

# THE PRETRIAL REPORTER

A BI-MONTHLY PUBLICATION OF THE PRETRIAL JUSTICE INSTITUTE

WWW.PRETRIAL.ORG

VOLUME XXXVI NO.2 | APR/JUNE, 2010

## In this issue:

EXECUTIVE SUMMARY .....	1
NATIONAL NOTES .....	2
CASES .....	7

## Executive Summary

This issue of The Pretrial Reporter contains the following:

### National Notes:

- New report calls for non-financial pretrial release options, better management of Baltimore jails.
- Study shows reduction in Iowa's pretrial population after implementation of alternatives to detention.
- PEW releases report on Philadelphia's jails, examining the rise and fall of inmate populations.

### Cases:

- Supreme Court of Virginia ruled that defendant has right to hearing before being terminated from a drug court treatment program.
- US Appeals Court found that a pretrial case monitor was entitled to qualified immunity from verbal threats made during supervising a defendant.
- Montana's Supreme Court held that the defendant was not entitled to credit for time served when serving time for previous convictions whilst awaiting conviction.
- Tennessee Appeals Court rejected State's right to appeal trial court's order for diversion program.



*Crowded conditions in Central Booking and the Men's Detention Center have persisted under state control despite the fact that the number of arrests in Baltimore have fallen 25 percent in the past five years.*

## National Notes

### REPORT TAKES CLOSE LOOK AT BALTIMORE JAIL POPULATION

The Justice Policy Institute, a non-profit organization dedicated to reducing the reliance on incarceration and promoting fair and effective solutions to social problems, recently released a report calling for a more effective management of the jail population in Baltimore, MD. According to the report, the State of Maryland, which assumed control of the city's jail system in 1991 after a court ordered the city to reduce the jail population, is planning on spending \$280 million to build two new facilities – one for women detainees and one for juveniles.

The Baltimore jail system is comprised of three facilities. Central Booking has a capacity of 895. The Men's Detention Center has a capacity of 2,117. Both of these facilities frequently hold substantially more inmates. The Women's Detention Center, which has a capacity of 671, is often below this figure. Juveniles are currently housed in separate wings in each of these facilities. Crowded conditions in Central Booking and the Men's Detention Center have persisted under state control despite the fact that, as the report notes, the number of arrests in Baltimore has fallen 25 percent in the past five years.

“While nobody will challenge the need for a more updated facility for women and children who need to be detained for public safety reasons,” the report says, “evidence from other localities that have expanded their jails shows that the addition of new pretrial correctional facilities frequently eliminates the public will to reduce the number of people held in jail, despite the best intentions. People who are now released either on bail or on their own recognizance may be locked up in these facilities in the future because more and better space is available.”

According to the report, nine out of 10 inmates in these facilities are awaiting trial. But, the report notes, since the state controls these facilities, sentenced offenders are more readily moved to state prisons than occurs with other, county-run jails in the state. Still, the report states that “[r]educing the number of people being held in jail while awaiting trial will save money that can be redirected toward proven cost-effective public safety strategies, such as education and treatment, for people who are either involved in – or at risk of becoming involved in – the criminal justice system.”



Of new arrestees booked into the jail, about a third are released non-financially, about half have a money bail set, and the remainder are released with no charges being filed. The Baltimore Pretrial Release Services Program screens about 50,000 defendants a year and supervises about 1,100 defendants a day. The report recommended expanding non-financial pretrial release options and increasing the utilization of the supervision provided by the Baltimore Pretrial Release Services Program.

Among the 22 other recommendations for reducing the population in the Baltimore jail system were the following:

- Baltimore police should use citation release rather than custodial arrests for defendants who do not post public safety threats
- The courts should divert persons with mental illness or substance abuse problems to the public health system
- The Division of Probation and Parole should establish alternatives to reduce the number of persons sent to jail for violations of probation or parole
- The State's Attorneys Office should establish mechanisms to review low-level arrests prior to the initial appearance before a bail commissioner just as it does now in the more serious cases
- The court should implement a court date notification system
- The court should work to decrease the time between arrest and final adjudication of the case
- The state and the city should provide more funding for front-end services such as education, treatment and housing
- The city should establish a reentry office within the jail to assist in the coordination and continuation of reentry services when inmates are released
- The jail should provide inmates with 30 days of medications or referrals to treatment, as appropriate, when released from jail.

In concluding, the report noted that “[t]he construction of two additional jail facilities in Baltimore City, at the expense of all Maryland taxpayers, will have a lasting impact on the number of people incarcerated in Baltimore and ultimately the state. Exploring alternatives to increasing the number of jail beds in Baltimore will save money in the long run and create more opportunities for people directly affected by the system.”

*The report, Baltimore Behind Bars: How to Reduce the Jail Population, Save Money and Improve Public Safety, is available at [www.justicepolicy.org](http://www.justicepolicy.org).*



*In assessing the progress over the last two years, it was found that the pretrial release rate increased by 15%, while maintaining community safety, and increasing court appearances by 2.6%.*

## **ADVANCEMENTS WITH THE USE OF ALTERNATIVES TO PRETRIAL DETENTION IN IOWA**

With a 69.5% pretrial detention rate between July 2006 and June 2007, the Southern District of Iowa saw their highest detention rates ever, rates significantly higher than the national average of 61.7%. A new case study released by Luminosity, Inc., *Alternatives to Pretrial Detention Southern District of Iowa*, examines the progress of a project spurred by the increase in detention rates, with the mission to use various alternatives to detention while assuring court appearance and community safety.

According to the study, the Southern District of Iowa implemented four strategies to appropriately increase pretrial release. The first strategy involved *allocating human and financial resources* by assigning full-time supervisors and staff, providing additional pretrial services resources and increasing the utilization of alternatives to detention funding with an emphasis on mental health and substance abuse as release conditions and responses to violations. The second strategy *utilized a customer service approach* by providing a pledge to magistrates to improve pretrial services, conducting progress surveys of magistrates, providing quarterly reports to judges, initiating dialogue with justice system stakeholders, and building positive relationships with defendants.

The third strategy *provided training and increased consistency of services* by engaging one staff member to review all pretrial services reports, creating a pretrial services process improvement committee, and developing a pretrial services report "how to" guide and example report. The final strategy saw the District *develop an identity for pretrial services* by emphasizing pretrial services and the District mission, having weekly meetings for pretrial services staff, and training all newly hired staff in pretrial services.

Using primary data provided by the Office of Probation and Pretrial Services and extracted from the Probation and Pretrial Services Automated Case Tracking System (PACTS), the report examined the performance and outcome measures based on Pretrial Services Reports, Recommendation for Release Rates, Pretrial Release Rates, Pretrial Services Supervision Activity, Supervision Outcomes, and Cost Avoidance and Savings. In assessing the progress over the last two years, it was found that the pretrial release rate increased by 15%, while court appearances rose by 2.6%. Community safety, which was measured by a pretrial release revocation due to a new arrest for a crime that was allegedly committed while the defendant was released pending trial was also maintained. There was also a 1.7% decrease in alleged new criminal activity and a 2.8% decrease in revocations for technical violations.

*...after stricter sentencing laws were passed for possession of unlicensed firearms, the number of individuals released on their own recognizance dropped from 50% to just 5%.*

The study's outcomes also saw that the increase in the number of defendants interviewed by pretrial services for the purpose of completing a pretrial services report translated into a 10% increase in pretrial services reports completed. Pretrial services recommended release for 42.6% of all defendants interviewed in 2009, representing a 16% increase when compared to the FY 2007 rate of only 26.9%. The report also found the courts releasing 15% more pretrial defendants to be consistent with the increase in recommendations for release by Pretrial Services and the U.S. Attorney's Office. Furthermore, as a result of the higher release rates, the number of defendants on pretrial services supervision increased from 130 to 164 between FY2006 and FY2009. Of significance, the study found that substance abuse testing and treatment as a condition of release increased by 92% while the use of location monitoring more than doubled. The changes implemented also led to \$1.7 million being saved due to 110 additional defendants released at a savings of \$15,393 each.

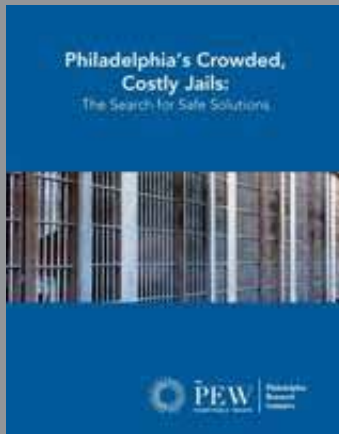
*The full case study, "Alternatives to Pretrial Detention Southern District of Iowa," can be found at [www.luminosity-solutions.com](http://www.luminosity-solutions.com).*

### **NEW REPORT ANALYZES PHILLY'S CROWDED AND COSTLY JAILS**

A new report by the PEW Charitable Trusts, Philadelphia's Crowded, Costly Jails: The Search for Safe Solutions, analyzes the rise – and decline – of Philadelphia's jail system. The analysis was spurred by the fact that the city of Philadelphia was spending seven cents of every tax dollar on jail inmates, which was almost as much as Cook County, IL which has three times as many residents.

According to the report, Philadelphia's jail system population was on the rise from 1999 to 2008, at a time when jail populations in the nation's two largest jurisdictions, New York City and Los Angeles Counties, were declining. However, since mid-2009 Philadelphia's jail population has been steadily decreasing, and public officials believe this decline could continue without threatening public safety. Review of the data showed that the jail population can largely be controlled by policy to fix flaws in the city's criminal justice system. Potential changes in policy included:

- Expanding the options for diverting troubled, low-level offenders out of the court system so that addictions or mental health issues can be addressed in an appropriate manner.
- Revitalizing Philadelphia's often-ignored bail guidelines to target low risk defendants so that as many as possible can stay out of jail prior to trial.



- Expanding the range of pretrial services.
- Developing new responses to probation violations so that so-called technical infractions can be punished without sending them back to jail.
- Devising programs to allow defendants not in custody to deal with missed court dates and probation appointments quickly and effectively without the threat of swift incarceration.
- Taking some of the savings from reducing the jail population and putting the money into programs aimed at further reducing the population

The drop in population has also resulted in an approximately \$15 million reduction in the jail's budget. Accordingly, if the population continues to drop, the savings would continue allowing for facilities to close and money used for programs to assist defendants.

Significant in the analysis was that the rise in jail population from 1999-2008 had little to do with the convicted population, but could strongly be contributed to the pretrial population. The pretrial population rose approximately 13% during those ten years and was mainly driven by defendants charged with misdemeanor crimes. One major factor in the rise in the pretrial population was an increase in bail setting and bail amounts, due in large part to magistrates only following Philadelphia's bail guidelines fifty percent of the time. The report also noted the higher number of police arrests for drug possession and drunk driving, along with changes in state law on the charge of carrying a firearm without a license, as other contributing factors for higher bail settings. Specifically, the data showed that, after stricter sentencing laws were passed for possession of unlicensed firearms, the number of individuals released on their own recognizance dropped from 50% to just 5%. There was also a 90% increase from 2000 to 2008 of individuals being put in jail for probation/parole violations and those defendants were staying in jail longer.

The report went on to describe factors that contributed to the recent decline in jail population, including a new state law that no longer gives convicted inmates with 2-5 year sentences the option of serving their time in the city jail, a decrease in crime in 2009 including a decline in arrests by 11%, a reorganization within the Department changing its reporting requirements and the distribution of its caseload, resulting in low level offenders having an easier time complying with the terms of supervision, and a new court process implemented to hear probation or parole violations more quickly. Other factors that impact the jail's population are the Municipal Court use of videoconferencing and an expedited-



*The court confirmed that Harris did enjoy a liberty interest while participating in the drug court program.*

plea process for lower-level misdemeanor pretrial individuals, which especially assists indigent defendants where even a low level bail would otherwise hold them in jail. Practices in other jurisdictions were reviewed for other methods to divert people out of jail and into more appropriate settings including treatment for addiction and mental health. There has been a push to follow the bail guidelines and expand the range of pretrial services as well and the Pennsylvania Supreme Court created a panel to monitor the criminal courts in Philadelphia to help further reduce the jail population.

*The report, Philadelphia's Crowded, Costly Jails: The Search for Safe Solutions, is available at [www.pewtrusts.org](http://www.pewtrusts.org).*

## Cases

### **HARRIS V. VIRGINIA, SUPREME COURT OF VIRGINIA, NO. 091177, 2/25/10**

After his arrest on charges of possession of heroin, Judson Harris was offered the opportunity to participate in the Rappahannock Area Regional Drug Treatment Court program. He accepted, and entered a plea, which would be deferred while he was in the program, with the understanding that the sentence he would receive if he failed to complete the program would be six months in jail and five years probation. If he succeeded, the charge would be dismissed. Some time after his enrollment in the drug court program, the drug court judge entered an order terminating Harris from the program for lack of compliance, and accepted Harris' earlier guilty plea. The agreed-upon sentence was then imposed. The termination order was issued without a hearing on the allegations of non-compliance. Harris argued before the trial court that he was entitled to a hearing before his participation in drug court was terminated. The trial court rejected this argument, as did the Virginia Court of Appeals. Harris then took his case to the Virginia Supreme Court.

Before that court, Harris argued that he has a liberty interest while participating in drug court, and that he cannot be deprived of his liberty without a due process hearing. The Commonwealth countered that while Harris did enjoy "some sort" of liberty interest, the record in this case is insufficient to conclude what transpired at the drug court judge's decision to terminate, and, therefore, the Supreme Court could not address Harris' claim. The court confirmed that Harris did enjoy a liberty interest while participating



*Neither the US  
Supreme Court  
nor the 3rd Circuit  
has defined with  
specificity the  
contours of when a  
threat constitutes  
an adverse action  
in the official-  
detainee setting.*

in the drug court program. It also noted that it was clear from what little record existed that Harris did not have an opportunity to be heard regarding allegations of non-compliance.

The court concluded that, “under the terms of the plea agreement accepted by the court, termination of the drug treatment court program would be a very significant factor in a decision of the circuit court to impose the terms of the agreement and revoke Harris’ liberty. Consequently, because Harris had no opportunity to participate in the termination decision, the trial court’s refusal to consider evidence of the reasons for termination from the program when deciding whether to revoke Harris’ liberty and impose the terms of the plea agreement deprived Harris of the opportunity to be heard regarding the propriety of the revocation of his liberty interest. That decision was in error.” The court remanded the case for further proceedings consistent with this finding.

**WILSON V. ZIELKE 2010 U.S. APP. LEXIS 10943 U.S. COURT OF APPEALS, THIRD CIRCUIT 5/28/2010**

The case at hand deals with whether a pretrial services staffer has qualified immunity from charges that certain actions in the pretrial supervision were unconstitutional. In March 2005, Zielke, a case monitor for the Delaware County Bail and Pretrial Services Unit, applied a rubber leg monitor to Wilson’s right leg pursuant to a court order placing him on house arrest. Wilson stated that he complained to Zielke on several occasions over a ten-day period that the leg monitor was too tight, but that she responded by threatening to put him in jail and otherwise ignored his complaints. Zielke denied that any complaints were made or that she made any threats. On the twelfth day of house arrest, Wilson went to the emergency room complaining of leg pain caused by the monitor, and it was removed. Wilson asserts that he suffered lacerations, swelling, and permanent nerve damage as a result of the leg monitor being too tight. Wilson went on to contend that Zielke’s threat to put him in jail after he complained about the tightness of his leg monitor was unlawful retaliation in violation of the First Amendment. The US District Court agreed and denied Zielke’s motion for summary judgment.

A First Amendment retaliation claim is found valid once it is established that 1) the plaintiff engaged in protected speech, (2) the defendant took adverse action sufficient to deter a person of ordinary firmness from exercising his First Amendment rights, and (3) the adverse action was prompted by the plaintiff’s protected speech. In examining this case, the Court of Appeals believed that, while case law shows that verbal threats alone can support a claim for retaliation, neither the US Supreme Court nor the 3rd Circuit has



*The Court stated that statutes giving sentencing credit for presentence confinement are designed to place incarcerated defendants who could not afford bail in the same position as their counterparts who obtained release with bail money.*

defined with specificity the contours of when a threat constitutes an adverse action in the official-detainee setting. Therefore, the law as it existed at the time of the incident would not have put a reasonable person in Zielke's position on notice that she was violating a clearly established right. Accordingly, Zielke is entitled to qualified immunity on Wilson's First Amendment retaliation claim and the District Court's ruling was reversed and remanded.

### **STATE V. PAVEY, 231 P.3D 1104 SUPREME COURT OF MONTANA 5/10/2010**

The Supreme Court of Montana held that crediting a defendant's sentence for time served where the defendant was incarcerated for prior convictions while awaiting adjudication of his current charges would not serve the purposes of the statute. According to the Court, the relevant Montana statute permitted a defendant's sentence to be credited with the time he was incarcerated only if that incarceration was directly related to the offense for which the sentence is imposed.

In this case, while awaiting adjudication of the underlying charges, the defendant was incarcerated for prior convictions. He ultimately pled guilty, and the district court sentenced the defendant to five years, to be served concurrently with the sentences he was already serving. The defendant argued that the time he had spent in prison prior to adjudication should be credited to this most current sentence, but the trial court disagreed, and the Montana Supreme Court affirmed. The Court stated that statutes giving sentencing credit for presentence confinement are designed to place incarcerated defendants who could not afford bail in the same position as their counterparts who obtained release with bail money. In particular, these statutes target disparate treatment of indigents and non-indigents, and seek to prevent indigents from being incarcerated longer than non-indigents solely because of their financial capacity. As such, crediting sentences where the defendant was serving time prior to trial for other convictions would not serve the purposes of the statute.

### **STATE V. RAINEY, 2010 TENN. CRIM. APP. LEXIS 484 COURT OF CRIMINAL APPEALS OF TENNESSEE 6/9/2010**

The Court of Criminal Appeals of Tennessee issued an opinion limiting the ways in which the State of Tennessee may appeal pretrial diversion decisions. In the case at hand the District Attorney General had denied the defendant's request for

*...appeal of  
decisions resulting  
in dismissal of the  
prosecution, was  
inappropriate  
because diversion  
only suspends  
the prosecution,  
and does not  
necessarily result  
in its dismissal.*

diversion, but the trial court granted the petition, holding that the State had improperly imposed higher standards for diversion qualifications than were statutorily required upon the defendant because of his job as a trooper with the Tennessee Highway Patrol. The State subsequently appealed the trial court's decision ordering pretrial diversion.

The Court of Criminal Appeals held that a State's appeal under Rule 3 of the Tennessee Rules of Appellate Procedure, which only permits appeal of decisions resulting in dismissal of the prosecution, was inappropriate because diversion only suspends the prosecution, and does not necessarily result in its dismissal. Additionally, Rule 38(b)(2) of the Tennessee Rules of Criminal Procedure grants the defendant the right to appeal a diversion denial pursuant to Rule 3 but does not grant the State the right to do so.

In the alternative, the State also sought extraordinary appeal under Rule 10, which is permissible only when the trial court's ruling represents a fundamental illegality and departs so far from the "accepted and usual course of judicial proceedings as to require immediate review." Upon reviewing the standards for determining pretrial diversion, the Court did find that the prosecution has the discretion in making the decision for diversion, and that trial courts can only review such decisions for abuse of such discretion. However, it was also shown that, even on remand, the prosecution had continued to place a higher standard on the defendant because of his position in law enforcement when rejecting the pretrial diversion request – an act that conflicts with previous rulings by the Court where placing a higher standard of conduct on public officials for off-duty acts is improper. Furthermore, the State never showed any evidence that the trial court departed so far from the norm to even warrant review under Rule 10. With the State having no right to appeal under Rule 3 nor showing evidence that the trial court had strayed so far from the acceptable course of judicial proceedings to require an immediate review, the Court subsequently dismissed the State's appeal.

---

# THE PRETRIAL REPORTER

A BI-MONTHLY PUBLICATION OF THE PRETRIAL JUSTICE INSTITUTE

WWW.PRETRIAL.ORG

VOLUME XXXVI NO.1 APR/JUNE, 2010

## INSTITUTE STAFF

EXECUTIVE DIRECTOR

Timothy J. Murray

CHIEF OPERATING OFFICER

Cherise Fanno Burdeen

CHIEF FINANCIAL OFFICER

Amy DeVries

SENIOR PROJECT ASSOCIATE

John Clark

SENIOR PROJECT ASSOCIATE

India L. Ochs, Esq.

PROJECT MANAGER

Stephanie Garbo

PROJECT ASSOCIATE

Stuart Cameron

GENERAL COUNSEL

Lindsey Carlson

Since 1977, the Pretrial Reporter has been keeping readers abreast of developments in pretrial. Articles are not copyrighted and may be condensed, rewritten, or used verbatim. Whenever the Pretrial Reporter materials are reproduced in another publication, the Pretrial Justice institute should be credited with the reprint and a copy of the publication in which the materials appear should be mailed to the editor.

The Pretrial Reporter will be published four times in 2010 (April, July, September, and a Juvenile edition in the summer). Subscribers receive it upon publication, sent directly to them via email. The rate is \$20 per edition. You can also subscribe online through our secure PayPal account (accepts major credit cards).

**Pretrial Justice Institute.**

**730 11th Street NW, Suite 302**

**Washington, DC 20001**

**202.638.3080 F: 202.347.0493**

**E: [ptr@pretrial.org](mailto:ptr@pretrial.org) • [www.pretrial.org](http://www.pretrial.org)**

