BAIL AND THE DANGEROUS DEFENDANT: THE EFFECT OF *PRAY* AND *CYR* ON THE USE OF PREVENTIVE CONDITIONS

Historically in Vermont, money bail and release conditions have been imposed for two reasons: to assure a defendant's appearance at trial, and to protect the public from a defendant's predicted pretrial criminal activities. In 1975 the Vermont Supreme Court held in *State v. Pray*[1] that under the Vermont Constitution, bail may not be denied a defendant to protect the public, that is, as it is commonly termed, he may not be preventively detained.[2] The constitutional underpinning of the court's decision was that the only permissible purpose of bail is to assure a defendant's appearance at trial. In the subsequent case of *State v. Cyr*,[3] the court applied the *Pray* rationale to money bail and release conditions, and held that they too must be used to assure appearance. Despite the mandate of the *Pray* and *Cyr* cases, judicial officers[4] currently persist in imposing bail solely because a defendant has a strong propensity to engage in pretrial criminal activity.[5] For example, in *State v. Oakes*[6] the defendant was charged with four felonies involving alleged sexual crimes. He was released on a $10,000 appearance bond and, in addition, a number of other expressed conditions were imposed. The defendant was ordered to reside with his parents, to report daily to the police, and to appear in court as required. Furthermore, the defendant was prohibited from operating a motor vehicle, from rid-

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1. 133 Vt. 537, 346 A.2d 227 (1975).

2. The word preventive, as used in the bail area of the law, merely characterizes an attempt by a judicial officer to prevent a defendant from endangering the public with his predicted criminal acts. *See generally* Martin v. State, 517 P.2d 1389 (Alaska 1974); *In re* Underwood, 9 Cal.3d 345, 508 P.2d 721, 107 Cal. Rptr. 401 (1973); Palmer v. District Court, 156 Colo. 284, 398 P.2d 435 (1965); *Ex Parte* Ball, 106 Kan. 536, 188 P. 424 (1920); State v. Pett, 253 Minn. 429, 92 N.W.2d 205 (1958); State v. Johnson, 61 N.J. 351, 294 A.2d 245 (1972); Commonwealth v. Truesdale, 449 Pa. 325, 296 A.2d 829 (1972).

3. ___ Vt. ___, 365 A.2d 969 (1976).

4. VT. STAT. ANN. tit. 13, §7554(f) (1974) provides that "[T]he term 'judicial officer' . . . shall mean a clerk of a county or district court or a superior or district court judge."

5. Some legislators are also apparently ignoring the holdings of *Pray* and *Cyr*. Vt. H. 335, a proposed amendment to VT. STAT. ANN. tit. 13, §7554(a), would have allowed judicial officers the discretion to impose bail conditions on a defendant to protect the public. The bill, which died in the Judiciary Committee, would clearly have been unconstitutional under *Pray* and *Cyr*.

6. No. 496-77 Wr.Cr. (Vt. Dist. Ct. April 29, 1977).

ing in a motor vehicle without his parents, from leaving his parents' residence from 6:00 p.m. to 8:00 a.m., and, during the rest of the day, from going out unless accompanied by both parents, from going on to the property where the alleged crimes were committed, and from committing any criminal acts for which probable cause is later found. The nature of these conditions gives rise to but one implication—that they were imposed to protect society from being further endangered by the defendant's alleged criminal activities.

It is possible that some judicial officers are reading the *Pray* and *Cyr* cases narrowly by confining these holdings to their respective facts. *Pray* involved a defendant who was denied bail because it was found that his release would constitute a danger to the public. In the *Cyr* case an implied condition of release, as opposed to an expressed one, was imposed upon a defendant for preventive purposes. Therefore, in cases such as *Oakes*, where neither bail is being denied nor implied conditions imposed to protect the public, a judicial officer might reason that he is not violating the holdings of these two cases by imposing expressed conditions. This note will analyze the *Pray* and *Cyr* decisions and demonstrate that the holdings of these cases cannot be confined to situations involving a denial of bail or the imposition of implied conditions, but are also applicable to situations where expressed conditions are imposed to protect the public. The note will further conclude that although a defendant's criminal propensity may not be an independent ground for the imposition of bail, it still has a role to play in a bail determination if relevant to the goal of assuring the defendant's presence at trial.

I. Pretrial Criminal Activity and the Vermont Constitution

By its language, Vermont's bail statute[7] sanctions the use of

7. The bail statute, Vt. Stat. Ann. tit. 13, §7554 (1974) provides in part:
(a) Any person charged with an offense other than an offense punishable by death, shall at his appearance before a judicial officer be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines in the exercise of his discretion that such a release will not reasonably assure the appearance of the person as required, or that the release of the person will constitute a danger to the public. When such a determination is made the judicial officer shall, either in lieu of or in addition

money bail and release conditions to protect the public and to assure appearance.[8] Until *Pray* and *Cyr*, the Vermont Supreme Court had consistently relied on the statute to allow the use of bail for preventive purposes. In 1974, the Vermont Supeme Court in *State v. Webb*[9] authorized the imposition of nonmonetary conditions to protect the public and in the same year in *State v. McInnis*[10] it held that bail may be denied to protect the public. However, the question of whether there is any affirmative constitutional authority for the use of bail to protect the public[11] was never directly addressed by

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to the above methods of release, impose the first of the following conditions of release which will reasonably assure the appearance of the person for trial or, if no single condition gives that assurance, any combination of the following conditions:

(1) place the person in the custody of a designated person or organization agreeing to supervise him;

(2) place restrictions on the travel, association or place of abode of the person during the period of release;

(3) require the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash or other security as directed, of a sum not to exceed 10 per centum of the amount of the bond such deposit to be returned upon the performance of the conditions of release;

(4) require the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof; or

(5) impose any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the defendant return to custody after specified hours.

(b) In determining which conditions of release will reasonably assure appearance and will not constitute a danger to the public, the judicial officer shall, . . . consider the relevant circumstances of the case.

8. The bail statute was enacted in response to criticisms of the money bail system. It was taken from the federal bail statute, 18 U.S.C. §3146 (1969), with one modification: the Vermont bail statute allows a judicial officer to impose conditions to protect the public. *See* State v. Webb, 132 Vt. 418, 320 A.2d 626 (1974); VT. STAT. ANN. tit. 13, §7554(b) (1974). *See generally* D. FREED & P. WALD, BAIL IN THE UNITED STATES (1964); Note, *An Answer to the Problem of Bail: A Proposal in Need of Empirical Confirmation*, 9 COLUM. J. L. & SOC. PROB. 394 (1973); Note, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031 (1954); Note, *Bail: An Ancient Practice Reexamined*, 70 YALE L. J. 966 (1961).

9. 132 Vt. 418, 320 A.2d 626 (1974).

10. 133 Vt. 20, 328 A.2d 400 (1974).

11. Defendant Webb argued that Stack v. Boyle, 342 U.S. 1 (1951) prohibited the imposition of conditions solely to protect the public. The Court in *Stack* held that bail set at an amount higher than reasonably calculated to assure appearance is excessive. Webb argued that because bail was not being imposed to assure appearance it was excessive. The Vermont Supreme Court reasoned that *Stack* posed no conflict with the imposition of preventive conditions because the *Stack* Court was not faced with a defendant who would constitute a

the Vermont Supreme Court until the 1975 *Pray* case. In that case a jury found the defendant Pray guilty of murder, but he successfully appealed his conviction.[12] Pending retrial, Pray was denied bail solely because the judicial officer believed that his release would constitute a danger to the public. The Vermont Supreme Court vacated the judicial officer's determination, holding that the bail system could not be used to protect the public.[13] The court rooted its decision in the bail provision of the Vermont Constitution: "[A]ll prisoners, unless in execution or committed for capital offenses, when the proof is evident or presumption great, shall be bailable by sufficient sureties; nor shall excessive bail be exacted for bailable offenses."[14]

The court noted that since Pray was neither in execution, that is, convicted beyond a reasonable doubt by a trier of fact,[15] nor charged with a capital offense,[16] he was entitled to be released on bail if his appearance at trial could be sufficiently assured. The court interpreted the language of the constitutional bail provision

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danger to the public. Because the court found no conflict with *Stack*, it relied on the rule of construction that statutes are presumptively constitutional. The court stated:

> 'A legislative enactment is entitled to the presumption of constitutionality. It will be given a reasonable construction, consistent with constitutional requirements unless such an interpretation is plainly foreclosed by the language itself . . . .
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> The burden of establishing the unconstitutionality rests upon the person who challenges its validity . . . . To give the statute the meaning claimed by the appellant would be to render it unconstitutional, and this result we must avoid if it is fairly and reasonably possible to do so.' (citations omitted).

132 Vt. at 420, 320 A.2d at 628 (quoting *In re* Delinquency Proceedings, 129 Vt. 185, 188-89, 274 A.2d 506, 509 (1970)).

12. Pray's conviction was reversed because the court failed to disclose to the jury that the defendant was under heavy sedation throughout his trial. The court reversed because the jury never saw the defendant in an undrugged state and this, coupled with the non-disclosure, was adequate grounds upon which to order a new trial. *In re* Pray, 133 Vt. 253, 257-58, 336 A.2d 174, 177 (1975).

13. 133 Vt. at 541-42, 346 A.2d at 229.

14. VT. CONST. ch. II, §40.

15. *See* State v. Ryan, 134 Vt. at 304, 359 A.2d 657 (1976); *In re* Woodmansee, 127 Vt. 575, 255 A.2d 667 (1969); *In re* Woodmansee, 124 Vt. 219, 202 A.2d 267 (1964); State v. Webb, 89 Vt. 326, 95 A. 892 (1915); *In re* Comolli, 78 Vt. 337, 63 A. 184 (1906).

16. The court stated that a capital offense is one for which the death penalty may be inflicted, 133 Vt. at 540, 346 A.2d at 229. Vermont has abolished the death penalty except in certain cases not applicable to the charges involved in *Pray*. *See* VT. STAT. ANN. tit. 13, §2303 (1974).

"shall be bailable by sufficient sureties," as authorizing the imposition of bail only for assurance purposes.[17]

The court proceeded to examine the bail statute, title 13, section 7554 of the Vermont Statutes Annotated, to determine whether it conflicted with the constitutional bail provision. This statute authorizes a judicial officer to grant or deny bail. Pursuant to section 7554(a), a defendant is entitled to be released on his own personal recognizance or upon the posting of an unsecured appearance bond "unless the [judicial] officer determines . . . that such a release will not reasonably assure the appearance of the person as required, or that the release . . . will constitute a danger to the public."[18] Upon a determination that the defendant will not appear at trial if released on his own recognizance, the judicial officer has at his disposal various conditions of release which are listed in an order of increasing severity.[19] The statute requires that the judicial officer impose the least onerous condition or conditions. With respect to the potentially dangerous defendant, the court noted that section 7554(a) was silent as to whether conditions "may be imposed, must be imposed, or bail denied altogether" in order to protect the public.[20] However, the court did find express authority to impose conditions of release on a potentially dangerous defendant in section 7554(b).[21] Section 7554(b) sets forth various factors that a judicial officer must consider when determining which conditions of release will reasonably assure appearance and protect the public. The statute does not provide any express authority for a judicial officer to deny a defendant bail on a finding that he is a danger to the public. Consequently, the court did not find a conflict between the statute and the constitutional bail provision. Had the court, as in *McInnis*, read the statute to authorize a denial of bail to protect the public, it would have had no choice but to declare the statute unconstitutional. The court stated that "[t]here is nothing in the Vermont Constitution, chapter II, section 40, that provides for [a] denial of bail because of a defendant's dangerous propensities."[22]

17. 133 Vt. at 541, 346 A.2d at 229.
18. VT. STAT. ANN. tit. 13, §7554(a) (1974).
19. *Id.*
20. 133 Vt. at 540, 346 A.2d at 229.
21. *Id.* at 541, 346 A.2d at 229.
22. *Id.*

The expressed holding of *Pray* was that "bail may not be entirely denied a defendant on grounds that his release would constitute a danger to the public."[23] Arguably, *Pray* can be confined to its facts because of the court's specific characterization of its holding. However, the reasoning of *Pray* clearly addressed situations beyond those in which a denial of bail is involved, for example, where bail conditions are imposed. The constitutional underpinning of the *Pray* decision was that "[t]he purpose of bail . . . is to assure the defendant's attendance in court, and cannot be a means of . . . protecting the public."[24] The purpose of the constitutional bail provision does not discriminate between a denial of bail and the imposition of bail with preventive conditions. Indeed, the denial of bail is only one of many alternatives available to a judicial officer in a bail determination hearing. In the subsequent case of *State v. Cyr*[25] the Vermont Supreme Court did in fact extend *Pray* to all conditions of release.

In *Cyr*, the court specifically dealt with a case concerning the constitutionality of the imposition of an implied bail release condition to protect the public. The implied condition was that the defendant was required to refrain from engaging in pretrial criminal activity.[26] The court vacated Cyr's bail order on two alternative grounds. The first was that the use of an implied condition of release violated the defendant's due process right of notice.[27] The second ground, affirming *Pray*, was that the only constitutional purpose of

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23. *Id.* at 542, 346 A.2d at 230.

24. *Id.* at 541-42, 346 A.2d at 229.

25. ___ Vt. ___, 365 A.2d 969 (1976).

26. In *Cyr* the defendant, while free on his own recognizance, was allegedly involved in further criminal activity. He was ordered arrested and confined pending a hearing on the revocation or imposition of release conditions. The confinement in effect served as a revocation of bail, even though it was found that the defendant would probably appear for trial. The supreme court released the defendant, noting that the lower court had obviously been concerned about the defendant's criminal activity while he was free on bail. "Although this is legitimately a matter for concern," the court stated "it cannot properly be reached by reference to 'implied' release conditions." ___ Vt. at ___, 365 A.2d at 971. The "implied" release condition referred to by the court was apparently the condition that the defendant not engage in criminal activity while released on bail.

27. In response to Cyr's due process argument the court stated that although pretrial criminal activity was a "legitimate concern" of judicial officers, such activity can be proscribed only by reference to express conditions which give adequate notice and are appropriately specified. *Id.*

bail is to assure appearance. The court stated that "[t]he appropriateness of *any* conditions of release, even though made in accordance with the requirements of the bail statute, must also meet that constitutional call"[28] (emphasis added). The court reversed the lower court's bail determination by holding "that bail cannot be used solely as a device for protecting the public."[29] The court, by addressing all conditions of release—implied as well as expressed—recognized the comprehensiveness of the constitutional bail provision. The complementary cases of *Pray* and *Cyr* clearly stand for the proposition that bail can no longer be denied, or in any form imposed, on the independent ground that a defendant has a probensity to engage in pretrial criminal activity.

II. The Role of Pretrial Criminal Activity in Bail Determinations

Although the court in *Cyr* stated that "bail cannot be used solely as a device for protecting the public,"[30] the court did not hold that pretrial criminal activity could not be considered by a judicial officer when imposing bail release conditions. Indeed, the court stated that such activity was "legitimately a matter for concern."[31] The condition in *Cyr* (to refrain from engaging in pretrial criminal activity) was held unconstitutional because it was not reasonably related to the goal of assuring appearance. Thus, if a judicial officer is to consider a defendant's propensity to engage in pretrial criminal activity, he must do so in relation to the issue of whether the defendant will reasonably appear at trial.[32]

A judicial officer's first task in a bail determination is to evalute the probability of the defendant's appearance without the imposition of any pretrial release condition. In determining a defendant's probability of appearance, a judicial officer considers the relevant circumstances in each individual case. The Vermont legislature has listed some of the relevant circumstances to be considered:

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28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *See* United States v. Melville, 306 F. Supp. 124 (S.D.N.Y. 1969).

> In determining which conditions of release will reasonably assure appearance and will not constitute a danger to the public, the judicial officer shall, on the basis of available information, take into account the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.[33]

In addition to these factors, pretrial criminal activity is also a proper consideration of judicial officers when fashioning bail orders.

In a situation where a defendant lacks family ties or employment or resources or any roots in the community, and is possessed of a poor record for fidelity to court engagements, it is reasonable for a judicial officer to conclude that he will not appear if released on his own recognizance.[34] Additionally, if a defendant is likely to engage in pretrial criminal activity, it it not unreasonable for a judicial officer to question whether he will willingly and voluntarily surrender himself to authorities to stand trial, with the consequence that further criminal proceedings may be initiated against him and with the concomitant prospect of further sentences, if he does engage in such activity. This factor is only one among many which a judicial officer will balance in determining whether it is likely that the defendant will appear.[35]

The consideration by a judicial officer of the defendant's propensity to engage in pretrial criminal conduct does not do violence

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33. VT. STAT. ANN. tit. 13, §7554(b) (1974).

34. *See generally* United States v. Gillin, 345 F. Supp. 1145 (S.D. Tex. 1972); United States v. Melville, 306 F. Supp. 124 (S.D.N.Y. 1969).

35. Several approaches have been advanced over the years to assign relative weight to these factors in an appearance determination. One view holds that the probability of appearance decreases as the severity of punishment and the likelihood of conviction increase. *See* 1 J. BISHOP, NEW CRIMINAL PROCEDURE §225 (4th ed. 1895). Another prefers an evaluation of the defendant's general reputation, financial ties, and past court conduct. *See* Commonwealth v. Truesdale, 449 Pa. 325, 296 A.2d 829 (1972) wherein the court stated:

> This decision [regarding a defendant's probability of appearance] must be reached by the application of certain criteria, such as: (1) general reputation in the community; (2) past record; (3) past conduct while on bail; (4) ties to the community in the form of a job, family, or wealth.

Id. at 338, 296 A.2d at 836.

to the fundamental principle of the presumption of innocence. Once a defendant has been charged with a crime, legal consequences attach.[36] One legal consequence is that the freedom of one charged with an offense is circumscribed to the extent that he is legally obligated to appear for trial. Even before a defendant has been proven guilty of any offense, a judicial officer is presently permitted under the Vermont bail scheme to reasonably restrain the defendant's freedom for the purpose of assuring his appearance.[37] Under the statute, a judicial officer may consider in a risk of flight determination the seriousness of the offense charged, the weight of the evidence, and the severity of the punishment upon conviction.[38] He is, therefore, constitutionally empowered to prejudge the defendant to some extent because all these factors relate to a crime for which the defendant has not yet been tried. For example, if a defendant is charged with a serious offense which carries a lengthy sentence, the judicial officer is presently permitted to assess the evidence to be introduced at trial for the purpose of determining the defendant's probability of conviction. If the judicial officer believes that there is a high probability of conviction, he may reasonably conclude that the defendant might be unwilling to appear for trial when this is balanced with the other relevant factors. Therefore, although a judicial officer's consideration of some factors serve to prejudge a defendant, such consideration will not transgress the permissible bounds of the presumption of innocence so long as it is reasonably related to a determination of the defendant's probability of appearance.

III. The Role of a Judicial Officer in Bail Determinations

If a judicial officer is faced with a defendant who will probably voluntarily appear, he has, with one exception,[39] no choice but to

36. *See* United States v. Melville, 306 F. Supp. 124, 126-27 (S.D.N.Y. 1969).

37. 133 Vt. at 542, 346 A.2d at 229-30.

38. *Id.*; Vt. Stat. Ann. tit. 13, §7554(b) (1974).

39. Trial courts have the inherent power to hold a defendant without bail if necessary to protect the administration of justice, *see* note 50 *infra* and accompanying text. In addition, there seems to be a second exception, that is, the trial court's power to commit a defendant for an evaluation by a psychiatrist when it is claimed that he is not competent to stand trial, *see* Vt. Stat. Ann. tit. 13, §§ 4814 - 4815 (1974). The Vermont Supreme Court has never decided the constitutionality of this commitment procedure. However, other jurisdictions

release the defendant on his own recognizance.[40] When the judicial officer finds[41] after an evaluation of all the relevant factors in the case that the defendant's appearance is not reasonably assured, he may impose reasonable conditions to assure appearance.[42] The Vermont bail statute provides a list of conditions, such as third party custody and travel restrictions, which a judicial officer may impose,[43] and the statute instructs the officer to impose the least onerous condition or conditions which will reasonably assure the defendant's appearance at trial.[44]

In a situation where a defendant's strong propensity to engage in criminal conduct is the factor which creates the uncertainty of the defendant's appearance at trial, the judicial officer must impose conditions to negate such uncertainty, even if they incidentially serve to protect the public.[45] For example, if a defendant has demon-

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have held that such pretrial commitment is in violation of a defendant's right to bail. *See, e.g.*, Marcey v. Harris, 400 F.2d 772 (D.C. Cir. 1968).

40. State v. Cyr, ___ Vt. ___, 365 A.2d 969, 970 (1976). Release on one's own recognizance means that the defendant is released on his promise to the court that he will appear as required. *See* State v. Vinal, 113 R.I. 426, 428, 325 A.2d 81, 83 (1974). *See generally* Note, *Trends in Own Recognizance Release: From Manhattan to California*, 5 PAC. L. J. 675 (1974).

41. The general rule regarding bail determinations is that they are peculiarly a matter for the trial courts, and as such, they will not be set aside unless clearly unreasonable. In State v. Toomey, 126 Vt. 123, 223 A.2d 473 (1966) the court stated:

> In our consideration of a question of whether a trial court abused its discretion we are bound to indulge every presumption in favor of the ruling below, unless it appears that it withheld or abused its discretion. The recognized test in this state of abuse of discretion is whether the discretion of the trial court was exercised on grounds or for reasons clearly untenable, or to an extent clearly unreasonable. John v. Fernandez, 124 Vt. 346, 348-49, 205 A.2d 552 [(1964)]; Grow v. Wolcott, 123 Vt. 490, 194 A.2d 403 [(1963)]; Stone v. Briggs, 112 Vt. 410, 26 A.2d 828 [(1942)].

Id. at 125, 223 A.2d at 475. *See* United States v. Wright, 483 F.2d 1068, 1069 (4th Cir. 1973) ("the fixing of the amount of bail is peculiarly a matter of discretion with the trial court."); United States v. Radford, 361 F.2d 777, 789 (4th Cir. 1966), *cert. denied*, 385 U.S. 877 (1966); Kaufman v. United States, 325 F.2d 305, 306 (9th Cir. 1963).

42. *See* United States v. Wright, 483 F.2d 1068 (4th Cir. 1973); State v. Pray, 133 Vt. at 542, 346 A.2d at 230.

43. VT. STAT. ANN. tit. 13, §7554(a) (1974), *see* note 7 *supra*.

44. *Id. See* Wood v. United States, 391 F.2d 981, 983 (D.C. Cir. 1968); United States v. Gillin, 345 F. Supp. 1145, 1146 (S.D. Tex. 1972); United States v. Melville, 306 F. Supp. 125, 126 (S.D.N.Y. 1969).

45. *See* United States v. Leathers, 412 F.2d 169, 172-73 (D.C. Cir. 1969) wherein the court stated: "All conditions of pretrial release have as their goal the close supervision of the defendant in order to curtail his opportunity to flee. A desirable *by-product* is that often any danger to the public presented by the release can also be minimized." (emphasis added).

strated a strong propensity to engage in narcotic transactions, the judicial officer might reason that this activity, when considered with all the other relevant factors, gives rise to a risk of flight. Such a defendant might be unwilling to surrender himself for trial if, during the interim, he is involved in one or more similar incidents which would consequently subject him to additional sanctions.[46] Under these facts, in order to reasonably assure appearance, the judicial officer may impose conditions such as prohibiting the defendant from associating with known narcotics dealers or placing the defendant under close supervision. A judicial officer must be careful, however, to refrain from imposing conditions to negate a defendant's criminal propensities solely on grounds to protect the public.[47] He may impose preventive conditions only when necessary for assuring appearance.

Apart from the bail system, trial judges might be able to secure public safety more directly through their inherent power to insure an orderly trial process. Courts traditionally have possessed the means to confine defendants without bail upon a finding that their release would affect the administration of justice.[48] A trial judge may invoke this power only after he accords the defendant an ample opportunity to show that he will not interfere with the criminal proceeding. This inherent power has been employed only in the extreme or unusual case[49] in which the court finds, based upon all the relevant evidence, that the defendant will threaten or cause to be threatened, a potential witness; or that he will otherwise unlawfully interfere with the criminal prosecution.[50] However, before it

46. The penalty for a first offense under the given facts will subject the defendant to a maximum sanction of up to five years in prison and a $10,000 fine. VT. STAT. ANN. tit. 18, §4224(g) (Cum. Supp. 1976). However, if a defendant is charged with a second or subsequent offense, he can receive a maximum sentence of up to twenty-five years in prison and a $25,000 fine. *Id.* at (i).

47. State v. Pray, 133 Vt. at 541-42, 346 A.2d at 230; State v. Cyr, ___ Vt. ___, 365 A.2d at 971.

48. *See* Carbo v. United States, 82 S. Ct. 662, 668 (Douglas, Circuit Justice, 1962) ("[K]eeping a defendant in custody during the trial 'to render fruitless' any attempt to interfere with witnesses or jurors may, in the extreme or unusual case, justify denial of bail" (citation omitted)); Fernandez v. United States, 81 S. Ct. 642, 644 (1961) (mem.); United States v. Gilbert, 425 F.2d 490, 491-92 (D.C. Cir 1969); United States v. Bentvena, 288 F.2d 442, 445 (2d Cir. 1961); Carbo v. United States, 288 F.2d 282, 285-86 (9th Cir. 1961).

49. Carbo v. United States, 82 S. Ct. 662, 668 (Douglas, Circuit Justice, 1962).

50. *See id.* at 667-68; United States v. Gilbert, 425 F.2d 490, 491-92 (D.C. Cir. 1969).

invokes the most severe protective device of confining the defendant without bail, the trial court must determine that no less restrictive method exists which can effectively protect the trial process.[51] Although the court's inherent power to protect its process is a narrow one, it will exercise that power to promote public safety in appropriate cases.

CONCLUSION

Despite current practice in Vermont, the imposition of bail conditions solely to protect the public is in violation of the Vermont Constitution. However, the consideration by a judicial officer of a defendant's propensity to engage in pretrial criminal activity has not been totally precluded by the Vermont Supreme Court's decisions in *Pray* and *Cyr*. The thrust of the *Pray* and *Cyr* decisions is that bail cannot be denied or imposed entirely or solely to protect the public. However, a judicial officer may yet consider a defendant's criminal propensity, along with the other relevant factors of the case, in the context of a risk of flight determination. Once the judicial officer determines that the defendant may not appear for trial if released on his own recognizance, he must impose the least onerous conditions which will reasonably assure appearance. In selecting conditions the judicial officer must first determine which factors indicate that the defendant may not appear for trial, and may then impose the conditions necessary to counteract these factors, even if such conditions incidentally serve to protect the public.

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51. *See generally* United States v. Gilbert, 425 F.2d 490, 492 (D.C. Cir. 1969).