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Pretrial Release and Detention and Pretrial Services

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This Issue in Brief

In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.

—United States v. Salerno, 107 S.Ct. 2095 (1987)

While it is impossible to predict future offender population levels with absolute precision, current Federal law enforcement policies and legislative initiatives lead everyone to agree that the number of new Federal offenders will continue to increase at a substantial rate. It is clear that the detention crisis will only become more severe if no action is taken to relieve the current situation. . . . If adequate bedspace to detain thousands of potentially dangerous prisoners is not acquired, public safety and the Federal Criminal Justice System itself could be threatened.

—Federal Detention Plan 1993-97 (United States Department of Justice, December 1992)

This is a special edition of *Federal Probation* devoted to the topics of pretrial detention and release and pretrial services. The two quotations above make an eloquent case for the timeliness and relevance of such an edition. The notion of depriving individuals of their liberty before they are proven guilty is one that deserves constant consideration and discussion by members of a free society. We hope this issue will provoke both.

The issue opens with a "call to arms" to persons actively involved in the criminal justice process—be they judges, probation or pretrial services officers, defense counsel, prosecutors, or prison officials—to use their knowledge and experience to foster effective approaches to the Nation's crime problem. Decrying what he calls a "Draconian" approach to alleviating crime, the Honorable Vincent L. Broderick, U.S. district judge, Southern District of New York, points out the folly in downplaying community corrections, fostering more prison construction, mandating longer prison terms, and enhancing the role of the criminal prosecutor while denigrating the role of the judiciary. In his article, **"Pretrial Detention in the Criminal Justice Process,"** he focuses on accelerating detention rates as a prime example of "one troublesome manifestation of the Draconian approach."

What can bail bondsmen do for defendants that the courts cannot? Absolutely nothing, contends the Honorable James G. Carr, U.S. magistrate judge, Northern District of Ohio, in his article, **"Bail Bondsmen and the Federal Courts."** Writing on the theme "corporate surety bonds fulfill no function and provide no service that cannot otherwise be accomplished within the framework of the Bail Reform Act, Judge Carr explains why releasing defendants on nonfinancial conditions imposed by the court is far preferable to involving bail bondsmen in the release process. He gives possible explanations for the perpetuation of bail bondsmen in some districts and urges pretrial services officers who continue to recommend surety bonds and judges who adopt such recom-

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Pretrial Detention in the Criminal Justice Process

BY VINCENT L BRODERICK

United States District Judge, Southern District of New York

THIS ARTICLE—and perhaps most of the other articles in this issue of *Federal Probation* as well—is a call to arms.

For too long the drumbeat for direction in the criminal justice process has been sounded by those who are not involved. Newspaper headlines, editorial alarums, and talk show analysts have charted the course. The course they have charted is one of punitive detention, and it is a pattern for disaster. It has, unfortunately, been adopted by many officials who run regularly for legislative office and seek to insulate themselves from charges of being "soft on crime."

There is indeed a serious crime problem in this country: we have perhaps the highest rate of violent crime in the entire civilized world. For many years our national response to this problem has been Draconian. We downplay community corrections as a viable response to criminal activity; we build more prisons; we mandate longer prison terms; we enhance the role of the criminal prosecutor and we denigrate that of the sentencing judge.

On the Federal level, Draconian measures have been given a good test and have been found wanting. The population of our Federal prisons has tripled in the past 10 years with little or no effect to date on violent crime. The prospects are good, in fact, that long mandated prison terms will be counterproductive, that they will serve as graduate courses in crime for many first offenders who might otherwise never commit crime again.

The Draconian approach to crime on the Federal level has been developed by rejecting the input of those with practical experience in the criminal justice process: judges; probation and pretrial services officers; defense counsel; prison officials; prosecutors who do not have political agendas. These people know 1) that most of those who commit violent crime are not caught and do not expect to be caught and hence are not deterred by statutes mandating long sentences; and 2) that most first offenders who are arrested and convicted are sobered by their exposure to the criminal justice process, can effectively be supervised in the community, and will not commit crime again. They are acutely aware of the basic contradiction between the Draconian approach and the wise statutory imperatives in 18 U.S.C. § 3553 that the sentence imposed should be not greater than necessary to accommodate the purposes of sentencing,[1] and the similar contradiction between the Draconian approach and the statutory instruction to the Sentencing Commission that for first offenders committing non-serious crimes, non-incarceratory sentences are preferred.[2]

Those with practical experience in the criminal justice process also know that there is a debilitating conflict between a sentencing guidelines system under which a Sentencing Commission is charged with preparing and keeping updated a just and proportional range of penalties, and the high penalties prescribed as sentences by mandatory statutes.

One troublesome manifestation of the Draconian approach is in the area of pretrial detention.

It is a fundamental premise of our system of criminal justice that a person charged with crime is presumed to be innocent, until such time as he or she pleads guilty or is found guilty after trial. At the beginning of every criminal case, and at times during the pretrial and pre-verdict trial phases of that case, the decision-maker—the district judge or the magistrate judge—must resolve the tension between the presumption of innocence and two imperatives: to insure resolution of the charges by preventing flight and to protect the community from further criminal activities of the person charged.

Judges know, of course, that most persons charged with Federal crime ultimately plead guilty or are found guilty after trial. They know that some persons charged with crime are likely to flee or to threaten the safety of others if not detained pending trial. They also know that most persons charged with crime will not flee and will not endanger members of the community if allowed to remain at large pending resolution of the charges against them.

Judges are not willing to categorize the presumption of innocence as no more than a rule of evidence which is important to the fact-finder at trial; they do not accept the proposition that for purposes of the pretrial stage the presumption of innocence is overcome by their knowledge of the statistical probabilities as to guilt and hence has little or no significance when the decision as to detention or pretrial release is to be made. They accept—indeed insist upon—the presumption of innocence as a given with respect to all persons charged with crime, and they require information when decisions as to pretrial release or detention are to be made which will permit those decisions to be made on a fully-informed basis.

Congress responded to this need by legislatively encouraging the development of pretrial services. Pretrial services—whether as an independent office or as an adjunct of the probation office—has been charged with the dual functions of 1) providing judges and magistrate judges making release/detention decisions with reliable information upon which those decisions can be grounded and 2) supervising, where required, pretrial releasees. One would have expected that the confluence of the information developed by pretrial services and the supervision provided by pretrial services officers would have reduced the relative numbers of defendants who were detained pretrial.

It has not worked out that way. The scale of pretrial detention appears to be accelerating at all levels of the criminal justice system, state and Federal, straining available resources. The proportion of Federal defendants who are detained prior to trial has fairly steadily increased since the advent of pretrial services. The current Federal pretrial detainee population is approximately 18,000. It has more than doubled since 1988.

There are probably various causes for this increase.

There has been a marked change in the mix of cases which pass through the Federal criminal justice system, with an increasing emphasis upon crimes involving the importation and distribution of illegal drugs. Many of those charged with committing these illegal drug crimes, facing long prison terms if convicted, are unable to establish that they are unlikely to flee if released. And many judges and magistrates, myself included, scrutinize such defendants extremely carefully, regarding any substantial indications that they may continue drug distribution while on pretrial release as constituting threats to the community which warrant detention.

The advent of the sentencing guidelines has perhaps been a factor. For many crimes the guidelines have ruled out probation as a probable, or possible, disposition, and the relative certainty of a prison sentence for defendants charged with such crimes may be construed in certain circumstances as increasing the risk of flight.

But it is probable that the greatest single cause of the increase in pretrial detention has been the flood of mandatory minimum sentences which Congress has prescribed. This is not the place to inveigh against such statutorily mandated minimum sentences. Suffice it to say that they are inconsistent with a rational guidelines sentencing system; that they prevent judges in many cases from imposing sentences which fit both the crimes and the criminals; and that as a practical matter they transfer the making of key sentencing decisions from the courtroom where they are made by experienced judges to prosecutors' offices where they are made outside the reach of public scrutiny. The threat of harsh mandatory minimum sentences certainly increases the likelihood of flight and in many cases makes a pretrial release decision, even with provision for supervision, less likely. Where a prosecutor avoids the impact of a statute with a mandatory minimum by charging a different or lesser crime the threat will be avoided. But in many situations a defendant will be charged with committing a crime with mandatory minimum prescribed, although the prosecutor hopes to elicit the cooperation of the defendant and intends, if the cooperation is forthcoming, to submit to the sentencing judge a letter pursuant to 18 U.S.C. § 3553(e) which would empower the judge to sentence below the mandatory minimum. In such a situation the judge, in making the pretrial release-or-detain decision, must deal with the charge at hand. If he assesses the mandatory minimum as making flight a probable risk he will detain, and the detention itself becomes part of the pressure on the defendant to cooperate.

Pretrial detention can be crucial when a defendant is likely to flee and will protect the community when a defendant is likely to cause harm to victims, witnesses, or others during the period prior to trial. Justifiable stress upon the hazards of indiscriminate release of dangerous defendants because of budgetary, space, and similar considerations—or because the defendant involved can post a monetary amount—must not, however, obscure the important problems caused by pretrial detention when overused. We must recognize both the necessity for pretrial detention in some cases and the need to confine it to those situations which require it.

Pretrial detention can create—and in many circumstances has created—crises of mammoth proportions, creating problems for every element of the criminal justice system: those charged with crime; defense counsel; pretrial services and probation officers; judges; prosecutors; marshals; and the Bureau of Prisons.

A microcosm of such crises and problems surfaced in the New York metropolitan area in 1991. Affected was the administration of criminal justice in the Eastern and Southern Districts of New York and in New Jersey, and shock waves were felt as far away as Tennessee and the Southern District of Texas.

In the fall of 1991 Leonard F. Joy, chief of the Federal Defenders Services Unit in the Southern and Eastern Districts of New York, sounded the alarm. In a letter to Chief Judge James L. Oakes of the Second Circuit he delineated various situations which adversely affected the ability of Federal defenders adequately to represent clients in pretrial or presentence custody. While the thrust of Mr. Joy's letter was to emphasize

the impact of these situations upon Federal defenders and their clients, he pointed out that they had parallel impact upon the ability of Criminal Justice Act counsel and privately retained counsel effectively to represent detained clients. I would note parenthetically that since the Metropolitan Correctional Center in Manhattan (MCC) also services the District of New Jersey, the crises identified by Mr. Joy had corresponding impact on attorney-client relations in that district.

Mr. Joy outlined six major areas of concern. There was some overlap between these areas, but each highlighted "the problems entailed in adequately representing clients in extremely difficult circumstances": 1) housing of defendants outside the districts in which they faced charges; 2) continual movement of pretrial defendants between the MCC and the closest Federal Correctional Institution (FCI) at Otisville, some 100 miles away; 3) housing of defendants between arraignment and detention hearings in inadequate (and unidentified) state facilities; 4) the inability of counsel to locate their detained clients; 5) the inadequacy of the arrangements for attorney-client contact at the FCI (Otisvllle) where many detained defendants were housed; 6) the occasional inhumaneness of the treatment of pretrial detainees who were billeted in state facilities.

Mr. Joy noted that at any given time his office represented 200-250 detained defendants in pretrial or presentence custody, some 10 percent of whom were housed in facilities—Federal or contract—outside the Southern and Eastern Districts of New York. As of the time he wrote several of these defendants were being held in a county facility in Texas; three were in Tennessee. One defendant his office represented was arrested in the Southern District of New York on August 12, 1991, and made his first appearance before the assigned district judge on November 13, 1991. In the interim he had spent some time sequentially at the MCC in New York, at the FCI at Otisville, in the county facility in Texas, and in El Reno, Oklahoma, before being returned to the New York MCC for his court appearance.

Mr. Joy reported an inquiry that he had which illumined the problem, and his response:

> Recently we had a call from a U.S. Magistrate Judge's clerk from Laredo, Texas wondering why a Southern District detainee was filing a *pro se habeas* petition in Webb County, Texas. He was informed that several pretrial detainees from New York were being kept in Texas. He told us that the Judge does not understand this. We told him that we do not understand it either.

Mr. Joy ticked off the difficulties caused by the frequent movement of pretrial and presentenced defendants who are detained. Their attorneys cannot contact them because they do not know where they are. Language problems make it difficult for many clients to be in touch with their attorneys. Mail contact is difficult: the defendants have often been moved by the time mail reaches a location which has been identified. Where the defendant has pleaded guilty and awaits sentence, a transfer is occasioned and is effected before the presentence interview, and in the era of guideline sentencing the defense attorney is unwilling to consent to an uncounseled interview. When defendants are moved their court clothes and legal papers are often left behind.

Mr. Joy pointed out that even where the pretrial defendants were moved no further than Otisville, there were problems. Interview facilities in Otisville were inadequate; attorneys (and interpreters, where necessary) would make the 100-mile trip to Otisville only to find that the detainees had been moved. If, between arraignment and detention hearings, detainees were housed in county facilities because of overcrowding in the MCC it was difficult to locate them. The overcrowded conditions and the continual shifting of defendants had caused, according to Mr. Joy, a breakdown in a formerly workable inmate locator system: there was "no record" or the defendant was "in transit," etc.

Leonard Joy's letter to Judge Oakes brought no new information to those of us involved in the criminal justice process in the New York metropolitan area. We all had struggled for some time with the pressures which increases in pretrial and presentence detention had brought. The warden of the MCC had, in fact, held meetings with a Criminal Advisory Board, composed of representatives of the various components of the criminal justice process—judges, defense counsel, prosecutors, pretrial services, probation, marshals, and Bureau of Prisons—to attempt to develop effective approaches to relieve those pressures, but the pressures continued. Leonard Joy's letter did, however, prompt immediate action. Judge Oakes challenged the Department of Justice (which controlled three of the components (the prosecutors, the marshals, and the Bureau of Prisons) to face up to the detention crisis in the New York metropolitan area. The Department of Justice responded, acknowledging the seriousness of the situation and setting forth the steps it was taking to attempt to ameliorate it.

The response from the Department of Justice made it clear that it was the increase in pretrial and presentence detention that was at the core of the crisis:

> The United States Marshals Service's prisoner population in the entire northeast continues to expand rapidly exceeding all available contract and Federal detention space. The New York Metropolitan Correctional Center's (MCC) current population of over 900 (up from 818 last year) far exceeds its rated capacity of 466. In order to keep the overcrowded MCC available for new arrestees, a Federal bedspace allocation plan including special weekly airlifts of sentenced but undesignated prisoners to such remote locations as Texas and Tennessee was recently implemented.[3]

Acting Deputy Attorney General George J. Terwilliger III assured Judge Oakes that the Department would devote all efforts to attempt to solve the problem. He outlined specific steps that were being taken:

1) negotiations with local authorities for assistance in housing Federal detainees;

2) weekly removal of sentenced but undesignated prisoners to other geographic locations;

3) removal of convicted but unsentenced defendants to other geographic locations after presentence information had been gathered (to be returned 1 week prior to sentencing);

4) working with U.S. attorneys "by prioritizing cases to be housed at the MCC and in FCI Otisville, expeditiously closing writ cases, using alternatives to detention in appropriate cases, and minimizing both the number and duration of stay for prisoner witnesses."[4]

Mr. Terwilliger stated that if relief was not produced by these steps, pretrial detainees who had completed initial hearings and were awaiting trial would be removed from the area, to be returned at least a week prior to subsequent hearings and 3 weeks prior to trial. The Marshals Service was to arrange telephone and fax capabilities for these detainees and their attorneys.[5]

It was helpful, of course, to have attracted the attention of the Department of Justice to the crisis and its dimensions.

One further step was taken. The judges of the District of New Jersey and of the Southern and Eastern Districts of New York took over the administration of the Criminal Advisory Board meetings which had formerly been held at the call of the warden of MCC, resulting in decided improvement in attendance at these meetings.

The Criminal Advisory Board meetings are held three to four times a year. They have been marked by a high spirit of cooperation between the various organizations represented. And they have performed an extremely useful educational function. Thus, as a result of these meetings the Bureau of Prisons has made yeoman efforts to adjust its procedures to accommodate defense counsel requiring access to their clients; impetus has been given to the development of additional detention sites within striking distance of the courthouses; and it has been possible to surface, and then direct attention to, particular problems which arise when detainees have been housed in less-than-adequate local facilities.

The Criminal Advisory Board approach has, in short, been invaluable in ensuring that those in the various components of the criminal justice process are aware of the problems faced by those in other components and by pretrial and presentence detainees. It has made it possible to bring to bear a collective wisdom in dealing with these problems. It is an approach which we intend to continue so long as the pretrial-presentence detention crisis continues.

But it will not solve the pretrial and presentence detention crisis. We detain people today who need not be detained—people who pose neither the threat of flight nor threats to the community. Until we develop a more rational approach to the question of pretrial detention and to a lesser extent to that of presentence detention, the crisis will continue.

Unfavorable consequences arise from overuse of pretrial detention, among them the following (by no means an exhaustive list):

1) Defendants are detained who are never ultimately convicted.[6]

2) Defendants who are incarcerated cannot as effectively assist their counsel in preparing for trial or plea.

3) Where supervision in the community is feasible, the detention of nonviolent defendants who pose risks neither of flight nor of danger to the community may tend to injure rather than to protect society, since possible rehabilitation of the detainees is foregone.

4) Large numbers of pretrial detainees strain the capacity of detention facilities.

5) Defense attorneys often find it difficult or impracticable to travel to detention facilities, to connect with shuttled clients, or to meet confidently with clients in detention facilities without fear of eavesdropping.

6) Transferring pretrial detainees between distant detention facilities and the courthouses strains the facilities of the Marshals Service. Prisoners must be shuttled back and forth at great expense and increased risk of escape. The high cost of pretrial detention, including security protection and transportation, reduces the funds which might otherwise be available for more productive criminal justice efforts.

7) When lockdowns or headcounts occur in detention facilities courts must without advance notice readjust their often-crowded calendars.

We must never flinch from pretrial detention in situations which call for it—where there are foreseeable risks of flight or of danger to members of the community. But we should not overuse it. Today we are detaining pretrial many people who will not flee and are not dangerous. Doing this creates a myriad of problems: it flies in the face of justice. It is time for those who are actively involved in and truly committed to the criminal justice process to make our voices heard.

NOTES

[1]These statutory purposes are:

"A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

B) to afford adequate deterrence to criminal conduct;

C) to protect the public from further crimes of the defendant; and

D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. § 3553(a)(2).

[2]"The Commission shall insure that the Guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense, and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury." 28 U.S.C. § 994(j).

[3]Letter of Acting Deputy Attorney General George J. Terwilliger III to Judge Oakes dated December 17, 1991.

[4]Ibid.

[5]Ibid.

[6]Department of Justice research indicates that defendants in state court prosecutions detained in prison until their cases were disposed of were convicted and received prison sentences in only 39 percent of the cases. 2 U.S. Department of Justice, Bureau of Justice Statistics *National Update* #3 at 3 (Jan. 1993). This low conviction rate, flowing from problems in the selection, prosecution, and trial of such cases, has occurred in spite of the disadvantages of incarcerated prisoners in assisting in their own defense. While the Federal conviction rate for defendants detained pretrial is undoubtedly much higher, it is nonetheless sobering to consider that we may be detaining pretrial persons, presumed innocent, who will never be convicted.