Reducing *Unnecessary* Detention: A Goal or Result of Pretrial Services?

James R. Marsh
Chief Pretrial Services Officer, District of Nevada

ALTHOUGH MANY pretrial services practitioners believe that reducing unnecessary detention is a goal of pretrial services, it is not a requirement or function by statute. Some who believe it is a goal have developed plans to reduce unnecessary detention. Some plans are simple and some are comprehensive. In some districts, simple actions or adjustments may affect the detention rate and, in other districts, more comprehensive plans will be required to reduce detention. There are also influences outside the control of pretrial services that affect the detention rate. In this article I will discuss some of these influences, and some simple and comprehensive ways that districts may reduce unnecessary detention.

Although not a requirement or statutory function of pretrial services, unnecessary detention is mentioned in previous Congressional acts relating to pretrial services. The Speedy Trial Act of 1975 set forth a statutory provision that, "The Director of the Administrative Office of the United States Courts shall annually report to Congress on the accomplishments of the pretrial services agencies, with particular attention to…(2) their effectiveness in reducing the volume and cost of unnecessary pretrial detention." The Pretrial Services Act of 1981 references that the demonstration pretrial services programs "have proven that the programs will meet the objectives of ... reducing the number of defendants unnecessarily confined during the pretrial detention period; ... and reducing the costs of unnecessary pretrial detention." Unnecessary detention was not mentioned in the Bail Reform Act of 1984 nor does any subsequent legislation specifically mention unnecessary detention when referencing pretrial services and its functions.

A Plan is Developed in 1994

In January 1994, while the national detention rate was still "reasonable" (approximately 40 percent) but of concern, three pretrial services practitioners[1] developed a national plan to reduce *unnecessary* detention. The term unnecessary was emphasized because these practitioners recognized the need for some defendants to be detained, to assure appearance and protect the community. The plan was based on the premise that one segment of the defendant population could be reached with such a plan—those defendants found to be an appearance risk only. The national failure to appear rate at that time was less than 3 percent, and many alternatives to detention had been developed to address appearance concerns. Those defendants detained solely as a danger were relatively small at the time (14 percent). Although most defendants who fail to appear in the federal criminal justice system are apprehended eventually, those who are not apprehended save the government the cost of prosecution and are forced to lead a secluded life in the United States or flee to confines less desirable to live in. The plan focused on the use of alternatives to detention, which required national financial resources to accomplish. About this same time, a plan was also developed by the Administrative Office of the U.S. Courts to transfer funds to pretrial services offices from the U.S. Marshal's Service to assist in providing alternatives to detention and reduce jail overcrowding and costs. For this reason, a detention reduction plan was timely.

The plan to reduce unnecessary detention did not focus on the outside influences of the increase in detention rate, but on some factors under the control of pretrial services that may have contributed to unnecessary detention. These factors were 1) inefficient operations; 2) over-reliance on the charge or penalty; 3) acquiescence in the presumption for detention; 4) under-use or inappropriate use of alternatives to detention; and 5) inadequate review of detained cases. Let's review each of these factors in more detail.

A review of probation and pretrial services offices revealed a number of pretrial services practices or procedures that reduced efficiency. Some of these include inadequate notice that a defendant had been arrested, inadequate access to the defendant prior to the initial appearance hearing, and inadequate time to verify information or prepare a written report prior to the court hearing. These practices could exist singly, in combination, or at times all together. One or more of these factors reduced the pretrial services officer's ability to properly assess the risks the defendant presented and inhibited the officer from properly formulating a recommendation for release to the court. These practices often resulted in a recommendation for detention or else for release with unnecessary (not least restrictive) conditions of release.

Officers were also often placing too great a value on the defendant's charge or the potential penalty. While the statute presumes detention for some offenses, it is a presumption that can easily be rebutted.[2] The presumption provision of the statute also does not apply unless the judicial officer finds it does. If officers addressed the presumption

in the pretrial services report, they did so prior to the judicial officer finding that a presumption for detention applies. Officers should assess the defendant with an eye to rebutting the presumption and look for factors why a defendant will not flee or pose a danger to the community. The potential penalty was also given too much weight by the officer. The potential penalty is generally reduced substantially from the time of arrest to conviction, and credits and enhancements with sentencing guidelines, which are unknown at the time of arrest, also affect the sentence. Sentencing guideline computations are also not prepared at the time of the defendant's arrest and should not be computed because of changes that may occur from arrest to sentencing.

Officers often acquiesced in the presumption of detention and made a recommendation for detention rather than attempt to fashion conditions of release to address risks. Defense counsel too frequently did not present information found in the pretrial services report to argue and rebut the presumption. In the absence of any attempt to rebut the presumption, the court had little option but to detain the defendant. Officers often also acquiesced in the request of the government for a three-day continuance of the detention hearing and did not prepare their reports until the time of the detention hearing. This allowed officers more than adequate time to prepare the reports, but perhaps diminished their neutrality and biased their recommendations due to the government's motion for detention. Reports and recommendations should be based on the history and characteristics of the defendant, not the intentions of the government.

Although alternatives to detention existed, they were not always used or used effectively. Home confinement conditions were sometimes imposed on defendants not really in need of that condition, and home confinement was often not the least restrictive condition that could be set. Alternatives were not used to get the riskier defendants released, but added unnecessary restrictive conditions to defendants who probably could have been released without these conditions. Some districts developed a "menu" of conditions that applied to every defendant regardless of background or risk presented. Alternatives were frequently imposed and never removed when circumstances changed with defendants; thus, precious funds for alternatives were expended and offices performed unnecessary work.

The review further revealed that many probation[3] and pretrial services officers did not review the cases of defendants who were detained to see if information needed to be verified or conditions could be fashioned. If an officer conducts a thorough interview and investigation and prepares an objective pretrial services report with verified information, the need to continue to review the case is unnecessary and futile. Some districts have used the Title 18 § Rule 46(g) report prepared by the U.S. Marshal's Service and U. S. Attorney's Office to review detained cases. This also would appear to be an exercise in futility, as information on that report is inadequate to be of any assistance in assessing the release of defendants already detained. In fact, the statute states that a person pending sentence or appeal should be detained, unless the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the community. A number of the defendants found on the 46(g) report would meet this criteria. Pretrial Services' statutory responsibility under this report is to assist the United States Marshal and United States Attorney in the preparation of this report. The report requires the attorney for the government to make a statement of the reasons why a defendant is still held in custody. There are no procedures or requirements connected with this report for the court to review a person's detention or to effect a person's release. The best defense against detaining a defendant is providing adequate information and a solid recommendation to address risks at the initial appearance or detention hearing, in lieu of trying to secure release later. In fact, 33 percent of defendants are released at the initial appearance hearing and only 14 percent are released at further hearings, which supports this view.

The plan presented two phases. Phase one required the support of the court to modify some of its practices and more importantly to release some defendants that would not otherwise have been released. It also required support from related agencies, such as the U.S. Marshal's Service, U.S. Attorney's Office, the defense bar, and community treatment providers. The support of the court was viewed as a prerequisite to the successful implementation of the plan.

Phase two included operational review, critical thinking in pretrial services reports, adoption of the Pretrial Services Supervision Monograph, and financial resource management. The operational review would identify practices and procedures that should be modified to maximize efficient use of resources while fulfilling the statute. After the review was completed, an operational plan was to be established. At the time the detention reduction plan was developed, a report writing monograph was also being produced by the Administrative Office, designed to be followed by pretrial services officers preparing their pretrial services reports. The monograph was finally adopted in 1998. This monograph addressed the misuse of the presumption provision and potential penalty, as well as assisting the officer in focusing on risks posed by the defendant and formulating an appropriate recommendation to address those risks. The designers of the plan also believed that an effective supervision program would serve as an alternative to detention and provide more confidence for judicial officers to take risks in releasing defendants. The Pretrial Services Supervision Publication 111, adopted in 1993, provided districts with procedures for an effective supervision program in their district. Lastly, Phase Two required a review of how funds were being expended in a district, particularly for alternatives to detention. The plan focused on providing more funds for alternatives, but with receipt of more funds, especially from the U.S. Marshal's Service, better management of those funds was required. At times, districts were using these funds unwisely, such as expending exorbitant amounts for drug treatment.

Although the plan appeared sound, it did not receive the needed support at the time to be refined and implemented. Therefore, no pilot demonstration program was attempted to determine its feasibility and effectiveness. Seven years later, others in the federal pretrial services system are now in the planning stages of developing a national plan to reduce the detention rate. The detention rate is at 52.2 percent,[4] and the failure to appear rate is still below 3 percent.[5] Even after removing the immigration and illegal alien cases, districts have detention rates as low as 16 percent to a high of 69.5 percent and the national rate is 44 percent.[6] A review was recently conducted in the district with the highest detention rate, and contributing factors listed in the 1994 detention reduction plan were detected, particularly the preparation of ineffective pretrial services reports and the lack of alternatives to detention. In this district, the lack of understanding of unnecessary detention was also evident from related agencies. The U.S. Marshal was quoted, "Because if the magistrate judges sees fit to release the subject on some sort of bond condition and he takes off, it is my job to find the guy. If they're in jail, you

don't have to go looking for them. It's the old thing; You can pay me now, or you can pay me later."[7] Although the U.S. Marshal's statement is well intended, I doubt he was aware that he was only talking about fewer than 3 percent[8] nationally of all defendants released. Hypothetically, if every defendant was released in this district, only about 12 defendants would fail to appear. Most of those would have been apprehended when rearrested and identified as wanted through a national automated database. Before he made this statement, the Marshal advised he spent $4.4 million last year in detention costs. It is doubtful that apprehending 12 defendants would cost anywhere near $4.4 million, because the cost of detention is much higher than the cost of apprehending most fugitives. The issues raised in this district demonstrate that the premise of the plan to reduce unnecessary detention offered in 1994 is still sound.

The "Stakeholders"

More recent plans discuss involving "stakeholders" in the detention reduction plan process. It is unclear if the term "stakeholder" is appropriate to use in this context.[9] However, since the term is being applied to reducing detention, we should ask, "Who are these stakeholders?" Obviously, they would include Pretrial Services, along with the Federal Public Defender and defense bar, the U.S. Attorney, and the U.S. Marshal's Service. It is uncertain if these groups all have an interest in reducing unnecessary detention. Again, Pretrial Services should be a stakeholder, but this is not mandated and there are no incentives for reducing detention. The current workload formula does provide substantial work credit for defendants released under pretrial services supervision, but no credit is given for released unsupervised defendants. The Federal Public Defender and defense bar have a stake in securing release of defendants pending trial so that they may assist in their case defense. It is more difficult for defense counsel to obtain such assistance from a detained defendant, and detained defendants are not as readily available as those released. Some defense attorneys, however, may not be troubled by their defendant's pretrial detention, if incarceration is inevitable, since this counts as jail time credit toward a sentence of incarceration. The U.S. Attorney's Office has a different stake in detention, because they believe they lose a great deal of leverage in their prosecution if a defendant is released. However, these concerns are immediately discounted when defendants choose to act as confidential informants. They are also concerned with having a defendant flee to avoid prosecution and punishment. The U.S. Marshal's Service also should be a stakeholder to reduce unnecessary detention, to reduce jail overcrowding and the cost of pretrial detention. The cost in 1999 exceeded 400 million dollars, but many take the view of the U.S. Marshal quoted above that releasing defendants only creates work if they fail to appear. Each "stakeholder" has a stake for different reasons, but all are not in favor of reducing unnecessary detention. The plan developed in 1994 included involving many of these agencies, as they all play a part in reducing or increasing unnecessary detention.

Should the Bureau of Prisons, Congress, the community, and the defendant also be considered as stakeholders? After considering their stake in detention, the answer should be "Yes." The Bureau of Prisons has a stake because many pretrial detainees are housed at Bureau of Prison facilities while awaiting disposition in their case. These detainees require a great deal of financial resources to house and take valuable space that could be used for convicted offenders. Congress has a stake in reducing government costs and fund programs. Excessive funds used for pretrial detainees take funds away from other program funding. There is little Congress can do to reduce these costs if defendants are being detained at a high rate. The community also has a stake, not only as taxpayers, but as potential victims if dangerous defendants are released and continue with their criminal activity. The community has a double stake then in reducing detention, in saving funds and in protecting themselves from dangerous or criminally active individuals.

Contributing Factors Outside the Control of Pretrial Services

While the primary premise of this article is that pretrial services may be able to reduce unnecessary detention, it should be pointed out that the rise in detention may be due to factors outside the control of pretrial services. By the end of 1989, the national detention rate was approximately 37 percent, and there was an outcry over increased detention rates and jail overcrowding. Ten years later, the national detention rate was 51 percent, with few concerns about jail overcrowding. This rise in detention could be attributed to many factors outside the control of pretrial services. During this period, there was a 5 percent increase in controlled substance offenses and a 6 percent increase in immigration offenses. The number of illegal aliens processed by pretrial services agencies increased by over 10,000 defendants by 1999. Defendants who refused interviews by pretrial services officers rose over 5 percent nationally. Defendants with prior felony convictions increased by 10 percent, and defendants with prior failures to appear increased by 6 percent. Weapons and firearm offenses were not an offense charged category on the national profile in 1989 prepared by the Statistics Division of the Administrative Office of the U.S. Courts, but were later added and made up 4.5 percent of all federal cases in 1999. From 1989 until 1999, it appears violent offenses and defendants increased, along with illegal alien defendants. These are categories of defendants that are more difficult, if not at times impossible, to fashion release conditions for. These defendants may, in fact, fall into a category of necessary detention. It is also unlikely a defendant will be released by the court without providing information to the judicial officer to make an informed release decision. Therefore, the types of cases and number of refusals may have substantially impacted the national detention rate from 1989 to 1999, but this does not mean pretrial services still cannot have an impact.

Defendants appearing on writs also contribute to an increase in the detention rate, although the numbers of these cases is not high. Because pretrial services is charged with preparing pretrial release reports on individuals charged with an offense,[10] they are therefore required to interview defendants who are serving state sentences. Some of these defendants are serving lengthy sentences and appear for their initial appearance on a writ due to a detainer placed on them by the government. Until the 1984 Bail Reform Act, pretrial services would only interview defendants in federal custody,[11] so defendants appearing on writs did not count. It would seem reasonable to not interview these defendants and address bail when they have completed their state sentence. To do this procedurally and to ensure a defendant is not released without addressing bail in the federal courts, a federal detainer would remain lodged on the defendant. This procedure, however, appears to violate the Interstate Agreement on Detainers, Title 18, Appendix 2. One district attempted to overcome writ cases skewing their detention rate by getting their court to enter release orders on some 30 writ cases. This pro-

cedure may be effective and not disrupt the pending federal case, because many of these cases would be disposed of in federal court before being released from their state sentence. A procedure to address writ cases appears to be worth exploring.

Another contributing factor to the high detention rate is the percentage of defendants unable to meet conditions of release. In one large district in 1999, 63 percent of defendants fell into this category. Presumably most of these defendants are unable to meet financial conditions, since those districts with a high rate of defendants unable to meet conditions of release also show a high rate of financial recommendations by the U.S. Attorney's Office. The setting of unmet financial conditions is in opposition to the 1984 Bail Reform Act and the statute. Title 18 § 3142(c) (2) states, "The judicial officer may not impose a financial condition that results in the pretrial detention of the person." This is a sub rosa use of bail to detain defendants, and this practice was eliminated by the Bail Reform Act of 1984. The statute states specifically that a person should be released on personal recognizance, upon execution of an unsecured appearance bond, or released on a condition or combination of conditions or be *detained.* A person should be detained only under an order of detention and not because of the inability to meet conditions of release. But, some 16 years after the Act and implementation of the statute, 8 percent of all defendants are detained because they cannot meet conditions of release.

National and Local Action Plans

Although not mandated to do so, should pretrial services do what it can to reduce unnecessary detention? The answer is "Yes." Reducing unnecessary detention was an anticipated result of establishing pretrial services in the federal system and it should be a result. Pretrial Services cannot be effective in this endeavor without support from the Administrative Office of the U.S. Courts, the judges, U.S. Attorney's Office, U.S. Marshal's Service, defense bar, and community agencies. Pretrial services also cannot be effective without sound operational practices that follow national standards and monographs developed to assist in performing pretrial services functions effectively and efficiently. One problem, however, is defining what *necessary* detention is. In one large district, the detention rate is a commendable 18 percent, but how do we know whether even this is a *necessary* rate of detention? Such a rate may not be achieved in districts with a high rate of contributing factors, such as illegal alien defendants, refused interviews, and writ cases. However, even in districts with a high rate of contributing factors, a reduction in the rate could still be achieved. The impact these factors may have on a district's detention rate, and even the national detention rate, should be explored.

I believe it is time for a study to help determine a national *necessary* detention rate. We should look at those factors that contribute to low detention rates in some districts and high detention rates in others. Even before our district had a high rate of illegal alien defendants, I was a strong advocate for removing illegal alien defendants from the national detention rate, since Congress did not intend to include them in factors to be considered for release in Title 18 § 3142. Also, defendants appearing on writs, in state custody or serving state sentences should be removed from the national detention rate. Once a study is completed, and factors pro and con are known, and a *necessary* national detention rate is determined, we can either finalize the plan developed in 1994 or develop another plan to reduce *unnecessary* detention nationally in the federal system. In the meantime, we seem to be only "spinning our wheels" and not truly doing anything productive to affect the rate of detention.

Absent a national detention reduction plan, Pretrial Services Offices should do what they can to reduce detention in their districts. They can do this if they follow the national monographs for report writing and supervision, prepare pretrial services reports prior to the initial appearance hearing with verified information, do not address the penalty and presumption, use alternatives to detention effectively to get defendants released who would otherwise be detained, provide information to the court on their release and detention decisions, and meet with those agencies that impact the detention rate to discuss ways to reduce detention. These are some simple steps that can be taken now to counter the rising detention rate. After all, if reducing unnecessary detention is a goal, "Shouldn't we just do it?"

Endnotes

[1]Marsh, James R., Miller, Donald S. and Primosch, Thomas F. January 1994. "A Plan to Reduce *Unnecessary* Pretrial Detention in the Federal Criminal Justice System." A Proposal for a Pilot Project and National Implementation.

[2]*U.S. v. Dominquez*, "Any evidence favorable to a defendant that comes within a category listed in § 3142(g) can affect the operation of one or both of the presumptions, including evidence of their marital, family, and employment status, ties to and role in the community, clean criminal record and other types of evidence encompassed in § 3142(g)(3)."

[3]In some districts, probation officers perform pretrial services functions.

[4]H-Tables for the twelve-month period ending March 31, 2001.

[5]H-Tables for the twelve-month period ending March 31, 2001.

[6]Green, O. Rene, June 14, 2001. Reducing Pretrial Detention, Federal Corrections and Supervision Division, Project Coordinator.

[7]*Belleville News Democrat*, January 3, 2001,"Local federal court leads nation in cases denied bail."

[8]The 3 percent Failure to Appear rate is based on a 52 percent detention rate, and there may be an assumption that as the number of people released increases so will the Failure to Appear rate. Even if the number of defendants who Failed to Appear in this district were doubled, it still would not cost $4.4 million dollars to apprehend them.

[9] "1. A person entrusted with the stakes of two or more persons betting against one another and charged with the duty of delivering the stakes to the winner 2. A person entrusted with the custody of property or money that is the subject of litigation or of contention between rival claimants in which the holder claims no right or property interest." Webster's Third New International Dictionary, 1981.

[10]"The term 'offense' means any Federal criminal offense which is in violation of any Act of Congress and is triable by any court established by Act of Congress (other than a Class B or C misdemeanor or an infraction, or an offense triable by court-martial, military commission, provost court, or other military tribunal)." Title 18 § 3156 (5)(b)(2).

[11]"The district pretrial services agency will have as its primary duty the responsibility for promptly interviewing all persons in the district who come into United States custody by way of summons or arrest,…" Administrative Office of the United States Courts, Probation Division, Pretrial Services Branch, Pretrial Services Manual, not dated.