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Pretrial Release and Detention and Pretrial Services

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Federal Probation

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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 Services--A Magistrate Judge's Perspective

By Joel B. Rosen
United States Magistrate Judge, District of New Jersey

IT WAS not an unusual situation. A law enforcement agency would make an arrest and the defendant would be brought before, on most occasions, a magistrate judge. The court would, after advising the defendant of his or her rights, ask the assistant United States attorney or defense counsel about the defendant. What was his or her criminal history? What was his or her background with regard to employment, ties to the community, physical or mental condition? What community resources were available? Should bail be granted to deal with any problems of the defendant? Who would monitor the conditions of bail and advise the court if there were a breach of those conditions?

Prior to the advent of pretrial services, these questions might have gone unanswered in whole or in part. Further, monitoring bail conditions would have often been left to chance. Perhaps, most importantly, information available to the court may have been inaccurate, incomplete, or not responsive. An individual wanted in another jurisdiction, possibly for a serious violent offense, may have been released since the court was not aware of other warrants or detainers. In short, pretrial services has filled this information gap.

While I have not undertaken a formal survey of magistrate judges' views concerning pretrial services, in anticipation of preparing this short piece, I have discussed with some of my colleagues throughout the country their views of pretrial services, its personnel, and its mission. I have also discussed with my colleagues some of their concerns relating to bail issues and pretrial services. I am pleased to have this opportunity to briefly share these views with you.

All of us are keenly aware of the importance that the initial bail decision can have. Magistrate judges are, in many jurisdictions, the judicial officer faced with decisions concerning bail which not only impact on the defendant, but also on questions of public safety and security. The importance of the bail issue has been brought to the fore by the enactment of the Bail Reform Act of 1984 which makes clear our obligation to protect not only the rights of the defendant, but to address the concerns of the public that it be protected from the violent and dangerous offender or the offender who is unlikely to appear in court to face trial.

The availability of pretrial detention or the imposition of significant bail conditions place a tremendously important responsibility on courts. Persons are of course presumed innocent. Yet, the Bail Reform Act gives courts the authority to detain without bail presumptively innocent individuals. The importance of independent, accurate, and prompt information in the hands of judicial decision makers is obvious when one's liberty interests are at stake.

Most of my colleagues have indicated that the collection of vital information concerning a defendant in a precise and expeditious fashion is perhaps the most important contribution made by a pretrial services officer to the court. Further, having a group of professionals dedicated precisely to this task is essential to the prompt and accurate flow of information and advice necessary to making decisions in accordance with the Bail Reform Act.

The Act mandates, for example, that we take into account information concerning, among other things, the personal history of a defendant, including such information as the defendant's physical and mental condition, family and community ties, drug and alcohol abuse history and record concerning prior court proceedings. 18 U.S.C. 3142(g). Further, the Act requires us to consider alternatives to detention such as requirements for a designated custodian, employment, participation in educational programs, travel restraints, and medical and psychiatric evaluations and treatments. 18 U.S.C. 3142(c). Such statutory requirements mandate that information of a rather detailed nature be assembled and analyzed in a relatively short time period. Without specialized pretrial services officers providing this input, we as judicial officers would be hard-pressed to make informed bail or detention decisions.

The responsiveness of pretrial services personnel has also been recognized. Particularly in those districts with a heavy docket of criminal cases, the ability of pretrial services officers to respond promptly keeps the system moving. There are, as we all know, significant delays inherent in our system by virtue of the many tasks that we are all called upon to perform. Having officials respond promptly on issues relating to bail assures that at least in this area, the system will not break down.

Having information provided by neutral professionals to judicial officers is far superior to relying on the various litigants in the criminal process for information concerning a defendant, as well as recommendations concerning the defendant's bail. Clearly, counsel are advocates with the primary, and proper, function

of asserting information and making recommendations with a less than objective view. The neutral fact-gathering by pretrial services officers assures the court at the very least that the information provided to the court will be objective.

Beyond their value as quasi-investigators and assemblers of facts, pretrial services officers bring to the court knowledge of available community services. Their role in being knowledgeable concerning community services and agencies is crucial in assisting the court in fashioning, where appropriate, a bail package. What drug programs are available? What programs are available to persons with an alcohol problem? What medical services are available? Equally as important in these times are questions of cost. What will these programs cost? Who will pay for these programs? What educational or training opportunities exist? Further, in the appropriate case, is electronic monitoring available, and if so, how will it be paid for? All of this information is critical to the court's analysis of an appropriate bail package. Without input from the pretrial services officer, most courts will certainly not have this information concerning community services at their fingertips.

In addition to the functions noted above, from my view, the most important void filled by pretrial services officers is the monitoring and reporting functions of their agency. Bail is, in virtually all cases, based upon assessment of risk of danger to the community or flight. Having a person monitored by pretrial services officers assures that the defendant knows that he or she is being supervised and monitored by an arm of the court. This monitoring function gives most judicial officers confidence that their bail orders and conditions contained therein will be complied with, and, if there appears to be a violation, it will be brought promptly to the court's attention. Not only does this give the court a sense of confidence that the bail conditions will be enforced, but the public can be assured that the setting of bail is not the end of the process but merely a prelude to court-supervised and enforced monitoring.

In addition to bail investigations and monitoring functions, in many districts, pretrial services personnel prepare investigations with regard to individuals entering into a pretrial diversion program. Further, if a person is admitted to the program, pretrial services officers monitor the performance of the individual, advising the court and the United States attorney of any breaches of the agreement. Certainly, by having the pretrial services officer engaged in this function, the United States attorney and courts can make decisions based on facts assembled by an objective professional. At times of prison overcrowding, having pretrial services officers available to investigate and monitor pretrial diversion applications gives needed support to a program which is a viable alternative to incarceration in the appropriate case.

While magistrate judges have a positive view of the role of pretrial services, there are some issues of concern to all of us. The ultimate decision concerning bail or detention is and must remain a judicial function. While the role of the pretrial services officer in providing information in making recommendations is critically important, it is the legal duty of the judicial officer to ultimately decide what conditions of bail, if any, should be imposed. This is a duty imposed upon us by statute and expected of us by the public. Ultimately, if we make the wrong decision, it is our responsibility—not the responsibility of the pretrial services officer.

There is an additional concern that I think many of us are feeling during these times of fiscal restraint. All of us in the criminal justice system have of late been receiving mixed messages from the public. On the one hand, the outrage of violent crime and drug-related offenses, as well as horrendous white-collar criminal activity, has generated an outcry from the public that defendants should be dealt with firmly. This imposes on us, as reflected in the Bail Reform Act, a duty of making hard decisions concerning personal liberty and public protection. In order to do this, we need jail space, drug and alcohol programs, psychiatric programs, and other community-based services which are crucial to the bail function. On the other hand, the public, and all of us as taxpayers, are concerned about the cost of government. We must find ways to satisfy our statutory obligations to act responsibly in making bail decisions. In so doing, however, we must maintain a level of services which can be utilized to assure the security of the public while at the same time protecting the rights of defendants. For example, we must maintain a level of resources which permits us to have available electronic monitoring rather than incarceration in the appropriate case. If we lose this and other options we will of necessity be forced to detain individuals where other far less costly options would suffice. These are questions which must be resolved by the legislative branch in assessing the needs of the justice system. However, across-the-board cuts that are not well thought out can, while decreasing costs in one area, significantly increase them in others.

Finally, we should carefully monitor how pretrial services officers become involved in the litigation process. While under certain limited circumstances an officer may of necessity become a witness in a judicial proceeding, we should guard against making officers witnesses on a routine basis. This would, in my view, diminish their role as adjuncts of the court and make

them less effective in the collection of accurate information.

I would conclude by recommending to all of my colleagues that they avail themselves of the support services and resources provided by pretrial services. All of us need the type of information and service which pretrial services provides if we are to function on a well informed basis. As to pretrial services officers, I would urge you, when new magistrate judges commence their terms, to make every effort to get to know the magistrate judges and let them know who you are and what you can do to make them better informed decision makers.

The issues confronting magistrate judges at the threshold of the criminal process are crucial not only to the defendant but to the safety and confidence of the public. To ignore a resource as professional and useful as pretrial services is foolish at best and risky in certain situations.