REPORT OF THE GOVERNOR'S COMMISSION TO STUDY THE LAWS RELATING TO BAIL IN CRIMINAL CASES

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I. INTRODUCTION

In an Executive Order dated May 24, 1982, Governor Joseph E. Brennan established the Governor's Commission to Study the Laws Relating to Bail in Criminal Cases ("Commission") with a broad mandate "to undertake a complete study of the law relating to bail in criminal cases and to make recommendations with respect to legislation and executive action to the Governor as it deems appropriate." The Commission was charged with evaluating the appropriateness and desirability of amending Article I, Section 10 of the Maine Constitution, and studying statutes governing the pre-verdict release of defendants on bail or other conditions. This report is the result of that study.

The Commission met on many occasions to consider this issue and held public hearings in which it solicited the opinions of both the legal profession and the public about the law of bail in Maine.

Although the Commission's mandate was extremely broad, it soon became clear that the central issue concerned the possible amendment of Article I, Section 10 of the Maine Constitution. This section, which is the starting point of any discussion concerning the issue of bail, presently provides that:

> No person before conviction shall be bailable for any of the crimes which now are, or have been dominated capital offenses since the adoption of the Constitution, when the

> proof is evident or the presumption great, whatever the punishment of the crimes may be. And the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

It is essential that the Legislature and the people of the State determine what the Constitution should say about the subject of bail before attempting any statutory changes. Therefore, this Report considers principally the history and rationale of Article I, Section 10 of the Maine Constitution, and the need to amend this provision to provide an equitable and effective bail law.

II. RECOMMENDATIONS

The Commission, after consideration of the policies and law relating to bail in criminal cases in Maine, makes the following recommendations to the Governor:

1. Article I, Section 10 of the Maine Constitution, as it relates to bail, should be amended to read as follows:

> Every person before adjudication shall have the right to reasonable bail or other conditions of release, except when the offense charged is a serious crime against the person and it is probable that conviction or adjudication for the offense charged will result and there is clear and convincing evidence that no combination of bail or other release conditions will reasonably minimize the substantial risk of non-appearance for court proceedings, the commission of another such offense, or a threat to the integrity of the judicial process.

2. After the Maine Constitution is amended, the numerous statutes that relate to pretrial bail should be repealed and replaced by a single, comprehensive bail statute that clearly establishes the guidelines and procedures for setting bail in all criminal prosecutions prior to conviction.

3. A statute should be enacted that clearly establishes the guidelines and procedures for setting bail in all criminal prosecutions after conviction.

4. A statute should be enacted immediately to end the current practice of requiring defendants to pay the Bail Commissioner's fee.

5. The Bail Commissioner system should be revised in order to provide training for all bail commissioners.

6. A Commission should, following this Report, be created and be expanded in membership and in staff to assist in the drafting of the new statutes, guidelines, and rules of criminal procedure concerning bail, with a report to be submitted to the next session of the Legislature.

III. THE APPROPRIATENESS AND DESIRABILITY OF AMENDING ARTICLE I, SECTION 10 OF THE MAINE CONSTITUTION

A. History and Background of Article I, Section 10 of the Maine Constitution

In order to understand the need for amendment of Article I, Section 10 of the Maine Constitution, it is necessary to consider the history and background of this provision.

The constitutional right to be admitted to bail, prior to conviction, has changed little since 1820 when Maine became a state. As written in 1820, Article I, Section 10 stated:

> All persons, before conviction, shall be bailable, except for capital offences, where the proof is evident or the presumption great.

This constitutional provision, which is part of the "Declaration of Rights" in the Maine Constitution, expresses an affirmative right to be admitted to bail in relation to any non-capital offense. The absolute constitutional right to be admitted to bail in most prosecutions prior to conviction has continued since 1820 and was reaffirmed recently by the Maine Supreme Judicial Court in Fredette v. State, 428 A.2d 395, 402 (Me. 1981).

In 1836, because the Legislature was considering abolishing the death penalty for the few remaining capital offenses (treason, murder and arson), they requested an advisory opinion from the Justices of the Supreme Judicial Court as to whether murder would become a "bailable offense" under Article I, Section 10 if the death penalty were abolished. On February 6, 1836, the Justices concluded that if the death penalty were abolished for murder, it would no longer be a "capital offence," and would therefore become a "bailable offence."

Following receipt of the Justices' Opinion, the current Article I, Section 10 was submitted to and ratified by the voters, effective March 21, 1838. Since that time, the provision relating to preconviction bail has read:

> No person before conviction shall be bailable for any of the crimes which now are, or have been denominated capital offences since the adoption of the Constitution, when the proof is evident or the presumption great, whatever the punishment of the crimes may be.

Although the 1838 version omitted an express affirmative statement of the right of an accused to be admitted to bail prior to conviction, there is little dispute that the 1838 amendment preserved the 1820 law that an accused had a constitutional right to be admitted to bail except where the offense charged had been denominated capital. There likewise is little dispute that this constitutional provision prohibits the Legislature from enacting a bail statute that eliminates a right to have reasonable bail set or authorizes pre-trial detention. The Commission, by its recommendations, seeks to return to Maine's Constitution an affirmative statement of that long-honored principle that an accused, because he is presumed to be innocent until proven guilty, has the right to reasonable bail or other conditions of preconviction release.

It should be pointed out that Maine's 1820 and 1838 constitutional provisions limit the absolute right to be admitted to bail solely because of the nature of the offense being charged, provided there is "proof evident or presumption great." However, after careful consideration, this Commission concludes that it is not just the nature of the offense being charged that defines the absolute or limited admission to pretrial bail or release; the key concerns are the degree of risk that the accused will flee or pose a serious danger to the community if released or threaten the integrity of the judicial process. In order to understand the Commission's rationale for this recommendation, it is necessary first to trace briefly the history of the "capital offense" in Maine.

Originally, persons accused of capital offenses were not "bailable," if the proof was evident or presumption great. The 1838 amendment of Article I, Section 10 seemed to limit the "bailability" of persons accused of any crime for which the death penalty ever was prescribed, including crimes other than murder. However, since 1838, the practice has been to provide the right to be admitted to bail to those accused of all offenses except murder. The Commission is unable to determine exactly when or why this practice developed, but it appears

that Maine prosecutors did not seek to limit the right to admission to bail for those accused of once-denominated capital offenses other than murder. Our present statute provides the right to admission to bail or release for any offense "other than an offense punishable by life imprisonment," i.e., murder. 15 M.R.S.A. § 942(1) (1978).

The reason that capital offenses were historically treated differently for purposes of bailability has to do with assuring the presence of the accused at trial for adjudication of guilt or innocence. Traditionally, the fundamental and sole purpose of bail before conviction was to provide reasonable assurance that the accused would appear for trial and submit to sentencing. The treatment of defendants accused of capital offenses as per se risks of flight was based on the assumption that a person facing the death penalty was not likely to appear for trial. The classic explanation for the capital crimes exception to the right to be admitted to bail was expressed in 1770 by the noted English jurist, William Blackstone, who observed that for capital offenses "no bail can be a security equivalent to the actual custody of the person. For what is there that a man may not be induced to forfeit, to save his own life?" Non-capital offenses were not felt to present a similar rationale and relevant concern.

It is against this historical background that the Commission's recommendations must be measured. Although the language of Article I, Section 10 of the Maine Constitution has remained unchanged since 1838, it is clear that bail practice has changed over the years from the per se treatment of an accused based merely on the offense charged. It is the Commission's recommendation that the Maine Constitution be amended to reflect contemporary community and judicial values and concerns. Although the Commission recommends that certain changes be made, it must be recognized that Maine's authority to change its bail law is circumscribed by the Federal Constitution. The Commission's recommendations reflect not only a careful balancing of individual and societal interests, but a balancing of State interests with the Federal requirement of Due Process and prohibition against excessive bail.

B. The Maine Constitution Should be Amended to Provide an Affirmative Right of an Accused to be Released on Bail or Other Conditions of Release.

The current bail constitutional framework is unsatisfactory because it neither balances the rights of individuals and society nor accurately reflects current practice. In order to determine why these important rights must be balanced, it is necessary to examine both the rights of the individual and the rights of society.

It is well-established in Maine and other jurisdictions that the right to pretrial release upon bail or other conditions is a fundamental protection for the presumption of innocence. As noted by the Maine Supreme Court in Fredette, this right of an accused to be admitted to bail, which derives from Massachusetts colonial history, and before that from English common law, has been recognized in Maine since 1820.

The United States Supreme Court has explained, on several occasions, the relationship between the presumption of innocence and the right to be admitted to bail: "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of our criminal law." Coffin v. United States, 156 U.S. 432, 453 (1895). The Supreme Court of the United States has stated the corrollary of this fundamental right: "This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction....Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would loose its meaning." Stack v. Boyle, 342 U.S. 1, 4 (1951).

The U.S. Supreme Court has stated that the presumption of innocence and the requirement that guilt be proven beyond a reasonable doubt are important elements of Due Process itself. However, nowhere in the present Article I, Section 10 of the Maine Constitution is there an affirmative statement of these fundamental rights. Instead, they must be inferred from a provision that provides only that persons charged with certain crimes cannot be admitted to bail "when the proof is evident or the presumption great." Accordingly, because it is a fundamental principle of our constitutional system that a person charged with a crime has a right to pretrial bail or other conditions of release, Article I, Section 10 of the Maine Constitution should be amended to express clearly and unequivocally that right.

C. The Maine Constitution Should be Amended to Except the Right to Bail or Other Conditions of Release if the Accused Charged With a Serious Crime Against the Person Poses a Substantial Risk of Non-Appearance, of Danger to the Community or Judicial Process

Although the Commission concludes that the Maine Constitution should be amended to include an affirmative right to bail, it also concludes that that right must be balanced against certain societal interests. Although traditionally the prevention

of flight has been the only State interest justifying the denial of bail, the Commission concludes that there are two additional interests, which, in certain circumstances, would justify the denial of bail: substantial risk of danger either to the community or to the judicial process.

The Commission does not make this recommendation lightly. Currently, the District Court or a Bail Commissioner is authorized to release on personal recognizance or bond any person charged with an offense other than murder. The District Court or Bail Commissioner must consider those conditions of release, including bail, that will reasonably assure the appearance of the accused at trial. The present Maine system therefore accords with the traditional view that prevention of future crimes is <u>not</u> a factor to be considered in the imposition of bail or other conditions of release. Furthermore, at the present time in Maine, the District Court or Bail Commissioner cannot deny outright any bail or conditions of release for a non-murder accused, regardless of either the risk of flight or the risk of danger.

The Commission recommends that the Constitution be amended to make explicit that if it is shown that an accused is an unreasonable risk of danger to the community or the judicial process, he or she may not be admitted to bail. Experience of Commission members and testimony at public hearings show that judges and bail commissioners sometimes practice preventive de-

tention, sub rosa or informally, by setting unreachably high bail in order to keep the accused in jail. The Commission believes that our Constitution should be amended so that the judicial system acts forthrightly, with due process and without arbitrariness, by eliminating the need for this fiction.

After much debate and argument on the pros and cons, both practical and constitutional, of having any limitation on the fundamental right to be admitted to bail or other conditions of release, the Commission has developed what it believes to be a compromise proposal which is carefully drafted to meet the strict requirements of due process and fairness. The Commission recommends the following amendment to Article I, Section 10 of the Maine Constitution.:

> Every person before adjudication shall have the right to reasonable bail or other conditions of release, except when the offense charged is a serious crime against the person and it is probable that conviction or adjudication for the offense charged will result and there is clear and convincing evidence that no combination of bail or other release conditions will reasonably minimize the substantial risk of non-appearance for court proceedings, the commission of another such offense, or a threat to the integrity of the judicial process.

The development of this proposed amendment must be set in the context of both statistical studies performed on pretrial release and the experiences of other States with their bail statutes and constitutional provisions.

As stated previously, the traditional and accepted governmental interest for imposition of bail or other restrictions on an accused's liberty was court control--the assurance that the accused will appear for his or her adjudication of guilt or innocence of the offense charged. Experience in Maine and elsewhere indicates that the risk of flight cannot be predicted solely by the nature of the crime charged. Studies reviewed by the Commission have indicated that the overwhelming majority of defendants appeared for court, regardless of the severity of the offense charged, and that no set of characteristics could be used to predict with reasonable accuracy those defendants who would fail to appear.

In light of this experience, it becomes clear that the granting or denial of bail should not depend solely upon the nature of the offense charged. Instead, judges and bail commissioners should be able to consider other relevant factors in determining whether the right to reasonable bail or release conditions is outweighed by a risk of flight.

In addition to the prevention of flight by an accused, crime prevention is a substantial societal interest, and bail should not be available to those who are shown to be an unreasonable risk to the community. Like the risk of flight, however, the risk of harm to the community does not depend necessarily upon the nature of the offense charged.

The prediction of danger is highly unreliable. Studies have failed to yield reasonably accurate predictive factors and have found little correlation between the type of crime of the first offense and the severity of a second offense. A study in the District of Columbia, where the first preventive detention statute was enacted, found that of the defendants initially charged with crimes subject to denial of the right to bail, 30% of the defendants were later acquitted of the charges against them. It has also been found in the District of Columbia that only one out of twenty persons who could have been detained under the D.C. detention law were actually rearrested for dangerous or violent crimes. Although there is no indication that it would necessarily occur in Maine, Maine's Constitution and laws should be drafted, and also interpreted to prevent the jailing of innocent persons or non-dangerous in order to deter the few guilty, dangerous offenders. This risk notwithstanding, the Commission concludes that there are circumstances in which an accused is an unreasonable risk of danger to the community, and therefore, should not be released on bail.

In addition to the risk of flight or the risk of harm to the community, experience in Maine and elsewhere demonstrates that a third circumstance would warrant pre-trial detention: danger to the integrity of the judicial process. If it can be

shown, for example, that an accused will threaten witnesses, or destroy evidence, the orderly administration of justice requires that bail be denied.

It should be emphasized, however, that these three circumstances are the exception and not the rule. Moreover, the burden would be on the prosecution to demonstrate by clear and convincing evidence that these societal interests clearly overweigh the individual's affirmative right to reasonable bail or other conditions of release.

The costs of erroneously denying a person's right to bail or other conditions of release are significant. Detention prior to trial may result in job loss. The detained defendant is unable to support his family, is unable to earn money to pay fines if convicted, and is less likely to be able to pay an attorney or to persuade the Court to grant probation on the basis of continued employment. Further, the released defendant is in a far better position to communicate with and assist his attorney in the preparation of his defense than the person who remains in custody. Additionally, youthful or first-time arrestees may be exposed to the potentially criminalizing and dangerous effects of jail. The United States Supreme Court has summarized the impact of pretrial detention upon defendants:

> The time spent in jail awaiting trial has a detrimental impact on the individual. It

> often means loss of job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time. Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious. It is especially unfortunate to impose them on those persons who are ultimately found to be innocent.

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

Balanced against the substantial interests favoring pretrial release are several competing interests. The interest of the judicial system in assuring the presence of the accused at all court proceedings is a compelling one and serves a basic "court control" function. The prevention of crime, on the other hand, is a generalized public goal that is not conditioned upon whether a person is presently under arrest. Pretrial arrest procedures that attempt to prevent future criminal or dangerous activity by persons already charged with a crime reflect a "crime control" function that must be undertaken with careful regard for the constitutional interests of due process, fairness, and reasonable accuracy.

Judges, legislators, and experts all over the country have been struggling for the past ten years to develop pretrial release systems that depart from the traditional consideration of risk of flight. Some states declare that the purpose of bail

is to assure the accused's appearance and the community's safety, and allow crime control factors to be considered in setting conditions of release. Fewer than five jurisdictions permit the imposition of pretrial detention--the denial of any bail or release conditions--for crime control purposes. This is due in part to the important limitations placed upon the States by the Federal constitutional protections of Due Process and against excessive bail. The National Association of Pretrial Service Agencies and the American Bar Association each have developed proposals that permit the detention of an accused prior to trial only in certain limited situations.

In order to meet the demands of due process, as defined by state and federal courts, and to minimize the risk of erroneously detaining presumably innocent individuals before conviction, the Commission recommends a carefully drafted amendment to Article I, Section 10. The different components of the proposed amendment should be briefly explained.

Every person before adjudication -- The Commission has chosen the word "adjudication" in order to make clear that Article I, Section 10 applies to both adult and juvenile accuseds. A juvenile is not "convicted" in Maine. Additionally, the Commission wanted to make clear that Article I, Section 10 applies up to the time of verdict in an adult case or finding of guilt

in a juvenile case. Once a judge or jury have found the accused to have legally committed an offense, the presumption of innocence no longer protects the accused. The Commission's language tracks Rule 46 of the Maine Rules of Criminal Procedure for adults, and 15 M.R.S.A. § 3310 for juveniles.

Shall have the right to reasonable bail or other conditions of release -- The Commission, as discussed previously, recommends providing an affirmative, explicit right to bail or other conditions of release. This "right" does not mean that every person must be released pretrial, but that every person shall be eligible for bail or other conditions of release. Our present 15 M.R.S.A. § 942 provides that a person should be ordered released pending trial on his personal recognizance or on execution of an unsecured bond unless the Judge or Bail Commissioner determines in the exercise of his discretion that more conditions, including surety bail, are necessary to insure appearance. The Commission is providing the clear affirmative constitutional basis for the rights recognized in present practice.

The Commission recognizes the careful distinction between "bail" and other "conditions of release." The word "bail" has a monetary connotation, and an indigent accused has the same right to pretrial release as a wealthier accused. The presump-

tion is that non-monetary conditions of release are favored, and that financial conditions, such as cash deposit bail, are not to be ordered routinely. The Commission also emphasizes that financial conditions are not to be used to ensure the safety of the community. In other words, the amount of cash deposit bail set should not be based solely on the risk of danger posed by the release of the accused. This recommendation is in accord with the Pretrial Service Agency Performance Standards and the American Bar Association standards.

Except when the offense charged is a serious crime against the person and it is probable that conviction or adjudication for the offense charged will result -- It is the intent of the Commission that "serious crime against the person" include only felony offenses, currently, murder and A, B, and C offenses, and not misdemeanors, currently, D and E offenses. It is therefore the intent of the Commission that the offenses for which an accused may be denied the right to be released on bail or other conditions of release be expanded from the presently limited category of murder, to offenses such as murder, rape, gross sexual misconduct, kidnapping, voluntary manslaughter, assault with a dangerous weapon, and robbery. The Commission has not reached this conclusion easily, because it is by no means clear that those accused of crimes against the person are

any more likely to commit future offenses than those who are accused of other types of offenses. While the Commission recognizes that there are persons accused of murder who pose no risk of non-appearance or future danger, it is also aware that there are other persons who are accused of lesser offenses who pose a greater risk of flight or danger. In those few jurisdictions where denial of bail has been legislated, the category of offenses has been strictly limited to certain violent, heinous offenses.

However, the mere fact that a person has been arrested for such an offense is not, by itself, enough to warrant the severe restriction of liberty through detention of the person prior to adjudication of guilt or innocence. Therefore, before an accused can be denied his liberty prior to trial, the State must have the burden of showing that it is more probable than not that the accused will be convicted for the offense charged. The "probable conviction or adjudication" standard is similar to that developed by the courts in Maine and elsewhere for "proof evident, presumption great." If there is no probability of conviction or adjudication for the offense charged, then the assumption that the accused might commit a future violent crime is weakened, and the constitutional justification for depriving the accused of his liberty disappears.

And there is clear and convincing evidence that no combination of bail or other release conditions will reasonably minimize the substantial risk of non-appearance for court proceedings, the commission of another offense, or a threat to the integrity of the judical process -- The standard of clear and convincing evidence is borrowed from the proposals of the National Association of Pretrial Service Agencies, the American Bar Association, and from the pretrial detention provisions in the District of Columbia. This provision is designed to ensure that the requirements of the due process of law are met before the accused's liberty is denied pretrial. The concern is to minimize the risk of erroneous deprivation of the fundamental liberty to go freely about the community, the right to be with family and friends, and the ability to seek or hold employment. The Commission anticipates that most defendants will be released pretrial and the use of pretrial detention will be minimal. It is for this reason, and because the current sub rosa pretrial detention by the setting of high money bail has elements of arbitrariness and unaccountability, that the Commission recommends specific findings that must be made prior to an order for pretrial detention.

The Courts uniformly have held that it is unconstitutional to deny automatically an accused of his right to bail or release without judicial inquiry into the accused's risk of

flight or danger. On the other hand, neither can unlimited discretion to detain be given to judges or bail commissioners. Like the courts and legislatures in other states, the Commission has struggled to balance the individual's clear and vital liberty interests, with the governmental interests of ensuring appearance and protecting society from violence, in order to develop the proposed standards for Article I, Section 10. If there are bail or other release conditions that will assure that an accused who is presumed innocent will appear at trial and will not commit a serious crime against the person or pose a danger to the judicial process while released pending adjudication, then the individual's liberty interests must be protected. If it is probable that the accused will be convicted of a serious crime against the person, and no conditions of release will minimize that person's substantial threat to flee or to commit another such offense, then the balance shifts to the governmental interests at stake. It is a delicate balance and one which must be handled carefully in order not to unconstitutionally deprive an innocent person of his freedom.

There also is a significant governmental interest in the integrity of the judicial process. Clear and convincing evidence produced by the prosecution that the accused poses a

threat to the integrity of the judicial process by threatening or intimidating witnesses, jurors, or court personnel, or by concealing or destroying evidence, may warrant the denial of bail or other conditions of release. Pretrial detention under these circumstances is necessary for the orderly administration of criminal justice, but must be limited to those circumstances where no condition or combination of conditions of release will reasonably minimize that substantial threat to the integrity of the judicial process.

IV. THE LEGISLATURE SHOULD IMPLEMENT A COMPREHENSIVE BAIL STATUTE OF STATUTORY SCHEME TO CARRY OUT THE INTENT OF THE NEW CONSTITUTIONAL PROVISION.

One of the first tasks the Commission undertook was to collect and examine all of the statutes relating to bail. There are literally dozens of statutes which, in some way, deal with the subject of bail. These include statutes which address the authority of clerks, law enforcement officers, game wardens, bail commissioners, District Court judges and Superior Court justices to grant bail.

In some instances these statutes simply state that a certain official may take bail. In others, the statutes can be read to set forth the circumstances under which bail should be allowed. In still others, the statutes utilize the terms "bailable offenses," a concept which continues to cause confusion.

Although many of these statutes are unnecessary or inconsistent, and should be replaced or harmonized, it is premature to attempt a major recodification of all the bail statutes in this State until it is clear what is the desired constitutional standard for bail. Accordingly, the Commission recommends a bifurcated approach by first amending the Maine Constitution before revising, repealing or enacting the numerous bail statutes. After the constitutional question has been settled, it is the Commission's view that there should be a single statute or series of statutes in the same Title which clearly set forth the guidelines and procedures to be followed in setting bail.

However, the Commission does recommend that if there is any constitutional provision that will permit the pretrial detention of an accused for risk of commission of a future offense, then certain statutory guidelines must be enacted in order to assure the constitutionality of such pretrial detention. The most important consideration is that of speedy trial. In all jurisdictions that have enacted pretrial detention statutes, and in all model standards or statutes, the accused who is ordered detained pending trial must be brought to trial within approximately sixty days of his detention. If, at the end of this period of time, trial is not held, then the accused must be admitted to bail or other conditions of release, like other

accuseds. The case need not be dismissed if the prescribed time expires.

Additionally, as stated earlier, it should be made clear that financial conditions of release should not be imposed to ensure safety or prevent the commission of future offenses. The prediction of future offenses should be articulated clearly and forthrightly, and should not be hidden by the setting of an excessive bail amount.

The Commission also recommends that a statute be enacted to authorize the revocation of bail or conditions of release if a finding is made that the accused has intentionally violated the release conditions, or has notice and intentionally fails to appear for a judicial proceeding. Furthermore, the Commission has determined that law exists independently of Article I, Section 10 authorizing the detention of an accused who violates conditions of release designed to prevent intimidation of or threats to witnesses or jurors. This is attributed to the inherent power of the court to protect its own adjudicating process.

V. POST-VERDICT BAIL

At the present time there is no statute which governs the issue of bail after conviction and pending appeal. The Maine Supreme Judicial Court recently promulgated Rules 46A, 46B,

46C, and 46D of the Maine Rules of Criminal Procedures to address this statutory omission. These rules provide a comprehensive scheme to address the issue of bail pending appeal for an individual convicted of a crime.

Rule 46A provides that:

> (a) Application to Presiding Justice. After a verdict or finding of guilt, a defendant may apply to the justice who presided at trial for bail pending imposition or execution of sentence or entry of judgment or appeal.
>
> The justice may enter an order for bail pending appeal prior to the filing of a notice of appeal but conditioned upon its timely filing.
>
> If the justice denies bail pending appeal, he shall state in writing or on the record his reasons for the denial.
>
> (b) Standards. After a verdict or finding of guilt a defendant may be admitted to bail unless the justice has reasonable grounds to believe that:
>
> > (1) there is a substantial risk that the defendant will not appear as required or
> >
> > (2) there is a substantial risk that the defendant will pose a danger to another or to the community.
>
> In addition to the factors relevant to pretrial release, the justice shall consider the facts proved at trial, the length of sentence imposed, and the defendant's record of appearances at trial.

(c) Conditions. In lieu of or in addition to an appearance or bail bond, the justice may impose any condition deemed reasonably necessary to minimize the risk of flight or danger.

Rule 46B provides that:

After the entry of judgment a defendant may apply to a single justice of the Supreme Judicial Court for bail pending appeal whenever the trial justice has denied bail or set bail conditions which aggrieve the defendant. An application may also be entertained by a single justice whenever application to the trial justice is not practicable.

The single justice shall make an independent determination of the application.

Following the single justice's decision no further application shall be entertained by any other justice of the Supreme Judicial Court.

Rule 46C provides that:

Any justice of the Superior Court may revoke an order of bail pending appeal entered by a Superior Court justice and a justice of Supreme Judicial Court may revoke any order of bail pending appeal, in either instance upon a determination made after notice and opportunity for hearing that:

(1) The defendant has violated a condition of bail; or

(2) The defendant has been charged with a crime allegedly committed while he was released pending proceedings in connection with the present crime; or

(3) The appeal has been taken for purposes of delay.

If bail is revoked by a justice of the Superior Court, the defendant may apply for bail to a single justice of the Supreme Judicial Court pursuant to Rule 46B.

Rule 46D provides that:

(a) Forfeiture

(1) Declaration. If there is a breach of condition of a bond, the court in which the defendant is to appear shall declare a forfeiture of the bail.

(2) Setting Aside. The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture.

(3) Enforcement. When a forfeiture has not been set aside, the court shall on motion enter a judgment of default and execution may issue thereon. By entering into a bond, the obligors submit to the jurisdiction of the court in which the defendant is to appear and irrevocably appoint the clerk of that court in the county in which the bail is posted as their agent upon whom any papers affecting their liability may be served. Their liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the obligors at their last known addresses.

(4) Remission. After entry of such judgment, the court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in paragraph (2) of this subdivision.

> (b) Exoneration. When the condition of the bond has been satisfied or the forfeiture thereof has been set aside or remitted, the court shall exonerate the obligors and release any bail. A surety may be exonerated by a deposit of cash in the amount of the bond or by a timely surrender of the defendant into custody.

While the court's rules have provided helpful guidance in this area, it is the Commission's view that a statutory framework is needed for bail following conviction and pending appeal. Since Article I, Section 10 of the Maine Constitution only addresses the issue of bail prior to conviction, and because different policies come into play once the presumption of innocence is overcome by conviction, the Legislature may wish to address the question of bail after conviction.

VI. THE BAIL COMMISSIONER SYSTEM

The Commission also received numerous comments concerning the bail commissioner system. Overall, bail commissioners perform an important function for the State. However, two criticisms were directed at the bail commissioner system. First, bail commissioners, who are performing a function of the State, receive their fees from the defendant being bailed. Second, bail commissioners receive little, if any, training in their duties and responsibilities.

The Commission recommends that the practice of requiring the defendant to pay the bail commissioner's fee be immediately

abolished. The Commission recommends further that such fees be paid through public funds.

The Commission also supports the view that bail commissioners should be given adequate guidance as to what the law requires of them. This could include training sessions at a central location, such as the Maine Criminal Justice Academy, as well as regular meetings with the judges and justices in the district in which the bail commissioner serves.

VII. THE BAIL COMMISSION

A Commission should, following this report, be created and be expanded to assist the Legislature in drafting a comprehensive statute, guidelines, and rules of criminal procedure concerning bail. Although these statutory changes cannot be enacted until after the voters consider the constitutional amendment in November 1984, work should begin now on these complex questions. The Commission, which would become analagous to the Commissions which developed the Juvenile and Criminal Codes, should be provided appropriations sufficient to hire staff. It should be expanded to include legislators, bail commissioners, and the general public, as well as members of the legal community. The Commission would be required to report its findings to the Legislature in January 1985. Although this Commission has deliberated carefully and made its recommendations, much work remains to implement those recommendations.

VIII. CONCLUSION

The purpose of this report has been to identify problem areas with respect to the law of bail in criminal cases and to stimulate further study and possible legislative action. This report does not attempt to offer final solutions to those problems but seeks to set the stage for continuing discussion of them. The Commission firmly believes that before any major revision of Maine's bail laws is undertaken, the Legislature and the people of the State must determine what the Constitution of Maine should provide as the rights of persons accused of crime yet presumed innocent until proven guilty. Article I, Section 10 of the Maine Constitution has not been amended since 1838, and some of its language is archaic and out-of-date. Consequently, the Commission strongly recommends that the first priority be to amend the Constitution of this State as outlined in this report.