

THE PRETRIAL REPORTER

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Executive Summary

This issue of The Pretrial Reporter contains the following:

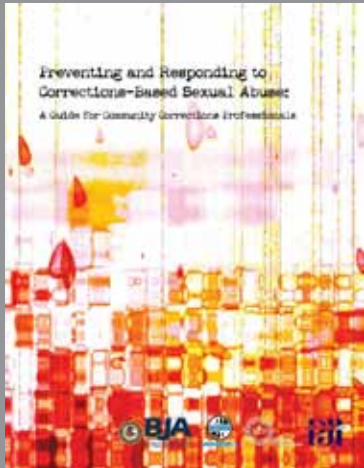
National Notes:

- The Bureau of Justice Assistance releases a guide for community corrections officers, including pretrial release and diversion staff, on preventing, identifying and responding to sexual abuse of those under supervision.
- Wealthy defendants charged with white collar crimes are paying private security firms to supervise them while on pretrial release.
- The Bureau of Justice Statistics has issued a report on intimate partner violence in large urban jurisdictions.
- Knox County, Tennessee approves a plan to reduce the number of persons with serious mental illnesses in jail.

Cases:

- The Louisiana Supreme Court rules that persons arrested without a warrant who are not brought before a court for initial appearance within 48 hours must be released on their own recognizance.
- A Florida appeals court says a victim cannot back out of a pretrial diversion agreement after the defendant has already met the terms of the agreement – in this case, by paying restitution.





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National Notes

GUIDE RELEASED ON SEXUAL MISCONDUCT IN COMMUNITY CORRECTIONS SETTINGS

Under a grant from the Bureau of Justice Assistance, the American Probation and Parole Association, in conjunction with the International Community Corrections Association and the Pretrial Justice Institute, has released a guide for community corrections officials for preventing, detecting, and responding to sexual misconduct in community corrections settings. The guide was produced as a response to the 2003 Prison Rape Elimination Act, passed by Congress in 2003 to address the problem of sexual abuse of those under correctional supervision either by staff or by other defendants or offenders.

As the guide points out, “[o]ne useful way of thinking about the target population (of the Act) is to consider the exposure of persons to sexual misconduct in any of the following settings: prisons, jails, juvenile detention centers, or halfway houses; on parole, probation, pretrial release, or bail; in a day reporting center, pretrial diversion program, as well as a drug, mental health or other specialty court; on community service, or under any supervision through a private vendor.”

The target audience for the guide is front line community corrections officers, including pretrial release and diversion staff. The purpose of the guide is to help officers better identify the signs of sexual assault victimization, provide information to victims regarding treatment options, and design supervision strategies for both victims and perpetrators.

As the report points out, given the relationships they form with those whom they supervise, front line community corrections staff are in a unique position to uncover sexual abuse that may have occurred while these defendants and offenders were in custody. Moreover, staff can play an important role in preventing sexual abuse from occurring by notifying those under supervision of their rights to be protected against sexual assaults. In addition, community corrections staff have a responsibility to report any suspected sexual abuse by other staff on those under supervision.

The guide presents a list of possible physical, emotional and behavioral “red flag” signs of abuse, and discusses how staff can look for those signs. It also describes appropriate responses to



*"This is a serious
flaw in our system.
But it is not a
reason to deny
a constitutional
right to someone
who, for
whatever reason,
can provide
reasonable
assurances
against flight."*

identifying sexual abuse. According to the guide, a staff person who is the first responder in the immediate aftermath of a sexual assault should first provide support and protection to the victim to assure that no further victimization can occur, and then secure the scene and preserve any evidence, and then notify the appropriate supervisor. The guide suggests that all community corrections agencies have written policies for how staff are to report any instances of sexual abuse.

The guide also presents tips to staff to protect themselves against false accusations of sexual abuse. According to the guide, staff should: establish and maintain professional boundaries; avoid being alone in confined or private spaces for prolonged periods of time; keep office doors open when meeting with those under supervision; document how time is spent with defendants during any home or office visits; and avoid any interactions that may appear inappropriate.

A copy of the guide, "Preventing and Responding to Corrections-Based Sexual Abuse: A Guide for Community Corrections Officials," can be downloaded at www.appa-net.org/eweb/docs/APPA/pubs/PRCBSA.pdf.

A NEW TWIST ON PRIVATE BAIL

A recent article in *The New York Times* featured a new trend in pretrial release decision making – wealthy defendants on home detention or with restricted movement in the community paying for their own guards. As the article described, a number of wealthy defendants charged with white collar crimes have recently been devising their own supervision plans on pretrial release as a way to avoid pretrial detention. Under the plans, which must be approved by the court, defendants pay all costs associated with the supervision. In many instances, such as with Bernard Madoff, this involves turning the home into a secure facility with locks, alarms and security cameras, as well as devices to monitor all communications between the defendant and the outside world, and around-the-clock presence of armed guards.

According to the article, several security firms in New York City have begun offering this service. As the article explained, these firms have been grappling with issues relating to their roles. Even though the firms recognize that they are responsible to the court, not the defendant, there is an obvious conflict of interest. "Would you, as a bail guard," the article asked, "reprimand the man who signs your paychecks? Lock him in the bathroom? Tackle him if he runs out the door?"



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About 85 percent of the cases were charged as misdemeanors, with the overwhelming majority of these charged as simple assault. Aggravated assault made up two-thirds of all felony charged cases, with nine percent involving rape or other sexual assault, and one percent murder. Fifty-five percent of those charged with a misdemeanor were convicted, and nine percent had their cases dismissed after completion of a pretrial diversion program. Of those charged with a felony, 47 percent were convicted of a felony, 14 percent were convicted of a misdemeanor, and 37 percent had their cases dismissed, including 6 percent who had completed a pretrial diversion program.

There was significant variation in conviction rates among the 16 counties, ranging from a low of 17 percent to a high of 89 percent. The practice of prosecutors in screening cases before the defendant’s initial appearance in court impacted the likelihood of conviction. In the nine counties where prosecutors did pre-initial appearance screening of cases the average conviction rate was 72 percent, compared to 37 percent in the seven counties where the decision to prosecute a case was not made until after the initial appearance.

About 75 percent of defendants who were convicted received a jail sentence and seven percent a prison sentence. The remainder was placed on probation.

A copy of this report, “Profile of Intimate Partner Violence Cases in Large Urban Counties,” can be downloaded at www.ojp.usdoj.gov/bjs/abstract/pipvcluc.htm.

COUNTY DEVELOPS PLAN FOR JAIL ALTERNATIVES FOR MENTALLY ILL

Knox County, Tennessee, like many counties across the country, is struggling with mentally ill persons detained in jail. It is estimated that 18 to 26 percent of the county’s inmates have a serious mental illness. The \$75-\$80 a day the county currently pays to house an inmate doubles when the inmate has a serious mental illness, driven in large part by the \$400,000 a year costs for psychotropic medications.

“The problem, of course, is money... It’s a revolving door,” explained Knox County District Attorney General Randy Nichols. The mentally ill are arrested, jailed, and “then (we) let you go and you’re back in three to four weeks.” To address this problem the county is discussing a plan that has three parts to it.

*“Why put people
who are mentally
sick in jail when
there’s not a
threat to public
safety?”*

The first part is a 15-20 bed Safety Center. This facility would allow mentally ill arrestees to voluntarily stay for a few days and receive medicine and treatment from mental-health professionals. It is estimated the cost for the center would be \$1.7 million a year, which the committee is hoping to have addressed at next year’s budget meeting. The second part would be an expansion of the Crisis Stabilization Unit which would allow voluntary stay for three days for those diverted from jail, from emergency rooms or a mobile crisis team, or who come in on their own. The third part would assist individuals who are chronically homeless by referring them to permanent supportive housing. These individuals would also have a case manager to monitor treatment services.

“The jailers at the detention facility are not trained to take care of those kinds of people and we’re responsible for their medication,” said County Commissioner Richard Briggs. The development of the plan represents “an economic decision and there’s a humanitarian decision. Why put people who are mentally sick in jail when there’s not a threat to public safety?” (*Knoxville News*, 11/17/09.)

Cases

LOUISIANA V. WALLACE NO. 09-KK-1621. SUPREME COURT OF LOUISIANA. NOVEMBER 6, 2009

The defendant, Bruce Wallace, was arrested without a warrant at 12:04 p.m., Monday, June 8, 2009, for possession of cocaine. Wallace was booked at 4:35 a.m. on June 9, and his paperwork, including the arresting officer’s affidavit of probable cause, came to the magistrate court at 3:00 p.m. on that date. However, the magistrate did not make a probable cause determination within 48 hours of Wallace’s arrest as required by La. C.Cr.P. art. 230.2. Wallace appeared before the magistrate on June 11, 2009, at which time a probable cause determination was made and bond was set. During the hearing, Wallace’s attorney moved for his release, citing the language of Article 230.2. Although the magistrate readily admitted that 48 hours had elapsed from the time of Wallace’s arrest, the court found the defect “cured” because the defendant had appeared before him within 72 hours for bond setting, an apparent reference to La. C.Cr.P. art. 230.1, and within 48 hours of when the proper paperwork for the arrest arrived in magistrate court. The magistrate also stated that the “probable cause determination was made at the time he was arrested.” The Fourth Circuit denied relief on July 2, 2009, and Wallace subsequently appealed.



*The Fourth
Amendment
clearly requires a
determination by a
judicial officer, not
a law enforcement
officer, of probable
cause when a
person is arrested
without a warrant.*

The Louisiana Supreme Court began addressing the issue by citing several U.S. Supreme Court cases related to the delay between a warrantless arrest and a probable cause determination made by a judicial officer. In those cases, it had been found that the Fourth Amendment requires every state to “provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest.” The U.S. Supreme Court went on to conclude that the judicial determination of probable cause cannot occur more than 48 hours from arrest unless a bona fide emergency or other extraordinary circumstances exist. Out of these decisions, Louisiana established the 48-hour probable cause determination rule under La. C.Cr.P. art. 230.2, which included the straightforward mandate that: “If a probable cause determination is not timely made in accordance with the provisions of Paragraph A of this Article, the arrested person shall be released on his own recognizance.”

Even with such set mandates, the Fourth Circuit had reviewed numerous cases from Orleans Parish in recent months, ordering that defendants be released on their own recognizance under La. C.Cr.P. art. 230.2 because the system did not provide them with timely probable cause determinations. This occurred even with the Orleans Parish Criminal District Court having adopted an even stricter rule whereby “absent extreme circumstances, the (initial) hearing shall take place within twelve hours from the time defendant is taken into custody.” The Court went on to note that, while the Orleans Parish Criminal District Court is free to combine the 48-hour probable cause determination with the other proceedings held at the first appearance hearing, based on the law, such hearings must be held within 48 hours of the defendant’s arrest.

In reviewing the circumstances of this specific case, the Court believed that several misconceptions had been present regarding the requirements of the 48-hour probable cause determination. The Fourth Amendment clearly requires a determination by a judicial officer, not a law enforcement officer, of probable cause when a person is arrested without a warrant. Furthermore, the time begins to run when the person is arrested, *not* when the magistrate court is presented with the relevant documents. The determination also cannot be delayed in order to allow the collection of additional evidence to find probable cause, and weekends and legal holidays are counted in the 48 hour time period. Finally, the Court concluded that a finding of probable cause made at a “first appearance” or 72-hour hearing does not “cure” the magistrate court’s failure to make a probable cause determination within 48 hours. Based on these set standards, the Court found that the magistrate did not comply with the requirements of La. C.Cr.P. art. 230.2, and reversed judgment.



"If that conduct is acceptable, the promise of pretrial intervention could be used as a device to collect restitution and could then be withdrawn once the restitution is paid."

The Court also ordered the Orleans Parish Criminal District Court to comply with the mandates of the opinion in ensuring that probable cause determinations required under La. C.Cr.P. art. 230.2 are being held within 48 hours of arrest. The Court concluded its ruling by stating: "In the absence of a bona fide emergency or other extreme circumstances, all persons arrested without a warrant for whom a probable cause determination is not made within 48 hours must be immediately released from custody on their own recognizance."

**FLORIDA V. SIMONS, NO. 1D08-1611, FLORIDA
FIRST DISTRICT COURT OF APPEALS, 11/13/09**

Stuart Simmons was arrested and charged with theft of a trade secret, taking and disclosing trade secrets, and grand theft. He was also sued in civil court by his former employer over the same controversy. All parties in both the criminal case and the civil case, including the victim, agreed upon a settlement that would require Simmons to pay \$4,500 in restitution to his former employer. Under the terms of the agreement, which had been signed by all parties, the criminal case was to be diverted to a pretrial intervention program, with criminal charges dismissed upon successful completion of the program, and the civil suit was to be dismissed. In compliance with the agreement, Simmons quickly paid the complete restitution amount. Upon receiving the restitution, however, the victim attempted to back out of the agreement by refusing to sign the consent form for Simmons to be admitted to the pretrial diversion program.

Lacking consent from the victim, the prosecutor declined to admit Simmons to the pretrial intervention program. Simmons filed a motion to request that the court enforce the settlement agreement. The court granted that motion over the objections of the prosecutor, and allowed the prosecutor two weeks to nolle pros the charges. When it became apparent that the prosecutor would not do so, the court entered an order dismissing the charges. The state appealed.

On appeal, the state argued that the trial court had no authority to enforce the agreement because the prosecutor has the sole discretion to admit a defendant to a pretrial intervention program. In response to this argument, the appeals court noted that "[i]t is significant that the state attempted to withdraw from the settlement agreement after the defendant had partly performed the agreement by making restitution. If that conduct is acceptable, the promise of pretrial intervention could be used as a device to collect restitution and could then be withdrawn once the restitution is paid. This possibility is particularly troubling in a case like this one, which is closely related to a civil dispute between the defendant and the

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alleged victim. It is not fair to allow the alleged victim to withdraw his agreement in the criminal case after he has successfully employed the threat of prosecution to collect the money that was at issue in the civil case.”

In affirming the trial court’s decision, the appeals court likened the trial court’s actions to the well-established principle that courts can enforce plea agreements made between prosecutors and defense. “When the parties agree to settle a case they should be bound by their agreement. The incentive to settle a case by plea bargaining or by an agreement not requiring a plea would quickly disappear if one party could renege on an agreement without any consequence.”

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