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CONSTITUTIONAL BAIL PROVISIONS IN THE SEVERAL STATES

I. INTRODUCTION

A constitutional amendment proposal relating to bail is included in Governor Dreyfus' call for a 1980 June Special Session of the Wisconsin Legislature. The Legislative Reference Bureau Wisconsin Brief on bail, issued in February 1980, is revised to reflect the current status of the topic.

The "Declaration of Rights" of the Wisconsin Constitution prohibits excessive bail (Art. I, Sec. 6) and provides that all persons, prior to their conviction, shall be permitted bail with sufficient sureties, except for those persons charged with capital offenses when the proof is evident or the presumption is great (Sec. 8). In the 1865 case of *In re Perry*, 19 W 711, the Wisconsin Supreme Court ruled that since capital punishment had been abolished in this state, persons charged with murder are in all cases bailable.

This constitutional provision, which appears to prevent a judge from refusing bail or from holding a person in preventive detention, has recently become a topic of increasing concern. The question has been raised: Should the Wisconsin Constitution be amended to allow the Legislature to determine specific crimes for which judges may deny bail? Furthermore, should prior convictions offset the granting of bail? Four proposed constitutional amendments have been introduced in the 1979 Legislature to date to limit the use of bail, including two in the January 1980 Special Session at the request of Governor Dreyfus. All four constitutional amendments failed adoption. One of the four proposals represented the efforts of the Legislative Council's Special Committee on Constitutional Bail Revision that had been created in January 1980. Governor Dreyfus' proposed constitutional amendment to be offered in the 1980 June Special Session of the Wisconsin Legislature will be the fifth such proposal. The judiciary has also been involved; the Judicial Conference created a bail study committee in the summer of 1979 to examine the problem of bail for defendants charged with violent crimes. A final report is expected in the fall of 1980.

Since the Wisconsin Legislature, in the January 1980 extraordinary session on crime, did enact legislation to deal with certain *statutory* aspects of the bail problem, this brief is concerned primarily with the *constitutional* problem. It lists the constitutional provisions of those states that authorize the refusal of bail for certain crimes other than capital offenses and surveys current legislation, including the five constitutional amendment proposals that have been or will be introduced in the Wisconsin Legislature relative to bail reform. Governor Dreyfus' June 1980 Special Session constitutional proposal is one of the five.

It should, perhaps, also be noted that Wisconsin's constitutional provisions on bail are included in the "Declaration of Rights", just as the U.S. constitutional provision is part of the "Bill of Rights". The Eighth Amendment of the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted".

II. PROVISIONS IN OTHER STATES

A survey of the 50 state constitutions indicates that ³¹~~44~~ states have constitutional provisions similar to those of Wisconsin whereby bail may be refused, prior to conviction, only in cases where capital offenses have been committed and the proof is evident or presumption great. Most states also have an additional provision prohibiting excessive bail.

The remaining 5 states (Arizona, Michigan, Nebraska, Texas and Utah) have recently amended their state constitutions to deny or to authorize the denial of bail for crimes other than "capital offenses". Included among the various additional constitutionally based offenses or reasons for denying bail to the accused persons are murder, treason, sexual assault, armed robbery, kidnapping, commission of a felony or a violent felony while on probation, parole or bail, or two prior felony convictions.

ARIZONA

Article II, Section 22 of the Arizona Constitution:

"All persons charged with crime shall be bailable by sufficient sureties, except for:

1. Capital offenses when the proof is evident or the presumption great.
2. Felony offenses, committed when the person charged is already admitted to bail on a separate felony charge and where the proof is evident or the presumption great as to the present charge."

MICHIGAN

Article I, Section 15 of the Michigan Constitution:

"No person shall be subject for the same offense to be twice put in jeopardy. All persons shall, before conviction, be bailable by sufficient sureties, except that bail may be denied for the following persons when the proof is evident or the presumption great:

(a) A person who, within the 15 years immediately preceding a motion for bail pending the disposition of an indictment for a violent felony or of an arraignment on a warrant charging a violent felony, has been convicted of 2 or more violent felonies under the laws of this state or under substantially similar laws of the United States or another state or a combination thereof, only if the prior felony convictions arose out of at least 2 separate incidents, events, or transactions.

(b) A person who is indicted for, or arraigned on a warrant charging, murder or treason.

(c) A person who is indicted for, or arraigned on a warrant charging, criminal sexual conduct in the first degree, armed robbery, or kidnapping with intent to extort money or other valuable thing thereby, unless the court finds by clear and convincing evidence that the defendant is not likely to flee or present a danger to any other person.

(d) A person who is indicted for, or arraigned on a warrant charging, a violent felony which is alleged to have been committed while the person was on bail, pending the disposition of a prior violent felony charge or while the person was on probation or parole as a result of a prior conviction for a violent felony.

If a person is denied admission to bail under this section, the trial of the person shall be commenced not more than 90 days after the date on which admission to bail is denied. If the trial is not commenced within 90 days after the date on which admission to bail is denied and the delay is not attributable to the defense, the court shall immediately schedule a bail hearing and shall set the amount of bail for the person.

As used in this section, "violent felony" means a felony, an element of which involves a violent act or threat of a violent act against any other person."

NEBRASKA

The State of Nebraska recently amended its constitution to provide that sexual offenses shall be nonbailable. Article I, Section 9 of the Nebraska Constitution:

"All persons shall be bailable by sufficient sureties, except for treason, sexual offenses involving penetration by force or against the will of the victim, and murder, where the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

TEXAS

The Texas Constitution permits denial of bail to a person charged with a felony less than capital who has been twice convicted of a felony. Article I, Sections 11 and 11-a of the Texas Constitution:

"Sec. 11 Bail. — All prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident; but this provision shall not be so construed as to prevent bail after indictment found upon examination of the evidence, in such manner as may be prescribed by law.

Section 11-a. Any person accused of a felony less than capital in this State, who has been theretofore twice convicted of a felony, the second conviction being subsequent to the first, both in point of time of commission of the offense and conviction therefor may, after hearing, and upon evidence substantially showing the guilt of the accused, be denied bail pending trial, by any judge of a court of record or magistrate in this State; provided, however, that if the accused is not accorded a trial upon the accusation within sixty (60) days from the time of his incarceration upon such charge, the order denying bail shall be automatically set aside, unless a continuance is obtained upon the motion or request of the accused; provided, further, that the right of appeal to the Court of Criminal Appeals of this State is expressly accorded the accused for a review of any judgment or order made hereunder."

UTAH

Utah's Constitution was recently amended to add to the prohibition of bail for capital offenses, persons accused of commission of a felony while on probation or parole or while free on bail awaiting trial on previous felony charge. Article I, Section 8 of the Utah Constitution:

"All prisoners shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption strong or where a person is accused of the commission of a felony while on probation or parole, or while free on bail awaiting trial on a previous felony charge, and where the proof is evident or the presumption strong."

III. BAIL REFORM ACTIVITY IN WISCONSIN

The Wisconsin Legislature, during its recent extraordinary session (January 22-25, 1980) enacted legislation revising procedures for bail and bail revocation, including repeal of the 10% rule (Chapter 112, Laws of 1979).

The 10% rule was the law which gave discretionary authority to the judge to allow a defendant to go free on payment of a sum not to exceed 10% cash of the total bail. For example, if a judge set bail at \$10,000, the defendant was permitted to deposit \$1,000 and be released. The 10% rule first appeared in Wisconsin law as part of the 1969 bail reform (Chap. 255, Laws of 1969). Until then, defendants had posted a bail bond for the full amount, but this bond could be purchased from a bondsman for 10% of the face value.

In addition to the repeal of the 10% rule, Chapter 112 also provided a procedure for the revocation of bail in a situation where the defendant is released on bail for the commission of a serious crime and, while on bail, commits a second serious crime. Although the court may hold the defendant in custody pending a hearing pursuant to statute Section 969.08 (5) (b) 1, the hearing must be commenced within 7 days from the date the defendant is taken into custody. The defendant may not be held without bail for more than 7 days unless a hearing is held and proper findings are established. Furthermore, if bail is revoked for the commission of a serious crime as provided for in statute Section 969.08 (5) (b) 3, the defendant may demand and shall be entitled to be brought to trial on the initial charge within 60 days after the date on which he appeared before the court.

WISCONSIN COUNCIL ON CRIMINAL JUSTICE'S BAIL REPORT

A bail reform report was recently issued by the Wisconsin Council on Criminal Justice making several recommendations. Although the report advocated a tougher bail law and a stepped-up timetable for bringing defendants to trial, the report recommended that Wisconsin not pursue a preventive detention law at this time. The following recommendations concluded the December 21, 1979, report of the council:

1. *"Wisconsin should not pursue a preventive detention law at this time.* Existing research has not provided the information required to establish fair criteria for a broad population to predict who is likely to commit new crimes. It is currently far more likely that providing the court with good information on a case-by-case basis is the best way to make the bail decision.

If reliable, predictive information ever does become available, the legislature will need to determine what level of accuracy will be required. For example, if it could be accurately determined that 30% (or 50% or 80%) of a particular group of offenders would definitely commit a new crime, would that be sufficient justification to detain the whole group?

2. *Pre-trial defendants charged with a felony or serious misdemeanor who commit new crimes should forfeit their rights to bail.* This can be accomplished by amending the present bail statute to include a presumption that refraining from criminal activity is a condition of bail and that bail may be revoked if the court has a reasonable belief that the defendant has committed a new felony or serious misdemeanor.

3. *Wisconsin should strengthen its Speedy Trial Law.* The most striking finding in the research on pre-trial crime is not its extent nor its nature. It is the dramatic increase in risk to the public as time between release and trial increases. Current law guarantees a defendant's right to have a speedy trial if it is requested by any party in writing. The current law should be amended under the premise that it is also in the public's interest to have speedy justice. The law should require that the trial of a defendant charged with a felony shall commence within 60 days of arraignment. Continuances may only be granted by the court for cause, and no continuance shall be for a period in excess of 30 days. If a delay is initiated by the defendant the case shall not be dismissed under 971.10 (4).

A Speedy Trial law should go into effect one year after passage to allow courts time to develop new scheduling procedures where necessary, and may require allocating new resources to court districts on a temporary basis, to allow them to reduce current case backlogs.

A criticism of strengthening speedy trial provisions is that there is no sanction that can be applied for nonperformance. This should not prevent initial enactment of the law. There should be a presumption that courts will comply with the law. However, sanctions can be developed to deal with noncompliance. Multnomah County, Oregon has successfully implemented a system which commences trial within 45 days. That system depends on performance by all parties and includes sanctions which can be, and are, applied. Specific sanctions to be applied in Wisconsin need not be developed in haste, but should be determined after close study of delays that are not eliminated through voluntary compliance."

Note! Pursuant to Section 1122m of Chapter 34, Laws of 1979 (printed below), statute Section 971.10 (3) was repealed and recreated to limit substantially the granting of continuances in criminal cases.

"971.10 (3) (a) A court may grant a continuance in a case, upon its own motion or the motion of any party, if the ends of justice served by taking action outweigh the best interest of the public and the defendant in a speedy trial. A continuance shall not be granted under this paragraph unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of the continuance outweigh the best interests of the public and the defendant in a speedy trial.

(b) The factors, among others, which the court shall consider in determining whether to grant a continuance under par. (a) are:

1. Whether the failure to grant the continuance in the proceeding would be likely to make a continuation of the proceeding impossible or result in a miscarriage of justice.
2. Whether the case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that it is unreasonable to expect adequate preparation within the periods of time established by this section.

(c) No continuance under par. (a) may be granted because of general congestion of the court's calendar or the lack of diligent preparation or the failure to obtain available witnesses on the part of the state."

LEGISLATIVE COUNCIL'S SPECIAL COMMITTEE ON CONSTITUTIONAL BAIL REVISION

On January 27, 1980, the Legislative Council created the Special Committee on Constitutional Bail Revision to consider alternative constitutional amendment proposals relative to bail reform. During the time that the committee met and held hearings, Legislative Council staff prepared several draft proposals for discussion by committee members. The following excerpts, concerning committee members' viewpoints were taken from Legislative Council Research Report No. 32, "Legislation Relating to Revising the Constitutional Right to Bail", March 3, 1980:

"During the course of Committee discussion of these various proposals, Committee members expressed numerous viewpoints on the need for and the specific language of a revision of art. I, S. 8. There was general agreement among Committee members, although not unanimous, that the current right-to-bail provision should be revised so that judges would not have to make use of the current sub rosa, high-bail system of pre-trial detention. Some members favored a revision of the right-to-bail provision that would be self-executing; that is, would directly authorize courts to deny pre-trial release for certain specified offenses or offenders. Other members argued for a constitutional revision that would not be self-executing; that is, would require the enactment of laws to implement the constitutional authority to deny pre-trial release.

"A majority of the Committee favored a provision that was not self-executing. After this decision was made, the Committee focused on whether the proposed revision should contain specific standards and limitations regarding the persons who could be denied release, the burden of proof necessary to deny release and time limitations on the length of the pre-trial detention. Other members argued that only minimal standards and limitations should be set forth in the Constitution and that the Legislature by law should impose the specific criteria to be applied by courts in denying pre-trial release. The latter position prevailed and the draft of the Joint Resolution recommended to the Legislative Council for introduction (WLCS: 481/2) reflected that position."

The Legislative Council made several changes in the special committee's proposal including limiting the authority of the courts to deny pretrial release only to those persons accused of crimes involving serious physical harm or threat of physical harm and requiring that before a pretrial release may be denied, the court must make its findings based on clear and convincing evidence presented at a hearing. The Legislative Council adopted the joint resolution, as revised, which was introduced in the Legislature as 1979 Assembly Joint Resolution 125.

1979 WISCONSIN CONSTITUTIONAL PROPOSALS

Four Constitutional proposals were introduced in the 1979 Wisconsin Legislature to amend Article I, Section 8 of the Wisconsin Constitution on bail reform, but failed to pass. The fifth proposal is scheduled for introduction in the 1980 June Special Session called by Governor Dreyfus. The failed proposals were 1979 Assembly Joint Resolutions 100 and 125, and 1980 January Special Session Senate Joint Resolution 1 and Assembly Joint Resolution 1. All were first consideration proposals. AJR-100 would have removed the right to bail for certain sexual assault and murder charges; AJR-125 would have required circuit courts to deny release for a limited period of time to persons charged with first degree murder, first degree sexual assault or a felony involving great bodily harm; 1980 January Special Session SJR-1 and AJR-1 (identical proposals) would have authorized statutory refusal of bail for exceptional felonies.

1980 June Special Session SJR-1 and AJR-2, would authorize the circuit courts, via legislative enactment, to deny release for a limited period of time for a person accused of a crime involving serious bodily harm.

1979 Assembly Joint Resolution 100

1979 Assembly Joint Resolution 100, introduced by Representatives Hauke, Barczak, Behnke and Andrea, removes the right to bail if the charge is a sexual assault punishable by a maximum prison term of 20 years (presently corresponding to first degree sexual assault) or a murder punishable by life imprisonment (presently first degree murder) and if the proof is evident or the presumption is great. These would be the only circumstances in Wisconsin for which a person would not be bailable by sufficient sureties since the constitutional restriction for capital offenses is inapplicable under the current statutes.

1979 Assembly Joint Resolution 125

1979 Assembly Joint Resolution 125, was introduced by the Legislative Council and represented the efforts of its Special Committee on Constitutional Bail Revision. The explanation for the original bill's content is found in the following Legislative Council note printed as part of the bill in lieu of an analysis by the Legislative Reference Bureau.

"PREFATORY NOTE: This constitutional amendment, proposed to the 1979 legislature on first consideration, revises an accused person's right to bail. Presently, prior to conviction, all persons accused of a crime have a right to bail upon sufficient sureties unless the person is held for a capital offense and the proof is evident or the presumption is great. As there is no capital punishment in this state, all persons have this right to bail prior to conviction.

Under this proposal, the legislature would be able to enact specific, limited and reasonable laws authorizing courts to deny release for a limited period of time to a person accused of a crime involving serious physical harm or a crime involving the threat of serious physical harm to another. The laws which are enacted must require a finding by a court, based on clear and convincing evidence presented at a hearing, that the accused person committed the alleged crime and that available conditions of release would not adequately protect members of the community from serious harm or prevent intimidation of witnesses. This limited authority to deny release reflects the presumption established by this proposal that all persons, before conviction, should be released under reasonable conditions designed to assure their appearance in court, protect members of the community from serious harm or prevent intimidation of witnesses.

The proposal would also recognize the authority of the legislature to authorize by law the revocation of release for a violation of a condition of release and the principle that monetary conditions of release may be imposed solely to assure appearance in court."

Engrossed 1979 Assembly Joint Resolution 125

Since the Assembly adopted AJR-125 in the form of a substitute amendment, as amended by other simple amendments, an engrossed bill was prepared under the direction of the Assembly Chief Clerk. The following analysis by the Legislative Reference Bureau explains the actual engrossment as well as the content of the engrossed proposal. (Although the proposal was adopted in the Assembly, it received no action in the Senate).

"Engrossment: The text of Engrossed 1979 Assembly Joint Resolution 125 consists of the text of Assembly Substitute Amendment 2, as affected by the assembly's adoption of amendments 1 and 2 thereto.

In adopting the 2 amendments to the substitute, the assembly:

(1) Divided Assembly Amendment 1 into 3 "items" numbered as shown in the printed amendment. The assembly refused to adopt Item 1. Item 2 of the amendment was

adopted as affected by Assembly Amendment 1 to the amendment (changing the first word in the item from "A" to "Any"). Item 3 was adopted as shown in the printed amendment.

(2) Adopted Assembly Amendments 1 to 6 and 2 to 6, and then adopted Assembly Amendment 6 as so modified.

Contents: This constitutional amendment, proposed to the 1979 legislature on first consideration, revises an accused person's right to bail. Presently, prior to conviction, all persons accused of a crime have a right to bail upon sufficient sureties unless the person is held for a capital offense and the proof is evident or the presumption is great. As there is no capital punishment in this state, all persons have this right to bail prior to conviction.

Under this proposal, circuit courts are required to deny release for a limited period of time to persons charged with 1st degree murder, 1st degree sexual assault or a felony involving great bodily harm or the threat of great bodily harm. Any circuit court is required to continue to deny release for an additional 60 days upon a finding by a court, by clear and convincing evidence, that the accused committed the crime and a finding by the court that available release conditions are not adequate to protect the public from serious bodily harm or prevent witness intimidation.

The proposal also requires that conditions of release be designed to assure a person's appearance at court, protect the community or prevent witness intimidation. A court may impose monetary conditions of release only to ensure appearance at court. A court may revoke release if a person violates a condition of release."

1980 January Special Session Senate Joint Resolution 1

January 1980 Special Session Senate Joint Resolution 1, introduced by the Committee on Senate Organization at the request of Governor Dreyfus, would have revised an accused person's right to bail.

Under this proposal, the Legislature would be able to authorize, by statute, circuit courts to deny release for a limited period to accused persons in exceptional felony cases. A court will have to find that the proof is evident or the presumption is great and that denial is necessary either to protect the community or preserve the integrity of the judicial process.

1980 January Special Session Assembly Joint Resolution 1

January 1980 Special Session Assembly Joint Resolution 1, introduced by Representative Prosser at the request of Governor Dreyfus, is identical to SJR-1.

1980 June Special Session Senate Joint Resolution 1 and Assembly Joint Resolution 2

1980 June Special Session Senate Joint Resolution 1 was introduced by the Committee on Senate Organization at the request of Governor Dreyfus, and Assembly Joint Resolution 2 was introduced by the Committee on Assembly Organization. The two proposals are identical. The highlights of these constitutional bail proposals are found in the following analysis prepared by the Legislative Reference Bureau and printed as part of the resolution.

"This constitutional amendment, proposed to the 1979 legislature on first consideration, revises an accused person's right to bail. Presently, prior to conviction, all persons accused of a crime have a right to bail upon sufficient sureties unless the person is held for a capital offense and the proof is evident or the presumption is great. As there is no capital punishment in this state, all persons have this right to bail prior to conviction.

Under this proposal, an accused person is eligible for release under reasonable conditions designed to assure appearance in court, protect the members of the community or prevent witness intimidation. However, the legislature is authorized to make an exception and enact specific, limited and reasonable legislation to deny release for a limited period of time to a person accused of a crime involving serious bodily harm to another or the threat of that harm. The legislation must require a finding by a court, based on clear and convincing evidence presented at a hearing, that the accused person committed the alleged crime and a finding that available conditions of release would not adequately protect members of the community from serious harm or prevent intimidation of witnesses.

The proposal also requires that a court may impose monetary conditions of release only to ensure appearance at court. A court may revoke release if a person violates a condition of release."