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COMMENTS

CRIMINAL PROCEDURE— PREVENTIVE DETENTION IN NEW MEXICO

The revised New Mexico Rules of Criminal Procedure for the District and Magistrate Courts for cases within district court trial jurisdiction have been in effect since July 1, 1972.¹ One controversial development engendered by the new rules is the establishment of a procedure for preventive detention² found in section (a)(3) of Rule 24, which provides:

The court on its own motion or upon motion of the district attorney may at any time have the defendant arrested to review conditions of release. Upon review the court may . . . after a hearing and upon a showing that the defendant has been indicted or bound over for trial on a charge constituting a serious crime allegedly committed while released pending adjudication of a prior charge, revoke the bail or recognizance.³

This comment will attempt to dispel a possible misconception with regard to the doctrine of preventive detention as imposed by Rule 24(a)(3), and also examine arguments in opposition to the efficacy of the rule. These arguments generally find their bases in three concepts, the presumption of innocence, the right to bail, and due process of law.

The doctrine of preventive detention has aroused controversy chiefly as a result of the introduction in the 91st Congress of the Nixon Administration's "Preventive Detention" bill,⁴ which provided:

Whenever a judicial officer determines that no condition or combination of conditions of release will reasonably assure the safety of any other person or the community, he may . . . order pretrial detention. . . .⁵

There is an important distinction between this proposed federal statute and New Mexico Rule 24(a)(3). The most objectionable fea-

1. Order of N.M. Sup. Ct., May 3, 1972, N.M. Stat. Ann., Compiler's Note to § 41-23-1 (Supp. 1973).

2. The term "preventive detention" as used in this comment means the pretrial detention of persons for the protection of society.

3. N.M. R. Crim. P. 24(a)(3).

4. S. 2600, 91st Cong., 1st Sess. (1969).

5. S. 2600, 91st Cong., 1st Sess., § 2 (1969).

ture of the administration's proposal lay in the arbitrary manner in which preventive detention could be imposed. The court could, in the words of one opponent⁶ to the measure, confine a defendant based upon "subjective guesswork of future conduct."⁷ In contrast, the New Mexico rule sets forth an objective precondition to imposing preventive detention, viz., a defendant's being indicted or bound over for trial on charges of serious criminal conduct allegedly committed while released from custody on a prior charge.⁸ Indictment or bind over under these circumstances is a reasonable criterion for revoking release, because it gives the court a further indication of dangerous behavior on the part of the defendant.

PRESUMPTION OF INNOCENCE

According to Wharton's Criminal Evidence, the presumption of innocence

is merely a method of stating that the burden is on the state to prove the defendant's guilt beyond a reasonable doubt and, until that burden has been sustained, the defendant is to be regarded as not guilty.⁹

Revocation of release does not shift the burden of proof onto the defendant. At trial, the state still bears the burden of proving the defendant's guilt beyond a reasonable doubt.

It is clear that in New Mexico, the presumption of innocence has no probative value in the sense of furnishing evidence of the accused's innocence.¹⁰ A presumption cannot *be* evidence.¹¹ The presumption of innocence is not a quantum of proof which the court or the prosecution must overcome before release can be revoked.

The members of the Advisory Committee on Pretrial Proceedings of the American Bar Association Project on Minimum Standards for Criminal Justice discussed the relationship between the presumption of innocence and pretrial detention in the Commentary to Section 1.1, "Policy favoring release," of the Standards Relating to Pretrial Release. The commentary states:

... [W]hile the presumption of innocence surely does not preclude

6. Jerome J. Shestack, Chairman, Section on Individual Rights and Responsibilities, American Bar Association.

7. *Preventive Detention, Hearings on S. 2600 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 2nd Sess., at 349 (1970).

8. *See, Rendel v. Mummert*, 106 Ariz. 233, 237; 474 P.2d 824, 828 (1970).

9. 1 Wharton, *Criminal Evidence* § 97, at 168 (1972); *see also*, Note, 79 Harv. L. Rev. 1489, 1501 (1966).

10. *State v. Henderson*, 81 N.M. 270, 272; 466 P.2d 116, 118 (1970).

11. 9 Wigmore, *Evidence* § 2511, at 409 (1940).

all pretrial detention, something akin to it does prevent the use of pretrial detention as a sort of anticipatory form of punishment.¹²

The committee's statement indicates that although revocation of release would result in pretrial detention, as long as release were revoked for the protection of society, and not to punish the defendant, such action would not have contravened the presumption of the defendant's innocence. In a practical sense, however, it would be almost impossible to determine if the court's motive in ordering pretrial detention were improper, i.e., with the intention of punishing the defendant, since Rule 24(a)(3) places the decision to revoke release solely within the court's discretion.¹³ This aspect of Rule 24(a)(3), though not directly related to the presumption of innocence, merits discussion.

New Mexico law provides three procedural safeguards against improperly imposing preventive detention. First, to prevent release from being arbitrarily revoked, Rule 24(a)(3) requires actual indictment or bind over on charges of criminal activity allegedly perpetrated while the defendant was released from custody pending adjudication of a prior charge.¹⁴ A court's independent finding of probable cause to believe that the defendant has committed a crime is not a sufficient basis for ordering revocation of release. Second, the indictment or information must charge a serious crime.¹⁵ For purposes of Rule 24(a)(3), a serious crime is one not within magistrate court trial jurisdiction.¹⁶ Third, if a defendant feels that a particular judge cannot make an impartial determination at the revocation hearing, he has an absolute right to disqualify that judge.¹⁷ In addition, Rule 24(c) provides for review and appeal of revocation of release.¹⁸

Rule 24(a)(3) is not unique in its grant of discretionary power. New Mexico district courts have similar authority in other matters directly affecting personal liberty, e.g., issuing warrants for arrest,¹⁹ setting bail,²⁰ and (within statutory limits) imposing²¹ and suspending²² sentences. Indeed, myriad situations in both civil and criminal

12. A.B.A. Project on Minimum Standards for Criminal Justice: Standards Relating to Pretrial Release 23 (Approved Draft, Sept. 1968).

13. N.M. R. Crim. P. 24(a)(3).

14. *Id.*

15. *Id.*

16. N.M. R. Crim. P., Commentary to R. 24.

17. N.M. Stat. Ann. § 21-5-8 (Repl. 1970).

18. N.M. R. Crim. P. 24(c).

19. N.M. R. Crim. P. 14(c).

20. N.M. R. Crim. P. 22(a)(3) and (4).

21. N.M. Stat. Ann. § 40A-29-3 and 40A-29-11 (Repl. 1972).

22. N.M. Stat. Ann. § 40A-29-15(B). (Repl. 1972).

cases call for the exercise of the court's discretion. Ultimately, the proper exercise of discretionary powers vested in this state's courts pursuant to Rule 24(a)(3) or any other authority depends upon the continued integrity of the New Mexico judiciary.

RIGHT TO BAIL

The United States Supreme Court has not directly ruled on the applicability to the states of the eighth amendment's²³ bail provision.²⁴ But the New Mexico Constitution provides that all persons shall be bailable by sufficient sureties, except for capital offenses.²⁵ At issue is whether this provision precludes revocation of release.²⁶

The New Mexico Supreme Court dealt with this question in the 1968 case of *Tijerina v. Baker*.²⁷ In *Tijerina*, the petitioners were 20 defendants charged with kidnapping,²⁸ a capital offense.²⁹ The charges arose from their alleged participation in the June 5, 1967, Tierra Amarilla Courthouse Raid.³⁰ All 20 defendants were released on bail.³¹ On January 3, 1968, prior to the time the defendants were tried, a principal witness against some or all of the defendants was found beaten to death.³² That same day, although none of the defendants was charged in the slaying,³³ the magistrate,

... upon application by the district attorney and at an ex parte hearing, ... ordered the bonds ... revoked and issued a warrant for their arrest and an order that they be confined in the state penitentiary for safekeeping ...³⁴

All but two of the defendants were arrested and remanded to custody.³⁵ A writ of habeas corpus was sought in the New Mexico Supreme Court on behalf of all the defendants.³⁶ The petitioners

23. U.S. Const. amend. VIII.

24. U.S. ex rel. Keating v. Bensinger, 322 F. Supp. 784, 786 (1971).

25. N.M. Const. art. 2, § 13.

26. Arizona's highest court in *Rendel v. Mummert*, 106 Ariz. 233, 239, 474 P.2d at 830, upheld a statute (A.R.S. § 13-1577 et seq.) (Supp. 1973) which permits pretrial revocation of release upon a showing of probable cause that the defendant committed a felony during the period of release. The court held that the challenged statute violated neither the U.S. Constitution nor the Arizona Constitution's bail provision (Ariz. Const. art. 2, § 22), which is similar to New Mexico's.

27. 78 N.M. 770, 438 P.2d 514 (1968).

28. 78 N.M. at 772, 438 P.2d at 515.

29. N.M. Stat. Ann. § 40A-4-1 (Repl. 1972).

30. Nabokov, *Tijerina and the Courthouse Raid* 154 (1969).

31. 78 N.M. at 771, 438 P.2d at 515.

32. Gardner, *iGrito!* 237 (1970).

33. *Id.* at 241.

34. 78 N.M. at 772, 438 P.2d at 515.

35. 78 N.M. at 771, 438 P.2d at 515.

36. 78 N.M. at 771, 438 P.2d at 515.

asserted that their bail bonds had been unlawfully revoked, and in their petition prayed that they be released from custody pending a preliminary hearing.³⁷

The court rejected the petitioners' contention that their release on bail was *res judicata* and not subject to revocation,³⁸ and stated that the right of a person accused of crime to be admitted to bail until adjudged guilty by his or her court of last resort is not absolute under all circumstances.³⁹ Citing cases in which courts of other jurisdictions had upheld revocation of release after the commencement of trial, the court reasoned in dicta:

If the court has inherent power to revoke bail of a defendant during trial and pending final disposition of the criminal case in order to prevent interference with witnesses or the proper administration of justice, the right to do so before trial seems to be equally apparent under a proper set of facts.⁴⁰

However, the court held that to revoke release without first giving notice and an opportunity to be heard was a denial of due process.⁴¹ The court upheld the revocation of bail as to four of the defendants, based on its finding that under New Mexico statutory law,⁴² the committing magistrate had exceeded his authority in granting bail to the four defendants in the first place.⁴³

The holding in *Tijerina v. Baker* establishes that, in New Mexico, an order granting pretrial release is not *res judicata*.⁴⁴ And, notwithstanding the New Mexico Constitution's bail provision, dicta in the *Tijerina* decision supports revocation of release in cases where crimes involving interference with the processes of justice are allegedly committed while the defendant is released on bond or recognizance pending the trial of an earlier charge.⁴⁵ But the courts would encounter difficulty in extending this dicta to apply in all cases in which revocation of release pursuant to Rule 24(a)(3) is sought, since it is doubtful whether, in every case, the subsequent criminal act(s) could be construed to "[interfere] with witnesses or the proper administration of justice."⁴⁶

37. 78 N.M. at 771, 438 P.2d at 515.

38. 78 N.M. at 772, 438 P.2d at 516.

39. 78 N.M. at 773, 438 P.2d at 516.

40. 78 N.M. at 773, 438 P.2d at 517.

41. 78 N.M. at 773, 438 P.2d at 517.

42. N.M. Stat. Ann. § 41-4-5 (Repl. 1972).

43. 78 N.M. at 774, 438 P.2d at 518.

44. 78 N.M. at 772, 438 P.2d at 516.

45. See text at note 40 *supra*.

46. 78 N.M. at 773, 438 P.2d at 517.

DUE PROCESS

Due process of law⁴⁷ presents the most serious challenge to the constitutionality of Rule 24(a)(3).⁴⁸ The due process argument asserts that even if there is compliance with the procedural requirements of notice and the opportunity to be heard, and the right to due process is not violated at the revocation hearing, the defendant preventively detained can still be considered to have been denied due process of law, since revocation of bond or recognizance results in deprivation of liberty prior to conviction.

Present law is not settled on the question of preventive detention as a violation of due process.⁴⁹ Whether the procedures implemented by Rule 24(a)(3) violate due process will not be conclusively resolved until the rule is challenged and the courts have made a final determination of the issue by weighing two competing interests: individual liberty, and society's right to be free from the threat of crime.⁵⁰ The resulting balance is already tipped in favor of the defendant.

"Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling."⁵¹

Rule 24(a)(3) is a tool the courts can use to protect the public from harm when a defendant released pending trial demonstrates recidivistic tendencies. And, to the person released from custody pending trial, the knowledge that the court is empowered to revoke release should provide a deterrent to criminal activity.

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47. U.S. Const. amend. XIV, § 1; N.M. Const. art. 2, § 18.

48. Hall, *Subsequent Misconduct as a Ground for Forfeiture of the Right to Release on Bail—A proposal*, 15 N.Y.L.F. 873, 878 (1969).

49. See e.g., A.B.A. Project on Minimum Standards for Criminal Justice: Standards Relating to Pretrial Release 65-71, 74 (Approved Draft, Sept. 1968).

50. Cf. *Terry v. Ohio*, 392 U.S. 1, 20-27 (1968).

51. *Bates v. Little Rock*, 361 U.S. 516, 524 (1959).