

**Report to Chief Justice Stuart Rabner on Procedures
Followed in the Setting and Consolidation of Bail on
Charges Filed Against Defendant Jose Lachira Carranza**

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TABLE OF CONTENTS

PREFACE	1
REVIEW PROCEDURES	1
FINDINGS	2
The Arrest for Aggravated Assault	2
The Initial Arrest for Aggravated Sexual Assault	3
The Second Aggravated Sexual Assault Arrest	6
CONCLUSIONS	12

PREFACE

On May 22, 2007, defendant Jose Lachira Carranza, having posted a bond in the amount of \$150,000 fixed by Judge Thomas R. Vena as security for his appearance on pending charges of aggravated sexual assault, was released from custody. On August 9, 2007, defendant surrendered himself on homicide charges. On August 20, 2007, Chief Justice Stuart Rabner appointed me to conduct a review of the procedures followed in setting and consolidating bails in defendant Carranza's cases.

REVIEW PROCEDURES

With the permission of the Chief Justice to engage an assistant, I enlisted the assistance of Joseph F. Davis, Trial Court Administrator in Hudson County. Together we undertook the following:

- Inspection of court files related to defendant Carranza;
- Review of audio and video tapes of court proceedings involving the defendant;
- Conducted audio tape interviews with:
 - Kathleen Fagan (Court Clerk to Honorable Thomas R. Vena, J.S.C.)
 - Felix Lopez Montalvo, Esq. (attorney for defendant Carranza)
 - Rosa Robinson (Court Clerk to Honorable John Kennedy, J.S.C.)
 - Honorable Thomas R. Vena, J.S.C.
 - Margarita Rivera, Esq., Assistant Prosecutor, Essex County
 - Robert D. Laurino, Esq., Chief Assistant Prosecutor, Essex County
- Conducted telephone interviews with Honorable Patricia K. Costello, A.J.S.C.; Honorable Donald J. Volkert, P.J. Criminal; and Honorable Siobhan A. Teare, J.S.C.

FINDINGS

The Arrest for Aggravated Assault

On October 1, 2006, West Orange police officers, responding to reports of a fight in progress at Huguito's Bar, arrested defendant Carranza and a co-defendant. A separate complaint was filed against Carranza for each of the four victims. Each of the four complaints charged: (a) third degree aggravated assault by purposely or knowingly causing bodily injury by use of a deadly weapon (striking the victim with a glass bottle and a chair) in violation of N.J.S. 2C:12-1b(2), (b) third degree knowing possession of a weapon with a purpose to use it unlawfully against the person or property of another by striking the victim with a glass bottle and chair in violation of N.J.S. 2C:39-4, and (c) fourth degree knowing possession of a weapon (a glass bottle and chair) under circumstances not manifestly appropriate for lawful use in violation of N.J.S. 2C:39-5d.

On October 2, 2006, West Orange Municipal Court Judge Margaret Padovano set bail by telephone at \$50,000 with a 10% cash option. The next day, October 3, 2006, defendant Carranza appeared in the Central Judicial Processing Court where Municipal Court Judge Joanne Watson reduced bail to \$20,000 with a 10% cash option. On the audio tape, Judge Watson is heard to recite that bail is "stipulated" at \$20,000/\$2,000 with a "no contact" order. The CJP calendar log also notes that the bail is by stipulation. It is not disputed that a "stipulated bail" is bail at an amount to which the Prosecutor has consented. Bail was reviewed later that same day by Superior Court Judge Siobhan Teare, and remained unchanged. Cash bail was posted on behalf of Carranza on October 3, and he was discharged from custody.

Directive #9-05 issued by the Administrative Office of the Courts on May 12, 2005, as supplemented on May 26, 2006, promulgates statewide bail schedules and adopts bail practices offered by the Conference of Criminal Presiding Judges and approved by the Judicial Council. The published bail schedules “contain general bail ranges that are meant to be advisory in nature.” The Directive sets forth the factors to be considered in determining bail articulated by the Supreme Court in State v. Johnson, 61 N.J. 351 (1972). The bail schedule recommends a range of \$20,000 to \$50,000 for third degree aggravated assault with a 10% cash bail option. Thus, both the bail initially set by Judge Padovano and the reduced bail set by Judge Watson and reviewed by Judge Teare fell within the recommended range.

The Initial Arrest for Aggravated Sexual Assault

On January 16, 2007, Carranza was arrested in the City of Orange under the name Jose Larchire. An Orange police detective filed four separate complaints, charging three separate counts of first degree aggravated sexual assault, N.J.S. 2C:14-2a(1), six counts of second degree endangering the welfare of a child, N.J.S. 2C:24-4b(1), and one third degree charge of terroristic threats for threatening to kill the 8-year-old victim’s family, N.J.S. 2C:12-3(b). The court jacket for this arrest includes a Case Management Report prepared by Orange police detective Rontesia Lewis and a copy of that detective’s interview with the 8-year-old victim.¹ *[Redacted]*

¹ The italicized portion of this report contains information that would disclose to the public the identity of the child victim, and is therefore confidential pursuant to N.J.S.A. 2A:82-46.

With regard to the alleged Newark assaults, the Case Management Report recites:

This detective contacted [Essex County] Prosecutor Dawn Scott and advised her of the allegations that were made per the statements that were given and also verbally. * * * I also advised the Prosecutor about the incident that took place in Newark, NJ, which she advised me to contact Newark P.D. in regards to this matter.

Bail on the new charges was set on January 18, 2007, at the Central Judicial Processing Court. Judge Joanne Watson set bail at \$200,000 cash or bond. It is not disputed that the bail amount was set with the consent of the Prosecutor. The conditions of bail included a “no contact” order and a surrender of defendant’s passport.

On January 19, 2007, Superior Court Judge Nancy Sivilli reviewed the bail in accordance with R. 3:26-2(c). The bail remained the same with the consent of the Prosecutor, as reflected by a checkmark on the Superior Court Judge 24-Hour Bail Review Form. Thereafter, on January 23, 2007, attorney Felix Lopez Montalvo filed a motion on behalf of defendant to reduce bail. The motion was scheduled before

Superior Court Judge John Kennedy on January 29, 2007. On that date, Judge Kennedy, with the consent of the Prosecutor, reduced bail to \$150,000 cash or bond with no contact. The amount of the reduced bail appears on the Bail Determination slip. Neither the consent nor the determination were placed on the record, and no consent is noted on the Bail Determination slip. However, Chief Assistant Prosecutor Robert Laurino confirmed the fact of consent during an interview on August 27, 2007. (T14 - 16 to 21).

The absence of any record regarding prosecutorial consent to the reduction of bail is consistent with a practice that appears to be common, although not uniform in Essex County. It is undisputed that all controverted bail motions are argued and decided on the record. Typically, however, defense counsel and the Prosecutor confer informally regarding bail motions in advance of the judge taking the bench at 9:00 a.m. and calling the calendar. If agreement on the amount of bail is achieved, both counsel advise the judge of this fact in chambers. The judge reviews the file, makes such inquiries as satisfy him or her regarding the stipulated amount, and releases the attorneys. This allows defense counsel to conduct business in other courts without waiting for the calendar call. The judge then advises the court clerk to prepare a Bail Determination slip reflecting the new bail. The slip does not have a place to note whether the Prosecutor has consented to the amount of bail. The Bail Determination slip is a multi-part form. However, none of the copies is designated for the Prosecutor. This practice was generally followed by Judge Kennedy, as reported to me by his court clerk, and Judge Vena, as reported by both the Judge and his clerk.

On February 7, 2007, bond in the stipulated amount of \$150,000 was posted by a surety and defendant was discharged from custody.

The bail schedule range for first degree aggravated sexual assault is from \$150,000 to \$300,000 with no 10% cash option. The bail schedule range for second degree endangering the welfare of a child is \$50,000 to \$100,000 with no 10% cash option. The range for third degree terroristic threats is \$10,000 to \$20,000 with a 10% cash bail permissible. Thus, both the initial bail set by Judge Watson and the reduced bail set by Judge Kennedy were within the range recommended by the bail schedule.

The Second Aggravated Sexual Assault Arrest

On May 3, 2007, complaint warrants issued from the Newark Municipal Court charging that prior to February 21, 2007, defendant Carranza committed various sexual offenses upon an 8-year-old victim. The complaints charge six counts of first degree aggravated sexual assault in violation of N.J.S. 2C:14-2a(1), two counts of second degree sexual assault in violation of N.J.S. 2C:14-2b and one count of second degree endangering the welfare of a child in violation of N.J.S. 2C:24-4. Initial bail of \$300,000 was set by Superior Court Judge Michael Ravin, who was on duty as the “speedy bail” or “emergent duty” judge.

On May 7, 2007, Defendant Carranza was arraigned at the Central Judicial Processing Court on the Newark Municipal Court complaints. Because bail had been set by a Superior Court Judge, bail was not addressed at the CJP hearing. The bail was reviewed later that day by Superior Court Judge Siobhan Teare and maintained at \$300,000 cash or bond. That same day, attorney Felix Lopez Montalvo filed a motion for bail review. As the reason for this review, counsel wrote:

Def. was arrested & charged with agg. sexual assault out of Orange, N.J. on February 21, '07, at that time, the victim also stated it had occurred as well, Newark did not charge def. until May 9, '07, while he was out on 150,000 bail. Will request these matters be consolidated & bail to remain at 150,000.

[Note that the arrest in Orange occurred on January 16, and not February 21, 2007. Also, the Newark charges were filed on May 3, and not May 9.]

The bail reduction motion was returnable before Judge Thomas R. Vena on May 10, 2007. On that date, attorney Montalvo reported to Judge Vena's courtroom and was informed by the Judge's court clerk, Kathleen Fagan, that the Judge was out that week but that she was in possession of the bail file. Soon thereafter, Assistant Prosecutor Margarita Rivera appeared. Rivera was covering the motion for Dawn Scott, to whom the case was assigned. Scott was out of the office, and Rivera had not spoken either to Scott or any supervisor regarding a position on the motion, nor had she reviewed the Prosecutor's file. All agree that the clerk gave the attorneys the bail file and left them to confer.

Montalvo reported his recollection to me as follows.

Q. Who - who was - who engaged in the discussion?

A. Well Kathy said, well, you know, Judge Vena's not here right now, but you guys talk, see what you're gonna do. We talked.* * * My recollection of the encounter is that she came in and she wanted right off the bat \$300,000 bail, which was the overnight speedy bail.

Q. Okay.

A. I then said to her that I felt it was not fair because basically this was the same case, it was the same victim, it happened over the same period of time, and she [the victim] had already made a statement that it

happened over that period of time, however, Newark had neglected to charge him. Had they originally charged him with Orange, it would still be the same case. To this date, it's still the same case that's going to be tried with one case. Based on that, I told her I wanted a hundred fifty thou -- I wanted to consolidate this with the other -- with the other charges, it was the same case. My recollection is that she agreed to that and then Kathy drew up the paper work. That's my recollection. (T53-12 to T54-15).

According to Montalvo, at some point the clerk joined the attorneys and Montalvo told her that "we have an agreed upon." (T55-19-25). He recalls that Ms. Rivera was present when he told the court clerk they had reached an agreement regarding the bail amount, that she made no objection and she thereafter left. (T56-8 to 15).

The court clerk has a similar recollection of events. She states that she provided the attorneys with the bail file and left them to confer. (T10-18 to T12-3). Thereafter, the attorneys returned to give her back the file. In response to a question regarding whether she had any conversation with them after the conference, Fagan responded:

And that - and Felix - she was standing there, but Felix said there's a consent. I says, alright, Mr. Montalvo, now that you have the consent, she's - will agree to consolidate, now you have to contact - it's up to the defense attorney to get the consent from the bonding company.... (T12-3 to 18).

* * * *

Q. Is that -- so it's Mr. Montalvo who did the talking --

A. Well he -- but Margarita was -- was aware of the conversation.

Q. And -- and --

A. She didn't stay, he -- she -- he -- there was enough for the consent, then -- then she didn't stay for the conversation where I told him what the procedure was after the consent --

Q. What did --

A. -- she walked away.

Q. -- what did he say while she was there?

A. That -- that they agreed.

Q. Agreed --

A. They've agreed to the consolidating this -- these charges into the already posted bail. (T12-24 to T-13-14).

Ms. Rivera's recollection differs. She recalls going into the law clerk office that separates the chambers of Judges Kennedy and Vena. She exchanged pleasantries with Mr. Montalvo and told him "I'm not lowering the bail, that's pretty much the first thing that I said to him." (T8-10 to 17).

She explained further:

And he says no, no, no, no, Margarita, I'm not asking you to lower the bail, I just want you to consolidate it. It's the same charges. And he went into an explanation. And I'm like, oh, let me look at that first. He had explained to me that he had been arrested previously, a couple of months previous on a sex assault charge, that these were the same charges but they were out of New -- Newark and that they were -- they hadn't filed them until now. So I said, all right, well let me look first.

So I -- I looked at the jacket. They have the bail jacket up there. I reviewed that. I looked at the complaint. I went onto promissory gavel and looked again on the complaints that were there to look up. But he wasn't going by the name Carranza, I believe it was Lachira or something like that. And I remember looking, seeing that they were in fact -- covering

the same time, the same charges, same time period. And I said, you know what, that's fine, I'll agree to -- then he started telling me how -- the bond -- I'll agree to consolidate it, that's fine. And he -- that's all I want.

Then we went to talk to -- we weren't sure if it was -- what was going to happen because Vena wasn't it (sic), Kennedy was going to hear it or, you know, who we were going to be in front of, and then we went to the court clerk and talked with her and we told her we would consolidate the bail. And she said, well there's you know, we can't consolidate anything until we get something from the bail bondsman that they agree to it. Oh yeah, that's right. So -- so she said you know, there's nothing you guys can do, and I'm like fine then, I guess, you know, you guys are done with me, I'm going to leave, call me -- we have to wait for them to agree to consolidate it, put everything -- and that was it, I left -- (T8-18 to T10-3).

Asked what she meant by consenting to consolidate, Rivera replied, "Well, it would have meant for me that it was bond -- the bail that was posted by Judge Ravin on the new charges would consolidate with the 150 and he would have to come up with the rest to cover --" (T10-12 to 19).

It is clear that both parties believed that the motion had been reconciled by consent. Were it otherwise, they would have been sent to Judge Kennedy to be heard on the record. In fact, they left without a common understanding of what had been agreed to, if anything. The clerk, however, understood the Prosecutor to have consented to the bail reduction. and proceeded to inform Mr. Montalvo that no final determination could be made until a consent had been obtained from the surety that had posted a bond to secure Carranza's appearance on the City of Orange complaints. Mr. Montalvo contacted the surety and, on May 17, 2007, the court clerk received a fax from Martell Bail Bonds consenting to the existing \$150,000 bond covering the new charges issued from Newark.

Judge Vena confirmed that on May 10, 2007, he was in Rome on his honeymoon. May 17th was his first return to chambers. His recollection is that his court clerk brought the Carranza bail reduction motion and bail file to his attention. The clerk had prepared the bail reduction slip for his signature. He recalls seeing the letter from the bail bondsman and his court clerk reporting that Ms. Rivera had consented to the consolidation, including “consolidating at the bail that was originally set for this case by Judge Kennedy.” (T79-21 to 81-14). Judge Vena confirmed that he reviewed the contents of the bail file and satisfied himself that \$150,000 was a reasonable bail. (T86-2 to 87-19).

Carranza had been indicted on the aggravated assault charges on April 16, 2007. On June 4, 2007, while free on bail, Carranza appeared as required before Judge Vena for a status conference on the progress of pretrial proceedings. Carranza was indicted on the aggravated sexual assault charges on July 2, 2007. On August 3, 2007, Carranza appeared before Judge Vena for arraignment on the indictment.

A review of the videotape of both court events indicates that bail was not addressed. The Assistant Prosecutor appearing at both events was Christopher Iu. Chief Assistant Prosecutor Laurino represented to me that he has examined the contents and cover of the Prosecutor’s file and found no notes or other indication of Judge Vena having reduced the bail.

On August 13, 2007, Judge Vena conducted a status conference on all pending charges and revoked bail based upon a homicide charge filed on August 9, 2007 and an immigration detainer.

CONCLUSIONS

There were no deviations from any law, court rule, or accepted practices in the setting or reviewing of bail in connection with the aggravated assault charges stemming from the bar fight. It was appropriate for bail to be set by a Municipal Court Judge, as aggravated assault is not one of the offenses set forth in R. 3:26.2 as requiring that bail be determined by a Superior Court Judge. Bail was set telephonically by Municipal Court Judge Padovano in compliance with R. 3:4.1(b), which requires that bail be set for an arrested person “without unnecessary delay and no later than twelve hours after arrest.” The initial bail of \$50,000 with 10% cash option was the high end of the bail schedule range.

Bail was reduced at CJP to \$20,000 with 10% cash option, the low end of the bail schedule range. The bail was reviewed that same day by a Superior Court Judge. R. 3:26-2(c) requires that “any person unable to post bail shall have his or her bail reviewed by a Superior Court Judge no later than the next day, which is neither a Saturday, Sunday nor a legal holiday.” Carranza’s criminal history included only a disorderly person’s conviction for theft in 2004, resulting in fines and costs totaling \$183.00.

Carranza’s arrest on January 16, 2007, included three first degree aggravated assault charges. Pursuant to R. 3:26-2(a), bail on these charges should have been set by a Superior Court Judge and not by the Municipal Court Judge presiding over CJP. However, on October 25, 1993, the Supreme Court issued an order relaxing the rule “so as to permit Presiding Judges - Municipal Courts to set bail in all matters other than homicide cases and extradition proceedings when assigned by their

Assignment Judge to preside as a judge of a formalized vicinage or first appearance court, including a Central Judicial Processing (CJP) or similar court.” In 2005, Essex Assignment Judge Patricia Costello, after consulting with the Administrative Office of the Courts, concluded that the order permitted initial bails to be set by the judge assigned to CJP, although that Judge was not the vicinage Presiding Judge - Municipal Courts. In Essex, the Presiding Judge - Municipal Courts sat in the Remand Court. Accordingly, on June 21, 2005, Judge Costello entered an order authorizing the Judge assigned to CJP to set bail in matters other than homicide or extradition. In any event, bail at \$200,000 cash or bond was set by CJP Judge Watson with the consent of the Prosecutor. Bail was reviewed by Superior Court Judge Nancy Sivilli the next day and remained unchanged, again with the Prosecutor’s consent.

Based on a limited inquiry, there is no uniform practice for conducting the 24 hour bail reviews. Some judges conduct them on the record in the presence of a Public Defender and Assistant Prosecutor. Other judges review the files in chambers. All Essex judges execute a “Superior Court Judge 24-Hour Bail Review” form which reflects the status of CJP bail and any determination made by the Superior Court Judge. One judge goes on the record with the defendant present only in the event bail is increased. R. 1:2-1, requiring all trials, hearings of motions and other applications to be conducted in open court, does not appear to cover these 24 hour reviews. The reviews are neither “hearings on motions” or “other applications”.

R. 1:2-1 likewise does not appear to apply to motions resolved by consent. For example, in civil practice, consent orders are routinely signed and filed without appearances in open court. The filed orders constitute the record. Criminal practice

differs in that it relies more on court-generated forms than orders prepared by counsel. Thus, Judge Kennedy's execution of a Bail Determination slip on January 29, 2007, reducing bail from \$200,000 cash or bond to \$150,000 cash or bond with prosecutorial consent does not contravene any rule despite the absence of either an open court determination or other record indication of prosecutorial consent. In order to avoid possible confusion regarding the fact or scope of consent, a preferable practice would be to place all bail determinations on the record with prosecutorial consents offered in open court.

The \$300,000 bail set by Judge Michael Ravin at 7:35 a.m. on May 4, 2007, and later reviewed by Judge Teare, was at the limit of the range set forth in the bail schedule for the crimes charged. As reduced to \$150,000 by Judge Vena, it was at the low end of the range.

The essential facts surrounding the bail reduction by Judge Vena are clear:

1. Judge Vena signed the Bail Determination slip reducing bail in the belief that Assistant Prosecutor Rivera had consented to consolidation of the charges under the \$150,000 bail earlier consented to by her office;
2. Judge Vena's belief was based upon information conveyed to him by his court clerk;
3. The court clerk understood Rivera to have consented to consolidation and reduction based upon what she had been told by Montalvo in Rivera's presence.

What will forever remain unknown is what, if anything, Montalvo and Rivera actually agreed to on May 10, 2007, and what precisely Montalvo said to the court clerk in Rivera's presence that generated the understanding she conveyed to

Judge Vena. There is no doubt that, had the court clerk been told clearly that the Prosecutor did not consent to a bail reduction, the attorneys would have been sent to another judge that same day to argue the motion. Thus, miscommunication between the two attorneys and the confused or confusing message to the court clerk, coupled with a practice that did not require consents to be made on the record, resulted in the Prosecutor not having an opportunity to be heard on the bail reduction motion.

What would have occurred had the Prosecutor assigned to the Carranza cases appeared on the motion return date instead of Rivera is speculative. However, Judge Vena's bail determination was made with knowledge of defendant's criminal history, the nature of the charges, and an awareness that the Prosecutor had previously consented in January 2007 to bail of \$150,000 with knowledge that the victim's allegations included a history of sexual abuse extending over time and occurring in two municipalities.

There has been public criticism regarding the fact that a defendant charged with aggravated sexual assault on a minor was released on bail. That criticism reflects a profoundly flawed understanding of the right to bail. In State v. Johnson, 61 N.J. 351, 355-56 (1972) our Supreme Court wrote:

Historically, therefore, in New Jersey the right of the individual to bail before trial is a fundamental one. Certainly since 1844 at least, the courts have been under a mandate to allow bail in all criminal cases, including capital offenses, excepting only those instances "when the proof is evident or the presumption great. * * *

Obviously, the duty of the judiciary is to obey the mandate of the Constitution. To deny bail in defiance thereof is to punish an accused before conviction, and to ignore the presumption of innocence which attends every citizen charged with crime -- actions which are not tolerable under our system of justice.

The Court stressed that “release on bail is not simply a formal or automatic matter.” Id. At 364. It requires the exercise of sound discretion and a number of factors must be considered. However,

The discretion must be exercised reasonably, having a mind that the primary purpose of bail in this state is to insure presence of the accused at trial, and the constitutional right to bail should not be unduly burdened. Id.

Carranza was entitled to a reasonable bail that would insure his presence at trial on serious charges. In fact, he appeared when required at two hearings subsequent to posting bail. Thus, the “primary purpose of bail” under the New Jersey Constitution was satisfied.

Respectfully submitted,

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