



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

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LEGAL MEMORANDUM 85-138

TO: ALL JUSTICES OF THE PEACE
 STATE OF DELAWARE

FROM: NORMAN A. BARRON
 CHIEF MAGISTRATE

DATE: NOVEMBER 12, 1985

RE: BAIL GUIDELINE RECOMMENDATIONS

Rescinded & Replaced by LM 92-191

Much has been written on the subject of bail. See: Legal Memorandum 81-79, dated December 10, 1981, Bail Considerations; Legal Memorandum 81-79 (Supplement), dated August 25, 1983, Bail Considerations With Regard To Persons Who Refuse To Identify Themselves; Legal Memorandum 82-88, dated June 29, 1982, Redetermination Of Bail. Nevertheless, nothing yet has been promulgated setting forth recommended bail parameters with regard to the different types of offenses. Two factors favor such a project: First, although the basic bail considerations are well known, there are those who perceive a lack of uniformity and consistency in the bails which have been set by our State's Magistrates. Bail guideline recommendations would tend towards the establishment of a uniform Statewide bail decision-making

¹
 See: Chapter 21, Title 11, Delaware Code.

process. Second, our prisons have reached a dangerous level of overcrowding. Those in the correctional field have noted the high number of pre-trial detentioners presently residing in our correctional facilities, many of whom stand charged with having committed relatively minor crimes. Common sense dictates that our limited prison space be reserved for those dangerous criminals who pose a substantial threat to society. Bail guideline recommendations which are weighted in favor of minor offenders who offer no real threat to society will free up some prison space for those deserving of incarceration, or at least that is the expectation.

With the above in mind, the following bail guideline recommendations are promulgated. You, as the Magistrate performing a bail-setting function, are not bound to follow the bail guideline recommendation should mitigating factors favor a lower bail amount than recommended or should aggravating factors favor a higher bail amount than recommended. However, absent such mitigating or aggravating factors, you are requested to keep within the bail guideline recommendations. Often, the bail guideline recommendation will give considerable leeway within a particular range. In setting the actual bail amount within that range, you are to utilize your discretion, basing your decision on the nature of the offense, prior record, ability to make bail, safety of the community, defendant's likelihood of appearing for future court proceedings, and other relevant factors.

* * * * *

BAIL GUIDELINE RECOMMENDATIONS²

I. Title 11 Criminal Code Felonies

- (a) Murder 1st degree: Hold without bail;
- (b) class A felony other than Murder 1st degree: From \$20,000 to \$50,000 secured;
- (c) class B felony: From \$10,000 to \$30,000 secured;
- (d) class C felony regarded as a crime against the person: From \$2,000 to \$10,000 secured;⁴
- (e) class C felony regarded as a crime against property: From \$2,000 to \$10,000 unsecured;
- (f) class D felony regarded as a crime against the person: From \$1,000 to \$5,000 secured;
- (g) class D felony regarded as a crime against property: From \$1,000 to \$5,000 unsecured;
- (h) class E felony regarded as a crime against the person: From \$500 to \$3,000 secured;
- (i) class E felony regarded as a crime against property: From \$500 to \$3,000 unsecured.

II. Title 11 Criminal Code Misdemeanors And Violations

- (a) class A misdemeanor; OR up to \$500 unsecured;
- (b) class B misdemeanor; OR up to \$100 unsecured;
- (c) class C misdemeanor; OR up to \$50 unsecured;
- (d) violations: OR up to \$25 unsecured.⁵

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Whenever a defendant is released on either secured or unsecured bail, the court may, by statute, set any number of conditions with regard thereto. See: 11 Del.C., §2108. One such condition is that the defendant be placed in the custody of a designated person or organization agreeing to supervise him. 11 Del.C., §2108(3).

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This recommendation is binding on the Magistrate since Murder in the 1st degree is not a bailable offense. See: 11 Del.C., §2102(2).

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You should consider Burglary 2nd degree as a crime against the person when an innocent person was within the dwelling at the time of the alleged burglary or when the crime intended to be committed within the dwelling may be construed as a crime against the person.

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No secured bail under any circumstances. See: Legal Memorandum 83-111, dated June 10, 1983, Incarceration Of Persons For Non-Incarcerable Offenses; 11 Del.C., §2707(b).

III. Title 16 Drug Offenses

- (a) Trafficking in narcotic or non-narcotic drugs:
 - (i) Marijuana: \$1,000 secured per pound;
 - (ii) Hashish: \$1,000 secured per ounce;
 - (iii) Methamphetamine, amphetamine, phencyclidine and other non-narcotic drugs not mentioned above: \$1,000 secured per gram;
 - (iv) Cocaine, heroin and other narcotic drugs: \$2,000 secured per gram.
- (b) Manufacturing, possession with intent to deliver, or delivery of narcotic and non-narcotic drugs:
 - (i) Marijuana:
 - (a) Less than 1 pound: \$1,000 up to \$3,000 unsecured;
 - (b) 1 pound or more: \$500 secured per pound;
 - (ii) Hashish:
 - (a) Less than 1 ounce: \$1,000 up to \$3,000 unsecured;
 - (b) 1 ounce or more: \$500 secured per ounce.
 - (iii) Methamphetamine, amphetamine, phencyclidine, cocaine, heroin and other narcotic or non-narcotic drugs not mentioned above: Secured bail with the street value of the drugs being the bail guideline recommendation, or \$5,000 secured, whichever is greater;
- (c) Possession of narcotic drugs: From \$500 to \$1,000 secured;
- (d) Possession of non-narcotic drugs: From \$500 to \$1,000 unsecured;
- (e) Other drug charges: From \$500 to \$1,000 unsecured.

IV. Title 21 Traffic Offenses

- (a) Driving while under the influence of alcohol or drugs; Reckless driving; Driving during suspension or revocation; Failure to stop at command of police officer: OR up to \$500 unsecured;
- (b) Other traffic offenses: OR up to \$50 unsecured.

V. Fugitive Warrants

Look at the crime alleged to have been committed in the requisitioning State. Translate that crime into the most comparable Delaware offense. Find the highest bail guideline recommendation and triple the figure always making the amount secured. Exception: If the crime is punishable by death or life imprisonment under the laws of the requisitioning State, hold without bail. See: 11 Del.C., §2516. When the warrant simply indicates a violation of probation/parole without further information as to the underlying charge for which probation or parole was imposed, set bail, in the ordinary case, at \$5,000 secured.

- VI. Other Miscellaneous Offenses: OR up to \$50 unsecured.

* * * * *

AGGRAVATING FACTORS

Should no secured bail be recommended for a particular charge, the unsecured bail guideline recommendation should, in the ordinary case, be converted to a secured bail amount whenever any one of the following non-exclusive⁶ aggravating factors⁷ is present:

1. Two or more capiases for failure to appear have been issued for the defendant within three years from the date of the instant offense; or

2. The defendant has been twice or more convicted of committing the same offense as the instant offense within five years immediately preceding the date of the instant offense; or

3. The defendant has a pending undisposed Title 11 or Title 16 charge or one of the following Title 21 charges: Driving under the influence of alcohol or drugs; Driving during suspension or revocation; or Failure to stop at command of police officer, or has a pending violation of probation or parole charge against him; or

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Both the aggravating and mitigating factors listed herein are provided as examples and are not intended to be exclusive reasons justifying departures from the bail guidelines.

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The importance in obtaining the defendant's criminal history cannot be over-emphasized.

4. A fugitive's warrant has been issued against the defendant or he is a prison escapee or a deserter⁸ from the military; or

5. The defendant was on a conditional release status from the Department of Correction on the date of the instant offense; or

6. The defendant is a non-resident and at least one other factor exists which makes it unlikely, in the Court's view, that the defendant will appear for future court proceedings without secured bail being set; or

7. The defendant's prior criminal record consists of at least two felony convictions or at least four misdemeanor convictions excluding Title 21 traffic convictions; or

8. The offense was allegedly committed against a victim who is considered to be helpless or defenseless; i.e., the victim is very young or very old, handicapped, crippled, mentally defective, etc.

9. The prosecutor or police officer proffers facts to the court which demonstrate that the defendant was aware before his arrest that the charge or charges for which bail is to be set had been filed and, thereafter the defendant intentionally attempted to evade arrest on such charge or charges.

* * * * *

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With regard to deserters, see: Legal Memorandum 81-75, dated December 1, 1981, Desertion And Servicemen AWOL.

MITIGATING FACTORS

Should secured bail be recommended for a particular charge, the secured bail guideline recommendation should, in the ordinary case, be converted to an unsecured bail amount or be reduced to ten percent of the secured bail amount whenever any one of the following non-exclusive mitigating factors is present:

1. To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident; or

2. Before detection, the defendant compensated, or made a good faith effort to compensate, the victim of the criminal conduct for any damage or injury sustained or, before detection, he voluntarily sought professional help for drug/alcohol treatment or for any other recognized compulsive behavioral disorders related to the offense; or

3. The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime; or

4. The offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed. The voluntary use of intoxicants (drugs or alcohol) does not fall within the purview of this factor; or

5. The offense was principally accomplished by another person and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim; or

6. The defendant has a secure, stable job, and has family and community ties, making it unlikely that the defendant will not appear for subsequent court proceedings; or

7. The defendant has or is willing to cooperate with the police with regard to an ongoing investigation and the police or prosecution requests low bail because of this fact; or

8. The defendant entertains an honest and reasonable belief that his actions causing his arrest were justifiable and legal.

* * * * *

Remember, when secured bail is set, the reasons for same must be indicated in the record. You will note that the bail guideline recommendations place strong emphasis on the nature of the offense and the safety of the community in determining the appropriateness of setting secured bail. This emphasis explains the high secured bail recommendations for serious felonies and the unsecured bail recommendation for most other offenses.

It is hoped that adherence to these bail guideline recommendations will result in a decrease in Delaware's pretrial detention population. Should such a decrease be realized, there should be no concomitant increased threat to the public safety.

We of the judiciary can no longer afford to take an isolationist view of the correctional landscape. Correction

9

See: 11 Del.C., §2106.

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See: 11 Del.C., §2102; 11 Del.C., §2105(a) and (b). As an example of the importance of these factors as recognized by the United States Congress, see 18 United States Code, Section 3142(e) which creates a presumption that no combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if there is probable cause to believe that the person has committed a drug offense punishable by ten years or more of imprisonment.

officials should not have to stand alone when defending early release policies made necessary by the overcrowded condition of the facilities under their control. The overcrowding of our prisons is our problem too, because in a very real sense, it is of our making. The bail guideline recommendations set forth herein is our attempt to alleviate a growing problem which, in the eyes of most criminal justice system policy makers, is fast approaching crisis proportion. I, therefore, urge your compliance with these recommendations, the utilization of which can best be seen through the following examples:

Example No. 1: Defendant's prior record consists of a Theft (M) conviction and a Burglary 3rd conviction. Defendant is presently charged with Possession of deadly weapon by person prohibited, a class E felony which cannot be considered as a crime against the person.

Bail guideline recommendation: \$500 to \$3,000 unsecured.

Bail determination: There is no reason to deviate from the recommendation in this case. Thus, bail set in the amount of \$1,000 unsecured would not be inappropriate since it falls within the recommended range.

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The bail guideline recommendations set forth herein are being submitted to the Criminal Justice Council and to the Sentencing Accountability Commission for their consideration and support.

Example No. 2: Same facts as Example No. 1, except this time the record reflects that the defendant was on supervised custody with regard to the prior Burglary conviction at the time the instant offense was committed.

Bail guideline recommendation: \$500 to \$3,000 unsecured.

Bail determination: Because the defendant was on supervised custody at the time the instant offense was committed, reasonable grounds exist for deviating from the bail guideline recommendation. Thus, bail set in the amount of \$1,000 secured would not be inappropriate. See: Aggravating factor 5.

Example No. 3: Defendant's prior record consists of two prior Shoplifting-misdemeanors within the past three years. Defendant is presently charged with Shoplifting-felony, a class E felony considered as a crime against property.

Bail guideline recommendation: \$500 to \$3,000 unsecured.

Bail determination: The two prior Shoplifting charges, although misdemeanors, may be considered as essentially the same offense as the instant offense. The judge may wish to deviate from the guideline in such a case. Thus, a bail in the amount of \$500 secured would not be considered inappropriate. See: Aggravating factor 2.

Example No. 4: Defendant's prior record consists of an Assault 2nd degree conviction. Defendant is presently charged with committing Assault 3rd degree, a class A misdemeanor.

Bail guideline recommendation: OR up to \$500 unsecured.

Bail determination: There being no aggravating or mitigating factors present, bail set in the amount of \$500 unsecured would not be inappropriate.

Example No. 5: Same facts as Example No. 4, except this time the defendant is a resident of New Jersey and is unemployed. The Court feels it unlikely that the defendant will appear at future court proceedings under an unsecured bond.

Bail guideline recommendation: OR up to \$500 unsecured.

Bail determination: Because of the defendant's resident status and his lack of visible means of support, the judge finds it unlikely that the defendant will appear for future court proceedings without secured bail being set. Therefore, the Court may well wish to deviate from the guideline recommendation and set bail in the amount of, for example, \$300 secured. See: Aggravating factor 6.

Example No. 6: Defendant is charged by way of a fugitive's warrant with Interference with custody, a felony charge in the State of Alabama, which is the requisitioning State. Defendant has no prior record. Facts gleaned from the papers indicate that defendant is the father of the child whose custody was given to the mother as a result of a Family Court decree issued out of Alabama.

Bail guideline recommendation: \$9,000 secured.

Bail determination: The most comparable charge in Delaware to Alabama's Interference with custody statute is 11 Del.C., §785, Interference with custody, a class E felony when

the person who interferes with the custody of a child thereafter causes the removal of said child from Delaware. The normal bail guideline recommendation for a class E felony against the person is from \$500 to \$3,000 secured. Because of the fugitive warrant, we take the highest bail guideline recommendation, \$3,000, triple that amount to \$9,000, and set secured bail in that amount.

Example No. 7: Defendant's prior record consists of one prior DUI conviction out of Pennsylvania. This offense occurred in 1981. He is charged with DUI. He is from Pennsylvania and is an executive with the First Bank of Philadelphia.

Bail guideline recommendation: OR up to \$500 unsecured.

Bail determination: Even though the defendant is a non-resident, his employment status makes it likely that he will appear for future court proceedings without secured bail being set. Thus, bail set in the amount of \$500 unsecured would not be inappropriate.

Example No. 8: Same facts as in Example No. 7, but this time defendant's record shows 2 prior DUI convictions within the past 5 years.

Bail guideline recommendation: OR up to \$500 unsecured.

Bail determination: Because of the defendant's two prior DUI convictions, reasonable grounds exist for deviating from the guideline recommendation. Thus, bail set in the amount of \$500 secured would not be inappropriate. See: Aggravating factor 2.

Example No. 9: Defendant, a female, has no prior record. She is charged with Burglary 1st degree, a class B felony and Theft-felony. The probable cause affidavit indicates that she had lived with the victim, her former boyfriend, in the apartment allegedly burglarized. She, at her initial appearance, contends that she was simply trying to recover her fur coat given to her by the victim which she left in the apartment when the victim had kicked her out for running around with the victim's best friend. She had entered the apartment at night through an open rear door. Police recovered the fur coat from the defendant at time of her arrest, and no other property was taken from the apartment.

Bail guideline recommendation: \$10,000 to \$30,000 secured on the Burglary 1st degree; From \$500 to \$3,000 unsecured on the Theft-felony charge.

Bail determination: Mitigating factors exist which indicate that a deviation from the class B felony bail guidelines is in order. Thus, bail set in the amount of \$4,000 unsecured on the Burglary 1st degree charge would not be inappropriate. See: Mitigating factor 8. The bail guideline recommendation for the Theft-felony charge should be followed. Thus, bail set in the amount of \$1,000 unsecured for the Theft-felony charge would not be inappropriate.

Example No. 10: Defendant has no prior record. He is charged with Sexual assault, a class A misdemeanor, against a 4 year old girl. It is alleged that the defendant, an employee of

a child day-care center, fondled the victim's genital area while the victim was under his control and custody. There was an alleged eyewitness to the incident.

Bail guideline recommendation: OR up to \$500 unsecured.

Bail determination: Because of the nature of the offense and the tender age of the victim, not to mention the defendant's position of trust, a deviation from the bail guideline recommendation is indicated. Thus, bail set in the amount of \$2,000 secured would not be inappropriate. See: Aggravating factor 8.

Example No 11: Defendant is charged with Reckless driving, Failure to stop at the command of a police officer, Reckless endangering second degree, Speeding 85 mph in a 35 mph zone, and Running a stop sign. His prior record consists of a Burglary 2nd degree conviction. The probable cause affidavit to the Reckless endangering charge indicates a six mile high speed police chase involving four police vehicles. The defendant is an 18 year old high school senior.

Bail guideline recommendation: Total: OR up to \$1,600 unsecured.

Bail determination: Because of the totality of the circumstances surrounding the five charges, all pertaining to a high speed police chase, reasonable ground exist for deviating from the total bail guideline recommendation. Remember, the list of aggravating factors found herein is a non-exclusive list. Other aggravating factors, such as those evident here, may be

considered in setting bail outside of the bail guideline recommendations. Thus, bail set in the following amounts would not be unreasonable:

Reckless driving:	\$500 secured
Failure to stop:	\$500 secured
Reckless endangering 2nd:	\$500 secured
Speeding:	\$ 50 secured
Running a stop sign:	\$ 50 secured
Total:	\$1,600 secured

Example No. 12: The defendant's prior record consists of a Resisting arrest conviction for which a 30 day sentence to prison was imposed. The Department of Correction placed the defendant in the Plummer Center under their work release program to serve his period of incarceration. Just prior to the expiration of his sentence, he failed to report to the Plummer Center as required. The Department of Correction obtained a warrant charging the defendant with Escape 2nd degree, a class E felony which cannot be considered as a charge against the person.

Bail guideline recommendation: \$500 to \$3,000 unsecured.

Bail determination: Because of the escapee status of the defendant, a deviation from the bail guideline is warranted. Thus, bail set in the amount of \$2,000 secured would not be unreasonable. See: Aggravating factor 4.

Example No. 13: Defendant is charged with possessing 6 packets of heroin with the intent to deliver same. Each packet is a dime bag meaning that the street value of each packet is \$10. Defendant has no prior record.

Bail guideline recommendation: \$5,000 secured.

Bail determination: The street value of the 6 packets is \$60. The bail guideline formula for determining bail for one charged with possession with intent to deliver heroin is the street value of the drugs or \$5,000, whichever is greater. Thus, bail set in the amount of \$5,000 secured is appropriate.

Example No. 14: Defendant is charged with Rape 2nd degree, a class B felony. Defendant has no prior criminal record.

Bail guideline recommendation: \$10,000 to \$30,000 secured.

Bail determination: Because of no prior record, the low end of the bail guideline recommendation would, all things being equal, be the more appropriate guide here. Thus, bail set in the amount of \$10,000 secured would not be inappropriate.

Example No. 15: Same facts as Example No. 14, except this time the record reflects that the defendant had one prior sex offense conviction for which he had served a sentence of incarceration.

Bail guideline recommendation: \$10,000 to \$30,000 secured.

Bail determination: Because of the prior record, the high end of the bail guideline recommendation would, all things being equal, be the more appropriate guide here. Thus, bail set in the amount of \$25,000 secured would not be inappropriate.

* * * * *

In light of the bail guidelines, the use of ten percent bail is discouraged. Its use should be confined only to those cases where mitigating factors have been found to exist, thus warranting a lower bail than that recommended by the guidelines.

The bail guidelines set forth herein are not intended to affect the bail review procedures found in Policy Directive 84-084 (Revised), dated July 15, 1985. The bail guidelines should be employed both by the judge setting bail at the defendant's initial appearance and by the judge presiding over a bail review hearing.

The bail guideline recommendations are effective upon receipt of this Legal Memorandum.

NAB:pn

cc: The Honorable Andrew D. Christie
The Honorable William T. Allen
The Honorable Albert J. Stiftel
The Honorable Robert H. Wahl
The Honorable Robert D. Thompson
The Honorable Alfred R. Fraczkowski
The Honorable Charles M. Oberly, III
Lawrence M. Sullivan, Esquire
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LEGAL MEMORANDUM 85-138 (SUPPLEMENT)

TO: ALL JUSTICES OF THE PEACE, STATE OF DELAWARE
ALL CLERKS OF THE COURT, JUSTICE OF THE PEACE COURTS

FROM: NORMAN A. BARRON
CHIEF MAGISTRATE

DATE: AUGUST 31, 1985

RE: BAIL GUIDELINES FOR JP COURT CAPIASES

*Resubmitted
Replaced by
Lm 92-171*

It has been pointed out to me by several Justice of the Peace Court personnel that Legal Memorandum 85-138, dated November 12, 1985, Bail Guideline Recommendations, is deficient to the extent that there are no bail guidelines suggested therein which pertain to Justice of the Peace Court capiases.

The number of outstanding Justice of the Peace Court capiases continues to increase in spite of the excellent efforts by the Capias Control Offices and Constables assigned thereto in dealing with the capias workload. Stronger enforcement efforts have to be instituted if this problem is to be controlled. It is with this in mind that the following bail guidelines for Justice of the Peace Court capiases are established and should be utilized by the presiding Magistrate before whom the defendant arrested on the capias is returned:

I. Where Law Enforcement Officer Returns Defendant
To Court

A. JP Court capias issued for failure to appear for a Justice of the Peace Court proceeding:

1. No prior capiases issued: \$500 unsecured;
2. One or two prior capiases issued: \$100 secured;
3. Three or more prior capiases issued: \$200 secured.

B. JP Court capias issued for failure to pay a fine, costs, restitution, or other fee imposed by a Justice of the Peace or imposed pursuant to statute:

1. Secured in the total amount of the fine, costs, restitution, or other fee owed.

Often, a defendant for whom a capias has been issued turns himself in to the Court without law enforcement intervention. In such cases another guideline is offered:

II. Where Defendant Comes In On His Own Without Constable Or
Police Intervention

A. JP Court capias issued for failure to appear for a Justice of the Peace Court proceeding:

1. Discretionary with the Court.

B. JP Court capias issued for failure to pay a fine, costs, restitution, or other fee imposed by a Justice of the Peace or imposed pursuant to statute:

1. Discretionary with the Court.

With regard to persons committed under Paragraphs I.A.2. and I.A.3., trials, sentencings or the applicable court proceedings should be scheduled at the earliest date possible.

Sentences imposed should, of course, consider time already served under such commitments.

With regard to situations falling within Paragraph I.B.1. whenever the defendant presents the monies due and owing, the Court receiving same should withdraw the capias, the bail monies satisfying the debt owed by the defendant, and forward the monies to the Magistrate Court out of which the capias was issued. Whenever the defendant is unable to make bail on the capias, a hearing in the Court out of which the capias was issued should be scheduled at the earliest date possible.

While it is most desirable to have the judge who issued the capias preside over the proceeding regarding the return of that capias, rarely will this be possible due to fluctuating schedules and changing court assignments. Thus, any judge is authorized to hold the return proceeding. Obviously, it is vital to verify the existence of the capias and the amount of the outstanding monies owed, if any.

With regard to outstanding fine cases, the capias return judge should not suspend fines imposed by another judge without that judge's consent. In other words, out of deference to the judge who imposed the sentence, that sentence should not be altered by another judge who did not hear the case or take the plea.

Finally, and in the same vein, where the judge who issued the capias states on the capias a recommended bail upon return of the defendant, that recommendation should be accorded great weight and should normally be given priority over the guidelines set forth herein.

NAB:pn

cc: The Honorable Andrew D. Christie
The Honorable William T. Allen
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The Honorable Robert D. Thompson
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