RESEARCH IN Corrections

Volume 1, Issue 3 Octo

Supported by the Robert J. Kutak Foundation and the National Institute of Corrections

l Release: ts, Issues, Strategies rovement

tevens H. Clarke

with reviews by harles Worzella, Bowne J. Sayner, hael Schumacher

A series reporting the results of applied research in corrections for administr tors

RESEARCH IN *Corrections*

Volume 1, Issue 3 **October 1988**

Supported by the Robert J. Kutak Foundation and the National Institute of Corrections

115657

115658

115659

EXPERIENCE WITH PRETRIAL RELEASE IN MILWAUKEE COUNTY

Charles Worzella
Research Director, Wisconsin Correctional Services

Bowne J. Sayner
Assistant Executive Director, Wisconsin Correctional Services

The comments provided in this response reflect several years of experience in delivering pretrial services to Milwaukee County. Our perspective is that of a private nonprofit agency under contract to the local criminal justice system. We have considered the study in terms of its relevance to our local scene and to the operation of pretrial release services in general.

Clarke's report provides a challenge to practitioners. It has special value in its relevance and usefulness on the local level, and it may spur pretrial release (PTR) agencies to reexamine their own internal policies and procedures and reevaluate the current use of their own limited resources. It also points to critical areas of pretrial release practice that are in need of further research.

The information presented will be helpful to practitioners who wish to bring themselves up to date on the latest research findings. It is also important for PTR agencies to circulate this kind of information to local criminal justice decisionmakers and funding sources. It can help the agencies by enabling them to determine how they compare with others around the country, and by informing them about the validity of local concerns and the nature of proven methods being used in PTR services to expand release opportunities and to predict and control risk.

There are three aspects concerning relevance that PTR agencies need to consider when reviewing this report:

1. Are the research findings consistent with, or do they seem to contradict, the agency's own programmatic experiences? Do they make sense in terms of its own results?
2. What bearing will the findings have on the agency's operations? What are the implications for current practices? Are those practices likely to change as a result of this information?
3. Finally, is it feasible for the agency to provide a practical demonstration of the principles suggested in the review?

To be relevant for a particular PTR agency, the findings have to be interpreted in light of the jurisdiction's current policies and practices, especially those that have a bearing on existing opportunities for release. The practitioner must view these findings as they relate to such factors as (a) the proclivities of the local

legal culture that determine the amount and kind of risk local authorities are willing to tolerate; (b) the strength of support provided by the diverse elements of the local legal culture for the administrative and program efforts of the PTR to innovate and spearhead system change; and (c) the existence of a mechanism or mechanisms, i.e., committees, task forces etc., that can explore and examine the issues and support changing or expanding roles.

The Milwaukee response deals primarily with three of the areas of concern in Clarke's paper:

1. Opportunities for pretrial release.
2. Controlling risks involved in pretrial release.
3. Effectiveness of PTR agencies (in controlling the above).

Our response in these areas not only reflects our experience with these issues, but also points out other factors that were not addressed by the author.

The paper presents a historical review, research findings, interpretation of those findings, and suggestions of strategies for improving pretrial release. Most helpful to our jurisdiction is the concentration of research in the areas that help us (1) to better negotiate the fine lines between increasing opportunities for release and reducing the risk of pretrial misconduct and (2) to more effectively distribute our limited pretrial resources to achieve better program results. To allocate PTR resources in a way that facilitates release of defendants who would not normally be released before trial, the PTR agencies must have the ability to regulate several factors:

1. They must have a way of identifying good bail risks and have general consensus as to what constitutes low risk.
2. They must have the commitment of the judiciary to act appropriately to release good risks.
3. There must be a mechanism to provide/assure pretrial controls (conditions) for moderate-risk defendants. There must be pretrial release supervision, bail monitoring resources, court notification services, and other program components to encourage the expansion of release opportunities.

A little-talked-about, but essential element of any PTR agency is its role as an exchange service for information about how the local criminal justice process works. Informing the defendants as to their status and obligations, relative to the process, pointing out the availability of social services, etc., are important functions of the PTR. By assuming this role, the PTR agency acts as a mediator between system problems and the defendant, who often faces great difficulties brought on by his or her own inadequacies and lack of understanding and/or motivation.

Over time, PTR agencies come to be evaluated in a number of ways. Role and goals are not always understood, or they may change as new functions are subsumed or assigned. Many PTR agencies have competing or conflicting goals and expectations placed on them. They are often given the concurrent responsibilities of reducing the jail population, strictly enforcing conditions of bail, lowering the risk of failure, and increasing opportunities for release.

Each PTR agency will find relevance in this review, based on who its constituents are, what its perceived goals are, and how it is administratively placed within the jurisdiction. Some agencies strictly provide bail information and coordinate the criminal justice response to the bail issue. Others take on elaborate planning and police roles and are integral members of jail reduction teams. Still others see their roles as social service providers who assist defendants to reshape or reorganize their lives.

OPPORTUNITY FOR PRETRIAL RELEASE

Pretrial release agencies in general, and those in Milwaukee specifically, are concerned with increasing the opportunities for release. Quite often, PTR agencies find themselves leading this effort in their jurisdictions. Research is vitally important to provide a sound rationale for expanding opportunities for release and to help promote the development of policies for expanding release within the local legal culture.

The research report discusses two theories of pretrial release: (1) that bond deters nonappearance, and (2) that community ties reduce failure to appear. Neither of the theories is supported by research, and both tend to be problematic for PTR agencies. The use of bail bond tends to create a situation of *de facto* preventive detention when applied to low-income offenders. Milwaukee's adherence to local bail guidelines is not strong enough to assure consistent application in the bail-setting process. We find widely varying policies regarding the use of bail bond by judicial decisionmakers. As a result, pretrial release staffs are compelled to vary their approach, depending on which judicial officer is presiding. In Milwaukee, we find that:

1. Judges support a comprehensive use of bail bond.
2. Bond is rarely set with the defendant's ability to pay in mind.
3. Thresholds exist in terms of charge severity and criminal record that trigger bail bond; these thresholds vary with judge and charge severity.

The use of community ties to measure risk of nonappearance is given varying amounts of weight by local judges, even though bail-guidelines research in Milwaukee indicates that community ties are not significantly related to failure to appear. We would support research to test the validity of the bail-bond theory and to retest the validity of the community-ties theory in this and other jurisdictions.

The report's findings regarding opportunity for pretrial release provide several points of comparison for PTR agencies and discuss several issues of concern. It is always of interest to compare one's release rates with those of other jurisdictions, because this allows a jurisdiction to place itself philosophically with other like areas. Yet, at best, such a comparison can only be used to measure in general terms, over all levels of pretrial release activity. It is not very meaningful to compare one jurisdiction with another, unless one also has information regarding types of crime, pretrial release programs, jail overcrowding situations, etc. It is more useful to measure a single jurisdiction over time. Important measures

are those that compare release activity from one period of time to another (month to month, between judges, and by volume and type of charges issued).

It is important to look at the research findings relating to opportunities for pretrial release in the context of the setting in which PTR services are offered. The influence of a community's legal culture must be analyzed. In general, the judiciary in Milwaukee sets the standard for pretrial release in the absence of court-ordered jail reduction or strong input from other governmental policymakers. There are no agreed-upon standards of release, nor is there any strong direction from a chief judge in this community. Pretrial release decisions become subject to the personal preferences of the presiding judge or bail commissioner. The typical bail-setting session is, as Clarke describes it, "performed under hectic conditions at a court hearing which is brief and based on very limited information, resulting in initial conditions which are rarely changed."

Typically, these conditions prevail at precisely the point when PTR agencies should have the greatest impact on reducing bail risk and disparity in bail setting. The author describes an *ideal* situation in which the judicial decisionmaker is responsive to a full range of pretrial information with a commitment to PTR for as many offenders as possible under conditions that are geared to reduce risk to the greatest extent possible without regard to race or economic status. The Milwaukee situation falls about midway between what is "typical" in this paper and what is "ideal."

To be more effective in expanding opportunities for release, PTR agencies should strive to improve their information gathering and refine their methods and formats for distributing information. They need to find new ways to enhance the predictive value of their recommendations by adopting and refining the guidelines, validating the recommendation scheme currently in use, and enabling research in risk prediction. They should also encourage development of relevant services such as supervised release, urine testing/medication monitoring, court notification services, etc., which can be properly utilized as conditions for release. These are all useful goals for PTR agencies, but to be successful, a partnership and close working relationship must be established between PTR agencies and the judiciary. If the local judiciary is not committed to the general goals of pretrial release, little can be accomplished.

We believe PTR agencies should always strive to improve their output and outcomes. They must be organizationally flexible enough to undergo frequent, almost constant change, to meet the changing needs of the criminal justice systems. Law enforcement, prosecutorial, and judicial policies frequently change in response to new legislation or changing community conditions. PTR agencies also need to be responsible for bringing to the attention of local authorities innovations and advancements in the field.

The setting of bond is, of course, the most effective barrier to pretrial release. The setting of bond when nonfinancial conditional release may be indicated and justified is the greatest area of contention with the local judiciary in our jurisdiction. The tendency to use cash bail seems to reflect the unwillingness of judicial

decisionmakers to accept the risks involved in pretrial release. Of equal importance in our jurisdiction is the resolution of hold issues. Nearly 40 percent of the detained population in the Milwaukee County Jail have unresolved hold issues. Expeditious resolution of hold issues requires effective coordination among departments, local agencies, and jurisdictions. The presence of a central intake unit operating around the clock, 7 days a week, within the criminal justice system, would allow for more efficient coordination of arrest, charging, bail evaluation, bail setting, early case disposition, and early release and would certainly provide a more effective mechanism for reducing processing delays and controlling jail population. Milwaukee currently provides central screening during court hours only. However, we are involved in planning a more comprehensive central intake process which is designed to operate around the clock. At any rate, PTR staff located within a central intake unit and who are screening defendants shortly after arrest are in the best position to take the initiative in resolving a variety of issues.

Secure bond is, no doubt, the greatest barrier to release, and it impacts unfairly on low-income minority populations. But it is, nevertheless, a widespread practice. The PTR agencies need to take the lead in establishing conditions within the legal culture that will allow for and promote greater acceptance of the expanded use of nonfinancial conditions of release. Generating research results and subsequent education and training on the imaginative, effective use of conditional release as an alternative to secured bond seems to be the best way to bring about change in this area.

The factors associated with probability of release in Milwaukee are similar to those reported for the three models of bail opportunity: bond amount, charge seriousness, and criminal record. The ability to accurately predict which defendant will be released before trial eludes Milwaukee, as it does other jurisdictions. Our approach has been to focus resources at the initial decision point and later in the process on defendants who are not released within 72 hours of initial appearance. The greatest program impact on jail space is obtained by securing conditional release for defendants who would normally be detained for months prior to case disposition.

Pretrial detention is of concern to PTR agencies, since they are often judged by their ability to reduce utilization of jail cells. It is also of concern because, as Clarke notes, "the longer a defendant stays in pretrial detention, the more severe the outcome of his case is likely to be." Prisons in Wisconsin are overcrowded, like those in other parts of the country. Pretrial release decisions take on added importance in light of this situation.

RISKS INVOLVED IN PRETRIAL RELEASE

Within a very narrow range, the rates of failure to appear and new crime are similar across a variety of jurisdictions. Milwaukee reports 1987 rates that are within the reported ranges for a group of higher-risk individuals stipulated to conditional release. The low rates are a positive point for PTR agencies to stress. Failure is, by and large, relatively rare for released defendants. The vast

majority make it through the pretrial period without difficulty. Of those who fail to appear at some point in their case processing, only a small proportion remain fugitives. This is certainly true in Milwaukee. A current study of reasons for failure to appear indicates that defendants in Milwaukee County who miss their scheduled court appearances can be categorized in four ways:

1. Defendants whose failure to appear is simply part of a pattern of irresponsible behavior and lack of commitment.
2. Defendants whose failure is symptomatic of a disorganized lifestyle and inability to plan.
3. Defendants who are frustrated with the process after repeated appearances and whose cases are being adjourned because one of the criminal justice parties was missing or unable to proceed.
4. Defendants who fail to appear because of system problems such as inaccurate calendaring or errors of notification to the defendant resulting in appearance for court at the wrong time or on the wrong dates.

Intervention of the Milwaukee PTR agency in a pilot effort with defendants not stipulated for PTR who were returned on bench warrants after failing to appear for a scheduled court appearance resulted in high rates of return to court at subsequent court dates when compared to a control group. The type of intervention provided in this pilot effort varied according to the cause of failure to appear. Enough data were generated to convince us that intervention with a high-risk group does work and is appropriate, especially in light of Clarke's finding that one-third of the persons who fail to appear are also rearrested. It is exciting to note that rearrests can be controlled by implementing methods of reducing failure-to-appear rates. Even though these intervention methods were applied after an initial failure occurred and a bench warrant was executed, they did produce the desired results.

It is disconcerting to note, as the author does, that to date there are no accurate predictors of pretrial failure to appear or rearrest. In Milwaukee, broad groups of defendants with low, moderate, and high risk of pretrial failure are identified. In the process, a certain number of false positives and false negatives are included in each group. We have responded to this situation by designing a supervised pretrial release component and a follow-up court intervention component for detained defendants. Our experience has been that more false positive situations exist in terms of conditional release. We too frequently provide conditional and supervised release for defendants who would more than likely follow through on their own, with no new pretrial crime. This situation arises from a combination of the risk assessment scheme we are utilizing and judicial conservatism.

Efforts are under way in Milwaukee to increase the accuracy of our prediction scheme. This is especially important to PTR agencies in terms of both PTR's credibility and providing direction to the PTR agencies in allocating their limited resources. False positives and false negatives both drain pretrial resources. It is certainly in the best interest of the PTR agencies to encourage and, if possible, participate in research efforts aimed at increasing the predictive value of their own risk assessment schemes.

In the meantime, it is equally important that PTR agencies encourage the use of other methods of reducing failure to appear and rearrest. Those methods may include system interventions such as participating in efforts to reduce court delay. Research findings cited by Clarke indicate that the likelihood of survival (successfully completing the pretrial period without failure to appear or rearrest) declines as case disposition time increases. Efforts may be as simple as providing printed tables of survival ratios and case disposition times comparing various judges in a jurisdiction to encourage reduction of case disposition times or identification of higher-risk defendants (albeit within broad risk groups) for speedy processing. Pretrial services personnel can often assist the judiciary in clearing up case processing delays by providing more detailed information relating to the defendant's condition or situation and by providing casework coordination. Just as PTR agencies need to more appropriately allocate their own resources, it is equally important that the judiciary find ways within the scope of its limited resources to process more expeditiously the defendants who pose higher risks of failure to appear or rearrest.

A special dilemma faces communities with overcrowded jails. Many pretrial services have been created by local governments to ease overcrowding conditions. In Milwaukee, court delay has been found to be the greatest single contributor to the recent crowding in our county jail. However, in a world of limited resources, we may unwittingly, by giving higher priority to the case processing needs of jailed defendants, be running the risk of increasing the failure rates for released defendants. This could happen by the concentration of limited judicial resources on the detained caseload at the expense of all other cases, with the result that case processing time for defendants released to the community is prolonged. The PTR agency is usually judged, however,in terms of its impact both on jail population reduction and on failure rates of defendants released at its recommendation.

EFFECTIVENESS OF PRETRIAL RELEASE AND STRATEGIES FOR IMPROVING IT

Four general concepts and principles are suggested for PTR agencies that are interested in self-improvement. The Milwaukee PTR agency has been actively involved in advocating for and implementing policy and system changes that are designed to improve its own effectiveness and efficiency in expanding release opportunity, controlling risks, and reducing delays in case processing. In light of our experience, we believe that the principles outlined by Clarke are helpful to keep in mind.

First, it is important for PTR agencies to measure themselves against agencies in other jurisdictions over time. The proposed effectiveness measure is a convenient method of placing PTR services on a continuum with other agencies. Being aware of the effectiveness ratios of other PTR agencies helps to stimulate self-evaluation and, we would hope, self-improvement.

Second, it makes sense that a program should take into account both benefits and costs (opportunities and risks) when applying a new strategy within its own

jurisdiction. Even more important, those benefits and costs must be outlined and presented convincingly for members of the local legal culture in order to gain recognition of, acceptance for, and adherence to the new strategy.

Third, further study may be required to determine what kinds or types of agencies are willing or best equipped to provide pretrial release services and promote the needed reform. From a resource allocation point of view, it makes sense to allocate resources to an existing agency. The key element for success, however, is unwavering commitment to the pretrial release principles. The agency, whether it already exists within the structure of the criminal justice system or not, that can draw out this commitment and sustain it over time will be successful. Finally, it is our experience that in jurisdictions that lack the driving force of a recent court order or new legislation, the incremental approach may be the most effective for accomplishing the necessary changes in pretrial practices. In Milwaukee, we have gathered support for change primarily by means of extensive dissemination of pretrial release results, along with ongoing and continuous dialogue with other criminal justice officials.

The recent creation of a jail population control committee through a Milwaukee County Board resolution involving the main actors in the local criminal justice system will provide us with another mechanism for reviewing and changing current system policies and practices that affect PTR program objectives.

A number of strategies are suggested by the author for increasing opportunities for release and reducing risk. The first of these relates to reducing court delay as a way of helping to reduce failure to appear and new crime. An added incentive for pursuing this strategy is that it does not adversely affect opportunity for bail. We strongly support this strategy as a means of accomplishing the goals of pretrial release. It has great potential for being highly effective. Our data indicate that as the length of time at risk is lowered, e.g., as case processing time is reduced, failure during pretrial release decreases proportionately. Reducing case processing time eliminates waste of limited pretrial resources. At the same time, we have found that reducing criminal case processing time is a difficult strategy to pursue successfully because of the characteristic inertia and resistance of the local legal culture to change. The local legal culture must be willing to participate in fairly extensive reforms to achieve any substantial reduction of criminal case processing time. Usually, higher court orders and/or legislative action aimed at reducing case processing time and jail overcrowding is needed to get the ball rolling. It is a good idea for PTR agencies to advocate for court delay reduction research and to generate and distribute information on the subject within their own jurisdictions whenever possible.

We in Milwaukee have reservations regarding the author's follow-up suggestions that financial controls (bail) be increased on released defendants as the age of their pending case grows. This is primarily a fairness issue for us. We believe that the use of financial sanctions unfairly penalizes low-income and minority defendants and actually reduces release opportunities as well. It can also be argued that as the age of cases increases, the individuals who remain under supervision become the most successful (better risks). In these cases,

supervision can be reduced because the defendants have followed through and have complied with the requirements mandated by the courts and pretrial services. Increasing supervision or asking for more bail would send a mixed message to these defendants. In the vast majority of cases, defendants have little input into the scheduling of their cases and little control over the length of time required to process the cases to disposition. Increasing financial controls (raising bail amounts) after successful completion of part of the pretrial period would seem more likely to lead to discouragement and frustration and could ultimately negatively affect defendants' performance during pretrial release.

Another strategy for improving pretrial services recommended in the paper, which we wholeheartedly support, is enhancing communication with the released defendants. Defendant obligations should be regularly stressed for supervised release defendants, especially those released on ROR who have failed to appear in the past. Our experience with this method has been favorable. We have often found defendants confused about how the criminal justice process works and about their responsibilities relative to the process. Pretrial services should serve as an information reference point for defendants.

The Milwaukee PTR program combines elements of a specialized ROR agency that provides bail evaluation along with supervised pretrial release and services that concentrate on advocating for release of defendants who are not considered for unsecured bond at their initial court appearance. Jurisdictions differ in their use of ROR. In Milwaukee, ROR is extended to certain types of defendants and restricted for others. The restricted group consists of defendants who have been successfully released through the efforts of the PTR programs' follow-up court intervention unit at a later date. A specialized ROR agency would be unlikely to be as effective in Milwaukee. The conservatism expressed in this jurisdiction with regard to the granting of ROR leads us to believe that case-by-case advocacy with follow-up court intervention is still needed, along with services such as supervised pretrial release, bail monitoring, and miscellaneous casework services.

One of the most effective program measures employed in Milwaukee County for providing release opportunities and controlling risks is postrelease supervision. The findings reported by Clarke indicate mixed results, particularly regarding the effectiveness of postrelease supervision in controlling risk. Our results are similar to those reported by Clarke in 1976 in Charlotte, N.C. Postrelease supervision in Milwaukee of high-risk defendants (those with two or more prior arrests and charged with serious felony or misdemeanor offenses) affects, in a positive way, the survival rates of defendants during pretrial release. Supervision of low-risk defendants was not nearly as effective in terms of survival.

One word of caution on the use of pretrial release supervision. If left on their own, judges tend to overestimate the risks of pretrial release, and when in doubt they tend to use whatever methods or resources they have at hand to assure survival. Any PTR agency providing postrelease supervision needs to guard against the use of supervision when it is not necessary for survival. Inappropriate use of supervision is one sure way of wasting limited pretrial resources.

Research regarding the effectiveness of supervision plus social services vs. supervision only (in which Milwaukee was one of the test sites) found no difference in failure rates between the two groups. However, the role of PTR agencies as a referral source for social services is often overlooked and underrated. During the course of business, PTR agency staff come into contact with large numbers of highly needy, low-functioning, or disabled, indigent, and homeless citizens. Literally thousands of defendants are identified with social service needs. Often, PTR agencies control an element of risk presented by this group of needy offenders through direct referral to community agencies and social services as well as by recommending conditions of pretrial release incorporating these services. It has also been our experience that services are essential for a small group of offenders with chronic psychiatric, alcohol, and/or drug-abuse problems. Availability of treatment services options in Milwaukee has resulted in substantial increases in pretrial release of moderate- to high-risk defendants.

A great deal of discussion in Clarke's paper is devoted to the deterrent effect of bail bond and bondsmen. Bondsmen were abolished in Wisconsin in 1978. We consider their use an archaic practice that penalizes low-income citizens because it promotes the use of financial conditions of release over other forms of nonfinancial arrangements and generally inhibits overall expansion of release opportunities, which is a primary goal of most PTR agencies.

We also think that it would be very difficult to make a case for the deterrent effect of bond. Setting lower bonds will still make release from custody out of the reach of the majority of defendants. In a recent study of Milwaukee defendants who failed to appear, over 90 percent were indigent, on welfare, or earning below the federal poverty level. Lower bonds would not measurably assist the majority of defendants in Milwaukee. We believe that to be truly equitable or effective, a policy of setting bond must be tied to a procedure other than self-reporting for accurately assessing ability to post bail.

Clarke also proposes a system of progressive discount of forfeiture to motivate defendants who fail to appear to return to court as soon as possible. Such a proposition would be supportable if bail were tied to ability to pay, and cost-effectiveness could be shown for administering a bail fund, assessing penalties, and collecting forfeited bail.

We fully agree with Clarke that any adjustments to the prevailing bail-setting practices must be the result of a comprehensive bail-setting policy. All of the criminal justice actors who have input into the setting of bail should reach consensus about proposed changes.

This principle relates to the idea that change should be incremental, should be arrived at by ongoing review, and should evolve over time. It is a slow and deliberate but sure method of creating change in policy.

We have found that a "consensus" model works best for implementing bail guidelines. Milwaukee uses bail evaluation guidelines that are modeled after the Philadelphia experience. The guidelines have, for the most part, improved the