

# THE PRETRIAL REPORTER

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## Executive Summary

This issue of The Pretrial Reporter contains the following:

### National Notes:

- In the aftermath of the killings of four police officers by a defendant who posted substantial amounts of bail money, the Washington legislature enacts three measures that address dangerousness in bail decision making practices.
- The bail bonding industry pushed bills in two states to severely limit the ability of pretrial services programs to provide supervision of defendants on pretrial release.
- The U.S. Senate is set to begin hearings to remove a federal judge from office after allegations that the judge took bribes from a bail bonding company.
- Bail bonding companies in Harris County, Texas owe \$26 million in unpaid forfeitures.
- Tennessee prosecutors are asking the state legislature to take away their authority to provide pretrial diversion options for first time offenders charged with minor offenses.

### Cases:

- The U.S. Court of Appeals for the 8th Circuit rejects facial challenge to the provisions of the Adam Walsh Act that require a curfew and electronic monitoring as a mandatory condition of pretrial release in specific sex offense cases.
- The 9th Circuit U.S. Court of Appeals approves San Francisco's blanket strip search policy of new arrestees.
- The 2nd Circuit rules that a summons to appear in court for a non-felony does not constitute a "seizure" under the Fourth Amendment.

### EXECUTIVE DIRECTOR'S LETTER

Dear Friends:

This edition of the Pretrial Reporter reflects yet another change in our communications strategy. For decades, we shared important issues in pretrial justice through this bimonthly report alone. Now, with our website, eBlasts, Facebook page, Annual Report and other publications, we have found that by the time the Pretrial Reporter is being written, we've already sent timely pretrial justice news to you in other ways.

This calendar year we will publish only four Pretrial Reporters, covering three months each. We expect to produce another "Special Edition" on juvenile detention reform this summer.

EXECUTIVE DIRECTOR'S  
LETTER  
(CONTINUED)

And then, after a good and long run, the Pretrial Reporter will be retired. If you are not already signed up for Updates via our website, or have not yet Friend us on Facebook, please do so. We look forward to continuing to share pretrial justice news, research, and case law with you.

Best,

Tim Murray



## National Notes

### WASHINGTON LEGISLATURE REACTING TO TRAGIC CRIME ON BAIL INCIDENT

Last May, Maurice Clemons was arrested in Pierce County, Washington on charges of assaulting two law enforcement officers. Since the arrest occurred on a weekend, Clemons would not appear in court for his initial appearance until Monday morning. Rather than wait, Clemons found a bail bonding company to post the \$40,000 in bail automatically set according to the county's bail schedule, and he was released. Two months later, while still out on bail for the charges of assaulting law enforcement officers, Clemons was arrested for the rape of a child, and the court set a bail of \$190,000. He posted that bail, also through a bail bonding company. He was taken back into custody on those charges but in November he again turned to a bail bonding company to post another bail of \$190,000 and he was released. Thus, in 2009, he posted a total of \$420,000 in bail through bail bonding companies. (*The Tacoma News Tribune*, 12/7/09.) Six days after his release in November, he walked into a coffee shop and gunned down, execution style, four police officers.

The Washington legislature recently passed three measures in response to these shootings. The first, HB 2625, eliminates the use of bail schedules for felony cases, requiring instead an "individualized determination by a judicial officer of conditions of release for persons in custody for a felony." This bill was passed unanimously.

The second, SB 6673, establishes a work group to conduct a comprehensive review of the state's bail practices and procedures. The work group is to be comprised of 26 members, including two each from the House and Senate, a representative from the governor's office, a supreme court justice, superior court and district court judges, two prosecutors, two defense attorneys, a police officer, a sheriff's deputy, representatives from the statewide association of city governments and the statewide association of county governments, a representative from the Department of Corrections, a victim's advocate, a civil liberties advocate, a bail bondsman and a bounty hunter. The group will be charged with looking at "all aspects of bail," including validated risk assessment tools, the legal and constitutional constraints in granting or denying bail, and bail practices within the individual counties. The work



*Killings of four  
police officers by  
defendant out  
on money bail  
received national  
attention*

group is required to submit its findings to the legislature, governor and supreme court by December 1, 2010. This bill was passed unanimously in the Senate and with just one dissenting vote out of the 98 cast in the House.

The third measure, also passed by wide margins, puts on next fall's electoral ballot a proposed constitutional amendment that would allow courts to hold certain defendants without bail. The proposed amendment will read: "Bail may be denied for offenses punishable by the possibility of life in prison upon a showing by clear and convincing evidence of a propensity for violence that creates a substantial likelihood of danger to the community or any persons, subject to limitations as shall be determined by the legislature." (Joint Resolution 4220.)

### **LEGISLATION RESTRICTING NON-FINANCIAL RELEASE REJECTED IN VIRGINIA, STILL UNDER CONSIDERATION IN FLORIDA**

The bail bonding industry has been actively pushing legislation in Virginia and Florida that would significantly limit the ability of pretrial services programs to do what national standards state they should do – interview and investigate all defendants in custody charged with a crime and present information to the court that is relevant to the pretrial release decision, and supervise defendants released by the courts with conditions.

In Virginia, where the state contributes significant portions of the costs of county pretrial services programs, the bonding industry sought to seize on a budget crisis confronting the legislature. Faced with a \$4.2 billion budget shortfall, the bonding industry pushed a bill that would have drastically cut pretrial services programs throughout the state. The bill provided that that "no person shall be released to a pretrial services agency unless he is determined by a court to be indigent." (HB 728.) The bonding industry set up an organization – Virginians for the Preservation of Bail – that ran television and radio ads throughout the state to rally public support for passing the bill. "If we don't fight this now, this very industry may well be eliminated," said Bill Weisband, executive director of the organization. (*Newport Daily Press*, 1/26/10.)

The measure passed the House of Delegates by a 63 to 36 vote. When it arrived in the Senate, it faced stiff opposition from the Virginia Sheriff's Association. Newport News Sheriff Gabe Morgan testified before the Senate's Courts of Justice Committee that the bill would end up costing more money, not saving more. He told the committee that when he took office in 2006 the jail, which was designed for 248 inmates, held in excess of 700. Currently,



*"I'm not going to put all of my career's work, going down the drain, flushed by the commode, because this Legislature seems to be owned by the bail bonding industry."*

the population stands at around 400, and he credits the pretrial services program for being partially responsible for the drop. "There are folks who can be released into the community and have been released into the community and shown to be successful," Morgan told the committee. "So why should taxpayers underwrite their care when they're capable of caring for themselves and they don't pose a significant risk?" Morgan also noted that bonding companies often decline to work with defendants who have low bails, which are set as a result of their lower risks, because there is no profit in it for the bonding companies. "I don't know of any bondsmen that come down here and write a bond for \$500. Too much hassle, too much trouble, and they're taking only \$50." As a result, he noted, some defendants "beg" magistrates to raise their bonds to \$1,000 "because at least they can get someone to underwrite it." (*Newport Daily Press*, 1/26/10.) The committee later voted to table consideration of the bill for the current legislative session, meaning that the next time it could be considered is in 2011.

In Florida, the bonding industry has been pushing a bill, HB 445 and SB 782, which would allow non-financial release only of defendants charged with misdemeanors or non-dangerous felonies. It would also prohibit non-financial release to defendants with a history of failure to appear in court, who are on probation, or who have a history of violent offenses. All of these categories of defendants could still be released on financial bail.

In testimony before a House committee considering the House bill, Leon County Commissioner Bill Proctor noted that the population of the Leon County Jail fell from 1,314 in 2006 to its current level of 915, partly as result of the work of the pretrial services program that he pushed to implement. He warned that jail crowding in Florida will grow worse if the bill passes. In a press conference after his testimony, Proctor stated that "[t]his bill is a heat-seeking torpedo that will come and it will bludgeon the great work, the efforts of countless people. We're doing good and I'm not going to put all of my career's work, going down the drain, flushed by the commode, because this Legislature seems to be owned by the bail bonding industry." (*Tallahassee Democrat*, 3/10/10.)

The bill was voted out favorably by the House Public Safety and Domestic Security Policy Committee and the Criminal and Civil Justice Appropriations Committee. The Senate bill, SB 782, is pending in the Senate Criminal Justice Committee. A vote by the committee on the bill was delayed at the end of March as opposition mounted from county governments and sheriffs. (*The Miami Herald*, 3/27/10.)



*“We wanted to  
make as much  
money as we could  
while he was on  
his way out.”*

## U.S. DISTRICT JUDGE IMPEACHED FOR TAKING BRIBES FROM BAIL BONDING COMPANY

With the U.S. House of Representatives sharply divided along partisan lines on health care and many other issues, members recently found themselves in unanimous agreement. On March 11, 2010, the House unanimously passed four articles of impeachment against U.S. District Court Judge Thomas Porteous of Louisiana. One of the four impeachment articles stemmed from actions allegedly taken by Judge Porteous while he was a state court judge in Jefferson Parish, Louisiana. Included among the charges was that he accepted bribes from a bail bonding company to steer more business to that company.

The bail bond company, owned by Louis and Lori Marcotte, was embroiled in an FBI investigation, begun in 2002, that landed the Marcottes and two sitting Jefferson Parish judges in federal prison. Judge Porteous, by then sitting on the federal bench, was implicated in that investigation but never charged.

In testimony before the House committee considering the impeachment articles, Louis Marcotte, recently released from prison, testified that he tried to rush through as many favorable bond rulings as he could before Judge Porteous left for the federal bench. “We wanted to make as much money as we could while he was on his way out,” Marcotte told the committee. Marcotte testified that he provided Judge Porteous with such favors as expensive lunches once or twice a week, a free trip to Las Vegas, and paying for repairs to the judge’s home and cars. He estimated that, in exchange, Judge Porteous issued 50 rulings in his final two months on the state bench that profited the bail bonding company, including one on his last day. Judge Porteous also expunged the felony convictions of two employees of the bail bonding firm so that they could obtain bail bonding licenses. (*The Times-Picayune*, 12/11/09.)

Article II of the impeachment includes these allegations, and also notes that Judge Porteous “used the power and prestige of his office to assist the Marcottes in forming relationships with State judicial officers and others. Judge Porteous also knew and understood that Louis Marcotte made false statements to the FBI in an effort to assist his appointment to the federal bench.” This article concludes that, based on these allegations, “Judge Porteous has engaged in conduct so utterly lacking in honesty and integrity that he is guilty of high crimes and misdemeanors, is unfit to hold the office of federal judge, and should be removed from office.”

The U.S. Senate has appointed a committee of six Democrats and six Republicans to hear the testimony from the House impeachment



*One bail bond  
board member  
recently voted to  
approve the bail  
bonding license  
for his brother.*

managers. The committee will then make a recommendation to the full Senate regarding removal of Judge Porteous from office. The committee hearing should begin in April.

### **HOUSTON NEWSPAPER LOOKS AT BAIL BOND FORFEITURES**

A recent review by the *Houston Chronicle* of bail forfeitures in Harris County, Texas found that 500 current and former bail bonding companies owe the county more than \$26 million in unpaid forfeitures. According to its review, on any given day there are 13,000 defendants out on bail, with the 86 bail bonding companies operating in Harris County holding \$125 million worth of bail.

The industry is regulated by an 11-member Harris County Bail Bond Board, which licenses bail bonding agents and is supposed to discipline those who do not pay their forfeitures. The *Chronicle* found that the board has not disciplined or revoked any bonding agent's license in seven years. The newspaper reported that the county treasurer, who is a member of the board, could not even provide a list of any recent bond forfeiture payments that have been made by bonding companies. His explanation: "It's convoluted." The *Chronicle* then asked the board's legal advisor, the assistant county attorney, who acknowledged that he was unfamiliar with some of the board's legal responsibilities under state law. The *Chronicle* also pointed to recent incidents of conflict of interest by board members, including one board member, who is an attorney, voting to approve a bail bonding license for his brother. The newspaper noted that the board has no rules on ethics or conflicts of interest.

The article highlighted some of the delaying tactics used by bail bonding companies to avoid paying forfeitures. It described one bail bond company owner who accumulated \$650,000 in unpaid forfeitures. In 2003, she became the last bonding agent to have her license revoked by the board. She declared bankruptcy, was relieved of her debts, got her license back and went to work for another bonding company. The owner of that company died in 2008, leaving dozens of uncollected bail forfeiture judgments that the county has tried, without success, to collect. (*Houston Chronicle*, 2/22/10.)

### **TENNESSEE PROSECUTORS LOOKING TO ELIMINATE PROSECUTORIAL PRETRIAL DIVERSION OPTION**

For years, the State of Tennessee has provided two different types of pretrial diversion opportunities. The first, offered through the prosecutor, is designed for those charged with minor offenses who have no prior criminal records. Eligible defendants can apply

*Too many  
defendants using  
appeal of denial of  
pretrial diversion  
application to  
delay prosecution  
of cases,  
prosecutors claim.*

for admission to the prosecutorial diversion program without having to enter a guilty plea. It is up to the prosecutor to decide whether to admit the defendant. Those who comply with diversion program requirements have their charges dropped and can have the record of their arrest expunged. The second type is offered through the court. The defendant must enter a conditional guilty plea. The court imposes conditions that the person must meet over a specified period, usually one to two years. If the conditions are met and there are no further arrests, the plea is vacated and the charge dropped.

Tennessee prosecutors have been urging the state legislature to remove the statutory authorization for the prosecutorial diversion option. According to Davidson County District Attorney Torry Johnson, the diversion process has become too much of a burden for prosecutors. The defendant can appeal a prosecutor's decision to reject a diversion application. While the Tennessee courts have consistently recognized that a prosecutor's denial decision can only be overturned by a court if there is clear abuse of discretion by the prosecutor, the appeals process can take years. Prosecutors claim that defendants are using the appeals process to delay the prosecution of the case.

Defendants would still have a pretrial diversion option available, the prosecutors say. "You end up in the same place (with the charge dropped)...The primary advantage is that they have to enter that plea," stated Johnson.

State Senator Jim Kyle, who is sponsoring a bill that would eliminate the prosecutorial diversion option, stated that having two types of diversion is confusing. "We're trying to eliminate that confusion by having one set of rules." He added that the elimination of the prosecutorial diversion option would not have a significant impact on the opportunities available to defendants. He pointed to records showing that in 2009, 278 individuals had their records expunged after successfully completing the prosecutorial diversion program, compared to 3,828 who did so after completing the judicial diversion.

The bill is being opposed by many in the defense bar. "There are instances where the judicial system should be rehabilitative and helpful," said Nashville criminal defense attorney David Raybin. "It avoids the cost and trauma of trial and focuses on rehabilitation. To me, that's critical." (*The Tennessean*, 3/30/10.)



....“We see nothing  
to indicate the  
Adam Walsh  
Act’s much  
less restrictive  
mandatory  
(pretrial) release  
conditions  
are facially  
unconstitutional.”

## Cases

### **U.S. V. STEPHENS, U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT, NO. 09-3706, 2/17/10**

The federal Adam Walsh Child Protection Act of 2006 (18 U.S.C. § 3142(c)(1)(B)) requires courts to impose a curfew and electronic monitoring as conditions of pretrial release for defendants charged in federal court with receiving and transporting child pornography. When David Stephens was indicted on such charges, at his pretrial release hearing the government asked the court to impose the curfew and electronic monitoring, as required by the act. In response, Stephens argued that mandatory release conditions violate the Fifth Amendment’s Due Process Clause and the Eighth Amendment’s Excessive Bail Clause. The magistrate judge agreed with Stephens and declined to order those conditions. The government appealed the matter to a district judge, who also agreed with Stephens’ argument. The government then appealed that decision.

In addressing the issue, the U.S. Court of Appeals for the Eighth Circuit noted that the U.S. Supreme Court “takes a dim view of facial challenges” to the constitutionality of Acts of Congress. It referenced the Supreme Court’s decision in *United States v. Salerno*, 481 U.S. 739 (1987), in which the court rejected a facial challenge to the constitutionality of the pretrial detention provisions of the Bail Reform Act of 1984. In that case, the court held that a party mounting a facial challenge “must establish that no set of circumstances exists under which the Act would be valid. The fact that the Bail Reform Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.”

The appeals court also noted that the U.S. Supreme Court has held that the Excessive Bail Clause does not prohibit Congress from defining classes of cases for which no bail is allowed. (*Carlson v. Landon*, 342 U.S. 524 (1952)). Thus, the appeals court reasoned, if Congress can ban pretrial release for entire classes of cases, “we see nothing...to indicate the Adam Walsh Act’s much less restrictive mandatory release conditions are facially unconstitutional.” The court also pointed out that the act does not dictate the specific hours of the curfew that the court is to impose or whether the electronic monitoring must be continuous or limited to a particular locality, leaving these matters to the discretion of the court. This discretion leaves the court setting pretrial release conditions with “a large number of individualized determinations...as to the extent of any mandatory conditions of release.”

*Appeals court  
approves blanket  
policy to strip  
search arrestees  
moving into  
jail's general  
population.*

In remanding the case back to the district court, the court noted that it was taking no position on whether Stephens could successfully assert a more limited “as applied challenge” to the mandatory pretrial release conditions. “We know very little about Stephens,” the court noted, “and decline to speculate as to whether a curfew and electronic monitoring are unconstitutional as applied to him.”

**BULL V. SAN FRANCISCO, U.S. COURT OF APPEALS  
FOR THE 9TH CIRCUIT, NO. 05-17080, 2/9/10**

The U.S. Court of Appeals for the 9th Circuit, sitting en banc, addressed the question of the constitutionality of the policy of the San Francisco Sheriff’s Department to conduct a strip search, including a visual body cavity search, of new arrestees transferred from a holding cell to the general population. The plaintiffs in the class action suit claimed that the policy violated their Fourth Amendment right to be free from unreasonable searches and their Fourteenth Amendment rights to due process and privacy. The class included all arrestees not arrested for drug, weapon or violence-related charges or probation or parole violation and who were subjected to a strip search without individualized suspicion that they might be carrying contraband. Over the five-year period in question in the suit, significant amounts of contraband was discovered, including 73 instances in which illegal drugs and numerous others in which weapons were found in body cavities.

The court noted that since the purpose of the strip search policy was to further institutional security goals within the jail, it would be guided in its analysis by two U.S. Supreme Court cases, *Bell v. Wolfish*, 441 U.S. 520 (1979) and *Turner v. Safley*, 482 U.S. 78 (1987). In *Bell*, the Supreme Court upheld a blanket policy of strip searching pretrial detainees after each contact visit. In that case, the court held that unless the search is “shown to be irrational or unreasonable,” courts must defer to the judgment of corrections officials for how to best maintain institutional security. In *Turner*, the court amplified principles set forth in *Bell*, ruling that when reviewing a correctional facility’s restrictions of constitutional rights, courts must consider whether the challenged restriction was “reasonably related to legitimate penological interests.”

The appeals court noted that the “scope, manner, and justification for” the San Francisco Sheriff’s strip search policy was “not meaningfully different” from *Bell*. Moreover, the court pointed out, the challenged policy in San Francisco had yielded dozens of instances where contraband was found, compared to only one such occasion in *Bell*. “[B]ecause the circumstances before us are

*Seizure  
under Fourth  
Amendment not  
implicated in  
summons for  
non-felony case,  
says U.S. appeals  
court.*

not meaningfully distinguishable from those presented in *Bell*, the balance between the need for San Francisco strip search policy and the invasion of personal rights that the search entails must be resolved in favor of the jail system's institutional concerns." Applying *Turner*, the court ruled that the strip search policy "did not violate the class member's Fourth Amendment rights because it was reasonably related to the legitimate penological interests of the jail in maintaining security for inmates and employees by preventing contraband smuggling."

The en banc ruling overturns a 2008 decision of a panel from the 9th Circuit that held the San Francisco strip search policy unconstitutional. At least two other circuits have ruled that policies to strip search arrestees being moved into the general population are unreasonable under the Fourth Amendment without individualized suspicion that the arrestees are smuggling contraband. *Roberts v. Rhode Island*, 239 F.3d 107, 112 (1st Circuit, 2001), and *Masters v. Crouch*, 872 F.2d 1248, 1255 (6th Circuit, 1989).

### **BURG V. GOSSELIN, U.S. COURT OF APPEALS FOR THE 2ND CIRCUIT, NO. 09-0708-CV, 1/7/10**

The question before the U.S. Court of Appeals for the 2nd Circuit was whether a summons issued for an infraction constitutes a seizure under the Fourth Amendment. The question arose after Judith Burg was issued a summons by an animal control officer to appear in court at a later date for behavior relating to Burg's dog. Burg failed to appear in court in response to the summons and was then arrested, handcuffed, and taken into physical custody. After the underlying charge against her was dismissed, Burg filed a suit against the animal control officer in her individual capacity on the grounds that the officer's issuance of a summons constituted an unreasonable seizure in violation of the Fourth Amendment. The U.S. District Court granted summary judgment against Burg, ruling that, as a matter of law, a pre-arraignment summons for an infraction offense does not even constitute a Fourth Amendment seizure, thus there can be no inquiry regarding whether the seizure was unreasonable. Burg appealed this ruling.

The court of appeals addressed this question by noting that while the Fourth Amendment is the proper source of constitutional protection for guarding against unreasonable seizure, a person asserting such a claim must "show some deprivation of liberty consistent with the concept of 'seizure.'" The court referred to its ruling in *Murphy v. Lynn*, 118 F.3d 938 (1997), in which it held that a pretrial release order in a felony case requiring the defendant

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not to leave the state and appear in court whenever directed did implicate a seizure under the Fourth Amendment.

The court noted that since its ruling in *Murphy* district courts in the 2nd Circuit have divided on whether a summons requiring a later court appearance, without further restraint, amounts to a Fourth Amendment seizure. The court distinguished this case from *Murphy*, stating that there were no travel or any other restrictions placed upon Burg by the summons, other than that she appear in court on one date. The court held that “the issuance of a pre-arraignment, non-felony summons requiring a later court appearance, without further restrictions, does not constitute a Fourth Amendment seizure.” As a result, Burg has no claim for violation of her Fourth Amendment rights by the animal control officer.

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