Florida State University Law Review

Volume 6 | Issue 3 Article 9

Summer 1978

An End to Ransom: The Case for Amending the Bail Provision of the Florida Constitution

Bennett H. Brummer

Bruce S. Rogow
Nova University Center for the Study of Law

Follow this and additional works at: http://ir.law.fsu.edu/lr

 Part of the Criminal Law Commons, Criminal Procedure Commons, and the State and Local Government Law Commons

Recommended Citation

Bennett H. Brummer & Bruce S. Rogow, *An End to Ransom: The Case for Amending the Bail Provision of the Florida Constitution*, 6 Fla. St. U. L. Rev. 775 (2014) .
http://ir.law.fsu.edu/lr/vol6/iss3/9

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized editor of Scholarship Repository. For more information, please contact bkaplan@law.fsu.edu.

AN END TO RANSOM: THE CASE FOR AMENDING THE BAIL PROVISION OF THE FLORIDA CONSTITUTION

BENNETT H. BRUMMER* AND BRUCE S. ROGOW**

I. INTRODUCTION

Reliance on money bail as a primary means of assuring the presence of an accused in court has been the focus of legislative, judicial, academic, and civic criticism for many years. Reform proposals have been submitted to the state legislature repeatedly over the past ten years,[1] only to be killed by the insurance company lobby representing the state's bail bondsmen. The Supreme Court of Florida has twice revised its rule of court relating to pretrial release and both times rejected suggestions that the revision conform to modern concepts of pretrial release, due process, and equal protection.[2] Federal litigation attacking Florida's money bail scheme as applied to indigents has, thus far, proven no more effective than other approaches. Against this background, the proposal by the Constitution Revision Commission to modernize the pretrial release provision of the Florida Constitution becomes highly significant as an immediate and effective reform measure, the fate of which will be determined by the electorate. This article will address the legal underpinnings of our system of pretrial release, the need for reform of that system, and certain procedural implications of reform.

II. FLORIDA'S MONEY BAIL SYSTEM: A DESCRIPTION

Article I, section 14 of the 1968 revision of the Florida Constitution provides the foundation of state law relating to the availability and conditions of bail pending trial:

---

* Public Defender, Eleventh Judicial Circuit of Florida. A.B. 1962, J.D. 1965, University of Miami.

** Professor, Nova University Center for the Study of Law. B.B.A. 1961, University of Miami; J.D. 1963, University of Florida.

1. *See generally* R. Askew, Recommended Program to the 1976 Florida Legislature at 20 (on file in Governor's Office):

> Also, I am asking you once again to ignore the pleas of those who prey on the unfortunate and adopt a comprehensive reform of our bail system in this State as proposed by Senator George Firestone. Our present system of money bail discriminates against the poor, and it burdens the taxpayers with the cost of detaining those awaiting trial who need not be in jail. There is no reason why it should not be changed by this Legislature.

2. The Florida Bar, 343 So. 2d 1247 (Fla. 1977); *In re* Florida Rules of Criminal Procedure, 272 So. 2d 65 (Fla. 1972).

> Until adjudged guilty, every person charged with a crime or violation of municipal or county ordinance shall be entitled to release on reasonable bail with sufficient surety unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great.[3]

From 1973 to 1977, the Florida Rules of Criminal Procedure reflected a heavy emphasis on money bail but noted the existence of judicial discretion to release an accused on his own recognizance.[4] Effective July 1, 1977, however, the rules were amended.

The present rule relating to pretrial release expressly recognizes several forms of release, ranging from personal recognizance to money bail.[5] This rule may be considered an improvement over its

---

3. FLA. CONST. art. I, § 14.

4. Hearing at First Appearance. The purpose of bail is to insure the defendant's appearance. The judge shall, therefore, at the defendant's first appearance, consider all available relevant factors to determine whether bail is necessary to assure the defendant's appearance and, if so, the amount of bail. The judge may, in his discretion, release a defendant on his own recognizance.

In re Florida Rules of Criminal Procedure, 272 So. 2d 65, 82 (Fla. 1972) (rule 3.130(b)(4)).

5.

RULE 3.130. PRE-TRIAL RELEASE

(a) *Offenses Less Than Capital.* All persons in custody for the commission of an offense unless it is a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great shall be entitled as of right to be admitted to bail before conviction. After conviction bail may be granted by either the trial or appellate court.

(b) *First Appearance.*

* * * * * *

(4) Hearing at First Appearance.

(i) The purpose of bail is to insure the defendant's appearance. For the purpose of this rule, bail is defined as any of the following forms of release:

(1) Personal recognizance of the defendant;

(2) Execution of an unsecured appearance bond in an amount specified by the judge;

(3) Placing the defendant in the custody of a designated person or organization agreeing to supervise him;

(4) Placing restrictions on the travel, association, or place of abode of the defendant during the period of release;

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

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

(ii) The judge shall at the defendant's first appearance consider all available relevant factors to determine what form of release is necessary to assure the defendant's appearance. If a monetary bail is required, then the judge shall determine the amount.

(iii) In determining which form of release will reasonably assure appearance, the judge shall, on the basis of available information, take into account the nature and circumstances of the offense charged, the weight of the evi-

predecessor insofar as it expressly reflects the wide range of alternatives available. However, the various forms of release now set forth in the rule do not, as a practical matter, provide a trial judge with any new alternatives.

Florida law recognizes no presumption in favor of nonfinancial bail alternatives.[6] Thus, the state bears no burden of proof to establish that all forms of pretrial release, short of secured money bail, would be insufficient to guarantee appearance in court by the accused. Likewise, the trial judge is not required to examine and exhaust all nonfinancial bail alternatives before setting money bail.

The United States Court of Appeals for the Fifth Circuit has recently declared that fourteenth amendment due process and equal protection *require* meaningful consideration of nonfinancial conditions of release for those who have difficulty in posting money bail.[7] Other decisions make clear that the Federal Constitution requires a presumption in favor of the least restrictive condition of release which will assure a defendant's appearance at trial.[8] Furthermore, the government must bear the burden of proving that a more restrictive condition is needed. Therefore, when the trial judge exercises his discretion to determine which condition to impose, he must look first to each succeedingly less restrictive alternative.[9]

The Florida Constitution Revision Commission has proposed the following for consideration by the electorate on the November ballot as part of article I of the Florida Constitution:

> dence against the defendant, the defendant'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.
>
> (iv) Information stated in, or offered in connection with, any order entered pursuant to this rule need not strictly conform to the rules of evidence.

The Florida Bar, 343 So. 2d 1247, 1250-51 (Fla. 1977).

6. The committee note to the new pretrial release rule accurately observes that, under the rule, there is no presumption in favor of release on recognizance or unsecured appearance, and the form of release is within the sound discretion of the judge. The note indicates that the judge *should* exercise his discretion to impose the least restrictive alternative which will ensure the defendant's appearance. *Id.* at 1251. However, under Florida law, the committee note is not part of the rule and is not binding on the judge in any way. State *ex rel.* Evans v. Chappel, 308 So. 2d 1 (Fla. 1975); *In re* Florida Rules of Criminal Procedure, 272 So. 2d 513 (Fla. 1973).

7. Pugh v. Rainwater, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc).

8. Duran v. Elrod, 542 F.2d 998 (7th Cir. 1976); Taylor v. Sterrett, 532 F.2d 462, 470 n.11 (5th Cir. 1976); Rhem v. Malcolm, 507 F.2d 333 (2d Cir. 1974); Escandar v. Ferguson, 441 F. Supp. 53, 58 (S.D. Fla. 1977); Dillard v. Pitchess, 399 F. Supp. 1225 (C.D. Cal. 1975).

9. This concept was also incorporated into the Federal Bail Reform Act of 1966. 18 U.S.C. § 3146(a) (1976).

> Section 14. *Release prior to trial* ~~Bail.~~—Until adjudged guilty, every person charged with a crime or violation of municipal or county ordinance shall be *released upon conditions reasonable under the circumstances to secure his appearance at future court proceedings including monetary bail when no other method is adequate.* ~~entitled to release on reasonable bail with sufficient surety unless~~ *No person* charged with a capital offense or an offense punishable by life imprisonment *shall be released prior to trial when* ~~and~~ the proof of guilt is evident or the presumption is great.[10]

This proposal is apparently designed to distinguish between monetary and non-monetary conditions of release and to create a rebuttable presumption in favor of the latter.[11] This represents a small—but highly significant—shift in Florida's bail system.

III. CRITICISM OF FLORIDA'S PRESENT MONETARY BAIL SYSTEM

A. *Interference with the Liberty and Other Fundamental Rights of Accused Persons*

The National Advisory Commission on Criminal Justice Standards and Goals (NACCJSG) has accurately described the nature of the money bail system: "In theory, money bail is intended to insure the presence of the accused for trial. In practice, it makes release prior to trial depend not on the risk of nonappearance but on the financial resources of the accused."[12]

Based solely on an individual's wealth, the monetary bail system, as presently enforced, deprives accused persons of a multitude of fundamental rights.

The conditions under which pretrial detainees are incarcerated are often so egregious that they are violative of constitutional standards.[13] And, of course, the incarceration per se has a direct, adverse impact on virtually all aspects of the broad range of "liberty" pro-

---

10. Fla. C.R.C., Rev. Fla. Const. art. I, § 14 (May 11, 1978). Words struck through are deletions from the existing section. Italicized words are additions.

11. The proposal does not address the constitutional problems relating to bail in capital or life cases. State and federal courts have recently held that, at least with regard to defendants charged with crimes punishable by life imprisonment, due process and equal protection require that Florida afford a bail hearing without regard to whether the proof is evident or the presumption is great. Riley v. Sundstrom, No. 78-1276 (S.D. Fla. April 14, 1978); Escandar v. Ferguson, 441 F. Supp. 53 (S.D. Fla. 1977); State v. McIntosh, No. 77-27393 (Fla. 11th Cir. Sept. 30, 1977).

12. Proceedings of the National Conference on Criminal Justice, Commentary on Corrections Standard 4.4, Alternatives to Pretrial Detention at 120-21 [hereinafter cited as Corrections Standard 4.4].

13. *See* Pugh v. Rainwater, 557 F.2d 1189, 1192 n.8 (5th Cir. 1977), *modified*, 572 F.2d 1053 (5th Cir. 1978) (en banc).

tected by the due process clause of the fourteenth amendment to the United States Constitution, as well as on the ability to prepare and present a defense.

Commonly, the conditions under which pretrial detainees are incarcerated are so extremely poor that they have been held to violate due process and equal protection standards and to constitute cruel and unusual punishment.[14] Pretrial detainees are often forced to survive at the most minimal level of human existence and are often subjected to overcrowding, excessive noise, temperature extremes, unpalatable food, sexual assaults, and other acts of violence. They are exposed, on an around-the-clock basis, to persons of wideranging criminal experience. They are often housed, too, with persons requiring treatment for severe mental illness and narcotics addiction.

Pretrial incarceration totally disrupts the life of an accused person. It "may imperil [his] job, interrupt his source of income, and impair his family relationships."[15] Detainees lose the ability to move about freely, to have any meaningful contact with others, and to care for their families. The privations resulting from pretrial incarceration entail the loss of fundamental "personal freedom in the most immediate and literal sense of those words."[16] It is easy to lose sight of the fact that pretrial incarceration involves deprivation of "the most basic [right] of all, since what is at stake is no less than the freedom to be free."[17] Subsumed under that basic right is the freedom to walk about,[18] to travel,[19] and to associate freely with persons of one's own choice[20]—all freedoms of which a detainee is deprived without any determination of guilt.

A particularly keen deprivation forced upon detainees is the loss of "the right to be let alone," which Justice Brandeis called "the most comprehensive of rights and the right most valued by civilized men."[21] Indeed, the right of privacy has been recognized as one of

14. *See* Miller v. Carson, 401 F. Supp. 835 (M.D. Fla. 1975); Rhem v. Malcolm, 371 F. Supp. 594 (S.D.N.Y.), *aff'd in relevant part*, 507 F.2d 333 (2d Cir. 1974) *and* 527 F.2d 1041 (2d Cir. 1975). *See also* cases cited in Pugh v. Rainwater, 557 F.2d 1189, 1191 n.6 (5th Cir. 1977), *modified*, 572 F.2d 1053 (5th Cir. 1978) (en banc).

15. Gerstein v. Pugh, 420 U.S. 103, 114 (1975).

16. United States v. Thompson, 452 F.2d 1333, 1340 (D.C. Cir.), *cert. denied*, 405 U.S. 998 (1972).

17. *Id.* at 1340.

18. *See* Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 686 (D. Mass. 1973).

19. Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Shapiro v. Thompson, 394 U.S. 618 (1969).

20. *See* Kusper v. Pontikes, 414 U.S. 51 (1973); Williams v. Rhodes, 393 U.S. 23 (1968); NAACP v. Button, 371 U.S. 415 (1963).

21. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

the fundamental values which the Bill of Rights was designed to protect.[22]

Pretrial detainees are also denied certain basic rights relating to the preparation and presentation of their cases. Their detention imposes severe restrictions on their ability to exercise their right to marshal evidence and witnesses, and to confer adequately with counsel prior to trial. The United States Supreme Court elaborated on this problem in *Smith v. Hooey:*

> Confined in a prison . . . [a detainee's] ability to confer with potential defense witnesses, or even to keep track of their whereabouts, is obviously impaired. And, while "evidence and witnesses disappear, memories fade, and events lose their perspective," a man isolated in prison is powerless to exert his own investigative efforts to mitigate these erosive effects of the passage of time.[23]

The problems an indigent detainee faces in preparing a defense are exacerbated by the physical conditions of incarceration. Contacts with the outside world are extremely limited. Telephone and visiting privileges are restricted, affording very limited opportunity to consult privately with counsel, family, or friends. Attorneys attempting to consult with their clients in jail are often forced to wait long periods of time to see them. This, of course, tends to limit the frequency of their visits. Generally, there are only a few private attorney-client interview rooms available in jails. This also discourages visits.

Pretrial detention also prevents the accused from being able to obtain employment, display an ability to remain drug-free (if that ability is relevant to his case), enter a therapeutic community, or explore any of the number of alternatives which would demonstrate repentance and the beginnings of rehabilitation. He can only promise such accomplishments and, thus, is less able to make a persuasive case for minimizing criminal sanctions in the event of a guilty plea or conviction.

Pretrial detainees are often confined in an inhumane jail under conditions which are more egregious than those under which con-

---

22. *See generally* Roe v. Wade, 410 U.S. 113, 152-53 (1973); Stanley v. Illinois, 405 U.S. 645, 651-52 (1972); Note, *Toward a Right of Privacy as a Matter of State Constitutional Law,* 5 FLA. ST. U.L. REV. 631 (1977).

23. 393 U.S. 374, 379-80 (1969) (quoting Note, *Effective Guaranty of a Speedy Trial for Convicts in Other Jurisdictions,* 77 YALE L.J. 767, 769 (1968)). *See also* Stack v. Boyle, 342 U.S. 1, 8 (1951): "Without this conditional privilege [of pretrial freedom], even those wrongly accused are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense." [Jackson and Frankfurter, JJ., concurring.]

victed prisoners are confined. It is well established that pretrial detainees do not stand on the same footing as convicted persons and, therefore, must be subjected to the least restrictive conditions of confinement necessary to assure their presence at trial.[24] However, in Dade County, for example, pretrial detainees continue to be incarcerated due solely to their poverty and, while incarcerated, continue to be housed with convicts and subjected to the same punitive conditions.

Not surprisingly, pretrial detention tends to coerce guilty pleas. The prosecutor knows that the longer the accused remains in jail awaiting trial, the more likely the accused will be to plead guilty. Severely hampered in preparing a defense and suffering from his incarceration, a pretrial detainee is much more likely to plead guilty in order to bring his case to a conclusion.

If the accused refuses to accept the prosecutor's plea offer and continues to maintain his innocence, he faces the prejudicial prospect of going to trial as an incarcerated person. The presiding judge and trial jury are inevitably confronted with this information because the pretrial detainee enters the courtroom from the side or front, escorted by a jail guard, rather than from the rear by himself. This cannot help but adversely influence the judge and jury, who must try and sentence the accused.

Because of these severe restrictions on the defendant's ability to present a defense, it is not at all surprising that pretrial detainees are convicted more often and sentenced more harshly than those who are wealthy enough to post bail and obtain their release from custody. The American Bar Association Project on Standards For Criminal Justice reports as follows:

> The consequences of pretrial detention are grave. Defendants presumed innocent are subjected to the psychological and physical deprivations of jail life, usually under more onerous conditions than are imposed on convicted defendants. The jailed defendant loses his job if he has one and is prevented from contributing to the preparation of his defense. Equally important, the burden of his detention frequently falls heavily on the innocent members of his family. Moreover, there is strong evidence that a defendant's failure to secure pretrial release has an adverse effect on the outcome of his case. Studies in Philadelphia, the District of Columbia and New York all indicate that the conviction rate for jailed defen-

24. *See, e.g.*, Duran v. Elrod, 542 F.2d 998 (7th Cir. 1976); United States *ex rel.* Tyrrell v. Speaker, 535 F.2d 823, 827 (3d Cir. 1976); Taylor v. Sterrett, 532 F.2d 462, 470 n.11 (5th Cir. 1976); Rhem v. Malcolm, 507 F.2d 333 (2d Cir. 1974).

> dants materially exceeds that of bailed defendants. For example, of defendants charged with grand larceny forty-three percent of those on bail pending trial were convicted while seventy-two percent of those in jail were convicted. In terms of the sentence imposed on convicted persons, the bailed defendant is far more likely to receive probation; his jailed counterpart, having been unable to demonstrate his reliability under supervision, more frequently goes to prison. Of course some of the factors, such as strong evidence of guilt or a long criminal record, that lead to high bail and hence detention, will also cause a court to find the defendant guilty and to sentence him to prison rather than to give him probation. But a recent study which attempted to hold other causative factors constant indicates that there is a strong relationship between detention and unfavorable disposition.[25]

The Supreme Court of the United States has aptly summarized the devastating consequences of the imprisonment of an accused before his trial:

> If an accused cannot make bail, he is generally confined . . . in a local jail. This contributes to the overcrowding and generally deplorable state of those institutions. Lengthy exposure to these conditions "has a destructive effect on human character and makes the rehabilitation of the individual offender much more difficult." At times the result may even be violent rioting.
>
> . . . .
>
> . . . The time spent in jail awaiting trial has a detrimental impact on the individual. If often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time. Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing these consequences on anyone who has not yet been convicted is serious. It is especially unfortunate to impose them on those persons who are ultimately found to be innocent.[26]

Thus, the monetary bail system constitutes a drastic interference with fundamental rights of the accused.

---

25. AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PRETRIAL RELEASE 2-3 (1968) (citations omitted) [hereinafter cited as ABA RELEASE STANDARDS].

26. Barker v. Wingo, 407 U.S. 514, 520, 532-33 (1972).

B. *Failure to Serve a Compelling Governmental Interest with the Least Restrictive Means Available*

Since Florida's monetary bail system drastically interferes with fundamental freedoms, the fourteenth amendment to the United States Constitution mandates that the state establish that its scheme (1) promotes a "*compelling* governmental interest"[27] and (2) does so with means which are "structured with 'precision' " and " 'tailored' narrowly to serve [its] legitimate objectives . . . ."[28] These requisite factors constitute the familiar standard for the protection of fundamental rights:

> [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.[29]

Florida's monetary bail system wholly fails to meet these federal constitutional standards. First, it fails to promote the compelling governmental interest in question, namely, assuring the appearance of accused persons at trial. Second, it fails to achieve its objective with the least restrictive means available and, thus, unnecessarily burdens a host of fundamental freedoms of the accused.

It is well established that the only legitimate governmental interest served by bail is to assure the presence of the accused at trial.[30] The Florida Rules of Criminal Procedure recognize as much in rule 3.130(b)(4)(i): "The purpose of bail is to insure the defendant's appearance." Ironically, though, the posting of monetary bail does little or nothing to ensure that the accused will appear in court and comply with court orders. The National Commission on Criminal Justice Standards has said that

> Society has a rightful interest in insuring that persons accused of crimes are available for trial. The accused on the other hand is

27. Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

28. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973).

29. Shelton v. Tucker, 364 U.S. 479, 488 (1960) (footnotes omitted). *See also* Dunn v. Blumstein, 405 U.S. 330, 343 (1972): "In pursuing [an] important interest, the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. . . . [I]f there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference."

30. *See* Stack v. Boyle, 342 U.S. 1, 5 (1951); Duran v. Elrod, 542 F.2d 998, 999 (7th Cir. 1976).

> presumed innocent and should not be detained unless he represents a substantial risk of not appearing when required. In most instances, *money bail is irrelevant in protecting or promoting either interest*.[31]

If the accused pays a bond premium to a bail bondsman, the premium will not be returned, even if the accused appears in court as required.[32] Thus, once he has paid the bondsman, the accused has absolutely no financial incentive to appear for his trial.[33]

If the accused posts a bond, with or without giving collateral to a bondsman, he may very well regard the forefeiture of the bond or collateral as a small price to pay for his freedom and thus fail to appear at his trial. A cash bond is not required under Florida law and is seldom used. Furthermore, it is totally discretionary under Florida law for a bail bondsman to require collateral. Many do not.[34] When a bondsman demands sufficient collateral, the bondsman is insulated from financial loss and thus has no financial interest in assuring the presence of a recalcitrant defendant. Thus, the basic premise of the monetary bail system—"that risk of financial loss is necessary to prevent defendants from fleeing prosecution—is itself of doubtful validity."[35]

Florida's monetary bail system fails to require the use of the least restrictive means available to achieve its avowed objective. Although Florida's latest rule of court relating to pretrial release provides for a number of nonfinancial conditions of release,[36] it guarantees only the right to monetary bail. If an accused is too poor to post money bail, and the court does not see fit to impose any of the nonmonetary alternatives, the accused must remain in jail (although supposedly presumed innocent) until his case is concluded.

---

31. Corrections Standard 4.4, *supra* note 12, at 121 (emphasis added).

32. Even if the defendant appears as required and the charges against him are dismissed, he must bear the cost of the bail bond premium. Dade County v. Baker, 356 So. 2d 65 (Fla. 3d Dist. Ct. App. 1978); Holton v. State, 311 So. 2d 711 (Fla. 3d Dist. Ct. App. 1975). In holding that the expense of a bail bond premium is not a taxable cost under Florida law, the *Holton* court noted the "staggering expense" which would have been incurred by the county if the court had ruled to the contrary. *Id.* at 712. This "staggering expense," of course, is presently being borne by individual defendants.

33. *See* Pannell v. United States, 320 F.2d 698, 699 (D.C. Cir. 1963) (Wright, J., concurring): "[U]nder the professional bondsman system the only one who loses money for nonappearance is the professional bondsman, the money paid to obtain the bond being lost to the defendant in any event."

34. In this regard, the NACCJSG has observed that "[t]he extent to which the accused is financially committed to appear is determined by the amount of collateral the bail bondsman requires for writing the bond, not how high the bail is set." Corrections Standard 4.4, *supra* note 12, at 121.

35. ABA RELEASE STANDARDS, *supra* note 25, at 1.

36. *See* note 5 *supra*.

The present bail system does not require that nonfinancial bail alternatives be fairly examined by the court to determine if they will assure the accused's appearance at trial. Moreover, these alternatives need not be exhausted before money bail can be set. When a court sets money bail for an indigent person, no time limit is placed on the accused's incarceration after which he must be released on nonfinancial bail. Nor is there any automatic reexamination of the bail decision by the court within a specified time for an indigent defendant who has failed to secure his release.

IV. THE CONSTITUTION REVISION COMMISSION PROPOSAL

The state has a substantial, even compelling, interest in assuring the appearance of all accused persons at trial.[37] The proposed amendment would require only that the trial judge use the least restrictive means available to ensure a defendant's appearance at trial.[38] The court would be prohibited from using money bail as the condition for pretrial release in those cases in which a nonfinancial condition of release would suffice. The commission proposal would create a rebuttable presumption that the accused is entitled to release on his own recognizance or some other nonfinancial bail alternative.

This would be new for Florida, but there is nothing novel in this approach. The American Bar Association has stated unequivocally that "[i]t should be presumed that the defendant is entitled to be released on order to appear or on his own recognizance," and that "[m]oney bail should be set only when it is found that no other conditions on release will reasonably assure the defendant's appearance in court."[39]

Also, the federal government, in enacting the Bail Reform Act of 1966,[40] recognized this presumption of release on recognizance as inherent in the presumption of innocence: "Any person charged with an offense, other than an offense punishable by death, *shall* . . . be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond . . . unless . . . such a release will not reasonably assure the appearance of the person as required."[41] Legislative history makes clear that this language was intended to give effect to the presumption of innocence. The report of the Senate Committee on the Judiciary stated:

37. *See* Pugh v. Rainwater, 572 F.2d 1053, 1056 (5th Cir. 1978) (en banc).
38. For the text of the proposal, see text accompanying note 10 *supra*.
39. ABA RELEASE STANDARDS, *supra* note 25, at 54, 58 (standards 5.1(a) and 5.3(a)).
40. Pub. L. No. 89-645, 80 Stat. 214 (current version at 18 U.S.C. §§ 3146-3151 (1976)).
41. 18 U.S.C. § 3146(a) (1976) (emphasis added).

> The principle that a person is presumed innocent until proven guilty by a court of law is perhaps the most basic concept of American criminal justice. A corollary of this presumption of innocence is that a person accused of crime should not be confined because of this impecuniosity prior to his trial and conviction so long as he can provide adequate assurance that he will be available to stand trial when called.[42]

It is not unreasonable to impose on the state the burden of proving that nonfinancial bail alternatives are insufficient to ensure the defendant's appearance at trial before secured money bail can be required. State attorneys routinely exercise their prerogative to be heard on the bail decision and are able to marshal the facts bearing on that decision. Indeed, the American Bar Association has asserted that

> It should be the policy of prosecuting attorneys to encourage the release of defendants upon an order to appear or on their own recognizance. Special efforts should be made to enter into stipulations to that effect in order to avoid unnecessary pretrial release inquiries and to promote efficiency in the administration of justice.[43]

The Supreme Court of Florida has twice rejected proposals to promulgate a bail rule which would (1) incorporate a presumption in favor of pretrial release based on one of a series of nonfinancial bail alternatives, (2) require the trial court to examine fairly and exhaust these alternatives prior to imposing secured money bail, and (3) make secured money bail a last resort.[44] However, some justices have supported such proposals and criticized their rejection. In 1972, Justice Richard Ervin refused to support any longer what he termed "Florida's archaic bail bond system."[45] Ervin chastised his fellow justices, saying:

---

42. S. REP. No. 750, 89th Cong., 1st Sess. 6 (1965). For further discussion of a presumption in favor of nonfinancial conditions of release, see United States v. Leathers, 412 F.2d 169, 171 (D.C. Cir. 1969); United States v. Cowper, 349 F. Supp. 560, 562 (N.D. Ohio 1972); United States v. Melville, 306 F. Supp. 124, 127 (S.D.N.Y. 1969); Foote, *The Coming Constitutional Crisis in Bail*, 113 U. PA. L. REV. 1125, 1180, 1183 (1965); McCree, *Bail and the Indigent Defendant*, 1965 U. ILL. L.F. 1, 2.

43. ABA RELEASE STANDARDS, *supra* note 25, at 45 (standard 4.3(f)).

44. *See* The Florida Bar, 343 So. 2d 1247 (Fla. 1977); *In re* Florida Rules of Criminal Procedure, 272 So. 2d 65 (Fla. 1972).

45. *In re* Florida Rules of Criminal Procedure, 272 So. 2d 65, 69 (Fla. 1972) (Ervin, J., dissenting in part and concurring in part).

> If conditions of release were found to be necessary, the Committee's rule [which was rejected by the court] provided that "the judicial officer shall impose the least onerous condition reasonably likely to assure the defendant's appearance in court." Money bail was a last resort, and even fully secured bail was to be required only in extreme cases where no other condition would satisfactorily guarantee the defendant's appearance. In each instance where a judicial officer or his authorized deputy, or law officer acting under his authority determined a summons, the defendant's promise to appear, or personal recognizance to be insufficient to assure the defendant's presence, the proposed rule required that the judicial officer give reasons for the imposition of conditions. In determining what conditions of release would reasonably insure the appearance of the defendant, the Committee recommended that the judicial officer take into account factors such as the length of his residence in the community and his past residences, his employment status and history, and his financial condition, his family ties and relationships, his reputation, character, and mental condition; his prior criminal record, including any record of prior release pending trial and record of appearance while released, the identity of responsible members of the community who would vouch for his reliability and agree to assist him in making required appearances, the nature of the offense charged, and any other factors indicating his ties to the community or bearing on the risk of willful failure to appear.
>
> The Committee's rule was an excellent attempt at eliminating from our legal system one more means of discriminating against the poor. It should have been approved.[46]

And, in 1977, Justices Arthur England and Alan Sundberg dissented from a denial of a request that the revision of its pretrial release rule require that: (1) the state bear the burden of showing that all nonfinancial alternatives are insufficient to ensure the defendant's appearance, and (2) money bail be used, especially with regard to indigents, only when it is found that no other condition will reasonably assure the defendant's appearance in court.[47]

The United States Court of Appeals for the Fifth Circuit recently accepted "the principle that imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible" and "that in the case of an indigent, whose appearance at trial could reasonably be assured by one of the alternate forms

46. *Id.* at 71-72.

47. The Florida Bar, 343 So. 2d 1247, 1266 (Fla. 1977). *See also* Pugh v. Rainwater, 572 F.2d 1053, 1064-65 (5th Cir. 1978) (en banc) (Simpson, Gewin, Goldberg, Godbold, JJ., dissenting).

of release, pretrial confinement for inability to post money bail would constitute imposition of an excessive restraint."[48]

The revision proposal, picking up where the dissenting Florida Supreme Court justices and the Fifth Circuit left off, would, if passed, guarantee all persons that pretrial freedom will not depend on their financial resources. Acceptance of the revision by the voters would trigger the next step in assuring adherence to the constitutional precept—the promulgation of new rules of criminal procedure. However, this step would not be without its problems.

V. Implementation of Proposed Article I, § 14

If the proposed revision of article I, section 14 of the declaration of rights in the Florida Constitution is approved by the voters in November, 1978, the focus for bail reform will shift to the Florida Supreme Court. The courts will have to promulgate procedural rules to effectuate the rights guaranteed by the new article I, section 14, just as it has promulgated rules to effectuate the present article I, section 14. This part of this article discusses the need for new rules, their scope, some problems which must be avoided, and some lessons learned from implementation of the Federal Bail Reform Act.

A. The Need for New Rules

Rule 3.130(b)(4) of the Florida Rules of Criminal Procedure recognizes the range of release options available to a judge making a pretrial release decision.[49] The rule also sets forth the relevant factors to be used to determine "which form of release will reasonably assure appearance."[50] In both areas, the Florida rule closely follows the language and direction of the Federal Bail Reform Act and poses no substantial problems.

Unfortunately, the Florida rule contains no provisions which would ensure that the burden of showing that money bail is required to assure the defendant's appearance be placed on the state. Also missing is any indication of the method by which the state would discharge such a burden. Since the crucial aspect of the revision commission's proposal is the creation of a presumption in favor of release on personal recognizance or other nonfinancial bail alternative, the rules on pretrial release would have to be amended to guarantee meaningful implementation of this presumption.

In its present form, rule 3.130(b)(4) instructs the judicial officer

48. Pugh v. Rainwater, 572 F.2d 1053, 1056, 1058 (5th Cir. 1978) (en banc).
49. For text of the rule, see note 5 *supra*.
50. Fla. R. Crim. Proc. 3.130(b)(4)(iii).

conducting an initial appearance hearing to "consider all available relevant factors to determine what form of release is necessary to assure the defendant's appearance." Those "factors" are enumerated in subsection (b)(4)(iii) of the rule:

> [T]he judge shall . . . take into account the nature and circumstances of the offense charged, the weight of the evidence against the defendant, the defendant'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.[51]

Obviously, some of the information relevant to the release decision, for example, the accused's conviction record, is available to the state. Some other data, however, can usually be made known only by the defendant or his counsel—for example, the accused's family ties and financial resources. Since the burden would be on the state to show that non-monetary release conditions are inappropriate, a minor dilemma arises: How is the state to discharge its obligation without the defendant's cooperation, and, if the defendant cooperates, does that not in effect shift the burden back to him and thus return us to the present state of pretrial release decisionmaking?

In the shadow of that dilemma, we address the problem of articulating a rule which would protect the guarantee of non-monetary pretrial release and still protect the state's interest in guaranteeing a defendant's appearance at trial.

B. The New Rule

The new rule should begin with an explicit statement that non-monetary conditions of release are to be given absolute priority and that monetary conditions may be used only if no other method is adequate for assuring a defendant's appearance at trial.

The rule should also provide guidelines for determining whether non-monetary conditions will suffice. Perhaps the fairest way to commence the inquiry would be for the judge to announce to the defendant that he will be released without the need to post any cash if the judge believes that, given such a release, the defendant will appear at all future court proceedings. At that point the court could inquire into the accused's family ties, employment, length of residence in the community, character and mental condition, and any

51. *Id.* at 3.130(b)(4)(ii).

previous record of appearance or nonappearance at court proceedings. These are the threshold factors most relevant to the release decision. Thus, the rule should make clear that if the court, after inquiry into these factors, is satisfied with the accused's assurances, a recognizance release is appropriate.

In its present form, rule 3.130(b)(4)(iii) requires the judge to consider, in addition to the above-mentioned factors, the weight of the evidence against the defendant, his financial resources, and his record of prior convictions. These three considerations, however, should not be included in the initial stage of any new rule. It should be apparent that, given the presumption of innocence, the weight of the evidence is irrelevant.[52] As for financial resources, they become relevant only if a monetary bail must be imposed. Thus, that line of inquiry is premature at the initial stage of the bail decision. Finally, prior convictions tell nothing about a person's future appearance, except—perhaps—that he did appear in earlier cases. However, the damage done by exposing prior convictions, in terms of possibly prejudicing the bail decision or even the ultimate fact-finding process, would severely outweigh the need for that information at the initial inquiry stage. Only by limiting the focus of the initial inquiry would it be possible to ensure the integrity of the promise of a revised article I, section 14. The new rule should clearly articulate the first range of questions to be posed to the defendant as well as the obligation of the judge to order recognizance release if satisfactory answers are provided.[53]

---

52. *Cf.* Escandar v. Ferguson, 441 F. Supp. 53, 58 (S.D. Fla. 1977) (holding that provision in FLA. R. CRIM. PROC. 3.130(a) which denies the right to bail in capital cases where "the proof of guilt is evident or the presumption is great" denied the plaintiff's fundamental right to be presumed innocent).

53. The need for a mechanism to verify the information provided by the defendant or his counsel is obvious. Presently, FLA. STAT. § 903.03(2) (1977), allows judges to request the Department of Offender Rehabilitation to investigate the factors set out in present rule 3.130(b)(4)(iii):

> (2)(a) The Department of Offender Rehabilitation shall have the authority on the request of a circuit court when a person charged with a noncapital crime or bailable offense is held, to make an investigation and report to the court, including:
>
> 1. The circumstances of the accused's family, employment, financial resources, character, mental condition, and length of residence in the community;
>
> 2. His record of convictions, of appearance at court proceedings, of flight to avoid prosecution, or failure to appear at court proceedings; and
>
> 3. Other facts that may be needed to assist the court in its determination of the indigency of the accused and whether he should be released on his own recognizance.
>
> (b) The court shall not be bound by the recommendations.

A proposed revision of § 903.03, Fla. HB 1775 (1978), would allow a court to "request any person to make an investigation and report relating to the information needed" for the release decision. This proposal has the advantage of permitting substantial leeway for the creation

The new rule should permit the court, if the initial inquiry raises some doubts about the advisability of personal recognizance release, to then enlarge its inquiry. However, for the same reason stated above, inquiry into the financial resources of the defendant should still be precluded.

By adopting clearly defined steps in the release inquiry process, such a rule would ensure judicial adherence to the constitutional mandate. As succinct as the Federal Bail Reform Act is, appellate courts have found it necessary to remind federal trial courts of the multistep process involved in conforming to the Act:

> The threshold determination to be made, under § 3146(a), is whether release on personal recognizance or unsecured appearance bond, without imposition of any further conditions, will reasonably assure appearance, and only after that inquiry is answered in the negative does the focus switch to conditions to be imposed alternatively or in addition to the method of personal recognizance or unsecured bond.[54]

Since the Florida courts would be fulfilling the commands of the Florida Constitution, it would be essential to avoid confusion about the appropriateness of specific actions at each level of the release inquiry process.

If, because of tenuous ties to the community, family, or employment, or because the defendant exhibited some kind of emotional instability, the court felt that recognizance release was inappropriate, then the inquiry could be broadened. At that stage the court should be allowed to inquire into the defendant's financial resources to determine if an unsecured personal recognizance release might be appropriate.[55] If such a release is deemed inappropriate, perhaps because the defendant has limited financial resources, only then should the court be allowed to broaden its inquiry to explore facts relevant to determining whether only non-monetary forms of release might serve to secure the release and future appearance of the ac-

---

of independent bail agancies which might be able to perform the investigative tasks more effectively (because of their lack of involvement in the criminal justice process) and more rapidly.

54. United States v. Cramer, 451 F.2d 1198, 1200 (5th Cir. 1971).

55. While the Federal Bail Reform Act equates an unsecured personal recognizance bond with release on recognizance, the Florida bail provision places an unsecured personal recognizance bond in a slightly inferior position. Since the clear intention of the proposed revision is to limit the relevancy of monetary wealth as a criteria for release, simple recognizance releases should be the most preferred method of release. The court should move beyond personal recognizance only if such a release may not be effective to guarantee appearance at trial.

cused. It is at this point that the nature and weight of the evidence, the defendant's prior convictions, and similar information should be explored.

Throughout the entire decisionmaking process, there should be no difficulty with the defendant and his counsel's offering their assistance to the court by providing factual data and fashioning non-monetary alternatives to money bail. Indeed, counsel (and the court) should be diligent and imaginative in attempting to design such alternatives.[56]

Therefore, while it may seem anomalous to place a defendant in the position where he must provide the relevant data justifying non-monetary release when a constitutional provision clearly entitles the defendant to the presumption of such a release, the fact is that it is the defendant or defense counsel who is in the best position to present those facts quickly. By requiring the judicial officer to conduct a step-by-step analysis and by forcing consideration of specific and simple forms of release before moving on to more restrictive forms, the new rule would protect that presumption of release in favor of the defendant. It would remain the state's burden to show that non-monetary forms of release would not suffice. Thus, as the court approached the point at which complicated release conditions might be imposed, the state would be forced to play a more active role—if it desired to meet its burden successfully.

Before examining the ultimate issue of how the state might prove that non-monetary conditions are insufficient, we will discuss the serious issues raised by release provisions which, while they do not involve money, do implicate significant liberty interests.

C. *Dangers in the Range of New Monetary Release Alternatives Beyond Release on Recognizance and Unsecured Personal Recognizance Bonds*

Some defendants with limited financial resources may prefer to use those resources rather than suffer the restrictions which might

---

56. To that end, any new rule should retain the flexible language of present rule 3.130(b)(4)(i)(6):

> (i) The purpose of bail is to insure the defendant's appearance. For the purpose of this rule, bail is defined as any of the following forms of release:
>
> . . . .
>
> (6) Imposing any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the defendant return to custody after specified hours.

See also Banks v. United States, 414 F.2d 1150, 1153 (D.C. Cir. 1969); United States v. Leathers, 412 F.2d 169, 173 (D.C. Cir. 1969); 18 U.S.C. § 3146 (a)(5) (1976).

be imposed in lieu of money bail to guarantee their future appearances.

The present Florida rule suggests alternatives which seriously infringe upon fundamental constitutional rights.[57] "Placing the defendant in the custody of a designated person or organization agreeing to supervise him"[58] involves a restraint on liberty. Whether or not the custody is a "significant restraint"[59] will depend on future interpretations of the rule's language and the specific custodial arrangements. Similarly, "[p]lacing restrictions on the travel, association, or place of abode of the defendant"[60] touches on obvious fundamental constitutional guarantees such as the right to travel,[61] the right to associate,[62] and the right of privacy.[63] While similar restrictions have been approved under the Federal Bail Reform Act as legitimate methods to assure appearance,[64] courts must remain cognizant of the need to balance competing interests—such as ensuring an accused's right to pretrial release, protecting an accused's other constitutional guarantees, and ensuring that the state's interest in future appearance is protected.[65]

The range of possible conditions of release is so great that courts must not lose sight of their ultimate goal—use of the least restrictive alternative short of monetary bail to effectuate pretrial release.[66] Therefore, it is imperative that the new rules contain language making the least restrictive alternative the preferred mode of pretrial release. By so doing, the rule would also protect against possible state efforts to employ restrictive non-monetary release conditions to limit a defendant's freedoms indirectly—something that it would no longer be able to accomplish directly by requesting bail which is so high that it is tantamount to no bail at all.[67]

---

57. See note 5 *supra* for text of the rule.

58. FLA. R. CRIM. PROC. 3.130(b)(4)(i)(3).

59. Gerstein v. Pugh, 420 U.S. 103, 114 (1975).

60. FLA. R. CRIM. PROC. 3.130(b)(4)(i)(4).

61. *See* cases cited note 19 *supra.*

62. *See* cases cited note 20 *supra.*

63. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

64. *See* United States v. Leathers, 412 F.2d 169, 172 (D.C. Cir. 1969).

65. The need for recognition of this balance is especially crucial when the court applies an open-ended provision which allows for the creation of new, ad hoc conditions of release. *See* note 56 *supra.*

66. A judicial imprimatur has even been given to "work-release" conditions which allow a presumably innocent person to reside in jail while working during the day. United States v. Leathers, 412 F.2d 169, 172 (D.C. Cir. 1969). Usually such a program is reserved for those already convicted. It seems that if a person is faced with the option of using the money he makes to post a bond or being in a pretrial work-release program, the former is a less onerous method of assuring future appearances, and the accused should have that choice.

67. As more restrictions are placed on a defendant's liberty, the state may believe it is

D. *Shifting the Burden to the State*

Under the proposed new rule which is outlined above, the burden would very subtly shift to the state at the point that release on recognizance or unsecured personal recognizance bonds are rejected by the court as methods of guaranteeing future appearances. As the court begins to move toward monetary bail, the state's interest in the proceeding increases, for some doubt has been expressed about the likelihood of the accused's voluntary future return to court. While the proposed constitutional revision would not shift the burden squarely to the state until the issue of monetary bail came into clear focus, the presumptions against monetary bail and in favor of the least restrictive alternative requirement would necessitate either state acquiescence in or objection to the less restrictive release conditions. At the point when the state chose to object, the burden would shift to the state to explain and justify its position. Of course, if the state contended from the outset that non-monetary release would not suffice, it would have the burden from the outset to justify its contentions.

Granted, it would be difficult to isolate the moment at which the burden would shift. In a rapidly evolving court proceeding in which the state has not taken an adverse position from the outset, it is important that the moment be identified as clearly as possible in order to prevent a court from placing on the defendant the burden of showing why he should be released on non-monetary conditions. In addition, the new rule should require the state to announce its position on whether it will seek monetary bail at the point when the court rejects release on recognizance or unsecured personal recognizance bond. Such a requirement would ensure that the court would be made aware of the state's concerns. As a result, the court, the defendant, and the defendant's counsel would be better able to tailor non-monetary release conditions successfully.

Ultimately the state, if it desires to oppose non-monetary release and seek imposition of monetary conditions, would have to show that "no other method [of release] is adequate"[68] to assure the defendant's future appearances. To do that, the state might attempt to prove that the defendant has told others he would not appear, that he has had made plans for an extended trip out of the country, or that he has recently sold his property in the area. The

---

meeting some perceived need to protect the public from danger. However laudable that goal may be, it is not the test for pretrial release, Stack v. Boyle, 342 U.S. 1 (1951), and the notion of preventive detention has been rejected as antithetical to democratic concepts of liberty.

68. *See* proposed art. I, § 14, quoted in text accompanying note 10 *supra*.

number of reasons for which the state may legitimately oppose release on non-monetary conditions is limitless. But it would be essential that the rule provide, and that courts understand, that the test for release would not be "absolute certainty" that a defendant would appear. All that a court could seek would be "reasonable" assurance of future appearances.[69] The revised article I, section 14 speaks in terms of "conditions reasonable under the circumstances." There is no way ever to guarantee absolute certainty of appearance. Even money bail does not provide that certainty. There is no reason to expect non-monetary conditions of relief to do so.[70]

E. The Evidentiary Rules

Rule 3.130(b)(4)(iv) now provides: "Information stated in, or offered in connection with any order entered pursuant to this rule need not strictly conform to the rules of evidence." The federal view is similar: "[E]vidence at [bail] hearings need not conform to the rules pertaining to the admissability of evidence in a court of law."[71] These tolerant views of evidentiary requirements are consistent with the similar approach taken by the United States Supreme Court in setting evidentiary standards for determining probable cause.[72] While there are grave dangers for defendants in probable cause determinations, for release purposes the tolerant attitude toward evidence has both positive and negative connotations for the defendant and the state.

Since it is essential that a release decision be speedy to protect the defendant's interests, and since the state must be protected from rash release decisions based on erroneous information, there must be a balanced approach which ensures quick access to reliable facts. Permitting informal presentation of information about the accused's background and family ties, combined with corroborative data (such as car registration, warranty deeds, voter registrations, paycheck stubs, and the like) should protect the state's interests and still permit speedy resolution of the release conditions decision.

As cases become more difficult and more restrictive release condi-

69. United States v. Alston, 420 F.2d 176, 178 (D.C. Cir. 1969).

70. There is a special irony in saying that if non-monetary conditions are insufficient to provide reasonable assurances, the court can turn to money bail. Such an approach would be nothing less than a return to the situation of a high-risk rich person's being able to buy his freedom while a high-risk poor person remains incarcerated—which raises troublesome equal protection issues.

71. United States v. Wind, 527 F.2d 672, 675 (6th Cir. 1975). *See also* 18 U.S.C. § 3146(f) (1976).

72. *See, e.g.*, Gerstein v. Pugh, 420 U.S. 103, 120-21 (1975).

tions are considered, the need for speed remains constant. But the need for reliable data increases. Since the more onerous conditions can involve significant restraints on liberty and on other fundamental rights, it is essential that great care be observed in the evidentiary process leading to a determination of release conditions. For example, one would be hard pressed to justify a high monetary bond solely on hearsay relating to a third party's assertion that the accused said he would not appear. In one of the few cases dealing with similar problems, *United States v. Wind,* the United States Sixth Circuit Court of Appeals noted that while some of the evidence presented to the lower court concerning the danger of releasing the defendant was hearsay, other substantial evidence justified the lower court's decision to set a high bond.[73] The case, however, presented another unique feature: an in camera hearing excluding the defendant and his counsel. That method of presenting evidence was struck down.[74]

Consequently, the implementing rule should contain the safeguard of a more stringent evidentiary standard than that which now prevails. This will be necessary if the court imposes conditions which, although non-monetary, significantly interfere with liberty, or if the court imposes monetary conditions of release. At a minimum, the new rule should require "reliable" evidence to justify the imposition of conditions of release more onerous than release on recognizance or release on unsecured personal recognizance bonds.

F. The Need for Written Reasons for the Imposition of Certain Conditions

If a court imposes nonfinancial conditions of release to which the defendant objects, or financial conditions of release to which he objects or is unable to meet, a recitation of the reasons for imposition of those conditions is an essential safeguard for effective judicial review. The present rule permits review by a trial court if a committing magistrate without trial jurisdiction sets excessive release conditions, or review by habeas corpus if the trial court's order

73. 527 F.2d 672 (6th Cir. 1975).

74. The principal issue in *Wind* was whether the trial court properly considered evidence that "Wind would flee if released, regardless of bail, and would pose a danger to witnesses and to the community," in deciding to remand him to custody *without* bail. *Id.* at 673. The court decided that consideration of such evidence and institution of such action was indeed proper.

The state's interest in protecting the integrity of its judicial process is probably the one interest which can justify a court's exercising its inherent power to protect that process by imposing difficult release conditions. *See* Carbo v. United States, 82 S. Ct. 662 (1962) (Douglas, J.).

is excessive.[75] But no appellate review is truly effective unless the reviewing court has the benefit of written reasons for the decision it reviews.

The federal statute requires written reasons if the defendant is unable to meet the conditions within twenty-four hours of their imposition.[76] Requiring written reasons would serve two purposes. First, it would enhance judicial review. Second, it would deter judges from making hasty, unreasoned decisions about release. The latter effect may be more important than the former. But, in either case, written reasons would be essential for ensuring that the Florida constitutional provision guaranteeing the right to non-monetary, less restrictive conditions of pretrial release would be followed by trial courts and protected by appellate courts.

VI. CONCLUSION

The new article I, section 14, if adopted by the voters, would be an important step toward remedying inequities in pretrial release which have concerned courts and commentators for decades.[77] The crucial decisions applying the constitutional precept would be made by trial courts and committing magistrates. It would be essential that these judges be provided with clear, specific guidelines for their decisions.

---

75. FLA. R. CRIM. PROC. 3.130(c).

76. (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.

18 U.S.C. §§ 3146(d)-(e) (1976) (emphasis added).

77. *See, e.g.,* GOLDFARB, RANSOM: A CRITIQUE OF THE AMERICAN BAIL SYSTEM (1965); Wisotsky, *Use of a Master Bond Schedule: Equal Justice Under Law?,* 24 U. MIAMI L. REV. 808 (1970); Note, *Bail and Its Discrimination Against the Poor: A Civil Rights Action as a Vehicle of Reform,* 9 VAL. U.L. REV. 167 (1974).

New rules of criminal procedure would establish those guidelines. It would be imperative that in promulgating those rules, the Florida Supreme Court recognize that by adopting the new bail provision, the people of the State of Florida have cast their vote for the presumption of innocence, for equal protection of the poor, and for liberty and justice. Carefully drafted criteria for implementing that choice would assure that the people's will would be the law in every court in Florida.