taken into account in setting bail are the nature of the offense, the possible penalty, the probability of willing appearance, the defendant's financial condition, his character, and his reputation. Subsumed in such statements are the factors indicating the defendant's roots in the community that give him a stake in remaining in the vicinity and appearing when required.

V. THE RELEASE DECISION

5.1 Release on order to appear or on defendant's own recognizance.

The presumption should favor release on one's own recognizance. The presumption may be overcome by a finding that there is substantial risk of nonappearance. In determining whether there is substantial risk of nonappearance, the following factors should be considered: length of residency in community, employment status and history, financial condition, family ties, reputation, character, mental condition, prior criminal record (including any record of prior release on recognizance), responsible members of community who would vouch for defendant's reliability, nature of the offense, and any other relevant factors bearing on the risk of wilful failure to appear. The judicial officer should exercise care not to give inordinate weight to the nature of the present charge.

The historical preference for pretrial freedom, as well as recent research indicating that release without bail may safely

be increased, supports a reversal of the presumption that bail should be set in every case unless the defendant asserts otherwise. This approach will not result in the automatic release of all defendants, but will simply require an adequate showing of such facts as justify the imposition of conditions on the defendant's release.

These standards require a release decision related explicitly to all factors found to be relevant to the accused's roots in the community, and they expressly warn against undue emphasis on the nature of the current charge. A bail schedule is incompatible with such an individualized decision.

5.2 Conditions on release.

If recognizance release is not to be effected, the least onerous condition reasonably likely to assure the defendant's appearance in court should be imposed. The conditions should impose one or more of the following: release the defendant to the care of some qualified person or organization responsible for assisting him in appearing in court; place the defendant under the supervision of a probation officer; impose reasonable restrictions on the activities, movements, and associations of the defendant; release the defendant during working hours but require him to return to custody after work; any other reasonable restriction designed to assure the defendant's appearance.

The standards seek to make the preference for non-monetary conditions on release sharper by clearly separating those conditions from any form of bail thereby encouraging supervised release. Release to a third person grows out of the discovery

by bail projects that frequently a friend, relative, employer, or perhaps clergyman would agree to help the defendant appear in court when required. Also, it need no longer be assumed that a defendant must either be released or detained continuously thereby allowing for release during certain periods for work and custody during other periods.

5.3 Release on money bail.

Money bail should be set only when it is found that no other conditions on release will reasonably assure the defendant's appearance in court. The sole purpose of the money bail is to assure the defendant's appearance. Money bail can be any of the following: execution of unsecured bond, unsecured bond accompanied by a 10% deposit, and the execution of a bond secured by the deposit of the full amount in cash or other property. Money bail should be set no higher than that amount reasonably required to assure the defendant's appearance in court and should take into consideration the defendant's residence, employment, family, reputation, past history of response to legal process, criminal record, and nature of the charge. Money bail should never be set with reference to a fixed schedule.

If the threat of financial loss will be a needed deterrent, the unsecured bond will often satisfy the need without tying up the defendant's money or property. The ten percent plan is premised on the idea that the defendant pay the court, instead of a bondsman, the 10% deposit which will be returned less an administrative fee upon appearance of the defendant.

Prevailing levels of bail across the nation are too high. Statistics indicate that even when bail is set at $500, the lowest amount usually required in a felony case, roughly 25 percent of defendants in that bracket are unable to secure their release even by resort to a surety bond. The results of recent bail studies support the proposition that bail amounts can safely be lowered generally. This standard seeks to promote that trend by stressing individualized decisions and prohibiting bail schedules.

5.4 Prohibition of compensated sureties.

No person should be allowed to act as a surety for compensation. In any action to enforce an indemnity agreement between a principal and surety on a bail bond it should be a complete defense that the surety acted for compensation.

The bail bondsman has become fixed in criminal jurisprudence and the decision to release the defendant is, in effect, made by the determination of wealth by the bondsman. The court and the commissioner are relegated to the chore of fixing the amount of bail. When there is no underlying collateral for a bond there is no real risk of immediate financial loss which deters the defendant from fleeing. The result is that recognizance would have done just as good. When the bond is secured, the bail setting may be frustrated because of the failure of the accused to secure the bond with sufficient property. Where the bondsman absolutely refuses to write a bond no matter what the circumstances, the whole bail system is undermined.

If releases without bail are increased, closer supervision of released defendants employed, bail amounts reduced, and the 10 percent cash deposit utilized, cases in which the services of a professional bondsman would be required should be practically nonexistent. The professional bondsman is an anachronism in the criminal process. Close analysis of his role indicates he serves no major purpose that could not be better served by public officers at less cost in economic and human terms.

5.5 Prohibition of wrongful acts pending trial.

Upon a showing that defendant will commit a serious crime or intimidate witnesses, the court may enter an order prohibiting the defendant from certain acts or from associations with certain people, prohibit the defendant from going certain places, possessing dangerous weapons, and require the defendant to report regularly to and remain under the supervision of an officer of the court.

The standards do not include a preventive detention provision because of the uncertainty of its constitutionality and the dangers of a denial of due process inherent in denying a person his freedom before he is convicted. The standards therefore draw out alternative methods for curbing crime by the use of restraining orders that embody restrictions on the activities of the defendant.

Another due process problem is that of predicting criminal conduct as likely to occur and therefore incarcerating the person based on this determination. This would result in punishing a person for a crime he has not committed.

5.6 Violation of conditions on release.

After verification that defendant has violated conditions of release, a warrant shall issue for his arrest. A law enforcement officer who has reasonable grounds to believe that the defendant has violated his release order may arrest the defendant when it is impracticable to seek a warrant.

Under a release system based on non-monetary conditions, the authority to arrest and surrender a released defendant is necessarily and properly vested in public officers and is tied explicitly to alleged violations of the terms of the release order.

5.7 Sanctions for violation of conditions.

After hearing, and upon finding that the defendant has wilfully violated reasonable conditions imposed on his release, the court should impose different or additional conditions upon defendant's release or revoke his release.

This section represents an accommodation between the decision not to propose outright preventive detention and the proposal that courts take the risk of future criminal activity into account when imposing conditions on the defendant's release. The power to revoke release has been analogized to the exercise of the contempt power. If the conditions imposed on release are reasonable and within the authority of the court, the analogy is apt. But the revocation power must stand on its own feet, and its reception by the courts will depend on whether the conditions imposed are reasonable and whether procedural safeguards are employed.

5.8 Commission of serious crime while awaiting trial.

Where it is shown by competent court that probable cause exists to believe defendant has committed a serious crime while on release, the court which initially released him should be authorized to revoke the release.

This is a form of preventive detention but as a result of the defendant committing criminal acts while on release. If the court has the power to take the risk of future criminal activity into account in setting conditions in his release, then it should follow that it may enforce those conditions by revocation where a clear violation is shown.

Where the inadequacy of the usual deterrent effect of pending criminal proceedings has been demonstrated by the defendant's commission of a serious crime while released, the ABA believes the practical arguments against detention fail.

5.9 Re-examination and review of the release decision.

A decision to release should be periodically reviewed, especially in the case of a person in custody (unable to post bail). Frequent and periodic reports should be made to the court as to each defendant who has failed to secure his release within two weeks of arrest.

Automatic review of the release decision ought to be provided in all cases where the defendant has remained in jail more than two days or so. Administrative procedures designed to expose any lapses in the system ought to be devised.

5.10 Accelerated trial for detained defendants.

Every jurisdiction should adopt a time limitation within which defendants in custody must be tried.

5.11 Trial.

The fact of pretrial confinement should not be allowed to prejudice the defendant at the time of trial or sentencing. Care should be taken to ensure that the trial jury is unaware of the defendant's detention.

5.12 Credit for pretrial detention.

Convicted persons should be given credit against the sentence for the time spent in custody whether or not the accused had pleaded guilty or not guilty.