

THE PRETRIAL REPORTER

A BI-MONTHLY PUBLICATION OF THE PRETRIAL JUSTICE INSTITUTE

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VOLUME XXXVI NO.3 JUL-SEPT, 2010

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Executive Summary

This issue of The Pretrial Reporter contains the following:

National Notes:

- Jim Burch, Acting Director of the Bureau of Justice Assistance, Office of Justice Programs, testified before the House Domestic Policy Subcommittee as to the importance of evidence-based prevention strategies, including pretrial justice efforts.
- The House passes Senator Jim Webb's Bill to create Justice Reinvestment Committee.
- The Nebraska Lawyer publishes an article detailing the positive impact of a pilot court reminder program on failure to appear rates.
- The Senate impeachment trial of Judge Thomas Porteous Jr. of New Orleans ended on September 14, 2010.

Cases:

- The New York Court of Appeals, New York state's highest court, recently held that the arraignment, where pretrial release decisions occur, is a "critical stage" of the prosecution in New York, requiring the presence of defense counsel, and indigent defendants left without counsel at such proceedings have a cognizable and immediate claim for relief.
- The U.S. Court of Appeals for the 10th Circuit held that the district court correctly denied a Sheriff summary judgment on the basis of qualified immunity after the Sheriff failed to provide a legitimate reason for refusing to allow an arrestee to post a pre-set bail, thereby detaining the arrestee for three days.
- The U.S. Court of Appeals for the 9th Circuit held that where a court has determined that there is probable cause to believe that the defendant committed a felony, the government's interest in collecting DNA as a pretrial condition solely for identification purposes outweighs the defendant's privacy interests under the Fourth Amendment.



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National Notes

JIM BURCH, ACTING DIRECTOR OF THE BUREAU OF JUSTICE ASSISTANCE, OFFICE OF JUSTICE PROGRAMS

On July 22, 2010, Jim Burch testified before the Committee on House Oversight and Government Reform Subcommittee on Domestic Policy on the Department of Justice’s commitment to investing in pretrial justice initiatives designed to produce a “more strategic, effective, and efficient approach to preventing and reducing crime.” Burch is currently the Acting Director of the Bureau of Justice Assistance (BJA), the Department of Justice entity that provides leadership and services in grant administration to state and local criminal justice systems.

Burch addressed the effect that crowded jails and prisons and high recidivism rates across the country are having on state and local budgets, and the importance of addressing these issues through the use of smarter front-end policies. Burch’s testimony revealed that there are more than 1.5 million individuals currently serving time in state and federal prisons, while nearly 800,000 individuals are incarcerated in local jails. Notably, states are spending more and more on corrections, even up to a quarter of their state general fund expenditures. As such, Burch testified, the Department of Justice is seeking to address crime in communities in part by identifying pretrial justice strategies that provide sustainable and effective solutions. These solutions will include validated risk assessments and evidence-based prevention efforts. “Effective reentry planning must begin when an offender first comes into contact with the criminal justice system,” Burch stated. “Validated risk assessment during pretrial decision-making and sentencing are necessary to permit the safe release of certain defendants without jeopardizing community safety or the integrity of the legal process.”

According to Burch, BJA will be developing initiatives to increase the role pretrial services can play in improving the effectiveness of the criminal justice system. Included is a \$5 million initiative titled Ensuring Fairness and Justice in the Criminal Justice System, which will fund in part the “front-end decision-making points.” This initiative will also support “efforts to provide training and technical assistance and to identify best practices in pretrial justice.” Burch also emphasized the importance of implementing smart front-end practices in order to achieve more successful re-entry and post-

“The House passed a “blue-ribbon, bipartisan commission of experts charged with undertaking an 18-month top-to-bottom review of the nation’s criminal justice system and offering concrete recommendations for reform.”

conviction efforts. Overall, Burch’s testimony reflected the awareness by the Department of Justice that more desirable outcomes in local criminal justice systems can only be achieved once policies and practices at the front end of the system have been addressed.

HOUSE PASSES SENATOR JIM WEBB’S BILL TO CREATE A JUSTICE REINVESTMENT COMMITTEE

The United States only constitutes 5% of the world’s population but has 25% of the world’s prison population. Currently, there are 2.38 million inmates in America’s prisons. In an effort to explore all the factors contributing to such high numbers, Senator Jim Webb of Virginia proposed legislation last year to create a commission to exhaustively examine the criminal justice systems from top to bottom. On January 21, 2010, the Senate Judiciary Committee approved this legislation, known as the National Justice Commission Act (S. 714), and on July 27, 2010, the House of Representatives passed the bill. S. 714 enjoys the support of over 39 bipartisan cosponsors, as well as the support of organizations such as the International Association of Chiefs of Police, the Fraternal Order of Police, the Marijuana Policy Institute, the Sentencing Project, the NAACP, the ACLU, and Criminal Justice Section of the American Bar Association.

In the House, Representative Bill Delahunt of Massachusetts guided S. 714 to passage. “It has been over four decades since we conducted a comprehensive review of our criminal justice system,” said Delahunt, according to his website. “Today our prison population is expanding at an alarming rate, with costs to the taxpayers that are unsustainable. The bill passed tonight will assess the current crisis, reverse these disturbing trends and help save taxpayer money. I am proud to have joined with Senator Jim Webb on this issue. His tireless efforts championing this bill will help ensure quick passage.”

Although crime has decreased nationally over the past two decades, the imprisonment rate in the United States remains very high. This national trend carries exorbitant costs, both for taxpayers and for those imprisoned. In the current economic climate, such costs are becoming unmanageable and unsustainable. The National Justice Reinvestment Commission will examine all areas of the criminal justice system, including federal, state, local and tribal governments’ criminal justice costs, practices, and policies. The review is intended to generate recommendations for ways to improve the policies, practices, and laws currently in place for the purpose of preventing, deterring, and reducing crime and violence. The Commission is also intended to assist states and federal government in improving

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the cost-effectiveness of the criminal justice system and ensure the interests of justice are being effectuated. S. 714 has been endorsed by approximately 100 organizations.

THE NEBRASKA LAWYER PUBLISHES AN ARTICLE DETAILING THE POSITIVE IMPACT OF A PILOT COURT REMINDER PROGRAM ON FAILURE TO APPEAR RATES

In an attempt to improve the failure to appear rates in Nebraska County Courts, University of Nebraska researchers conducted a fifteen-month experiment on the effectiveness of a pilot court date reminder program. According to an article in the Nebraska Lawyer, “[f]rom March 2009, to May 2010, researchers at the University of Nebraska Public Policy Center randomly sent misdemeanants one of three different postcard reminders or provided no reminder.” One of the goals of the project was to explore whether court date reminders had different impacts on black defendants, Hispanic defendants, and white defendants. The project also collected information on a portion of the defendants to assess whether those who appeared for court had different perceptions of procedural justice and trust in the courts than those who didn’t. A total of 7,865 defendants were included in the project and each was assigned one of four reminder options. The first option was simply no reminder; the second option was a “simple reminder option” which was a reminder postcard simply containing the time and place of the scheduled court hearing; the third option was a “reminder-sanctions condition” which was a postcard including the simple reminder as well as a list of the possible penalties for failing to appear; and the fourth option was a “reminder-procedural justice condition” that contained the simple reminder, a description of the possible sanctions, and a “procedural justice message that highlighted the defendant’s ability to speak on his or her own behalf by appearing for court.”

The baseline FTA rate in these fourteen courts prior to the pilot program was 12.6% (although rates varied greatly by geographical region), and the reminder pilot program reduced the FTA rate to 9.7%. The researchers deduced that any reminder generally helps to reduce FTA rates among misdemeanor defendants. Among blacks, the baseline FTA rate was 18.8%, but the reminder-sanctions and the procedural justice groups dropped to 13.5% and 13.6% respectively. Among Hispanics, the reminder-sanctions option reduced the FTA from 10.5% to 4.7%. Ultimately, the researchers determined that whites and blacks respond to procedural justice messages and punitive messages similarly, while Hispanics tend to reduce non-appearance after receiving a punitive message. Regarding the defendants’ perceptions of procedural justice in the

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courts, although only a small percentage of defendants responded to this survey, generally speaking those who failed to appear in court were less positive about government than those who appeared. The researchers concluded that individuals who failed to appear for court have significantly more negative views of the courts and the government.

Overall, the researchers drew three broad policy implications from their study. First, reminder postcards can in fact reduce the failure to appear rates among misdemeanants. Second, the type of message on the postcards does in fact matter, and varies in effect depending upon the racial group. Finally, individuals within different racial groups hold differing levels of trust toward one another and in political institutions. Given the results of the program, the researchers concluded that messages to comply with the law can be quite effective, but care must be taken to ensure that the messages are developed with care and understanding of the racial and socio-economic status of the recipients

FEDERAL JUDGE FACING REMOVAL FOR ROLE IN BAIL BONDING SCANDAL

In September, a committee of the United States Senate completed an impeachment trial for U.S. District Judge Thomas Porteous of Louisiana. Judge Porteous had been impeached earlier this year by the U.S. House of Representatives for, among other allegations, his acceptance of bribes from a commercial bail bonding company. The 12-member Senate Impeachment Trial Committee, comprised of six Democrats and six Republicans, will shortly submit a report to the full Senate with its recommendation regarding the removal from office of Judge Porteous.

One of the four articles of impeachment presented by the House 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 gifts, including a trip to Las Vegas, and free meals, car repairs and other benefits for a Jefferson Parish bail bonding company in exchange for issuing bail rulings that favored the company.

Two other Jefferson Parish judges, along with bail bonding agents and jail and court staff, were charged, convicted, and sent to prison as a result of a lengthy investigation of bail bonding practices in the parish, but Judge Porteous was never charged. Notwithstanding the fact that he was never charged, Article II of the impeachment asserts that Judge Porteous “used the power and prestige of his office to assist the [bail bonding company] in forming relationships with State judicial officers and others. Judge Porteous also knew

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and understood that Louis Marcotte (the owner of the bail bonding company) made false statements to the FBI in an effort to assist his appointment to the federal bench.” (See *The Pretrial Reporter*, January – March, 2010.)

The impeachment trial before the committee lasted five days and included 14 witnesses called by the House impeachment managers and 13 defense witnesses. The House impeachment managers argued that short of removal, the only sanction available is to continue Judge Porteous’ suspension from active duty – which has been in effect since 2008 – and he would continue to receive his full salary and maintain his retirement benefits. The defense argued that removing Judge Porteous from office despite the fact that he was never charged with a crime would set a dangerous precedent – almost all other federal judges ever removed from office had been charged with a crime. (*The Times-Picayune*, 9/22/10.)

A two-thirds vote of the Senate is required to remove Judge Porteous from office. The Senate vote is expected after Thanksgiving

Cases

HURRELL-HARRING V. STATE OF NEW YORK, NEW YORK COURT OF APPEALS, NO. 66, 5/6/2010

The New York Court of Appeals, the state’s highest court, recently considered a class action by a group of indigent criminal defendants alleging that New York’s public defender system failed to provide them with their constitutional right to counsel under the Sixth Amendment. Pursuant to *Gideon v. Wainwright*, 372 U.S. 3351 (1963), states may not deny a defendant counsel based upon their inability to pay for a lawyer. The state of New York has discharged its *Gideon* responsibilities to its counties, which are required to provide indigent defendants with public defenders according to local rules and practices. However, the plaintiffs alleged that this unpopular mandate goes largely unfunded at the local level, and in many counties it was fairly common for courts to arraign defendants without counsel and leave them, particularly when accused of relatively minor offenses, unrepresented in subsequent proceedings. Just as importantly, the plaintiffs alleged that where counsel was actually appointed, they were unavailable to their clients or appeared to do little more than arrange unfavorable plea bargains. As such, the plaintiffs sought a declaration by the courts that their rights to effective assistance of counsel under the Sixth Amendment were being violated, and an injunction to prevent further violation of those



rights. The lower court held that the plaintiffs could only seek relief for this claim after conviction, and that the courts could not properly vindicate this claim because the way in which New York has chosen to provide counsel for indigents is primarily a legislative function.

Although the state argued that the plaintiffs could not claim ineffective assistance of counsel until the prosecution concluded in a conviction, the Court of Appeals determined that the proper question was whether the state has met its foundational obligation under *Gideon* to provide legal representation. The Court held that the right to counsel for criminal defendants attaches at arraignment and “entails the presence of counsel at each subsequent ‘critical stage’ of the proceedings.” The Court noted that ten of the twenty plaintiffs were unrepresented at their arraignments, and eight of these defendants had bail set that they could not meet. At the arraignments, the plaintiffs’ liberty interests were “regularly adjudicated with most serious direct and collateral consequences, including the loss of employment and housing, and inability to support and care for particularly needy dependents.” Thus, the Court stated, “[t]here is no question that ‘a bail hearing is a critical stage of the State’s criminal process.’” Moreover, the Court noted, the state of New York has already recognized crucial importance of arraignment and that they contain matters routinely “affecting a defendant’s liberty and ability to defend against the charges.” These are the very reasons for which New York has expressly provided for “the right to the aid of counsel at the arraignment and at every subsequent stage of the action.”

Moreover, the Court held the allegations that after counsel was appointed, they were uncommunicative, waived important rights without consent, and made virtually no efforts on their clients’ behalf subsequent to arraignment could be reasonably understood to “allege non-representation rather than ineffective representation.” Given the foregoing, the Court held that the plaintiffs’ complaints stated claims for constructive denial of the right to counsel by the counties’ insufficient compliance with their constitutional obligations under *Gideon*. Although the Court noted that a possible remedy for this complaint could entail appropriation of funds and a re-ordering of legislative priorities, it could not ignore its essential obligation to remedy the violation of a fundamental constitutional right.

**DODDS V. RICHARDSON, U.S. COURT OF APPEALS
FOR THE TENTH CIRCUIT, NO. 09-6157, 8/6/2010**

The Tenth Circuit Court of Appeals examined whether the Sheriff of Logan County, Oklahoma, could claim qualified immunity for following the county court clerk’s long-standing policy of requiring felony arrestees to be arraigned prior to posting bail, even where

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the arrest warrant contained a statutorily required pre-set bail amount. In this case, the defendant, Thomas Carl Dodds, Jr., had been arrested by Sheriff Randy Richardson’s deputies pursuant to a felony arrest warrant on a Friday afternoon. The deputies placed Dodds in jail, and although the arrest warrant set bond at \$5,000, the deputies informed Dodds that because he was arrested for a felony, he could not post bond until after he was arraigned by a judge the following Monday morning. At the Monday morning arraignment, a state district judge set Dodd’s bail in the amount of \$10,000, but later that week Dodds was released on a personal recognizance bond. The charges against Dodd were ultimately dismissed, and Dodds subsequently brought a lawsuit under 42 U.S.C. §1983 against Sheriff Randy Richardson, alleging that the Sheriff had denied Dodds his Fourteenth Amendment due process rights by refusing him an opportunity to post the pre-set bond set forth in his arrest warrant. 42 U.S.C. §1983 permits individuals to sue government officials who, acting under the color of any statute, ordinance, custom, policy, or the like, deny the individual their constitutional rights.

In response, Sheriff Richardson moved for summary judgment on the basis that he had immunity from individual liability because he personally did not deny bail to Dodds, nor did he intentionally deprive Dodds of his constitutional rights. Rather, Sheriff Richardson argued, his office acted pursuant to a long-standing policy of the Logan County Court Clerk, which requires felony arrestees to be arraigned prior to posting bail, despite the fact that state law required the arrest warrant to include a bail amount that the arrestee could post to obtain immediate release. As such, Sheriff Richardson argued, he could not be held personally liable. Under 42 U.S.C. §1983, a government official can claim qualified immunity if their conduct “does not clearly violate established statutory or constitutional rights of which a reasonable person would have known.” However, the district court denied the motion, holding that Sheriff Richardson should have known that his participation in such a policy would ultimately deny arrestees with pre-set bonds their constitutional rights because, under Oklahoma law, a sheriff is required to accept pre-set bail for those arrestees jailed during non-business hours.

In reviewing the district court’s decision, the Tenth Circuit noted that Dodd’s claim fell into a “category of claims which unfortunately have become so common that they have acquired their own term of art: ‘overdetention,’ i.e., when ‘the plaintiff has been imprisoned by the defendant longer than legally authorized, whether because the plaintiff’s incarcerative sentence has expired or otherwise.’” The court went on to explain that where bail is denied, it must comport with the requirements of due process. Where bail has been set, the defendant obtains a liberty interest in being freed of detention because “the setting of bail accepts the security of the bond for the

“Once a defendant has been subject to a judicial determination of probable cause that he has committed a felony, he has little or no right to withhold his identity from the government.”

arrestee’s appearance at trial and ‘hence the state’s justification for detention fades.’” Where the state has decided to deny bail, it must apply a clear legal standard and a statement of the rationale for the denial, and that rationale must clearly relate to a “legitimate goal.”

After examining the record, the Tenth Circuit held that Sheriff Richardson had set forth no reason, much less a ‘legitimate goal’ for refusing to allow Dodds to post bail and for detaining Dodds for three additional days, outside of an assertion that it was the county’s policy. The court stated that the “Plaintiff’s liberty interest in being freed from pretrial detention once his bail had been set may not be denied just because an official says it has been his practice to do so for a long time...” Ultimately, without such a legitimate goal, and given that Sheriff Richardson knew of the offending policies and was responsible for implementing them at his jail, he caused Dodds to be deprived of his due process rights.

UNITED STATES V. POOL, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, NO. 09-10303, 10/14/2010

The Ninth Circuit Court of Appeals had occasion in this case to consider whether two provisions of the Bail Reform Act, which permit courts to impose DNA tests on certain defendants as a condition of release, violate a defendant’s constitutional rights. Pursuant to the DNA Analysis Backlog Elimination Act of 2000, courts are able and even occasionally required to collect the DNA from arrestees on most, if not all, federal criminal charges. Here, Jerry Arbert Pool, the defendant, was arrested and charged with possessing and receiving child pornography. The court released Pool on a \$25,000 unsecured bond and subject to a variety of pretrial conditions, including the condition that he provide a DNA sample. Pool objected to this condition primarily on the grounds that that it violated his Fourth Amendment rights, but he also argued that this violated the Eighth Amendment and the Due Process Clause, as well as the separation of powers doctrine.

The Ninth Circuit’s analysis primarily focused on Pool’s objections under the Fourth Amendment. The Fourth Amendment protects individuals against unreasonable searches and seizures. Generally speaking, law enforcement officials are required to have probable cause, most frequently in the form of a warrant, before they can legally conduct a ‘search’ of an individual. Pool argued that collection of his DNA constituted an unreasonable search within the meaning of the Fourth Amendment. The Ninth Circuit agreed that collection of DNA as a pretrial release condition does in fact constitute a search, and moved to the question of whether such



a search violates the Fourth Amendment. Because the statutory provision permitting a DNA test of arrestees did not require a warrant based upon probable cause, the Ninth Circuit first had to determine whether such a search would still be permissible pursuant to “certain established and well-established exceptions to the warrant clause.” One of these exceptions is found in the “totality of the circumstances” test, which requires courts to balance “the degree to which a search intrudes upon an individual’s privacy and, on the other, the degree to which it is necessary for the promotion of legitimate governmental interests.” Where the legitimate governmental interests outweigh the individual’s privacy interests, the search will be found to be reasonable.

The Ninth Circuit first noted that once there has been a judicial determination that there is probable cause to believe the defendant has committed a felony, as was the case with Pool, the defendant’s rights may be greatly diminished. The court then noted that while a DNA test does represent an intrusion into a defendant’s privacy, it is only minimal “both in terms of the bodily intrusion it occasions, and the information it lawfully produces.” Moreover, the information gathered from DNA tests is used exclusively for identification purposes, and once a defendant has been subject to a judicial determination of probable cause that he has committed a felony, he has little or no right to withhold his identity from the government. On the other hand, the court observed, “[t]he government’s interests in DNA samples for law enforcement purposes are well established,” the purpose of collection of Pool’s DNA was solely for identification purposes, and DNA is “the most accurate means of identification available.” Thus, given the government’s legitimate interest in ascertaining the identity of defendants, and the very limited use for which DNA information may be used, under the totality of the circumstances, the DNA test did not constitute an unreasonable search under the Fourth Amendment.

As for the other constitutional arguments advanced by Pool, the court also remained unpersuaded. In response to Pool’s assertion that the DNA test violated his due process rights, the court stated “Congress’s determination to require a DNA sample as a condition of pretrial release where the district court has made a probable cause determination . . . does not deny Pool procedural due process.” Similarly, Pool’s argument that the DNA test constituted excessive bail under the Eighth Amendment because it served neither of the two purposes of bail, safety and appearance, failed because the only substantive limitation upon bail is that it not be ‘excessive’ in light of the perceived evil. The court held that the value of DNA identification in solving crimes and deterring the commission of crimes is not excessive within the meaning of the Eighth Amendment.

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A BI-MONTHLY PUBLICATION OF THE PRETRIAL JUSTICE INSTITUTE

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VOLUME XXXVI | NO. 3 | JUL-SEPT, 2010

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Ultimately, the finding of probable cause for Pool's arrest was the "watershed event" permitting the application of the 'totality of the circumstances' exception of the Fourth Amendment's warrant requirement. Moreover, the government's interest in definitively determining Pool's identity outweighed his privacy interest in giving a DNA sample because the limited purpose of the DNA test was for identification. Therefore, the DNA test was a valid pretrial condition.

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The Pretrial Reporter will be published four final times this year: April, July, and September 2010 and January 2011. 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).

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