

## Pretrial Diversion: The Overlooked Pretrial Services Evidence-Based Practice

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**ALTHOUGH PRETRIAL DIVERSION** (PTD) was conceived in the late 1940s as a program for dealing with juvenile offenders, it was not implemented in the federal judiciary under its current form until the passage of the *Pretrial Services Act of 1982*. Originally, PTD was meant to be an alternative to prosecution for low-level criminal offenders who had identifiable rehabilitative needs (Ulrich 2002). Moreover, an expectation of this program was that participants lack a significant criminal history. Through identifying potential participants in this program and developing an individualized supervision plan aimed at addressing root causes of the individual's criminal activity, stakeholders attempted to prevent future involvement in criminal behavior.

Emerging as part of the rehabilitative movement of the 1960s and 1970s, PTD gained popularity as an informal alternative to prosecution (Roesch 1978). Despite multiple different forms of PTD that have developed over the past 50 years, research regarding this program is significantly lacking (for a more complete legislative history, see Bellassai 2008 and Clark 2007a). Thus, similar to pretrial services bond supervision, far too little current research has been conducted to make recommendations for "best practices." Additionally, a consistent decline in the use of PTD at the federal level raises concern that the program will dissolve prior to the development of such practices.

Of the 98,244 pretrial services cases activated nationwide in FY 2008, 1,426 were PTD cases. In comparison, at the time of the last published analysis of PTD in 1999, the number of cases activated were 80,154, with 2,716 being PTD cases (Ulrich *Ibid.*). Alarming, despite an increase of more than 20 percent in overall cases, PTD cases diminished by more than 48 percent. Of similar concern, three districts (the District of New Jersey, the Eastern District of Virginia, and the Eastern District of Missouri) accounted for approximately one-quarter of these PTD activations in FY 2008. The number of cases activated in each of these three districts constitutes more activations than the entirety of the first, second, third, sixth, or seventh circuits (H-Table 1). This reduction of nearly half of all cases within the past 10 years is significantly concerning.

Over the past 25-plus years, this program has largely failed to gain and maintain momentum

throughout the pretrial services system. Although this failure has gone unexamined at the federal level, the trend of limited research and limited use seems consistent with many state-operated diversion programs (Tragos & Sartes 2008). Also, numerous legal challenges at the state level may have discouraged the implementation and operation of PTD programs (Clark *Ibid.*). Through a review of Eastern District of Missouri (ED/MO) and national policy, supplementary information gained through a record analysis, and ethnographic interviews of assistant U.S. attorneys (AUSA) and a judicial officer, this article attempts to offer evidence of the worth of an often overlooked program.

## **Literature Review**

Under 18 U.S.C. § 3154(10), pretrial services and probation offices are authorized to participate in PTD programs according to the agreement between the chief pretrial services or probation officer and the U.S. attorney's office for each district. This program is to be administered by the U.S. attorney's office with pretrial services officers and probation officers acting in an investigatory and supervisory capacity. The U.S. Attorney's Criminal Resource Manual (USAM) title 9 § 712 provides additional guidance for the administration of this program.

Specifically, the USAM provides that PTD is subject to eight basic requirements at the federal level. These guidelines require that the U.S. attorney's office be involved in 1) the identification of eligible individuals; 2) the voluntary participation of candidates following consultation with legal counsel; 3) the maintaining of confidential information; 4) the coordination with the pretrial services or probation office for investigation, enrollment, and fingerprinting of eligible program candidates; 5) the development of an individualized supervision plan that is tailored to the subject's needs; 6) the ensuring that a PTD agreement is signed and that supervision does not extend beyond 18 months; 7) the formal dismissal of charges should the candidate successfully complete the term of supervision; 8) the initiation of prosecution should a subject fail to successfully complete PTD. Furthermore, title 9 § 22.100 of the USAM indicates that eligibility for this program is contingent upon the subject 1) not being charged with an offense that, under guidelines for the local U.S. attorney's office, should be diverted to the state for prosecution; 2) maintaining fewer than two felony convictions; 3) not being addicted to controlled substances; 4) not being a public official accused of an offense arising out of public trust; 5) not being charged with an offense related to national security or foreign affairs.

In addition to these regulations, *The Guide to Judiciary Policies and Procedures* offers direct guidance to pretrial services and probation officers on their specific responsibilities in the investigation and supervision of PTD candidates. Second, the National Association of Pretrial Services Agencies (NAPSA) reformulated its 1995 standards for PTD and issued a final version of these revisions in November 2008. Third, the American Bar Association (ABA) has emphasized adherence to its standards for its members' participation in PTD.

The common themes arising out of the standards of these agencies are the prevention of future criminality through the addressing of criminogenic needs, the conservation of public resources, and the implementation of restorative justice. Thus, pretrial services and probation officers are called on to collaboratively identify, assess, and supervise PTD candidates to monitor their program compliance as well as reasonably assure that any required restitution or community service obligation is completed. Moreover, these officers are called to do so by making judicious use of available resources to address criminogenic needs. At all stages, the standards listed above encourage the development and use of innovative practices.

In light of these standards and the promotion of the use of innovative practices, it is necessary to differentiate PTD from other, seemingly similar programs, such as specialty courts that have arisen in state and federal jurisdictions (Clark 2007b). Most prominent among these types of courts are drug courts. Such programs encourage defendants and offenders to work collaboratively with judicial officers and community supervision officers to address criminogenic needs. However, two noticeable differences emerge between these programs and PTD.

First, in such courts, a judicial officer is still required, whereas the goal of PTD programs is to

bypass the judicial officer in order to conserve that officer's time for cases needing greater attention. Second, despite an individual's successful or unsuccessful completion of these programs, a criminal conviction or participation in that program may remain on the defendant's criminal history indefinitely, depending upon the program's protocol. In contrast, PTD offers to expunge the offense of those who complete the program successfully.

Although the investigation and supervision of individuals who pose risks of danger to the community and nonappearance are common for probation and pretrial services officers, the PTD program requires the officer to step beyond those narrow constraints in order to effect long-term change in the divertee's life. In place of the presumption of innocence, officers have a voluntary acceptance of responsibility prior to program initiation. Instead of confining the officer's concerns to the few months prior to case disposal, he or she is required to continually assess the subject's third-party risk while under supervision and to assist in longitudinal planning that encourages positive lifestyle changes. In lieu of release on the least restrictive conditions, officers must determine an appropriate restitution or community service schedule (where appropriate), as well as any conditions imposed by the U.S. attorney's office or deemed necessary during the PTD investigation.

Such requirements obviously necessitate flexibility on the officer's part. In fact, PTD cases may seem to be contrary to the core identity and mission of pretrial services agencies, the investigation and supervision of defendants presumed innocent under the least restrictive means possible in order to reasonably assure the safety of the community and the presence of the individual as required. However, PTD clearly relates to pretrial services' mission, beliefs, and values of providing service to the court, assisting in the fair administration of justice, and ensuring the safety of the community

Critics of PTD argue that the discretionary power granted to the U.S. attorney's office is too great and in violation of constitutional rights, as evidenced by the multiple legal challenges that PTD has faced. Moreover, concerns have been raised that the PTD program is a method of net-widening, which consumes more judicial and prosecutorial resources than it conserves (Hillsman 1982). Due to the paucity of research in this area, however, such criticism cannot be adequately validated or refuted. However, it is worth noting that the NAPSAs standards attempt to address these concerns.

## **Methodology**

The current study attempts to triangulate data regarding PTD through the use of multiple research methods. Specifically, the use of content analysis, ethnographic interviewing, and minimal quantitative analysis were employed to develop conclusions regarding the benefits derived from a well-implemented PTD program as well as anecdotal "best practices" that may be replicated in other districts. This multi-methodological approach allows for enhanced internal and external validity.

A thorough review of national and local policy was undertaken to determine the nature of the PTD program within the Eastern District of Missouri (ED/MO). As all districts that participate in a PTD program are required to establish a memorandum of understanding (MOU) with the U.S. attorney's office, it is reasonable to believe that unique factors exist within the ED/MO that impact the functioning of the program. In addition, national policy analysis uncovered specifications to the approved methods of operation of PTD throughout the federal judiciary. Following this review, minor clarifications were obtained through a brief discussion with office executives.

The examination of PTD in the ED/MO progressed with the investigation of data obtained through the use of Probation and Pretrial Automated Case Tracking System (PACTS) national reports. Additionally, supplemental information was obtained through a content analysis of annual reports from the ED/MO FY 2003 to FY 2007. Once these data were obtained, they were subjected to a frequency analysis that included the use of descriptive statistics.

In stage three of this analysis, ethnographic interviews were conducted with four assistant U.S. attorneys who refer cases for PTD frequently. Also, in order to obtain the perspective of a judicial officer, one additional interview was conducted with a magistrate judge. These interviews were conducted in person, telephonically, and via electronic correspondence, depending upon the schedule of the study participant. Confidentiality was assured to all study participants.

### **Findings**

The review of the local and national policy revealed the general operation procedures for PTD in ED/MO. Essentially, cases are referred to the pretrial services office from the U.S. attorney's office with the investigative report of the investigating agents. These referrals are filtered through a PTD program coordinator who makes initial contact with the subjects and assigns cases for investigation. While these cases are commonly assigned to a student intern for investigation, all officers and officer assistants regularly conduct these investigations as well.

Within the police-defined, 45-day time frame, the product of these investigations is submitted to the U.S. attorney's office with a recommendation for participation in PTD or denial to PTD. The AUSA then has 14 working days to object to any information in the report. Absent any objection, the subject is enrolled into the program by the pretrial services office, fingerprinted by the appropriate executive-branch agency, and placed under the supervision of a pretrial services officer or officer assistant.

This supervision consists of individualized case management that targets the identifiable needs of the program participants for 12 to 18 months. Minimally, all divertees are required to submit a monthly written report to the pretrial services office, maintain monthly telephone contact with the pretrial services office, and submit to occasional, unannounced home assessments. Subjects who consent to participation in various forms of therapeutic treatments and/or require more intensive supervision will, of course, be monitored more closely.

After completing the agreed-upon time frame, subjects are successfully discharged from the PTD program. Should a restitution balance remain outstanding, the subject signs a notarized promissory note, with the divertee and the victim of the underlying offense each receiving a copy. Should this subject fail to make restitution payments to the victim following completion of PTD, the victim can pursue civil legal action against the subject at his or her discretion. In contrast, subjects who fail to abide by their PTD agreement are unsuccessfully terminated from the PTD program and referred to the U.S. attorney's office for prosecution at their discretion.

The premier example of this individualized, needs-based case management in the ED/MO is the community supervision-based Jail Diversion Program. This program, funded through a federal grant to an outside mental health agency, is a partnership with a local social service agency that caters to subjects with a Diagnostic and Statistical Manual of Mental Health Disorders (DSM-IV) axis diagnosis. This program offers divertees with serious mental health issues regular access to psychiatric and psychological treatment as well as assistance with medication. Moreover, participation in this program also familiarizes divertees with mental health issues with local resources that can continue to assist them following their completion of the PTD program.

In addition to the presence of such programs, pretrial services administrators take an active role in the PTD program. Pretrial services managerial leaders meet regularly with U.S. attorney's office managers to discuss the importance and successes of the PTD program as well as explore areas needing improvement. Furthermore, pretrial managers will actively pursue PTD case referrals from the U.S. attorney's office if referrals begin to wane. Finally, pretrial managers make an effort to educate all newly hired AUSAs of the benefits and process for PTD referrals.

An analysis of the ED/MO's annual reports from FY 2003 to FY 2007 indicates that an average of 130 PTD referrals are made each year and that 115 of these referrals are deemed appropriate for program participation. A mean analysis determined that an average of \$364,416.26 in restitution payments are collected prior to PTD program enrollment, \$196,312.74 was collected during supervision, and \$249,289.16 was pledged in promissory notes. In light of these figures, it appears that while the most restitution was collected prior to program enrollment, a significant

amount was collected while subjects participated in the program, as well as pledged money following their participation.

A review of PACTS data regarding PTD cases closed between FY 2003 and FY 2008 (Table 1) in the ED/MO revealed that the white collar crimes, especially fraudulent activity targeting governmental agencies and financial institutions, made up the overwhelming majority of offenses referred to PTD. However, the presence of minor drug-related crimes as well as minor crimes of violence and sex offenses displays the ability of the PTD program to serve a variety of populations.

<b>Table 1</b> <b>ED/MO Pretrial Diversion Cases from FY 2003 -</b> <b>FY 2008 by Offense Type</b>		
	Frequency	Percentage
White Collar Crimes	537	83.1%
Drug-Related Crimes	22	3.4%
Driving While Intoxicated on Federal Property	22	3.4%
Minor Sex Offenses and Minor Crimes of Violence	13	2.0%
Miscellaneous Federal Offenses	52	8.0%
<b>TOTAL</b>	<b>646</b>	<b>100.0%</b>

These data also display an individualized attribute of the ED/MO that helps its PTD program to flourish. The presence of a large bar and nightclub district in close proximity to the Jefferson National Expansion Memorial (the St. Louis Arch) often results in many subjects being referred for participation in PTD due to operating a vehicle while intoxicated on federal property. While this specific national park is located in the ED/MO, there are undoubtedly numerous other federally owned properties, such as military bases, districts with special maritime jurisdiction, or other national parks, throughout the country where PTD could offer authorities and criminal offenders an alternative to unnecessary prosecution.

Data from the ethnographic interviews of AUSAs revealed multiple trends. Among these individuals, a common misunderstanding arose that the U.S. Attorney's Office does not obtain statistical workload credit for making PTD referrals. Similarly, these AUSAs believed that the pretrial services office as well as investigative agencies do receive this credit. While the perception of such a disparity would obviously make AUSAs disinclined to make referrals, it should be noted that such workload credit is obtained by U.S. attorney's offices according to information received from the Department of Justice.

Despite this misunderstanding, these attorneys lauded the success and importance of the PTD

program. Primarily, the responses of these subjects highlighted the importance of the high level of confidence that each attorney had in the capabilities of the pretrial services office to thoroughly and individually supervise divertees. Unfortunately, due to the individualized way in which the AUSAs must treat their cases, no interview subject was able to provide an accurate or consistent estimation of time or financial resources saved that could be directly attributed to the presence of the PTD program.

The lone judicial officer who was interviewed regarding the costs and benefits of the PTD program expressed sentiments similar to those of the AUSAs. In addition to the importance of high quality pretrial services case management and saving the time and resources of the court, however, the judicial officer's responses focused on the importance of maintaining numerous alternatives for case disposal and offering those who engage in criminal behavior a chance at making positive lifestyle changes. This judge emphasized that such changes are too often hindered by the presence of an individual's criminal record.

## **Implications**

In a 2007 article, John Clark, Senior Project Associate with the Pretrial Justice Institute, proposed that a "third generation" of non-traditional case disposal options is poised to begin. As the initial generation of PTD gave way to the specialty courts, the new generation will combine these similarly oriented programs to manage the wide array of cases that each court faces. Thus, it seems that the field is willing to accept PTD as a realistic option of the case disposal continuum so long as it can be validated as an effective program.

The evidence presented in this analysis proposes that such validation can be seen in a district where PTD is widely used. These data suggest that significant time and resources may be saved by the U.S. attorney's office, the judicial officers of a court, the investigative agents, and the pretrial services or probation office when PTD is thoroughly implemented. In addition to the conservation of time and economic resources, PTD can positively impact the lives of participants through the avoidance of criminal conviction and the offering of social services to address criminogenic needs.

In light of these program foci, it appears that the current study confirms the literature finding that a clear discrepancy can be found between the traditional mission and tasks of pretrial services and the longitudinal addressing of criminogenic factors that PTD is intended to achieve. It seems that pretrial services functions are not isolated to addressing factors prior to trial only. As participation in the PTD program attempts to make significant lifestyle changes in divertees through substance abuse counseling, mental health counseling, addressing chronic unemployment, and instilling a sense of personal accountability, the clear, overarching goal of this program is to reduce future criminality.

From the perspective of a pretrial services or probation officer, the PTD program offers an ability to individualize case supervision in order to address identified needs. Thus, providing accountable supervision of participants is necessary to maintain the high level of trust between the pretrial services office and the U.S. attorney's office that this program requires. However, due to the comparatively insignificant nature of many of these crimes and the requirements for program admission, many of these cases require less intensive investigation and supervision than pretrial services cases do. For example, PTD cases often lack significant criminal history, do not require the submission of status reports, and often cannot be addicts. This being the case, officer assistants and/or student interns may be able to perform the investigation process with limited supervision or officer involvement. Thus, similar to time and resources saved by the attorneys and judicial officers involved in a case, the pretrial services or probation officer benefits immensely from this program by having more time to dedicate to higher-risk defendants. Such factors clearly adhere to the recently established "pretrial risk principle" (VanNostrand & Keebler 2009).

A pretrial services or probation administrative viewpoint suggests that the time invested in developing and embracing an excellent relationship based upon open communication with the

U.S. attorney's office may result in an influx of workload credit-earning cases. Through tenaciously pursuing PTD referrals by managerial pretrial services staff, providing ongoing training to the U.S. attorney's office, and offering regular, public recognition of the number of cases referred for diversion, pretrial services administrative personnel must actively work to build a successful diversion program. Also, successful PTD programs must be structured so that the assistant U.S. attorneys are not expected to devote an unreasonable amount of time to the referral process. Moreover, such a program benefits greatly from the endorsement of the judicial officers for that district. Thus, open communication and promotion of such a program are needed for the continuation and growth of a PTD program.

In addition to saving time and resources, the U.S. attorney's office is offered an alternative to case disposal that is mutually beneficial to the government and to the subject of investigation. Clearly, however, the complexities of the statistical workload formula of the U.S. attorney's office may need to be more widely understood if PTD is going to gain greater momentum. It is believed that such additional guidance would promote the enhanced usage of PTD nationwide.

Although investigative agencies seemingly gain less from the implementation of a PTD program, the minimal gain in time and resources in not having to search for and arrest charged defendants as well as the time and resources gained from not having to prepare for and attend court hearings suggests that such a program benefits these stakeholders as well. Of course, the reduction of the threat to an investigative agent's safety cannot be minimized as PTD participation does not require that agent to effect an arrest.

Benefits to the participants of the PTD program are numerous as well. In addition to being given the opportunity to address problematic aspects of their lives, divertees also gain the immeasurable benefit of not being convicted of a federal crime. Numerous evidence-based practices (EBPs) developed in the post-conviction stage of supervision, such as the defendant offender workforce development (DOWD), and a plethora of academic research (Petersilia 2003) demonstrate that individuals with federal criminal convictions face many challenges to obtaining employment and housing, and developing positive interpersonal and familial relationships upon release from incarceration.

Similarly, in analyzing the ED/MO's Jail Diversion Program, substantive research on the prevalence of mental health disorders within the criminal justice system, including some research regarding similar diversion programs or special needs courts (e.g. Swaminath et al. 2002), clearly justifies the presence and need for such programs. Such research also regularly discusses the causal links between mental health disorders and criminal involvement and indicates the lack of programs to assist individuals with such conditions in the criminal justice system (Hartford et al. 2007). Thus, the PTD program and, subsequently, the Jail Diversion Program offer an alternative to prosecution and confinement of individuals in serious need.

While the main contributors to a successful PTD program are the U.S. attorney's office and the pretrial services or probation office, the contributions of the federal public defender's office and the U.S. Marshals Service cannot be overlooked. Evidence from ED/MO suggests that although all divertees are informed of their right to legal representation prior to entering this program, the overwhelming majority waive this right. Nonetheless, the federal public defender's office is always available to be appointed to represent PTD candidates, should the need arise. Such availability is necessary for the successful functioning of this program. Similarly, the assistance of the U.S. Marshals Service with the fingerprinting of the vast majority of PTD cases allows for greater ease and completeness of the enrollment process.

One final group of stakeholders are the victims of criminal acts. From the perspective of a program emphasis on restorative justice, success can only be gauged by whether identifiable victims were made whole. Also, the financial nature of the majority of the criminal offenses referred to PTD justifies using restitution as a metric of anecdotal success. These data suggest that, on average, the majority of restitution is collected prior to enrollment into PTD and while under supervision. In addition, victims are provided with a civil recourse to obtain any uncollected restitution in the form of a notarized promissory note signed at the conclusion of

supervision. Third, victims receive their compensation more quickly than if the case were submitted for prosecution.

Such a reduction in criminality and a conservation of resources are particularly appealing during current times of economic conservatism. Undoubtedly, criminal acts as well their prevention, investigation, prosecution, rehabilitation, and punishment are tremendously expensive to the American public. With fewer economic resources available, it seems that PTD offers a less costly form of case disposal that is mutually beneficial and based upon the theory of restorative justice.

Enhancement and further quantitative analysis of these data, however, were inhibited by multiple factors. Although PACTS offers a variety of standard data reports, it lacks an analysis of the number of PTD cases unsuccessfully terminated that were referred for prosecution. Thus, while all cases unsuccessfully terminated are referred back to the U.S. attorney's for prosecution, no accurate measurement is available for how many of these cases are actually prosecuted without further analysis or the development of structured query language (SQL) programs, which is beyond the scope of this investigation. Second, the inability to filter PTD cases in some of the national reports prevents easily interpretable data from being obtained at the local level. Third, the lack of access to longitudinal data regarding divertees' future involvement in criminality after successfully completing the program inhibits a fuller analysis of the long-term effectiveness of PTD.

Although early evaluation research from the 1960s and 1970s offers evidence of the effectiveness of PTD, the dated nature of these analyses and the many changes that have occurred since that time prohibit modern attribution of these findings. Thus, additional research is required to further validate the effectiveness of PTD. Moreover, these future investigations should account for the presence of the recently developed specialty-type courts that are arising at the federal level. In doing so, pretrial services can begin to crawl away from a reputation of being the field that research forgot. Finally, future investigations should examine the longitudinal impact on PTD participants to determine any future involvement in criminal activity.

### **Limitations**

Limitations in this study are those regularly associated with qualitative ethnography as well as case-study analysis. However, in a system that is increasingly interested in quantitative analysis and drawing conclusions based upon correlation and regression analyses, proponents of the field must not overlook qualitative works such as those presented here if they desire to fully depict and understand the elements of pretrial services work. Nonetheless, the limited scope of the current investigation and the relatively low number of ethnographic interviews conducted may prohibit field-wide generalizability of the findings presented.

### **Conclusions**

Echoing modern findings regarding program reviews (Zlatic 2009) and prior analysis of the federal diversion program (Moriarty 1993), it seems that a key component of PTD program success in the ED/MO lies in an open-systems management style and the collaboration of multiple agencies through the use of effective communication. Such relationships and communication must be actively maintained by all parties in order to better assist in the fair administration of justice. In collaborating with the U.S. attorney's office in the PTD program, enhanced service to the court may be realized and numerous other stakeholders may benefit. Furthermore, in light of the continual search for pretrial EBPs that respect the legal and constitutional rights of those under supervision, the impact of PTD should be more thoroughly examined as a potential pretrial EBP.

As the example of the Eastern District of Missouri shows, implementing an effective PTD program requires pretrial services and probation officers to extend their traditional roles of assessing and addressing risks of nonappearance and danger to the community in favor of examining criminogenic factors in participants' lives. While such a role is beyond what is traditionally expected in pretrial services casework, the benefits displayed in the ED/MO by such



an approach seem to outweigh the adherence to a traditional role. Thus, while this evidence is based upon a qualitative analysis, findings suggest that communication, officer flexibility, and individualized supervision may constitute “best practices” for PTD program implementation and management.

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