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CPL 520.30: New York Supreme Court Holds that Defendant Has the Burden of Proving that Collateral Posted to Indemnify a Bail Bond Obligor is Not the Fruit of Criminal or Unlawful Activity

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CPL 520.30: New York Supreme Court holds that defendant has the burden of proving that collateral posted to indemnify a bail bond obligor is not the fruit of criminal or unlawful activity

When a criminal defendant first "comes under the control of a court," the court must, under New York law, release him on his own recognizance, remand him to custody, or fix bail.[1] If bail has been granted and posted, the court may, upon application of the prosecutor, conduct a hearing to examine the "sufficiency" of the cash or bond posted as bail.[2] As a result of these hearings, courts have rejected bail bonds when the capital used to indemnify the

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[1] CPL § 510.10 (McKinney 1984). Defendants may apply for bail at any time, even after being remanded to custody. *Id.* § 510.20.1. In certain situations, the hearing judge has substantial discretion in determining whether, and in what amount, to grant bail. *Id.* § 510.30. The court must consider, however, factors such as the defendant's criminal record, employment history, and community ties in the determination of bail amounts. *Id.* § 510.30.2(a).

[2] *Id.* § 520.30. That section provides:

> 1. Following the posting of a bail bond and the justifying affidavit or affidavits or the posting of cash bail, the court may conduct an inquiry for the purpose of determining the reliability of the obligors or person posting cash bail, the value and sufficiency of any security offered, and whether any feature of the undertaking contravenes public policy; provided that before undertaking an inquiry, of a person posting cash bail the court, after application of the district attorney, must have had reasonable cause to believe that the person posting cash bail is not in rightful possession of money posted as cash bail or that such money constitutes the fruits of criminal or unlawful conduct. The court may inquire into any matter stated or required to be stated in the justifying affidavits, and may also inquire into other matters appropriate to the determination, which include but are not limited to the following: (a) The background, character and reputation of any obligor, and, in the case of an insurance company bail bond, the qualifications of the surety-obligor and its executing agent; and (b) The source of any money or property deposited by any obligor as security, and whether any such money or property constitutes the fruits of criminal or unlawful conduct; and (c) The source of any money or property delivered or agreed to be delivered to any obligor as indemnification on the bond, and whether any such money or property constitutes the fruits of criminal or unlawful conduct; and (d) The background, character and reputation of any person who has indemnified or agreed to indemnify an obligor upon the bond; and whether any such indemnitor, not being licensed by the superintendent of insurance in accordance with the insurance law, has within a period of one month prior to such indemnity transaction given indemnification or security for like purpose in more than two cases not arising out of the same transaction; and (e) The source of any money posted as cash bail, and whether any such money con-

bond company is determined to be "the fruit[ ] of criminal or unlawful conduct."[3] Bail arrangements have been disallowed when, for example, a defendant used $35,000 in cash which was previously rejected by the court as being suspicious in origin to secure a bail bond,[4] or when a pastor, in violation of his corporate powers, pledged $100,000 of church funds to secure a bond for the release of a parishioner.[5] Recently, in *People v. Esquivel*,[6] the Supreme Court, New York County rejected a bail bond supported by collateral of unquestionably lawful origins,[7] based on its suspicions about the motivation of the indemnitors in offering their assets as collateral.[8] In doing so, the court ruled that the defendant has the burden of proving, by a preponderance of the evidence, that the collateral posted to indemnify a bail bond obligor[9] is not the fruit of criminal or unlawful conduct.[10] In addition, the court held that it is authorized to disapprove the bail bond if it finds that any aspect of the transaction, including provisions for indemnification of the obligor in case of forfeiture,[11] contravenes public policy.[12]

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stitutes the fruits of criminal or unlawful conduct; and (f) The background, character and reputation of the person posting cash bail.

2. Upon such inquiry, the court may examine, under oath or otherwise, the obligors and any other persons who may possess material information. The district attorney has a right to attend such inquiry, to call witnesses and to examine any witness in the proceeding. The court may, upon application of the district attorney, adjourn the proceeding for a reasonable period to allow him to investigate the matter.

3. At the conclusion of the inquiry, the court must issue an order either approving or disapproving the bail.

Id.

3 *Id.*

4 Johnson v. Crane, 171 A.D.2d 537, 539, 568 N.Y.S.2d 22, 23 (1st Dep't 1991).

5 *In re* CPL § 520.30 Inquiry, 78 Misc. 2d 244, 356 N.Y.S.2d 749 (Sup. Ct. Bronx County 1974).

6 158 Misc. 2d 720, 601 N.Y.S.2d 541 (Sup. Ct. N.Y. County 1993).

7 *Esquivel*, 158 Misc. 2d at 731, 601 N.Y.S.2d at 547-48.

8 *Id.* at 731, 601 N.Y.S.2d at 548.

9 *See* CPL § 500.10.11 (McKinney 1984). " 'Obligor' means a person who executes a bail bond on behalf of a principal and thereby assumes the undertaking described therein." *Id.* A "principal" is a defendant or other party who may be compelled to appear before the court to enable the exercise of jurisdiction in a criminal proceeding. *Id.* § 500.10.1.

10 *See id.* § 520.30.1.

11 *Id.* § 540.10.1. "If, without sufficient excuse, a principal does not appear when required," bail is forfeited to the State. *Id.* In addition, if a criminal defendant who has been released on bail fails to make a required appearance, he may be criminally liable under bail jumping statutes. N.Y. PENAL LAW §§ 215.55-.57 (McKinney 1984).

12 *Esquivel*, 158 Misc. 2d at 730, 601 N.Y.S.2d at 547.

The defendant, Leonardo Esquivel, was arrested and charged with possession of two kilograms of cocaine that were recovered along with $98,000 in cash, jewelry, and "various Colombian passports."[13] Bail was set at $125,000, and a bond in that amount was subsequently posted by the surety, International Fidelity Insurance Company,[14] in order to secure the defendant's release.[15] According to the terms of the bond, the surety was to be indemnified in case of forfeiture by an interest in the Queens County home of Domingo and Guillermina Rodriguez.[16]

Justice Leslie Crocker Snyder exercised her discretionary authority[17] to conduct a bail sufficiency hearing.[18] At the hearing, Mr. and Mrs. Rodriguez testified that the defendant was their real estate agent and had called from jail to ask them to post bail.[19] Justice Snyder found the Rodriguezes' decision to post their house as collateral for a business acquaintance "unworthy of belief."[20] Based on this skepticism, and some minor inconsistencies between the Rodriguezes' testimony and the defendant's statements to police,[21] the court categorized the testimony as "perjured"[22] and

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13 *Id.* at 721, 601 N.Y.S.2d at 542.

14 Since the principal himself may be an obligor, CPL § 500.10.11 (McKinney 1984), the term "surety" in this context refers to any bail bond obligor who is not a principal. *Id.* § 500.10.12.

15 *Esquivel*, 158 Misc. 2d at 722, 601 N.Y.S.2d at 542.

16 *Id.*

17 *See* CPL § 520.30.1 (McKinney 1984). This section states that "[f]ollowing the posting of a bail bond . . . the court *may* conduct an inquiry" into "the value and sufficiency of any security offered." *Id.* (emphasis added); *supra* note 2 (setting forth CPL § 520.30).

18 *Esquivel*, 158 Misc. 2d at 721, 601 N.Y.S.2d at 542.

19 *Id.*

20 *Id.* at 723, 601 N.Y.S.2d at 543. According to the defendant's attorney, the Rodriguezes claimed that they were merely doing "what they hoped someone else would do for their son if he were in trouble." Telephone Interview with Noah Lipman, Esq., Attorney for the defendant (Sept. 1993). Nevertheless, the court found an insufficient personal relationship between the defendant and the indemnitors to justify the pledging of their home. *Esquivel*, 158 Misc. 2d at 723, 601 N.Y.S.2d at 542-43.

21 *Id.* at 723, 601 N.Y.S.2d at 542. For example, Mrs. Rodriguez testified that Esquivel had given her his home address in October 1990; however, according to the police, the defendant did not reside there until July of 1991, nine months later. Similarly, the Rodriguezes testified that they visited Esquivel at his office eight months before the time he told police that he began working there. *Id.* Although Justice Snyder ruled that contradictions such as these indicated that the witnesses had committed perjury, it is submitted that this is clearly not the only inference that can be taken from these inconsistencies. For instance, the witnesses might have confused the exact dates, or might have been hampered by limited English language skills. The defendant might have misstated this information to the Rodriguezes, or lied to the police when arrested. The dates might have been misrecorded on the police report. In any

concluded that "either some unknown arrangement exists between the Rodriguez family and the defendant or that the defendant induced the family to post their home as collateral through threats or bribes."[23] On these grounds, Justice Snyder invalidated the posting of the bail bond as against public policy.

In order to reject the posted bail bond without any actual proof of impropriety, it was necessary for Justice Snyder to shift the burden of proof to the defendant.[24] Her rationale for doing so was based on the proposition that the function of bail is to secure a defendant's appearance in court.[25] Drug defendants, the court asserted, may have "vast amounts" of illegal resources of which the court has no knowledge when determining appropriate bail amounts, and if the posted funds are the fruit of criminal or unlawful conduct, a defendant may choose to forfeit the collateral

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event, the mere existence of these inconsistencies is far from convincing evidence that the witnesses were committing perjury.

22 *Esquivel*, 158 Misc. 2d at 731, 601 N.Y.S.2d at 548. The court's finding raises substantial questions. If the Rodriguezes were found to be "perjurers," would this be an official determination of criminal culpability? *See* N.Y. PENAL LAW §§ 210.05-.15 (McKinney 1984). Since this clearly was not the court's intention, its "finding" amounted simply to a perception of the witnesses' credibility. It is submitted that the mere perception of "indicia of coercion," 158 Misc. 2d at 731, 601 N.Y.S.2d at 547, is too slight a basis for deeming the entire bail arrangement "unlawful" or against public policy, without supporting evidence. Indeed, in People v. Rosario, N.Y. L.J., Jan. 5, 1994, at 23 (Sup. Ct. Bronx County 1994), the court accepted $7500 cash bail from an individual who was unacquainted with the defendant and gave false information to the police about his criminal record and the source of the money. The witness, Ernesto Gonzalez, bought some property in the Dominican Republic, offered by the defendant's family for the purpose of raising bail, and arranged, at their request, to post the purchase money directly with the court. Gonzalez lied about his criminal record and the source of the cash and had been living well beyond the means indicated by his reported income. The court found this evidence insufficient to reject bail under § 520.30, stating that the prosecution's case was based on "highly speculative conclusions of [Gonzalez's] . . . wrongful possession of the bail funds." *Id.* at 23. Because the connection between the indemnitors and the defendant is stronger in *Esquivel* than in *Rosario*, and because the situation in *Esquivel* is arguably less suspicious, it is submitted that the conclusions of impropriety made by the court in *Esquivel* are at least as speculative.

23 *Esquivel*, 158 Misc. 2d at 724, 601 N.Y.S.2d at 543.

24 The question of the burden of proof was one of first impression in this case. *Id.* at 721, 601 N.Y.S.2d at 541. The only statutory indication of a burden of persuasion requires the prosecutor to provide the court with "reasonable cause to believe . . . that such money constitutes the fruits of criminal or unlawful conduct" as a condition precedent to convention of a bail sufficiency hearing. CPL § 520.30.1 (McKinney 1984). The court failed to state whether this statutory burden was met in *Esquivel*. *See infra* notes 39-43 and accompanying text (discussing reasonable cause requirement in context of bail bonds).

25 *Esquivel*, 158 Misc. 2d at 727, 601 N.Y.S.2d at 545.

and flee.[26] Additionally, defendants are "uniquely suited to know the source of the bail funds";[27] thus, despite contrary language in the statute, the court posited that the prosecution should be spared the burden of lengthy investigations which could extend pretrial detention periods.[28] Justice Snyder concluded that the practice of placing the burden of persuasion on a criminal defendant "in contexts collateral to the question of guilt is well established under New York law."[29]

It is submitted that there are significant problems with the court's rationale. First, the "hidden resources" rationale relates only to the sufficiency of bail *amounts*, which was not an issue before the *Esquivel* court;[30] therefore, Justice Snyder's reliance on this argument in determining that the Rodriguez home was improperly pledged was inappropriate. In addition, the court mistakenly assumed that placing the burden of proof on the defendant, rather than on the State, would provide additional assurance that the defendant does not possess hidden resources. It is possible, however, that shifting the burden, and thus relieving the prosecution of the need to investigate a defendant's finances, could actually enhance a defendant's ability to conceal illicit resources.

Further, the argument that a defendant is "uniquely suited" to know whether he has engaged in criminal or unlawful activity may be jurisprudentially inadequate in the criminal context. When the alleged conduct is criminal in nature, such burden shifting creates a de facto presumption of culpability that the defend-

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[26] *Id.*

[27] *Id.* at 728; 601 N.Y.S.2d at 545.

[28] *Id.* According to the court, to require a defendant who submits bail funds acquired from legitimate sources to remain incarcerated while the People conduct a lengthy investigation would be unfair. *Id.* at 728, 601 N.Y.S.2d at 545-46. Because the defense must routinely provide detailed information regarding the source of bail funds, *id.*, an inquiry by the prosecutor arguably would not impose significant additional burdens. *See infra* note 37 and accompanying text (discussing burden of proof allocation). Moreover, the statute specifically contemplates an investigation by the People: it allows the court, "upon application of the district attorney, [to] adjourn the proceeding for a reasonable period to allow him to investigate the matter." CPL § 520.30.2 (McKinney 1984). In addition, relieving the prosecutor of any investigatory burden would make asset-concealment by defendants more, not less, feasible.

[29] *Esquivel*, 158 Misc. 2d at 728, 601 N.Y.S.2d at 546 (citing People v. Rosa, 65 N.Y.2d 380, 387, 482 N.E.2d 21, 25, 492 N.Y.S.2d 542, 547 (1985)).

[30] In a bail sufficiency inquiry under this statute, the court is empowered only to "issue an order either approving or disapproving the bail." CPL § 520.30.3 (McKinney 1984). Therefore, the bail amount, which had been set prior to this hearing, was not subject to revision here.

ant would have to overcome in order to post bail.[31] A defendant who has lawfully arranged bail, but cannot meet the burden of proof, would suffer the consequences of culpability even though, as here, the prosecutor has not demonstrated his culpability to the court.[32]

It is true, as Justice Snyder noted, that the burden in collateral matters is often placed on a criminal defendant.[33] Thus, the relevant question becomes whether the legality of the source of the defendant's bail funds is truly collateral to the issue of guilt. It is foreseeable that in many cases, especially those involving cash bail posted by those accused of narcotics sales, larceny, or extortion, defendants might effectively have to prove their innocence in order to establish the legitimacy of their bail offerings.[34] To do so, such defendants will have to meet a higher standard in a pretrial hearing, because of this burden shifting, than they will face at trial.[35] Although placing the burden of proof for certain issues on the defendant is accepted in criminal jurisprudence, the cases supporting such burden shifting under New York law all involve matters less related to the question of criminal culpability than those involved in *Esquivel*.[36]

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[31] The effect of such a de facto presumption can be seen in *Esquivel*. The court ruled that because the circumstances "suggest" that the defendant is "capable of corrupting the indemnitors and has a compelling motive to do so," it "*must conclude*" that he has done so. 158 Misc. 2d at 723-24, 601 N.Y.S.2d at 543 (emphasis added). It would appear that without the benefit of such a presumption, capacity and motive would have to be accompanied by some evidence of commission to result in a finding of culpability.

[32] In actions to determine criminal culpability, defendants are guaranteed a presumption of innocence under New York law, CPL § 300.10.2 (McKinney 1984), and by the Due Process Clause of the Fourteenth Amendment. *See* People v. Sickles, 156 N.Y. 541, 547, 51 N.E. 288, 290 (1898). The fact that a defendant is uniquely suited to know whether he has committed the substantive crime charged is clearly insufficient justification for shifting the burden of proof on guilt or innocence.

[33] N.Y. PENAL LAW § 40.00 (McKinney 1984). For example, criminal defendants in New York have the burden of proving any affirmative defenses, such as duress, *id.*, or entrapment, *id.* § 40.05, by a preponderance of the evidence. *Id.* § 25.00.2.

[34] For example, a defendant accused of selling drugs could have to prove that the resources at his disposal for bail were not acquired by selling drugs.

[35] *See* N.Y. PENAL LAW § 25.00 (McKinney 1987). At trial, it is the People who have the burden of disproving any defense, other than affirmative defenses, beyond a reasonable doubt. *Id.*

[36] *See, e.g.*, People v. Rosa, 65 N.Y.2d 380, 482 N.E.2d 21, 492 N.Y.S.2d 542 (1985). In *Rosa*, the New York Court of Appeals held that when a defendant moves to suppress a statement made to police outside the presence of counsel on the grounds that he was represented on a pending charge of which the police had knowledge, he has the burden of proving such prior representation. *Id.* at 386, 482 N.E.2d 21, 26, 492

Defendants should not be free to use criminal proceeds to satisfy bail requirements. Nevertheless, it would be more consistent with traditional notions of defendants' rights, especially where criminal conduct is alleged for the prosecution to have the burden of showing that bail funds were illegally obtained.[37]

The other holding in *Esquivel*, that the court may reject a bail offering based on a finding of impropriety in a tertiary indemnification arrangement,[38] raises questions about the scope and application of section 520.30 of the CPL. The CPL requires that the court to have "*reasonable cause* to believe that the person posting cash bail is not in rightful possession of money posted as cash bail or that such money constitutes the fruits of criminal or unlawful conduct" in order to convene a sufficiency hearing, "*after application of the district attorney*."[39] Although the CPL is unclear as to whether this reasonable cause requirement applies where bail has been posted in bond form, there is significant authority to suggest

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N.Y.S.2d at 546. In People v. Berrios, 28 N.Y.2d 361, 367, 270 N.E.2d 709, 712, 321 N.Y.S.2d 884, 888 (1971), the court held that a defendant who challenges the admissibility of physical evidence has the burden of proving that the evidence should not be admitted. *Id.* at 367, 270 N.E.2d at 712, 321 N.Y.S.2d at 888 (citations omitted). Although the evidence, once admitted, may weigh heavily on the issue of culpability, the question of admissibility itself is arguably less related to culpability for illegal acts than whether a defendant has arranged bail unlawfully.

The defendant may also have the burden of proving certain affirmative defenses in New York, as long as the prosecution is not thereby relieved of proving any element of the alleged crime. Patterson v. New York, 432 U.S. 197, 211-12 (1977). *See, e.g.*, People v. Patterson, 39 N.Y.2d 288, 347 N.E.2d 898, 383 N.Y.S.2d 573 (1976) (extreme emotional disturbance defense); People v. Kohl, 72 N.Y.2d 191, 527 N.E.2d 1182, 532 N.Y.S.2d 45 (1988) (insanity defense); People v. Donovan, 53 A.D.2d 27, 385 N.Y.S.2d 385 (3d Dep't 1976) (requiring defendant to prove he did not commit, solicit, or aid in commission of felony murder).

37 The prosecution traditionally bears the burden of proof when criminal conduct is alleged. *See supra* note 35. In addition, the New York Court of Appeals has suggested that "it is most reasonable to require [the party asserting a claim] to bear the burden of proof of that wrong." *Berrios*, 28 N.Y.2d at 367, 270 N.E.2d at 713, 321 N.Y.S.2d at 888. Section 520.30 requires that the hearing be initiated by the prosecutor. *See supra* note 2 and accompanying text. Thus, it appears logical to place that burden on the prosecution.

The *Esquivel* court suggests, however, that assigning the burden of proof to defendants actually *protects* their rights, by shielding them from lengthy prosecutorial investigations while they await bail. 158 Misc. 2d at 728, 601 N.Y.S.2d at 545-46. This contradicts the court's stated purpose of uncovering "hidden resources," *see supra* notes 26-28 and accompanying text, because those resources will hardly come to light in the *absence* of prosecutorial investigations.

38 *Esquivel*, 158 Misc.2d at 731, 601 N.Y.S.2d at 547-48.

39 CPL § 520.30.1 (McKinney 1984) (emphasis added).

that it does.[40] Nevertheless, after confirming that this standard applies,[41] the court failed to determine whether the standard was

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[40] In his official practice commentary on this section, Judge Bellacosa indicated that reasonable cause must always be demonstrated in order to convene a § 520.30 hearing. CPL 520.30 commentary at 57 (McKinney 1984); *see also* Abraham Abramovsky, *Bail Source Hearings*, N.Y. L.J., July 29, 1992, at 3 ("Absent this reasonable cause, the court cannot conduct a sufficiency hearing and cannot *sua sponte* order the defendant detained until a hearing has been conducted.").

[41] *Esquivel*, 158 Misc. 2d at 725-26, 601 N.Y.S.2d at 544. The difference in treatment of cash and bail bonds under the statute may be a result of historical differences between these forms of bail. *See id.*; *see also* People v. Sherman, 132 Misc. 2d 15, 15-16, 502 N.Y.S. 2d 914, 915 (Sup. Ct. N.Y. County 1986) (describing various types of bail bonds). At common law, cash bail was not recognized; it is a purely statutory creation. Badolato v. Molinari, 106 Misc. 342, 345, 174 N.Y.S. 512, 514 (Sup. Ct. Kings County 1919). The purpose of bail is to ensure the defendant's appearance at trial. People v. Dizdar, 91 Misc. 2d 23, 25, 397 N.Y.S.2d 340, 341 (Sup. Ct. N.Y. County 1977). Historically, the securing function of a bail bond was satisfied by the surety's personal obligation to deliver the principal to the court when required. *Id.*; *Badolato*, 106 Misc. at 345-46, 174 N.Y.S.2d at 514 (citation omitted). With cash bail, however, it is the threat of forfeiture, not the obligation of the surety, that is relied upon to ensure the principal's appearance. People v. Castro, 119 Misc. 2d 787, 793, 464 N.Y.S.2d 650, 655-56 (Sup. Ct. Kings County 1983) (citing Moloney v. Nelson, 158 N.Y. 351, 355, 53 N.E. 31, 32-33 (1899)). In 1984, however, the New York Legislature amended the Criminal Procedure Law to eliminate many of the remaining differences in the legal treatment of cash and bail bonds. *See Esquivel*, 158 Misc. 2d at 725, 601 N.Y.S.2d at 544. For example, those who post cash bail must now undertake to ensure the principal's presence when the principal is required in court. CPL § 520.15(2)(e) (McKinney 1984).

Justice Snyder rationalized the apparent distinction between cash bail and bail bonds in the language of § 520.30 in terms of the State's interests in these two types of securites. 158 Misc. 2d at 726, 601 N.Y.S.2d at 544. Since the State is already in possession of the collateral when cash bail is posted, it is substantially protected against the defendant's flight by the risk of forfeiture, *id.*, and thus reasonable cause should be required to prompt an examination of the source of cash bail. With bail bonds, on the other hand, courts historically needed more discretion to question the sufficiency of bail since, if the obligor was unreliable, the State would not be adequately protected against the defendant's flight. *See id.*

Justice Snyder correctly stated, however, that "it makes no logical sense for a court to distinguish between cash bail and bail bonds in deciding whether to order an examination of surety where it appears that the *collateral* may be the fruit of unlawful conduct." *Id.* (emphasis added). Apparently, this means that if the surety is reliable (and there was no question that International Fidelity was unreliable), then the State is equally guaranteed its forfeiture if the defendant flees. Thus, as with cash bail, an inquiry into the underlying collateral should be undertaken only when reasonable cause exists. This position is supported by the official practice commentary to § 520.30. *See supra* note 40 and accompanying text. The commentary suggests that reasonable cause may be required *whenever* a bail sufficiency hearing is requested. *Id.*; *see* Abramovsky, *supra* note 40. However, there is no discussion in the *Esquivel* opinion of whether this reasonable cause requirement was met before the hearing was convened.

If the distinctions between cash bail and bail bonds were meant to be diminished or extinguished under New York law, it is arguable that the limits of a sufficiency

satisfied under the facts of *Esquivel*. In addition, despite the statutory requirement that the prosecutor initiate the hearing application,[42] the court indicated it had authority to do so sua sponte.[43] Thus, the very decision to convene the hearing in this case may have been beyond the scope of section 520.30.

Esquivel is the first case to extend the "public policy" provision of section 520.30[44] to a tertiary agreement between a principal and an indemnitor on a bail bond, under circumstances in which there was no actual proof of unlawfulness.[45] In fact, an-

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inquiry may be determined by the state's interest in guaranteeing that bail will be forfeited if the principal does not appear. In Barnes v. Cohen, 45 A.D.2d 837, 358 N.Y.S.2d 1 (1st Dep't 1974), the court stated that "if a qualified company is willing to write a bond, then the requirements are fulfilled for the purpose of bail, which is to guarantee the appearance of the defendant at the trial." *Id.* at 838, 358 N.Y.S.2d at 2. The court also stated, however, that "CPL § 520.30 . . . is directed primarily toward the obligor . . . rather than the underlying indemnification, except to the extent of any public policy question." *Id.* The *Esquivel* court described the issue there in terms of public policy ramifications. 158 Misc. 2d at 729-30, 601 N.Y.S.2d at 546-47.

42 *See supra* note 2 (setting forth CPL § 520.30); *see also In re* CPL § 520.30 Inquiry, 78 Misc. 2d 244, 245, 356 N.Y.S.2d 749, 750 (Sup. Ct. Bronx County 1974) ("The District Attorney, pursuant to § 520.30 . . . questioned the sufficiency of the collateral and asked that the indemnitor . . . justify such security."); Abramovsky, *supra* note 40 (stating that courts cannot initiate bail sufficiency hearings sua sponte).

43 *See Esquivel*, 158 Misc. 2d at 726, 601 N.Y.S.2d at 544-45. The court stated that "[i]f *the court or the People* have a rational basis for inquiring into the reliability of the obligors or the source of the collateral posted . . . , a surety hearing should be ordered by the court." *Id.* (emphasis added).

44 CPL § 520.30 (McKinney 1984). This section provides, in pertinent part, that "the court may conduct an inquiry for the purpose of determining the reliability of the obligors or person posting cash bail, the value and sufficiency of any security offered, and *whether any feature of the undertaking contravenes public policy*." *Id.* (emphasis added). Since the reliability of the obligor and the sufficiency of the posted bond itself were not questioned in this case, *see supra* note 40, it is this last clause on which Justice Snyder relied for the authority to question the sufficiency of bail here. *Esquivel*, 158 Misc. 2d at 729-30, 601 N.Y.S.2d at 546-47.

45 In Johnson v. Crane, 171 A.D.2d 537, 568 N.Y.S.2d 22 (1st Dep't 1991), the court interpreted § 520.30 as granting "substantial discretion" to inquire into the source of collateral pledged as security on a bail bond. *Id.* at 538, 568 N.Y.S.2d at 23. In *Crane*, however, the court found that the $35,000 pledged as security by the defendant's grandmother was the same money previously offered as cash bail and rejected because of its suspicious origin. *Id.* at 538-39, 568 N.Y.S.2d at 23. This "facile manipulation" of funds to support a bail bond was held to be within the scope of the court's § 520.30 inquiry. *Id.* at 539, 568 N.Y.S.2d at 23. In *In re CPL Inquiry*, a bond was rejected on public policy grounds when a minister, *in violation of his corporate powers*, pledged $100,000 of church funds as indemnification on a bond to secure the release of a church member. 78 Misc.2d at 244, 356 N.Y.S.2d at 749. Thus, the public policy provision of § 520.30 has never been used to reject a posted bail bond based on an indemnification arrangement that was not clearly unlawful. Also, it is arguable that when the State is protected by the obligor's reliability, examination of the underlying indemnification arrangement is outside the court's purview, *see supra* note 41,

other recent supreme court decision held that bail posted in practically analogous circumstances was acceptable.[46] Furthermore, the court's inquiry extended beyond the enunciated scope of the CPL because there was no allegation that the Rodriguez home itself represented the "fruits of criminal or unlawful conduct" or that the couple had any background in, or reputation for, such conduct.[47]

The combination of the two holdings in *Esquivel* enables judges to disallow a bail bond posted by a reputable surety and secured by a pledge of real property of unquestionable provenance, without any actual proof of impropriety.[48] This may create a de facto pretrial burden on defendants to prove innocence on any collateral charges involving the unlawful accumulation of capital. Defendants who are unable to meet this standard would suffer the consequences of the allegedly unlawful conduct, in the form of denial of bail, whether they had acted unlawfully or not.

Furthermore, Justice Snyder's decision in this case expands the scope of CPL section 520.30 beyond any previous judicial ap-

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especially when the arrangement is not explicitly shown to be illegal, as in *In re CPL Inquiry*.

[46] People v. Rosario, N.Y. L.J., Jan. 5, 1994, at 23 (Sup. Ct. Bronx County 1994). In *Rosario*, the court held that a supplier of cash bail was "in rightful possession of the money he posted," even though he had never met the defendant, and had been induced to post bail in circumstances at least as tenuous as those in *Esquivel*. *Id.* at 24.

[47] *See supra* note 2 (CPL § 520.30). Section 520.30 sets out six specific areas of inquiry "appropriate to the determination" of bail sufficiency. *Id.* Two of these relate to cash bail only, and thus are not applicable here. *Id.* Although these categories clearly do not limit the scope of inquiry, they do provide clear guidelines. Because the obligor's reliability, the background of the indemnitors, and the provenance of the collateral were unquestioned in the instant case, there is no suggestion that the object of inquiry in *Esquivel* falls within any of the four remaining categories.

[48] The Appellate Division rejected Esquivel's appeal without comment or publication. Telephone Interview with Noah Lipman, Esq., Attorney for the defendant (Sept. 1993). It is axiomatic that no inferences on the merits of a case should be drawn from a decision not to consider an appeal. However, the fact that this case had been substantively concluded by the time the appeal was considered should not in itself mandate rejection. Although this particular controversy had become moot by that time, these circumstances typify the classical exception to the mootness doctrine: the effect of an improper bail ruling tends, by the nature of its brief duration, to evade review, yet it is capable of repetition under similar circumstances. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 125 (1973); Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714, 409 N.E.2d 876, 878, 431 N.Y.S.2d 400, 402 (1980); Adirondack League Club v. Board of Black River Regulating Dist., 301 N.Y. 219, 222, 93 N.E.2d 647, 649 (1950) (stating that although immediate circumstances do not warrant, state occasionally decides moot questions which arise with frequency). In addition, the apparent conflict between the holdings in *Esquivel* and *Rosario*, *supra* notes 22, 46, militates in favor of appellate review of these issues.

plication. It is possible that in creating this dramatic precedent, the court was merely attempting to strike down a bail determination that the court deemed inadequate to ensure the defendant's presence at trial.[49] The result, however, established a precedent for a presumption of unlawfulness that defendants must overcome if bail arrangements are to be sustained under CPL section 520.30.

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[49] *See Esquivel*, 158 Misc. 2d at 731, 601 N.Y.S. 2d at 547 (indicating Court's fear that defendant was a flight risk). In *Johnson*, 171 A.D.2d at 539, 568 N.Y.S.2d at 23, the court stated that "the People have no appeal from an order setting bail." *Id.*; *see* CPL § 450.20 (McKinney 1984). Thus, since the bail *amount* could not be altered in this CPL 520.30 hearing, only the complete rejection of the posted bail could ensure the defendant's continued detention.