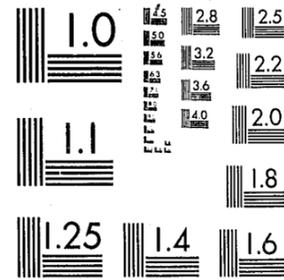


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WISCONSIN LEGISLATIVE COUNCIL STAFF
INFORMATION MEMORANDUM 80-2

JUN - 2 1981

ACQUISITIONS

Room 147 North
State Capitol
Madison, Wisconsin 53702

By: Shaun Haas,
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January 30, 1980

PROSCRIPTION AGAINST EXCESSIVE BAIL:
THE 8TH AMENDMENT TO THE UNITED STATES CONSTITUTION

INTRODUCTION

This Information Memorandum, prepared for the Legislative Council's Special Committee on Constitutional Bail Revision, summarizes briefly several federal court decisions construing the 8th Amendment to the United States Constitution: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Memorandum is organized so as to first provide a brief summation of the conclusions that may be derived from the more detailed analysis of the cases cited and discussed in the final section of this Memorandum.

SUMMARY OF CONCLUSIONS DERIVED FROM FEDERAL CASES CONSTRUIING THE 8TH AMENDMENT

1. The proscription against "excessive bail" in the 8th Amendment does not guarantee a right to bail in every instance where a person is charged with committing a crime. It applies only where the crime is recognized as bailable by law.
2. The traditional right to freedom before conviction is consistent with the presumption of innocence, permits the accused to prepare his or her defense and serves to prevent the infliction of punishment prior to conviction.
3. The right to release before trial is conditioned upon the accused's giving adequate assurance that he or she will stand trial and submit to sentence if found guilty. Bail set at a figure higher than the amount reasonably necessary to assure appearance is "excessive." A court may not act arbitrarily or discriminatorily in its administration of laws

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which recognize a right to bail for certain offenses. A factual basis must exist to support the amount of bail which is set. The amount cannot deviate substantially from the amount imposed upon similarly situated defendants in the absence of a hearing designed to protect the constitutional rights of the accused.

4. A defendant may be released on bail pending the appeal of a conviction but the considerations for determining the proper amount of bail are not limited to the risk of escape but may include the potential for interference with the orderly administration of justice and the threat to public safety resulting from, for example, the possible intimidation of witnesses. A denial of bail is not necessarily "excessive" bail.

Although beyond the scope of this Memorandum, the author observes that whereas the 8th Amendment prohibits excessive bail where release on bail is authorized by law but does not establish a right to bail for every crime, this does not mean that no constitutional restraints exist regarding the laws that may be enacted which deny bail to certain persons who are charged with committing certain crimes.

In particular, the 14th Amendment to the United States Constitution provides, in part: "No state shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Fundamental due process and equal protection rights must be carefully observed if laws are to be enacted which deny liberty to certain persons prior to conviction for certain crimes.

DISCUSSION OF FEDERAL JUDICIAL INTERPRETATION OF THE 8TH AMENDMENT TO THE UNITED STATES CONSTITUTION

The 8th Amendment to the United States Constitution, as quoted in the Introduction to this Memorandum, proscribes against "excessive" bail. A comparable provision is contained in art. I, s. 6, Wis. Const. Despite this parallel provision, it is likely that the 14th Amendment to the United States Constitution would be interpreted so as to make the 8th Amendment binding on Wisconsin and other states. See Mastrian v. Hedman, 326 F. 2d 708 (8th Cir. 1964). Therefore, the following discussion of federal judicial construction of the 8th Amendment is directly relevant to Wisconsin.

The leading United States Supreme Court decision construing this constitutional proscription is Stack v. Boyle, 342 U.S. 1, 72 S. Ct. 1 (1951). This case involved an appeal of a Federal District Court decision denying the petitioners motion to reduce the amount of bail which had been set for an alleged conspiracy to violate a specific federal crime (the Smith Act). The Court of Appeals affirmed the decision of the District Court. The Supreme Court concluded that bail had not been fixed by proper methods and therefore vacated the judgment of the Court of Appeals and remanded the case to the District Court for further proceedings to determine reasonable bail.

In the majority opinion of the Court, Justice Vinson observed:

From the passage of the Judiciary Act of 1789, 1 Stat. 73, 91, to the present Federal Rules of Criminal Procedure, Rule 46 (a) (1), 18 U.S.C.A., federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. [Citations omitted.] Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.

The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty. [Citation omitted.] Like the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is "excessive" under the Eighth Amendment. [Citations omitted.]

Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant. [Pages 4-5.]

After this statement regarding the purpose of bail to assure appearance at trial and the need to determine the amount that is reasonably calculated to fulfill this purpose so as not to be "excessive" under the 8th Amendment, the Court reviewed the method by which the amount of bail had been set in the instant case. The Court noted that the amount of bail was unusually high inasmuch as the maximum fine for the charged offense was \$10,000 and bail was set at \$50,000. Additionally, the amount of bail was much higher than usually imposed for the charged offense. The Court rejected the argument put forth by the government that petitioners were involved in a conspiracy and, upon the order of a superior, would likely flee the jurisdiction. As stated in the opinion:

To infer from the fact of indictment alone a need for bail in an usually high amount is an arbitrary act....

If bail in an amount greater than usually fixed for serious charges of crimes is required in the case of any of the petitioners, that is a matter to which evidence should be directed in a hearing so that the constitutional rights of each petitioner may be preserved. [Page 6.]

Assuring appearance at trial is not the only purpose of bail recognized by the United States Supreme Court. Pending appeal following conviction it is permissible to consider the orderly administration of justice and public safety.

In Carbo v. United States, 82 S. Ct. 662 (1962), Justice Douglas, acting in his capacity as Circuit Justice for the 9th Circuit, ordered the denial of an application for bail pending appeal following conviction for racketeering, extortion and conspiracy. In his order Justice Douglas commented:

Yet the risk of the applicant using release on bail as the occasion to escape does not, in my view, exhaust the conditions that may warrant denial of bail. [Citations omitted.]

One convicted of rape or murder is not necessarily turned loose on bail pending review, even though substantial questions were presented in the appeal. If, for example, the safety of the community would be jeopardized, it would be irresponsible judicial action to grant bail. As stated in United States ex rel. Estabrook v. Otis, 8 Cir., 18 F. 2d 689, 690, 'Bail should not be granted where the offense of which the defendant has been convicted is an atrocious one, and there is danger that if he is given his freedom he will commit another of like character.' [Page 666.]

After a study of the briefs and consideration of the arguments, Justice Douglas concluded:

...There is a substantial probability of danger to witnesses should the applicant be granted bail; that this danger is relevant to the propriety of granting bail on appeal, since a new trial may be ordered; and that in this case bail should be denied in the public interest. [Page 669.]

The application for review of Circuit Justice Douglas' order denying bail pending appeal was subsequently denied [Carbo v. United States, 369 U.S. 868 (1962)].

While the United States Supreme Court has held that the 8th Amendment prohibits excessive bail where release on bail is authorized by law and has established certain criteria for determining a reasonable amount of bail, it has only indirectly addressed the issue of a constitutional right to bail in its recognition of the limited propriety to deny bail.

A reading of Carbo, supra, indicates that a denial of bail pending appeal of a conviction is proper if in the public interest. Denial of bail was also at issue in Carlson et al. v. Landon, 342 U.S. 524, 72 S. Ct. 525 (1952).

In Carlson, the Supreme Court held that the denial of bail to an alien who was the subject of a deportation proceeding did not violate the constitutional prohibition against excessive bail. In rejecting the argument that the 8th Amendment requires the setting of bail for aliens subject to deportation, the Supreme Court discussed the history of the proscription against excessive bail in arriving at its conclusion in support of the denial of bail:

The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept. The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus in criminal cases bail is not compulsory where the punishment may be death. Indeed, the very language of the Amendment fails to say all arrests must be bailable. We think, clearly, here that the Eighth Amendment does not require that bail be allowed under the circumstances of these cases. [Pages 545-6.]

Whereas the Supreme Court has addressed only indirectly the issue of a constitutional right to bail in decisions upholding the authority to deny bail under the proper circumstances, lower federal courts have considered the question directly.

In Mastrian v. Hedman, 326 F. 2d 708 (1964); cert. denied, 376 U.S. 965, 84 S. Ct. 1128, the 8th Circuit Court of Appeals addressed the issue of the existence of a constitutional right to bail under the 8th Amendment when it considered the petitioner's argument that fixing the amount of bail on a charge of first degree murder at \$100,000 was:

...such excessive bail as to amount to an arbitrary and discriminatory denial of petitioner's general right to liberty pending trial, and hence to constitute a violation of the Eighth and Fourteenth Amendments.

In the opinion of the Court:

Neither the Eighth Amendment nor the Fourteenth Amendment requires that everyone charged with a state offense must be given his liberty on bail pending trial. While it is inherent in our American concept of liberty that a right to bail shall generally exist, this has never been held to mean

that a state must make every criminal offense subject to such a right or that the right provided as to offenses made subject to bail must be so administered that every accused will always be able to secure his liberty pending trial. Traditionally and acceptedly, there are offenses of a nature as to which a state properly may refuse to make provision for a right to bail. (We are not here concerned with what these offenses may be.) As to the offenses, however, for which a state has provided a right of bail it may not, any more than as to other substantive or procedural benefits under its criminal law system, engage in such administration as arbitrarily or discriminatorily to effect denial or deprivation of the right to a particular accused. [Pages 710-11.]

For a similar holding, see Turco v. State of Maryland, 324 F. Supp. 61 (1971).

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