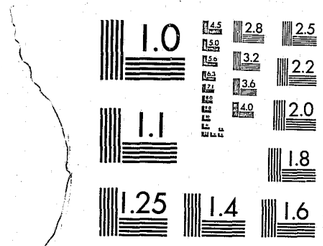

STATE OF ARKANSAS
LEGISLATIVE COUNCIL
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CONSTITUTIONAL, STATUTORY AND CASELAW STUDY OF THE UNITED STATES AND ARKANSAS REGARDING BAIL

A REPORT PUBLISHED
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Interim Study Proposal 81-76 by Senator Morrell Gathright directs the Joint Interim Committee on Judiciary of the Arkansas General Assembly to:

> . . .conduct a study of the laws and practices in Arkansas and other states regarding the release on bail of persons charged with criminal offenses, for the purpose of determing the need for revising the present Arkansas law to more clearly specify the matters to be taken into consideration by courts, judges and other officers in determining the right to release on bail and the amount of bail for persons charged with criminal offenses.

SCOPE OF STUDY

This report will review constitutional, statutory and caselaw provisions of the United States and Arkansas regarding bail.

Amendment 8 to the Constitution of the United States reads as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Article 2, Section 8 of the 1874 Constitution of the State of Arkansas reads as follows:

> No person shall be held to answer a criminal charge unless on the presentment or indictment of a grand jury, except in cases of impeachment or cases such as the General Assembly shall make cognizable by justices of the peace, and courts of similar jurisdiction, or cases arising in the army and navy of the United States; or in the militia when in actual service in time of war or public danger; and no person, for the same offense, shall be twice put in jeopardy of life or liberty; but if, in any criminal prosecution, the jury be divided in opinion, the court before which the trial shall be had may, in its discretion, discharge the jury, and commit or bail the accused for trial at the same or the next term of said court; nor shall any person be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty or property, without due process of law. All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great.

Article 2, Section 9 of the Constitution of the State of Arkansas reads as follows:

> Excessive bail shall not be required, nor excessive fines be imposed; nor shall cruel or unusual punishment be inflicted; nor witnesses be unreasonably detained.

The primary purposes of bail in a criminal case are to relieve the accused of imprisonment, to relieve the state of the burden of keeping him pending the trial, and at the same time to keep the accused constructively in the custody of the court, whether before or after conviction, to assure that he will submit to the jurisdiction of the court and be in attendance thereon whenever his presence is required. Bail is awarded to one accused, under our system of constitutional government, to honor the presumption of innocence until guilt is proven, and to enable the accused to prepare his defense to the charge. The refusal of bail is not to be used as a weapon for the punishment of a person charged with a crime, and it is an abuse of bail to use an offer of bail to influence a defendant's attitude or action with respect to cooperating with the prosecuting attorney.

REVIEW OF ARKANSAS LAW

In Arkansas, the Supreme Court has stated that the giving of bail bonds is favored as a policy of the State. In the case of Central Casualty Company v. State, 233 Ark. 602, 346 S.W.2d 193, (1961) the Court declared:

> It is well settled that the giving of bail bonds is to be encouraged, not only because the accused is ordinarily entitled to his freedom before trial but also because the state is relieved of the expense of maintaining the prisoner until the case can be heard. . . . The purpose of requiring bail bonds is not to enrich the treasury, but to secure the administration of justice. (See also Craig and Schaaf v. State, 257 Ark. 112, 514 S.W.2d 383, (1974))

Arkansas cases refusing the issuance of bail include the following: In Carr v. State, 93 Ark. 585, (1909), the accused was arrested and imprisoned for murder in the first degree. He applied for bail, which was refused. On

appeal to the Supreme Court the accused asserted the lower court erred in refusing to grant bail. The Supreme Court stated that in capital cases the temptation to forfeit bail in preference to endangering life by trial might be beyond resistance. The Court affirmed the order denying bail.

In Parnell v. State, 206 Ark. 652, 176 S.W.2d 902 (1944) the defendant was charged with murder in the first degree. He was committed to jail without bond. The defendant appealed to the Supreme Court stating that the refusal of the trial court was arbitrary and was not supported by the proof. The Supreme Court stated:

> In considering the evidence to determine whether the guilt of the accused is "evident or the presumption great," the judge of the court, who hears the testimony and observes the demeanor of the witness, while on the stand, is in a much better position to judge of the credit that should be given their statements than this court could possibly be. Unless it should appear to this court from a review of the evidence presented that there has been an abuse of discretion in denying bail or that the trial court has acted arbitrarily in the matter, we should not disturb the order denying bail. (See also Fikes v. State, 221 Ark. 81, 251 S.W.2d 1014 (1952))

The Supreme Court of Arkansas has strictly construed our constitutional provision in favoring the issuance of bail.

In Walker v. State, 137 Ark. 402, 209 S.W. 86 (1919), the court held that a life sentence is a bailable offense under Article 2, Section 8 of the Constitution.

In Kendrick v. State, 180 Ark. 1160, (1930) the accused was indicted, tried and convicted for selling intoxicating liquor. The defendant appealed and prayed for bail but the trial judge directed the sheriff to deny bail because the defendant boasted he could make up to $50,000 and that he would abscond and forfeit his bail.

The Court declared that it was proper for the trial court to investigate the report that the defendant would forfeit his bail but the court should have ascertained what amount of bail would have kept the defendant within the

court's jurisdiction instead of denying bail altogether. The Supreme Court went on to say:

> . . .the offense charged was a felony, punishable only by imprisonment in the penitentiary, and the accused had the legal right to give bond for his appearance, and the denial of this right was not conducive to securing a fair trial.

In Baumgarner v. State, 253 Ark. 723 (1972), the petitioner filed a writ of certiorari seeking to overturn a lower court's ruling that an indictment for first degree rape is not a bailable offense in Arkansas. The Supreme Court reversed on the grounds that the death penalty cannot be assessed for rape in this State; therefore, rape is a bailable offense in this State.

In an interesting recent case, the Arkansas Supreme Court in Renton v. State, 265 Ark. 223, 577 S.W.2d 595 (1979), reversed a lower court decision which refused to grant the petitioner bail in a capital murder case. In a decision, which reversed prior decisions by shifting the burden of proof, the Court stated that in a capital case, the State must assume the burden of proving that bail should be denied because the proof is evident or the presumption great against the defendant. Otherwise, the accused is subjected to the difficult task of proving the negative, when it is the State which has instituted the prosecution and should fairly have the responsibility for defending its position when bail is sought. In other words, even in a capital murder case, the accused shall not be denied bail if the State cannot overcome the burden of proof.

In a case decided in 1976 the Supreme Court of Arkansas listed the factors involved in fixing the amount of bail. In Allen v. State, 260 Ark. 466, 541 S.W. 2d 675, Justice Fogelman stated that the amount of bail lies peculiarly within the sound discretion of the court fixing it. He listed several determining factors involved in arriving at a constitutionally approved amount:

1. The circumstances of the accused's apprehension may be considered.
2. It is proper to consider the character and reputation and the criminal activities and tendencies of the person charged as

factors bearing upon the security required to insure his appearance.

3. It is also appropriate to consider recent actions and threats of the accused because they bear upon his good faith in appearing.

It should be noted at this point that on January 6, 1976 the Supreme Court of Arkansas, by legislative acquiescence, (Act 470 of 1971) promulgated the Arkansas Rules of Criminal Procedure. Such rules effectively govern almost all imaginable aspects of the bail procedures in Arkansas. The pertinent sections are herein provided. (Note Rule 9.2 - Release on Money Bail).

RULE 8. RELEASE BY JUDICIAL OFFICER AT FIRST APPEARANCE

Rule 8.1 Prompt First Appearance

An arrested person who is not released by citation or by other lawful manner shall be taken before a judicial officer without unnecessary delay.

Rule 8.2 Appointment of Counsel

(a) An accused's desire for, and ability to retain, counsel should be determined by a judicial officer before the first appearance, whenever practicable.

(b) Whenever an indigent accused is charged with a criminal offense and, upon being brought before any court, does not knowingly and intelligently waive the appointment of counsel to represent him, the court shall appoint counsel to represent him unless he is charged with a misdemeanor and the court has determined that under no circumstances will imprisonment be imposed as a part of the punishment if he is found guilty.

(c) Attorneys appointed by municipal courts, city courts, police courts, and justices of the peace may receive fees for services rendered upon certification by the presiding judicial officer if provision therefor has been made by the county or municipality in which the offense is committed or the services are rendered.

Rule 8.3 Nature of First Appearance

(a) Upon the first appearance of the defendant the judicial officer shall inform him of the charge. The judicial officer shall also inform the defendant that:

(i) he is not required to say anything, and that anything he says can be used against him;

(ii) he has a right to counsel; and

(iii) he has a right to communicate with his counsel, his family, or his friends, and that reasonable means will be provided for him to do so.

(b) No further steps in the proceedings other than pretrial release inquiry may be taken until the defendant and his counsel have had an adequate opportunity to confer, unless the defendant has intelligently waived his right to counsel or has refused the assistance of counsel.

(c) The judicial officer, if unable to dispose of the case at the first appearance, shall proceed to decide the question of the pretrial release of the defendant. In so doing, the judicial officer shall first determine by an informal, non-adversary hearing whether there is probable cause for detaining the arrested person pending further proceedings. The standard for determining probable cause at such hearing shall be the same as that which governs arrests with or without a warrant.

Rule 8.4 Pretrial Release Inquiry: In What Circumstances Conducted

(a) An inquiry by the judicial officer into the relevant facts which might affect the pretrial release decision shall be made:

(i) in all cases where the maximum penalty for the offense charged exceeds one (1) year and the prosecuting attorney does not stipulate that the defendant may be released on his own recognizance;

(ii) in those cases where the maximum penalty for the offense charged is less than one (1) year and in which a law enforcement officer gives notice to the judicial officer that he intends to oppose release of the defendant on his own recognizance.

(b) In all other cases, the judicial officer may release the defendant on his own recognizance or on order to appear without conducting a pretrial release inquiry.

Rule 8.5 Pretrial Release Inquiry When Conducted; Nature of

(a) A pretrial release inquiry shall be conducted by the judicial officer prior to or at the first appearance of the defendant.

(b) The inquiry should take the form of an assessment of factors relevant to the pretrial release decision, such as:

(i) the defendant's employment status, history and financial condition;

(ii) the nature and extent of his family relationships;

(iii) his past and present residence;

(iv) his character and reputation;

(v) persons who agree to assist him in attending court at the proper times;

(vi) the nature of the current charge and any mitigating or aggravating factors that may bear on the likelihood of conviction and the possible penalty;

(vii) the defendant's prior criminal record, if any, and, if he previously has been released pending trial, whether he appeared as required;

(viii) any facts indicating the possibility of violations of law if the defendant is released without restrictions; and

(ix) any other facts tending to indicate that the defendant has strong ties to the community and is not likely to flee the jurisdiction.

(c) The prosecuting attorney should make recommendations to the judicial officer concerning:

(i) the advisability and appropriateness of pretrial release;

(ii) the amount and type of bail bond;

(iii) the conditions, if any, which should be imposed on the defendant's release.

RULE 9. THE RELEASE DECISION

Rule 9.1 Release on Order to Appear or on Defendant's Own Recognizance

(a) At the first appearance the judicial officer may release the defendant on his personal recognizance or upon an order to appear.

(b) Where conditions of release are found necessary, the judicial officer should impose one (1) or more of the following conditions:

(i) place the defendant under the care of a qualified person or organization agreeing to supervise the defendant and assist him in appearing in court;

(ii) place the defendant under the supervision of a probation officer or other appropriate public official;

(iii) impose reasonable restrictions on the activities, movements, associations, and residences of the defendant;

(iv) release the defendant during working hours but require him to return to custody at specified times; or

(v) impose any other reasonable restriction to insure the appearance of the defendant.

Rule 9.2 Release on Money Bail

(a) The judicial officer shall set money bail only after he determines that no other conditions will reasonably ensure the appearance of the defendant in court.

(b) If it is determined that money bail should be set, the judicial officer shall require one (1) of the following:

(i) the execution of an unsecured bond in an amount specified by the judicial officer, either signed by other persons or not;

(ii) the execution of an unsecured bond in an amount specified by the judicial officer, accompanied by a deposit of cash or securities equal to ten per cent (10%) of the face amount of the bond. Ninety per cent (90%) of the deposit shall be returned at the conclusion of the proceedings, provided the defendant has not defaulted in the performance of the conditions of the bond; or

(iii) the execution of a bond secured by the deposit of the full amount in cash,or by other property, or by obligation of qualified sureties.

(c) In setting the amount of bail the judicial officer should take into account all facts relevant to the risk of wilful nonappearance including:

(i) the length and character of the defendant's residence in the community;

(ii) his employment status, history and financial condition;

(iii) his family ties and relationship;

(iv) his reputation, character and mental condition;

(v) his past history of response to legal process;

(vi) his prior criminal record;

(vii) the identity of responsible members of the community who vouch for the defendant's reliability;

(viii) the nature of the current charge, the apparent probability of conviction and the likely sentence, in so far as these factors are relevant to the risk of nonappearance; and

(ix) any other factors indicating the defendant's roots in the community.

(d) Nothing in this rule shall be construed to prohibit a judicial officer from permitting a defendant charged with an offense other than a felony from posting a specified sum of money which may be forfeited or applied to a fine and costs in lieu of any court appearance.

(e) An appearance bond and any security deposit required as a condition of release pursuant to subsection (b) of this rule shall serve to guarantee all subsequent appearances of a defendant on the same charge or on other charges arising out of the same conduct before any court, including appearances relating to appeals and upon remand. If the defendant is required to appear before a court other than the one ordering release, the order of release together with the appearance bond and any security or deposit shall be transmitted to the court before which the defendant is required to appear. This subsection shall not be construed to prevent a judicial officer from:

(i) decreasing the amount of bond, security or deposit required by another judicial officer; or

(ii) upon making written findings that factors exist increasing the risk of wilful nonappearance, increasing the amount of bond, security, or deposit required by another judicial officer.

Upon an increase in the amount of bond or security, a surety may surrender a defendant.

Rule 9.3 Prohibition of Wrongful Acts Pending Trial

If it appears that there exists a danger that the defendant will commit a serious crime or will seek to intimidate witnesses, or will otherwise unlawfully interfere with the orderly administration of justice, the judicial officer, upon the release of the defendant, may enter an order:

(a) prohibiting the defendant from approaching or communicating with particular persons or classes of persons, except that no such orde · shall be deemed to prohibit any lawful and ethical activity of defendant's counsel;

(b) prohibiting the defendant from going to certain described geographical areas or premises;

(c) prohibiting the defendant from possessing any dangerous weapon, or engaging in certain described activities or indulging in intoxicating liquors or in certain drugs;

(d) requiring the defendant to report regularly to and remain under the supervision of an officer of the court.

Rule 9.4 Notice of Penalties

(a) When the conditions of the release of a defendant are determined or an order is entered under Rule 9.3, the judicial officer shall inform the defendant of the penalties for failure to comply with the conditions or terms of such order.

(b) All conditions of release and terms of orders under Rule 9.3 shall be recorded in writing and a copy given to the defendant.

Rule 9.5 Violations of Conditions of Release

(a) A judicial officer shall issue a warrant directing that the defendant be arrested and taken forthwith before any judicial officer having jurisdiction of the charge for a hearing when the prosecuting attorney submits a verified application alleging that:

(i) the defendant has wilfully violated the conditions of his release or the terms of an order under Rule 9.3; or

(ii) pertinent information which would merit revocation of the defendant's release has become known to the prosecuting attorney.

(b) A law enforcement officer having reasonable grounds to believe that a released defendant has violated the conditions of his release or the terms of an order under Rule 9.3 is authorized to arrest the defendant and to take him forthwith before any judicial officer having jurisdiction when it would be impracticable to secure a warrant.

(c) After a hearing, and upon finding that the defendant has wilfully

violated reasonable conditions or the terms of an order under Rule 9.3 imposed on his release, the judicial officer may impose different or additional conditions of release upon the defendant or revoke his release.

Rule 9.6 Commission of Felony While Awaiting Trial

If it is shown that any court has found reasonable cause to believe that a defendant has committed a felony while released pending adjudication of a prior charge, the court which initially released him may revoke his release.

Approximately one year after the rules were promulgated, an accused, while out on bail, committed two other felonies. The circuit court pursuant to Rules of Criminal Procedure Rule 9.6 revoked petitioner's bail on the previous charge. (See Rule 9.6 above). The petitioner appealed from the circuit court's order revoking bail and remanding him to custody without bail.

In the case of Reeves v. State, 261 Ark. 384, 548 S.W.2d 822 (1977), the State claimed that since there was a showing of probable cause that defendant had committed two felonies while on bail on another similar offense that his continuing criminal conduct constituted a compelling state interest to justify refusal of any future release of the petitioner on bail. In response, the petitioner contended that he had an absolute right before conviction, except in capital cases, to a reasonable bail. The Court agreed with the petitioner. The Court, per Justice Holt stated:

> . . .the rule does not in non-capital cases, as here, preclude the setting of a new and reasonable bail with whatever terms and restrictions deemed appropriate within its provisions.

In the case of Thomas v. State, 260 Ark. 512, 542 S.W.2d 284 (1976), appellant contested the bail bond procedure conducted in the Little Rock Municipal Court. The accused was arrested for possessing marijuana for sale. Bail at that time by prearrangement for all such offenses was set at $20,000. At petitioner's first appearance before the municipal court,

it was determined that since he was a State resident, the bail would be reduced to $5,000. Petitioner filed a motion to reduce the $5,000 bail bond. The municipal judge refused. The appellant contended on appeal that the circuit court erred in refusing to direct the municipal court to conduct a pretrial release inquiry before setting money bail as required by the Supreme Court's promulgated rules of Criminal Procedure.

The Court, per Justice Byrd, stated:

> . . .money bail in any form ought to be a last resort and should be used only to assure the defendant's appearance.

The Court went on to say that they agreed with appellant that the circuit court erred in refusing to direct the municipal court to conduct a pretrial release inquiry before setting money bail. The Court stated that the reduction of bail from $20,000 to $5,000 for a state resident did not classify as a pretrial release inquiry.

The Court further declared:

> . . .Rule 9.2 contemplates that in fixing money bail, the judicial officer will use the least restrictive type of money bail arrangement set out in Rule 9.2(b) for securing the appearance of an arrested person.

REVIEW OF FEDERAL LAW

One of the most famous cases interpreting the 8th Amendment is Stack v. Boyle, 342 U.S. 1, 72 S.Ct.1, 96L. Ed.3 (1951).

In this case 12 petitioners were indicted on a charge of conspiring to violate the Smith Act. The trial court set bail at $50,000 for each petitioner. The only evidence offered by the government on a motion for reduction of bond was a certified record showing that 4 persons previously convicted under the Smith Act had forfeited bail. The Supreme Court, per Chief Justice Vinson, held that the District Court had violated constitutional and statutory standards for admission to bail.

Justice Jackson concurring stated:

> . . .the District Court fixed a uniform blanket bail

> chiefly by consideration of the nature of the accusation and did not take into account the difference in circumstances between different defendants. Each defendant stands before the bar of justice as an individual. Even on a conspiracy charge defendants do not lose their separateness or identy. . . .Each accused is entitled to any benefits due his good record, and misdeeds or a bad record should prejudice only those who are guilty of them. (See Thomas v. State of Arkansas, 260 Ark. 512, 542 S.W.2d 284 (1976) in this report.

Another important 8th Amendment case is the case of Fernandez et al v. United States, 81 S.Ct. 642 (1961). In this case 19 defendants were charged with conspiracy to violate federal narcotic laws. During the trial, the judge revoked bail as to 15 defendants. Evidence showed that there were incidents of threatening and tampering with witnesses along with other acts of trial interruptions.

On appeal, the defendants claimed the judge acted improperly revoking bail. The Supreme Court, per Justice Harlan, concluded that any federal court has the authority to revoke bail during the course of a criminal trial when such action is appropriate to establish the orderly process of the trial.

In 1966, Congress passed the federal Bail Reform Act (18 U.S.C. §§3146-3152 (Supp.III, 1965-67). The pertinent sections are listed below.

§3146 Release in Noncapital Cases Prior to Trial

(a) Any person charged with an offense, other than an offense punishable by death, shall, at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required. When such a determination is made, the judicial officer shall, either in lieu of or in addition to the above methods of release, impose the first of the following conditions of release which will reasonably assure the appearance of the person for trial or, if no single condition gives that assurance, any combination of the following conditions:

(1) place the person in the custody of a designated person or organization agreeing to supervise him;

(2) place restrictions on the travel, association, or place of abode of the person during the period of release;

(3) require the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash or other security as directed, of a sum not to exceed 10 per centum of the amount of the bond, such deposit to be returned upon the performance of the conditions of release;

(4) require the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof; or

(5) impose any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours.

(b) In determining which conditions of release will reasonably assure appearance, the judicial officer shall, on the basis of available information, take into account the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.

(c) A judicial officer authorizing the release of a person under this section shall issue an appropriate order containing a statement of the conditions imposed, if any, shall inform such person of the penalties applicable to violations of the conditions of his release and shall advise him that a warrant for his arrest will be issued immediately upon any such violation.

(d) A person for whom conditions of release are imposed and who after twenty-four hours from the time of the release hearing continues to be detained as a result of his inability to meet the conditions of release, shall, upon application, be entitled to have the conditions reviewed by the judicial officer who imposed them. Unless the conditions of release are amended and the person is thereupon released, the judicial officer shall set forth in writing the reasons for requiring the conditions imposed. A person who is ordered released on a condition which requires that he return to custody after specified hours shall, upon application, be entitled to a review by the

judicial officer who imposed the condition. Unless the requirement is removed and the person is thereupon released on another condition, the judicial officer shall set forth in writing the reasons for continuing the requirement. In the event that the judicial officer who imposed conditions of release is not available, any other judicial officer in the district may review such conditions.

(e) A judicial officer ordering the release of a person on any condition specified in this section may at any time amend his order to impose additional or different conditions of release: Provided, That, if the imposition of such additional or different conditions results in the detention of the person as a result of his inability to meet such conditions or in the release of the person on a condition requiring him to return to custody after specified hours, the provisions of subsection (d) shall apply.

(f) Information stated in, or offered in connection with, any order entered pursuant to this section need not conform to the rules pertaining to the admissibility of evidence in a court of law.

(g) Nothing contained in this section shall be construed to prevent the disposition of any case or class of cases by forfeiture of collateral security where such disposition is authorized by the court.

§§ 3147 Appeal from Conditions of Release

(a) A person who is detained, or whose release on a condition requiring him to return to custody after specified hours is continued, after review of his application pursuant to section 3146(d) (18 USCS §3146(d)) or section 3146(e) (18 USCS §3146(e)) by a judicial officer, other than a judge of the court having original jurisdiction over the offense with which he is charged or a judge of a United States court of appeals or a Justice of the Supreme Court, may move the court having original jurisdiction over the offense with which he is charged to amend the order. Said motion shall be determined promptly.

(b) In any case in which a person is detained after (1) a court denies a motion under subsection (a) to amend an order imposing conditions of release, or (2) conditions of release have been imposed or amended by a judge of the court having original jurisdiction over the offense charged, an appeal may be taken to the court having appellate jurisdiction over such court. Any

order so appealed shall be affirmed if it is supported by the proceedings below. If the order is not so supported, the court may remand the case for a further hearing, or may, with or without additional evidence, order the person released pursuant to section 3146(a) (18 USCS § 3146(a)). The appeal shall be determined promptly.

§ 3148. Release in Capital Cases or after Conviction

A person (1) who is charged with an offense punishable by death, or (2) who has been convicted of an offense and is either awaiting sentence or sentence review under section 3576 of this title (18 USCS §3576) or has filed an appeal or a petition for a writ of certiorari, shall be treated in accordance with the provisions of section 3146 (18 USCS §3146) unless the court or judge has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community. If such a risk of flight or danger is believed to exist, or if it appears that an appeal is frivolous or taken for delay, the person may be ordered detained. The provisions of section 3147 (18 USCS §3147) shall not apply to persons described in this section: Provided, That other rights to judicial review of conditions of release or orders of detention shall not be affected.

Cases decided after passage of the Bail Reform Law of 1966 include the following:

United States v. Gilbert, 425F.2d 490 D.C.Cir. (1969). The defendant appealed an order from the United States District Court for the District of Columbia denying pretrial bail release. Evidence tended to show that the defendant threatened to kill the complaining witness. Citing 18 U.S.C.A. §3146, the U. S. Court of Appeals, stated that the trial court has inherent power to revoke a defendant's bail during trial if necessary to insure orderly trial processes and the right to bail is not literally absolute. But before bail could be properly revoked, a hearing was required to determine whether there was a genuine basis for the allegation of threats by the accused against the government's witness.

In United States v. Wind, et al, 527 F.2d 672 6thCir.(1975), defendant appealed

an order of the U. S. District Court denying his motion to fix bail in the amount of $25,000 and remanding him to await trial on an indictment charging him and others with conspiracy and narcotic violations. Evidence showed that the defendant had threatened potential witnesses. Citing 18 U.S.C.A. §3146 and U. S. v. Gilbert, supra, the Sixth Circuit Court of Appeals held that in a pretrial hearing on a noncapital offense, a judicial officer could consider evidence that the defendant had threatened witnesses and was a danger to the community in determining whether the defendant should be released on bail.

In United States v. Leathers, 412 F.2d 169 D.C.Cir. (1969), appellant Leathers was detained initially on a $1,500 bond pending trial on a charge of unauthorized use of a vehicle. The District Court reduced the amount to $1,000, but appellant, due to his indigency, was unable to pay it. Appellant appealed to the Court of Appeals from the District Court denying pretrial release without bail. The Court of Appeals, held that in non-capital federal cases, pretrial detention cannot be premised upon assessment of danger to the public should the accused be released (18 U.S.C.A. §3146(a)). It went on to say that the Bail Reform Act of 1966 created the presumption in favor of releasability on personal recognizance or upon execution of unsecured appearance bond, and it is only if such release will not reasonably assure the appearance of the accused may other conditions of release be imposed. The imposition of a money bond, the Court held, is proper under the Bail Reform Act of 1966 only after all other nonfinancial conditions have been found (18 U.S.C.A. §3146(a)) and money bond should be imposed only when no other conditions appear to be sufficient to guard against flight.

The Court remanded the case to the District Court for consideration of those minimal nonfinancial conditions of release which would assure the appearance of the defendant.

One of the latest and most exhaustive summaries of the Bail Reform Act of 1966 is the famous case of United States v. Anthony Provenzano, 605 F.2d 85 3d Cir. (1979).

Appellant moved the Third Circuit Court of Appeals for an order releasing him on bail pending his appeal from a conviction of violating federal racketeering laws. The trial judge imposed a sentence of 20 years imprisonment

and a fine of $20,000. The trial judge, following imposition of sentence placed the defendant into custody without bail stating that the defendant would constitute a danger to the community.

The trial judge specifically refused to base his decision, even in part, on the grounds that the appellant either posed a risk of flight or was pursuing a frivolous appeal. He declared that given appellant's ties to the community and his record of previous court appearances, bail could be set so as to minimize the risk of flight. Similarly, while doubting the merits on an appeal and disclaiming the existence of any judicial error, the trial judge emphasized that such judgments should be left to a higher court, and also declined to deny bail on that ground. In predicating his decision solely on the determination that the appellant posed a danger to the community, the trial judge recognized the ambiguity inherently in the clause "danger to the community." (Section 3148 of the Bail Reform Act). His review of cases interpreting that provision convinced him that pecuniary harm, as well as physical danger, was clearly contemplated within the meaning of the Act.

In reaching his decision that Provenzano posed a danger to the community, the trial judge considered the appellant's histories including information contained in the presentence report. He noted in particular that this was Provenzano's third felony conviction dealing with some form of labor extortion or racketeering. Of even greater significance to the trial judge was Provenzano's continued "substantial and undersirable" influence within the Teamster Union as evidenced by Local 560's munificence toward him during his previous incarcerations as well as his continued control, through his family, of the union. Concluding that he would continue to exercise his influence within the union corruptly and in violation of the criminal law, the trial judge found Provenzano's freedom pending appeal would constitute a danger to the community.

The Court stated that Rule 9(c) of the Federal Rules of Appellate Procedure by expressly incorporating the criteria for release enunciated in the applicable provisions of the Bail Reform Act, governs an applicant's eligibility for bail or other release pending review of his conviction in federal court.

Federal Rule 9(c) provides:

> The decision as to release pending appeal shall be made in accordance with Title 18, U.S.C. §3184 (the Bail Reform Act of 1966).
>
> <u>The burden of establishing that the defendant will not flee or pose a danger to the community rests with the defendant.</u>

The Court went on to state:

> Although there is no absolute right to release on bail pending appeal, the Bail Reform Act favors post-trial as well as pre-trial release. Its directive that courts must consider a convicted appellant's potential danger to another person or to the community distinguishes such treatment from that accorded non-convicted persons, however, and reflects Congress's attempt to reconcile the appellant's interest in freedom during the pendency of judicial review and society's interest in preventing individuals convicted of crimes from absconding or endangering the community.

Section 3148 of the Act lists the three questions courts must answer in the negative before admitting an applicant to bail pending disposition of his appeal:

(1) Is the appeal frivolous or taken for delay?

(2) Is there reason to believe that no set of conditions will reasonably assure that the person will not flee?

(3) Is there reason to believe that no set of conditions will reasonably assure that the person will not pose a danger to any other person or to the community?

If it appears that an appeal lacks requisite legal merit or is taken for delay, or that the appplicant poses an unreasonable risk of flight or danger, the court possesses discretion to order his detention. If not, then the court must order the applicant's release, albeit with appropriate conditions, in accordance with the provisions of section 3146. Despite the Act's embodiment of a strong presumption in favor of post-trial as well as pretrial release, "both its structure and its interpretation underscore the delicacy of the determinations which must precede any ruling on that score."

Before enactment of the Bail Reform Act, the Court declared, federal courts exercised broad discretion in bail matters, taking into account an array of various considerations. The Act's provisions regarding bail pending appeal, however, effectively limit judicial consideration in these matters to two relevant criteria:

(1) The risk that defendant will flee; and

(2) The risk that he will pose a danger if admitted to bail.

Decisions in case involving bail applications pending appeal prior to the Bail Reform Act clearly placed the burden of establishing the risk of danger to the community on the government, and firmly established the principle that doubts whether bail should be granted or denied should be resolved in the applicant's favor.

But the enactment of Federal Rule of Appellate Procedure 9(c) inverted both the burden of proof and the principle of resolving doubts in the applicant's favor.

In summation the United States Court of Appeal, 3rd Circuit declared:

> The Bail Reform Act specifies neither the kinds of harm nor the particular factors to be considered in determing whether a defendant poses a danger to the community. The trial judge's study of decisions interpreting the Act's "danger to. . . the community" provision, however, convinces him that courts are not confined in such cases to considering only harms involving an aura of violence. We agree and hold that a defendant's propensity to commit crime generally, even if the resulting harm would be not solely physical, may constitute a sufficient risk of danger to come within the contemplation of the Act.

The defendant, the Court concluded, did not meet his burden of demonstrating that he did not pose a danger to the community, or that conditions existed which if imposed would protect society against such a danger. Therefore defendant's motion for an order releasing him on bail during the pendency of his appeal was denied.

<u>SUMMARY</u>

The United States Constitution states that "excessive bail shall not be required . . . ."; the Arkansas Constitution states that "all persons shall,

before conviction, be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great" . . . and also declares that "excessive bail shall not be required. . .."

Federal caselaw and federal statutes as codified in the Bail Reform Act create a presumption favoring releasability of the accused pending trial and the imposition of a money bond only after other avenues are pursued.

Arkansas caselaw has emphatically interpreted our Constitution to literally mean what it says and places the burden on the State even in a capital murder case to prove that the accused should be denied bail.

Any change in the present bail structure would seem to require an amendment to the Arkansas Constitution. The Judicial Branch, by legislative acquiescence, has promulgated procedural rules which effectively govern the aspects of bail in Arkansas. (See Rules of Criminal Procedure-Rules 8 and 9). Whether the General Assembly may amend these procedural rules cannot be definitively determined at this time. Therefore, a Constitutional amendment which would be proposed by the General Assembly to be submitted to the citizens of this State reflecting whatever changes in our bail structure in Arkansas that need correction seems the logical avenue to pursue if legislative change is desired.

END