DEFENDANTS WHO AVOID DETENTION — A GOOD RISK?

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Defendants Who Avoid Detention — A Good Risk?

Executive Summary

Defendants released after processing by pretrial services officers have low violation rates. This fact, in conjunction with the high cost (monetary and human) of pretrial incarceration, may support increased pretrial release. But what of the defendants whom the federal prosecutor sought to detain for fear of flight or danger to the community but who, nevertheless, were freed pending trial? Do they have similarly low violation rates or did their subsequent behavior justify the prosecutor's request?

Our findings show that 3 percent (153) of the released defendants had bail violations which involved the commission of a felony, mostly drug offenses. However, only 19, or 0.3 percent committed a violent crime. This figure is similar to the 0.2 percent of released defendants whom the government did not seek to detain, yet who then committed a violent crime. Clearly, most defendants whom the government feared would commit an act of violence did not do so. They were significantly more prone to violate some other bail condition, but the threat that these defendants posed to the community during the period of pretrial release was statistically small. Examination of the demographic profiles of felony violators shows them to be disproportionately young, with a greater likelihood of having a prior criminal record than a defendant who did not commit a violation.

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I. Introduction

In a recently published article, the low violation rate for all defendants released after processing by pretrial services officers is discussed.[1] The writer then poses the question of whether the high cost (monetary, human, and judicial) of pretrial incarceration, in conjunction with the low violation rate, supports the release of additional defendants prior to trial. But what of defendants whom the U.S. Attorney wishes to detain because of the threat of flight or danger presented to the community? If more defendants could be safely released prior to trial, should fewer defendants whom the federal prosecutor seeks to detain be incarcerated?[2]

In response to a request from a Chief PreTrial Officer, the Statistics Division analyzed the pretrial data base to determine the degree to which defendants whom the government had sought to detain for either of these reasons did, in fact, flee or commit violent crimes after release.[3] To pursue this question in a meaningful context, we created and compared three profiles, one for the defendants the government unsuccessfully sought to confine prior to trial, one for the subset of this group that committed felonies while released, and one for the group of defendants whom the prosecutor succeeded in convincing the courts to detain.

II. Background

Pretrial services officers (PSOs) prepare reports for judges and magistrate judges in U.S. district courts to help them decide whether to detain or release defendants prior to trial. These reports are usually based upon interviews with defendants held prior to the first hearing before a judge or magistrate judge. In situations where defendants either decline interviews or cannot be interviewed, pretrial services officers gather information from friends, relatives, employers, and the public record. Upon completion of the report, the PSO can recommend detention, release, or an intermediate type of restriction such as electronic monitoring. If he or she advises detention, the recommendation is based on one of four reasons: (1) flight risk, (2) danger to a witness, (3) danger to the community, or (4) flight risk and danger to the community. To detain a defendant,

[1]Dan Ryan, "The Federal Detention Crisis: Causes and Effects," Federal Probation, Washington, D.C., March 1993, p. 57.

[2]In FY 1992, the Assistant United States Attorneys (AUSAs) made approximately 18,000 motions for detention and succeeded in two-thirds of the cases.

[3]The Pretrial Services Statistical Information System does not permit us to distinguish between defendants whom the prosecution thought represented a threat of flight from those that they thought posed a danger to the community.

the Assistant U.S. Attorney must make a motion in court for detention based upon these factors or upon the nature of the crime with which the defendant is charged; the presiding judicial officer may also make a motion for detention based on flight risk or danger to a witness.

U.S. attorneys and defense counsel often disagree about the risk of flight posed by a federal defendant and/or the degree of risk such a defendant poses to the community. The decision to release or detain a defendant involves competing considerations: on the one hand, there are the negative consequences associated with overuse of pretrial detention. These include:

- detention of defendants who are ultimately found innocent;
- overcrowding of detention facilities leading to greater expenditure of funds for both construction of detention facilities and transportation of defendants from court to detention facilities and back;
- difficulty in formulating a defense caused by the relative inaccessibility of the defendant;
- and delays in the court calendar arising from the difficulty of moving defendants from jail to the court.[4]

On the other hand, there are real dangers to the public safety when crimes are committed by defendants who have been released pending trial.

III. Research Results

The results of the inquiry give some support to the concerns of the prosecution regarding potential for flight, but, in the main, validate the decisions of the court. Of the 50,198 Pretrial Services Act (PSA) cases closed in 1992[5] (all those cases processed by PSOs), the percentage of released defendants with bail violations comprised 14 percent. If the 18,089 defendants for whom the U.S. attorney had requested detention are removed, the percentage engaging in misconduct falls to 13 percent (Figure 1). This contrasts with the 19 percent violation rate for released defendants for whom the prosecution had requested detention. Of the bail violations committed by this group, 242, or 4 percent, were for failure to appear, compared to a 2 percent rate for defendants the U.S. attorney did not ask to be detained.

Three percent (153) of the released defendants[6] had bail violations which involved the commission of a felony, mostly drug offenses. However, only 19, or 0.3 percent were charged with committing a violent crime. This figure is similar to the 0.2 percent of released defendants whom the government did not seek to detain, yet who then were charged with committing a violent crime; clearly, most defendants whom the government

[4]See the March, 1993 issue of Federal Probation, for a discussion of these topics, particularly an article by Judge Vincent Broderick, "Pretrial Detention in the Criminal Process", and the previously noted piece by Dan Ryan.

[5]Twelve month period ended 9/30/92.

[6]In the remainder of the paper, "released defendants" will refer to those released over the AUSA's motion for detention.

feared would flee or pose a danger to the community, did neither. They were significantly more prone to violate some other bail condition, but the threat that these defendants posed to the community during the period of pretrial release was statistically small.

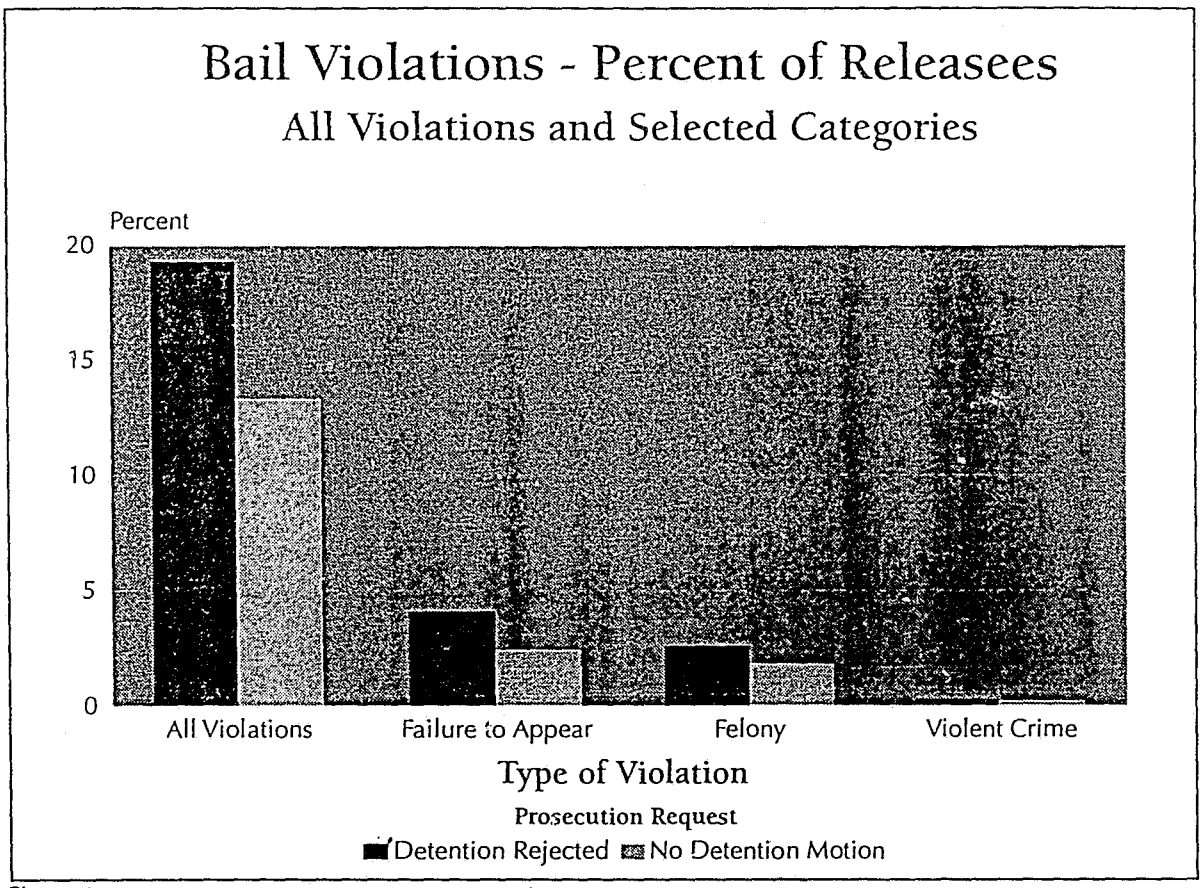

Figure 1

IV. Discussion

As part of the Bail Reform Act of 1984, the federal courts are required to identify defendants least likely to flee or commit violent crime. To implement this law, the judicial officer must take into account "the history and characteristics of the person" as well as the nature of the offense charged and previous criminal conduct. The background and traits of the defendant include such factors as marital status, family relationships, and employment history. Not surprisingly, the demographic characteristics of defendants whom the court agrees to detain differ from those whom it decides to release. Those who are released are more likely to have at least high school diplomas, be U.S. citizens, own homes, be employed, and have lived in the area 5 or more years (Figure 2). In fact, the profile of this group is nearly identical in terms of these factors to the profile of the entire pretrial population, evidence that society incurs no great risk through their release.

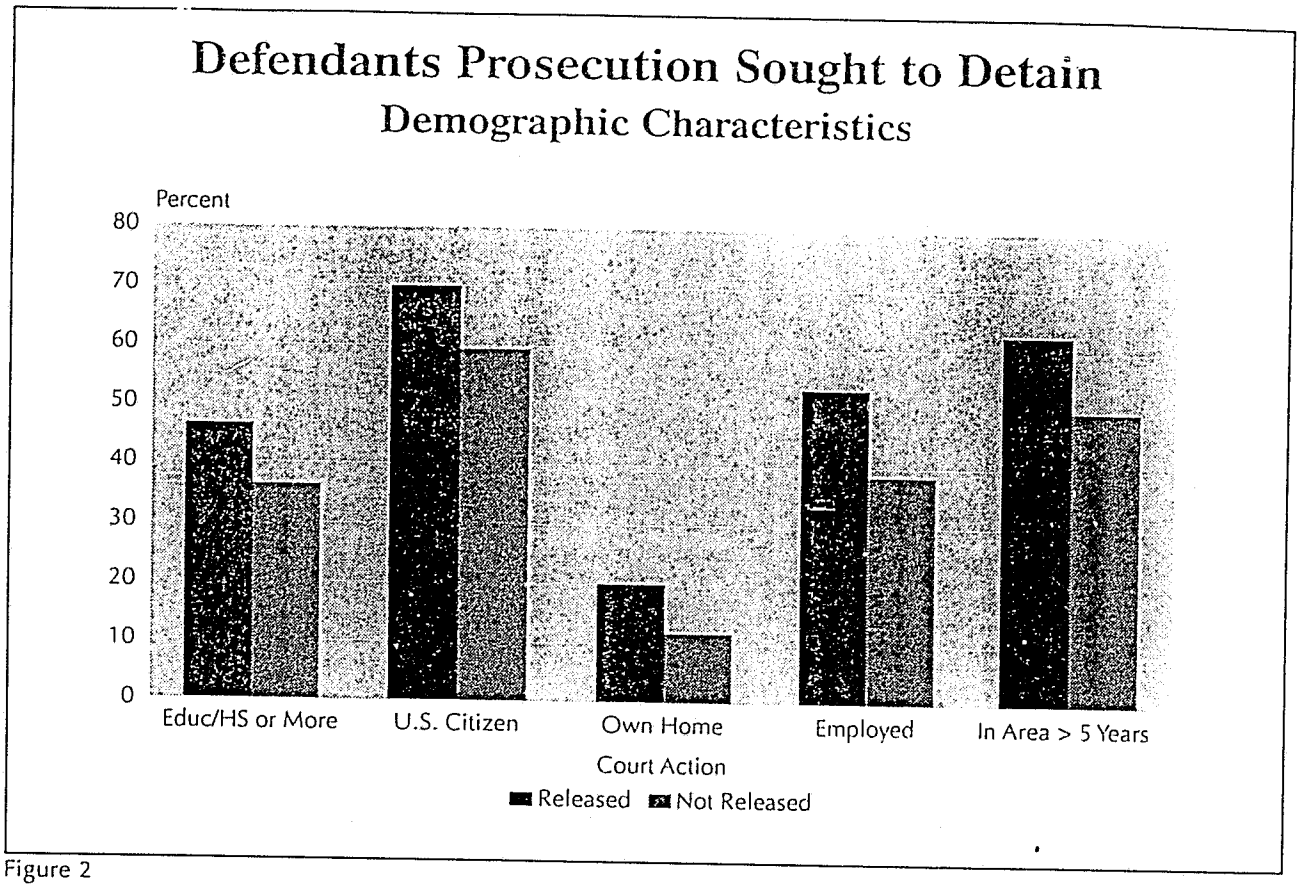

Figure 2

With regard to criminal history, conviction for past crimes reduces, but does not eliminate, a defendant's opportunity for pretrial release. For example, 45 percent of those detained had been previously convicted of a felony, while 26 percent of those released were convicted felons (Figure 3) Similarly, 57 percent of detainees have been arrested for a felony, as opposed to 41 percent of those released despite the prosecutor's motion for detention.

As judicious as the courts are in balancing the safety of the community against the rights of the defendant, according greater weight to prior criminal record and slightly less weight to several demographic factors could reduce still further the likelihood of a released defendant committing a felony violation This is because prior felony arrests and convictions as well as the decreased likelihood of appearance at court hearings seem to be related to felony violations. An examination of the criminal history profile of the 153 defendants, *who were arrested for felonies* after being released over the objections of the AUSA, shows that 53 percent of them had prior felony arrests and 37 percent had prior felony convictions. These arrest and conviction rates are close to the 57 percent prior felony arrest rate and 45 percent prior felony conviction rate of defendants whom the courts agreed to detain; they are considerably above the 41 percent prior felony arrest rate and 26 percent prior felony conviction rate for *all defendants released over the objections of the AUSA* (see Table 1 on page 8). In

addition, those who committed felony violations while on pretrial release are likely to have missed hearings in the past at the same rate as detainees (15 percent failure to appear rate) and considerably more often than other released defendants (10 percent).

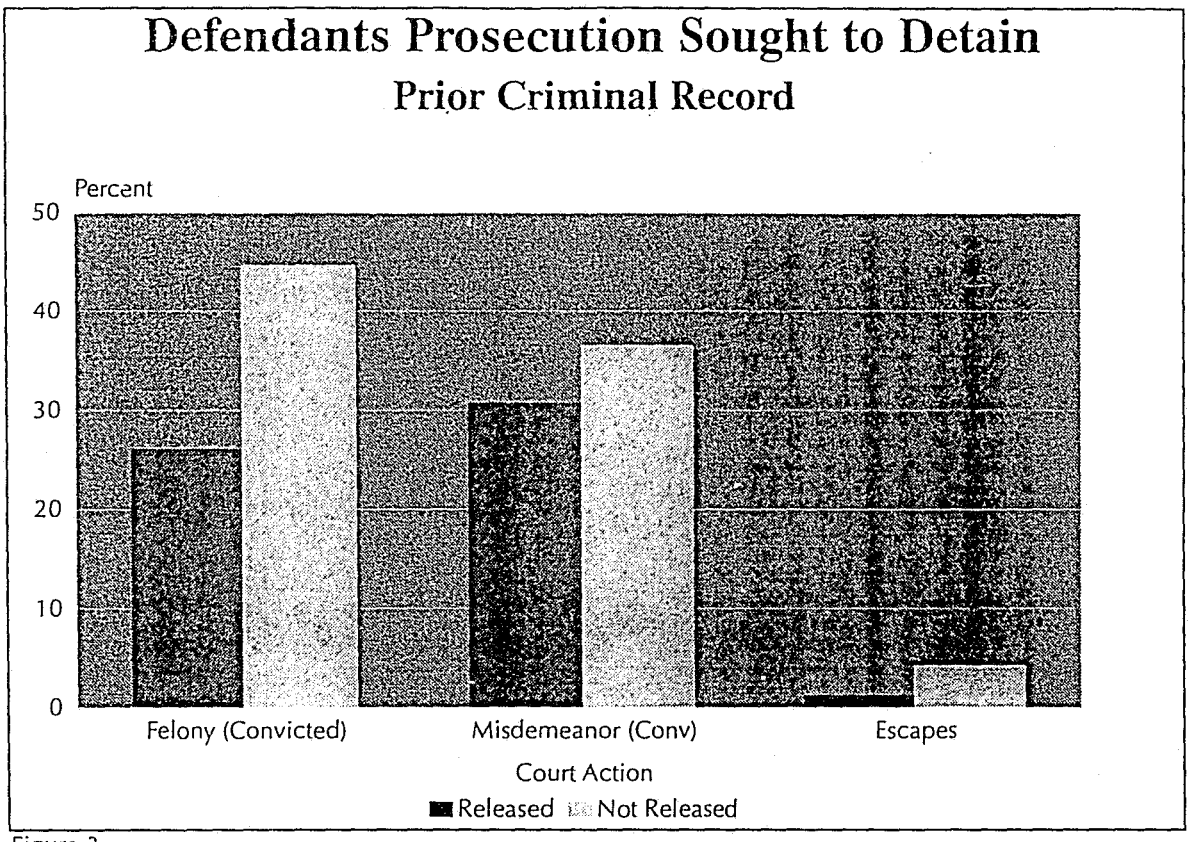

Figure 3

The release of defendants who, on the basis of their criminal records, appear to be good candidates for detention may be explained by the apparent weight given to youth and community ties. Sixty-three percent of all released defendants for whom detention was sought were in the area over 5 years and only 50 percent of defendants who are detained have been in the area that long. Seventy-seven percent of released defendants with felony violations have been in the area for over 5 years. Eighty-one percent of felony violators are U.S. citizens compared to 70 percent of released defendants and 59 percent of detainees. Released defendants who commit felonies are also considerably younger than either detainees or other released defendants (see Table 1 on page 8). Courts seemingly are more willing to release defendants who are young and who have lived in the area a long time despite criminal histories which would lead to detention for older, more transient defendants. These young released defendants, however, have exhibited a greater tendency to commit felony

[7]The number of defendants who might be detained because of greater scrutiny of factors such as prior felony convictions and youth is small. Of the more than 5,000 defendants released over the motion of the AUSA, slightly more than 100 had a prior felony conviction and were under age 25.

violations.[7]

Of course, for those defendants whom the court believes pose a risk of flight or of danger to the community, alternatives to incarceration exist which allow the court to supervise the defendant in the pretrial period. These include drug testing, house arrest, submission to warrantless searches for drugs or alcohol, residence in a halfway house, electronic bracelet monitoring, and submission to random, unannounced visits by pretrial services officers.

V. Conclusion

In writing the Bail Reform Act of 1984, Congress did not intend to increase the number of detainees substantially, but sought to limit the law's application to a "small but identifiable group of particularly dangerous defendants".[8] The courts have further determined that the intent of the Act was reasonably to assure, not necessarily to guarantee, the safety of the public.[9]

While bail violations among the group of defendants the U.S. attorneys attempted to detain is relatively high, the violations are generally not of the type for which detention was sought. Violent crimes are rare. Judicial officers have been largely successful in balancing public safety with the rights of defendants. However, this already impressive performance could be further enhanced if they were to accord more weight to prior criminal record when reviewing the cases of young defendants who have community ties. By doing so, the small risk to public safety engendered by pretrial release could be further reduced.

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[8]David N. Adair, Jr., "Looking at the Law," **Federal Probation**, Washington, D.C., March 1993, p. 74.
[9]Ibid., p. 75.

Table 1
Criminal History and Personal Data of Defendants Whom the AUSA Sought to Detain in FY 1992

	Released Defendants with Felony Violations Commited during Release	All Released Defendants Including Those Who Commit Felony Violations during Release	Detained Defendants
Total Defendants	153	5,871	12,218
Criminal History			
Felony Arrests	53%	41%	57%
Felony Convictions	37%	26%	45%
Failure to Appear at Hearing	15%	10%	15%
Personal Data			
In Area over 5 Years	77%	63%	50%
U.S. Citizen	81%	70%	59%
Age Under 25	40%	29%	29%

Table 2
Defendants Released in FY 1992

	No Motion for Detention by AUSA (n=25,459)		Motion for Detention by AUSA (n=5,871)	
	Number	Percent	Number	Percent
Defendants With No Violations	22,082	86.7%	4,739	80.7%
Type Violation				
All Violations	3,377	13.3%	1,132	19.3%
Failure to Appear	621	2.4%	242	4.1%
Felony Violation	448	1.8%	153	2.6%
Felony Violation/Violent Crime	46	0.2%	19	0.3%

Table 3
FY 1992 Detention Summary

Total Cases Closed	50,198
of which:	
Court Approved Detention/AUSA Motion	12,218
Released without Government Challenge	25,459
Released despite Government Challenge	5,871
Other*	6,650

*Detained for failure to make bail, court motion for detention, etc.