

Northeastern Regional Office

BAIL POLICY FOR CRIMINAL DEFENDANTS BEFORE, DURING AND AFTER TRIAL IN PENNSYLVANIA

A Technical Assistance Report on Recommendations
Offered in June 1989
to the Criminal Procedural Rules Committee
of the Pennsylvania Supreme Court

January 1990

David C. Steelman, Regional Director

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January 25, 1990

William Platt, Esq., Chairman
Criminal Procedural Rules Committee
Pennsylvania Supreme Court
1719 Broad Broad Street
Philadelphia, PA 19122

Dear Bill:

Enclosed is a copy of the technical assistance report entitled, Bail Policy Before, During and After Trial in Pennsylvania. I have also sent copies to the staff of the Criminal Procedural Rules Committee.

After the meeting of the Committee on June 24, 1989, in Gettysburg, I dictated the recommendations I had made during my presentation there. But because you were having the committee proceedings transcribed, I decided there was no need for me to have my dictation reduced to writing.

In December 1989, however, I received a request from John Ferry (Deputy Administrator in the Michigan State Court Administrative Office) for information about the assistance I had given the Committee. To respond to John's request, I have had my dictated recommendations transcribed in the format of a brief report.

The recommendations as they appear here are very much in the spirit of what I recommended to the Committee in Gettysburg. Yet they are somewhat modified, for four reasons: (1) any transition from oral to written form affects style of presentation; (2) I have given further thought to the recommendations as a result of revisiting them after the Committee meeting; (3) I have added a brief discussion in support of each recommendation; and (4) I have noted some of the changes in Pennsylvania criminal rules since the Gettysburg meeting (most notably, the new rules for postconviction collateral proceedings that took effect July 1, 1989).

Please let me know if you, committee members, or committee staff have any questions about these recommendations.

Sincerely yours,

DCS/d/4008B

Enclosure

cc: Ms. Nancy Sobolevitch
Ms. Betsy Moore
Mr. Rufus S. Lynch

David
David C. Steelman
Regional Director

BAIL POLICY FOR CRIMINAL DEFENDANTS
BEFORE, DURING AND AFTER TRIAL IN PENNSYLVANIA

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BAIL POLICY FOR CRIMINAL DEFENDANTS BEFORE, DURING AND AFTER TRIAL IN PENNSYLVANIA

Introduction

In early 1989, with the approval of the Administrative Office of the Pennsylvania Courts (AOPC), the Criminal Procedural Rules Committee of the Pennsylvania Supreme Court requested technical assistance from the National Center for State Courts (NCSC). The director of the Northeastern Regional Office of NCSC was asked to attend a meeting of the committee to discuss general trends relating to bail, prison overcrowding and caseload management.

With regard to bail, he was asked to address general trends in state and federal courts pertaining to bail policy for criminal defendants before and during trial, after conviction, during appeal, and during collateral attacks on convictions. It was explained that the Committee is concerned with problems in Pennsylvania relating to: (1) standards for bail in stages after conviction; (2) judges' discretion as to the type of bail that a defendant may post; (3) bail decisions and jail overcrowding; and (4) lack of uniformity in the manner in which judges set bail.

The Committee also expressed interest in bail procedures in other jurisdictions for those facing revocation of probation or parole. Pennsylvania currently has no case law on this problem. The problem is compounded by jurisdictional questions: (1) trial court authority regarding state parole cases, which come within the jurisdiction of the state parole board; and (2) differences between the Commonwealth Court and the Superior Court in policy regarding scope of review of bail decisions and revocation proceedings

The Committee members asked further, "What procedural means are other states using to cope with prison overcrowding?" "What approaches," they asked, "are deemed 'procedural' (as opposed to such resource solutions as the building of additional jails or prisons)?" Finally, the Committee asked about caseflow management: "What procedural approaches (other than those like Pennsylvania's latest revision of its speedy trial rule) are being used to handle pretrial log jams?"

In preparation for the meeting with the Committee, the NCSC regional director had research done on state and federal caseload, statutes and court rules. With regard to bail trends, he received helpful information from the Pretrial Services Resource Center in Washington, D.C. With regard to jail overcrowding, he received valuable information from the Adjudication Technical Assistance Project at American University in Washington, D.C. With regard to caseflow management, he relied on recent NCSC research results.

The meeting of the Committee was held in Gettysburg, Pennsylvania, on June 24, 1989. There was considerable discussion among committee members on the issues raised in the presentation by the NCSC regional director. This brief report gives a summary of the recommendations made by the NCSC regional director as part of that presentation.

Recommendations

At the conclusion of the June 24 meeting of the Criminal Procedural Rules Committee, the NCSC regional director offered suggestions on possible ways to improve on current Pennsylvania procedures and practice in the areas discussed at the meeting. Set

forth below are recommendations following the general tenor of the suggestions made at the committee meeting. To the extent that these recommendations depart from the suggestions made on June 24, 1989, they reflect further thoughts during the preparation of this report.

While these recommendations in their present form were dictated by the NCSC regional director in July 1989, they were not at first transcribed. When a state-level court administrator from another state expressed interest in this technical assistance effort, however, it was decided that it would be worthwhile to prepare this brief report.

Recommendation 1. The Committee should consider amendment of Pennsylvania Criminal Rule 4001 to provide that the official deciding bail before verdict should impose the least restrictive alternative on the defendant. Whenever release on recognizance (ROR) is refused, the reasons for refusal should be stated in writing or on the record.

While Pennsylvania bail rules are progressive, it appears that those making bail decisions are inconsistent in their applications of the rules in specific cases. Greater emphasis on "least restrictive alternatives" and ROR should support greater consistency in pretrial release decisions and contribute to the alleviation to jail overcrowding problems in some judicial districts.

Recommendation 2. The Committee should consider amendment of Pennsylvania Criminal Rule 4003 to promote greater use of ROR in appropriate circumstances.

Although section (b) of Rule 4003 permits ROR in cases where a defendant is faced with the possibility of a sentence in excess of three years, the rule generally encourages ROR only for less serious

offenses. Encouraging broader use of ROR in appropriate cases might often not result in greater threat to the community or greater likelihood of the defendant's failure to appear at subsequent proceedings. The rule might be rewritten generally to provide for explicit circumstances when ROR would not be appropriate.

Recommendation 3. The Committee should consider revising Pennsylvania Criminal Rule 4006

- a. to provide that the bail setting authority should impose the least restrictive alternative when deciding pretrial release, and
- b. to set priorities among pretrial release alternatives.

In setting priorities for the choice of least restrictive alternatives, other jurisdictions commonly give first priority to ROR; then release on nonfinancial conditions; release on specified types of financial conditions including percentage deposit bail; and giving lowest priority to different forms of partial or continuous detention. The Committee might also consider whether it would be desirable to call for statewide availability of percentage deposit bail as a release alternative, rather than permitting it to be a matter of local option.

Recommendation 4. The Committee should consider a provision like that in Rule 46(b) of the Federal Rules of Criminal Procedure, providing that a defendant may be released during trial under the same conditions as before trial, unless the trial court determines that additional conditions are necessary to assure the defendant's presence at trial or to prevent obstruction of the trial.

Current criminal rules in Pennsylvania do not now distinguish between release before trial and that after the commencement of the

trial. A rule provision such as that suggested here would give some degree of explicit guidance to the trial court.

Recommendation 5. In considering rule revisions to guide bail determination after conviction, the committee should follow the suggestion in Commonwealth v. McDermitt, 547 A.2d 1236 (Superior Court 1988), that the availability of release on bail is subject to increasing restrictions at each succeeding stage, as a defendant passes from being a suspect, to being the accused, to being an appellant to being an allocatur petitioner, to being a certiorari petitioner, to being a postconviction petitioner.

In McDermitt, the Pennsylvania Superior Court offers a rationale for distinguishing bail release before conviction from that after conviction similar to the rationale offered by courts in many other states. It also discusses trial court discretion to grant bail pending determination of a postconviction petition. (See below, Recommendation 8.)

Recommendation 6. The Committee should consider amending Pennsylvania Criminal Rule 4010 B(2) to provide guidelines for the exercise of trial court discretion in deciding bail after sentencing. In providing such guidelines, the Committee should consider the provision of 18 U.S.C. §3143, Federal Appellate Rule 9(c) and Federal Criminal Rule 46(c), which provide, among other things:

- a. that after sentencing a defendant be detained unless the trial court finds by clear and convincing evidence
 - (1) that he or she will not flee or pose a danger to any other person or to the community, and
 - (2) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in reversal or in an order for a new trial; and further
- b. that the burden of establishing such grounds for release pending appeal is on the defendant.

Recommendation 7. The Committee should consider amending Pennsylvania Appellate Rule 1762(f) to eliminate the requirement for an opinion by a lower court when it has denied release pending appeal.

As is the case with posttrial motions in Pennsylvania, delay in both trial court and appellate court is likely to result from the rule requiring an opinion to be filed forthwith by the trial court if a defendant appeals from the denial of release after sentencing. Federal Appellate Rule 9(b) requires that a trial judge routinely give written reasons for denial of release pending appeal. A simple form might be designed for this purpose when the reasons for denial do not already appear of record.

Recommendation 8. The Committee should consider amending Pennsylvania Criminal Rule 1508(a) (adopted February 1, 1989, effective July 1, 1989) to provide:

- a. that a trial court has limited discretion pending disposition of postconviction collateral proceedings to release the petitioner on bail in exceptional circumstances when required in the interests of justice; and
- b. that criteria used for determining conditions of release be identical to or similar to those for preconviction release.

After the meeting of the Committee on June 24, 1989, new rules governing postconviction collateral proceedings went into effect. This recommendation was initially offered with regard to Pennsylvania Criminal Rule 1506; but the recommendation has been revised, because that rule was replaced by new Pennsylvania Criminal Rule 1508, effective July 1, 1989.

This amendment of the rule would reflect the opinion the the Pennsylvania Superior Court in Commonwealth v. McDermitt, supra.

The suggestion that the criteria for determining the conditions of release follow the bail rules governing preconviction release is based on apparent practice in federal courts.

Recommendation 9. The Committee should consider amending criminal or appellate rules to provide:

- a. that bail pending appeal from the denial of postconviction collateral relief be granted only in exceptional circumstances when required in the interests of justice, with a burden on the appellant to show that incarceration pending review of the PCHA denial would be manifestly unjust; and
- b. that, as in Federal Appellate Rule 23(c), a petitioner must be released on recognizance, with or without sureties, pending any appeal that may be possible from the grant of postconviction collateral relief, unless the trial court or appellate court orders otherwise.

Appeals in collateral review proceedings are not uncommon in Pennsylvania, and this suggested rule would provide some guidance to trial and appellate judges in this area. The federal rule mentioned here gives preference to release of a petitioner granted collateral relief, but it leaves the opportunity for a trial court or appellate court to order otherwise.

Recommendation 10. The Committee should consider amending Pennsylvania Criminal Rule 4004, which specifies standards to guide the setting of preverdict bail, to add that consideration should also be given to whether a defendant is on probation or parole and to whether a detainer has been lodged against a defendant by the State Board of Probation and Parole.

Statutes or rules governing pretrial release in several states include such a provision as that suggested here among conditions to be considered by a trial court in determining bail on pending criminal charges. The Pennsylvania Supreme

Court has held that the lodging of a detainer does not itself preclude a trial court with jurisdiction both pending criminal charges from setting bail when such charges constitute an alleged parole violation. Hines v. Pennsylvania Board of Probation and Parole, 491 Pa.142, 420 A.2d 381 (1980).

Recommendation 11. The Committee should consider adding a rule provision patterned on Federal Criminal Rule 32.1, providing that if probable cause is found to hold a probationer for a revocation hearing (often called a "Gagnon II" hearing in Pennsylvania), then the probationer may be released upon meeting the burden to show that there would be no risk of flight or threat to the community if he or she were released.

Other jurisdictions consistently provide that a probationer has no right to bail pending revocation proceedings, and trial court discretion to grant or withhold bail pending a decision on revocation is recommended in the Criminal Justice Standards of the American Bar Association.

Recommendation 12. The Committee should consider rules or other steps to promote such "procedural" means as the following to cope with jail overcrowding:

- a. Creation of a jail capacity management committee;
- b. Procedures and staff (such as a bail agency) to gather relevant information on which to base bail decisions;
- c. Procedures for taking an early "second look" at the status of all defendants not released at preliminary arraignment;
- d. Daily trial court review of the status of all pretrial detainees;
- e. Ongoing monitoring and reassessment of pretrial release practices, based on the collection and analysis of relevant data; and

- f. Operation of pretrial programs and sentencing alternative programs as options in lieu of detention and incarceration.

Options such as these for coping with overcrowding have been tried in many states and in several Pennsylvania trial jurisdictions. Since rules of procedure may not be an appropriate vehicle for encouraging some of these options, the Committee may want to work with the Administrative Office of Pennsylvania Courts (AOPC), associations of judges, district justices and district court administrators, and others to promote efforts to find effective ways to deal with jail overcrowding. (See below, Recommendation 14.)

Recommendation 13. The Committee should consider rule revisions to provide effective concentration of justice system resources on the earliest stages of criminal justice proceedings to help reduce pretrial logjams. More specifically, the Committee should consider such procedural approaches as:

- a. centralized preliminary hearings or other mechanisms to promote early district attorney and public defender case involvement;
- b. early determination of eligibility for counsel at public expense and continuous representation of indigent defendants from preliminary hearing through final case disposition in the trial court;
- c. early prosecutorial screening of cases to promote early case disposition by diversion, dismissal, nolle prosequi or plea;
- d. revision by the district attorney of a "discovery package" to defense counsel at or soon after preliminary hearing; and
- e. adoption of such national time standards as those of the American Bar Association or the Conference of State Court Administrators, as well as time standards for progress through each intermediate stage of a criminal proceeding.

Such caseflow management approaches as those suggested here have been used in several jurisdictions to achieve and maintain timely disposition of criminal cases. (See Barry Mahoney et al., Changing Times in Trial Courts (NCSC 1988). Successful implementation of such techniques, however, calls for more than changes in rules of procedure. Other common elements of effective caseflow management programs include leadership; goals; information; commitment ; communication; education and training; and explicit program for caseflow management and inventory control. Ibid.

Recommendation 14. Members of the Committee should work with Pennsylvania Supreme Court, the Chief Justice, AOPC, trial judges, district justices, district court administrators, members of the bar, and other institutional participants in the criminal justice process to build consensus and consistency in the bail process, to help reduce prison overcrowding, and to improve criminal caseflow management.

Research has shown that even the most sophisticated procedures for pretrial release can be ineffective if judges do not follow them. At the June meeting of the Committee, many Committee members agreed that rules of procedure are often not followed.

Improvements in the administration of criminal justice in Pennsylvania thus cannot be accomplished simply by amendment of the Rules of Procedure. Members of the Committee must work with other justice system leaders in the development of educational programs and other means to promote greater investment and commitment to the effective administration of justice in criminal cases.