LIMITATIONS ON DEFENSE CONFRONTATION RIGHTS IN PRETRIAL DETENTION HEARINGS

MANAGING EXPECTATIONS AND THINKING STRATEGICALLY

In the two years that have followed the implementation of bail reform, the New Jersey Supreme Court has disposed of the notion that defendants have an absolute statutory or due process right to confront state witnesses in the course of pretrial detention and probable cause hearings. Specifically, the Court has declined to interpret the Criminal Justice Reform Act (CJRA) as requiring the state to produce a live witness in order to establish grounds for detention or to demonstrate probable cause that an offense has been committed. The Court has also held that the defense right to call an adverse witness in the course of a pretrial detention hearing is qualified, not absolute.

by Daniella Gordon

In rendering these opinions, however, the Court has stressed that trial courts have discretion to require live testimony in the face of a weak state proffer, or a strong defense proffer that establishes the need for a live adverse witness. With the uphill battle for confrontation placed squarely before the trial courts, and defendants' pretrial liberty interests at stake, defense attorneys must make strategic decisions about whether and how to frame arguments that could compel the production of live adverse witnesses during these critical, early stages of litigation.

Background

Prior to Jan. 1, 2017, defendants had a right to bail under the New Jersey State Constitution.[1] With the passage of the CJRA,[2] made possible by an accompanying constitutional amendment, that right was eliminated. Instead, under the new regime, all defendants, unless charged with murder or a crime that carries a sentence of life imprisonment, are afforded a presumption of release pending trial.[3] Defendants charged with murder or crimes that carry sentences of life imprisonment are subject to a presumption of detention,[4] which may be rebutted by a preponderance of the evidence.[5]

When the state seeks to detain an eligible defendant under the CJRA,[6] the state must "prove[] by clear and convincing evidence that no release conditions would reasonably assure the defendant's appearance in court, the safety of the community, or the integrity of the criminal justice process."[7] The rules of evidence do not apply at the pretrial detention hearing.[8] If the state has not yet obtained an indictment at the time it moves for pretrial detention, it must also establish probable cause that the defendant committed the predicate offense.[9] At a pretrial detention hearing, defendants have the right to be represented by counsel, and are "afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise."[10]

State v. Ingram

In Aug. 2017, the New Jersey Supreme Court, in *State v. Ingram*,[11] addressed the quality of evidence required of the state when it attempts to establish probable cause in the course of seeking pretrial detention of a defendant. Specifically, the Court assessed the state's ability to proceed in a detention hearing by proffer, without a live witness, against the defendant's claim of a countervailing right to meaningfully confront the state's evidence.

The Court observed that the state has always been permitted to establish probable cause *ex parte* before a judicial officer by merely presenting "the complaint or an accompanying affidavit or deposition," without the need for an adversary proceeding. The Court then extended this rationale, holding that even where a defendant's liberty interest is at stake, the state is not required to produce live witnesses to establish probable cause.[12] Similar to the federal Bail Reform Act of 1984,[13] the Court observed the CJRA provides that a defendant may proceed in a detention hearing by proffer, but is silent as to the government's ability to do the same. Nonetheless, drawing guidance from federal interpretations of the Bail Reform Act, the Court determined that the Legislature's silence should not serve to bar the state from presenting proofs by way of proffer, or obligate the state to present a live witness to establish probable cause in a detention hearing. The Court furthermore revealed a practical concern about the fiscal and administrative burden that would be associated with a requirement for the state to present a live witness at more than 10,000 detention hearings each year.[14]

While the Court rejected a blanket rule that would require the state to produce a live witness at detention hearings, in reviewing the specific facts presented to the trial court in support of probable cause in *Ingram*, the Court took issue with the dearth of information submitted by the state in that matter. The Court determined that the barebones affidavit, in which the officer simply asserted that the defendant was observed to be in the possession of a handgun "with no lawful purpose," should have been accompanied by a narrative that established "the basis of the officer's knowledge, rather than mere legal conclusions."[15] In sum, while rejecting a requirement for the state to produce live witnesses at pretrial detention hearings, the Court reaffirmed existing minimal standards for demonstrating probable cause.

State v. Pinkston

In *Ingram*, the Court observed that defendants maintain the ability to challenge the state's proofs at detention hearings through "other means," including, for example, presenting witnesses of their own, and proffering additional information. A year later, however, in *State v. Pinkston*, the Court held that while the CJRA provides that defendants "shall be afforded an opportunity… to present witnesses," that right is only conditional with respect to adverse witnesses.[16]

To warrant calling an adverse witness, a defendant must first make a proffer as to how the adverse witness's testimony would tend to negate probable cause or undermine the state's evidence in support of detention in a material way. In support

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of its narrow interpretation of defendants' rights to call adverse witnesses, the Court cited the Bail Reform Act and the District of Columbia's statutory scheme upon which the CJRA is partly based, both of which contain identical language to the CJRA, and both of which have been construed to only afford defendants a qualified right to summon adverse witnesses at pretrial detention hearings.[17] While *Pinkston* does not provide significant guidance as to what would constitute a sufficient defense proffer, it is clear that "impeachment and 'premature discovery' would be deemed insufficient reasons to compel the appearance of adverse witnesses."[18] All told, while *Ingram* seemingly left open the defense's ability to call an adverse witness, *Pinkston* made this right conditional and based upon the sufficiency of the defense proffer.

Potential Strategies

The state may proceed by proffer in pretrial detention hearings, and probable cause is an exceedingly low bar for the state to meet. Nonetheless, defendants should, under appropriate circumstances, be prepared to challenge state submissions and encourage courts to exercise their discretion to demand more when pretrial liberty interests are at stake. In addition to the primary concern of obtaining pretrial release, which is critical to a defendant's ability to assist in his or her own defense, the early ability to cross-examine a state witness may yield obvious benefits, such as determining whether a witness will appear, observing the witness's demeanor, and evaluating the substance of their testimony. Accordingly, when the state moves for detention, defense counsel should consider employing the following tactics:

Challenge the state's narrative in support of probable cause directly or by making a defense proffer for an adverse witness.

The Court in *Ingram* made clear that probable cause cannot be established by an officer's conclusory statements. Probable cause must instead be supported by a narrative that contains factual details and establishes the basis of the officer's knowledge. The electronic probable cause form that is required in each matter prompts the state witness to enter this information. The officer's entries should be reviewed for sufficiency as a matter of course.

Assuming the sufficiency of the state's affidavit, defendants should consider what additional information may tend to negate probable cause or undermine the state's evidence in support of detention in a material way. If such information may be drawn from an adverse witness—for instance, exculpatory statements made by the complainant—a defense proffer may be successful, and the state may be compelled to produce the adverse witness at the hearing.

Consider offering a defense witness.

Offering a defense witness at a detention hearing may be worthwhile under certain circumstances, but often may not be advisable. Depending on the purpose and substance of a defense witness's testimony, there may be significant concerns about subjecting the witness to cross-examination at this stage. Defense strategy may be revealed without sufficient preparation or opportunity to investigate. However, to the extent that a defense witness is offered, the defense may argue that the court should place more value on the testimony of the live witness than the state proffered evidence.

Revisit detention in light of new information, or upon receipt of a favorable plea offer.

If the state successfully moves for pretrial detention, that decision may be reopened at a future date so the court may consider new material and evidence.[19]

In addition to the discovery of new material facts within the case, courts should also consider the impact of shifts in the state's position as the case progresses. For instance, if the state makes an offer to a detained defendant for a time-served sentence, or presents a plea offer that would afford a defendant his or her freedom shortly upon acceptance, the defense should consider framing the plea offer as a shift in the state's position regarding detention. When the state indicates through a plea offer that it would be satisfied with an outcome that would put the defendant 'back on the street' in short order, the basis for further pretrial detention becomes questionable. The CJRA was implemented to overhaul the coercive effects of unaffordable bail. All stakeholders agree that justice is not done when defendants 'plead out to get out.' Accordingly, if a defendant declines a plea offer that, if accepted, would not have called for significant additional incarceration, the defendant's continued pre-trial incarceration arguably becomes punitive.

Defendants do not have true confrontation rights in the pretrial detention setting under the CJRA. However, when the state moves for detention, defendants should test these and other strategies in order to obtain live witnesses within the confines of the law and in the interest of justice. ⚖

Endnotes

1. Prior to amendment, the New Jersey Constitution provided: "All persons shall, before conviction, be bailable by sufficient sureties, except for capital offences, when the proof is evident or presumption great." N.J. Const. of 1844, art. I, ¶ 10.
2. N.J.S.A. 2A:162-15 to -26.
3. N.J.S.A. 2A:162-18(b).
4. N.J.S.A. 2A:162-19(b).
5. N.J.S.A. 2A:162-19(e)(2).
6. Prosecutors may seek detention when an eligible defendant is charged with:

(1) any crime of the first or second degree enumerated under [N.J.S.A. 2C:43-7.2(d)];
(2) any crime for which the eligible defendant would be subject to an ordinary or extended term of life imprisonment;
(3) any crime if the eligible defendant has been convicted of two or more offenses under paragraph (1) or (2) of this subsection;
(4) any crime enumerated under [N.J.S.A. 2C:7-2(b)(2)] or crime involving human trafficking pursuant to [N.J.S.A. 2C:13-8] or [N.J.S.A. 52:17B-237 et al.] when the victim is a minor, or the crime of endangering the welfare of a child under N.J.S.A. 2C:24-4;
(5) any crime enumerated under N.J.S.A. 2C:43-6(c);
(6) any crime or offense involving domestic violence as defined in [N.J.S.A. 2C:25-19(a)]; or
(7) any other crime for which the prosecutor believes there is a serious risk that:
  (a) the eligible defendant will not appear in court as required;
  (b) the eligible defendant will pose a danger to any other person or the community; or
  (c) the eligible defendant will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure or intimidate, a prospective witness or juror.
N.J.S.A. 2A:162-19(a).

7. *State v. Ingram*, 230 N.J. 190, 200-01 (2017).
8. *State v. Ingram*, 230 N.J. 190, 202 (2017).
9. N.J.S.A. 2A:162-19(e)(2).
10. N.J.S.A. 2A:162-19(e)(1).
11. *State v. Ingram*, 230 N.J. 190 (2017).
12. *State v. Ingram*, 230 N.J. 190, 206 (2017) (*citing* R. 3:3-1(a); R. 3:4-1(b)).
13. 18 U.S.C. §§ 3141-3156 (1990).
14. *State v. Ingram*, 230 N.J. 190, 212 (2017); Criminal Justice Reform Report to the Governor and Legislature 14 (Feb. 2018), https://www.njcourts.gov/courts/assets/criminal/2017cjrannual.pdf (in fact, there were approximately 14,000 hearings in the first year of bail reform).
15. *State v. Ingram*, 230 N.J. 190, 214 (2017).
16. *State v. Pinkston*, 233 N.J. 495 (2018).
17. *Compare* N.J.S.A. 2A:162-19(e)(1) with 18 U.S.C. sec 3142(f)(2)(B) and D.C. Code sec 23-1322(d)(4).
18. *State v. Stewart*, 453 N.J. Super. 55 (App. Div. 2018) (*citing United States v. Edwards*, 430 A.2d 1321, 1337-39 (D.C. 1981).
19. N.J.S.A. 2A:162-19(f).