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FILLING IN THE GAPS OF VIRGINIA BAIL REFORM

R. Bryan Hatchett*

I. INTRODUCTION

The 1960's and early 1970's witnessed an unprecedented reform of the bail laws of this country.¹ The reform has made it possible for a greater percentage of criminal defendants to be released before trial² thereby avoiding the stigma and considerable prejudice flowing from incarceration.³ Even though the reform has also produced a modest increase in the number of persons who fail to appear for trial,⁴ on balance critical response to the reform has been favorable.

The question of whether a person accused of a crime should be admitted to bail arises shortly after arrest,⁵ and may be considered again by appropriate judges as the case winds its way through the

* Attorney, CBS, Inc. and member, Virginia State Bar. B.A., Washington and Lee University, 1973; J.D., University of Richmond, 1977.

1. W. THOMAS, *BAIL REFORM IN AMERICA* 3 (1976) [hereinafter cited as THOMAS]; Ervin, *The Legislative Role in Bail Reform*, 35 GEO. WASH. L. REV. 429 (1967) [hereinafter cited as Ervin].

2. Probably the most elaborate attempt to measure the results of the nationwide bail reform was made by Prof. Wayne H. Thomas, Jr. He conducted a survey of twenty cities (none in Virginia) comparing the release figures of 1962 with the release figures of 1971. He concluded that the proportion of felony defendants released before trial rose from 50% to 65%. THOMAS, *supra* note 1, at 252. For misdemeanor cases, the proportion of defendants released before trial increased from 60% to 70%. *Id.* At the same time, the percentage of defendants failing to appear at trial rose from 6% to 10%. *Id.* at 253. Prof. Thomas concluded that the general increase in the percentage of defendants released prior to trial is directly attributable to the reform's success at encouraging the use of nonfinancial release conditions. Furthermore, in Prof. Thomas's opinion, "[t]he long-term use of nonfinancial releases appears assured" notwithstanding the rise in the failure to appear rate. *Id.*

3. The prejudice suffered by an accused person who is incarcerated for a prolonged period of time prior to trial goes beyond the loss of personal dignity. Incarceration takes an accused away from his job, jeopardizes his marital and family relationships, and limits his ability to locate favorable witnesses. Foote, *The Coming Constitutional Crisis in Bail* (pts 1 & 2), 113 U. PA. L. REV. 959, 1125, 1137-48 (1965) [hereinafter cited as Foote]. Some authorities argue that an accused person, not released prior to trial, will more likely be convicted and more likely receive a harsher sentence than a similarly situated accused person who is released. Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U. L. REV. 641 (1964); Note, *Preventive Detention—An Empirical Analysis*, 6 HARV. C.R.-C.L.L. REV. 291, 347 (1971). See also, *Campbell v. McGruder*, 580 F.2d 521, 530-32 (D.C. Cir. 1978).

4. See note 2 *supra*, and note 24 *infra*.

5. VA. CODE ANN. § 19.2-80 (Repl. Vol. 1975); VA. SUP. CT. R. 3A:5(a).

court process.⁶ Each bail determination involves a two-part decision: (1) should the accused person be granted release, and (2) if so, what condition or conditions should be imposed. Reformers focused on the latter issue, advocating alternatives to the traditional practice of conditioning release on the execution of a bail bond or the deposit of cash or property in the full amount of the bail set by the judge. The three principal reform plans called for: (1) release of the accused upon his personal recognizance or unsecured promise to appear,⁷ (2) release in exchange for a cash deposit of ten percent of the bail amount, and (3) release subject to one or more nonfinancial conditions such as being placed in the custody of a responsible person or organization.⁸

Because of the reform's emphasis on alternatives to traditional release methods, it has expanded the definition of "bail" beyond the common law sense of release secured by surety⁹ to encompass any release regardless of the type of condition imposed. It is clearly in the newer expanded sense that "bail" appears in the title of the federal Bail Reform Act of 1966 (Act).¹⁰ The Act authorizes all three of the major reform techniques, and is generally regarded as the most important legislation to come out of the bail reform era.¹¹ Virginia's release statutes, enacted during the early and mid-seven-

6. VA. CODE ANN. §§ 19.2-124 to .2-125, .2-130, .2-132, .2-319 (Cum. Supp. 1979); VA. CODE ANN. § 19.2-133 (Repl. Vol. 1975).

7. "Personal bond [another name for an unsecured promise to appear] is a promise to pay a specified sum in the event of nonappearance. Personal recognizance is a promise, without a monetary penalty, to appear. Unlike conventional bail bond, neither entails a cash deposit." *United States v. Stanley*, 469 F.2d 576, 579, n.4 (D.C. Cir. 1972), *citing* D. FREED & P. WALD, *BAIL IN THE UNITED STATES: 1964* at 61-62 (Report to the National Conference on Bail and Criminal Justice, 1964) [hereinafter cited as FREED & WALD].

8. See notes 14-15, 20 and 33 *infra* and accompanying text. Other recent reforms designed to reduce the incarcerated pretrial population include the greater use of summonses rather than arrest warrants (the summoned person makes his promise to appear where he is apprehended rather than at the police station before a magistrate) and the greater use of diversion projects (commonly the projects are designed for drug offenders). THOMAS, *supra* note 1, at 200-10, 224-26.

9. BLACK'S LAW DICTIONARY 127 (5th ed. 1979). "Bail" will be used in both the strict and the modern expanded sense in this article. The particular meaning should be clear from the context.

10. Pub. L. No. 89-465, 80 Stat. 214 (current version at 18 U.S.C. §§ 3146-3147, 3149-3151 (1976)); 18 U.S.C. §§ 3148, 3156 (Cum. Supp. 1979). See *Ervin*, *supra* note 1, at 440; Wald & Freed, *The Bail Reform Act of 1966: A Practitioner's Primer*, 52 A.B.A.J. 940 (1966).

11. THOMAS, *supra* note 1, at 161.

ties, and the corresponding rule of court are closely modeled on the federal reform. However, the principal new statutes and the rule have received no published interpretation by the Supreme Court of Virginia.¹² There is little or no guidance in Virginia defining: the defense counsel's role in seeking release for his client; the rules of evidence to be observed in release hearings; the information to include in filing an appeal; and the appellate court's function in reviewing motions for release. This article will summarize the federal developments in these areas, concentrating on pretrial release, rather than the related area of release pending sentencing or appeal, and will recommend whether the federal practices should be adopted for use in Virginia proceedings.¹³

Because the change in federal and Virginia statutory bail law has been so substantial, it is necessary to begin with a background summary of the reform movement itself, giving particular attention to the 1966 Act. Next, the principal constitutional questions respecting release on bail will be briefly discussed followed by an account of how the reform changed Virginia law. Finally, this article will consider aspects of federal release law pertaining to matters on which Virginia law is silent, with emphasis on whether or not the federal practices also should be followed in Virginia proceedings.

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12. [T]he Court does not receive a great number of requests to set or reduce bond. Rulings on requests in the form of a motion do not appear in the Virginia Reports. However, if the request is properly filed, that is in the form of a petition for writ of error, a refusal by this Court will be published in the Reports in the section "Appeals and Writs of Error Refused." If the Court grants relief, this will not appear in the Reports unless a written opinion is handed down.

Letter from David B. Beach, Deputy Clerk, Supreme Court of Virginia, to the author (January 23, 1980).

13. It should be noted at the outset that, aside from the many similarities shared by federal and Virginia release law, the federal test for release eligibility allows for release in situations where the Virginia test does not. This difference will be touched on; however, no opinion preferring one test over the other will be offered. The debate over which of the two tests better balances the accused's interest in maintaining his freedom against society's interest in assuring that the accused appears for trial and commits no crimes during the interim has already received extensive attention. See note 67 *infra*. Instead, we shall take the Virginia test as we find it and concentrate on recommending procedures for its expeditious administration consistent with due process.

II THE BAIL REFORM MOVEMENT

A. *The Manhattan Bail Project*

In 1961 industrialist Louis Schweitzer, alarmed at overcrowded New York City jails, funded a plan known as the Manhattan Bail Project to post bail for city defendants too poor to obtain release through other channels.¹⁴ Originally, the project was to provide a revolving bail fund, but was later transformed into a program of interviews to determine each detained pretrial defendant's stability and community roots. If certain criteria were met, the project staff would recommend to the judge that the defendant be released on his own recognizance, that is, based on the defendant's bare promise to return for trial without posting bond or making any other financial obligation.¹⁵ In its first year of operation four times as many pretrial defendants obtained release on recognizance than would have received it had the judge not reviewed the project's reports and recommendations.¹⁶ Only three released persons failed to appear for trial.¹⁷ The project was praised for demonstrating the feasibility of divorcing pretrial release from traditional financial requirements while still assuring the appearance of the released person for trial.¹⁸ According to recent figures, seventy bail projects modeled on the Manhattan Bail Project now operate in scattered communities all across the country, though none of them are in Virginia.¹⁹

B. *Ten Percent Deposit Plans*

Another approach designed to make pretrial release more readily accessible began in Illinois. In 1963, the state legislature authorized

14. Ares, Rankin & Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole*, 38 N.Y.U. L. Rev. 67, n.7 (1963) [hereinafter cited as Ares]. The Manhattan Bail Project was the first undertaking of the Vera Foundation, started by Schweitzer, and now operating as the Vera Institute of Justice. THOMAS, *supra* note 1, at 3-4.

15. THOMAS, *supra* note 1, at 20.

16. Ares, *supra* note 14, at 86. This estimate is based on the clinical survey by the Manhattan Bail Project. *Id.*

17. *Id.*

18. N. Y. Times, June 19, 1962, at 34, col. 2.

19. This figure was obtained by counting the pretrial release programs listed in The 1978 Directory of Pretrial Services, which is available from the Pretrial Resource Center, Washington, D.C.

the pretrial release of defendants who deposited with the court ten percent of the bond amount set as a condition of release. If the defendant appeared for trial, the entire deposit, save a small service fee, would be returned.²⁰ The Illinois Ten Percent Deposit Plan was enacted in response to a bail bond scandal in Chicago, and was designed to dry up the market for commercial bondsmen who regularly charge a fee of ten percent of the bond amount—a fee never returned to the defendant.²¹ Similar ten percent deposit plans have been enacted in thirteen other states²² and also included in the 1966 federal reform.²³

C. *The Bail Reform Act of 1966*

The federal Act of 1966 reformed the release procedure for all defendants accused of non-military federal crimes,²⁴ and has since served as the model for the reforms enacted in at least eighteen states.²⁵ The Act's principal innovation is the express duty it imposes on judicial officers (the Act's generic description for persons authorized to grant release²⁶) to favor conditions of release which inflict the least financial burden on the defendant.²⁷ The Act also incorporates the earlier reforms pioneered by the Manhattan Bail Project and the Illinois Ten Percent Deposit Plan.

The Act distinguishes between persons accused of capital crimes and persons accused of noncapital crimes. In noncapital cases, the

20. ILL. ANN. STAT. ch. 38, § 110-7 (Smith-Hurd) (Cum. Supp. 1979).

21. FREED & WALD, *supra* note 7, at 30.

22. THOMAS, *supra* note 1, at 187.

23. 18 U.S.C. § 3146(a)(3) (1976).

24. 18 U.S.C. § 3156(a)(2) (Supp. 1977). For a statistical analysis of federal release practices before and after enactment of the 1966 Act, see JUDICIAL COUNCIL COMMITTEE TO STUDY THE OPERATION OF THE BAIL REFORM ACT IN THE DISTRICT OF COLUMBIA, Report 46 (1968), reprinted in *Hearings on S.2600 before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 522 (1970). See also THOMAS, *supra* note 1, at 165. Criticism of federal release practice under the Act has focused on the sometimes uneven application given it by different judges rather than the reform concepts themselves. COMPTROLLER GENERAL, REPORT TO THE CONGRESS BY THE COMPTROLLER GENERAL: THE FEDERAL BAIL PROCESS FOSTERS INEQUITIES (Oct. 17, 1978).

25. THOMAS, *supra* note 1, at 27. The states are: Alaska, Arizona, Connecticut, Delaware, Iowa, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, New Mexico, North Dakota, Ohio, Oregon, South Carolina, Vermont, Virginia and Wyoming. *Id.*

26. 18 U.S.C. § 3156(a)(1) (Supp. 1977).

27. 18 U.S.C. § 3146(a) (1976).

defendant "shall . . . be ordered released pending trial."²⁸ Notwithstanding this explicit guarantee that some form of release will be offered to all defendants charged with noncapital crimes, subsequent case law has interpreted the Act as not depriving the judicial officer of his inherent authority to deny release where there is strong evidence that the defendant will likely injure a potential witness or juror.²⁹ On the other hand, the judicial officer has no authority to deny pretrial release in a noncapital case where the defendant's freedom would only constitute a general danger to the community at large.³⁰ After considering an extraordinary factual situation one court recently held that this inherent authority also includes the authority to deny pretrial release in a noncapital case if it is nearly certain that no set of release conditions will prevent the defendant from attempting to flee.³¹

The judicial officer ruling on pretrial release in a noncapital case is required first to consider allowing release upon "personal recognition or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer."³² If, "in an exercise of his discretion," the judicial officer finds that these forms of release will not "reasonably assure the appearance of the person for trial," he may consider other alternatives.³³ The conditions imposing the

28. *Id.*

29. *United States v. Wind*, 527 F.2d 672 (6th Cir. 1975); *United States v. Gilbert*, 425 F.2d 490 (D.C. Cir. 1969). Both *Wind* and *Gilbert* were remanded for further hearings to determine the actual danger involved.

30. *United States v. Bigelow*, 544 F.2d 904, 907 (6th Cir. 1976). See *United States v. Leathers*, 412 F.2d 169, 171 (D.C. Cir. 1969); H. R. REP. No. 1541, 85th Cong., 2d Sess. 6, reprinted in [1966] U.S. CODE CONG. & AD. NEWS 2293, 2296; see also *Ervin*, *supra* note 1, at 443.

31. *United States v. Abrahams*, 447 F. Supp. 395 (D. Mass), *aff'd*, 575 F.2d 3 (1st Cir.), *cert. denied* 439 U.S. 821 (1978). The defendant in *Abrahams* was an escapee from a state prison, had given false information at the release hearing, had failed to appear eight days later thereby defaulting on a \$100,000 cash bond, and had recently transferred \$1.5 million to Bermuda. 575 F.2d at 4-5.

32. U.S.C. § 3146(a) (1976). See note 7 *supra*.

33. The conditions, in order of preference, are:

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

greatest financial hardship are reserved until other have been considered and rejected. If no single condition provides the requisite assurance of appearance, the judicial officer may fashion a combination of conditions that will.³⁴ It has been repeatedly held that the Act's sole purpose in conditioning pretrial release in noncapital cases is to reduce the likelihood of flight. Therefore, the accused's potential danger to the community is not a proper basis for imposing further release conditions.³⁵

A defendant accused of a capital crime who seeks pretrial release is accorded the same treatment given to a defendant in a noncapital case "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."³⁶ In such cases, the Act clearly provides that release be denied.³⁷ Any defendant, regardless of the crime charged against him, who is denied release or is unable to meet the specific conditions attached to his release, is entitled to have his case reviewed by judicial officers of succeeding higher authority.³⁸

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.

18 U.S.C. § 3146(a)(1)-(5) (1976).

34. 18 U.S.C. § 3146(a) (1976). In determining which conditions of release to impose, the Act instructs the judicial officer to consider

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.

18 U.S.C. § 3146(b) (1976).

35. See, e.g., *United States v. Leathers*, 412 F.2d 169, 171 (D.C. Cir. 1969). But see *United States v. Melville*, 306 F. Supp. 124, 126-27 (S.D.N.Y. 1969), where Judge Frankel suggested that the two purposes cannot be completely separated from one another:

[W]hile "danger to any other person or to the community" is not in itself a proper consideration for pretrial bail in a noncapital case, we doubt that a defendant's powerful disposition to incur further criminal liabilities could be ignored utterly in judging what will "reasonably assure" his appearance for trial.

36. 18 U.S.C. § 3148 (Cum. Supp. 1979).

37. *Id.*

38. 18 U.S.C. § 3146(d) (1976); FED. R. APP. P. 9.

III. CONSTITUTIONAL CONSIDERATIONS

A. *The Eighth Amendment*

Curiously, the eighth amendment,³⁹ the only amendment to the Constitution expressly mentioning bail, has figured only slightly in the development of the country's bail law. The amendment proscribes the imposition of "excessive bail," but does not expressly prohibit the absolute denial of release where the court declines to set bail in any amount. The Supreme Court avoided confronting the amendment's internal inconsistency until 1952, when it decided *Carlson v. Landon*.⁴⁰ The case concerned aliens accused of being members of the Communist Party. They challenged the government's right to detain them without bail pending deportation hearings. In rejecting the aliens' reliance on the eighth amendment, the Court ruled that the amendment did not prohibit Congress from identifying classes of nonbailable crimes.⁴¹ Critics of the decision have complained that its treatment of the eighth amendment is merely dictum and based on a misreading of history.⁴² They also criticize *Carlson* for being at odds with *Stack v. Boyle*,⁴³ decided that same term.⁴⁴ *Stack* held that a federal trial court disregarded the eighth amendment by setting bail higher than was reasonable to assure that the accused would later appear for trial.⁴⁵ Also according to *Stack*, when bail is unusually high, it must be supported by record evidence.⁴⁶ While it may be that the logic of *Carlson* and *Stack* are in conflict, their literal holdings are not; *Carlson* addresses denial of bail and *Stack* addresses excessive bail. Therefore, with near unanimity, lower federal courts have accepted the assertion in *Carlson* that the eighth amendment grants

39. "Excessive bail shall not be required . . ." U.S. CONST. amend. VIII.

40. 342 U.S. 524 (1952).

41. *Id.* at 545.

42. Foote, *supra* note 3, at 979-89; Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 403 (1970).

43. 342 U.S. 1 (1951).

44. *E.g.*, Tribe, *supra* note 42, at 403-04.

45. The defendants in *Stack* were charged with violating the Smith Act, ch. 439, 54 Stat. 670-671 (1940) (current version at 18 U.S.C. § 2385 (1976)), which carried a maximum penalty of five years imprisonment and a \$10,000 fine. Bail for each of the twelve defendants was set at \$50,000. 342 U.S. at 3.

46. 342 U.S. at 6.

no constitutional right to release.⁴⁷

The effect of these interpretations of the eighth amendment on state proceedings is unclear because the Supreme Court has never held the excessive bail clause to be enforceable against the states as a protection incorporated by the fourteenth amendment.⁴⁸ Fortunately, since most state constitutions grant defendants greater rights than those afforded by *Carlson*, the uncertainties surrounding the eighth amendment are often academic.⁴⁹ Virginia, however, is in the minority. In fact, the excessive bail proscription enacted in Virginia's first constitution⁵⁰ and repeated in the present constitution⁵¹ was the model for the draftsmen of the eighth amendment.⁵²

B. *Griffin v. Illinois*

The Supreme Court's decision in *Griffin v. Illinois*,⁵³ although not directly involving bail, has had a much more discernible effect on bail reform than either *Carlson* or *Stack*. In *Griffin*, the Court interpreted the fourteenth amendment as requiring the state of Il-

47. See, e.g., *Wansley v. Wilkerson*, 263 F. Supp. 54, 57 (W.D. Va. 1967). See Duker, *The Right to Bail: A Historical Inquiry*, 42 ALB. L. REV. 33, 89 (1978) [hereinafter cited as Duker].

48. See *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971). The Supreme Court has approved the incorporation of the eighth amendment's cruel and unusual punishment clause into the fourteenth amendment. *Robinson v. California*, 370 U.S. 660, 667 (1962). The absence of direct authority from the Supreme Court has not prevented numerous lower courts from holding the bail clause enforceable against the states. E.g., *Arsad v. Henry*, 317 F. Supp. 129 (E.D.N.C. 1970); *Goodine v. Griffin*, 309 F. Supp. 590, 591 (S.D. Ga. 1970); *Wansley v. Wilkerson*, 263 F. Supp. 54, 56 (W.D. Va. 1967).

49. According to a summary of state bail laws by Duker, *supra* note 47, at 93 n.373, forty-two states grant a right to pretrial release if the accused is charged with a noncapital offense.

50. The Virginia Declaration of Rights, art. 9, reprinted in 9 W. HENING, STATUTES AT LARGE OF VIRGINIA 111 (1821).

51. VA. CONST. art. I, § 9.

52. The excessive bail clause of the eighth amendment, ratified in 1791, is all but identical to the Virginia Declaration of Rights, clause nine, which reads: "Excessive bail ought not to be required. . . ." The Virginia Declaration of Rights was drafted by George Mason and enacted by the Virginia Constitutional Convention in 1776. 1 PAPERS OF GEORGE MASON, 1725-1792, at 286 (R. Rutland ed. 1970). Mason borrowed the phrase from the English Bill of Rights of 1689. 1 W.&M., Sess. 2, c.2. See generally 1 A. HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 150-51 (1974); Duker, *supra* note 47, at 66; Foote, *supra* note 2, at 982-88.

53. 351 U.S. 12 (1956).

linois to supply a convicted, indigent defendant with either a full transcript or an adequate substitute as an incident of the right to full appellate review.⁵⁴ Dissenting Justices Burton and Minton, alarmed at the possible consequences of the majority's position, asked rhetorically, "[W]hy fix bail at any reasonable sum if a poor man can't make it?"⁵⁵ Almost as if the irony intended by the dissenting justices had gone unrecognized, federal authorities⁵⁶ and law review commentators⁵⁷ began advocating an extension of *Griffin* which would invalidate the setting of bail in any amount beyond the accused's ability to pay.

The 1966 Act and similar state reforms⁵⁸ reflect this concern, and have succeeded in reducing the number of release cases in which the *Griffin* argument can be raised. The Act lists a hierarchy of possible restrictions on release, of which the requirement of a ten percent cash deposit and the execution of a bail bond are numbered third and fourth, respectively.⁵⁹ Therefore, these financial release conditions are statutorily permissible only if the preceding nonfinancial restrictions have been found inadequate.⁶⁰

C. Preventive Detention

Preventive detention is the name commonly given to the practice of denying release to prevent the commission of a future crime rather than to ensure appearance at trial. The long standing practice has been to restrict its use to persons charged with capital crimes, convicted persons awaiting sentencing or appeal, or, as pre-

54. *Id.* at 19-20.

55. *Id.* at 29 (Burton and Minton, JJ., dissenting).

56. *Bandy v. United States*, 81 S. Ct. 197, 198 (1960) (Douglas, Circuit Justice); ATTORNEY GENERAL'S COMM. ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE, REPORT: POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 85-86 (1963).

57. Foote, *supra* note 3, at 1151-64; Paulsen, *Pre-Trial Release in the United States*, 66 COLUM. L. REV. 109, 119-22 (1966).

58. *See* note 25, *supra*.

59. 18 U.S.C. § 3146(a) (1976).

60. Apart from the *Griffin* argument discussed in the text, the fourteenth amendment has often been invoked by defendants seeking release as a guarantee against an arbitrary release determination. However, because of the abundant discretion normally afforded judges in release matters, reviewing courts rarely interpret release determinations as being arbitrary. *See, e.g.,* *Bowring v. Cox*, 334 F. Supp. 334 (W.D. Va. 1971); *Wilborn v. Peyton*, 287 F. Supp. 787 (W.D. Va. 1968); *Wansley v. Wilkerson*, 263 F. Supp. 54 (W.D. Va. 1967). *But see* notes 138-39 *infra* and accompanying text.

viously mentioned, accused persons who, if released, will likely injure a potential witness or juror. The 1966 Act, continuing a federal policy begun in 1789, authorizes preventive detention only in these limited situations.⁶¹ All but the most vehement detractors of preventive detention agree that when so limited and not arbitrarily imposed, it is a constitutionally permitted exercise of state or federal authority.⁶²

In 1969, the Nixon administration, as part of its pledge to restore "law and order,"⁶³ sided with critics of the 1966 Act who proposed expanding the availability of preventive detention to include any noncapital case where there is evidence of danger to the community.⁶⁴ Eventually, unable to get support for its original proposal, the administration lowered its sights and substituted a bill changing only the District of Columbia's release law.⁶⁵

The numerous scholarly articles spawned by the Congressional debate and passage of the new District of Columbia bail law⁶⁶ bear witness that opinion is sharply divided over the constitutionality of preventive detention except as authorized by case law interpreting the 1966 Act.⁶⁷ Those opposed to expanding the use of preventive detention argue that all persons charged with noncapital crimes have a right to pretrial release guaranteed by the eighth amend-

61. Judiciary Act of 1789, ch. 20, 1 Stat. 73, 91. See notes 28-31 *supra*, and accompanying text.

62. Foote, *supra* note 3, at 1181.

63. See generally J. McGINNISS, *THE SELLING OF THE PRESIDENT* 1968, at 11-20 (1969).

64. 27 CONG. Q. WEEKLY REP. 238, Feb. 7, 1969 (Pres. Nixon's Jan. 31, 1969 statement on crime control).

65. For a summary of the political maneuverings behind the proposal, see Borman, *The Selling of Preventive Detention* 1970, 65 NW. U. L. REV. 879, 881-82 (1971) [hereinafter cited as Borman].

66. The District of Columbia Court Reform and Criminal Procedure Act, Pub. L. No. 91-358, 84 Stat. 473 (codified in D. C. CODE ANN. §§ 23-1321 to -1332 (1973)).

67. Borman, *supra* note 65; Dershowitz, *Imprisonment by Judicial Hunch*, 57 A.B.A.J. 560 (1971); Ervin, *Forward: Preventive Detention—A Step Backward for Criminal Justice*, 6 HARV. C.R.-C.L. L. REV. 289 (1971); Hess, *Pretrial Detention and the 1970 District of Columbia Crime Act—The Next Step in Bail Reform*, 37 BROOKLYN L. REV. 277 (1971); Hruska, *Preventive Detention: The Constitution and Congress*, 3 CREIGHTON L. REV. 36 (1970); Miller, *Preventive Detention—A Guide to the Eradication of Individual Rights*, 16 HOW. L. J. 1 (1970); Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223 (1969); Portman, "To Detain or not to Detain?"—A Review of the Background, Current Proposals, and Debate on Preventive Detention, 10 SANTA CLARA L. REV. 224 (1970); Tribe, *supra* note 42.

ment.⁶⁸ It is also maintained that the concept of due process,⁶⁹ particularly as it encompasses the presumption of innocence,⁷⁰ imposes a similar guarantee. Finally they argue that the District of Columbia bail law violates both the equal protection and due process guarantees by withholding freedom to a broad class of persons even though statistical evidence indicates that only a small percentage of this class would in fact commit acts of violence if left at large.⁷¹

In response to those criticisms, defenders of the increased use of preventive detention argue that the eighth amendment, as interpreted by *Carlson*, does not grant a right to release;⁷² nor is due process violated where society's need for protection outweighs the accused's interest in freedom.⁷³ They also argue that the presumption of innocence is merely an evidentiary rule,⁷⁴ and that all release determinations involve uncertain predictions.⁷⁵

Partially because of the controversy surrounding preventive detention, District of Columbia prosecutors have used their expanded powers sparingly,⁷⁶ and there is still no reported case ruling on the constitutionality of the main features of the District's law.⁷⁷ As will

68. Borman, *supra* note 65, at 901-03; Miller, *supra* note 67, at 8-10; Portman, *supra* note 67, at 242-44; Tribe, *supra* note 42 at 396-406.

69. Borman, *supra* note 65, at 903-13; Miller, *supra* note 67, at 10-15; Portman, *supra* note 67, at 244-49; Tribe, *supra* note 42, at 381-96.

70. Miller, *supra* note 67, at 15-17; Portman, *supra* note 67, at 244-46; Tribe, *supra* note 42, at 403-05.

71. Borman, *supra* note 65, at 896-901; Dershowitz, *supra* note 67, at 562; Portman, *supra* note 67, at 249-55. See generally THOMAS, *supra* note 1, at 234-40.

72. Hess, *supra* note 67, at 312; Hruska, *supra* note 67, at 42-48; Mitchell, *supra* note 67, at 1232.

73. Hess, *supra* note 67, at 314-19; Hruska, *supra* note 67, at 48-57; Mitchell, *supra* note 67, at 1232.

74. Hruska, *supra* note 67, at 49-50; Mitchell, *supra* note 67, at 1231-32.

75. Hess, *supra* note 67, at 317-18; Mitchell, *supra* note 67, at 1239-42.

76. Report of the D.C. Bail Agency, for the Period Jan. 1, 1977-Dec. 31, 1977, at 7 (no publication date given); N. BASES & W. McDONALD, PREVENTIVE DETENTION IN THE DISTRICT OF COLUMBIA: THE FIRST TEN MONTHS 89 (1972).

77. See *Dash v. Mitchell*, 356 F. Supp. 1292 (D.D.C.), *aff'd mem. sub. nom.* Briscoe v. Kliendienst, 408 U.S. 808 (1972) (constitutional challenge dismissed due to mootness, lack of standing, and the issue not being ripe for review). See also *United States v. Thompson*, 452 F.2d 1333 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 998 (1972) (limiting the application of the D.C. bail law to defendants charged with violating local D.C. laws rather than any federal crime allegedly committed in the District of Columbia).

be evident from the discussion of Virginia release law to follow, the Virginia policy of preventive detention is basically the same as the District of Columbia's and therefore subject to the same constitutional challenges.

IV. REFORM IN VIRGINIA

Reform of pretrial release in Virginia evolved in three stages. The first two stages, the adoption by the Supreme Court of Virginia of rule 3A:29,⁷⁸ effective in 1972, and the enactment of legislation by the Virginia General Assembly⁷⁹ in 1973, borrowed features from the 1966 federal Act. The third stage, part of the comprehensive 1975 revision of all Virginia criminal procedure,⁸⁰ actually added nothing novel to the procedure already established in 1972 and 1973. It did, however, regroup these reforms into one chapter of the code.

A. 1972: Rule 3A:29

Rule 3A:29 was part of a package of criminal procedure rules for circuit and district courts drafted by a committee of the Virginia Bar Association and adopted by the Supreme Court of Virginia.⁸¹ The rules were generally patterned after the Federal Rules of Criminal Procedure,⁸² and were not intended to supersede existing statutory law as much as to clarify and supplement it.⁸³ Rule 3A:29 establishes a standard for release on bail. While "bail" is not defined by the rule, it is clear from its context that the drafters intended "bail" to carry the traditional common law meaning of release secured by surety.⁸⁴ The rule provides that any person in

78. VA. SUP. CT. R. 3A:29.

79. 1973 Va. Acts ch. 485.

80. 1975 Va. Acts ch. 495.

81. The court adopted the rules but not the accompanying comments supplied by the drafting committee. JOINT COMMITTEE ON CONTINUING LEGAL EDUCATION, VIRGINIA STATE BAR AND VIRGINIA BAR ASSOCIATION, *DEFENDING CRIMINAL CASES IN VIRGINIA*, at A-1 (P. Manson ed. 1975) [hereinafter cited as *DEFENDING CRIMINAL CASES IN VIRGINIA*].

82. FED. R. CRIM. P. 46 is the federal rule covering pretrial release. It was amended in 1972 to conform to the 1966 federal bail reform. FED. R. CRIM. P. 46, Advisory Committee Note.

83. VA. SUP. CT. R. 3A:1, Drafting Committee Comment, *reprinted in* *DEFENDING CRIMINAL CASES IN VIRGINIA*, *supra* note 81, at A-2.

84. Subsection (e) of the rule authorizes release other than release secured by bail, but

custody pending trial shall be admitted to bail unless there is probable cause that "(1) he will not appear for trial . . . or (2) his liberty will constitute an unreasonable danger to the public."⁸⁵

This standard, which does not distinguish between persons accused of capital crimes and those accused of noncapital crimes, imposes approximately the same test for release that the federal law sets forth as the test in capital cases.⁸⁶ By comparison to Virginia rule 3A:29, the federal law governing noncapital cases clearly favors release in two distinct respects. The federal courts may deny pretrial release in noncapital cases on the ground of preventing a future crime only when there is strong evidence that the accused's liberty threatens the safety of a potential witness or juror in the defendant's trial.⁸⁷ The drafters of the Virginia rule rejected the federal policy as inevitably encouraging *sub rosa* preventive detention in the form of setting bail at extremely high amounts.⁸⁸ Secondly, the 1966 Act only recently has been interpreted to allow the denial of release to prevent flight in a noncapital case.⁸⁹ In that case, the court took great pains to emphasize that the denial was in response to "extreme and unusual circumstances" indicating overwhelmingly that flight was all but certain.⁹⁰ Rule 3A:29, on the other hand, provides that release can be denied upon a probable cause showing that flight is likely which, on its face at least, imposes a lesser standard of proof.

When a determination has been made to release the accused, rule 3A:29 lists the factors to be considered in fashioning the terms of bail.⁹¹ Finally, the rule provides a right of appeal to persons de-

provides no test for determining when these other release forms are appropriate. VA. SUP. CT. R. 3A:29(e).

85. VA. SUP. CT. R. 3A:29(a). Virginia bail law prior to the adoption of rule 3A:29 was largely undeveloped. See generally 2B MICHIE'S JURIS. *Bail and Recognizance* § 8 (1970).

86. 18 U.S.C. § 3148 (1976).

87. See note 29 *supra* and accompanying text.

88. VA. SUP. CT. R. 3A:29, Drafting Committee Comment, reprinted in *DEFENDING CRIMINAL CASES IN VIRGINIA*, *supra* note 81, at A-43. See note 35, *supra*.

89. *United States v. Abrahams*, 575 F.2d 3 (1st Cir.), *cert. denied*, 439 U.S. 821 (1978).

90. 575 F.2d at 8. See note 31 *supra*.

91. "(1) the nature and circumstances of the offense, (2) the weight of the evidence, (3) the financial ability to pay bail, and (4) the character of the accused." VA. SUP. CT. R. 3A:29(b).

nied bail or burdened with excessive bail.⁹² Both of these features closely follow the language of the federal Act.⁹³

B. 1973: Legislation

The 1973 legislation created the first Virginia release laws expressly to favor the unsecured pretrial release of criminal defendants.⁹⁴ Of course, this concept was the very heart of the 1966 federal reform.⁹⁵ Like the federal provision, the 1973 legislation authorizes the judicial officer,⁹⁶ in noncapital cases, to consider releasing the accused either on his written promise to appear or upon an unsecured bond.⁹⁷ The legislation lists factors for the judicial officer to consider in making this determination.⁹⁸ If the judicial officer determines that such release would "not reasonably assure the appearance of the accused as required," then the legislation instructs the judicial officer to impose one or more conditions of release.⁹⁹ These conditions are the same financial and nonfinancial conditions appearing in the federal reform with the single exception that no ten percent bail deposit is authorized.¹⁰⁰

The 1973 legislation affords a person accused of a capital crime the same opportunities for release afforded a defendant in a non-capital case unless the judicial officer has reason to believe that no conditions of release would provide sufficient assurance against

92. VA. SUP. CT. R. 3A:29(e).

93. 18 U.S.C. §§ 3146(b), (d), 3147 (1976).

94. 1973 Va. Acts ch. 485. The legislation enacted new statutes, codified as VA. CODE ANN. §§ 19.2-122 to -130, and amended or repealed numerous preexisting statutes to conform to the new language. *Id.* See also Note, *Eighteenth Annual Survey of Developments in Virginia Law: 1972-1973*, 59 VA. L. REV. 1400, 1514-16 (1973).

95. 18 U.S.C. § 3146 (1976).

96. "Judicial officer," in the Virginia legislation, is the generic description for all persons authorized to hear requests for release just as it is in the federal law. VA. CODE ANN. § 19.2-119 (Repl. Vol. 1975).

97. 1973 Va. Acts ch. 485 (§ 19.1-109.2(a)) (current version at VA. CODE ANN. § 19.2-123(a) (Cum. Supp. 1979)). See note 7 *supra*.

98. *Id.* The factors were taken verbatim from the federal reform, 18 U.S.C. § 3146(b) (1976). See note 34 *supra*. The factors are different in only minor respects from the factors listed in VA. SUP. CT. R. 3A:29(b). See note 91 *supra*.

99. 1973 Va. Acts Ch. 485 (§ 19.1-109.2(a)) (current version at VA. CODE ANN. § 19.2-123(a) (Cum. Supp. 1979)).

100. See note 33 *supra* and accompanying text.

flight and danger to the community.¹⁰¹ Finally, a right of appeal is provided.¹⁰²

C. 1975: General Revision of Virginia Criminal Procedure

In 1975, the General Assembly enacted a general revision of all Virginia criminal procedure; however, the pretrial release reforms of 1972 and 1973 received only cosmetic changes. The 1975 revision simply reenacted and renumbered the 1973 statutes, and, in separate statutes, enacted language virtually identical to rule 3A:29.¹⁰³ It is perhaps confusing that section 19.2-120,¹⁰⁴ which repeats rule 3A:29's test for admission to bail, does not also mention the availability to other forms of release or the statutory preference given to personal recognizance and unsecured bond. However, these fundamental principles do appear in section 19.2-123¹⁰⁵ where the heart of the 1973 legislation is now located.¹⁰⁶ Neither section 19.2-120 nor section 19.2-123 expressly provides that the judicial officer should favor nonfinancial release conditions in those cases where personal recognizance or unsecured bond, alone, would be insufficient. As previously discussed, the 1966 federal Act, reflecting the Supreme Court's logic in *Griffin v. Illinois*, requires the judicial officer to choose in serial fashion from a list of release conditions, and nonfinancial conditions occupy the top of the list.¹⁰⁷ The lack of precision of Virginia law on this point is probably inconsequential because the general spirit of section 19.2-123 suggests that

101. 1973 Va. Acts ch. 485 (§ 19.1-109.5) (current version at VA. CODE ANN. § 19.2-126 (Repl. Vol. 1975)).

102. 1973 Va. Acts ch. 485 (§ 19.1-109.3) (current version at VA. CODE ANN. § 19.2-124 (Cum. Supp. 1979)).

103. Rule 3A:29 remains in effect; however where the language of the 1975 statutes diverge from the language of the rule, the statutes control. VA. CONST. art. VI § 5; VA. CODE ANN. § 8.01-3(D) (Repl. Vol. 1977).

104. VA. CODE ANN. § 19.2-120 (Cum. Supp. 1979). The factors to consider in fixing terms of bail, listed in Rule 3A:29, are repeated in VA. CODE ANN. § 19.2-121 (Cum. Supp. 1979).

105. VA. CODE ANN. § 19.2-123 (Cum. Supp. 1979).

106. The Virginia Code also contains numerous specific release provisions which are beyond the scope of this article. Among these are provisions for: the authorization of arresting officers to grant bail in certain cases, VA. CODE ANN. § 19.2-122 (Repl. Vol. 1975); release of a material witness, VA. CODE ANN. § 19.2-127 (Repl. Vol. 1975); the use of cash deposit in lieu of surety, VA. CODE ANN. § 19.2-138 (Cum. Supp. 1979); the execution of a recognizance, VA. CODE ANN. § 19.2-128, -135, -143 (Repl. Vol. 1975), *id.* §§ 19.2-135, -143 (Cum. Supp. 1979); release pending appeal, VA. CODE ANN. §§ 19.2-319, -322 (Cum. Supp. 1979).

107. 18 U.S.C. § 3146 (1976).

nonfinancial conditions generally should be favored, and that a judicial officer who imposes an onerous financial condition when a nonfinancial condition would suffice would be abusing his discretion. An interpretation to the contrary invites a *Griffin* challenge such as the one recently raised against the Florida pretrial release rule.¹⁰⁸

The only significant amendment to Virginia release statutes since the 1975 revision occurred in 1978. Section 19.2-123 was amended to grant the judicial officer the express authority to impose release conditions designed to assure "good behavior pending bail" as well as assure appearance at trial.¹⁰⁹ This change represents a departure from the language of the federal Act which was the model for section 19.2-123. However, because almost all release conditions can be interpreted as serving this double purpose, the 1978 amendment will likely have little effect except in extreme applications.¹¹⁰

V. FEDERAL PRACTICE UNDER THE 1966 ACT

It should be clear from the preceding sections how closely Virginia statutory release law is modeled on the federal reform. Next, we consider aspects of pretrial release law which federal authorities have addressed, but which Virginia authorities have not yet considered. Our focus will be the federal rules of court and case law interpreting the 1966 Act. The succeeding section assesses the merits of the federal approach in these areas and whether Virginia could profit by following the federal example.

A. *The Trial Level*

If the judicial officer is to tailor the pretrial release conditions to

108. See *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978), rehearing en banc vacat'g., 557 F.2d 1189 (5th Cir. 1977).

109. 1978 Va. Acts ch. 500. The amendment also added a provision authorizing the judicial officer to "issue a *capias* or order to show cause why the bond should not be revoked" if the released person violates any condition of release pursuant to § 19.2-123. *Id.* This portion of the amendment adds little to the authority already granted the judicial officer by § 19.2-135. VA. CODE ANN. § 19.2-135 (Cum. Supp. 1979). See also *Bisping v. Commonwealth*, 218 Va. 753, 240 S.E.2d 956 (1978).

110. See note 35 *supra* and the discussion of preventive detention at notes 61-77 *supra* and accompanying text.

fit the particular needs of each case—as the 1966 Act envisions—he must obtain adequate information about the defendant. Federal case law places the duty to investigate the facts on the defendant's attorney¹¹¹ and, to a lesser extent, on the prosecutor.¹¹² In the District of Columbia, the District of Columbia Bail Agency, a publicly funded agency modeled after the Manhattan Bail Project, conducts the investigation and reports its findings along with a recommendation to the judicial officer.¹¹³ However, participation by a separate agency does not relieve the defense attorney of the responsibility to offer the judicial officer a proposed set of release conditions and alternative conditions if the original proposal is rejected.¹¹⁴

111. *Banks v. United States*, 414 F.2d 1150, 1154 (D.C. Cir. 1969); Wald & Freed, *The Bail Reform Act of 1966: A Practitioner's Primer*, 52 A.B.A.J. 940, 942 (1966). Frequently, however, the initial release determination is made prior to the defendant retaining counsel or having counsel appointed by the court. FED. R. CRIM. P. 5 (Notes of Advisory Committee on 1972 Amendments to Rule). In that situation, the defense attorney, upon accepting the defendant's case, should investigate the facts prior to seeking reconsideration of the initial decision or review by a higher authority. 18 U.S.C. § 3146(d) & (e) (1976).

112. *Vauss v. United States*, 365 F.2d 956, 957 (D.C. Cir. 1966) ("Where 'the government knows or has the means of knowing . . . [it] should . . . assist the court in acquiring such information.'"), quoting with approval *Lake v. Cameron*, 364 F.2d 657, 661 (D.C. Cir. 1966) (ellipses and brackets by the court).

113. D.C. CODE §§ 23-1301 to -1332 (1973). The Bail Agency explains its procedures as follows:

The process begins with an interview of the arrestee. In the case of an arrestee charged with a misdemeanor, and otherwise eligible for release on a citation, the interview will probably be conducted over the telephone from a local police station. For those not eligible for this form of early release, Agency personnel conduct interviews either at the Central Cellblock (the overnight holding facility in the Police Department) or the Court Cell block. The interview is initiated with a "Miranda warning," explaining the arrestee's rights as well as the potential uses of the information, followed by a series of questions regarding community ties and pending or prior involvement with the criminal justice system. Following the interview an attempt to corroborate or verify the information is made through references provided by the arrestee. Calls are made, when appropriate, to probation or parole officers. A "criminal history" is compiled using police arrest records, computer inquiries, court and Bail Agency records.

* * * *

After the interview and verification process is completed, a recommendation is made.

DISTRICT OF COLUMBIA BAIL AGENCY, REPORT OF THE D.C. BAIL AGENCY FOR THE PERIOD JANUARY 1, 1977 - DECEMBER 31, 1977 at 3-5 (no publication date given) (footnotes omitted).

114. *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).

While federal courts frequently recite that release is favored,¹¹⁵ only one decision has been found which actually assigns the burden of proof to the prosecutor to show the defendant will likely violate proposed release conditions.¹¹⁶ Apparently, the courts see no need to concern themselves with such a formalistic point of procedure on an issue which involves the weighing of many factors and is collateral to the determination of guilt or innocence.¹¹⁷ Also the allocation of the burden of proof is less significant where factual accuracy is not disputed.¹¹⁸ The disputed details of the crime charged against the defendant are largely irrelevant to the release determination.¹¹⁹ More important are facts indicating the defendant's place of residence, his family and community ties, and his record for appearing in previous cases. The reported federal cases suggest that the accuracy of these facts is not regularly disputed. Instead, at issue is the weight to be accorded them in predicting the defendant's actions.¹²⁰

Hearsay and other evidence which would be inadmissible at the defendant's trial may be considered by the judicial officer¹²¹ and no doubt frequently is considered. The 1966 Act envisions that the defendant will cooperate with the judicial officer and the bail agency investigator in courts where such agencies operate. The de-

115. See, e.g., *White v. United States*, 412 F.2d 145, 147 (D.C. Cir. 1968). See also *Wood v. United States*, 391 F.2d 981, 983 (D.C. Cir. 1968).

116. *United States v. Edson*, 487 F.2d 370, 372 (1st Cir. 1973). *Edson* does not make clear whether the court is using the phrase "burden of proof" to mean the burden of producing the evidence or the burden of persuasion. See D. McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 336 (2d ed. 1972).

117. See generally, NATIONAL ASSOCIATION OF PRETRIAL SERVICES AGENCIES, PERFORMANCE STANDARDS AND GOALS FOR PRETRIAL RELEASE AND DIVERSION: RELEASE IV, B (1978) [hereinafter cited as NAPSA] (providing that the prosecutor should have the burden of proving by clear and convincing evidence any need for restrictive conditions of release); D.C. CODE § 23-1322(b)(2) (1973) (where defendant is denied release for reasons of preventive detention, the prosecutor has the burden to prove by clear and convincing evidence that the defendant meets the statutory requirements). While the question of burden of proof in pretrial release cases has not generated much interest from the courts, in post trial release requests there is clear authority. FED. R. CRIM. P. 46(c) and FED. R. APP. P. 9(c) place the burden on the defendant seeking release pending appeal to show that he will not flee or pose a danger.

118. See Note, *A Hidden Issue of Sentencing: Burdens of Proof for Disputed Allegations in Presentence Reports*, 66 GEO. L. J. 1515 (1978).

119. *United States v. Alston*, 420 F.2d 176, 179 (D.C. Cir. 1969).

120. See note 154 *infra*.

121. 18 U.S.C. § 3146(f) (1976).

fendant is the most convenient source of information and, on some subjects, the only source.¹²² To limit the likelihood of chilling the defendant's fifth amendment protection against self-incrimination, the judicial officer is required to inform the defendant of his right to seek pretrial release and the factors relevant to the release determination.¹²³ For the same reasons, the judicial officer, the prosecutor, and the bail agency investigator may not use the inquiry to determine release eligibility as a ruse for interrogating the defendant about the facts underlying the pending charge.¹²⁴ District of Columbia statutory law provides that any information obtained by the District of Columbia Bail Agency "shall not be admitted on the issue of guilt" at the defendant's trial.¹²⁵ It would follow that an incriminating statement made by the defendant in the portion of a pretrial hearing considering pretrial release should likewise be inadmissible on the issue of guilt or innocence,¹²⁶ although there is authority to the contrary.¹²⁷

The point of procedure that has received the most attention is the requirement, in certain situations, that the judicial officer set down in writing the reasons for his release determination. The federal Act requires that written reasons be given a defendant who, after twenty-four hours, is unable to meet the conditions of release and whose request to have the conditions amended has been denied.¹²⁸ Also, rule 9 of the Federal Rules of Appellate Procedure requires the district court to supply reasons for its actions in every

122. *E.g.*, *United States v. Cook*, 442 F.2d 723 (D.C. Cir. 1970) (remanding the case so that the defendant could be asked what amount of bail he could afford).

123. FED. R. CRIM. P. 5(c).

124. *See* McCarthy & Wahl, *The District of Columbia Bail Project: An Illustration of Experimentation and a Brief for Change*, 53 GEO. L. J. 675, 703 (1965). *Accord*, NAPSA, *supra* note 117, at III, D.

125. D.C. CODE § 23-1303(d) (1973).

126. *See* *Simmons v. United States*, 390 U.S. 377, 394 (1968) (defendant who testified in a pretrial hearing to establish standing to object to allegedly illegally seized evidence may not have the testimony used against him at trial on the issue of guilt or innocence); UNIFORM RULES OF CRIMINAL PROCEDURE 344(e); NAPSA, *supra* note 117, at VII, B, 3 (recommending incriminating statements made during release hearings be inadmissible).

127. *United States v. Miller*, 589 F.2d 1117, 1135 (1st Cir. 1978), *cert. denied*, 440 U.S. 958 (1979). The court rejected the defendant's attempt to suppress the statement, *inter alia*, because there was no showing that if the defendant had withheld the statement he would have been denied release. *Id.*

128. 18 U.S.C. § 3146(d) (1976).

release determination appealed to the federal court of appeals.¹²⁹ Written reasons are probably the most effective assurance that the judicial officer considers all of the release options available,¹³⁰ particularly in light of the expedited nature of the typical release determination.¹³¹ Also, written reasons assist the appellate court in properly focusing its review.¹³² These protective characteristics have undoubtedly reduced the pressure on federal judges to compile a long list of other required procedural safeguards. Consequently, the federal release hearing remains a flexible and informal proceeding.

Federal appellate courts interpreting rule 9 have held that where a district court denies release, its written reasons must reveal the legal justification for denial, the supporting evidence, and why no set of release conditions will reduce these risks to an acceptable level.¹³³ Where release is granted, and the defendant seeks to have the conditions of release amended, rule 9 requires the judicial officer to provide reasons why less onerous conditions of release were rejected.¹³⁴

The requirement for written reasons has been generally well received.¹³⁵ Identical or similar requirements have been incorporated into the release procedure of fourteen states¹³⁶ and included in sev-

129. FED. R. APP. P. 9(a).

130. See *Mecom v. United States*, 434 U.S. 1340, 1342 n.4 (1977) (Powell, Circuit Justice); *Weaver v. United States*, 405 F.2d 353, 354 (D.C. Cir. 1968).

131. Ervin, *supra* note 1, at 442-43. See generally 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 16.05 (1958).

132. *Mecom v. United States*, 434 U.S. 1340, 1342 n.4 (1977) (Powell, Circuit Justice); *Weaver v. United States*, 405 F.2d 353, 354 (D.C. Cir. 1968); FED. R. APP. P. 9, Notes of the Advisory Committee on Amendments to Rules (Subdivision (a)).

133. *Weaver v. United States*, 405 F.2d 353, 354 (D.C. Cir. 1968). *Weaver* concerned the denial of release pending appeal. See notes 29 and 31 *supra* and accompanying text (listing grounds for denial of pretrial release in noncapital cases). See also 18 U.S.C. § 3148 (Supp. 1976) (listing the grounds for denial of post trial release and denial of release in capital cases).

134. *United States v. Estes*, 458 F.2d 1076 (5th Cir. 1972); *United States v. Leathers*, 412 F.2d 169, 172 (D.C. Cir. 1969).

135. *E.g.*, *Mecom v. United States*, 434 U.S. 1340 (1977) (Powell, Circuit Justice).

136. *State v. Gary*, 247 S.E.2d 420 (W. Va. 1978) (trial court required to provide written reasons for its action whenever the prosecution opposes the defendant's right to bail or the amount); *In re Podesto*, 15 Cal. 3d 921, 938, 544 P.2d 1297, 1307, 127 Cal. Rptr. 97, 107 (1976) (trial court required to provide reasons whenever bail pending appeal is denied); *State v. Roessell*, 132 Vt. 634, 328 A.2d 118, 119 (1974) (hearing and reviewing judges re-

eral model codes.¹³⁷ There is even a line of cases holding written reasons to be such an effective procedural safeguard against arbitrariness that the fourteenth amendment requires judicial officers in state proceedings to submit their reasons whenever release is denied.¹³⁸ However, another line of cases, while conceding the value of the written reasons, holds that they are not required by the constitution so long as general fairness is observed.¹³⁹

B. *The Appellate Level*

All orders by the federal district court "refusing or imposing conditions of release" may be appealed to the court of appeals and "shall be determined promptly."¹⁴⁰ There is no necessity for formal briefs, and the appeals court is free to consider "such papers, affidavits and portions of the record as the parties shall present."¹⁴¹ Rule 17(d) and (e) of the Rules of Court for the United States Court of Appeals for the District of Columbia lists the types of factual material that the court normally finds helpful.¹⁴² The ap-

quired to record factual findings upon which decisions were based); TENN. R. APP. P. 8 (defendant has right to written reasons for any release determination appealed to the Supreme Court of Tennessee). Other states have provisions modeled after § 3146(d) requiring the judicial officer who made the initial release determination to submit written reasons if, upon reconsideration, he does not modify the conditions of release and the defendant remains detained. ALASKA STAT. § 12.30.020(f) (Cum. Supp. 1979); IOWA CODE ANN. § 811.2(3) (Repl. Vol. 1979); KY. R. CRIM. P. 4.40(2); MD. DIST. CT. R. 721(f); MICH. GEN. CT. R. 790.5; NEB. REV. STAT. § 29-901.03 (Repl. Vol. 1975); N.M. R. CRIM. P. DIST. CT. 22(e); S.D. CODIFIED LAWS ANN. § 23A-43-8 (Special Supp. 1978); WIS. STAT. ANN. § 969.08 (Cum. Supp. 1979); WYO. R. CRIM. P. 8(c)(4) (1979). *Accord*, D.C. CODE § 23-1321(d) (1973).

137. AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, Ch. 10, Pretrial Release 10-5.1(d) (2d ed. tentative draft 1978, approved by ABA House of Delegates, Feb. 12, 1979); NAPSA, *supra* note 117, at IV, D; NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS 4.5(3)(c) (1973).

138. *Finetti v. Harris*, 460 F. Supp. 1069 (S.D.N.Y. 1978); *Flowers v. Greco*, 445 F. Supp. 979 (S.D.N.Y.), *vacated on other grounds*, 582 F.2d 1271 (2d Cir. 1978); *Abbott v. Laurie*, 422 F. Supp. 976 (D.R.I. 1976); *United States ex rel. Abate v. Malcolm*, 397 F. Supp. 715 (E.D.N.Y.), *vacated as moot*, 522 F.2d 826 (2d Cir. 1975); *United States ex rel. Bad Heart Bull v. Parkinson*, 381 F. Supp. 985 (D.S.D.), *enforced in* 385 F. Supp. 1265 (D.S.D. 1974); *United States ex rel. Keating v. Bensinger*, 322 F. Supp. 784 (N. D. Ill. 1971).

139. *United States ex rel. Smith v. Twomey*, 486 F.2d 736, 739 (7th Cir. 1973), *cert. denied*, 416 U.S. 994 (1974); *United States ex rel. Walker v. Twomey*, 484 F.2d 874 (7th Cir. 1973); *Brown v. Wilmot*, 443 F. Supp. 118 (S.D.N.Y. 1977), *aff'd on other grounds*, 572 F.2d 404 (2d Cir. 1978); *Natal v. People of Puerto Rico*, 424 F. Supp. 1082 (D.P.R. 1975).

140. FED. R. APP. P. 9(a).

141. *Id.*

142. The D.C. rule suggests that the following facts, if deemed relevant by the defendant,

peals court may consider evidence not presented to the trial court.¹⁴³ Of course, if the factual accuracy of the new evidence is disputed, the appeals court may remand the case for further consideration below.¹⁴⁴ Most of the federal appellate court decisions concerning release are made without the benefit of oral argument.¹⁴⁵

Before the reforms of the mid-1960's and early 1970's, both federal and state appellate courts regularly gave great deference to the release determination made by the trial judge.¹⁴⁶ The 1966 Act altered this practice, as far as federal courts are concerned, by giving appellate judges a ready statutory reference for determining whether the trial judge has abused his discretion. The Act provides that the trial judge's determination will be upheld only if "supported by the proceedings below."¹⁴⁷ Notwithstanding some early indications that this standard of review would be no more strict than the former practice,¹⁴⁸ federal appellate judges now regularly assert an authority "to make an independent determination of all relevant factors"¹⁴⁹ deferring to the trial judge only "when deference is due."¹⁵⁰ Most clearly, deference is not due a trial judge's

be included in the pleadings filed with the court of appeals: (1) the charge against the defendant, (2) the history of the bail application in the lower court, (3) the defendant's date and place of birth, and a list of the defendant's places of residence for the last five years, (4) the defendant's marital and employment status, (5) the names of local relatives or other persons who are close to the defendant, (6) the defendant's criminal record and record for appearing for trial, (7) the defendant's probation or parole record, (8) the defendant's health, (9) the defendant's means of support and plans if released, (10) the defendant's financial ability to post bond, and (11) any other pertinent matters. D.C. CIR. R. 17(d) & (e).

143. See, e.g., *United States v. Bobrow*, 468 F.2d 124, 126, n.9 (D.C. Cir. 1972).

144. See note 160 *infra* and accompanying text.

145. See, e.g., D.C. CIR. R. 17(d); 5TH CIR. R. 10.2.10 & 10.3.

146. Foote, *supra* note 2, at 1130-31 and the cases cited therein.

147. 18 U.S.C. § 3147(b) (1976).

148. *Allen v. United States*, 386 F.2d 634 (D.C. Cir. 1967); *United States v. Blyther*, 295 F. Supp. 1088 (D.D.C.), *aff'd*, 407 F.2d 1279 (D.C. Cir.), *cert. denied*, 394 U.S. 953 (1969) (compare the comments of District Judge Gesell in 295 F. Supp. at 1090 with the comments of Senior Circuit Judge Fahy in 407 F.2d at 1280).

149. *United States v. Stanley*, 469 F.2d 576, 586 (D.C. Cir. 1972) (quoting *Hansford v. United States*, 353 F.2d 858, 860 (D.C. Cir. 1965)). Cf. *Truong Dinh Hung v. United States*, 439 U.S. 1326, 1328 (1978) (Brennan, Circuit Justice) (Supreme Court Justices, when sitting as circuit justices reviewing bail issues, also exercise independent judgment).

150. *United States v. Jackson*, 417 F.2d 1154, 1156 (D.C. Cir. 1969). *Accord*, *United States v. Stanley*, 469 F.2d 576, 587 (D.C. Cir. 1972); *Weaver v. United States*, 405 F.2d 353, 354 (D.C. Cir. 1968).

determination if it is not accompanied by a statement of reasons.¹⁵¹ Nor is deference due a trial judge's determination if the reasons indicate that no consideration was given to less onerous conditions¹⁵² or relevant facts such as the defendant's record for appearing for trial in previous cases.¹⁵³ Even where these requirements are met, the appellate court may find fault with the trial judge for improperly weighing the evidence before him.¹⁵⁴ The rebalancing technique quite properly allows an appellate court to correct a result which is grossly inconsistent with the spirit of the 1966 Act favoring release.¹⁵⁵ On the other hand, in close cases appellate judges often cannot agree about the propriety of rebalancing the evidence to overrule the decision of the trial judge.¹⁵⁶

151. See notes 133-34 *supra* and accompanying text.

152. *Id.*

153. *Wood v. United States*, 391 F.2d 981 (D.C. Cir. 1968).

154. *Truong Dinh Hung v. United States*, 439 U.S. 1326 (1978) (Brennan, Circuit Justice) (trial judge erroneously denied release pending appeal because he equated opportunities to flee with intent to flee); *United States v. Edson*, 487 F.2d 370 (1st Cir. 1973) (Following reversal of defendant's conviction, the defendant sought release pending a new trial. In setting release conditions, the trial court erred in not giving sufficient weight to the defendant's superior record as a prisoner and the likelihood that, if reconvicted, the defendant would receive a shorter sentence.); *United States v. Honeyman*, 470 F.2d 473 (9th Cir. 1972) (trial judge exaggerated the importance of the evidence of the defendant's guilt and disregarded the defendant's record for appearing at trial); *United States v. Cramer*, 451 F.2d 1198, 1200 (5th Cir. 1971) (trial judge set onerous release conditions to prevent defendant from associating with "fast company," rather than to assure appearance at trial); *United States v. Alston*, 420 F.2d 176 (D.C. Cir. 1969) (trial judge over-emphasized the evidence of guilt, the defendant's prior convictions and the likelihood of a long sentence); *United States v. Forrest*, 418 F.2d 1186 (D.C. Cir. 1969) (trial judge erroneously denied release pending appeal because he exaggerated the importance of the defendant's prior convictions and minimized the importance of the defendant's opportunity for employment); *Banks v. United States*, 414 F.2d 1150 (D.C. Cir. 1969) (trial judge erroneously denied release pending appeal by discounting the likely effectiveness of conditions designed to minimize danger to the community); *White v. United States*, 412 F.2d 145 (D.C. Cir. 1968) (trial judge erroneously denied pretrial release to defendant charged with capital offense because defendant's lack of prior criminal record, his strong community roots, and voluntary surrender to police were not given sufficient weight); *United States v. Harrison*, 405 F.2d 355 (D.C. Cir. 1968) (trial judge erroneously denied release pending appeal because he underestimated the importance of the defendant's record for appearance, his ties to the community, and conduct in prison). On rare occasions, appellate courts have rebalanced the evidence to deny release which had been granted by the trial court. *Chapman v. United States*, 408 F.2d 1276 (D.C. Cir. 1969); *Russell v. United States*, 402 F.2d 185 (D.C. Cir. 1968).

155. *E.g.*, *United States v. Edson*, 487 F.2d 370 (1st Cir. 1973); *United States v. Cramer*, 451 F.2d 1198 (5th Cir. 1971).

156. *United States v. Forrest*, 418 F.2d 1186, 1188, (D.C. Cir. 1969) (Robb, J., dissenting); *Banks v. United States*, 414 F.2d 1150, 1154 (D.C. Cir. 1969) (Leventhal, J., dissenting);

Once error has been shown, a federal appellate court has statutory authority to remand the case for further hearings before the trial judge or it may set the conditions for release.¹⁵⁷ Appellate courts frequently characterize this latter option as acting *de novo*.¹⁵⁸ The rule, announced in *United States v. Stanley*,¹⁵⁹ is that there is no need to remand where relevant facts are "clear enough to lead convincingly to but one conclusion."¹⁶⁰ Extreme cases, such as where the trial judge neglects to state any reasons for his release determination, are the most obvious candidates for remand.¹⁶¹ However, since *Weaver v. United States*,¹⁶² the more common situation is for the trial judge to submit at least some factual findings and conclusions of law. In such cases,¹⁶³ whether the appellate court should act *de novo* or remand for the trial judge's further consideration depends on the likelihood that either the trial judge, if given another chance, will uncover better information than that already in the record¹⁶⁴ or that his further analysis will be more

White v. United States, 412 F.2d 145, 147 (D.C. Cir. 1968) (Danaher, J., dissenting). See also *United States v. Wright*, 483 F.2d 1068 (4th Cir. 1973) (the two majority judges defer to the trial judge's decision while Judge Winter, in dissent, would rebalance to reach a different result).

157. 18 U.S.C. § 3147(b) (1976).

158. *E.g.*, *United States v. Stanley*, 469 F.2d 576, 588 (D.C. Cir. 1972); *United States v. Blyther*, 407 F.2d 1279, 1280 (D.C. Cir. 1969); *Russell v. United States*, 402 F.2d 185, 186 (D.C. Cir. 1968).

159. 469 F.2d 576 (D.C. Cir. 1972).

160. *Id.* at 585.

161. *United States v. Briggs*, 472 F.2d 1229 (5th Cir. 1973); *Weaver v. United States*, 405 F.2d 353 (D.C. Cir. 1968). *Cf.* *Mecom v. United States*, 434 U.S. 1340 (1977) (Powell, Circuit Justice). (Even though no written reasons were submitted, Circuit Justice Powell ruled on the merits because he obtained the lower court's reasoning from the government's pleadings.) The judicial officer's reasons may be stated orally and transcribed in the record. *United States v. Cramer*, 451 F.2d 1198 (5th Cir. 1971). *Cf.* *United States v. Fields*, 466 F.2d 119, 121 (2d Cir. 1972) (oral reasons were not sufficiently specific); *United States v. Manarite*, 430 F.2d 656, 657 (2d Cir. 1970) ("[W]e do not consider extensive colloquy without any definite statement in conclusion to be in accordance with the Rule.").

162. 405 F.2d 353 (D.C. Cir. 1968). See note 133 *supra* and accompanying text.

163. *United States v. Stanley*, 469 F.2d 576 (D.C. Cir. 1972); *United States v. Jackson*, 417 F.2d 1154 (D.C. Cir. 1969); *Banks v. United States*, 414 F.2d 1150 (D.C. Cir. 1969); *Chapman v. United States*, 408 F.2d 1276 (D.C. Cir. 1969).

164. Where the case has been remanded once before and the trial judge failed to correct his original error or otherwise comply with the appellate court's instruction, the appellate court will be more inclined to act *de novo* when considering the record appeal. *United States v. Alston*, 420 F.2d 176, 177-78 (D.C. Cir. 1969); *Banks v. United States*, 414 F.2d 1150, 1154 (D.C. Cir. 1969).

reliable than the appellate court's own. One school of thought is that the trial judge's analysis carries the most force when the trial judge has had an opportunity to observe the defendant's demeanor,¹⁶⁵ though this theory has been criticized.¹⁶⁶ Another factor to be considered is that remand can mean delay, sometimes extreme delay,¹⁶⁷ which in the context of a pretrial release determination is almost tantamount to denying all relief.¹⁶⁸

VI. RECOMMENDATIONS

Clearly two of the points of federal release procedure just summarized—placing the primary responsibility on the defense counsel to investigate the facts and to recommend conditions of release, and the relaxation of the rules of evidence—are suggested by common sense more than anything else, and have probably been the regular practice in Virginia courts even though Virginia law makes no explicit provisions containing them. On the other hand, no federal court has definitively addressed the controversial question of whether to admit into evidence an incriminating statement made by the defendant while seeking pretrial release. The authorities who have considered this issue offer conflicting solutions. The issue will undoubtedly receive more attention in the future. In order to obtain the benefits of the 1966 Act, the defendant, either directly or through other persons, must supply considerable personal information. Even when the judicial officer and other court personnel do not purposely seek facts surrounding the pending charge, questions seemingly irrelevant to the charge may sometimes produce relevant answers. As far as appellate procedure is concerned, the check list of information to include on appeal, provided in the rules for the United States Court of Appeals for the D.C. Circuit, is

165. *United States v. Stanley*, 469 F.2d 576, 587 (D.C. Cir. 1972).

166. *Id.* at 590 (Bazelon, C.J., dissenting).

167. The defendant in *Banks v. United States*, 414 F.2d 1150 (D.C. Cir. 1969) appealed the trial court's denial of a motion for release pending appeal and the appellate court remanded the case with instructions. The trial court again denied release and the defendant appealed a second time. The appellate court acted *de novo* and set conditions of release; however, five months elapsed between the remand order and the eventual setting of release conditions. *United States v. Stanley*, 469 F.2d 576, 590 n.7 (Bazelon, C.J., dissenting).

168. Judge Robinson, writing the majority opinion in *Stanley*, suggests that appellate courts can minimize the opportunity for delay by placing time limitations on remand orders. 469 F.2d at 588 n.65.

another example of a common sense approach that could easily serve as a model for seeking review from the Supreme Court of Virginia.

The most significant and innovative point of procedure, described in the preceding section, is the requirement that the trial judge submit written reasons supporting a release determination whenever the determination is appealed to the court of appeals. In return for the modest amount of time and attention required for the trial judge to put his reasons to paper, the defendant is provided a written indication of whether his rights are being observed. The trial judge's statements serve as the focal point for identifying the evidence he deemed to be relevant and worthy of belief. More importantly, the federal appellate courts insist that the reasons also reveal why less onerous conditions of release were rejected. In other requests for appellate review, this sort of protection is afforded by the written record. The appeal of a pretrial release determination, however, comes early in the proceeding. The written record, if it exists at all, is likely to be short and cryptic,¹⁶⁹ and therefore of little value in resolving the allegations and counter-allegations contained in the pleadings.¹⁷⁰

The authority to elicit explanations why less onerous conditions were rejected has been the federal appellate court's primary resource for spurring lower courts to put into practice the reform measures of the 1966 Act.¹⁷¹ Since 1973, Virginia statutory law has clearly favored two of the Act's reform measures—release on personal recognizance and release pursuant to nonfinancial conditions. But there are no reported decisions by the Supreme Court of Virginia encouraging their use.¹⁷² Even assuming that the Virginia

169. See *State v. Roessell*, 132 Vt. 634, 635, 328 A.2d 118, 119 (1974).

170. "Without the settling effect of a reasoned treatment of the relevant information by the judge, we are apt to confront 'a welter of assertion and counter-assertion [by the parties] . . . from which we have no adequate means of emerging.'" *United States v. Stanley*, 469 F.2d 576, 583 (D.C. Cir. 1972), quoting *United States v. Hansel*, 109 F.2d 613, 614 (2d Cir. 1940) (ellipsis and brackets by the court).

171. *E.g.*, *Weaver v. United States*, 405 F.2d 353 (D.C. Cir. 1968).

172. Shortly after the 1973 legislation enacting these reform measures became effective, a newspaper survey of Northern Virginia counties found that judges continued to place traditional financial conditions on release in most cases. *Washington Post*, Aug. 30, 1973, § B, at 1, col. 5.

court's unreported decisions¹⁷³ require trial judges to consider these forms of release, it cannot be doubted that they would receive fuller consideration if Virginia trial judges, in certain cases, were required to support their determinations with reasons.

I propose that either the Supreme Court of Virginia, by amendment to rule 3A:29, or the General Assembly, by amendment to section 19.2-124,¹⁷⁴ require circuit judges to supply written reasons supporting the release determination whenever the issue of release is appealed to the state supreme court or to one of its justices.¹⁷⁵ This change would in no way make the Virginia test for release eligibility any less restrictive. It would simply provide the state's highest court with a tried and tested tool for revealing whether circuit judges are properly applying the test. The responsibility of the Supreme Court of Virginia to give full attention to these appeals is greater than that of comparable courts in other states where intermediate appellate courts handle much of the case load. Nor should it be forgotten that a growing line of cases holds that the Constitution requires state courts to submit written reasons whenever release is denied.¹⁷⁶

By limiting the written reasons requirement to determinations that are being appealed, there would be no increased burden on circuit court judges in the majority of cases.¹⁷⁷ The Supreme Court

173. See note 12 *supra*.

174. VA. CODE ANN. § 19.2-124 (Cum. Supp. 1979), setting forth the defendant's right to appeal his release determination to successively higher judges "including the Supreme Court of Virginia or any justice thereof."

175. The initial release determination is usually made by a magistrate or a district judge, and comes before the circuit court on interlocutory appeal. VA. SUP. CT. R. 3A:5, :29(c). The circuit court also has jurisdiction over release matters in all criminal cases coming before it for trial. VA. CODE ANN. § 19.2-130 (Cum. Supp. 1979); VA. CODE ANN. § 19.2-133 (Repl. Vol. 1975). Because the circuit court has ready access to the same information about the defendant that the magistrate and or the district judge relied on, the circuit court's need for written reasons is less than that of the Supreme Court of Virginia.

176. See note 138 *supra*.

177. As a less drastic alternative to the proposal contained in the text, the law could be changed to require written reasons only when release is actually denied and not when the defendant complains that his conditions of release are onerous. This alternative proposal would benefit those defendants receiving the trial judge's most severe sanction. However, the proposal in the text is preferable because a defendant who is denied release and a defendant who is granted release but unable to meet the conditions of release both suffer the same prejudice.

of Virginia has traditionally given trial judges great discretion in release matters.¹⁷⁸ This policy could be continued in a slightly modified form. The justices could use the written reasons to hold the trial judge strictly accountable for considering all relevant evidence and available conditions of release, but defer to the trial judge's evaluation of the risks involved in close cases.¹⁷⁹ As a collateral benefit, the Supreme Court may find, as the federal appellate courts have, that having the issues laid out in pleadings by the defendant and the prosecutor, supplemented by the trial judge's reasons, normally renders oral presentation unnecessary. Thereby, another potential source of delay would be eliminated.

VII. CONCLUSION

Regrettably, all release determinations are attempts to predict the future. Consequently, an element of risk is unavoidable.¹⁸⁰ The bail reform movement has demonstrated that personal recognition, nonfinancial conditions, and ten percent deposit plans are reliable techniques for reducing this risk to an acceptable level. The Supreme Court of Virginia and the General Assembly have already decided to pattern Virginia release law on the 1966 federal reform. This forward-looking decision brought Virginia law in general conformity with a reform act that still enjoys wide approval.

The federal reform act requires judges to consider numerous factors about the defendant and numerous release options. The principal procedural safeguard assuring that the trial judge properly follows this intricate process is the requirement that he submit written reasons supporting all release determinations appealed to the appellate court. The same procedural safeguard should be available to Virginia defendants.

178. See *Jordan v. Commonwealth*, 207 Va. 591, 601, 151 S.E.2d 390, 397 (1966) (upholding the setting of bail pending appeal at \$10,000 as within the trial judge's discretion).

179. The federal appellate courts have not been consistent in their handling of close cases. See note 156 *supra*.

180. *Ward v. United States*, 76 S. Ct. 1063, 1066 (1956) (Frankfurter, Circuit Justice); *United States v. Alston*, 420 F.2d 176, 178 (D.C. Cir. 1969).

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