PRETRIAL INTERVENTION: A MEANS OF COMBATTING SERIOUS CRIME *

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All are aware that our criminal justice system is straining to keep pace with the spiraling crime rate. It is no exaggeration to state that courtrooms, jails and prisons are woefully unable to accommodate present needs. Every phase of society's defenses against criminal attack is presently taxed to the utmost.

Perhaps the most significant unsolved problem presently confronting law enforcement concerns the implementation of an effective strategy to combat the burgeoning increase in criminal behavior. Clearly, such an endeavor requires a joint effort by all those involved in the criminal justice system. A recent example of such concerted action is the implementation of the pretrial intervention concept in the various counties. Judiciously utilized, P.T.I. has the potential of being a viable counter-offensive against serious crime.

A realistic appraisal of current resources in both law enforcement and the judiciary clearly indicates that some form of budgeting is in order. Energies must be directed toward vigorous prosecution of specific categories of serious and heinous offenses. While not disparaging the gravity of all criminal behavior, it is self-evident that some offenses entail far more serious consequences than others. Crimes of violence, for example, must be speedily brought to trial and the offenders promptly sentenced. In this fashion, innocent citizens may be spared from criminal attack by offenders not yet incarcerated because of the trial backlog of criminal cases. Moreover, society's expectations with respect to the swift prosecution and punishment of violent offenders must be vindicated.

It is within this context that pretrial intervention offers a potential advantage in allocating our criminal justice resources. As most criminal justice officials agree, not every technical infraction of the law warrants prosecution to the fullest extent allowable. Likewise, not every offender requires incarceration.

By selecting in advance those individuals who are unlikely to repeat their offenses, and who are amenable to rehabilitative treatment, society's efforts may be diverted from marginal cases to those meriting fullest attention. Thus, the public will benefit from a judicious reallocation of law enforcement resources to the areas where they are most urgently needed. The individual too is a beneficiary of a well-designed pretrial intervention program. He or she is afforded an opportunity to resolve the pending charges without incurring the social opprobrium attendant upon a criminal conviction. It should be frankly acknowledged that the stigma of criminality may in some cases be counter-productive by foreclosing employment opportunities and placing the individual under a perpetual cloud of suspicion.

Perhaps a more significant aspect of pretrial diversion is the recognition that certain marginal offenders may be dissuaded from criminal careers through the prompt rehabilitative efforts of an appropriate agency. In some instances, criminal activity may be an isolated manifestation of an underlying problem such as chronic unemployment, drug addiction, or alcoholism. By detecting and dealing with these causative factors, pretrial intervention offers hope that the individual will not become part of the unfortunate but typical pattern of escalating recidivism.

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Of course, all of these hypothesized benefits of pretrial intervention presuppose that candidates will be judiciously selected. In short, the public has a right to be protected. A few well-publicized errors could undermine public confidence and perhaps justifiably cause termination of the program. Community support must be fostered because without it, P.T.I. participants may be denied access to neighborhood treatment facilities and potential employers may be reluctant to cooperate.

Careful screening of applicants is likewise necessary to avoid the necessity of reinstituting criminal proceedings. Each P.T.I. failure increases the potential for acquittal in view of fading memories, unavailable witnesses, and other logistical problems attributablle to the lapse of time.

In recognition of the importance of the screening phase of the program, the New Jersey Supreme Court has established a tripartite admission procedure involving the program director, the prosecutor, and the trial court. These officials are governed by a detailed set of uniform guidelines which shall be referred to presently. The role of the program director, the prosecutor and the court in this process has recently been clarified in the New Jersey Supreme Court's decision in *State v. Leonardis.*[1]

The court rule creating P.T.I.[2] expressly conditions admission to diversion programs upon the consent of the prosecuting attorney. The question the Supreme Court addressed in *Leonardis*, therefore, concerned the ability of the court to review the exercise of this prosecutorial veto power. The Attorney General and the County Prosecutors Association argued, and the court agreed, that the judiciary could not constitutionally act as the sole arbiter of P.T.I. admissions. The very nature of diversion demands that there be prosecutorial input prior to judicial abatement of a well-founded criminal action. Since P.T.I. is essentially an amalgam of the executive charging and the judiciary sentencing functions, a cooperative effort by the two branches of government must be fostered.

Consequently, the Supreme Court concurred with the position of the Attorney General and the County Prosecutors Association regarding the existence and scope of judicial review of a prosecutor's refusal to consent to P.T.I. Specifically, the court held that the judiciary's power to order diversion without the concurrence of the prosecuting attorney was to be strictly delimited. In this context, the court held that judicial interference with a prosecutor's refusal to consent to diversion may be had only when the applicant clearly and convincingly establishes that the prosecutor's action constituted "a patent and gross abuse of discretion,"[3] The Court added that in appropriate circumstances, the prosecutor may legitimately veto diversion based solely upon the nature of the offense charged.[4]

The significance of *Leonardis* lies in the explicit acknowledgement that if P.T.I. is to succeed, the program must be considered a joint endeavor between the prosecutors and the courts. Neither is supreme, yet both have an indispensable role in the all-important task of screening candidates for diversion. The prosecutor, together with the program director, bear the primary responsibility for the screening of individuals for admission, while the courts serve as a safeguard against patently improper decisions. With these differing roles in mind, I will highlight the most significant operational guidelines pertaining to P.T.I.

Eligibility for diversion is broadly based to encompass "all defendants who demonstrate sufficient effort to effect necessary behavior change and show that future

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1. 73 *N.J.* 360 (1977).
2. *R.* 3:28 of the New Jersey Court Rules.
3. *Leonardis, supra* at 376, 382.
4. *Id.* at 382.

criminal behavior will not occur."[5] Nevertheless, certain factors are enumerated which will ordinarily mandate exculsion from P.T.I. Firstly, and most obviously, diversion is only available to individuals who are charged with a criminal offense against the laws of the State.[6] While undoubtedly many persons not accused of crimes could benefit from counseling and supervision, it must be recalled that a primary goal of P.T.I. is to conserve criminal justice resources. Therefore, only individuals facing prosecution should take advantage of the program.

For similar reasons, the guidelines also suggest the exclusion of those accused of petty crimes of violations of health codes or municipal ordinances.[7] Convictions for such minor offenses rarely result in a sentence of any consequence. At any rate, the resources of diversionary programs are better allocated to those individuals with more significant behavioral problems.

At the other end of the scale of criminality, P.T.I. is likewise unjustified. Although not limited to first offenders, diversion will ordinarily be denied to defendants with prior records of conviction for serious crimes.[8] Rejection will also be warranted if the accused has previously participated in a P.T.I. program. In both of these situations, the risk of recidivism dictates exclusion from P.T.I. The goal is not merely to conserve time by removing certain offenders from the criminal justice system. It must also be insured that there is a reasonable likelihood that the defendant will not repeat his crime.[9] Otherwise, efforts at rehabilitating the offender will be squandered upon the undeserving.

An unfavorable prior criminal history, however, is not the sole means of disqualifying an applicant. Frequently, as the guidelines aptly recognize, and as the court remarked in *Leonardis*, the nature of the offense committed may be so grave that diversion must be rejected. If the crime was (1) part of organized criminal activity, (2) part of a continuing criminal business or enterprise, (3) deliberately committed with violence against another person, or (4) a breach of the public trust, P.T.I. will be deemed inappropriate.[10] In each of these instances, diversion will be incompatible with the public interest.

It must be recognized that the legitimate needs of the public may not always parallel those of the offender. With a serious crime of violence, for example, society cannot tolerate a diminution of general and specific deterrence unless the offender has a clearly demonstrated amenability to rehabilitative programs and has shown compelling reasons justifying his admission. Stated somewhat differently, a violent criminal must present an unequivocal favorable prognosis before the community should be expected to assume the dual risk of recidivism by the individual and increased depredation by others who may perceive P.T.I. as a form of immunity. Thus, a heavy burden must be imposed in such cases requiring the applicant to demonstrate compelling reasons justifying admission to a program.

Similarly, other categories of crime entail such an affront to societal values that informal disposition through P.T.I. Should be avoided. For example, officials who betray the public trust fall within this classification. In this instance, reprehensible misconduct must be adjudicated as such through the traditional criminal process in order to reaffirm societal norms and to provide notice that certain conduct is unacceptable.

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5. *Guidelines For Operation of Pretrial Intervention in New Jersey*, Guideline 2, Effective September 3, 1976.
6. Guideline 3(c)
7. Guideline 3(d)
8. Guideline 3(e)
9. Guideline 1(e)
10. Guideline 1(i)

Finally, for those engaged in ongoing illicit ventures and other criminal entrepreneurs, P.T.I. will almost invariably be inappropriate. Once again, it is the nature of the offense committed that mandates the conclusion that the rehabilitative goals of P.T.I. must ordinarily yield to the overriding demands of deterrence and public security. Individuals who make a calculated and conscious choice to participate in a criminal enterprise are merely balancing the risk of conviction and punishment against the anticipated benefits of the illicit venture. Diversion of such offenders from the regular course of prosecution would necessarily cause a downward revision of the estimated risks by persons about to embark upon an illegal career.

Plainly, in these circumstances, the certainty of punishment has a vital role in accomplishing the essential deterrent purpose of the criminal law. To the extent that automatic, unimpeded eligibility for P.T.I. decreases this certainty, the deterrent effect will correspondingly decline. In essence, the possibility of P.T.I. participation for this category of offenders may be viewed as little more than another opportunity to evade punishment which decreases the risks involved in criminal venture. Wholesale diversion of the foregoing types of offenders is thus incompatible with the fundamental goal of deterrence.

Moreover, as previously noted, one of the primary goals of P.T.I. is to pave the way for speedy prosecution of serious offenders by conserving law enforcement resources. Clearly, if the system were required to thoroughly screen every defendant for diversion, an enormous administrative quagmire would be created. Rather than a means of allocating criminal justice resources, P.T.I. would become merely another opportunity to delay the eventual day of reckoning.

While the guidelines do not seek to foreclose diversion of deserving individuals, it is evident that frivolous applications should not be given serious consideration. By making it clear that certain categories of offenders will not ordinarily be granted admission, and by squarely placing a heavy burden of proof upon these applicants, the guidelines may thus discourage many patently groundless applications.

Aside from these screening criteria, a further check against abuse is recognized. To enter a P.T.I. program, an applicant must first be evaluated and approved by the program director. This phase of the selection process entails an assessment of the defendant's background, motivation, and general amenability to available rehabilitative treatment.

Even if the applicant is recommended for admission, however, he must still obtain the consent of the prosecutor. A multitude of factors may be pertinent at this stage, for the prosecutor's perspective might well be different from the program director's. Thus, for example, if diversion would impede the prosecution of a codefendant, consent may be withheld.[11] Likewise, the attitude of the victim and the community, or the urgency of detering a particular class of offenses may, as recognized in *Leonardis*, dictate the need for maintaining the prosecution.

In sum, the program director determines whether diversion is feasible based upon the individual's characteristics. The prosecutor, on the other hand, must vindicate society's interests by deciding whether foregoing prosecution is consistent with the legitimate demands of law enforcement.

If both the program director and the prosecutor agree that the case should be diverted, an order may be entered admitting the defendant to P.T.I. On the other hand, if either or both officials find diversion unacceptable, the rejected applicant may ask the court to overturn this decision. However, as held in *Leonardis*, judicial relief will be granted only where the defendant is able to sustain the heavy burden of convincing the

11. Guideline 3(j)

court that his rejection amounts to a patent and gross abuse of discretion.[12] Ultimately, either the prosecutor or the defendant may request appellate review of a trial court's order accepting or rejecting a P.T.I. application.[13]

Of course, the court will not conduct a trial on the question of whether the accused should be admitted to P.T.I. Rather, this proceeding must be confined to the materials presented to the project director and the prosecutor. No testimony may be presented since the court is solely concerned with whether the actions of these officials were proper based upon the information before them.[14]

In this fashion, the P.T.I. screening procedures attempt to provide a balance between expediency on the one hand and fairness to both the accused and the public on the other. The deserving defendant is protected against arbitrary rejection while at the same time, the public interest is preserved through the prosecutor's input and the ability of the State to appeal from an erroneous diversion decision.

Despite these procedural safeguards, the entire program must finally rest upon the judgment and acumen of the officials involved. Sincerity must be sharply distinguished from manipulation. Excessive optimism regarding the program's success should not blind its proponents to feigned motivation. However, if wisely and carefully administered, diversion represents a significant criminal justice innovation. To the extent that such a program enables law enforcement to more vigorously confront the problem of violent crime, it deserves the wholehearted support of all involved in the administration of criminal justice.

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12. Guideline 8; *State v. Leonardis, supra.*

13. Guideline 8; *R.* 2:2–4; *State v. Leonardis*, 71 *N.J.* 85 (1976); *State v. Leonardis, supra*, note 3.

14. *State v. White*, 145 *N.J.Super.* 257 (Cty.Ct. 1976).

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