

THE PRETRIAL REPORTER

A BI-MONTHLY PUBLICATION OF THE PRETRIAL JUSTICE INSTITUTE

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VOLUME XXXV | NO.2 | MAR, APR, 2009

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EXECUTIVE DIRECTOR'S LETTER

Dear Friends:

In March, Democratic Senators Jim Webb (Virginia) and Arlen Specter (Pennsylvania) introduced legislation to form an 18-month National Commission on Criminal Justice. PJI and NAPSA co-signed a letter to Senator Webb asking that he include a review of bail reform in this commission's work. As we all know, front-end decisions have a huge impact on back-end outcomes. Pretrial justice - both release and diversion - must be a part of this national examination of policies and practices. We are asking that all who support pretrial services and programs send a letter to the Senator as well. A template with instructions can be downloaded from our website.

In other news, we are pleased to release an updated version of our website. The new

Executive Summary

This issue of The Pretrial Reporter contains the following:

National Notes:

- A new book looks at the life's work of Herb Sturz, founder of the first pretrial services program – the Manhattan Bail Project.
- Designed to save \$1.4 million, a new Kentucky law authorizes screening of defendants for drug use prior to pretrial release and as a condition of release, and expands opportunities for pretrial diversion of drug users.
- After five years of study, the Constitution Project issues report calling for major reforms in indigent defense systems.
- Report looks at how racial disparities are compounded at each stage of the criminal and juvenile justice systems, leading to disproportionate minority representation.
- The National Association of Pretrial Services Agencies wraps up its pretrial diversion study – a report is expected this summer.

Cases:

- The U.S. Supreme Court holds that a confession obtained during a delay in bringing the arrestee before a judicial officer for initial appearance must be thrown out.
- In another ruling, the Supreme Court overturns a Vermont Supreme Court decision that a three-year delay in bringing a jailed defendant to trial as a result of problems with the defendant's indigent defense was a violation of speedy trial rights.
- An Ohio appeals court agrees with a trial court in a bond forfeiture case that a bail bonding firm was not concerned with whether the defendant appeared in court, only if the firm had its losses covered through collateral.
- An Arizona appeals court holds that a trial court has the authority to consider the source of bail money in deciding whether to accept the bail.
- A New York appeals court says trial court erred when it threatened to remand a defendant for violating pretrial release conditions if he did not immediately plead guilty.

EXECUTIVE DIRECTOR'S
LETTER
(CONTINUED)

organization of the site came as a result of constructive feedback from users. Now, right from the home page, you can access information about Our Services, News and Articles, and explore Special Topics, showcasing the intersection of pretrial justice and, for example, substance abuse, mental health, gender, and veterans. We appreciate user feedback and ask that you continue to provide it.

This year marks the 20th anniversary of the Miami-Dade County Drug Court, the first Drug Court in the nation. Started by Judge Herbert Klein, then-State Attorney Janet Reno, then-Dade County Public Defender Bennett Brummer, and myself, that court sparked a national revolution that changed the face of the American justice system. It has provided for twenty years of restoring lives, reuniting families and making communities safer. I am honored to be invited by the National Association of Drug Court Professionals to both their "20th Birthday Celebration of Drug Court" on May 6, 2009 on Capitol Hill, and their conference this summer in California.

National Notes

FOUNDER OF NATION'S FIRST PRETRIAL SERVICES PROGRAM SUBJECT OF NEW BIOGRAPHY

A new book by a *New York Times* urban affairs correspondent tells the story of Herb Sturz, who began a lifetime of innovative social reform by founding the Manhattan Bail Project, the nation's first pretrial services program. According to the book, in 1961 there were 118,000 men and women being held in jails in New York City simply because they could not afford bail. This was more than twice the number who were incarcerated after conviction, leading Sturz to the conclusion that many pretrial detainees were low risk individuals who could be safely released. At the same time, there were several high profile cases of defendants charged with very dangerous offenses who were able to post high bails and be released.

As the book relates, Sturz teamed with philanthropist Louis Schweitzer, who was also concerned about the poor sitting in jail because they could not afford bail. In 1960, the two toured two New York City jails and "were shocked by the Dickensian squalor: the filth, the stench, the overcrowding and the pervasive sense of despair and degradation among people who the system presumed were innocent." Schweitzer soon offered Sturz the financial backing to look into the issue of bail. Sturz immersed himself in the issue and in the process, "I learned that when a bail amount was set by the judge,' Sturz recalls, 'it was actually the bail bondsman, a private businessman, who made the unfettered, unreviewable decision as to whether, for a fee, he would post the required bail amount.' Sturz also learned that decades of personal and political connections had endowed self-interested bail bondsmen with the power to hamper meaningful investigation of the process."

Looking for a way to address the problem, the book describes how Sturz, who had just turned 30 years old, managed to get appointments with New York City Mayor Robert Wagner, University of Pennsylvania Law School Professor Caleb Foote, U.S. Supreme Court justices William O. Douglas and William Brennan, and finally, U.S. Attorney General Robert Kennedy. According to the book, Justices Douglas and Brennan were most concerned about "the apparent relationship between a judge's original decision about bail and the ultimate disposition of the charges." They each assigned a former law clerk to work with Sturz and Schweitzer, neither of whom were attorneys, to help think about bail reform.

“The main thing we’ve done is to introduce the system to fact finding. ‘With facts, we can open up options.’”

Schweitzer formally hired Sturz to be director of a new organization, named Vera – after Schweitzer’s mother. On October 1, 1961, Mayor Wagner announced that, under Vera’s auspices, law students from New York University would begin interviewing defendants right before their initial bail setting appearance, assess their community ties, and present the information to the bail-setting court. “‘The main thing we’ve done is to introduce the system to fact finding,’ Sturz said at the time. ‘With facts, we can open up options.’” The Manhattan Bail Project “showed promise from the start,” according to the book. “With astounding speed, it was elevated to poster child for a national movement.” By 1964, Vera was co-sponsoring, along with Attorney General Kennedy, the National Conference on Bail and Criminal Justice. At that conference, the attorney general noted that Sturz and Schweitzer helped to foster concern among people “who want to ensure that the scales of our legal system weigh justice, not wealth.”

The book goes on to describe the dozens of off-shoots of the Manhattan Bail Project that Sturz shepherded that were aimed at bringing about justice reform, including the Court Employment Project, one of the first pretrial diversion programs in the country, and the Midtown Community Court, the nation’s first community court. After 17 years as director of the Vera Institute, Sturz went on to serve as Deputy Mayor of New York City for Criminal Justice, head of the City Planning Commission, where he was credited with cleaning up Times Square, and as a member of the editorial board of the *New York Times*. He is currently associated with the Soros Foundation, working on projects of affordable housing in the United States and South Africa and after-school programs in New York. According to the book, Sturz, who turns 80 next year, has no plans to retire.

Copies of the book, “A Kind of Genius: Herb Sturz and Society’s Toughest Social Problems,” by Sam Roberts, are available in bookstores.

NEW LAW IN KENTUCKY ADDRESSES PRETRIAL RELEASE AND DIVERSION OF DRUG USERS

Kentucky Governor Steve Beshear recently signed into law a bill that greatly expands the opportunities for the pretrial diversion of drug users, authorizes screening of defendants for drug use prior to pretrial release, and allows for drug testing and treatment as a condition of pretrial release. The goal of the bill is to cut the state’s growing prison population by 20% in the next five years by addressing drug problems starting at the time of arrest. In signing the bill, Governor Beshear noted that its provisions are expected to save the state more than \$1.4 million a year in prison costs. (*Press Release, Office of the Governor, Commonwealth of Kentucky, 3/26/09.*)

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The provision of the bill pertaining to pretrial release states that defendants charged with a felony drug offense or with any felony who have records indicating recent substance abuse must be screened by the pretrial services program “for recent and relevant substance abuse risk factors.” According to the provision, a defendant’s refusal to participate in the screening process “shall not disqualify the person from being granted pretrial release.” If the screening process identifies substance abuse risk factors, the provision authorizes the court to impose such conditions of pretrial release as drug testing, participation in additional assessments, and participation in substance abuse treatment. The results of the screening may also be used to identify potential candidates for pretrial diversion.

As to the pretrial diversion provisions, the Department of Corrections is directed to establish “an intensive secured substance abuse recovery program” capable of housing, in a secure facility, no less than 200 persons. Defendants charged with a Class D felony drug or drug-related offense, after screening by the pretrial diversion program for suitability, can agree to participate in the secured program. The length of the program is determined by the court, but cannot be less than 90 days nor more than 365 days. The program is required to provide each participant leaving the facility with an aftercare plan, which will include a referral to substance abuse treatment in the community. Those who complete the program will have their charges dismissed. For those who fail to complete the program, “the court may award full or partial credit (for time served in the secure facility) if the defendant demonstrates that good cause existed for the failure to complete the program.”

REFORMS RECOMMENDED FOR INDIGENT DEFENSE SYSTEM

In 2004, the National Legal Aid and Defenders Association and Georgetown University’s Constitution Project, concerned about the quality of indigent defense, established a bipartisan Committee on the Right to Counsel. The committee was comprised of prominent judges, prosecutors, defense counsel, law school professors, law enforcement, victim advocates, and others. Former vice president of the United States, Walter Mondale, served as honorary co-chair of the committee, along with William Sessions, former director of the FBI and a former federal judge. The committee was given the two-fold mission of examining whether indigent defendants receive adequate legal representation, and to develop consensus recommendations for achieving lasting reforms. After five years of work, the committee has released its report.

*Poorly funded
indigent
defense systems
have impacts
far beyond
the indigent
defendant,
report says.*

According to the report, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*, indigent defense systems throughout the United States are failing to meet basic constitutional requirements. The report describes the "astonishingly large caseloads" of indigent defenders, their poor training and oversight, low compensation, and inadequate support services that lead these defenders, "through no fault of their own, (to) provide second rate legal services, simply because it is not humanly possible for them to do otherwise." The impact of this failure, the report states, affects not only the defendants who are denied constitutionally guaranteed representation, it also affects state and local governments that "are faced with increased jail expenses, retrials of cases, lawsuits, and a lack of public confidence in our justice system."

The report contains 22 consensus recommendations for reforming indigent defense. Among the recommendations are that legislators appropriate adequate funds for indigent defense, salaries of indigent defenders be equivalent with prosecuting attorneys, sufficient support services be provided, states should establish a board or commission to oversee all components of the indigent defense system, and these bodies should establish and enforce qualification and performance standards for indigent defenders. The report also recommended that the federal government establish an independent and adequately funded National Center for Defense Services to assist state governments in providing quality indigent defense. In addition, the report recommended that defense attorneys and public defender programs should "refuse to compromise their ethical duties in the face of political and systemic pressures that undermine the competence of their representation provided to defendants and juveniles unable to afford counsel. Defense attorneys and defender programs should, therefore, refuse to continue representation or accept new cases for representation when faced with excessive workloads that will lead to a breach of their professional obligations."

A copy of the report is available at <http://tcpjusticedenied.org>.

NEW REPORT ADDRESSES RACIAL DISPARITIES IN THE JUSTICE SYSTEM

The National Council on Crime and Delinquency (NCCD) recently published a report entitled "Created Equal: Racial and Ethnic Disparities in the U.S. Criminal Justice System." The report discusses disproportionate minority contact (DMC), defined as the unequal representation of persons of color in the criminal justice system. According to the report, DMC can result from just one decision or multiple "circumstances and decisions" that occur throughout the lifetime of a particular case. As a person's

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case moves through the stages of the system the outcomes are compounded by the decisions made at preceding stages and to assess the extent to which DMC occurs, the report analyzed existing data relating to arrest, pretrial release decision making, and sentencing in both the adult and juvenile justice systems.

Looking at the adult system, the report notes that research reveals racial disparities at almost every decision point in the processing of a criminal case. Beginning with data on arrests, African Americans are 2.5 times and Native Americans 1.5 times more likely than Whites to be arrested. African American defendants are then detained pretrial at 5.2 times the rate for White defendants, due to the reliance on the use of money bail to determine who is released pretrial and who is detained. As the report points out, “Hispanics and Blacks have odds of making bail that are approximately half of those of Whites with the same bail amounts and legal characteristics.” In addition, when looking at the composition of the jail population – which is composed of over half not yet convicted people – African Americans are held 4.7 times and Hispanics 1.6 times the rate of Whites. Progressing through the processing of a case to sentencing, data show that African Americans were sentenced to probation at lower rates than Whites, and to jail or prison for a variety of different crimes, including violent, property, drugs and weapons, at higher rates. Moreover, African Americans receive longer terms of imprisonment. For example, the average term for an African American convicted of a violent crime is 108 months, compared to 95 months for Whites.

Looking at the juvenile justice system, the same accumulating disparity resulting in the same disproportionate minority representation can be found. For example, African Americans are detained over 5 times, Native Americans over 3 times, and Hispanics over 2 times the rate of Whites. Studies also show that minorities detained “are more likely than Whites to have their mental health, education, and employment adversely affected, more likely to be formally charged and receive harsher dispositions, and are more likely to recidivate after release.”

The report concludes that “shortcomings in the data collection efforts of states and especially the federal government most likely obscure the true extent of DMC.” The report calls for improvements in data collection that include “tracking system-involved persons from first contact with law enforcement through each stage of the system, including court processing, sentencing, and release, sampling not only felony but less serious offenders, and linking legal variables such as offense history with extra legal variables including socioeconomic and community factors.”

A copy of this report is available at www.nccd-crc.org

NAPSA pretrial

diversion

survey report

expected by

this summer.

PRELIMINARY RESULTS FROM NAPSA PRETRIAL DIVERSION SURVEY

The National Association of Pretrial Services Associations (NAPSA) has recently completed a national survey of pretrial diversion programs, and preliminary results have been compiled. A total of 69 diversion programs in 26 states responded to the survey. This represents 27% of the 253 known pretrial diversion programs nationwide.

Among the major findings of the study:

- 35% of diversion programs are located administratively within pretrial services agencies, 28% within prosecutor's offices, 13% within non-profit agencies, 10% each within the courts and probation departments, and 3% within county corrections agencies.
- 31% of the programs were started in the 1970s, 18% in the 1980s, 25% in the 1990s, and 27% in this decade.
- The median annual budget for the respondents' programs was \$159,000. Eight percent had budgets of at least \$1 million, while a quarter were budgeted at less than \$100,000.
- The median staff size was six, with a range of one to 70.
- In considering eligibility for the diversion program, 98% look at prior criminal history, 91% at the current charge, 39% at substance abuse history, 36% at mental health history, 35% victim approval, 33% restitution amount imposed, and 30% arresting officer approval.
- 56% reported that a conditional guilty plea or an admission of responsibility is not required to be eligible to participate.
- 62% charge fees for participation.
- Over 90% of programs have standard conditions of diversion, including 68% drug testing, 65% restitution, 62% community service, and 60% counseling.
- Three out of four programs impose administrative sanctions to address non-compliance. Those sanctions typically include increased community service hours (29%), modifications to the level of supervision (23%), and increased frequency of drug testing or treatment requirements (19%).
- The median rate of successful completion of diversion was 85%, with a range of 15% to 98%. Eighty-four percent reported success rates of at least 70%.

*U.S. Supreme
Court throws
out confession
because
of delay in
bringing
defendant
to his initial
appearance.*

- Looking at recidivism, 37% reported maintaining data on recidivism rates. The median recidivism rates were 5% for new felonies, 12% for new misdemeanors, and 1% for new serious traffic offenses.

The report describing these results is currently under review and should be available this summer.

Cases

CORLEY V. UNITED STATES, SUPREME COURT OF THE UNITED STATES, NO. 07-10441, 4/6/09

The question in this case was whether Congress intended 18 U. S. C. §3501 to eliminate, or merely to narrow, the rule in *McNabb v. United States*, 318 U. S. 332 (1943), and *Mallory v. United States*, 354 U. S. 449 (1957), under which an arrested person's confession is inadmissible if given after an unreasonable delay in bringing him before a judge for his initial appearance. Specifically, under *McNabb* and *Mallory*, confessions are generally inadmissible if made during periods of detention that violate the prompt presentment requirement of Federal Rule of Criminal Procedure 5(a). Under Rule 5(a), a person making an arrest must take the defendant without unnecessary delay before a magistrate judge. Congress subsequently enacted 18 U. S. C. §3501 in response to *Miranda v. Arizona*, and some applications of the *McNabb-Mallory* rule. In an attempt to eliminate *Miranda*, §3501(a) provides that "a confession...shall be admissible in evidence if it is voluntarily given," and §3501(b) lists several considerations for courts to address in assessing voluntariness. Subsection (c), which focuses on *McNabb-Mallory*, provides that a confession made by a defendant while under arrest shall not be inadmissible solely because of delay in bringing such person before a magistrate judge if such confession is found by the trial judge to have been made voluntarily and within six hours of arrest, and it extends that time limit when further delay is "reasonable considering the means of transportation and the distance to the nearest available magistrate."

In the case at hand, Johnnie Corley was arrested at 8:00 a.m. on September 17, 2003 for assaulting a federal officer pursuant to an altercation when federal agents suspected him of bank robbery and were attempting to serve a state warrant on unrelated charges. Around 11:45 a.m. FBI agents took him to a Philadelphia hospital to treat a minor injury. At 3:30 p.m. he was taken from the hospital to the local FBI office and told that he was a suspect in a bank robbery. Though the office was in the same building as the nearest magistrate judges, the agents did not bring him before a judge,

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but questioned him, hoping for a confession. At 5:27 p.m., some 9.5 hours after his arrest, Corley began an oral confession that he robbed the bank. He asked for a break at 6:30 p.m. and was held overnight. The interrogation resumed the next morning, ending with his signed written confession. He was finally presented to a magistrate judge at 1:30 p.m., 29.5 hours after his arrest, and charged with armed bank robbery and related offenses. The District Court denied a motion to suppress his confession under Rule 5(a) and *McNabb-Mallory*. It reasoned that the oral confession occurred within §3501(c)'s six-hour window because the time of Corley's medical treatment should be excluded from the delay and that the written confession was admissible because Corley had requested the break. Corley was convicted of conspiracy and bank robbery and the Third Circuit affirmed. The case then went to the U.S. Supreme Court.

In their argument, the Government claimed that because §3501(a) makes a confession admissible if it is voluntarily given, it entirely eliminates *McNabb-Mallory* with its bar to admitting even a voluntary confession if given during an unreasonable presentment delay. Corley argued that §3501(a) was only meant to overrule *Miranda*, and noted that only §3501(c) touches on *McNabb-Mallory*, making the rule inapplicable to confessions given within six hours of an arrest. The Court found that Corley had the better argument. According to the Court, the Government's reading would be at odds with the basic interpretive canon that a statute should be construed to give effect to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.

The Court believed that the Government's position would leave the Rule 5 presentment requirement without teeth, for if there was no *McNabb-Mallory* there would be no apparent remedy for a presentment delay. Under Rule 5, presentment is the point at which the judge must take several key steps to foreclose Government overreaching: e.g., informing the defendant of the charges against him and giving the defendant a chance to consult with counsel. Without *McNabb-Mallory*, federal agents would be free to question suspects for extended periods before bringing them out in the open, even though "custodial police interrogation, by its very nature, isolates and pressures the individual," inducing people to confess to crimes they never committed. As the Court expressed, while one might not care if the prompt presentment requirement were just some administrative nicety, the fact remains that the rule has always mattered in very practical ways and still does. The rule stretches back to the common law, when it was "one of the most important" protections against unlawful arrest.

The judgment of the Third Circuit was vacated and the case remanded.

*U.S. Supreme
Court rejects
speedy trial
challenge
based on
shortcomings
in indigent
defense
system.*

VERMONT V. BRILLON, SUPREME COURT OF THE UNITED STATES, NO. 08-88, 3/9/09

In July 2001, Michael Brillon was arrested on felony domestic assault and habitual offender charges. Almost three years later, in June 2004, he was tried by jury, found guilty, and sentenced to 12 to 20 years in prison. During the time between his arrest and his trial, during which Brillon remained jailed, unable to post bail, at least six different attorneys were appointed to represent him. The first lawyer had been fired while four others had withdrawn or been released by the court. The trial court denied Brillon’s motion to dismiss for want of a speedy trial. The Vermont Supreme Court subsequently reversed the decision, holding that Brillon’s conviction must be vacated, and the charges dismissed, because the State did not accord him the speedy trial required by the Sixth Amendment. The Vermont Supreme Court based its decision on the US Supreme Court’s ruling in *Barker v. Wingo*, 407 U. S. 514, citing that all four factors described in *Barker*: length of delay, the reason for the delay, the defendant’s assertion of his right, and prejudice to the defendant, weighed against the State. The Vermont Supreme Court found the three-year delay in bringing Brillon to trial as “extreme,” specifically citing that the delays during the last two years were caused by the failure or unwillingness of several of the assigned counsel, over an inordinate period of time, to move the case forward. Additionally, in examining the third and fourth factors from *Barker*, the court found that Brillon repeatedly and adamantly demanded a trial and that his lengthy pretrial incarceration was prejudicial. Upon appeal, the U.S. Supreme Court found that the Vermont Supreme Court erred in its reasoning and reversed and remanded the decision.

In coming to their finding the U.S. Supreme Court found that the main issue revolved around the reason for the delay in Brillon’s trial. In *Barker*, the Court had asked “whether the government or the criminal defendant is more to blame for th[e] delay.” Under *Barker*, while deliberate delay “to hamper the defense” weighs against the prosecution, a delay caused by the defense weighs against the defendant. Given that the individual attorney is “the defendant’s agent when acting, or failing to act, in furtherance of the litigation,” a delay caused by the defendant’s attorney is charged against the defendant. Moreover, that principle applies whether the attorney is privately retained or publicly assigned, for “once a lawyer has undertaken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defender program.” Therefore, the Vermont Supreme Court was wrong in associating Brillon’s assigned counsel as state actors in the criminal justice system. Under such reasoning, the majority of the delay the

Appeals court finds that bail bonding company not concerned with “whether the defendant actually appeared in court,” but only with whether it would lose money.

Vermont court attributed to the State should have been attributed to Brillon as delays caused by his counsel, each of whom requested time extensions. The Court noted that a contrary conclusion could encourage appointed counsel to delay proceedings by seeking unreasonable continuances, hoping thereby to obtain a dismissal of the indictment on speedy-trial grounds.

The Court did state that the general rule attributing to the defendant delay caused by assigned counsel is not absolute, and that a delay resulting from a systemic breakdown in the public defender system could be charged to the State. However the Vermont Supreme Court made no determination, and there was nothing in the records to suggest, that institutional problems caused any part of the delay in Brillon’s case.

OHIO V. DEBRA’S BAIL BONDS, COURT OF APPEALS OF OHIO, SEVENTH DISTRICT, 2009 OHIO, 1033, 3/4/09

In this case, a bail bonding company appealed a trial court decision refusing to remit part of two forfeited bonds posted for a defendant who failed to appear in court. In deciding whether the trial court abused its discretion in refusing to remit the forfeited bonds, the appeals court reviewed the facts of the case. The defendant, Darrell Sinkfield, had two underlying misdemeanor cases. He was released in both cases through Debra’s Bail Bonds. Over the course of several years, he failed to appear multiple times for these cases; at one point he was a fugitive for 2 ½ years. After each apprehension on the failure to appear warrant, he was re-released by the bonding company. The trial court, after a hearing, ordered the bonds forfeited.

The appeals court then reviewed the forfeiture hearing held in the trial court. As the appeals court noted in its opinion, “the trial court found that Horvath (the bail bonding agent who wrote the bonds) performed little if any investigation into the defendant’s criminal history....The trial court was particularly struck by Mr. Horvath’s ‘cavalier attitude’ regarding whether or not the defendant for whom the bond is posted actually appears at hearings. Horvath himself testified that, ‘our main concern is going to be to get the person out of jail and whether or not we can collateralize it to insure that the insurance company is not going to lose money.’ Their concern,” the appeals court wrote, “was not whether the defendant actually appeared in court. Mr. Horvath testified: ‘[W]e felt that even if he didn’t show, which I knew he had a history of not showing for court, he didn’t abscond from the area and we would always, once again, bring him in. Someone would pick him up along the way.’”

"In assessing whether a defendant poses a flight risk if released on bail, the source of his or her posted security may be relevant."

The appeals court pointed out that the "someone" who picked him up along the way was the police. "The record indicates that, time after time, the police needed to locate and arrest Sinkfield in order to secure his appearance." The court ruled that nothing in this record can "reasonably be interpreted to establish any abuse of discretion in this case."

ARIZONA V. DONAHOE, COURT OF APPEALS OF ARIZONA, DIVISION ONE, NO. 1 CA-SA 09-0011, 2/26/09

Karen Garibaldi-Osequere was indicted in the Superior Court of Arizona for conspiracy to transport marijuana, conducting an illegal enterprise, and money laundering. She was arrested the next day and the court set a \$100,000 cash-only bail. A few days later, an employee of a law firm appeared at the Maricopa County Jail and attempted to post the bond. Since the money was in small denominations and was bundled in duct tape, the jail refused to accept the bail. The jail alerted the County Attorney's Office, which immediately filed an emergency motion with the court requesting a hearing to consider whether the source of the bail money was "legitimate." The Superior Court granted the request for a hearing, but at the hearing concluded that it lacked the authority to inquire into the source of the bail money. The court did note, however, that it had the authority to raise the bail – which it did to \$750,000 cash only. The State appealed the court's ruling that it could not inquire into the bail money source.

In taking up this issue, the Arizona Court of Appeals noted that "[t]he primary purpose of bail is to secure the defendant's appearance at future court proceedings. The underlying assumption is that cash or property posted as security for a bond is sufficiently valuable to the defendant that he or she will appear in court as required. According to the State, when the pledged property or cash comes from an illegal activity such as drug trafficking, it does not in fact ensure the defendant's future appearance because: (1) the defendant 'has no legal right to the money and losing it will be of no consequence;' and (2) its forfeiture may simply be viewed as an acceptable cost of conducting an illicit business. We are persuaded that, in assessing whether a defendant poses a flight risk if released on bail, the source of his or her posted security may be relevant." The court concluded that, even though Arizona statutes do not explicitly grant the trial court the authority to inquire into the source of bail money, those laws "are sufficiently broad to allow the Superior Court" to make such an inquiry.

“A threatened change in bail status may not be used by the prosecution or the court as a ‘bargaining chip’ to persuade a defendant to plead guilty.”

**PEOPLE V. GRANT, SUPREME COURT OF NEW YORK,
APPELLATE DIVISION, 2008-01623, 2/24/09**

Terry Grant was arrested on two counts of first degree falsification of business records and was released on the condition that he be supervised by the probation department. One year later, the trial court noted that the case was “ripe for trial.” A month after that, the court stated that the case was “getting old meaning it’s going to be either disposed of soon or it’s going to be tried soon.” The court then informed the defendant that, based on the testimony presented to the grand jury, the proof against him was “overwhelming” and his chances of prevailing at trial were slim. The court presented the defendant with a choice – plead guilty within two days and the sentence would be probation, or proceed to trial and, if convicted, the sentence would include prison.

When the case was next in court, Mr. Grant was not ready to enter a guilty plea. At that hearing, however, the judge revealed that he had received a report from the probation department indicating that Mr. Grant was not complying with the conditions of pretrial release. At this hearing, the judge gave Mr. Grant a different choice – plead guilty that day or be remanded into custody for violating the pretrial release conditions. Mr. Grant then pled guilty. Over the course of the next several months, Mr. Grant changed attorneys and filed a motion to withdraw the guilty plea, claiming that it had been coerced with the threat of remand. The court rejected the motion and sentenced Mr. Grant to probation, with restitution and a fine. Grant appealed the trial court’s rejection of his motion to withdraw his plea.

The appeals court was not concerned about the choice that the trial court presented the defendant regarding receiving a more lenient sentence in exchange for a guilty plea. As the court noted, plea bargaining is an accepted practice whereby a defendant often “receives consideration, almost always in the form of a sentence more lenient than might reasonably be expected upon conviction after trial.” The court was concerned however, about the choice presented to either plead guilty or have the bond revoked. A defendant’s bail status “has no legitimate connection to the mutuality of advantage underlying plea bargaining because it does not relate either to the more lenient sentence for which the defendant is negotiating or to the waiver of trial and the certainty of conviction the prosecution is seeking. The prospect of an immediate change in bail status, therefore, is an inappropriate consideration in plea negotiations.”

Based on this finding, the court ruled that “a threatened change in bail status may not be used by the prosecution or the court as a

THE PRETRIAL REPORTER

A BI-MONTHLY PUBLICATION OF THE PRETRIAL JUSTICE INSTITUTE

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VOLUME XXXV | NO.2 | MAR, APR, 2009

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'bargaining chip' to persuade a defendant to plead guilty." The court vacated the guilty plea and sent the case back to the trial court for further proceedings.

Announcement

NAPSA's 37th Annual Conference will be held from September 13 to 16, 2009 at the Omni Charlotte Hotel in Charlotte, North Carolina. The theme of this year's conference is "Game Plan for Change."

For more information, or to register, go to www.napsa.org.

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