

THE PRETRIAL REPORTER

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EXECUTIVE DIRECTOR'S LETTER

Dear Friends:

We are pleased to announce two new initiatives that will expand our work to help improve pretrial services programs across the nation:

Improving the State Court Processing Statistics Program. PJI is leading the redesign of the State Court Processing Statistics Program (SCPS) - the nation's only source of information that tracks persons charged with felonies as they move through the criminal justice system in state courts. Funded by a grant from the Bureau of Justice Statistics, the redesign will vastly improve the efficiency of data collection and expand the types of information included in the SCPS.

Continued on page 2.

Executive Summary

This issue of *The Pretrial Reporter* contains the following National Notes:

- The U.S. Supreme Court will hear a case this term on the issue of whether a three-year delay in bringing a defendant to trial should result in the dismissal of charges when the delay was caused, in large part, by deficiencies in the indigent defense system.
- A New York State commission has released recommendations to modernize bail-setting courts in rural areas of the state.
- A review of records of illegal immigrants being held in Virginia has shown that many are held in detention awaiting deportation for months after they have agreed to be deported. Causes for the delays range from lost files to immigrants being brought to the wrong court.
- One year before it was set to expire, Congress has re-authorized the Mentally Ill Offender Treatment and Crime Reduction Act, under which funds are awarded to local jurisdictions to implement plans for addressing problems with persons with serious mental illness coming into contact with the criminal justice system.

The cases reported here include the following:

- A Washington appeals court has ruled that pretrial drug testing cannot be imposed as release condition without a demonstrated tie to appearance or safety risks.
- A Wisconsin appeals court has upheld a trial court decision to require a defendant to reimburse his mother for the money she lost by posting and then, when the defendant failed to appear in court, forfeiting bail.
- An Ohio appeals court has ruled that a defendant need not be on personal recognizance with no monetary liability to be convicted of Failure to Appear.

EXECUTIVE DIRECTOR'S

LETTER
(CONTINUED)

Pretrial Justice and Jail Management: Guiding County Officials. PJI will provide education, guidance and technical assistance on effective pretrial services to elected county officials across the nation through a grant from the Bureau of Justice Assistance. In partnership with the National Association of Counties Research Foundation (NACoRF), PJI will help county officials find less costly alternatives to building jails.

For more information, please visit www.pretrial.org.



- A Washington appeals court rejects a speedy trial challenge of a defendant.

In the Research section, a new study looking at pretrial release decision making relating to Latino defendants has found that Latinos are released pretrial at the same rate as non-Latinos. It also found that Latinos are more likely to have a financial bail set.

National Notes

U.S. SUPREME COURT TO HEAR CASE WHERE INADEQUATE DEFENSE SYSTEM LED TO 3-YEAR TRIAL DELAY

During its 2008-09 term, the U.S. Supreme Court will be hearing an appeal from a ruling by the Vermont Supreme Court that vacated a defendant's felony domestic violence conviction after finding that his speedy trial rights were violated. What makes the case unique is that the three-year delay in bringing the defendant to trial, throughout which the defendant was held without bail, was caused not by the prosecution, but by the defendant's own indigent defense counsels. The court had ruled that "the inaction of assigned counsel does not relieve the state of its duty, through implementation of the criminal justice system, to provide the defendant with a constitutionally guaranteed speedy trial." (*Vermont v. Brillon*, Vermont Supreme Court, No. 08-88, 3/14/08.)

From the point of his arrest, the defendant consistently requested a speedy trial. The first trial date, set at about six months after his arrest, was continued after the defendant fired his assigned attorney out of frustration that the attorney kept moving the court to change the date, claiming that his caseload made it impossible for him to be ready. The court was then forced to agree to a continuance so that a new attorney could be appointed and prepare for trial. Shortly before the continued trial date, the new attorney cited a conflict of interest and withdrew from the case, requiring yet another continuance. Three months after a third attorney was appointed, the defendant informed the court that he wanted a replacement because he wanted his case to be tried soon and his attorney claimed to be too busy to prepare for a quick trial. The attorney disputed this account in open court, leaving the court with no choice but to remove the attorney on the grounds of an irreconcilable breakdown in the attorney-client relationship. A fourth attorney was then appointed.

From the outset, the fourth attorney claimed that he would need 60 days to prepare for trial due to a heavy caseload. As the trial date

*Are speedy
trial rights
violated when
delays caused
by deficiencies
in indigent
defense
system?
U.S. Supreme
Court to
decide.*

approached, this attorney asked to be relieved, stating that he had left his criminal practice and his contract with the defender general's office, which assigns indigent counsel, had expired. A fifth attorney was then assigned. Four months later, without having done any work on the case, the fifth attorney withdrew, citing a dispute with his firm's contract with the defender general's office. For the four months following that, the defendant had no counsel at all. When a sixth attorney was finally appointed, several delays occurred as the attorney sought to review files collected by the previous attorneys. Finally, three years after his arrest and jailing without bail, the defendant was brought to trial. He was convicted under an habitual offender statute and sentenced to a minimum of 12 years in prison.

In reviewing this record of continuances, the court found several periods that should not be counted against the state, because the delays were influenced in part by the defendant's actions. Still, the court identified time periods amounting to two years where the defendant had no control over the delays. "While the defendant moved for the removal of several of the attorneys assigned to his case, he did so because they did not do anything to move his case forward, not because of any disagreements he may have had with them over trial strategy," noted the court.

The court concluded that "a significant portion of the delay in bringing the defendant to trial must be attributed to the state, even though most of the delay was caused by the inability or unwillingness of assigned counsel to move the case forward. The defender general's office is part of the criminal justice system, and ultimately it is the court's responsibility to assure that the system prosecutes defendants in a timely manner that comports with constitutional mandates."

Expressing its concern that the delays manifested in this case may be the result of a "growing crisis in the provision" of indigent defense services in Vermont, the court cautioned that if the delays are the result "of inadequate resources given to the defender general's office, it would behoove the Legislature to address the problem before we are confronted anew with the dilemma of dismissing charges and prematurely releasing potentially dangerous individuals into the community."

NEW YORK JUSTICE COURTS IN THE 21ST CENTURY

In New York, if you are arrested in a rural part of the state you will come in contact with one of the 1,250 town and village courts, also known as Justice Courts. It is likely that a part-time judge who is not an attorney will decide the issue of bail. The bail hearing will take place in a non-traditional setting, possibly a town barn or highway garage. In addition to bail-setting, Justice Courts process routine

New York
Commission
looks for
“pragmatic
middle
ground” for
improving
bail-setting
courts.

traffic infractions, conduct suppression hearings, authorize search warrants, preside over jury trials, impose sentences of up to one year, and conduct felony arraignments.

In 2006, *The New York Times* published a three-part series entitled “Broken Bench.” This series exposed the failures and abuses in Justice Courts, including questionable bail-setting practices. The common theme repeated in the series emphasized that the vast majority of justices are not legally trained and lack educational standards for becoming judicial officers. The lack of qualifications and educational background was further exacerbated by the absence of training for justices. Once elected within their town or village, justices must attend a week-long training session and pass a true/false test before they can begin work. The test is said to be so simple that only one person failed it on the first attempt since 1999. (*New York Times*, 9/25/06.)

Partly in response to the *Times* series, New York State is addressing how these Justice Courts dispense justice and how to make improvements. A special commission convened in November 2006 by Chief Judge Judith S. Kaye to study and propose reforms to the state court system has just released a comprehensive report that proposes reforms to the state court system. Recognizing that calling for the elimination of non-attorney justices is not a practical solution, the commission felt that addressing qualifications and training of justices would be an effective way to improve justice. The commission recommended that incoming justices be at least 25 years old and at a minimum should have earned a two-year undergraduate degree from an accredited college. The Commission also recommended merging some of the 1,250 Justice Courts around the state to increase efficiency and reduce redundancy. Fewer town and village courts would allow more targeted and meaningful support to upgrade facilities and security of the courts that remain.

The Commission’s approach to recommendations is “a pragmatic middle ground” that will modernize and improve the centuries-old system, said Carey R. Dunne, chairman of the commission. (*New York Times*, 9/18/08.) Chairman Dunne said, “It is our hope that this study paves the way for significant reform and improvement of these historic courts, by moving us beyond the old debate between those who urge that the Justice Courts be abolished and those who argue that they should be left alone.” (Press Release, New York State Unified Court System, 9/17/08.)

A copy of “Justice Most Local: The Future of Town and Village Courts in New York State” is available at www.courts.state.ny.us/courts/townandvillage/actionplan.shtml.

*“How would you
like to sit in jail
for two more
weeks,” asks
immigration
judge of
prosecutor.*

LENGTH OF DETENTION OF IMMIGRANTS CRITICIZED

Illegal immigrants, when detained in Virginia by the Immigration and Customs Enforcement (ICE), often spend months in jail after they have agreed to be deported. The extensive stay in jail tends to be the result of missing files, taking immigrants to the wrong court, or not bringing them to court all.

Between 900 and 1,100 immigrants are detained daily in Virginia. A group called the CAIR Coalition recently conducted a review of records of these immigrants. According to the review, prosecutors came to court without detainees' files in 60 of 162 cases. In 81 other cases, the immigrant was not brought at all to court or brought to the wrong court, requiring a continuance of the case. During a recent day of hearings, immigration Judge Wayne Iskra became so frustrated with the inability to get immigrants into court and have their cases disposed that he asked the prosecutor, “How would you like to sit in jail for two more weeks” so that the case could be re-scheduled. “The system is broken,” stated the judge.

One detained immigrant has been in jail for eight months while his requests to be deported have gone unanswered. Another has been waiting in jail for eight months because his name was spelled wrong in the police computer and he has been unable to get anyone to fix it. “It’s a very frustrating process for everybody,” said immigration lawyer Ofelia Calderon. “I had three cases last month where ICE didn’t even know my client was in their custody.”

The high number of detainees is partially due to a new national ICE program that deputizes local police and jail officers to assist ICE. Since deputizing local police from several Virginia counties, the number of immigrants transferred to federal custody for immigration hearings rose 504 percent. (*Washington Post*, 10/5/08.)

CONGRESS REAUTHORIZES MENTAL HEALTH BILL THROUGH 2014

In 2004, Congress passed and President Bush signed into law the Mentally Ill Offender Treatment and Crime Reduction Act (MIOTCRA). The goal of the act was, in short, to assure that lack of mental health treatment does not lead to incarceration for persons with serious mental illness, and that incarceration, when it does occur, does not lead to a disruption in treatment. The Bureau of Justice Assistance awarded funds - \$5 million in both FY 2006 and FY 2007 and \$6.5 million in FY 2008 - to jurisdictions to promote public safety and community health by facilitating collaboration among criminal and juvenile justice systems and mental health and

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substance abuse systems to divert individuals with mental illness from incarceration and into treatment.

Even though the law was not set to expire for another year, President Bush recently signed a bill that reauthorizes MIOTCRA for an additional five years at \$50 million per year. The measure had passed by unanimous consent in the U.S. Senate. The new law seeks to encourage expanded training for law enforcement officers and the development of receiving centers to assess mental health need of persons taken into custody by police without having to bring them into a jail setting.

Cases

WASHINGTON V. ROSE, WILSON & WENTZ, WASHINGTON COURT OF APPEALS, DIVISION II, NO. 36269-4, 8/26/08

The courts in Mason County, Washington have a policy to set drug testing as a standard condition of pretrial release in all cases where the defendant is charged with a drug offense. The state's Court of Appeals recently heard challenges to this policy from three defendants. The court ruled that because drug testing is a warrantless search, it cannot be conducted without evidence that the defendant receiving a drug testing condition poses a risk of non-appearance in court or danger to the community and that the testing is the least restrictive means of addressing those risks.

For each of the three defendants – Rose, Wilson and Wentz – the bail-setting court checked a box on the release order stating that the court had “determined that there exists a substantial danger that defendant will commit a serious crime, or that defendant’s physical condition will jeopardize defendant’s personal safety or that of others, or that defendant will seek to intimidate the witnesses or otherwise unlawfully interfere with the administration of justice.”

In challenging the imposition of the drug testing condition, the three defendants argued that the condition violated Washington Court Rule 3.2, which governs pretrial release decision making. That rule states that persons charged with non-capital crimes shall be ordered released on personal recognizance without conditions unless the court determines that such release will not reasonably assure appearance or the safety of the community.

In taking up this challenge, the appeals court first examined the issue of future appearance. The court noted that Court Rule 3.2 requires

*Wisconsin
appeals court
upholds order
requiring
defendant to
reimburse his
mother for
forfeited bail
after FTA.*

a court to impose “the least restrictive conditions” necessary to reasonably assure appearance. Looking at each case individually, the court held that there was no evidence to support a trial court finding that Rose and Wilson would be unlikely to appear. Based on a previous failure to appear, the court held that the trial court had sufficient evidence that Wentz posed a risk of non-appearance.

The court then addressed the issue of dangerousness. For Rose and Wilson, the court found no basis to support a finding that either posed a danger risk. For those two defendants, then, the court found no basis for imposing drug testing as a condition of pretrial release. It instructed the trial court to remove the drug testing condition for those defendants. For Wentz, however, the court concluded that, based on his prior criminal history, the trial court did not err in finding a risk of danger.

To determine, however, whether drug testing was the least restrictive condition to address the risks that Wentz posed, the court continued its inquiry. It cited the case of *United States v. Scott* (450 F. 3d 863), in which the U.S. Court of Appeals held that since drug testing is a search, “special needs” must be present in order to impose the condition. On the basis of that ruling, in the instant case, the court held that “the State failed to establish a special needs exception to the warrantless, suspicionless, searches” of Wentz. Accordingly, the court concluded that the trial court erred in imposing drug testing as a pretrial release condition in Wentz’s case.

WISCONSIN V. AGOSTO, WISCONSIN COURT OF APPEALS, NO. 2006AP2646-CR, 9/23/08

When William Agosto was arrested on a charge of second degree sexual assault of a child, his mother posted \$50,000 cash bail. When Agosto failed to appear for a hearing on that case, the bond was forfeited and Agosto was charged and later convicted of bail jumping. He was convicted of the assault charge at the same time. At sentencing for these charges, the trial court imposed concurrent prison terms, with a period of extended community supervision following release from prison. The court included in the sentence on the assault charge, but not on the bail jumping charge, that Agosto pay restitution to his mother for her loss of the \$50,000 bail. Agosto appealed the restitution part of the sentence, claiming that the court did not have the authority to order him as part of the assault sentence to reimburse his mother either as restitution or as a condition of extended supervision.

The Wisconsin Court of Appeals rejected these claims. Taking up first the issue of reimbursement as restitution, the court noted that Wisconsin law requires that unless there is a substantial reason not to do so, a sentencing court must order restitution when there is a

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of Failure to
Appear.*

victim of a crime. The court concluded that Agosto's mother was the victim of his crime of bail jumping "as surely as if he had taken the \$50,000 from her by force." Furthermore, the court concluded that restitution can be ordered as part of a sentence if two conditions apply: (1) the beneficiary of the restitution order is a person against whom a crime has been committed, and (2) the beneficiary is the victim of a crime that was considered at sentencing. The court found both of these conditions to be met.

In rejecting Agosto's claim that the court did not have the authority to order reimbursement of the forfeited bail money as a condition of extended supervision, the court noted that "a condition of extended supervision need not directly relate to the offense for which the defendant is convicted as long as the condition is reasonably related to the dual purposes of extended supervision," which are rehabilitation of the defendant and protecting community interests. The court concluded that "requiring Agosto to make good on his debt to his mother reinforces the core aspects of rehabilitation" and serves the interests of the community.

**STATE V. GREEN, OHIO COURT OF APPEALS, NO.
2008-A-0009**

Dale Lee Green was charged with one count of Aggravated Burglary and one count of Theft. The trial court set bond in the amount of \$25,000, "personal recognizance." Green signed a personal recognizance, which stated that he "acknowledged" the fact that he would owe the State \$25,000 if he did not appear in court at all times until the final disposition. Green failed to appear before the court as required and was subsequently arrested and indicted for Failure to Appear. He later pled guilty to Aggravated Burglary and Failure to Appear, and the trial court imposed consecutive sentences of a ten-year prison term for the Burglary Charge and an eighteen-month prison term for the Failure to Appear charge. Green later filed a Motion to Withdraw Plea relative to the charge of Failure to Appear, which the trial court denied.

On appeal, Green asserted that he could not be convicted for Failure to Appear because he was not released on his "own recognizance." He argued that to be convicted for Failure To Appear, it is necessary that the defendant be released on his "own recognizance." Furthermore, under Ohio law, a "personal recognizance" is defined as a recognizance undertaken by a defendant and "unsecured by others on his behalf." He claimed that the language contained in his recognizance bond stating that he would owe the State \$25,000.00 "...to be levied on [his] goods and chattels, lands and tenements" if he failed to appear, distinguished that bond from a true personal recognizance bond.

Washington

appeals court

looks at speedy

trial issue.

The court disagreed with such reasoning, stating that Green misconstrued the recognizance he signed. According to the court, Green did not promise that he “would owe” the State the sum of \$25,000, rather he “acknowledged [himself] to owe” the State this sum. Consistent with the definitions of recognizance, the document signed by Green acknowledged the debt as already owing, subject to payment if he violated the condition of the recognizance. The references to “goods and chattels, lands and tenements” also did not alter the character of the recognizance, but simply recognized the fact that Green’s property was subject to levy for the debt acknowledged. Green did not pledge any property as surety for his release nor did he deposit any money. Green’s promise to appear in court was secured by nothing other than his recognizance of the debt owed the State.

**STATE OF WASHINGTON V. THOMAS, WASHINGTON
COURT OF APPEALS, NO. 59832-I, 9/2/08**

On September 10, 2005, Michael Thomas was arrested and booked into the King County Jail on suspicion of second degree criminal trespass. He posted \$250 cash bail and was released the same day. On November 14, 2005, the State filed a complaint charging Thomas with criminal trespass in the second degree. The clerk issued a summons directing Thomas to appear for arraignment on November 28, 2005, but the summons was not sent to the correct address, and Thomas did not appear for the scheduled arraignment. On January 13, 2006, the State submitted a certification that the address to which the arraignment notification was sent appeared to be Thomas’s most recent address and on January 18, 2006, the district court issued a bench warrant for Thomas’s arrest because of his failure to appear. Thomas was arrested on the warrant and on February 27th and had his first appearance following the filing of the complaint. However, he was not arraigned until March 6, 2006, because he moved for a change of judge. Thomas objected to the date of arraignment, contending that the time for trial had already expired. He argued that the State was required to bring him to trial by December 9, 2005, 90 days after he posted bail. On March 31, 2006, the district court dismissed the charge with prejudice, concluding that “speedy trial was violated” because Thomas had been “held to answer starting back in September when he was arrested and posted bail.” The State appealed and the King County Superior Court reversed the judgment. The Court of Appeals then granted discretionary review.

The case before the Washington Court of Appeals dealt with the single question of whether 2003 amendments to the time-for-trial rule superseded the decision in *State v. Fulps*, 141 Wn.2d 663, 9 P.3d 832 (2000). In *Fulps*, the court had relied upon American Bar Association

*Latino
defendants
more likely to
have money
bail set, study
finds.*

Standards to rule that the speedy trial period started the day the defendant had posted bail on the day of his arrest and ended 90 days later. In 2003, the Washington Supreme Court amended court rules to require the State to bring a defendant to trial within 90 days of arraignment if the defendant is not incarcerated.

Thomas argued that *Fulps* was still good law despite the 2003 amendments, claiming that the changes in the rule were intended to address the issue of constructive arraignment dates determined under earlier cases. Those cases imposed a constructive arraignment date 14 days after formal charges were filed if there were an unnecessary delay in bringing the defendant before the court for arraignment. However, the court found that while the task force that drafted the 2003 amendments devoted substantial attention to remedying perceived problems with the rule established in those earlier cases, and that there was nothing in the amended rules or the task force final report that reflected the amendments were narrowly drawn to address only those cases. Additionally, said the court, issues raised by the *Fulps* decision were specifically listed as a priority for the task force to address.

Even though the court acknowledged that Thomas was correct that the court still had the ability to interpret the time-for-trial rule, the court ruled that it was not authorized to interpret the rule to allow dismissal when such reading is contrary to a plain language of the rule. Given that the 2003 amendments supersede the *Fulps* holding, the court concurred with the superior court's reversal of the district court's dismissal.

Research

STUDY LOOKS AT FELONY RELEASE PRACTICES FOR LATINO DEFENDANTS

The Pretrial Justice Institute recently released a study, funded by the National Institute of Justice, that examined whether Latino defendants charged with a felony were less likely to receive pretrial release than non-Latino defendants. The study also looked at whether Latino defendants in counties with a rapidly increasing Latino population were less likely to receive pretrial release than Latino defendants in counties where the Latino population was not rapidly increasing.

The study used the database from the State Court Statistics (SCPS) Project, which PJI has been administering for the Bureau of Justice Statistics since 1988. SCPS gathers data on felony case

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processing, including pretrial release decisions, every even-numbered year in 40 of the nation's 75 largest counties. The study also draws upon data from the Uniform Crime Reporting Program, Annual Survey of Jails, National Prosecution Survey, and U.S. Census Bureau reports.

The study found that Latino defendants were not less likely than non-Latino defendants to receive pretrial release, but they were more likely to have a money bail set. It also found that Latino defendants in counties with rapidly growing Latino populations were not less likely to receive pretrial release than Latinos in counties where there was little or no growth. The study recommends additional research into why Latinos are disproportionately having money bail set.

A copy of the study, "Pretrial Release of Felony Defendants," can be downloaded at the PJI website at www.pretrial.org.

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