

# Overview of Federal Pretrial Services Initiatives from the Vantage Point of the Criminal Law Committee

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**THE JUDICIAL CONFERENCE** of the United States was created by Congress in 1922 to make national policy for the administration of the federal courts, including the probation and pretrial services system.<sup>1</sup> One of its committees, the Criminal Law Committee, reviews issues relating to the administration of the criminal law and oversees the federal probation and pretrial services system. This includes, among other responsibilities, proposing policies and standards on issues affecting the probation and pretrial services system and reviewing pending legislation relating to the administration of criminal law.

There is a series of noteworthy national initiatives related to the federal pretrial services system, which can be summarized from the vantage point of the Criminal Law Committee. In particular, the Committee has monitored and made recommendations regarding: (1) pretrial diversion programs; (2) judge-involved supervision programs modeled after problem-solving courts in the states; (3) the use of data-driven strategies to reduce unnecessary pretrial detention; and (4) proposed legislation regarding the statutory

presumption of detention.

## I. Pretrial Diversion Programs

Pretrial diversion is an alternative to prosecution that, at the discretion of the United States Attorney's Office, diverts certain persons from traditional criminal justice processing into a program of supervision and services administered by the probation and pretrial services system. The United States Attorney's Office may formally decline or initiate prosecution depending on whether the program requirements are satisfied. The objectives of pretrial diversion supervision are to ensure that the divertee satisfies the terms of the pretrial diversion agreement and to provide the divertee with support services to help facilitate the divertee's compliance with supervision and reduce the likelihood that the divertee will recidivate. The statutory functions and powers related to pretrial services officers include collecting, verifying, and preparing reports for the United States Attorney's Office of information pertaining to the pretrial diversion of any individual who is or may be charged with an offense.<sup>2</sup>

The Judicial Conference of the United States has supported alternatives to criminal prosecution for several decades.<sup>3</sup> More

recently, former Chair of the Criminal Law Committee Judge Irene M. Keeley of the Northern District of West Virginia testified before the Charles Colson Task Force on Federal Corrections that pretrial diversion is a potentially underutilized program in the federal criminal justice system.<sup>4</sup> Noting that less than one percent of activated cases are pretrial diversions, Judge Keeley expressed the Criminal Law Committee's readiness to work with the Department of Justice to discuss ways to increase the number of individuals participating in the pretrial diversion program.<sup>5</sup>

to require equal treatment of similarly situated persons selected for pretrial diversion. JCUS-MAR 80, p. 43.

<sup>4</sup> See Testimony of Hon. Irene M. Keeley Presented to the Charles Colson Task Force on Federal Corrections on January 27, 2015 (on file with the Administrative Office of the U.S. Courts). The Charles Colson Task Force on Federal Corrections was a blue-ribbon task force created by Congress to examine challenges in the federal corrections system and develop practical, data-driven solutions. The Task Force met throughout 2015 to conduct its work and presented findings and recommendations to Congress, the Department of Justice, and the President in January 2016. The final report of the Task Force is available at: <https://www.urban.org/features/charles-colson-task-force-federal-corrections>.

<sup>5</sup> For a more detailed discussion about the Judicial Conference's support for and the state of pretrial diversion programs, see Testimony of Hon. Irene M. Keeley, *supra* note 4. In addition to taking a position on pretrial diversion, the Judicial Conference also recently recommended legislation expanding the scope of "special probation" under 18 U.S.C. § 3607. Section 3607 of title 18, U.S. Code, offers a process

<sup>1</sup> While national entities such as the Judicial Conference of the United States play a role in policy-making, the federal judiciary has a highly decentralized structure. Each district court in the 94 federal judicial districts also has the authority to issue and implement its own local policies and initiatives. For more information about the Judicial Conference and how it is organized and to read reports of the Judicial Conference proceedings, see: <http://www.uscourts.gov/about-federal-courts/governance-judicial-conference>.

<sup>2</sup> 18 U.S.C. § 3154 (10).

<sup>3</sup> In March 1980, the Judicial Conference agreed to support a bill to establish alternatives to criminal prosecution for certain persons charged with offenses against the United States and procedures for judicial involvement in pretrial diversion proceedings designed to standardize practices and

## II. Judge-Involved Supervision Programs

Since 2008, as part of its continuing exploration of evidence-based practices and its commitment to using empirical data to make programmatic resource decisions, the Criminal Law Committee has been discussing judge-involved supervision programs in the federal system.<sup>6</sup> These programs are modeled on “problem-solving courts” used by state and local governments since the 1980s. They operate at different stages of the criminal justice process and go by many names, including “pretrial diversion court programs,” “drug court programs,” “alternative-to-incarceration court programs,” and “reentry court programs.” In 2008, one type of judge-involved supervision program—post-conviction reentry court programs—had been implemented by 21 federal districts and was under development in another 31 districts.

As the Criminal Law Committee stated in its September 2009 report to the Judicial Conference, these federal reentry court programs “reveal an energetic commitment to the betterment of federal offenders and an

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of special probation and expungement for first-time drug offenders who are found guilty of simple possession under 21 U.S.C. § 844. Specifically, a court may, with the offender’s consent, place the offender on a one-year maximum term of probation without entering a judgment of conviction, and upon successful completion of the term of probation, the proceedings are dismissed. For offenders under the age of 21 that successfully complete their terms of probation, upon application by the offender, an order of expungement is entered. A bill was introduced in Congress, H.R. 2617 (115th Congress), the RENEW Act, that would expand the age of eligibility for expungement under section 3607 of title 18 from “under the age of 21” to “under the age of 25.” The Committee on Criminal Law noted that the RENEW Act’s aim of expanding the scope of section 3607 is consistent with practices already occurring in many courts looking to increase alternatives to incarceration and enhance judicial discretion and is consistent with Judicial Conference policy on sealing and expunging records in that it would not limit judicial discretion in the management of cases and adoption of rules and procedures. On recommendation of the Criminal Law Committee, the Conference agreed to support amendments to 18 U.S.C. § 3607 that provide judges with alternatives to incarceration and expand sentencing discretion. JCUS-SEP 17, p. 11.

<sup>6</sup> For a more detailed discussion of judge-involved supervision programs in the federal system, see Stephen E. Vance, *Judge-Involved Supervision Programs in the Federal System: Background and Research*, 81 Federal Probation 15 (2017); Stephen E. Vance, *Federal Reentry Court Programs: A Summary of Recent Evaluations*, 75 Federal Probation 64 (2011).

enthusiasm that should be commended.” While it considered research demonstrating the effectiveness of some judge-involved supervision programs in the state systems, the Committee determined that further research on the effectiveness of reentry court programs was necessary before endorsing a national model policy for these programs at the federal level. Further, the Committee recognized that programs of this kind are resource intensive and, because they typically involve a relatively small number of offenders, some assessment of cost-effectiveness might be prudent.

In 2009, upon the Criminal Law Committee’s recommendation, the Judicial Conference endorsed the commissioning of a study “to assess the efficacy and cost-effectiveness of reentry court programs,” and it asked the Committee “to consider the results of this study in recommending any appropriate model programs.” The Criminal Law Committee subsequently asked the Federal Judicial Center (FJC) to design and conduct a study of reentry court programs in the federal courts. The FJC designed a two-pronged approach for the study. The first prong involved a retrospective assessment of 20 existing reentry court programs. The second prong involved a multi-year, randomized experimental study of a federal reentry court program model policy as implemented in five districts with new or relatively new reentry court programs.<sup>7</sup>

In June 2016, the FJC completed the final report of its randomized experimental study. Among the report’s findings were that the study districts had difficulty adhering to the requirements of the reentry court program model policy, there was a high refusal rate

<sup>7</sup> The experimental study design called for each study district to implement a reentry court program with offenders who began a term of supervised release after being randomly placed into one of two treatment groups (Groups A and B) or a control group (Group C). Treatment Group A had a reentry court program team consisting of a judicial officer, one or more probation officers, and representatives from the U.S. Attorney’s Office and the Federal Defender’s Office. Participation by a treatment provider is optional. Treatment Group B had a team similar to that of Group A, but the Group B reentry court program did not include a judicial officer. The reentry court program model policy, which was based on the recommendations of groups like the National Association of Drug Court Professionals, guided the operations of the two program teams. The offenders assigned to Group C received standard supervision by a probation officer. Random assignments ended in April 2013, and the final participants graduated from the programs in October 2014.

for study participants who were randomly assigned to a reentry court program, there was a low completion or graduation rate for program participants, and no impact on revocation or recidivism rates was found.<sup>8</sup> The Criminal Law Committee concluded that, while the FJC’s report added to the research literature on the efficacy and cost-effectiveness of the reentry court program model used during the study, additional information should be considered before it could decide what, if any, recommendations it would make to the Judicial Conference about a national model policy.

In recent years, the Committee has reviewed a broader body of empirical research on the effectiveness of judge-involved supervision programs, not just at the back-end of the process (i.e., when an individual is released from prison), but at the front-end (i.e., at the pretrial or presentence stage). While there has been a significant amount of promising research about the effectiveness of front-end drug courts in the states, there is not a significant amount of research about their effectiveness in the federal system. Pretrial and presentence judge-involved supervision programs in the federal system are in their infancy, but the number of such programs has increased rapidly in recent years. According to a recent survey conducted by the Administrative Office of the U.S. Courts, there are approximately 25 initiatives in the federal courts that may provide alternatives to incarceration or reduced sentences for certain defendants who satisfy the requirements of these programs.<sup>9</sup>

In June 2017, the Committee was briefed on a paper prepared by Christine Scott-Hayward, the Supreme Court Fellow assigned

<sup>8</sup> For a more specific summary of the findings of the FJC study, see Stephen E. Vance *Judge-Involved Supervision Programs in the Federal System: Background and Research*, 81 Federal Probation 15 (2017).

<sup>9</sup> See also United States District Court, Eastern District of New York, *Alternatives to Incarceration in the Eastern District of New York, Second Report to the Board of Judges* (August 2015) (cataloguing some of the existing diversion programs and describing the different methods of diversion from traditional criminal justice processing including by: (1) dismissal of charges, (2) reduction in charge to a lesser offense, (3) the vacatur of convictions, (4) avoiding prison through probationary sentences (agreed upon under Federal Rule of Criminal Procedure 11(c)(1)(C)), and (5) receiving a reduced sentence (e.g., a downward departure (or a variance) from the applicable Sentencing Guidelines range based on post-conviction rehabilitation)).

to the Sentencing Commission, on the emergence of pretrial diversion and front-end alternative-to-incarceration court programs in the federal system.<sup>10</sup> The paper explains that the evidence on the effectiveness of these programs, most of which is in the state system, is mixed. For instance, while drug courts that are properly designed and evaluated are typically found to reduce recidivism, there are minimal data on the effectiveness of other types of specialty court programs. The paper concludes by highlighting the need for program evaluation and using best practices in existing courts.

In November 2017, the Criminal Law Committee was briefed on a September 2017 report by the U.S. Sentencing Commission titled *Federal Alternative-to-Incarceration Court Programs*.<sup>11</sup> This report includes a summary of the nature of emerging front-end federal alternative-to-incarceration court programs and a discussion of relevant legal and social science issues. As discussed in the report, these programs have developed independently of both the Sentencing Commission and the Judicial Conference policy.

The report concludes that a number of questions related to the evaluation of the effectiveness of these programs are not capable of being answered at this time due to the nascent nature of the programs. As it explains, not only are the programs relatively new in the federal system, with as yet only a small number of graduates, they also have developed in a decentralized manner and differ from each other. Thus, they cannot yet be evaluated to determine whether the programs meet their articulated goals as effectively as, or more effectively than, traditional sentencing and supervision options. The report recommends that existing programs and any newly developed programs include input from social scientists so that data may be properly collected to allow for a meaningful evaluation at a later time.

The Criminal Law Committee remains aware that there are a number of judge-involved supervision programs currently operating in the federal courts, and that these programs continue to wrestle with issues related to adherence to evidence-based practices, resources, and measuring outcomes. The Committee has also recognized that

there may be factors related to the effectiveness of community corrections generally that the districts may wish to consider when operating, or determining whether to operate, a judge-involved supervision program. The Committee and the FJC intend to continue exploring how districts can consider evidence-based practices demonstrated by social science research to reduce recidivism and protect the public. The Committee will continue to evaluate these judge-involved supervision programs and consider whether any recommendations should be offered to the Judicial Conference.

### III. Data-Driven Strategies to Reduce Unnecessary Pretrial Detention

The Bail Reform Act of 1966, Pub.L. No. 89-465, was enacted to “revise the practices relating to bail to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges, testify, or pending appeal, when detention serves neither the ends of justice nor the public interest.” In making pretrial release or detention decisions, the courts are required to consider the least restrictive condition or combination of conditions to reasonably assure a defendant’s appearance in court as required and the safety of any other person or the community.<sup>12</sup> Among other responsibilities, pretrial services offices are tasked with “prepar[ing] . . . such pretrial detention reports . . . relating to the supervision of detention pending trial.”<sup>13</sup>

Despite these and other provisions designed to reduce unnecessary pretrial detention, the federal pretrial detention rate remains high.<sup>14</sup> The Criminal Law Committee has been briefed on and discussed data-driven strategies designed to reduce unnecessary pretrial detention and reasonably ensure that defendants will appear in court as required and will not pose a danger to the safety of any other person or the community, pending their appearance. These strategies include implementation of the Pretrial Risk Assessment Instrument (PTRA) to inform the recommendations of pretrial services officers regarding release or detention, training and outreach to stakeholders in the local districts, and the review of data reports to evaluate trends and outcomes.

In 2004, IBM Consulting Services issued a report commissioned by the Administrative Office of the U.S. Courts that highlighted several positive indicators of performance in the federal pretrial services system.<sup>15</sup> For instance, all respondents to a survey of magistrate judges rated the quality of bail reports and violation reports and the overall quality of pretrial supervision as either good or very good.<sup>16</sup> The report concluded, based on outcome data on violation rates, that the pretrial services system “appear[ed] to perform on par with or better than most state systems.”<sup>17</sup> It noted, however, that a key outcome measure—the percentage of defendants detained prior to trial—was increasing.<sup>18</sup> The report’s central recommendation was that the probation and pretrial services system should “become a results-driven system: to develop and maintain an infrastructure and management approach focused on collecting, analyzing and acting on outcome data.”<sup>19</sup>

The Administrative Office subsequently developed the PTRA, which is an empirically-based actuarial risk assessment instrument that provides a consistent and scientifically valid method of predicting risk of failure-to-appear, new criminal arrest, and technical violations leading to revocation while on pretrial release. The PTRA includes five risk categories depending on whether defendants are at lower, moderate, or higher risk to fail to appear, have a new criminal arrest, or have a technical violation leading to revocation of release. In 2009, the Criminal Law Committee and a working group of pretrial services officers endorsed the national use of the PTRA. While the tool is intended to inform the release and detention recommendations of pretrial services officers, it is intended to supplement (not replace) their professional judgment and experience.

In addition to developing and implementing the PTRA, the Administrative Office has recently initiated the Detention Reduction Outreach Project (DROP), which is an on-site educational and training program in which Administrative Office and court staff visit districts interested in reducing their detention rates. During the visits, judges, probation and pretrial services staff, and

<sup>10</sup> Christine Scott-Hayward, *Rethinking Federal Diversion: The Rise of Specialized Criminal Courts* 22 *Berkeley Journal of Criminal Law* 47 (2017).

<sup>11</sup> This report is available at: <https://www.ussc.gov/research/research-reports/federal-alternative-incarceration-court-programs>.

<sup>12</sup> 18 U.S.C. § 3142(c)(1)(B).

<sup>13</sup> 18 U.S.C. § 3154(8).

<sup>14</sup> See Matthew G. Roland, *The Rising Federal Pretrial Detention Rate, In Context* (this issue).

<sup>15</sup> *Strategic Assessment: Federal Probation and Pretrial Services* (on file with Administrative Office of U.S. Courts.).

<sup>16</sup> *Id.* at A-2.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

staff from the U.S. Attorney's Office and the federal defenders hear information about the PTRAs ability to identify low-risk defendants, review national and district-specific data related to release and detention, and focus on ways they can work together to reduce unnecessary pretrial detention.

Finally, the Administrative Office maintains databases and generates data reports to help inform release and detention decisions, including information to measure the implementation and use of the PTRAs and how the PTRAs may influence release outcomes. Measuring the effectiveness of recommendations regarding release or detention is complex in light of the balancing that is required between maximizing rates of pretrial release and minimizing pretrial misconduct. As one researcher put it, "There is no national benchmark that defines 'optimal' or even 'acceptable' pretrial release and misconduct rates."<sup>20</sup> The pretrial release decision-making process is essentially about striking a balance. It involves two potentially conflicting goals that must be reconciled: (1) to allow, to the maximum extent possible, pretrial release; but also (2) to ensure that defendants appear in court and do not pose a threat to the public or any specific individual during pretrial release.<sup>21</sup> Nevertheless, data reports are helpful for understanding the relevant populations and trends and making informed decisions.

#### IV. Proposal to Amend the Statutory Presumption of Detention

One contributing factor to the federal detention rate may be the effect of the statutory presumption favoring detention. Section 3142(e) of title 18 of the U.S. Code creates a rebuttable presumption that no condition or combination of conditions could reasonably assure the defendant's appearance or the safety of another person or the community. The presumption is triggered when the case involves certain offenses or certain penalties or when the defendant has a certain criminal history. To assess the impact of the presumption on the detention of low-risk defendants, the Administrative Office commissioned a study.<sup>22</sup> The study focused on the presumption

applicable to defendants charged with certain drug and firearms offenses (hereafter, "the drug and firearm presumption").<sup>23</sup> Once the drug and firearm presumption cases were identified, they were compared to cases where this presumption did not apply, by offense type and PTRAs risk level.

The study found that the drug and firearm presumption applied in 93 percent of cases charged with drug offenses. The analysis also showed that the lowest risk defendants who were charged in drug and firearm presumption cases were released 68 percent of the time, while other low-risk defendants without this presumption were released 95 percent of the time. Additionally, the study compared the rates at which probation and pretrial services officers recommended the release of defendants charged with an offense where the drug and firearm presumption applied compared to those charged with an offense where the presumption did not apply. Despite the Judicial Conference's policy that officers not consider the presumption,<sup>24</sup> the results reflected a similar disparity in their release and detention recommendations. Most notably, for low-risk defendants charged with an offense where the drug and firearm presumption applies, officers recommended release in 68 percent of cases; however, they recommended release in 93 percent of cases for low-risk defendants where the presumption did not apply.

Finally, for those defendants who successfully rebutted the presumption and were released on bond, outcome data were analyzed and compared to the outcomes for

*Statute's Relationship to Release Rates*, 81 *Federal Probation* 52 (2017).

<sup>23</sup> This presumption is triggered when the judicial officer finds that there is probable cause to believe that the defendant committed an offense for which a maximum term of imprisonment of 10 years or more is prescribed in the Controlled Substances Act (21 U.S.C. § 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. § 951 et seq.), the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.), or an offense under 18 U.S.C. § 924(c) (Use of Firearm to Commit a Felony).

<sup>24</sup> *Guide to Judiciary Policy*, Vol. 8, Pt. A, Ch. 1, § 170(b)-(c) ("[T]he officer does not consider whether the rebuttable presumption applies to a defendant. . . . Determining whether a rebuttable presumption arises, whether a defendant has rebutted it, and whether the presumption is appropriately considered in the release decision requires a judicial officer to weigh evidence and make a finding. The officer has no authority to make such a finding. Although the presence of a presumption is easily identified, determining the appropriate consideration it receives is a legal issue and legal decisions are beyond the scope of an officer's functions.").

non-presumption cases in terms of rates of (1) rearrest, (2) rearrest for violent offenses, (3) failure to appear, and (4) technical violations ultimately leading to revocation of bond. Results failed to show that differences in outcomes between presumption and non-presumption cases were statistically significant. Although low-risk defendants charged with offenses where the drug and firearm presumption applies were slightly more likely to be rearrested, defendants across every other risk category who were charged in a presumption case were less likely to be rearrested for any offense, including violent offenses.<sup>25</sup>

In sum, overall the study suggests that there is a sizeable segment of low-risk defendants who are being detained as a result of the statutory presumption of detention. The vast majority of these defendants appear to be charged with drug trafficking offenses. Since low-risk defendants tend to be successful on pretrial supervision, regardless of whether they are charged with an offense where the presumption of detention applies, it appears that the presumption is unnecessarily increasing pretrial detention rates. In the years since the enactment of the statutory presumption in 1984, actuarial risk assessment has drastically improved and provided empirical evidence of the factors that contribute to a defendant's failure to appear or failure on pretrial supervision. These factors correlate less with the nature of the charged offense and more with the defendant's criminal history and past failures on pretrial release.

At its June 2017 meeting, the Criminal Law Committee discussed whether the study provided adequate support for a recommendation

<sup>25</sup> The risk principle could explain the slightly higher rearrest rates found for lower-risk presumption defendants. The risk principle states that the level of supervision should be commensurate to a defendant's actual risk and that low-risk defendants do worse when they are grouped with and treated like higher-risk defendants. See, Andrews, D. R., Bonta, J., & Hoge, R. D., "Classification for effective rehabilitation: Rediscovering psychology," *Criminal Justice and Behavior*, 17, 19-52 (1990); Lowenkamp, C., & Latessa, E., "Increasing the effectiveness of correctional programming through the risk principle: Identifying offenders for residential placement," *Criminology and Public Policy*, 4(2): 263-290 (2004); Lowenkamp, C., Latessa, E., & Holsinger, A., "The risk principle in action: What have we learned from 13,676 offenders and 97 correctional programs?" *Crime and Delinquency*, 51(1): 1-17 (2006); Lowenkamp, C., Flores, A., Holsinger, A., Makarios, M., & Latessa, E., "Intensive supervision programs: Does program philosophy and the principles of effective interventions matter?" *Journal of Criminal Justice*, 38(4): 368-375 (2010).

<sup>20</sup> Clark, J., Pretrial Justice Institute, *A Framework for Implementing Evidence-Based Practices in Pretrial Services*. at 9 (2008).

<sup>21</sup> Clark, J., Henry, A., *The Pretrial Release Decision*, 81 *Judicature* 76, 77 (1997).

<sup>22</sup> For a detailed overview of this study, see Amarylly Austin, *The Presumption for Detention*

to amend the presumption of detention statute. The Committee ultimately agreed to recommend that the Judicial Conference seek legislation that would amend the presumption of detention found in 18 U.S.C. § 3142(e)(3)(A) to limit its application to defendants described therein whose criminal history suggests that they are at a higher risk of failing to appear or posing a danger to the community or another person.<sup>26</sup> The Judicial Conference adopted the Committee's recommendation at its September 2017 session.<sup>27</sup>

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<sup>26</sup> Specifically, it would limit application to those defendants charged with an offense for which a maximum term of imprisonment of 10 years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 and such defendant has previously been convicted of two or more offenses described in subsection (f)(1) this section, or two or more state or local offenses that would have been offenses described in subsection (f)(1) of this section if a circumstance giving rise to federal jurisdiction had existed, or a combination of such offenses.

<sup>27</sup> JCUS SEP-17, p. 10.