

THE PRETRIAL REPORTER

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In this issue:

EXECUTIVE SUMMARY	2
CASES	3



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Dear Friends,

1977 brought many exciting changes to our national landscape. Jimmy Carter was elected President, Star Wars opened in theaters and the first issue of the Pretrial Reporter, (PTR), was published. The PTR quickly developed a dedicated readership among those concerned with pretrial justice. Each issue of the PTR brought current case law, important news and developments to many of us who would otherwise have had no ready access to them. The PTR quickly earned a solid reputation as an accurate and reliable source of information for practitioners, policy makers and advocates who were concerned with pretrial justice reform. Like most of you, I eagerly looked forward to each issue of the PTR to bring me up to date with current trends and important news that I could not get anywhere else. The PTR was “our” periodical, and it filled the bill magnificently.

Now, after almost thirty-four years of publication, more modern and effective communications media will replace the PTR. In this, the last issue of the PTR, I want to thank our loyal readership and supporters for your part in making the PTR a pretrial justice institution. I hope that each of you will continue to be informed through PJI’s regular e-blasts, blog, website, and the like, and that you will take the time to provide your feedback on our work as we focus more on our interactive communications platforms. We welcome your input and look forward to continued communication with our readership.

I cannot put the PTR to “bed” for the final time without thanking those who worked so hard to produce it. Throughout the past thirty-four years, countless friends, staff, supporters and scholars contributed to making the PTR the finest publication of its type. While it is impossible to acknowledge everyone who contributed to the PTR, four individuals stand out above the rest: Alan Henry Madeleine Crohn, Jolanta Juskiewicz and John Clark. At different points in time, these folks spent countless hours researching, writing and editing the PTR. Their contributions have created an enviable legacy among all who are committed to pretrial justice, and their work with the PTR has left an indelible mark on our field. As we move forward, we will strive to honor legacy of the PTR and everyone who made it such an important part of our history.

Executive Summary

This issue of The Pretrial Reporter contains the following:

Cases:

- The New Hampshire Supreme Court recently held that pretrial detention laws which mandate detention for defendants charged with crimes punishable by life imprisonment, and the government must only show that proof is evident or the presumption is great that the defendant will be convicted, do not violate due process concerns simply because they do not also require individual evaluations of the defendant's dangerousness and risk of flight.
- The US District Court for the Middle District of Tennessee held that preset bond amounts, imposed without individualized review, do not automatically violate the Eighth and Fourteenth Amendments without evidence that the terms of the bond itself do not address the legitimate government purposes of assuring appearance or providing for community safety.
- The Texas Court of Appeals recently held that even where state law requires release on recognizance or affordable bail because the defendant has been detained due to state delay, courts must still consider the safety of victims and the community when setting bail and may impose an amount that the defendant cannot afford if such concerns demand it.

Cases

STATE V. FURGAL, NEW HAMPSHIRE SUPREME COURT, NO. 2010-439, 11/24/2010

In this case, the defendant Corey Furgal was indicted on alternative counts of second-degree murder. The State requested that Furgal be held without bail pursuant to New Hampshire statute 597:1-c, which mandates pretrial detention for defendants charged with crimes punishable by life in prison where the State shows that proof is evident or the presumption is great that the defendant will be convicted. Furgal challenged the constitutionality of §597:1-c, arguing that it denied him due process because it barred the court,

in deciding whether to release the defendant on bail, from considering his dangerousness or risk of flight; instead, the only relevant factor was Furgal's likelihood of conviction. Furgal also argued that if the law was deemed constitutional, the State had to demonstrate Furgal's guilt beyond a reasonable doubt in order to deny bail.

The New Hampshire Supreme Court began by noting that the language of §597:1-c clearly does not require trial courts to evaluate the defendant's likelihood to return to court or pose a threat to the community before denying bail. The Court then turned to Furgal's contention that due process and *U.S. v. Salerno*, 481 U.S. 739 (1987), a United States Supreme Court case, require such considerations. In *Salerno*, the defendants challenged the constitutionality of the Bail Reform Act, a federal law that permitted the federal government to deny bail to certain arrestees if they are deemed to pose a substantial risk to the community. The United States Supreme Court held that the Bail Reform Act was not unconstitutional on its face because it required the government to engage in a number of procedural steps prior to detaining someone pretrial, including presenting evidence that the defendant either posed a risk of flight or danger to the community. Furgal argued that according to *Salerno*, due process required the trial court to evaluate his dangerousness before denying bail. However, the New Hampshire Supreme Court found that *Salerno* did not stand for the proposition that "all statutory bail schemes must include an individualized inquiry into a defendant's dangerousness in order to pass constitutional muster." Furthermore, the New Hampshire Supreme Court could find no precedent requiring a court to consider the specific circumstances of each defendant's risk of flight before denying bail. Instead, the Court stated, bail systems have always embraced an exception to the rule favoring release where the defendant is charged with a very serious crime. And the New Hampshire legislature has determined that in such cases, where the "proof is evident or presumption great" that the defendant will be convicted of the crime, risks of flight and danger to the community are inherently present. Therefore, the Court held that §597:1-c is constitutionally sufficient.

**TATE V. HARTSVILLE/TROUSDALE COUNTY,
UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE, NO. 3:09-0201,
10/14/2010**

In this case, the plaintiff, William Tate brought a class action under 42 U.S.C. §1983 against Hartsville/Trousdale County, Tennessee, alleging that the county's process for setting bail violates the Eighth And Fourteenth Amendments. Tate had been arrested pursuant to an arrest warrant for domestic assault, but alleges that when

the Commissioner interviewed him prior to setting bail, the Commissioner failed to ask him any questions relevant to the issue of bail, such as his address and how long he had lived there. Instead, Tate argues that the amount of bail was pre-determined because he was told how much it would be when he was arrested, prior to his interview with the Commissioner. The Commissioner set Tate's bail at \$2000, held him for twelve hours as required in domestic assault cases, and then Tate posted bail and was released. Tate ultimately filed suit against the county for violating his Eighth and Fourteenth Amendment rights to have individualized bail set to address his particular risks of flight and dangerousness, and the District Court granted Tate's request to certify a class of persons who have been subject to the county's alleged arbitrary bail practices. The county responded that because Tate was able to post bail, it was inherently not excessive.

The District Court held that although the remaining class members may be able to allege that their Eighth and Fourteenth Amendment rights were violated, Tate failed to demonstrate that his bail was unconstitutional. The Court stated that to determine whether bail is excessive, it must compare the "terms of the bail against the interest the government seeks to protect." The Court determined that Tate's \$2000 bail was indisputably set to assure Tate's appearance in court, which is a legitimate purpose for bail. Further, the Court held, just because the bail was allegedly preset does not make it unconstitutionally excessive, noting that exhaustive research regarding the constitutionality of bond schedules in these types of cases found only one case where a federal court found the use of a bond schedule to be unconstitutional. Instead, Tate must show how the allegedly preset amount necessarily created excessive bail. Merely concluding that bail was improperly set, without evidence that bail was actually excessive, does not establish a constitutional violation. Therefore, without more, the Court could not find evidence that Tate's Eighth or Fourteenth Amendment rights were violated.

**EX PARTE MATTHEWS, COURT OF APPEALS OF
TEXAS, NINTH DISTRICT, BEAUMONT, NO. 09-10-
00238-CR, 11/24/2010**

The defendant, Shane Jermaine Matthews, was charged with capital murder while attempting to commit robbery. At Matthews' bond hearing, the District Court refused to release him. Under Texas law, in order to detain a defendant prior to trial the State must produce clear and strong evidence that the offense of capital murder has been committed, that the defendant is the guilty party, and that he or she will be convicted and the jury will return findings requiring a sentence of death. However, Article 17.151 of the Texas criminal code

also requires the state to release felony defendants who are detained for longer than ninety days because the state is not ready for trial on personal bond or reduced bail. Matthews was held without bail for more than ninety days, and he applied for habeas corpus relief asking the court to set bail. He argued that the proof of his guilt was not evident, nor had the State established the likelihood that Matthews would receive a death sentence upon his conviction. At his hearing, the state conceded that it was not ready for trial, nor did it put on evidence that it intended to seek the death penalty. In response, the District Court set Matthews' bail at \$475,000. Matthews challenged the bail amount, arguing that it was excessive and that since it had been ninety days and the state was not ready for trial, the District Court was required by Article 17.151 to set bail at an amount he could afford.

The Court of Appeals disagreed. It noted that while the Texas Court of Criminal Appeals (the highest court in Texas for criminal matters) has held that Article 17.151 requires a trial court to either release a defendant on personal bond or reduce bail to an affordable amount, the Texas legislature has also mandated trial courts to consider victim and community safety in all bail decisions. Thus, even in cases where the defendant has been detained for over ninety days and the State is not ready for trial, trial courts must consider victim and community safety concerns in determining the appropriate amount of bail. In this case, the Court of Appeals noted that when determining Matthews' bail, the District Court considered the testimony of the criminal investigator, which was sufficient to establish that community safety concerns were implicated by Matthews' release. According to the investigator, the murder occurred during a drug deal that was also intended to be a robbery, Matthews was one of three males present in the room where the murder occurred, all three males had a weapon on them at the time of the murder, and that they left the scene wearing ski masks. The investigation also indicated that Matthews was a member of a gang known for committing violent crimes. When Matthews testified, he did not deny his gang membership or dispute the gang's reputation. Therefore, the Court of Appeals concluded that should Matthews be granted affordable bail, the witnesses in his case were likely to face threats and intimidation. As such, the legislative mandate to consider community safety and witness intimidation permits trial courts to set bail beyond a defendant's reach even where they have been detained beyond the statutory limits.



Dear Readers:

In September of 1977, the first edition of *The Pretrial Reporter* was published. Thirty-three years and 200 editions later, this is the last. I have had the pleasure of writing for the Reporter for the past 24 years, and serving as its editor for the past 12. And so it is with some sadness that I see it go.

Thumbing through the pages of all those editions reveals the history of our field since 1977: the struggles over how to deal with risks of dangerousness posed by defendants on pretrial release; the debates about preventive detention; the challenges confronting our courts and jails resulting from jail crowding; the large numbers of persons with mental illness entering the criminal justice system; the crack cocaine epidemic; the overrepresentation of minorities in jail; juveniles charged as adults; illegal immigrants; the innovative measures implemented by individual jurisdictions and the reports of national or state commissions, associations, or task forces to address these and other challenges; the use of such technologies as drug testing, electronic monitoring and GPS in monitoring defendants on pretrial release; the introduction of drug and other specialty courts, and the role of pretrial programs in those courts; the passage of legislation, some of it advancing the field, some of it making advancement more difficult; the rulings of federal or state appellate courts; the latest research findings on issues impacting pretrial release and diversion; and, the births of many pretrial services programs and the deaths of a few others.

There is much in the pages of the *Reporter* to cause us concern. It seems that at least once each of the past 33 years there was an article discussing how local jail populations had risen, driven primarily by increases in the pretrial detainee population. There were dozens of articles stretching the entire three-decade run of the Reporter on the corruption associated with bail bonding for profit, which is as prevalent today as it was 30 years ago.

But there is also much to give us hope. In a time when the bail bonding industry is pushing legislation that would reduce non-financial release options, we can scan the pages of the *Reporter* and see that it has done so on many occasions in the past and the field has always stepped up and limited the industry's success. The most recent victory, in Colorado in 2010, is a shining example of the progress stakeholders in the system have made in understanding and appreciating the role of assessing the risk posed by defendants and the research-based supervising strategies that can be employed to keep communities safe and the court systems operational.

In this time of crushing budget problems facing all levels of government, it is encouraging to see that there have been several times in the past 33 years where we have gone through major budget crises. The field has survived them all, and many individual pretrial programs even flourished, given the cost-effectiveness of the services they provide.

While *The Pretrial Reporter* is heading into retirement, the important content it has communicated to you will not disappear. We will continue to gather and analyze case law, legislative activity, and news clippings relevant to the pretrial release and diversion fields. The only change is in how we present that information – through frequent e-mail blasts that will get the information to you in a much more timely fashion, and by posting the content on our website and Facebook page. If you have not already signed up for these free e-mail blasts, we urge you to do so by going to www.pretrial.org/layouts/SubscribeToUpdates.aspx. If you have not “friended” us on Facebook, please do. And if you have suggestions for content, please do not hesitate to send them in.

Sincerely,

John Clark

Editor



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