STATE OF DELAWARE
THE COURTS OF THE JUSTICES OF THE PEACE
820 NORTH FRENCH STREET, 11TH FLOOR
WILMINGTON, DELAWARE 19801

NORMAN A. BARRON
CHIEF MAGISTRATE

TELEPHONE: (302) 571-2485

LEGAL MEMORANDUM 81-79

TO: ALL JUSTICES OF THE PEACE
STATE OF DELAWARE

FROM: NORMAN A. BARRON
CHIEF MAGISTRATE

DATE: DECEMBER 10, 1981

RE: BAIL CONSIDERATIONS

Delaware's bail statutes are found in Chapter 21 of Title 11 of the Delaware Code, as amended. A periodic review of this chapter is deemed appropriate since the bail-setting function is an important duty performed by a Justice of the Peace. When bail is set at too low an amount, the risk to the community may be high. When bail is set at too high an amount, a defendant's pretrial release may be jeopardized. There is a need to perform a delicate balance with regard to the setting of bail such that both the rights of the defendant and the community are preserved.

We may start with the proposition that the purpose of bail is to assure the reappearance of the accused and to assure the safety of the community. The Court shall not require oppressive bail. 11 Del.C., §2107(a). Indeed, our Constitution prohibits the

setting of excessive bail. Del.Const. of 1897, Art. I, §11. The very purpose of Chapter 21 to Title 11 was to empower and equip the Courts to utilize a system of personal recognizance[1] or an unsecured personal appearance bond[2] to be used whenever feasible, consistent with a reasonable assurance of the appearance of the accused and the safety of the community in connection with the release of persons accused of crime pending a final determination of the Court as to the guilt of such persons. 11 Del.C., §2101. This purpose is emphasized by 11 Del.C., §2105(a) which reads as follows:

> "(a) The court shall release a person accused of a bailable crime on his own personal recognizance or upon the execution of an unsecured personal appearance bond of the accused in an amount to be determined by the court when the court is satisfied from all the circumstances and the criteria set forth in subsection (b) of this section that it is reasonably likely that the accused will appear as required before or after conviction of the crime charged and that there is no substantial risk to the safety of the community in permitting such unsecured release."

Pursuant to 11 Del.C., §2105(b), in determining whether the accused is likely to appear as required and that there will be no substantial risk to the safety of the community, the Court shall,

---

[1] "Personal recognizance" is the written recognizance of the accused that he will obey the further direction of the Court. 11 Del.C., §2102(6).

[2] "Unsecured personal appearance bond" is an undertaking by the accused promising his appearance in court where, upon his failure, he will be liable for the amount of the bond, but the bond is not guaranteed by any surety or specific pledge of property or other assets. 11 Del.C., §2102(9).

on the basis of the available information, take into consideration, the following factors:

1. The nature and circumstances of the crime charged;[3]
2. The family ties of the accused;
3. His employment;
4. His financial resources;
5. His character and mental condition;
6. The length of his residence in the community;
7. His record of convictions; and
8. His record of appearances at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.[4]

If the Court determines that an unsecured or a secured personal appearance bond[5] is warranted, then the Court, besides taking into consideration the criteria set forth above, shall require "such bail as reasonably will assure the reappearance of the accused . . . and the safety of the community . . ." 11 Del.C., §2107(a).

---

[3]Obviously, the more serious the crime, the higher the bail should be. Serious crimes of physical violence call for secured bail in all but the most unusual of cases. Property crimes involving another's private dwelling also will call for secured bail in the normal case, as will weapons offenses and charges which allege the possession or delivery of narcotic drugs. In general, it can be said that a felony charge will usually warrant secured bail.

[4]The judge should ascertain from a defendant who has previously been released on bail whether he appeared as required. Such a finding speaks in favor of an O.R. bail determination, assuming the absence of negative factors which may control the bail decision.

[5]"Secured personal appearance bond" is a bond of the accused promising his appearance in court, guaranteed by a surety, property, cash or other assets. 11 Del.C., §2102(8).

If a secured personal appearance bond is warranted, then the Court "shall make a record finding of the reason or reasons for such action and shall permit the release of the accused upon the furnishing of surety satisfactory to the court in an amount to be determined by the court." 11 Del.C., §2106. Pursuant to §2106, a Justice of the Peace should always record on the warrant or other Court document the reason for secured bail whenever secured bail is set.

The determination of whether the accused shall be released on his own personal recognizance, or by way of an unsecured or a secured personal appearance bond shall be in the discretion of the Court subject to the provisions of Chapter 21 to Title 11 of the Delaware Code, as amended. 11 Del.C., §2104. With regard to all three types of bail, the Court may impose 1 or more of the conditions of release set forth in 11 Del.C., §2108 which states as follows:

> "§2108. Conditions for release.
>
> In connection with either a secured release or an unsecured release of any person the court may also impose 1 or more of the following conditions:
>
> (1) Require the person to return to the court at any time upon notice and submit himself to the orders and processes of the court;
>
> (2) Place the person in the custody of a designated person or organization agreeing to supervise him;
>
> (3) Place the person under the supervision of a presentence or probation officer;
>
> (4) Place restrictions on the travel, associations, activities, consumption of alcoholic beverages, drugs or barbiturates, or place of abode of the person during the period of release;

(5) Require periodic reports from the person to an appropriate agent or officer of the court including the attorney for the accused;

(6) Require psychiatric or medical treatment of the person;

(7) Require the person to provide suitable support for his family under supervision of an officer of the court or the Family Court, with the consent of the Family Court;

(8) Require a person who has been convicted to duly prosecute any post-conviction remedies or appeals; and if the case is affirmed or reversed and remanded, such person shall forthwith surrender himself to the court;

(9) Impose any other condition deemed reasonably necessary to assure appearance as required and to carry out the purpose of this chapter."[6]

All that has thus far been said refers to bailable offenses. A bailable offense is any offense not punishable by death. 11 Del.C., §2102(2). An offense punishable by death is a capital offense. 11 Del.C., §2102(3). Under Delaware law, the only crime designated as a capital offense is Murder in the first degree in violation of 11 Del.C., §636. Attempted murder in the first degree is not considered as a capital crime; therefore, Attempted murder in the first degree is a bailable offense. Murder in the first degree is not a bailable offense; therefore, a person charged with Murder in the first degree shall be held in custody without bail until the

[6] I would suggest that 11 Del.C., §2108(9) gives a judge the authority to take and hold as security for reappearance for trial or sentencing a defendant's operators license. In any event, specific legislation is being sought to accomplish this purpose.

charge be withdrawn, reduced or dismissed. 11 Del.C., §2103(a). In no circumstances should one charged with Murder in the first degre be released on bail by a Justice of the Peace.[7] If a person charged with Murder in the first degree wishes to be admitted to bail, he may apply for such bail in Superior Court. 11 Del.C., §2103(b).

So many are the variables involved in the setting of bail that it is impossible to set exacting monetary or numerical formulae for the setting of bail. For example, while $10,000 secured bail may be reasonable with regard to a businessman accused of Theft (felony), $500 secured bail may be unreasonable with regard to an indigent accused of the same offense. Or, while secured bail might be warranted for one charged with issuing a bad check, unsecured or O.R. bail may be warranted for another charged with the same offense. Nevertheless, it may be said that, with regard to a secured personal appearance bond, the posting of 10% thereof should be allowed when, by such allowance, the reappearance of the accused and the safety of the community are reasonably assured.

While I do not choose to impose a bail setting formula which would be applicable to all Justice of the Peace Courts, it might, nevertheless, be interesting to examine a plan utilized in the City of Philadelphia, and to suggest that you may, in your discretion, wish to set bail in accordance with the Philadelphia plan, keeping

---

[7] A recent unfortunate incident where a Justice of the Peace determined, on his own, that there were no aggravating circumstances which he could find, as listed under 11 Del.C., §4209(e), and thus released on bail a person charged with Murder in the first degree should not be repeated.

in mind that no forumla will be able to guarantee in every case the objectives of the bail setting functions. As stated, the variables are just too great; no two cases or defendants will ever be exactly the same. Nevertheless, let us examine the Philadelphia bail plan if for no other reason than to observe how another jurisdiction treats the issue.[8]

It is the job of the Pretrial Services Division of the Philadelphia Courts[9] to interview all defendants before they appear at preliminary arraignment. How defendants are rated for O.R. bail depends to a great extent on the guidelines promulgated by the Philadelphia courts. The Pretrial Services Division -- in carrying out this evalution function -- serves principally as an advisory resource for the bail judges of the Philadelphia Municipal Court. It presents defendant information deemed pertinent to assessing risk of flight and submits O.R. recommendations; but neither are binding on the judge in reaching his or her decision. To the degree that judges do make use of the Pretrial Services resource, the manner in which defendants are rated for O.R. suitability may figure importantly in the bail decision and the use of pretrial detention in Philadephia.

---

[8]The material concerning the Philadelphia bail plan comes from John S. Goldkamp's book, Two Classes Of Accused: A Study Of Bail And Detention In American Justice, Ballinger Publishing Co., 1979.

[9]Although the Philadelphis bail plan has as an intergral part thereof a pretrial services component, there is nothing which would prevent a Justice of the Peace from performing the duties of said component in order to arrive at a mental conclusion as to the appropriateness of O.R. bail in a particular case.

Suitability for O.R. bail is determined by the Pretrial Services Division through two kinds of evaluations:

Rating the defendant. The defendant is interviewed and the information obtained is, if possible, rapidly verified. The defendant is scored on the basis of a number of interview dimensions thought to be indicators of risk of flight (e.g., family and community ties). If the required number of points is obtained, a positive recommendation may be forwarded to the bail judge. If the required number of points is not accumulated by the defendant as a result of the interview, no recommendation is made, although a summary report is still forwarded.

Automatic Disqualification from Positive Recommendations. The defendant is checked against a number of automatically disqualifying factors, legislated by the local judiciary. Regardless of how well a defendant might score based on the interview points, if he or she falls into certain exclusionary categories, no recommendation for O.R. release will be made.

No recommendation for O.R. release can be made by the Pretrial Services Division if any of the following are found to be true:

1. If a defendant is charged with any of the following serious felonies: murder, rape, robbery, burglary of a dwelling, arson, assault in the first or second degrees, possession of a deadly weapon during the commission of a felony; or for certain serious charges where the defendant has a prior conviction for the same offense,

such as carrying concealed a deadly weapon and possession or delivery of narcotics;[10]

2. There are two pending cases against the defendant, or there is one pending case against the defendant where the offense is one against a person (e.g., robbery, assault, etc.);

3. There was a willful failure to appear within the last three years for which a capias had been issued;

4. The defendant has an outstanding violation of probation or parole charge against him;

5. The defendant is listed as a "fugitive" or is a prison escapee or is a deserter from the military;

6. The defendant is on a conditional release (release under special conditions) for a prior arrest;

7. The defendant is not a [Delaware] resident; or

8. The interviewer was not able to verify the address given by the defendant.

The major emphasis in the disqualifying criteria listed above is for exclusion of defendants charged with serious crimes. Since danger is usually inferred on the basis of the offense charged, the inclusion of this particular variety of disqualifying criteria translates essentially into a dangerousness screening mechanism. Most of the other criteria, however, seek to exempt defendants with prior records of unreliable dealings with the criminal justice system, that is, those who have failed to appear previously or who have violated parole or probation.

---

[10] The designated crimes have been structured in accordance with Delaware nomenclature.

The interview employed by the Pretrial Services Division evolved from an earlier prototype designed by the Vera Institute as a means of measuring defendants' community ties (as indicators of flight risk) for the Manhattan Bail Project. However, in the interview instrument employed by the Philadelphia program, it is evident that a defendant's community ties are not all that is being measured. The table which follows summarizes the five interview dimensions by which a defendant is scored. Three of the five pertain to a defendant's ties to the community. They are:

1. residence points;
2. family points; and
3. employment points.

The two remaining dimensions on which a defendant is scored are:

4. prior record points; and
5. "character" points, a mixed indicator of drug and alcohol use, physical and mental health, and prior failures to appear.

To receive a "recommendable for O.R. release" score, a defendant would have to make a score of 6 or more. A defendant cannot receive negative points on the residence, family and employment dimensions. If he or she does not have a local residence or local family ties and has not held a job recently, no negative points are recorded -- instead, no points are recorded. (This has the same effect as assigning a negative score, since without positive points on these three dimensions, it is not possible to make the six required

points for a positive O.R. bail recommendation.) Conversely, a defendant is not credited with positive points for having no prior record of convictions or no character problems; instead, this state of affairs is treated as the norm and no points are given. Negative points are earned for prior convictions, prior failures to appear, and definite knowledge of drug or alcohol involvement. With the above in mind, let us review the table employed in Philadelphia:

O.R. Interview Dimensions & Scoring Criteria

Interview Dimensions	Scoring Criteria	# Points Earned
I. Residence (in Delaware)[11]	3 or more years in Delaware	1
	Present residence 1 year or present and prior residence 1 1/2 years	3
	Present residence 6 months or present and prior residence 1 year	2
	Present residence 4 months or present and prior residence 6 months	1
II. Family (in Delaware)	Lives with family and has contact with other family member	4
	Lives with family	3
	Lives with nonfamily friend whom he gives as a reference and has contact with family	2
	Lives with nonfamily friend whom he gives as a reference or has contact with family	1

[11] Delaware is substituted for Philadelphia for greater relevance and easier adaptability.

III. Employment (in Delaware)	Present job 1 year where employer will take back	4
	Present job 1 year	3
	Present job 4 months where employer will take back or present and prior job 6 months where present employer will take back	2
	Present job 4 months or present and prior jobs 6 months	1
	Current job where employer will take back	1
	Unemployed 3 months or less with 9 months or more single prior job from which was not fired for disciplinary reasons	1
	Receiving unemployment comp, welfare, and so forth	1
	In poor health (regular visits to doctor)	1
	Fulltime student	1
IV. Prior record (within last 15 years)	Negative points are assessed on the basis of the total number of offense units achieved. The offense code is as follows:	
	One adult felony conviction = 7 units One adult misdemeanor conviction = 2 units	
	Units: 0, 1, 2	0
	3, 4, 5, 6	-1
	7, 8, 9, 10, 11, 12, 13	-2
	14, 15, 16, 17, 18, 19, 20	-3
	21 and over	-4
V. Character	Prior failure to appear for a court appearance within the last 3 years	-1
	Definite knowledge of present drug addiction	-2

Definite knowledge of present alcoholism	-2
Number of points required for positive O.R. bond recommendation =	6
Maximum points obtainable =	12

It is unclear how the relative weights for each dimension were decided upon. For instance, why can a defendant earn a maximum of 3 points under residence, but 4 under family and 4 under employment? How is it determined that prior convictions should be scored as they are or that drug or alcohol addiction should play the role that it does? These are, for the most part, unanswered questions. In part, too, the weighting scheme employed in the Philadelphia O.R. interview was adapted to reflect local experience, local concerns and common sense.

Recognizing that only the Gander Hill Court (Justice of the Peace Court No. 18) has the luxury of being able to utilize the services of a Pretrial Officer,[12] we may, nevertheless, employ the Philadelphia plan which is explained above through questioning of a defendant at his or her initial appearance. Let's take a hypothetical defendant and see what score we come up with:

Hypothetical Defendant

John Doe is 24 years old. He has lived in Delaware for the past 2 years. He presently resides at the Mt. Holly Apartments where

[12] It would be interesting to ascertain the criteria used by this Pretrial Officer in formulating for the Gander Hill Justice of the Peace a bail recommendation.

he has lived with his girlfriend for the past 3 months. John Doe would not use his girlfriend's name as a reference. Prior thereto, he lived alone at the Harmony Crest Apartments for a total of 18 months. He is fully employed as a laborer with the Avon Construction Company. Avon is pleased with his performance and would like for him to continue as an employee thereof. He has been an Avon employee for 2 1/2 months. Immediately prior thereto, he worked for 6 months as a laborer with the Diamond Construction Company. He has a father who resides in Dover, and they periodically see each other.

At age 19, John Doe was convicted of Theft (misdemeanor). At age 20, he was convicted of Shoplifting (misdemeanor). He is presently before the Court on a charge of Receiving stolen property (misdemeanor). He has had a few minor traffic convictions, and there is an outstanding capias on him out of Court No. 15 for failure to pay a fine in the amount of $50 for Inattentive driving, his conviction thereunder dating back to 1979. Under the Philadelphia plan, would a positive O.R. bail recommendation be warranted?

First, because of the outstanding capias, John Doe may be automatically disqualified from receiving a positive O.R. bail recommendation.[13] But let's suppose the capias had been issued because of the absentmindedness of John Doe. What now? We see that no automatic disqualification criteria are then applicable, and we may look to the table of O.R. Interview Dimensions and Scoring Criteria. Under said table, John Doe would receive the following points:

---

[13] Or, to put the Philadelphia plan into the perspective of Delaware Justice of the Peace Court practice, where no Pretrial Services Officer normally gives to the judge a bail recommendation, from arriving at a conscious decision to grant O.R. bail.

I.	Residence (in Delaware)	Present residence 1 year or present and prior residence 1 1/2 years	3
II.	Family (in Delaware)	Lives with nonfamily friend whom he gives as a reference or has contact with family	1
III.	Employment	Present job 4 months where employer will take back or present and prior job 6 months where present employer will take back	2
IV.	Prior record	Two adult misdemeanor convictions = 4 units.	
		4 units =	-1
V.	Character	Prior failure to appear for a court appearance within last 3 years	-1

Total points = 6 minus 2 = 4

Conclusion: No positive O.R. bail recommendation.

We see that by utilizing the Philadelphia plan, a Justice of the Peace would not have felt compelled to grant our hypothetical defendant, John Doe, a release on O.R. bail.

Without utilizing said plan, would the same Justice of the Peace have granted John Doe a release on O.R. bail? If the Justice of the Peace had simply employed the criteria set forth in Chapter 21 of Title 11 of the Delaware Code, said criteria being set forth in the initial pages of this Legal Memorandum, the answer is, probably not. Thus, it is felt that, except where a Justice of the Peace wishes to experiment with the Philadelphia plan,[14] no bail formula such as that utilized by the Philadelphia Municipal Court

[14] Or with other numerical bail formulae of which the Court may be familiar.

need be utilized by a Justice of the Peace, the present statutory scheme as found in Title 11, Chapter 21, being an effective one in achieving the proper balance of protecting the rights of both the defendant and the community at large.

NAB:pn

cc: The Honorable Daniel L. Herrmann
The Honorable William Marvel
The Honorable Albert J. Stiftel
The Honorable Robert H. Wahl
The Honorable Robert D. Thompson
The Honorable Alfred Fraczkowski
The Honorable Richard S. Gebelein
The Honorable Lawrence N. Sullivan
The Honorable Richard J. McMahon, State Prosecutor
Bruce M. Stargatt, Esquire, Pres., Delaware State Bar Assoc.
Professor William J. Conner, Delaware Law School
John R. Fisher, Director, Administrative Office of the Courts
Law Libraries: New Castle, Kent and Sussex Counties
Files

STATE OF DELAWARE
THE COURTS OF THE JUSTICES OF THE PEACE
820 NORTH FRENCH STREET, 11TH FLOOR
WILMINGTON, DELAWARE 19801

NORMAN A. BARRON
CHIEF MAGISTRATE

TELEPHONE: (302) 571-2485

LEGAL MEMORANDUM 81-79 (SUPPLEMENT)

TO: ALL JUSTICES OF THE PEACE
STATE OF DELAWARE

FROM: NORMAN A. BARRON
CHIEF MAGISTRATE

DATE: AUGUST 25, 1983

RE: BAIL CONSIDERATIONS WITH REGARD TO PERSONS WHO REFUSE TO IDENTIFY THEMSELVES

Hypothetical

John Jacob Quincy robbed a Super Saver clerk of the cash within her control at gunpoint. The police were summoned and after receiving from the clerk a detailed description of the suspect, they began a systematic search of the immediate crime scene. One block from the crime scene the police observed a male exactly matching the suspect's description running in the opposite direction from the store. The suspect was apprehended and, after being identified by the clerk as the perpetrator of the robbery, he was placed under arrest. A search of his person revealed a large wad of bills and a handgun. He carred no identification and he refused to identify himself.

When he was taken before a Justice of the Peace for his initial appearance, the warrant simply referred to him as "John Doe". The officer requested the judge to order him to identify himself. He again refused.

Under the facts above, what options are available to the Justice of the Peace vis-a-vis the refusal?

* * * * *

We start with 11 Del.C., §1910 which reads as follows:

> "§1910. Identification of witness.
>
> Whenever a peace officer[1] has reasonable ground[2] to believe that a crime has been committed, he may stop any person who he has reasonable ground to believe was present thereat and may demand of him his name and address. If the person fails to identify himself to the satisfaction of the officer, he may take the person forthwith[3] before a magistrate. If the person fails to identify himself to the satisfaction of the magistrate, the latter may require him to furnish bond or may commit him to jail until he so identifies himself."

While one might argue that a criminal defendant comes within the scope of "any person" as found in the statute, it is my opinion that Section 1910 is intended to deal with witnesses to crime who refuse to identify themselves to the police and, thus, hamper police efforts in crime investigation. Section 1910 provides a recalcitrant witness an incentive to cooperate with the authorities. Under §1910,

---

[1] A "peace officer" is any public officer authorized by law to make arrests in a criminal case. 11 Del.C., §1901(2).

[2] "Reasonable ground" is synonymous with probable cause. United States ex rel. Mealey v. Delaware, 352 F.Supp. 349 (D.Del. 1972).

[3] "Forthwith" means immediately; without delay, directly, hence within a reasonable time under the circumstances of the case; promptly and with reasonable dispatch. Black's Law Dictionary, Revised Fourth Edition.

a Justice of the Peace is authorized to set bail with regard to such a witness or to commit him to jail until he agrees to identify himself. In the latter case, the commitment envisioned is by way of civil contempt. Thus, the maximum length of the commitment may not exceed 170 days.[4]

As stated, §1910 may be construed to include defendants who refuse to identify themselves within its scope. Yet, on a practical level, there is really no reason to so construe the statute. Instead, a defendant's refusal to identify himself may simply be taken into consideration at the time of setting bail in connection with the underlying charge or charges.

In considering whether secured bail is appropriate, the Court shall, on the basis of available information, take into consideration:

1. The nature and circumstances of the crime charged;
2. The family ties of the accused;
3. His employment;
4. His financial resources;
5. His character and mental condition;
6. The length of his residence in the community;
7. His record of convictions; and

---

[4] 10 Del.C., §9506 states as follows:
"§9506. Civil contempt: penalty.
A justice of the peace shall have the power to punish by fine not exceeding $100, or by imprisonment not exceeding 170 days, any disobedience or resistance to his lawful writ, process, order or rule.
Any disobedience or resistance to the lawful writ, process, order or rule of a justice of the peace shall be punished as a civil contempt only, and any person imprisoned for such disobedience or resistance shall be discharged from such imprisonment upon satisfying the justice that he has obeyed the writ, process, order or rule, or is prepared to do so."

8. His record of appearances at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.[5]

When a defendant refuses to identify himself to the satisfaction of the Court, the judge will not be in a position to gain adequate background information concerning factors 2 through 8 above so as to make an informed bail determination. Without such information, consciously withheld by the defendant, the worse may be presumed and, thus, high bail would be warranted with regard to the underlying charge or charges.[6]

Thus, with regard to a criminal defendant, as opposed to a mere witness to a crime, the use of the civil contempt statute, as sanctioned by 11 Del.C., §1910 is to be discouraged. Instead, the Justice of the Peace setting bail at a defendant's initial appearance may consider the defendant's refusal to identify hismelf in conjunction with those factors, as set forth in 11 Del.C., §2105(b), which are normally considered at the time of setting bail.

NAB:pn

cc: The Honorable Daniel L. Herrmann
The Honorable Grover C. Brown
The Honorable Albert J. Stiftel
The Honorable Robert H. Wahl
The Honorable Robert D. Thompson
The Honorable Alfred Fraczkowski
The Honorable Charles M. Oberly, III
Lawrence M. Sullivan, Esquire
Eugene M. Hall, Esquire
Henry N. Herndon, Jr., Esquire, Pres., Delaware State Bar Assoc.
Professor William J. Conner, Delaware Law School
John R. Fisher, Director, Administrative Office of the Courts
Law Libraries: New Castle, Kent and Sussex Counties
Files

---

[5] Eleven Del.C., §2105(b); Legal Memorandum 81-79, dated December 10, 1981, Bail Considerations.

[6] Male defendants who are unidentified should be referred to as "John Doe" in the warrant(s) and accompanying Court documents, while female defendants who are unidentified should be referred to as "Jane Doe" in the warrant(s) and accompanying Court documents.