

## Pretrial Risk Assessment in the Federal Court <sup>1</sup>

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[Executive Summary](#)

[Background](#)

[Findings](#)

[Recommendations](#)

[Introduction](#)

[Background](#)

[Purpose](#)

[Research Objectives](#)

[Dataset](#)

[Population Description](#)

[Demographics](#)

[Community Stability](#)

[Health](#)

[Criminal History](#)

[Pretrial Status](#)

[Research Objective One—Pretrial Risk Classification](#)

[Methods and Analysis Results](#)

[Risk Classification Scheme](#)

[Summary of Findings and Recommendations](#)

[Research Objective Two—Risk Levels, Release and Detention Rates, and Pretrial Failure Rates](#)

[Methods and Analysis Results](#)

[Summary of Findings and Recommendations](#)

[Research Objective Three—Alternatives to Detention, Risk Levels, and Pretrial Failure](#)

[Methods and Analysis Results](#)

[Summary of Findings and Recommendations](#)

[Research Objective Four—Efficacy of the Alternatives to Detention Program](#)

[Methods and Analysis Results](#)

[Summary of Findings and Recommendations](#)

[Research Objective Five—Current Risk Assessment Practices](#)

[Methods and Analysis Results](#)

[Summary of Findings and Recommendations](#)

## Executive Summary

**THE MISSION OF** the Office of the Federal Detention Trustee (OFDT) is to manage and regulate the federal detention programs and the Justice Prisoner and Alien Transportation System (JPATS) by establishing a secure and effective operating environment that drives efficient and fair expenditure of appropriated funds. One of the primary responsibilities of OFDT is to review existing detention practices and develop alternatives to improve mission efficiency and cost effectiveness. OFDT and the entire justice system recognize that in some cases the most operationally-efficient and cost effective utilization of funds involves the use of alternatives to secured detention for certain defendants awaiting trial.

The Department of Justice (acting through the U.S. Marshals Service and OFDT) provides the Federal Judiciary with supplemental funding to support alternatives to pretrial detention. Alternatives to pretrial detention include, but are not limited to, third-party custodian, substance abuse testing, substance abuse treatment, location monitoring, halfway house, community housing or shelter, mental health treatment, sex offender treatment, and computer monitoring. Pretrial services agencies can recommend any of these alternatives to detention as conditions of pretrial release and the judicial officer can set one or more of the alternatives to detention as conditions of bail in lieu of secured detention.

Consistent with the mission of OFDT, the current study was sponsored by OFDT with support from the Administrative Office of the U.S. Courts. The purpose of this research effort was twofold:

- identify statistically significant and policy relevant predictors of pretrial outcome to identify federal criminal defendants who are most suited for pretrial release without jeopardizing the integrity of the judicial process or the safety of the community, in particular release predicated on participation in an alternatives to detention program; and
- develop recommendations for the use of OFDT funding that supports the Federal Judiciary's alternatives to detention program.

The study employed data provided by the Administrative Office of the U.S. Courts, Office of Probation and Pretrial Services (OPPS) that described all persons charged with criminal offenses in the federal courts between October 1, 2001 and September 30, 2007 who were processed by the federal pretrial services system (N=565,178). All federal districts with the exception of the District of Columbia were represented in the study.<sup>2</sup>

The research included six primary research objectives.

1. Identify statistically significant and policy relevant predictors of pretrial risk of federal criminal defendants. Develop a classification scheme to scale the risk persons arrested for federal criminal offenses pose if released pending trial. The risk classification scheme should allow for the future development of an instrument that could be used by federal pretrial services officers to assess the risk of individual criminal defendants.
2. Examine persons charged with federal criminal offenses over the past seven (7) years and assess how the average pretrial risk level of federal criminal defendants has changed. Assess whether the change in the average risk level has resulted in changes in the pretrial release/detention rate and pretrial failure rate.
3. Examine defendants released pending trial with the condition of participation in an alternative to detention. Identify the level of pretrial risk these defendants pose and,

controlling for risk level, assess whether participation in an alternative to detention mitigated the risk of pretrial failure.

4. Assess the efficacy of the alternatives to detention program at reducing federal criminal justice costs, particularly costs associated with pretrial secured detention. Identify a population most suited—both programmatically and economically—for pretrial release with conditions of alternatives to detention.
5. Examine how federal pretrial services currently assesses pretrial risk federal criminal defendants pose and the effectiveness of those practices in reducing unwarranted detention and preventing failures to appear and danger to the community while pending trial.
6. Identify “best practices” relating to the determination of pretrial risk and recommendations to release or detain a defendant pending trial, particularly as they relate to the assessment of pretrial risk and the administration of the alternatives to detention program.

[back to top](#)

## Background

Each time a person is arrested and accused of a crime a decision must be made as to whether the accused person, known as the defendant, will be released back into the community or detained in jail awaiting trial. The bail decision—to release or detain a defendant pending trial and the setting of terms and conditions of bail—is a critical part of the pretrial stage of the criminal justice system.

For the majority of our history the sole consideration when deciding bail was the risk of failure to appear in court. Until the 1960s, the Courts relied almost exclusively on the traditional surety bail system. The basic principle of the surety bail system is that a defendant can secure his/her release if he or she can arrange to have bail posted in the amount set by the judicial officer.<sup>3</sup> This system allows a person accused of a crime to remain free pending trial by posting security—property or money—to ensure that he will stand trial and submit to a sentence if found guilty. The release of defendants pending trial is consistent with the presumption of innocence and the Eighth Amendment right against excessive bail, it permits the defendant to more fully assist in the preparation of his defense, and it reduces the possibility that the defendant might be detained for a longer period than would otherwise be appropriate if convicted of the accused offense.

The first major federal bail reform since the Judiciary Act of 1789 occurred in the form of the Bail Reform Act of 1966. The Act reinforced that the sole purpose of bail was to assure court appearance and that the law favors release pending trial. In addition, the Act established a presumption of release by the least restrictive conditions with an emphasis on non-monetary terms of bail. The de-emphasis on the use of surety bail as a pretrial release requirement, consistent with the Eighth Amendment, prohibits the imposition of excessive bail that would, by default, result in the defendant’s detention.<sup>4</sup> Based on this standard of presumptive release, federal criminal defendants were generally released on their personal recognizance or an unsecured bond pending trial.

By the late 1970s, however, a noticeable shift in the perceived functions of bail had emerged. There was growing concern over the need to protect the community from the potential danger posed by the defendant awaiting trial in the community. Accordingly, the Bail Reform Act of 1984 granted the federal courts the authority to detain criminal defendants for preventative purposes.<sup>5</sup> Whereas the 1966 Act generally required the defendant’s release, the 1984 Act permits pretrial detention for the purposes of protecting the community from any danger that the defendant may pose. Specifically, the Bail Reform Act of 1984 permits the federal courts to base pretrial release decisions on (1) the risk of pretrial flight the defendant poses, and (2) the potential threat the defendant poses to the community or to specific individuals including the

likelihood that the defendant would commit new crimes while on release. For defendants charged with certain offenses, the 1984 Act presumes that pretrial detention would be required; whereas the government must normally demonstrate why pretrial detention is required, these defendants must demonstrate why pretrial release is justified.<sup>6</sup>

Additionally, the Bail Reform Act of 1984 identified several factors that the federal courts should consider when making pretrial release/detention decisions. The factors specified by the Act are: (1) the nature and circumstances of the offense charged, (2) the weight of the evidence, (3) the financial resources of the defendant, (4) the character and physical and mental condition of the defendant, (5) family ties, (6) employment status, (7) community ties and length of residency in the community, (8) record of appearances at court proceedings, (9) prior convictions, (10) whether, at the time of the current offense, the defendant was under criminal justice supervision, and (11) the nature and seriousness of the danger to the community or any person that the defendant's release would pose.<sup>7</sup>

At the time the Bail Reform Act of 1984 was enacted, the U.S. Attorneys were primarily focused on prosecuting fraud, regulatory, and other offenses that occurred within the original jurisdiction of the federal government. For example, during 1985, nearly a third of suspects considered for prosecution by U.S. Attorneys were involved with a fraud offense, 11 percent a regulatory-type offense, and 8 percent an immigration offense.<sup>8</sup> Less than 20 percent were involved with drugs and 7 percent with a violent offense. Accordingly, the impact of the increased flexibility to detain criminal defendants that the 1984 Act provided the judiciary was limited. During 1984, the average daily detention population was approximately 5,400. However, with the advent of the "War on Drugs" during the late 1980s and the increased enforcement of immigration laws during the 1990s, the number of persons prosecuted for drug, weapon, and immigration offenses substantially increased. During 2007, the number of suspects referred to U.S. Attorneys for drug offenses doubled to approximately 36,000; the number of felony immigration offenses increased more than five-fold to approximately 38,000; and the number of weapons offenses increased more than three-fold to approximately 12,000.<sup>9</sup> As a result of the change in enforcement priorities, between 1985 and 2007 the average daily detention population had increased ten-fold to more than 56,000.<sup>10</sup>

Since the implementation of the Bail Reform Act of 1984, increased emphasis has been placed on developing and implementing alternatives to secured detention that would mitigate the risk of flight and danger to the community and provide some relief for pretrial detention. For example, various forms of home confinement have increasingly gained acceptance within the criminal justice community—at both the State and Federal levels—as credible alternatives to pretrial detention.<sup>11</sup> With the advent of technologies to monitor the defendant's location, electronic monitoring has also gained acceptance as a tool for monitoring the defendant's compliance with the home confinement alternative. Other alternatives currently approved by the federal judiciary include:

- ***third-party custody***, whereby the defendant is designated to the custody of a person who agrees to assume responsibility for supervision and report violations to the court;
- ***halfway house placement***, whereby the defendant is designated to a community-based residential facility and may leave the facility for approved purposes (such as employment, education, medical treatment, and religious practices);
- ***intermittent custody***, whereby the defendant is released from detention for limited time periods (such as employment and education);
- ***substance abuse treatment***, whereby the defendant is required to participate in a drug or alcohol dependency program and/or to submit to a period of drug testing; and
- ***mental health treatment***, whereby the defendant is required to undergo psychological or psychiatric treatment to reduce the risk of nonappearance and/or danger to the community associated with his emotional or mental health.<sup>12</sup>

## Findings

The study focused on persons charged with a federal criminal offense and processed by federal pretrial services between 2001 and 2007. During this time the pretrial detention rate increased from 53 percent of persons charged with a federal offense to 64 percent; similarly, the detention population increased from an average daily population of approximately 37,000 to 56,000.<sup>13</sup> Approximately 60 percent of the increase in the detention rate is directly attributable to the greater number of defendants identified as higher risk of failing if released pending trial. During the study period, the cohorts of defendants prosecuted have increasingly become higher risk, thereby necessitating a higher rate of pretrial detention. Most notably, during 2001 (the first observation year), 16 percent of defendants prosecuted were classified at the highest risk level. By contrast, during 2007 the proportion of defendants classified at the highest risk level increased to 23 percent.

One of the objectives of the study was to develop a risk classification scheme to scale the risk persons arrested for federal criminal offenses pose if released pending trial. The classification scheme developed as part of the study is based on nine factors, consistent with those factors identified in the Bail Reform Act of 1984, that have been demonstrated in this and other studies to be statistically significant predictors of pretrial risk for both federal and state criminal defendants. The nine predictors are: (1) whether there were other charges pending against the defendant at the time of arrest, (2) the number of prior misdemeanor arrests, (3) the number of prior felony arrests, (4) the number of prior failures to appear, (5) whether the defendant was employed at the time of the arrest, (6) the defendant's residency status, (7) whether the defendant suffered from substance abuse problems, (8) the nature of the primary charge, and (9) whether the primary charge was a misdemeanor or a felony.

Using the data the Administrative Office of the U.S. Courts-OPPS provided, statistical models were created and used to develop a classification scheme and assign "weights" to the nine factors included in the model. Defendants classified at the low end of the scale were deemed to pose the least risk for pretrial failure whereas defendants at the high end posed the greatest risk (on a scale of 1 to 5). When applied to the population of defendants released between 2001 and 2007, the data indicate the risk classification scheme mimics judicial practice: as risk increased, the likelihood of pretrial detention increased from 13 percent of defendants classified as level 1 (the lowest risk) to 72 percent of those classified as level 5 (the highest risk). Similarly, when defendants were released, the likelihood of pretrial failure increased as the level of pretrial risk increased. For example, two percent of defendants classified in the lowest risk category failed their pretrial release whereas more than 10 percent of those classified in the higher risk categories failed: 12 percent of defendants classified as a level 4 risk and 16 percent of those classified as level 5. Further, while the likelihood of failing to appear for court appearances varied by risk level (1.4 percent to 5.7 percent), defendants classified at the higher risk levels were substantially more likely to pose a danger to the community by committing new crimes (0.9 percent to 9.8 percent).

Given the increased risk of pretrial failure that federal criminal defendants pose, it is critical to identify the steps that could be taken by the federal courts to further the goals of (1) ensuring the least restrictive conditions necessary are imposed pretrial to ensure the defendant's appearance at trial and the safety of the community, and (2) reducing the burden of pretrial detention by detaining only those defendants for which pretrial detention is unequivocally required. Since implementation of the Bail Reform Act of 1984, efforts have been dedicated to developing and implementing alternatives to secured detention that would mitigate pretrial risk and permit defendants—who might otherwise be detained—to be released into the community pending trial. While approximately 60 percent of defendants prosecuted during the study period were ordered detained pending trial, of those released, conditions that included at least one alternative to detention were required for nearly three-quarters. Most of those participating in the alternatives to detention program were required to submit to drug testing (60 percent) or a

substance abuse treatment program (35 percent). Additionally, 17 percent participated in the location monitoring program and 10 percent had a third-party custodian.

Participation in the alternatives to detention program was most often required of those defendants who posed the greatest pretrial risk: 84 percent of risk level 3, 92 percent of risk level 4 and 96 percent of risk level 5 defendants who were released pending trial participated in the alternatives to detention program. These moderate-to-high-risk defendants who were released to the alternatives to detention program were less likely to experience pretrial failure when compared to defendants released without a condition that included an alternative to detention. Paradoxically, when required of lower-risk defendants, i.e., risk levels 1 and 2, release conditions that included alternatives to detention were more likely to result in pretrial failure. These defendants were, in effect, over-supervised given their risk level.<sup>14</sup>

Assessing the efficacy of the alternatives to detention program included considerations of cost while attempting to strike the proper balance between the rights of the defendant with the need to assure court appearance and safety of the community pending trial. When considering cost alone, the average savings per defendant released pending trial to the ATD program in lieu of detention is substantial. The average cost of pretrial detention is approximately \$19,000 per defendant. By contrast, the average cost of pretrial release that includes alternatives to detention is between \$3,100 and \$4,600, depending upon the defendant's risk level.<sup>15</sup>

Accordingly, throughout the duration of the Department of Justice-Administrative Office of the U.S. Courts alternative to detention reimbursement program, the program has resulted in financial efficiencies for the secured detention program. For example, during 2007, the federal judiciary utilized approximately \$2.4 million of funding provided by the Department of Justice (acting through the Office of the Federal Detention Trustee) to supplement their funding for alternatives to detention. This funding was used to fund alternatives to detention for 3,226 defendants released pending trial. Had these defendants been ordered detained, the Department of Justice would have incurred additional costs for detention housing of approximately \$38 million. Additionally, considering the scarcity of secured detention resources, an additional 1,500 additional detention beds would have been occupied throughout the year.

[back to top](#)

## **Recommendations**

The results of this study should be utilized to develop a standardized empirically-based risk assessment instrument to be used by federal pretrial services. The use of a standardized instrument will assist in reducing the disparity in risk assessment practices and provide a foundation for evidence-based practices relating to release and detention recommendations and the administration of the alternatives to detention program. Further, it will allow for the development of policy that provides guidance to pretrial services agencies regarding release and detention recommendations including the use of the alternatives to detention program. Any policy developed should reflect the following principles.

- Lower-risk defendants are the most likely to succeed if released pending trial. Release conditions that include alternatives to detention—with the exception of mental health treatment, when appropriate—generally decrease the likelihood of success for lower risk-defendants and should be required sparingly.
- The alternatives-to-detention program is most appropriate for moderate- and higher-risk defendants as it allows for pretrial release while generally increasing pretrial success. Alternatives to detention should be recommended for this population when a defendant presents a specific risk of pretrial failure that can be addressed by a specific alternative.
- Defendants in risk levels 3 and 4 are the most suited for pretrial release—both programmatically and economically—with conditions of alternatives to detention. The pretrial release of these defendants can be maximized by minimizing the likelihood of

pretrial failure through participation in an alternatives-to-detention program.

- Pretrial release with conditions that include alternatives to detention is consistent with the purpose and intent of the federal bail reform legislation; and it strikes an appropriate balance between the legal and constitutional rights of defendants with the need to protect the community and assure court appearance pending trial.

[back to top](#)

## Introduction

### Background

The bail decision, to release or detain a defendant pending trial and the setting of terms and conditions of bail, is a monumental task which carries enormous consequences not only for the pretrial defendant but also for the safety of the community, the integrity of the judicial process, and the utilization of our often overtaxed criminal justice resources. The bail decision is made by a judicial officer. Bail, as it stands today in the federal court system, serves to provide assurance that the defendant will appear for court and not be a danger to the community pending trial. There remains a legal presumption of release on the least restrictive terms and conditions,<sup>16</sup> with an emphasis on non-financial terms, unless the Court determines that no condition or combination of conditions will reasonably assure the appearance of the person in court and the safety of any other person and the community.<sup>17</sup>

Pretrial services agencies perform critical functions related to the bail decision. They provide information via investigations and reports to judicial officers to assist them in making the most appropriate bail decision. The information provided to judicial officers includes, but is not limited to, the areas specified in the statute as follows: (1) the history and characteristics of the person, including the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, record concerning appearance at court proceedings; and (2) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under federal, state, or local law.<sup>18</sup>

Pretrial services agencies also provide supervision of defendants released with conditions pending trial. Conditions of supervision can relate to the following: employment; education; restrictions on travel, residence, and associations; refrain from use of alcohol or other drugs; undergo medical, psychological, or psychiatric treatment; and other conditions deemed appropriate by a judicial officer.<sup>19</sup>

The Pretrial Services Act of 1982 authorized the implementation of pretrial services nationwide with a primary purpose of reducing unnecessary pretrial detention. The Administrative Office of the United States Courts—Office of Probation and Pretrial Services (OPPS) support the probation and pretrial services system, including developing system policies, supporting system programs, and reviewing the work of probation and pretrial services offices.

The mission of the Office of the Federal Detention Trustee (OFDT) is to manage and regulate the federal detention programs and the Justice Prisoner and Alien Transportation System (JPATS) by establishing a secure and effective operating environment that drives efficient and fair expenditure of appropriated funds. One of the primary responsibilities of OFDT is to review existing detention practices and develop alternatives to improve mission efficiency and cost effectiveness. OFDT and the entire justice system recognize that in some cases the most operationally-efficient and cost-effective utilization of funds involves the use of alternatives to secured detention for certain defendants awaiting trial.

Consistent with the concept of pretrial justice<sup>20</sup> and U.S. Code Title 18, Part II, Chapter 207, § 3142 Release or Detention of a Defendant Pending Trial, the Department of Justice (acting through the U.S. Marshals Service and OFDT) provides the federal judiciary with supplemental funding to support alternatives to pretrial detention. Alternatives to pretrial detention include, but are not limited to, third-party custodian, substance abuse testing, substance abuse treatment, location monitoring, halfway house, community housing or shelter, mental health treatment, sex offender treatment, and computer monitoring. Pretrial services agencies can recommend any of these alternatives to detention as conditions of pretrial release and judicial officers can set one or more of the alternatives to detention as conditions of bail in lieu of secured detention.

[back to top](#)

## **Purpose**

The purpose of this research effort is twofold:

- identify statistically significant and policy relevant predictors of pretrial outcome to identify federal criminal defendants who are most suited for pretrial release without jeopardizing the integrity of the judicial process or the safety of the community, in particular release predicated on participation in an alternatives-to-detention program; and
- develop recommendations for the use of OFDT funding that supports the federal judiciary's alternatives-to-detention program.

[back to top](#)

## **Research Objectives**

The report is organized by the six primary research objectives.

1. Research Objective One—Pretrial Risk Classification: Identify statistically significant and policy relevant predictors of pretrial risk of federal criminal defendants. Develop a classification scheme to scale the risk persons arrested for federal criminal offenses pose if released pending trial. The risk classification scheme should allow for the future development of an instrument that could be used by federal pretrial services officers to assess the risk of individual criminal defendants.
2. Research Objective Two—Risk Levels, Release and Detention Rates, and Pretrial Failure Rates: Examine persons charged with federal criminal offenses over the past seven (7) years and assess how the average pretrial risk level of federal criminal defendants has changed. Assess whether the change in the average risk level has resulted in changes in the pretrial release/detention rate and pretrial failure rate.
3. Research Objective Three—Alternatives to Detention, Risk Levels, and Pretrial Failure: Examine defendants released pending trial with the condition of participation in an alternative to detention. Identify the level of pretrial risk these defendants pose and, controlling for risk level, assess whether participation in an alternative to detention mitigated the risk of pretrial failure.
4. Research Objective Four—Efficacy of the Alternatives to Detention Program: Assess the efficacy of the alternatives to detention program at reducing federal criminal justice costs, particularly costs associated with pretrial secured detention. Identify a population most suited—both programmatically and economically—for pretrial release with conditions of alternatives to detention.
5. Research Objective Five—Current Risk Assessment Practices: Examine how federal pretrial services currently assesses pretrial risk federal criminal defendants pose and the effectiveness of those practices in reducing unwarranted detention and preventing failures to appear and danger to the community while pending trial.
6. Research Objective Six—Best Practices for Pretrial Risk Assessment and



Recommendations: Identify “best practices” relating to the determination of pretrial risk and recommendations to release or detain a defendant pending trial, particularly as they relate to the assessment of pretrial risk and the administration of the alternatives to detention program.

[back to top](#)

## **Dataset**

The dataset used to conduct this study was provided by the Administrative Office of the United States Courts—Office of Probation and Pretrial Services (OPPS). The dataset was extracted from the Probation and Pretrial Services Automation and Case Tracking System (PACTS) in June 2008 and consists of all persons charged with criminal offenses in the federal courts between October 1, 2001 and September 30, 2007 (FY2001–FY 2007) who were processed by the federal pretrial services system. The dataset includes defendants who entered the pretrial services system via a complaint, indictment, information, or superseding indictment/information (all others, such as material witness and writs, were excluded). There are 94 federal judicial districts, including at least one district in each state, the District of Columbia and Puerto Rico. Three territories of the United States—the Virgin Islands, Guam, and the Northern Mariana Islands—also have district courts that hear federal cases. The data represents all of the federal districts with the exception of the District of Columbia (93 of 94) and includes 565,178 defendant records.

[back to top](#)

## **Population Description**

### **Demographics**

#### **Age**

The average age of defendants processed by pretrial services was 34 years old while the most common age was 26 years old. Twenty-six percent of all defendants were 25 years old and younger, 27 percent were between 26 and 32 years old, 23 percent were between 33 and 40 years old, and 24 percent were 41 years old or older. Nearly all (99.7 percent) of defendants were adults, while less than 1 percent were juveniles.

#### **Gender**

Men made up on average 85 percent of all defendants processed by pretrial services; conversely, women made up 15 percent of the population.

#### **Race/Ethnicity**

Forty-four percent of all defendants’ race/ethnicity was White Hispanic ([figure 1](#)). The race/ethnicity of the remaining defendants was as follows: White non-Hispanic 27 percent, Black non-Hispanic 23 percent and Asian, Native American, and Black-Hispanic approximately 2 percent respectively.

#### **Citizenship Status**

The citizenship status of defendants was as follows: 62 percent U.S. Citizens, 31 percent Illegal Alien, and 7 percent Legal Alien. As can be seen in [figure 2](#), the citizenship status of defendants varied between 2001 and 2007. While the percent of Legal Aliens remained relatively constant, the percent of defendants whose citizenship status was U.S. Citizen decreased by 7 percent from 66 percent in 2001 to 59 percent in 2007.

#### **Education Level**

The education levels for the defendants can be found in [figure 3](#).

[back to top](#)

## **Community Stability**

### **Residence Status**

Thirty-seven percent of defendants were renting a residence, 20 percent owned or were buying their home (had a mortgage on their home), 24 percent had a place to live but made no financial contribution toward the residence, and 17 percent had an “other” residence status. Nearly 2 percent of all defendants were essentially homeless with no place to live at the time of their initial appearance.

### **Length of Residence in Area**

At the time of their initial appearance, 43 percent of all defendants lived in the area for less than one year, 18 percent for between 1 to 5 years, 6 percent between 6 to 10 years, and approximately one-third (33 percent) had lived in the area for 11 or more years.

### **Employment Status**

The employment status of defendants varied across years and ranged from 56 percent to 49 percent employed at the time of the initial appearance, with an average of 52 percent of defendants employed between FY 2001 and FY 2007. The [corresponding figure](#) demonstrates the fluctuation in employment rates.

[back to top](#)

## **Health**

### **Psychiatric Treatment**

Approximately 9 percent of all defendants had received psychiatric treatment at some time during the two years prior to the initial appearance. The rate gradually increased from 8 percent in 2001 to 11 percent in 2007.

### **Substance Abuse Problem**

On average, 51 percent of all defendants were determined to have a substance abuse problem at the time of the initial appearance ([figure 5](#)). The most frequently abused drugs were Cannabis (40 percent), followed by Alcohol (25 percent), Narcotics (23 percent), Stimulants (9 percent) and another drug (3 percent).

### **Charge Information**

Defendants’ primary charge was a felony 92 percent of the time, a misdemeanor 7 percent, and an infraction 1 percent. There were few fluctuations in the percent of charge offense level across the years.

The most common primary charges for defendants were drug-related offenses (36 percent). Approximately 26 percent of all defendants were charged with immigration law violations, followed by theft and fraud-related offenses 17 percent, firearm offenses 9 percent, violent offenses 5.5 percent, and other offenses 7.5 percent. The primary charge percentages varied across the years. Notably, immigration law violations increased from 20 percent in 2001 to 29 percent in 2007 while drug-related offenses decreased from 40 percent in 2001 to 33 percent in 2007 (see [figure 6](#)).

[back to top](#)

## **Criminal History**

### **Prior Arrests and Convictions**

Forty-four percent of defendants had not previously been arrested for a felony and 57 percent had not previously been convicted of a felony ([see figure 7](#)).

Forty-two percent of defendants had not previously been arrested for a misdemeanor and 55 percent had not previously been convicted of a misdemeanor ([see figure 8](#)).

More detailed information about prior drug and violent misdemeanor and felony convictions can be found in Appendix Tables [A1](#) & [A2](#).

### **Pending Charges**

Eighteen percent of all defendants had a misdemeanor or felony pending in court at the time of their arrest. The percentages of defendants who had misdemeanor and felony charges pending in court at the time of their arrest are provided in [figure 9](#).

### **Prior Failure to Appear, Absconding and Escape**

Eighty-four percent of all defendants had never failed to appear in court, 7 percent had one prior failure to appear and 9 percent had two or more failures to appear in court. Three percent of the defendants had previously absconded from some form of criminal justice supervision while 2 percent had previously escaped from custody.

[back to top](#)

## **Pretrial Status**

### **Pretrial Services Recommendations**

Pretrial services recommended detention for defendants an average of 61 percent of the time between 2001 and 2007. The recommendations for detention by pretrial services increased from 56 percent of all defendants in 2001 to 64 percent in 2007.

### **Court Decisions**

Similar to the trend identified in pretrial services recommendations, detention rates have increased steadily over the years while release rates have simultaneously decreased. As can be seen in [figure 10](#), detention increased from 53 percent of all defendants in 2001 to 64 percent in 2007.

### **Pretrial Outcome**

Pretrial outcome is the success or failure of a defendant released pending trial. The purpose of bail is to assure court appearance and the safety of the community during the pretrial stage. Failure to appear was measured by a defendant's failure to appear for a scheduled court appearance or absconding from pretrial supervision while pending trial. Danger to the community was measured by a bail revocation due to a new arrest for a crime that was allegedly committed while the defendant was released pending trial.

There are two common definitions of pretrial failure.

1. **Excluding technical violations**—Defendants who were deemed to have failed to appear and/or to have been a danger to the community pending trial are classified “failure” and those defendants who experienced neither and remained in the community during the entire time pending trial are classified “successful.” Note that in this definition defendants who had their bail revoked for violating technical conditions (reasons other than failing to appear or danger to community) or other reasons do not meet either of these categories

and are excluded.

2. **Including technical violations**—Defendants who were deemed to have failed to appear, been a danger to the community, or had their bail revoked for technical violations pending trial are classified “failure” and those defendants who experienced none of these and remained in the community during the entire time pending trial are classified “successful.”

There is a utility for both of these definitions which will be discussed in more detail in the next section. For this reason, the outcomes are provided here for each definition.

### **Outcome Excluding Technical Violations**

Defendants released pending trial had a 93 percent success rate (failure to appear 3.5 percent and danger to community 3.5 percent). These rates remained relatively constant across the years.

### **Outcome Including Technical Violations**

Defendants released pending trial had an 87.4 percent success rate (failure to appear 3.4 percent, danger to community 3.2 percent, and technical violations 6 percent). These rates remained relatively constant across the years.

[back to top](#)

## **Research Objective One—Pretrial Risk Classification**

*Identify statistically significant and policy relevant predictors of pretrial risk of federal criminal defendants. Develop a classification scheme to scale the risk persons arrested for federal criminal offenses pose if released pending trial. The risk classification scheme should allow for the future development of an instrument that could be used by federal pretrial services officers to assess the risk of individual criminal defendants. ([figure 11](#))*

### **Methods and Analysis Results**

#### **Statistically Significant and Policy Relevant Predictors of Pretrial Risk**

The first step to answering this research objective was to identify the statistically significant and policy relevant predictors of pretrial risk of federal criminal defendants. Pretrial risk is the likelihood that a defendant will succeed or fail if released pending trial. For the purposes of this research and consistent with the intent of bail, pretrial failure is defined as failing to appear for court and/or being a danger to the community pending trial. Failure to appear was measured by a defendant’s failure to appear for a scheduled court appearance or absconding from pretrial supervision while pending trial. Danger to the community was measured by the presence of a bail revocation due to a new arrest for a crime that was allegedly committed while the defendant was released pending trial. Defendants who were deemed to have failed to appear and/or to have been a danger to the community pending trial were classified “failure” and those defendants who experienced neither and remained in the community during the entire time pending trial were classified “successful.” It should be noted that defendants who had their bail revoked for violating technical conditions or other reasons were omitted from this analysis.

The analysis consisted of univariate, bivariate, and multivariate analysis. The univariate analysis including descriptive statistics of the dependent variable (pretrial outcome: success or failure pending trial) and each independent variable (risk factor). The bivariate analysis included an examination of the relationship between each risk factor and pretrial outcome. The risk factors found to be statistically significantly related to pretrial outcome were identified and used to conduct the multivariate analysis.

Logistic regression was the multivariate analysis technique used to identify the statistically significant and policy relevant predictors of pretrial risk of federal criminal defendants. A logistic regression model was built using cross validation to confirm the replicability and generalizability of the results. Because some risk factors are considered more policy relevant based on bail considerations as outlined in statute, the model was built using a hierarchical approach by entering the statistically significant risk factors within a block of variables in order of policy relevance. The order included the risk factors that measure criminal history, community stability, health, and charge information. See [Appendix Table A3](#) for the logistic regression model to predict pretrial outcome.

The analysis identified nine (9) statistically significant and policy relevant predictors of pretrial outcome—success or failure pending trial.

1. ***Pending Charges***—Defendants who had one or more misdemeanor or felony charges pending at the time of arrest were 20 percent more likely to fail pending trial when compared to defendants who did not have a pending charge.
2. ***Prior Misdemeanor Arrests***—Defendants with prior misdemeanor arrests were more likely to fail pending trial when compared to defendants who did not have prior misdemeanor arrests: one prior misdemeanor arrest (13 percent more likely); two prior misdemeanor arrests (32 percent more likely); three prior misdemeanor arrests (45 percent more likely); four misdemeanor arrests (59 percent more likely); and five or more prior misdemeanor arrests (69 percent more likely).
3. ***Prior Felony Arrests***—Defendants with prior felony arrests were more likely to fail pending trial when compared to defendants who did not have prior felony arrests: one prior felony arrest (22 percent more likely) and two or more prior felony arrests (38 percent more likely).
4. ***Prior Failures to Appear***—Defendants with prior failures to appear in court were more likely to fail pending trial when compared to defendants who did not have a prior failure to appear in court: one prior failure to appear (22 percent more likely) and two or more prior failures to appear (35 percent more likely).
5. ***Employment Status***—Defendants who were unemployed at the time of their arrest were 21 percent more likely to fail pending trial when compared to defendants who were employed.
6. ***Residence Status***—Defendants who did not own or were not buying their residence were more likely to fail pending trial when compared to defendants who did own or were buying their residence (had a mortgage on their home): renting (65 percent more likely); making no financial contribution to residence (74 percent more likely); no residence/place to live (2.1 times or 110 percent more likely); and another type of residence (48 percent more likely).
7. ***Substance Abuse Type***—Defendants who abused alcohol (21 percent), cannabis (23 percent), and narcotics (40 percent) were more likely to fail pending trial when compared to defendants who did not abuse any substances.
8. ***Primary Charge Category***—Defendants charged with a felony were 61 percent more likely to fail pending trial when compared to defendants who were charged with a misdemeanor or infraction.
9. ***Primary Charge Type***—When compared to defendants charged with a theft or fraud-related offense, defendants charged with a firearm offense (51 percent), a drug offense (78 percent), and an immigration law violation (78 percent) were more likely to fail pending trial. There was no statistically significant difference between defendants charged with a violent offense or another offense when compared to defendants charged with a theft or fraud offense.

[back to top](#)

## Risk Classification Scheme

The next step to answering this research objective was to develop a classification scheme to scale the risk persons arrested for federal criminal offenses pose if released pending trial. The results of the logistic regression model, including the nine statistically significant and policy relevant predictors of pretrial failure and related output, were used to create a pretrial risk classification scheme to scale the risk persons arrested for federal criminal offenses pose if released pending trial.

A formula was created which uses the logistic regression results to generate a predicted probability for each defendant (see [Appendix Table A4](#)). Predicted probabilities range from 0 to 1 and can be interpreted as the percent chance of pretrial failure if released pending trial. The predicted probabilities were used to create five (5) risk levels by identifying the 20th percentiles (see [Appendix Table A5](#)). Each defendant was then classified into one of five levels of risk based on the assigned predicted probability. The following figure shows the pretrial outcome for all defendants when considering the risk levels.

The average pretrial failure rate for all released defendants was 7 percent. As shown in the figure above, the average pretrial failure rate for defendants released pending trial ranged by risk level from 2.3 percent to 15.5 percent as follows: level 1 (2.3 percent), level 2 (6 percent), level 3 (9.2 percent), level 4 (11.8 percent), and level 5 (15.5 percent).

It is also important to disaggregate the failure by type—failure to appear in court and danger to the community. Additional analysis was completed to identify the rates of both failure to appear in court (measured by a defendant’s failure to appear for a scheduled court appearance or absconding from pretrial supervision while pending trial) and danger to the community (measured by the presence of bail violation due to a new arrest for a crime that was allegedly committed while the defendant was released pending trial). As can be seen in [figure 12](#) below, the higher the risk level the higher the average pretrial failure rates for both danger to the community and failure to appear.

As noted previously, for the purposes of data analysis to develop a risk classification scheme, defendants who were deemed to have failed to appear and/or to have been a danger to the community pending trial were classified “failure” and those defendants who experienced neither and remained in the community during the entire time pending trial were classified “successful.” It was further noted that defendants who had their bail revoked for violating technical conditions or other reasons were omitted from the analysis. Although the purpose of a pretrial risk assessment is to predict the risk of failure to appear and danger to the community pending trial, additional analysis was conducted to determine if the risk classification scheme also appropriately classified risk of technical violations. As can be seen in [Appendix Tables A6–8](#), the risk classification scheme also accurately classified defendants in five levels of risk based on the likelihood of pretrial failure due to technical violations.

[back to top](#)

## Summary of Findings and Recommendations

Research was conducted which identified nine statistically significant and policy relevant predictors of pretrial risk of federal criminal defendants. The nine predictors include pending charges, prior misdemeanor arrests, prior felony arrests, prior failures to appear, employment status, residence status, substance abuse type, primary charge category, and primary charge type. The predictors of pretrial risk were utilized to develop a risk classification scheme that classifies defendants into five levels of risk of pretrial failure (failure to appear and danger to the community). Separate data analysis revealed the risk classification scheme to also be a good predictor of the risk of technical violations. The research conducted and the corresponding risk classification scheme provide the necessary information for the future development of a risk assessment instrument that could be used by federal pretrial services officers to assess the risk of individual criminal defendants.

## **Research Objective Two—Risk Levels, Release and Detention Rates, and Pretrial Failure Rates**

*Examine persons charged with federal criminal offenses over the past seven (7) years and assess how the average pretrial risk level of federal criminal defendants has changed. Assess whether the change in the average risk level has resulted in changes in the pretrial release/detention rate and pretrial failure rate.*

### **Methods and Analysis Results**

#### **Average Pretrial Risk Levels 2001–2007**

The first step in answering this research objective was to determine the average risk levels for defendants for the past seven (7) years to identify any changes in risk level over time. [Figure 13](#) shows the average risk level for each year while [figure 14](#) shows the percentage of defendants classified in each risk level between 2001 and 2007.

The average risk level for persons charged with federal criminal offenses has gradually increased from 2.85 to 3.1. [Figure 14](#) demonstrates the change in the percentage of defendants classified in each of the five risk levels. Most notably, in 2001 16.2 percent of the defendants were classified in the highest risk level (5) and by 2007, 23.1 percent of the defendants were classified in the highest risk level—an increase of 6.9 percent. In 2001, 43.9 percent of all defendants were classified in the two lowest risk levels (1 & 2) while only 37.5 percent of all defendants were classified in these levels in 2007. Similarly, in 2001, 35.1 percent of all defendants were classified in the two highest risk levels (4 & 5) while 43.8 percent of all defendants were classified in these levels in 2007.

#### **Pretrial Release/Detention Rates and Risk Levels 2001–2007**

The next step in answering this research objective was to determine the pretrial release/detention rates for the past seven (7) years and examine the release/detention rates by risk level. [Figure 15](#) demonstrates the change in release/detention rates over time. The average detention rates increased 11 percent between 2001 and 2007.

The release rates varied substantially across risk levels as can be seen in [figure 16](#) below. The Court released 87 percent of all defendants classified as risk level 1, 62 percent classified as risk level 2, 49 percent classified as risk level 3, 40 percent classified as risk level 4 and 28 percent classified as risk level 5. The higher the risk level the less likely defendants were to be released pending trial.

The average risk levels have increased gradually over the past seven years while the detention rates have also increased. An examination of risk levels and detention rates by year was completed to assist in determining whether or not the increase in average risk level may have affected the increase in detention rates. Although there have been fluctuations in detention rates by risk level across the years, on average a higher percentage of people were detained pending trial in each risk level.

There are a greater percentage of people classified in the higher risk levels in 2007 compared to 2001, yet the detention rates within risk levels have also increased. A closer examination of the data reveals that approximately 60 percent of the increase in the detention rate change can be attributed to a greater number of defendants classified in the higher risk levels (Category 4 and 5) while 40 percent of the increase is due to other reasons that were not identified.

#### **Pretrial Failure Rates and Risk Levels 2001–2007**

The final step in answering this research objective was to determine the pretrial failure rates for the past seven (7) years and examine the failure rates by risk levels. [Figure 17](#) demonstrates the pretrial failure rates by risk level over time.

There was little variance in the average pretrial failure rates across the 7 years. The failure rates were as follows: 7.3 percent in 2001; 6.9 percent in 2002, 2003, and 2004; 6.8 percent in 2005; 7 percent in 2006; and 7.4 percent in 2007. It should be noted that the data were extracted in June 2008. At that time 2.6 percent of all released defendants in 2006 and 8.6 percent released in 2007 were still pending trial and their cases had not been closed. For this reason, it can be expected that the pretrial failure rates may change for these years and will likely decrease slightly.

The average pretrial failure rates for risk level 1 showed little change across the seven years (2.2 percent in 2001 to 2.4 percent in 2007). The average pretrial failure rates for risk level 2 decreased by 1.7 percent between 2001 and 2007 (7.2 percent to 5.5 percent). The average pretrial failure rates for risk level 3 decreased by nearly 1 percent between 2001 and 2007 (10.2 percent to 9.3 percent). The average pretrial failure rates for risk level four remained relatively unchanged (12.6 percent in 2001 to 12.7 percent in 2007). Most notably, the average pretrial failure rates for risk level 5 increased from 14.6 percent to 17 percent between 2001 and 2007.

[back to top](#)

## **Summary of Findings and Recommendations**

An examination of persons charged with federal criminal offenses over the past seven (7) years revealed that the average pretrial risk level of federal criminal defendants has increased from 2.85 to 3.1 based on the 5 risk level scale. In addition, there are a greater percentage of people (8.7 percent) classified in the higher risk levels in 2007 compared to 2001 yet the detention rates within risk levels have also increased. A closer examination of the data reveals that approximately 60 percent of the increase in the detention rate change can be attributed to a greater number of defendants classified in the higher risk levels (4 and 5), while 40 percent of the increase is due to other reasons that were not identified.

[back to top](#)

## **Research Objective Three—Alternatives to Detention, Risk Levels, and Pretrial Failure**

*Examine defendants released pending trial with the condition of participation in an alternative to detention. Identify the level of pretrial risk these defendants pose and, controlling for risk level, assess whether participation in an alternative to detention mitigated the risk of pretrial failure.*

### **Methods and Analysis Results**

#### **Defendant Participation in an Alternative to Detention**

The first step in answering this research objective was to examine the defendants released pending trial with the condition of participation in an alternative to detention (ATD). There are nine alternatives to detention including the following: third-party custodian, substance abuse testing, substance abuse treatment, location monitoring, halfway house, community housing or shelter, mental health treatment, sex offender treatment, and computer monitoring. The data used for analysis did not distinguish between halfway house and community housing or shelter; therefore, the two ATDs are combined into one category—housing and shelter.



Seventy-two percent of the defendants with a known risk level were released via the alternatives to detention program (released with one or more alternatives to detention). The percent of defendants released via the alternatives to detention program varied by risk level as seen in [figure 18](#).

The defendants required to participate in each of the alternatives to detention as a condition of release include the following: third-party custodian (10.4 percent), substance abuse testing (60.1 percent), substance abuse treatment (35.1 percent), location monitoring (17.6 percent), housing and shelter (4.1 percent), mental health treatment (9.3 percent), sex offender treatment (0.4 percent), and computer monitoring (1.5 percent).

### **Alternatives to Detention Participation by Risk Level**

The next step in answering this research objective was to examine the defendants released pending trial with the condition of participation in an alternative to detention by type of alternative based on risk level ([see figure 19](#)).

Five alternatives to detention were required as conditions of release at increasing frequencies based on risk level including third-party custodian, substance abuse testing, substance abuse treatment, location monitoring, and housing and shelter. The ATD of mental health treatment, however, was required more consistently across risk levels and the condition was required slightly less frequently as the risk level increased. The ATD of sex offender treatment and computer monitoring were required as conditions of release very infrequently—1.5 percent of the defendants were released with a condition of computer monitoring and sex offender treatment was a required condition in only 0.4 percent of all cases.

### **Alternatives to Detention and Pretrial Failure**

The final step in answering this research objective was to assess whether participation in the alternatives to detention program mitigated the risk of pretrial failure when controlling for risk. [Figure 20](#) demonstrates the pretrial success rates for defendants who did and did not participate in the alternatives to detention program by risk level.

On average, defendants released to the alternatives to detention program who were lower risk, risk levels 1 and 2, were less likely to be successful pending trial while defendants in the moderate- to higher-risk levels (risk levels 3, 4, & 5) were more likely to be successful if released to the alternatives to detention program.

More detailed analysis was conducted to determine the impact of each ATD on pretrial outcome. The analysis was conducted by completing logistic regression models for each alternative to detention while controlling for risk level ([see Appendix Table A9](#)).

### **Third-Party Custodian**

Defendants in the highest risk level (5) who were released with a condition of third-party custodian were 20 percent less likely to fail pending trial when compared to defendants in the same risk level who did not have the condition. There was no statistically significant difference in pretrial failure rates for those defendants in risk levels 3 and 4 who did and did not have a third-party custodian. Defendants with a condition of third-party custodian in the lowest risk levels were more likely to fail (risk level 1—56 percent more likely and risk level 2—30 percent more likely) when compared to defendants in those risk levels who did not have the condition.

### **Substance Abuse Testing And Treatment**

There was no statistically significant difference in pretrial failure rates for defendants in the higher risk levels (4 & 5) who had the condition of substance abuse testing when compared to those that did not have the condition. Defendants in risk levels 1, 2, and 3 were more likely to fail (risk level 1—41 percent, risk level 2—27 percent, and risk level 3—16 percent) if they were released with a condition of drug testing when compared to those who did not have the

condition.

The results for the condition of substance abuse testing and substance abuse treatment were similar. There was no statistically significant difference in pretrial failure rates for defendants in the higher risk levels (4 & 5) who had the condition of substance abuse treatment when compared to those that did not have the condition. Defendants in risk levels 1, 2, and 3 were more likely to fail (risk level 1–33 percent, risk level 2–11 percent, and risk level 3–12 percent) if they were released with a condition of drug treatment when compared to those who did not have the condition.

### **Location Monitoring**

There was no statistically significant difference in pretrial failure rates for defendants in the moderate and higher risk levels (3, 4 & 5) between those that had the condition of location monitoring and those that did not have the condition. Defendants in the lower risk levels were more likely to fail (risk level 1–2.12 times or 112 percent and risk level 2–46 percent) if they were released with a condition of location monitoring when compared to those who did not have the condition.

### **Housing & Shelter**

There was no statistically significant difference in pretrial failure rates for defendants in the higher risk levels (4 & 5) who had the condition of housing & shelter when compared to those that did not have the condition. Less than 5 percent of defendants in each of the remaining three risk levels (1, 2, and 3) were released with this condition. The low number and percent of defendants receiving this condition prevented meaningful analysis of this condition for these risk levels.

### **Mental Health Treatment**

Defendants who received mental health treatment as a condition were on average 17 percent less likely to fail when compared to defendants who did not have this condition. The decrease in failure rates varied across levels and ranged from 29 percent less likely to no statistically significant difference. There was no risk level in which defendants were more likely to fail pending trial if they were released with a mental health treatment condition.

### **Sex Offender Treatment and Computer Monitoring**

Less than 0.5 percent of all defendants released pending trial had a condition of sex offender treatment while less than 1.5 percent of all defendants released had a condition of computer monitoring. The low number and percent of defendants receiving this condition prevented meaningful analysis of these conditions.

## **Summary of Findings and Recommendations**

On average, lower risk defendants released to the ATD program (risk levels 1 & 2) were more likely to experience pretrial failure when compared to defendants released without the program. Moderate and higher risk defendants released to the ATD program (risk levels 3, 4 & 5) were less likely to experience pretrial failure when compared to defendants released without the program. This finding is consistent with the Evidence-Based Principle for Effective Intervention 3(a) Target Interventions: Risk Principle—prioritizes supervision and treatment resources for higher risk offenders.<sup>21</sup> When examining individual alternatives to detention, this pattern was similar for the following alternatives: third-party custodian, substance abuse testing, substance abuse treatment, location monitoring, and housing and shelter. The ATD of mental health treatment, however, either had a neutral effect or decreased failure pending trial regardless of risk level. Sex offender treatment and computer monitoring were used so infrequently that meaningful analysis of the alternatives could not be conducted.

## **Research Objective Four—Efficacy of the Alternatives to Detention Program**

*Assess the efficacy of the alternatives to detention program at reducing federal criminal justice costs, particularly costs associated with pretrial secured detention. Identify a population most suited—both programmatically and economically—for pretrial release with conditions of alternatives to detention.*

### **Methods and Analysis Results**

#### **Federal Criminal Justice Costs**

The first step to answering this research question was to quantify the costs associated with pretrial detention and release to the ATD program by risk level. The average cost of detention by risk level is provided in [figure 21](#) and the average cost of release to the ATD program is provided in [figure 22](#).

It must be acknowledged that there are costs that were not included primarily because they are difficult to quantify. Examples of such costs include, but are not limited to, the costs associated with new crimes committed by defendants on release pending trial, the cost incurred by the courts and the rest of the justice system when a defendant fails to appear for a scheduled court appearance, and the cost of unnecessary detention to the defendant and his/her family.

#### **Efficacy of the Alternatives to Detention Program**

The average cost of detaining a defendant pending trial is \$19,253 while the average cost of releasing a defendant pending trial to the alternatives to detention program (including cost of supervision, the alternatives to detention, and fugitive recovery) is \$3,860. A simple comparison of the average cost of detention and the average cost of release to the alternatives to detention program reveals the alternatives to detention program is substantially less costly than detention. The average savings per defendant released pending trial to the ATD program in lieu of detention is \$15,393.

There are, however, significant considerations other than simply cost. The decision to release or detain a defendant pending trial requires the consideration of pretrial justice—the honoring of the presumption of innocence, the right to bail that is not excessive, and all other legal and constitutional rights afforded to accused persons awaiting trial while balancing these individual rights with the need to protect the community, maintain the integrity of the judicial process, and assure court appearance. In addition to cost, assessing the efficacy of the alternatives to detention program must include attempting to strike the proper balance between the rights of the defendant with the need to assure court appearance and safety of the community pending trial.

[Figure 23](#) provides the release rates and corresponding success rates by risk level.

As discussed in the previous section (Research Objective Three), lower-risk defendants released to the ATD program (risk levels 1 & 2) were more likely to experience pretrial failure when compared to lower-risk defendants released without the program. Moderate- and higher-risk defendants released to the ATD program (risk levels 3, 4 & 5) were less likely to experience pretrial failure when compared to defendants released without the program. This finding is consistent with the Evidence-Based Principle for Effective Intervention 3(a) Target Interventions: Risk Principle. When examining individual alternatives to detention, this pattern was similar for the following alternatives: third-party custodian, substance abuse testing, substance abuse treatment, location monitoring, and housing and shelter. The ATD of mental health treatment, however, either had a neutral effect or decreased failure pending trial regardless of risk level. Sex offender treatment and computer monitoring were used so

infrequently that meaningful analysis of the alternatives could not be conducted.

### **Population Most Suited For Pretrial Release with Alternative to Detention Conditions**

Most of the defendants (87 percent) in the lowest risk level, risk level 1, were released pending trial. Of those released, less than half (43 percent) were released with an alternative to detention condition. Defendants in risk level one had a 97.7 percent success rate and release with an ATD did not increase success. Defendants classified as risk level 1 are the best candidates for release, yet the use of the ATD program for these defendants generally does not increase success and in some cases increases the risk of pretrial failure.

Sixty-two percent of all defendants classified in level 2 were released pending trial and of those released, the average success rate was 94 percent. Over two-thirds of risk level 2 defendants were released with one or more ATD conditions. Defendants classified as level 2 are good candidates for release, yet, similar to risk level 1, the use of the ATD program for these defendants generally does not increase success and in some cases increases the risk of pretrial failure.

Defendants classified in risk level 3 had an average success rate of 90.8 percent, yet just less than half of the defendants were released pending trial. Eighty-four percent of all the risk level 3 defendants released pending trial were released with one or more alternatives to detention. Defendants who participated in the alternatives to detention program were slightly more likely to be successful pending trial. In addition, it is plausible that many of these defendants may have been detained if not for the ATD program.

Defendants classified in risk level 4 had a 2.6 percent lower success rate when compared to risk level 3 defendants, 88.2 percent vs. 90.8 percent respectively. Forty percent of the risk level 4 defendants were released pending trial and nearly 92 percent of those were released to the ATD program. In these cases it is likely that many of these defendants may have been detained if not for the ATD program.

Approximately 30 percent of the highest risk defendants, risk level 5, were released pending trial and nearly all (95.7 percent) were released to the ATD program. The highest risk defendants had an average success rate of 84.5 percent.

[back to top](#)

### **Summary of Findings and Recommendations**

Assessing the efficacy of the alternatives to detention program included considerations of cost while attempting to strike the proper balance between the rights of the defendant with the need to assure court appearance and safety of the community pending trial. When considering cost alone, the average savings per defendant released pending trial to the ATD program in lieu of detention is \$15,393.

Accordingly, throughout the duration of the Department of Justice-Administrative Office of the U.S. Courts' alternative to detention reimbursement program, the program has resulted in financial efficiencies for the secured detention program. For example, during 2007, the federal judiciary utilized approximately \$2.4 million of funding provided by the Department of Justice (acting through the Office of the Federal Detention Trustee) to supplement their funding for alternatives to detention. This funding was used to fund alternatives to detention for 3,226 defendants released pending trial. Had these defendants been ordered detained, the Department of Justice would have incurred additional costs for detention housing of approximately \$38 million. Additionally, considering the scarcity of secured detention resources, 1,500 additional detention beds would have been occupied throughout the year.

When considering the percent of defendants released pending trial, success rates, ATD participation rates and the impact of participation in the ATD program by risk level, the populations most suited for pretrial release—both programmatically and economically—with

conditions of alternatives to detention are defendants in risk levels 3 and 4. Defendants in risk levels 1 and 2 have the lowest risk with the highest success rates and, consistent with the EBP risk principle, these defendants generally do better if released without ATD conditions. Defendants determined by the Court to be appropriate for release in risk level 5 should be provided ATD conditions as deemed necessary.

[back to top](#)

## Research Objective Five—Current Risk Assessment Practices

*Examine how federal pretrial services currently assesses the pretrial risk federal criminal defendants pose and the effectiveness of those practices in reducing unwarranted detention and preventing failures to appear and danger to the community while pending trial.*

### Methods and Analysis Results

#### Statistically Significant and Policy Relevant Predictors of Pretrial Recommendations

Pretrial services officers make recommendations to the Court regarding whether defendants should be released or detained pending trial. The first step to answering this research objective was to identify the statistically significant and policy relevant predictors of pretrial recommendations for release or detention. See [Appendix Table A10](#) for the logistic regression model predicting pretrial recommendation.

The analysis identified eight (8) statistically significant and policy relevant predictors of pretrial recommendation—release or detention pending trial.

1. ***Pending Felony Charges***—Pretrial services officers were 63 percent more likely to recommend detention for defendants with one pending felony and nearly two and a half times more likely (150 percent) for defendants with two or more pending felonies when compared to defendants who did not have a pending felony charge at the time of the arrest for the current charge.
2. ***Prior Felony Convictions***—Pretrial services officers were 81 percent more likely to recommend detention for defendants with one prior felony conviction and nearly three and a half times more likely for defendants with two or more prior felony convictions when compared to defendants who did not have a prior felony conviction.
3. ***Prior Felony Violent Convictions***—Pretrial services officers were 20 percent more likely to recommend detention for defendants with one prior violent felony conviction and 86 percent more likely for defendants with two or more prior violent felony convictions when compared to defendants who did not have a prior violent felony conviction.
4. ***Prior Failures to Appear***—Defendants with prior failures to appear in court were more likely to be recommended for detention pending trial when compared to defendants who did not have a prior failure to appear in court: one prior failure to appear (21 percent more likely) and two or more prior failures to appear (67 percent more likely).
5. ***Employment Status***—Defendants who were unemployed at the time of their arrest were 47 percent more likely to be recommended for detention when compared to defendants who were employed.
6. ***Residence Status***—Defendants who did not own or were not buying their residence were more likely to be recommended for detention pending trial when compared to defendants who did own or were buying their residence: renting (68 percent more likely); making no financial contribution to residence (90 percent more likely); no residence/place to live (7.8 times more likely); and another type of residence (2.6 times more likely).

7. **Primary Charge Category**—Defendants charged with a felony were 3.8 times more likely to be recommended for detention pending trial when compared to defendants who were charged with a misdemeanor or infraction.
8. **Primary Charge Type**—When compared to defendants charged with a theft or fraud-related offense, defendants charged with an immigration law violation (14.4 times), a violent offense (4.6 times), a drug offense (4.6 times), a firearm offense (2.6 times), or another offense (1.6 times) were more likely to be recommended for detention pending trial when compared to defendants charged with a theft or fraud offense.

### **Effectiveness of Current Risk Assessment Practices**

The final step in answering this research question was to assess the current risk assessment practices in reducing unwarranted detention and preventing failures to appear and danger to the community while awaiting trial. Pretrial services considered many of the same factors that were identified to be the best predictors of pretrial outcome, including prior failures to appear, employment status, residence status, primary charge category, and primary charge type. In addition, pretrial services considered measures of pending charges and prior criminal history that were similar to the risk factors identified as predictors of pretrial outcome. [Figure 24](#) shows the recommendations made by pretrial services for release and detention pending trial by risk level for defendants with a known risk level.

On average, pretrial services recommended release 85 percent of the time for the lowest risk defendant—risk level 1. The recommendations for release continuously decreased as the risk level increased.

[Figure 25](#) compares the recommendations for release made by pretrial services with the court's decisions regarding release and the pretrial success rates for those released pending trial. Pretrial services officers make recommendations for release less frequently in all risk levels when compared with the Court's decision to release defendants pending trial.

An examination of recommendations for release rates by District was completed. In nearly all Districts the recommendation for release decreased as the risk level increased. In addition, the recommendation release rates within risk levels varied greatly across the 93 Districts.

[Figure 26](#) represents a box and whiskers plot of the recommendation for release rates for the 93 Districts by risk level. The upper and lower bounds of the larger box represent the 75th and 25th percentile, respectively, while the center horizontal line represents the 50th (median). The inner box represents the mean and the vertical lines extend to the 10th and 90th percentile. Using risk level 3 as an example, the rate of recommending release averaged 46 percent, while the median was 51 percent. A closer examination reveals release recommendation rates for Districts ranged from 43 percent at the 25th percentile to 63 percent at the 75th percentile. This represents a 20 percent variation in release recommendation rates when considering the 25th and 75th percentiles; at the extremes, the rates for recommending release for risk level 3 defendants ranged from 21 percent to 82 percent.

[back to top](#)

### **Summary of Findings and Recommendations**

Pretrial services considered many of the same factors that were identified to be the best predictors of pretrial outcome including prior failures to appear, employment status, residence status, primary charge category and primary charge type. In addition, pretrial services considered measures of pending charges and prior criminal history that were similar to the risk factors identified as predictors of pretrial outcome.

The examination of current pretrial risk assessment and release/detention recommendations made by pretrial services revealed that generally pretrial services agencies consider many of the best predictors of pretrial outcome when making release/detention recommendations to the court. In

nearly all Districts the recommendations for release decreased as the risk level increased. There were three other significant findings detailed below.

1. The Court released a higher percentage of defendants in each risk level than was recommended by pretrial services.
2. Release and detention recommendations varied greatly across Districts within risk levels. This variation represents disparity in recommendation practices across Districts. Release recommendations varied as much as 20 percent within the same risk level (when considering the 25th and 75th percentiles).
3. Pretrial services recommended detention for 15 percent of the lowest risk defendants—risk level 1 (97.7 percent success rate), 40 percent of the lower risk defendants—risk level 2 (94 percent success rate), and more than half of the more moderate risk defendants—risk level 3 (90.8 percent success rate).

[back to top](#)

## **Research Objective Six—Best Practices for Pretrial Risk Assessment and Recommendations**

*Identify “best practices” relating to the determination of pretrial risk and recommendations to release or detain a defendant pending trial, particularly as they relate to the assessment of pretrial risk and the administration of the alternatives to detention program.*

The research identified nine (9) statistically significant and policy relevant predictors of pretrial outcome—success or failure pending trial. The predictors were used to develop a classification scheme to scale the risk persons arrested for federal criminal offenses posed if released pending trial. The risk classification scheme identifies defendants’ risk levels from 1 to 5 with pretrial success rates ranging from 97.7 percent to 84.5 percent. The classification scheme correctly classifies defendants by their risk of failure to appear and danger to the community, and although not the intent of a pretrial risk assessment, it also correctly classifies defendants based on their risk of technical violations.

The results of this study should be utilized to develop a standardized empirically-based risk assessment to be used by all federal pretrial services agencies. The use of a standardized empirically-based assessment will assist in reducing the disparity in risk assessment practices and provide a foundation for evidence-based practices relating to release and detention recommendations and the administration of the alternatives to detention program.

The implementation of a standardized risk assessment will allow for the development of a policy that provides guidance to pretrial services agencies regarding release and detention recommendations, including the use of the alternatives to detention program. Such a policy should represent several of the research findings presented here.


First, the lower-risk defendants, risk levels 1 and 2, are the most likely to succeed if released pending trial and in most cases release should be recommended. An alternative to detention, with the exception of mental health treatment when appropriate, generally decreases the likelihood of success for this population and should be recommended sparingly.

Second, the alternatives to detention program is most appropriate for the more moderate and higher-risk defendants as it allows for pretrial release while generally increasing pretrial success. Alternatives to detention should be recommended for this population when a defendant presents a specific risk of pretrial failure that can be addressed by an ATD. For example, a person with a substance abuse problem may be appropriate for drug testing, assessment, or treatment based on their specific situation. Defendants who do not present with a substance abuse problem should

not be recommended for a substance abuse-related ATD.

Finally, the populations most suited for pretrial release—both programmatically and economically—with conditions of alternatives to detention are defendants in risk levels 3 and 4. Attempts should be made to maximize the release of the defendants in these risk categories while minimizing the risk of pretrial failure through the ATD program. This practice is consistent with the purpose and intent of bail and striking the balance between the legal and constitutional rights of defendants with the need to protect the community and assure court appearance pending trial.

[back to top](#)



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[Publishing Information](#)



## Endnotes

[Pretrial Risk Assessment in the Federal Court](#)

[Implementing Evidence-Based Practices in Federal Pretrial Services](#)

[Pretrial Services in the District of Nebraska After the Office of Federal Detention Trustee Study](#)

[An Assessment of District Reviews: Implications for Pretrial Services Policy Development and Practice](#)

### Pretrial Risk Assessment in the Federal Court

<sup>1</sup> This report and the study on which it was based were sponsored by the Office of the Federal Detention Trustee, U.S. Department of Justice, with support from the Administrative Office of the U.S. Courts. The research was conducted by Luminosity, Inc. and the report, dated April 2009, appears in full here, minus the table of contents and with minor formatting changes.

<sup>2</sup> The District of Columbia operates a pretrial services agency that services both Superior Court and the District Court. This agency operates independent of the federal system and no data are reported to the Administrative Office of the U.S. Courts.

<sup>3</sup> National Institute of Justice, *Pretrial Services Programs: Responsibilities and Potential* (Washington, D.C.: U.S. Department of Justice, U.S. Government Printing Office, 2001) p. 7.

<sup>4</sup> See, Pub. L. 89-465, 80 Stat. 214 (1965).

<sup>5</sup> Pub. L. 94-473, 98 Stat. 1976 (1984).

<sup>6</sup> Title 18, United States Code, Section 3142(e) (which presumes that for defendants charged with a drug trafficking or importation offense with a maximum statutory penalty of 10 years or more, using a weapon in conjunction with a violent crime or drug offenses, or a terrorism offense no condition or combination of conditions can reasonably ensure the defendant's appearance at trial or the safety of the community).

<sup>7</sup> Title 18, United States Code, Section 3142(f).

<sup>8</sup> Bureau of Justice Statistics. *Compendium of Federal Justice Statistics*, 1985 (July 1990).

<sup>9</sup> During 2007 an additional 27,000 persons were booked and prosecuted for a misdemeanor

immigration offense.

<sup>10</sup> Bureau of Justice Statistics. Federal Justice Statistics Program Website (<http://fjsrc.urban.org>). Executive Office for U.S. Attorneys, LIONS data system, Fiscal Year 2007 (as standardized by the FJSRC).

<sup>11</sup> See, e.g., Darren Gowen, *Overview of the Federal Home Confinement Program*, 64 *Federal Probation* 11 (2000). Home confinement is interpreted by the federal judiciary to include curfew (whereby the defendant is prohibited from leaving his residence during specific hours), home detention (whereby the defendant is restricted to his residence at all times except for approved leaves such as for employment, education, medical treatment, and religious practices), and home incarceration (whereby the defendant is restricted to his residence at all times except for approved absences, medical treatment, or religious practice).

<sup>12</sup> Administrative Office of the U.S. Courts, Office of Probation and Pretrial Services, *The Supervision of Federal Defendants*. Monograph 111 (September 2004). Other alternatives to detention include sex offender treatment and computer monitoring. However, given the types of offenses for which persons are federally prosecuted, these conditions are infrequently imposed: 0.4 percent of persons included in the study were released pending trial to a sex offender treatment program; and 1.5 percent were required to have their computer usage monitored.

<sup>13</sup> Bureau of Justice Statistics. Federal Justice Statistics Program Website (<http://fjsrc.urban.org>). Executive Office for U.S. Attorneys, LIONS data system, Fiscal Year 2007 (as standardized by the FJSRC).”

<sup>14</sup> This observation is valid for all alternatives to detention with the exception of mental health treatment. Mental health treatment was equally effective at reducing pretrial failure for all risk levels.

<sup>15</sup> The cost of pretrial release was based on the cost of supervision, the average cost of alternatives to detention, and the average cost of fugitive recovery given the probability of failure.

<sup>16</sup> Title 18, United States Code, Section 3142(c)(1)(B)

<sup>17</sup> Title 18, United States Code, Section 3142(e) contains three categories of criminal offenses that give rise to a rebuttable presumption that “no condition or combination of conditions” will (1) “reasonably assure” the safety of any other person and the community if the defendant is released; or (2) “reasonably assure” the appearance of the defendant as required and “reasonably assure” the safety of any other person and the community if the defendant is released.

<sup>18</sup> Title 18, United States Code, Section 3142(g)

<sup>19</sup> An illustrative list of conditions is set forth in Title 18, United States Code, Section 3142 (c)(1)(B)(i through xiv) which gives the judicial officer authority to impose conditions not specifically enumerated so long as the same serve the purposes set out in § 3142(c)(1)(B).

<sup>20</sup> VanNostrand, Marie and Gena Keebler. “Our Journey Toward Pretrial Justice” in *Federal Probation*, Volume 71, Number 2 (September 2007), pp. 20-25.

<sup>21</sup> “Implementing Evidence-Based Practice in Community Corrections: The Principles of Effective Intervention” (National Institute of Corrections and Crime and Justice Institute (2004)).

[back to top](#)

**Implementing Evidence-Based Practices in Federal Pretrial Services**