Including the Larger Community in Pretrial Services Community Supervision:
The Circles of Peace Experiment

A thesis submitted in partial fulfillment of the requirements for the degree of Master of Judicial Studies

by

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ABSTRACT

This thesis is the story of the creation of a restorative justice, volunteer community based pretrial services program (PTS) in Nogales, Arizona on the border of the United States and Mexico. The experiment was a partnership between Construyendo Circulos de Paz/Constructing Circles of Peace, known as “Circles of Peace” (CCP), a non-profit agency, and the Santa Cruz County Courts.

This thesis explores the history of pretrial release practices, current best practices in pretrial from the research literature focusing on studies and developments in Philadelphia, and support in the literature for the use of the larger community in pretrial community supervision. The thesis research measured failure to appear rates and the commission of other crimes while on pretrial release for two groups, one that attended pretrial and one that did not. Treatment and other assistance to the experimental pretrial group was also measured.

Prior to this experiment there was no pretrial services agency in the jurisdiction and judges had no way of obtaining community supervision. No risk assessments were used at the time of initial appearance or arraignment and the judges had very little information about the accused when making the decisions regarding release. As a result, decisions were made from a booking form that contained the booking charges, a statement of probable cause for arrest, the Complaint filed, the judges’ knowledge of the community and their gut instincts or intuition.

The PTS circles were held twice per month. The circles did not discuss the facts of the cases of the individuals, respecting their legal and Constitutional rights to remain silent and be presumed innocent. The PTS circles did operate in a restorative justice approach with focus on healing all concerned, building consensus, stress reduction, life and career skills, and referrals for education, job training, job placement, and substance abuse or mental health treatment. All participants
were required to keep their residence, phone and job information current. The participants were reminded of their court dates by phone calls from the Director. Judges were given written reports of progress on participants prior to each court date.

As part of the program, connections were made with community resources with potential to benefit the participants. Some prosecutors considered the participants’ progress at pretrial when offering plea agreements.

At the Circles of Peace Pretrial Services agency, community members volunteer to attend the “pretrial circles” and bring with them their life experiences and empathy along with a desire to help others who are going through challenging times. The community members attend a volunteer training at Circles of Peace to understand the process of restorative justice and peacemaking circles. They agree to hold the information they hear in confidence and work to gain the trust of the individuals they meet who are waiting for their court dates. They learn the court process so they can explain what a preliminary hearing, a motions hearing, a plea negotiation date or a jury trial is, and why participants should attend. Sometimes the volunteers attend the court dates with the defendants. They listen to frustrations about defense lawyers or prosecutors and sometimes talk with defense lawyers in order to help defendants understand what is going on in their cases. They help in other ways such as encouragement to attend job training, preparation for job interviews and general support. One of the volunteers conducts stress reduction circles with the participants when they express anxiety over their court dates and the process they are experiencing. The PTS agency provides intake risk assessments, monitoring, court reminders, reports to the judges, and drug or alcohol testing when ordered by the judge.

The Court system adopted the use of risk assessments during the experiment to assist judges.
TABLE OF CONTENTS

Title Page
Committee Approval Page

Abstract i
Table of Contents iii
List of Tables iv
List of Figures v
Introduction 1

What Is the Larger Community 3
Claims /Hypothesis Asserted 5
History of Pretrial Release 8
The Philadelphia Pretrial Research 1954-2011 18
Current Best Practices Regarding Pretrial Release 49

Support for Using the Larger Community in Pretrial Community Supervision 51

Going Forward 54

Coming Full “Circle?” 57
The Problem Addressed by the Research 63

Design of the Program 64
Objective Research Plan Followed 66
Results of the Claims/Hypothesis Asserted 69
Conclusion 78

Footnotes 82
Appendix 1 87
LIST OF TABLES

Table 1 The impact of PTS on a selected set of positive outcomes 74
Table 2 Projected annual budget for starting a new county department for pretrial services vs. placing the program in the existing probation department in Santa Cruz County 76
Table 3 Historical funding of Pretrial Services 77
LIST OF FIGURES

Figure 1 Comparison between expected and actual numbers of pretrial arrests among cases assigned to pretrial services and no pretrial services groups 71
This thesis is the story of the creation of a restorative justice, community based pretrial services program in Nogales, Arizona on the border of the United States and Mexico. This thesis explores the use of volunteer community members in a pretrial services program operated in a non-profit agency. The experiment was a partnership between Construyendo Circulos de Paz/Constructing Circles of Peace, known as “Circles of Peace” (CCP), a non-profit agency, and the Santa Cruz County Courts.

Founded in 2004, Circles of Peace is engaged in restorative justice programs in the areas of domestic violence and substance abuse treatment, anger management, parenting, Strengthening Families and prevention of underage substance abuse. The Circles of Peace program using a restorative justice approach for pretrial services started in 2012 with small local foundation funding and three community members.

This thesis will explore the history of pretrial release practices, current best practices in pretrial from the research literature focusing on studies and developments in Philadelphia, and support in the literature for the use of the larger community in pretrial community supervision. The thesis research will measure failure to appear rates and the commission of other crimes while on pretrial release for two groups. One group attended the experimental pretrial services program and one group did not. Treatment and other assistance to the experimental pretrial group will be measured and reported also.

One participant in the program, Jose (a pseudonym), received help with his utility payment and help entering drug rehabilitation. His story will be told in segments throughout the thesis as an anecdotal demonstration of how the program functions. His story will be indented to clearly indicate it as a separate part of the thesis, in order to not break the flow of the overall presentation.
3/26/13 The clang of the holding cell door roused Jose from his reverie. How could this be happening? He remembered Rosa’s anxious pleas to stop when he drank that last shot. The drugs were messing with his mind. His clammy hands held his head. He saw the judge’s face in his mind’s eye. Would she release him? He needed help, he knew that.

Rosa studied the other people in the courtroom. Jose and several inmates in orange were brought into the jury box to wait. The chains shackling their hands and their feet caused them to shuffle along the carpet. She prayed that the judge would release Jose. He didn’t mean to hurt her when he tried to choke her. She had been so scared she called 911. After all, he did leave without hurting her. How would she get help for Jose?

The judge stared at the booking sheets before her for the inmates she was about to see. One page for each person with a brief statement of probable cause, address, date of birth, physical description and sometimes the officer’s request for “high bond.” How could this meager information inform her decision? She appreciated the foot dragging about her request for criminal history information. Nothing happened fast in county government and she was not an “authorized” user of NCIC. She was using a risk assessment borrowed from another court. She asked the questions herself. How would she ever obtain a “validated” risk assessment? One estimate of its cost was over $100,000. As usual, she prayed that she would make the right decisions.
In the courtroom Jose scored medium risk and Rosa asked for him to be released. The judge released Jose with the usual admonitions. His random assignment was to no pretrial services.

**WHAT IS THE LARGER COMMUNITY?**

At the Circles of Peace Pretrial Services agency, community members volunteer to attend the “pretrial circles” and bring with them their life experiences and empathy along with a desire to help others who are going through challenging times. The community members attend a volunteer training at Circles of Peace to understand the process of restorative justice and peacemaking circles. They agree to hold the information they hear in confidence and work to gain the trust of the individuals they meet who are waiting for their court dates. They learn the court process so they can explain what a preliminary hearing, a motions hearing, a plea negotiation date or a jury trial is, and why participants should attend. Sometimes the volunteers attend the court dates with the defendants. They listen to frustrations about defense lawyers or prosecutors and sometimes talk with defense lawyers in order to help defendants understand what is going on in their cases. They help in other ways such as encouragement to attend job training, preparation for job interviews and general support. One of the volunteers conducts stress reduction circles with the participants when they express anxiety over their court dates and the process they are experiencing. The agency provides intake risk assessments, monitoring, court reminders, reports to the judges, and drug or alcohol testing when ordered by the judge.

8/26/2013 Jose was arrested again yesterday. (No formal charges were ever filed by the County Attorney for the March event.) This time the probable cause statement alleged Jose left his mother’s home with a knife and told his mother he
would go kill his ex-girlfriend, Rosa. A few minutes later he arrived back at his mother’s home without the knife. Rosa told police he pulled her hair and pushed her. Upon arrest, a search revealed a Roche pill in Jose’s pocket, but no knife.

8/27/2013 Rosa had been busy. She convinced her Pastor to try to help Jose and find a drug rehabilitation center that was free. She told the judge that Jose needed rehab. Jose agreed. The Pastor told the judge that he found a free faith based rehabilitation center for Jose, and a bed would be available soon. The Pastor promised to notify the judge as soon as the bed was ready. The risk assessment showed high risk: a felony charge (the Roche pill) 1 point; other pending charges (an open container), 1 point; no failures to appear; 1 year at current residence; unemployed, 1 point; criminal history (yes-unknown charges) 1 point; history of drug abuse yes, 1 point; outstanding warrants, no.

The judge released Jose with instructions to report to CCP pretrial services within 24 hours (this time his random assignment was pretrial at CCP), no alcohol, weapons or illegal drugs. Rosa requested his release and wanted contact.

8/28/2013 The Pastor notified the judge the bed in rehabilitation would be available September 2 and Jose would admit for at least 30 days. Jose reported he had a job as a painter lined up and his employer, Raul, would write her a letter confirming this.
CLAIMS/HYPOTHESIS ASSERTED

A restorative justice community based pretrial services program (PTS) may ensure a connection between those released pretrial and the court system, reducing the number of warrants for failure to appear.

Restorative justice pretrial services may reduce the number of crimes committed by those released pretrial into this larger community based PTS agency.

The community based pretrial services will create community connections that advance the chances of job training, job placement, educational advancement, treatment referrals and other positive factors in the lives of the participants.

It is possible to start a community based pretrial services with small grant funding and big community commitment.

SPECIFIC RESEARCH PROBLEM UNDERTAKEN

One hundred fifty-six individuals accused of serious misdemeanors or felonies were given a risk assessment by the judge at their initial appearance or arraignment in Justice Court in Santa Cruz County, Arizona from October 2012 through December 2014. Two random assignment pools were used for individuals who scored between medium to high risk. One group of the research subjects was not assigned to pretrial services, while the other group was assigned to the new restorative justice pretrial services (PTS) agency. The two groups were released either on their own word or to the custody of a third party, a family member or friend. A third group of individuals was created who were sent to PTS without a random assignment as “pilot cases” requested by the Presiding Judge in the beginning of the experiment. Others were put into this pilot group because of errors in their assignments.
Prior to this experiment there was no pretrial services agency in the jurisdiction and judges had no way of obtaining community supervision. No risk assessments were used at the time of initial appearance or arraignment and the judges had very little information about the accused when making the decisions regarding release. As a result, decisions were made from a booking form that contained the booking charges, a statement of probable cause for arrest, the Complaint filed, the judges’ knowledge of the community and their gut instincts or intuition.

During the course of this experiment, through the efforts of a new Court Administrator, the Santa Cruz County Probation Department was enlisted to complete the risk assessments for the judges, to review past criminal histories, to conduct interviews of the accused, and to provide the information to the arraignment judges. We borrowed a “validated” risk assessment from another Arizona county.

Those individuals who were referred to Circles of Peace were monitored by the Director of PTS and received the support of a “pretrial services circle” composed of community members, the Director, and some support persons who came to the circle to support their friend or relative. Sometimes, the surety who had taken custody of the accused was part of the circle.

The PTS circles were held twice per month. The circles did not discuss the facts of the cases of the individuals, respecting their legal and Constitutional rights to remain silent and be presumed innocent. Sometimes participants spontaneously spoke about the facts of their cases and were redirected to the circle topic. (One objection was filed by a defense attorney claiming his client was being forced to talk about the facts of her case. During the hearing on the motion, the client
told the judge she “loved” pretrial and was looking for jobs with some fellow participants.) The
PTS circles did operate in a restorative justice approach with focus on healing all concerned,
building consensus, stress reduction, life and career skills, and referrals for education, job
training, job placement, and substance abuse or mental health treatment. Substance abuse testing
was done if ordered by the referring judge. Those who were employed were allowed to report by
phone or in person with occasional attendance at the PTS circles. All participants were required
to keep their residence, phone and job information current. The participants were reminded of
their court dates by phone calls from the Director. Judges were given written reports of progress
on participants prior to each court date.

As part of the program, connections were made with community resources that had the potential
to benefit the participants. Santa Cruz County’s Workforce Investment Act (One Stop) program
became an integral partner. Through that connection alone, two PTS participants obtained
tuition, transportation and living costs to attend trucking school in Tucson Arizona, and secured
jobs upon completion. Other partnerships were established with Ed Options, Pinnacle Alternative
High School, Cochise Community College, Pinal Hispanic Council, Community Intervention
Associates, and Corazon Services. Some prosecutors considered the participants’ progress at
pretrial when offering plea agreements.

My submission for waiver of human subjects’ review to the University of Nevada at Reno is
attached as Appendix 1. As a result of this submission, the proposed experimental research was
determined to be exempt from human subjects’ review.
Before proceeding with a report on results of the research just described some discussion of the history and philosophy of pretrial release programs seems appropriate.

**HISTORY OF PRETRIAL RELEASE**

A look at the history of pretrial release practices may help understand the current state of the system and the logical connection of the larger community in pretrial services practice.

The American understanding of pretrial incarceration or release comes from the English common law developed over hundreds of years. Two basic themes emerge from this history. First, bail originally reflected the judicial officer’s prediction of the trial outcome in a case. Second, the practice of using bail to avoid pretrial imprisonment arose historically from a series of abuses in the pretrial decision making process. These abuses were linked to the inability to predict trial outcomes, or to predict the appearance in court or the commission of new crimes. These led to an over reliance on judicial discretion to grant or deny bail or fix conditions of release that were presumed to mitigate a defendant’s pretrial misconduct. 1

Historically, and today, the emphasis is on prediction of a defendant’s probability of making all court appearances and the risk of committing new crimes while released. The science of prediction of these factors has emerged over the past few decades. The dilemma remains the same. If released, the accused can avoid trial by flight, jeopardize the course of justice by tampering with witnesses, and commit other crimes. If detained, the accused is subject to confinement similar to punishment for a crime without having been proven guilty. 2 Judges over the centuries have made decisions balancing the dangers of release against the right of the
accused to be presumed innocent and avoid the punishment of incarceration before conviction. Making these decisions was the most distressing of all duties I performed during 21 years as a Justice of the Peace.

In Arizona, with a few exceptions, any person charged with an offense bailable as a matter of right, “shall” be released on his own recognizance or on the execution of bail in an amount decided by the judicial officer. In deciding the method of release the judicial officer, on the basis of available information, shall take into consideration all of 12 factors listed in the statute, A.R.S.13-3967. These factors include: views of the victim, nature and circumstances of the offense charged, weight of the evidence against the accused, the accused’s family ties, employment, financial resources, character and mental condition, results of any drug tests submitted to the court, whether the accused is using any substance if its use or possession is illegal, whether the accused violated certain illegal drug statutes involving methamphetamines, the length of residence in the community, the accused’s record of arrests and convictions, the record of appearance at court proceedings, flight to avoid prosecution, failure to appear, whether the accused has entered or remained in the United States illegally, whether the accused’s residence is in the state, in another state, or outside the United States.

The legal process developed in our pretrial roots was designed as an alternative to blood feuds, outlawry or hue and cry methods of settling wrongs. Outlawry and hue and cry allowed the public to hunt down and deliver summary justice to the offender. As Anglo Saxon law developed, a system of “bots” or payments designed to compensate grievances, developed.
Crimes were considered to be private affairs and suits were brought by persons against others seeking money as the criminal penalty. The bot could be fixed by the judicial officer in an amount considered to compensate the victim. In a small number of cases, offenders were considered a danger to society and were referred to as false accusers, persons of evil repute, habitual criminals, and those caught in the act of the crime, or escaping. These persons were often mutilated or summarily executed. 4

The majority of offenders were “safe” so the issue of a defendant’s danger to the community was not a major concern. The concerns were flight to avoid payment or penalty and payment of the bot or “wite” to the king. Prisons were costly and troublesome so arrestees were “manprised” or set free when some sureties became bound for their appearance in court. Those unable to pay the bot were typically handed over to the victim for execution or enslavement. If the accused fled they were declared outlaws and were subject to immediate justice by whoever tracked them down. 5

Certain offenders were “absolutely irreplevisable” and required some type of prison. All prisoners facing penalties payable by fine were bondable and the bail bond was linked to the outcome of the trial-money for money. The surety provided the pledge to guarantee the appearance in court and the payment of the bot or bail upon conviction. If the offender fled, the surety paid all to the accuser. Carbone called this system the “last entirely rational approach to bail.” 6
The system became more complex after the Norman conquest beginning in 1066. Crime became a state affair which could be initiated by the suspicions of a presentment jury or sworn statements of the aggrieved. Capital and other forms of corporal punishment replaced money fines for all but the least serious offenses. Summary mutilations and executions were phased out. Corporal punishment increased, creating an incentive for offenders to flee. Delays between accusation and trial were caused by itinerant justices administering local justice. Offenders were kept in primitive jails and unchecked discretion in judges and magistrates led to corruption and abuse. The shire’s reeve or sheriff had the duty to hold offenders for the magistrate’s visit and this broad discretion led to abuse as well. Ideas about who was bailable also changed. The categories of nonreplevisable or non-bailable included homicide, forest offenses (violation of royal forests) and a catch all category of “any other wrong” (retto) for which, according to English custom, an offense was not replevisable.

During the 12th and 13th centuries, bail law developed to attempt to control the increasingly corrupt system. Parliament passed the first “Statute of Westminster” which codified five existing laws from the Magna Carta and departed from Anglo Saxon customs by establishing three criteria to govern bailability:

1. the nature of the offense (categories of bailable and non-bailable offenses);
2. the probability of conviction (required the sheriff to examine all the evidence and measure each variable to determine whether or not the accused was held on “light suspicion” and,
3. the criminal history of the accused (bad character or ill fame)
Under this system the bail should mirror the outcome of the trial. For the next five hundred years, the standard for bail was “the seriousness of the offense offset by the likelihood of acquittal.”

Other laws were passed defining bailability of crimes and adding safeguards to protect against political abuse and local corruption. These included the requirement that two Justices of the Peace decide the vague issues of “ill fame” and “light suspicion” (1486) and, in 1554 these decisions were required to be made in open session with both Justices present. This first type of a preliminary hearing required that the evidence be weighed and recorded in writing. The “Petition of Right” prohibited detention without a charge. This law was passed in response to the King’s directive to hold several rebellious knights without charge for an extended period of time. In 1676, Jenkes was held without bail for two months on a charge that the law required admittance to bail. This led to the passage of Habeas Corpus in 1679. Stubborn and unruly judges learned that high bail could detain offenders indefinitely. This led to the passage of the English Bill of Rights of 1689 which stated “excessive bail ought not be required.” This language was later included in the Eighth Amendment to the United States Constitution.

Decisions by the Justices of the Peace could have serious consequences personally. Granting bail inappropriately or voluntarily and knowingly accepting insufficient bail could result in the revocation of the Justice’s commission by the Lord Chancellor. A Justice of the Peace could be punished for allowing a negligent escape. A Justice who refused or delayed bail in a case where a subject was legally eligible for it committed an offense. A Justice who granted bail with insufficient sureties could be punished by a fine if the accused failed to appear for trial.
The form of bail in all criminal cases was recognizance (cash deposit was available in some civil cases with the court’s consent). Blackstone described this as a type of deed used to encumber and later discharge property rather than to convey it. Recognizance was an obligation to pay a specified sum entered into before an authorized magistrate, subject to a condition of performing a specified act (presenting the accused for trial). Recognizance was the acknowledgement on the record of an existing debt. Performance of the condition, appearance of the accused in court, voided the obligation. If the accused failed to appear in court, the obligation was deemed forfeit and the sureties had to pay what was considered their pre-existing debt. Blackstone described the friendship aspect of recognizance where there were consequences for one’s friend standing surety. This discouraged flight since the friend or family member could lose property, money, or be punished. 11 Sureties protected themselves at times by re-seizing the accused if they feared an attempt to flee. The surety could then return the accused to the court and be discharged when the accused was put in prison. 12

The development of commercial bail bonding in the United States can be traced from the Supreme Court cases that led to the United States becoming one of only two countries in the world that allow commercial bail bonds. 13 In 1873, the case of Taylor vs. Taintor was decided by the U. S. Supreme Court. In that case, McGuire was arrested in Connecticut for grand larceny. Several sureties entered into a recognizance with the Treasurer for the amount of $8,000. McGuire was released with a court date set. These sureties were then indemnified by a third party who paid the amount they had pledged. The third party allowed McGuire to leave the state. He went to New York “where he belonged.” While in New York, McGuire was seized by New York officers upon the requisition of the Governor of Maine and, against his will, transported to
Maine on a charge of burglary. He was convicted in Maine and sentenced to 15 years in prison. None of the sureties knew about the Maine charge. When McGuire failed to appear for his court date in Connecticut, (because he was in custody in Maine) the recognizance was forfeited and the $8,000 was placed in the hands of the Treasurer. The sureties appealed and the case was sent to the Superior Court of Errors for Fairfield County where the judgment for the Treasurer was affirmed. The defendants then brought a writ of error to the United State Supreme Court. The Supreme Court held that:

“The fact that the sureties were indemnified was proper to be considered by the Superior Court upon an application for time to produce the body of McGuire. But it could have no effect upon the rights of the parties in this action and may therefore be laid out of view.”

In those few words the Court “laid out of view” the issue of the propriety of indemnification, the very issue that led courts in England, Ireland, New Zealand and India, in the same time frame, the second half of the nineteenth century, to find that something inherent in the concept of a bail surety is offended by converting the role to a commercial transaction. When other countries study options for reform of systems of pretrial release, the commercial bail bonding system in the United States is seen as what to avoid. 14 The Taylor Court found against the sureties because they were negligent in letting McGuire remove himself from the state, opining that it was unwise and imprudent of them and that they must bear the burden of any evil that ensued. The Court also reviewed the rights of the sureties against the principal who is delivered to their custody:

“Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge, and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights
in person or by agent. They may pursue him into another State, may arrest him on the
Sabbath; and, if necessary, may break and enter his house for that purpose. The seizure is
not made by virtue of new process. None is needed. It is likened to the re-arrest by the
sheriff of an escaping prisoner.” 15

Perhaps in light of these broad powers, the Court had no patience for the sureties’ negligence in
allowing McGuire to leave the State of Connecticut. The indemnification did not raise any issue
worth discussing for the Court.

While the United States Supreme Court ignored the development of commercial bail bonding,
the rest of the world did not. The resistance in other countries against the commercialization of
bail was shown in three different ways. First, contracts or less formal agreements to indemnify
sureties were seen as illegal contracts that were unenforceable. Second, bail sureties that were
suspected of being indemnified were rejected and bail could be refused completely, or those
suspected of indemnification could be placed at a disadvantage in attempts to mitigate
forfeitures. Third, agreements for the indemnification of sureties were regarded as criminal
conspiracy subject to punishment. Unlike the United States and the Philippines, the world view
of commercial bail is that such agreements constitute a public mischief and are contrary to public
policy. When indemnification occurs, the public is deprived of the usual motivation for a surety,
who is often a family member or friend of the accused, to make sure that person appears in court.
9/6/2013 Jose is off the radar. The judge received a copy of a letter to Jose from CCP pretrial services stating he had been suspended from services for failure to report, with instructions to report in 24 hours.

9/24/2013 Jose appeared for his arraignment on the two misdemeanors: domestic violence threatening and intimidating, and domestic violence assault-unwanted touching. The judge appointed an attorney to represent Jose and set the pretrial conference for October 16. Jose was instructed to report to pretrial services immediately.

The practices of the criminal justice system in the United States around the issues of bail and pretrial release have been studied extensively. Although sometimes referred to as early research on bail and bail reform, the study edited by Roscoe Pound and Felix Frankfurter in 1922 was a survey of the administration of the criminal justice system in Cleveland from 1920-1922. The study exposed poor practices in the areas of prosecution, procedures for setting bail, case processing and other inefficient court practices. The editors advocated for the elimination of commercial bail bonds completely, and if that was not possible, they recommended that the practice be regulated similar to loan sharking. The editors opined: “Commercial bail bonding tends to prostitute the administration of justice in the inferior courts.”

Research has shown that commercial bail practices have led to serious discrimination among minority groups. Bail reform efforts began in the 1960’s when society was focused on civil rights and poverty. Robert Kennedy’s efforts at bail reform, started in 1964, were stalled in the 1970s when the focus became more centered on crime control. Judges continued doing what they saw
their predecessors do and received little or no training in pretrial decision making. Criminal justice participants thought defendants would not come back to court without money bail. The commercial bail bond industry became more and more powerful. 18

In 2011 the National Symposium on Pretrial Justice was convened as a joint effort by the Department of Justice, the Bureau of Justice Assistance and the pretrial services community to restart the reforms started by Attorney General Robert Kennedy in 1964. 19 Many of the participants from Robert Kennedy’s 1964 conference were still alive and attended this 2011 symposium. The research at that time showed that defendants who stay in jail pretrial receive more severe sentences, are offered less attractive plea bargains and are more likely to become “reentry” clients for no other reason than their pretrial detention, regardless of charge or criminal history. There is no more powerful predictor of post-conviction incarceration than pretrial detention. 20 This research has been confirmed in recent days by the Arnold Foundation. 21

9/26/2013 Jose reported to pretrial services. His drug/alcohol test showed alcohol, meth, THC, and cocaine. Jose stated he needed to get sober through detox. PTS recommended in patient rehab but Jose stated he needed to talk it over with his family. Pretrial services helped Jose with utility bills through a special grant program. The Director of PTS sent a report to the judge stating she had recommended that Jose check into a rehab center, but he wanted to check with his family first. He did not call to report to PTS on October 4 or attend the pretrial circle on October 10.
Researchers from the University of Pennsylvania and Temple University, among others, have studied the Philadelphia court system in the area of pretrial practices since the 1950s. All aspects of the pretrial decision making process and pretrial services have been studied in Philadelphia and create a relevant history of the development of today’s best practices.

Caleb Foote: The Rights of the Accused are Paramount

In 1954, Caleb Foote reported that the 1931 Wickersham Commission in Philadelphia called for research on bail “in the direction of individualization of bail determinations based on the history, character, standing, personality and record of the accused. Foote argued that a 1951 decision of the Supreme Court held that such an individual determination at bail setting was a Constitutional requirement. This opinion found that the spirit of the bail procedure is to keep persons out of jail until a trial has found them guilty rather than a means of keeping them in jail on a “mere accusation.” The concurring opinion by Justices Jackson and Frankfurter stated that fixing “a uniform blanket bail chiefly by consideration of the accusation that did not take into account the differences in circumstances between defendants” would be a clear violation of Federal Rule of Criminal Procedure 46(c). Foote’s study in Philadelphia concluded that the only individualization significant was the frequent practice of assuming the defendant was guilty and deciding whether the circumstances of the offense warranted a high bail. Individual factors were not developed and Foote pointed to theoretical and administrative difficulties that prevented individualizing bail according to the risk of a defendant. Foote noted this lack of knowledge on which a judge could base a decision of the defendant’s reliability showed the need for the kind of
research that the Wickersham Commission advocated. One of the major defects in Philadelphia at that time was the length of time (an average of 5 days) it took for defendants charged with serious crimes to have bail determined or be released. Foote pointed to the obstacles for an individualized bail hearing. There were non-lawyer magistrates and bail amounts set had no relationship to an amount a defendant could afford. Foote believed the idea of commercial bail as a financial deterrent for jumping bail was fictitious. He advocated that an appropriate criminal sanction for non-appearance, enforced by the police, would make the increase of flight highly improbable. A law penalizing failure to appear would be a direct deterrent, and speedy trial dates for bail cases would decrease the opportunity for new crimes and reduce failures to appear. Foote looked for a time when the abolition of the wrongs inherent in pretrial imprisonment was more highly valued than the usually fictitious deterrent effect provided by commercial bail. He felt the only resolution to the clash between bail and defendants’ rights was to abandon the necessity for bail. 24

Professor Foote continued to write about the discriminatory effects of our bail system that requires financial security for release. Although the Supreme Court had made significant changes in search and seizure, the right to counsel and the application of the Fourteenth Amendment to the states, the Court had been almost entirely silent in the face of mounting documentation of the discriminatory effect upon indigents of the bail bond system’s requirement of financial security for pretrial release. Studies over the thirty years prior to Foote’s article showed that the bail system operates to deny, rather than facilitate, liberty before trial for the poor because of their poverty. 26 Many indigent defendants, jailed because of their poverty, never served any later prison time because they were either not convicted, or their sentences did not include imprisonment. There was a large correlation between pretrial status (jail or bail) and the severity
of the sentence. Those in jail pretrial were two to three times more likely to receive prison sentences and were more likely to receive more severe sentences as well. 27

I have a personal history with the City of Philadelphia since I attended Temple University School of Law and practiced in the criminal courts of Philadelphia upon graduation. When I began my practice in 1979, John S. Goldkamp published the book, Two Classes of Accused: A Study of Bail and Detention in American Justice 28 At the time I began my practice, I had a more experienced criminal attorney as my mentor. We would appear in the night court described by Professor Goldkamp and Professor Michael R. Gottfredson in a later book. 29 My mentor had a connection in the court who would call him when the judge arrived (anywhere between midnight and 4 a.m.) My mentor would then call me and we would head for our appearance in court. Our job was to argue for the release of our clients, pointing out all the reasons why he or she would appear in court and refrain from criminal conduct during release pretrial. The book describes the other class, the group of prostitutes there to support their friend who was awaiting pretrial decision, and the grandmother who wondered how she would raise the bail for her beloved grandson.

**John Goldkamp: In Search of the State’s Interests**

Professor Goldkamp, and later, fellow Temple University researcher, Michael Gottfredson, used their major laboratory in the Philadelphia court system to analyze and dissect the bail decision making procedures. Two Classes of Accused presents the contradiction between pretrial detention and the Constitutional right to the presumption of innocence. The “interest” of the defendant to be at liberty before trial results in no disruption in social ties, i.e. family life and employment, no disruption in the ability to prepare a defense to the charge, and no infliction of the emotional,
physical and psychological stigmas that go along with confinement. Goldkamp argued that release under reasonable circumstances is not just an “interest” but a fundamental right, and cited federal court support for this idea. 30

In order to find the legal underpinnings of the bail decision making process, Goldkamp searched for the state “interests” in the bail mechanism and pretrial detention. Goldkamp scrutinized state legal guidelines in search of the definition of the state interests in bail. He also investigated the nature of the classification system itself. What are the interests of the state when incarcerating presumably innocent defendants before trial, or more correctly stated, since not all defendants are held in detention, what right does the state have to create two classes of accused; one that suffers hardship and one that does not? Goldkamp’s stated major theoretical task of the book and the study was to define the state interests responsible for bail and detention. What reasons does the state use for the mechanism that classifies defendants into custody statuses before trial?

Traditionally, this has been linking bail to a need to secure defendants’ appearance in court, but Goldkamp saw a powerful hidden agenda: the preventive detention of those deemed dangerous. The Supreme Court has held that the state does not have to treat all persons identically to satisfy equal protection, but equal protection does require that, if a distinction is made, it must have some relevance to the purpose for which the classifications are made. 31 Three questions arose for Goldkamp:

1. What are the distinctions on the basis of which defendants may find themselves in jail or at liberty?
2. How are these distinctions or decision criteria defined in legal guidelines?
3. How are the decision criteria invoked in practice?

If prison is an instrument of the state, or an instrument designed to accomplish the desires of society as asserted by Sykes 32, then the bail decision process and pretrial detention are also instruments of the state with regard to persons accused, but not convicted, of crime.

Goldkamp hypothesized that if what society does reflects what society wants to do, then his research would contribute to knowledge of the desires of society with regard to accused persons. If what society does, does not reflect what society wants, then his study would add to the knowledge of what society does. In order to determine the legal theoretical state of affairs, he examined four important sources of legal policy: The Eighth Amendment of the U.S. Constitution, Supreme Court decisions, key federal cases dealing with bail and detention, and the Federal Bail Reform Act of 1966.

The Constitution gives no guidance or definitions of bail or “excessive.” It is hard then to define factors to guide the choice between detaining or releasing defendants when you don’t know precisely what purposes ought to be served by the bail decision and pretrial detention. Foote stated that bail under English law was a device to secure pre-adjudicatory release while providing assurance of appearance in court. Denial of bail served the purpose of confining those who were likely to flee because they were facing the death penalty. 33 Researchers Mitchell and Hess contended that denial of bail to protect the community has always been a legitimate bail function. 34

Goldkamp asserted three common interpretations of a right to bail:
1¶ Since there is no explicit reference to the right to bail in the Eighth Amendment, then one must defer to statutory provisions.

2¶ If no Constitutional or statutory authority or direction for the right to bail, then judicial discretion determines if bail is appropriate and, if so, then it shall not be excessive.

3¶ The third interpretation finds the right to bail implicit in the Eighth Amendment and relies on the historical evolution of bail under English law. This contention is that the Eighth Amendment’s concern for excessive bail can only come from a presumption favoring release before trial, 35; or there is a federally guaranteed right to freedom pretrial that can only be abridged under extremely high risk circumstances. 36

These questions are important in determining the state interests for detention and bail. If you decide there is a presumed right to release in certain cases and not others, then you can examine the basis for the selective granting of that right. Depending on which of the three interpretations of the right to bail you choose, different conclusions regarding bail decision making result. The Eighth Amendment really gives no guidance.

Goldkamp analyzed the American Bar Association’s (ABA) standards and the National Association of Pretrial Services Agencies (NAPSA) standards. The ABA Standards stated the interests of appearance in court and dangerousness as allowable considerations. The National Association of Pretrial Services Agencies (NAPSA) standard advocated for preventive detention on the grounds of danger and flight risk.
The Bail Reform Act of 1964 led to the release of those with good community ties while those detained scored poorly on offense, criminal record etc. At the time of *Two Classes of Accused*, all states but Illinois had excessive bail clauses like the Eighth Amendment and none had an absolute right to bail. Most states had some formula for a statutory right to bail. Goldkamp identified the important themes from studies of bail from 1927-1960 as follows:

1. Bail was rather arbitrary, based on a mechanical appraisal of the offenses charged, rather than an assessment of the defendant’s likelihood of absconding;
2. Bail was often fixed at high rates without regard to the defendant’s ability to pay or the role of the bondsman.
3. A substantial proportion of defendants were detained unnecessarily prior to trial without any apparent rationale.
4. Whether a defendant was released or detained seemed to have an important bearing on his outcome later in the judicial process.

Goldkamp inferred from these findings that pretrial detention served to hold defendants who were seriously charged, those considered dangerous, those without financial resources and those most likely to be found guilty and sentenced.

In the study conducted in *Two Classes of Accused*, Goldkamp took a sampling of persons passing through their first appearance in Philadelphia. He found a disproportionate number of young, male, black or minority, low income and single persons. His goal was to show how bail is decided in a major urban jurisdiction. He chose Philadelphia which had a reputation as a national leader in bail reform and pretrial services. The objective was to gain knowledge of the distinctions made among defendants entering the criminal justice process at the first appearance.
The three choices available to bail decision makers were release on own recognizance, no bond, or a bail amount which in Philadelphia required posting 10% of the amount set. This study showed that, in all three options, bail decision making seemed to operate on the seriousness of the charge. Opponents to the use of the seriousness of the charge as the rationale for setting bail were the Bail Reform Act and the ABA and NAPSA standards.

The equity of using the seriousness of the charge as the reason for detention may be questioned on the following grounds:

1. Charging can be manipulated by police or prosecutors to affect the defendant’s chances for bail.
2. It has all of the drawbacks of using a bail schedule, i.e. similarly charged defendants may have unfair release prospects based on their differential ability to afford bail.
3. Different judges will have different views of seriousness, so bail setting will vary from judge to judge, creating inconsistency in bail outcomes among similar defendants.

My own experience verified all of these findings. Each judge in my jurisdiction had a category of offenses he or she felt required a high bond. One judge felt drug offenses required high bonds. My own concerns were for burglary and robbery with a weapon.

Goldkamp concluded that, without a statistical ability to predict flight and or future crimes, the bail decision must operate in the realms of judicial discretion and judicial intuition. His aim was still to determine the basis of the classification, the state interests. The conclusion that the seriousness of the charge was the predominant determiner of pretrial detention was supported by
the argument that the more serious the charge, the more the defendant had to fear and the more
likely he/she would flee or fail to come to court. However, Goldkamp raised serious issues
around this standard of the seriousness of the charge:

1. This standard was not supported by the empirical research to show it correlates to failure
to appear.

2. The seriousness of the charge standard assumes the guilt of the defendant rather than the
presumption of innocence. This involves judicial projections of guilt and an assumption
that the seriously charged defendant is more likely to commit such acts again and is more
likely to flee to avoid conviction and sentence. Once these assumptions happen there is
no guarantee that pretrial punishment does not enter into the use of pretrial detention.
This may result in preventive detention decision making without a mechanism to review
the decision or the reasoning that led to it.

Goldkamp found this type of pretrial decision making process to be murky, and the unarticulated
reasoning behind decisions made it impossible to contest.

Taking the findings from his study, Goldkamp identified two state interests: 1. assuring
defendants will appear in court, and 2. protecting the community and the judicial process from
defendants who are deemed to be dangerous. The question thus became: Does the classification
of defendants promote these two interests? The question is hard to answer. It is tied to the
consideration of the standard concerning the nature of the classification (the distinctions made)
and weighed against the defendant’s right to pretrial release. Bail decision making operates
within an obscure theoretical framework. The confused state of prescriptive guidelines in the
area of bail may come from the fact that the purposes of bail and the use of detention are not clearly set forth or understood. 37

October 4, 2013 Jose appeared in court and told the judge he needed rehab as soon as possible. She reset his pretrial for October 9 and the attorneys were notified of the change.

October 9, 2013 Jose appeared with his attorney and his pastor who reported to the judge that he had found a place for Jose at Victory Outreach in Phoenix and Jose would enter that rehabilitation facility on October 12. Jose waived his speedy trial time and the pretrial was reset by the agreement of all parties. The judge told Jose to write to her to confirm that he was still in Victory Outreach in order to avoid the thought that he was not appearing for his court dates.

October 14, 2013 The Court clerk notified PTS that Jose had entered Victory Outreach for an extended rehabilitation program. He spent 60 days there.

**Goldkamp and Michael Gottfredson: The First Empirical Bail Guidelines,**

**The Great Philadelphia Experiment**

Armed with the knowledge that, despite the academics’ criticism of the seriousness of the charge standard for setting conditions of release, judges still used the charge standard when setting bail, Goldkamp, along with fellow researcher, Michael Gottfredson, undertook a comprehensive experiment in the Philadelphia Courts to set standards for judges to follow. The project was funded by the National Institute of Justice and the National Institute of Corrections. In 1982, the Philadelphia Municipal Court and the First Judicial District of the Court of Common Pleas were
the first court system in the United States to adopt an empirically-based pretrial risk assessment tool with the assistance of Dr. John Goldkamp and Dr. Michael R. Gottfredson of Temple University. The journey to the adoption of these guidelines is detailed in their book published in 1985. 37 The preliminary data gathering began in 1981-1982. The researchers collected information on 1,920 cases which included the following: the number of offenses charged, the most serious injuries experienced by victims, preliminary arraignment dispositions, the amount of bail set, the socio-economic status and demographics of the defendants, prior criminal history and reasons given for granting or denying bail. The defendants were followed over a period of 90 days, tracking failures to appear or rearrests for crimes during release. The items of information used included police reports, court reports, preliminary arraignment information, pretrial services reports, judges’ summaries, pre-arrest interviews, sworn statements and extracts of criminal records. 38

The process was a beautiful partnership between the academics and the judiciary. The researchers involved the judges every step of the way. The experiment identified several early criticisms of pretrial practices: unregulated exercise of judicial discretion; inequitable treatment of defendants at bail setting and through bail detention; procedural impediments to the fair administration of bail; the effectiveness of bail practices; and the issues related to the presumption of innocence. As learned in the earlier study, another large criticism of bail practices was the nearly exclusive reliance by judges on the nature of the criminal charge when setting bail. Critics argued that the use of the criminal charge had little relevance to the likelihood that a defendant would abscond and that it was a way to detain any defendant that the judge viewed as dangerous, unworthy, undesirable, unreliable or even disrespectful. 39
The Manhattan Bail Project of the 1960s promoted the review of community ties as a way to encourage the use of release on one’s own recognizance. Further, that study showed that release on one’s own recognizance did not contribute to increased rates of failure to appear or pretrial crime. 40 Early researchers had argued for the judicial consideration of social background information as a more appropriate determiner of release. 41 Early studies also included findings showing that greater proportions of released defendants received favorable dispositions in dismissals, convictions and sentencing than detained individuals. 42 The development of pretrial service agencies brought background information on defendants to judges for bail decisions and created notification procedures to keep non-willful failures to appear at a minimum in jurisdictions fortunate to have the resources to develop pretrial service programs. Goldkamp and Gottfredson questioned whether the movement toward consideration of community ties and other background information really engaged judges. While early researchers stressed the presumption of innocence issue, the Supreme Court did not make a distinction between pretrial detainees and convicted felons, unless there was an express intent to punish or the restrictions amounted to punishment. 43 The Court held that the presumption of innocence plays an important role in the criminal justice system, but it has no application to a determination of the rights of a pretrial detainee facing confinement before his case has even begun, if the issue is a regulatory one. This case involved a challenge to a prison facility’s actions to maintain their facility. The defendants argued they should not be subject to the same conditions as convicted felons. While the Court acknowledged that pretrial detention is designed to assure a defendant’s appearance in court, the legitimate regulatory function of the prison (security concerns) under review did not amount to punishment and did not violate the presumption of innocence, due process or the Fifth
Amendment. The case did not look at the decision making process that led to the pretrial detainment.

Goldkamp and Gottfredson were focused on the importance of rationality in the criminal justice decision making process. They believed this required the statement of the decision goals and a body of relevant information to aid in achieving those goals. For example, if the goal is ensuring appearance in court and the use of criminal record is used as a measure of the likelihood of flight, then this is rational only if there is a relationship between prior criminal record and appearance in court. In their evaluation of the strengths and weaknesses of bail guidelines the researchers considered the judges’ job in setting bail. This job is far from simple. The lack of clear cut goals, and straightforward criteria for reaching them, leads to errors during the difficult balancing act judges are asked to perform. The study viewed the judicial discretion necessary as “normal” and sought to address this discretion. Judges are asked to make a quick consideration of information, offense charged, background of defendant, community ties, etc. and make a prediction of whether defendants will commit crimes or fail to appear if released. Good judgment on the part of the judges will result in the majority of defendants being released on the least restrictive conditions with minimal re-arrest and failure to appear rates. Feedback to judges was mainly negative, i.e. the negative publicity following the judge’s wrong hunch in releasing a defendant who then goes out and commits a major crime. Naturally, this leads to conservative bail setting decisions.

The guidelines research was designed to attempt to develop a decision making resource for judges. The experiment randomly selected sixteen judges (of 22 on the court) to use guidelines
(experimental) and non-guidelines (control). The results showed more consistency among the experimental decisions, improving the equity of bail decisions. The guidelines seemed to be a substantial tool for reducing the inequities usually associated with the bail decision and the use of pretrial detention. While the researchers had hypothesized that the guidelines’ decision matrix of severity and risk would show lower rates of failure to appear and re-arrest, the findings did not support this hypothesis. But the data did show the greater equity in decisions without worsening the failure to appear and re-arrest rates. The researchers felt the guidelines provided a resource for improving bail practices. This study showed that pretrial detention is determined, indirectly at least, by the assigning of cash bail amounts that defendants may or may not be able to afford. The guidelines did not increase or decrease the rate of detention or the length of pretrial confinement. The experiment showed that the majority of defendants detained pretrial were high risk and seriously charged.

The researchers acknowledged that their experiment did not address the questions of the utility of cash bail and posed significant questions about its deterrent effect. They posited that a more developed version of guidelines should build alternatives to cash bail such as conditional release, supervised release, or the use of bail sponsors.

Changes that occurred within the criminal justice system in Philadelphia during and after the guidelines research included: the district attorney took over the initial charging function from the police, and the charging information presented at the bail hearing was more organized and reliable. The bail guidelines have been revised several times. On the whole it seemed that a great amount of arbitrariness in setting bail was removed.
In the 1980s Philadelphia jails were seriously overcrowded and subject to court orders mandating reduction in their populations. Professor Goldkamp took this opportunity to conduct a “natural experiment.” Goldkamp reviewed the reforms of the 1960s and 1970s focused on conditions, resources and rights of the accused confined pretrial. These again highlighted the great disadvantages to persons confined, but not convicted of crimes. Now in the 1980s, the focus was on jail overcrowding and the function and performance of the pretrial detention institution. Unfairness was an issue as studies showed that defendants incarcerated pretrial had their charges dropped or cases dismissed less often and were convicted and sentenced to incarceration more often than those who were not confined pretrial. Overcrowding and preventive detention proponents shared the criticism that pretrial detention was not sufficiently selective, over including poor, not seriously charged persons with reasonable community ties, and under including dangerous individuals with money available to post bonds who posed danger to communities. Bail judges are gatekeepers who engage in prediction of risk of flight and danger to the community. The two concerns identified by Goldkamp were these:

1. That courts make unwarranted assumptions of guilt, and
2. That courts are unable to accurately predict future behavior of the accused.

Goldkamp identified the “sub rosa” aspect of traditional cash bail: practices which produce detention indirectly by setting unaffordable cash bail based on the judges’ assessment that the crime charged shows a probability of future crime or flight. Making these assumptions creates tension with the due process right to a presumption of innocence. Goldkamp noted that predictive studies at the time did not include persons in detention and felt this was a serious flaw,
screening out persons who remained incarcerated. This study focused on the extent to which pretrial detention differentiates among criminal defendants (selectivity) and the degree to which this selectivity is appropriate and effective. The study compared a group of defendants detained in Philadelphia on a given day, November 13, 1980, with a sample of defendants who would otherwise have remained in jail but for their selection by a court order for emergency release due to overcrowding litigation. The researchers examined the characteristics of those typically detained in Philadelphia and made inferences about the selectivity of detention practices. Second, they tested the accuracy of a predictive classification they had recently developed through the study of released Philadelphia defendants. The predictive classification was applied to both groups.

The background to the overcrowding litigation: A 1980 Public Welfare Annual Report of the Philadelphia prisons showed 88% of the population of the Detention Center, 78% of Holmesburg Prison and 50% of the House of Corrections’ population were pretrial detainees. (In Philadelphia the three jails are referred to as prisons.) The court hearing the overcrowding cases believed that a significant percentage of those held pretrial were not seriously charged, had good community ties, were reasonably good risks and were being held because they could not afford the low amounts of bail set. The court ordered expedited release of those with the lowest bail ($1,500 or $150 under the Philadelphia 10% system or lower) with priority to those confined for the longest periods waiting for trial. This created a “natural” experiment from Goldkamp’s social science perspective since the overcrowding court’s remedy seemed to grant release to the lowest risk defendants who, but for a few dollars, could have been released. However, Goldkamp questioned the assumption that low bail amounts indicated low risk. This study took that sample of
defendants detained in the prisons on a typical day, November 13, 1980 to compare to the group released by the overcrowding court’s order. Those released were followed for 180 days after release.

The sample of defendants chosen to be released due to overcrowding showed they were predominately young, single, black, male and unemployed. About one third were on public assistance at the time of arrest. Most were charged with serious felonies. Overall, 56% of these defendants had prior felony convictions. Twenty percent of these defendants had outstanding warrants or detainers, 40% had other charges pending at the time of their arrest, more than half had prior willful failures to appear in court. An estimated 22% were held on $1,500 bail ($150 in the 10% Philadelphia scheme) or less. These were the defendants that were the target of the overcrowding litigation.

The two sets of defendants were contrasted with an earlier sampling of all defendants entering the system in Philadelphia at the first appearance in the fall of 1975 through the conclusion of all cases by 1977. As part of the Bail Decision-Making Project in Philadelphia, a prediction instrument, designed to predict pretrial failure generally, was validated on an independent sample representative of Philadelphia defendants who were processed into the judicial system and later secured release. That instrument contained factors of type of charge, recent arrests pending charges, prior willful failures to appear, age, telephone, and combination of charge and arrests.

The study results showed that the defendants released due to overcrowding, under the assumption that they were low risk with the inability to pay their smaller bonds, were not low
risk. Their failure to appear rates and rearrests were several times higher than the overall population. Thus, the conclusion showed there was a great deal of selectivity in the pretrial decision making process.

**Moving from the Incapacitation Rationale to Preventive Detention**

Goldkamp’s article “Danger and Detention; A Second Generation of Bail Reform” 46, chronicles the development of the notion of preventive detention in pretrial decision making. Now, the bail reform movement of the 1960s and 1970s shifted to a serious consideration of dangerousness as a factor in determining pretrial release. The use of the incapacitation rationale, when bonds are deliberately set at high levels beyond the defendant’s ability to pay, was supplanted by laws in the District of Columbia and many states, along with the Federal Bail Reform Act of 1984. The Federal Bail Reform Act asks the judge to consider the “danger and seriousness of the danger to any person or the community that would be posed by the person’s release.” 47 The Arizona Constitution provides that all persons charged with a crime “shall be bailable by sufficient sureties except:

> For felony offenses committed when the person charged poses a substantial danger to any other person or the community, if no condition of release which may be imposed will reasonably assure the safety of the other person or the community and if the proof is evident and the presumption great as to the present charge. 48

Goldkamp found a problem with the vague definitions in state statutes and pointed out that this trend was taking the process back to the seriousness of the charge criterion. He supported a
sound test for evaluating dangerousness and preventive detention described by von Hirsch which contains three elements:

1. There must be reasonably precise legal standards of dangerousness.

2. The prediction methods used must be subject to careful and continuous validation; and

3. The procedure for commitment must provide the defendant with certain minimal procedural safeguards. 49

Goldkamp wrote that clearly defined standards for confining a person are necessary so that the individual knows the proscribed action and its consequences. He continued to believe that deprivation of liberty must be decided in an arena which protects the interests of the state but also the rights of the individual. Goldkamp concluded this article with a discussion of the use of risk assessments in determining pretrial risk of dangerousness. He worried about the lack of the validity of bail predictions and the Supreme Court’s disinclination to recognize the importance and the difficulty in pretrial crime prediction:

Our cases indicate, however, that from a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct. 50

Although Goldkamp cites studies that have examined the predictive aspects of bail and pretrial detention decision making, he found a number of problems with the accuracy of evaluations of danger assessments:

1. Pretrial detention is often not a direct decision but rather the indirect result of a cash bail decision;
2. The factors actually influential in judges’ decisions may correspond only slightly with those recommended for consideration by law or those actually predictive of defendant misconduct: and

3. Only rarely do laws instruct judges to consider specific factors or to employ specific conditions of release in assessing and addressing danger concerns as differentiated from appearance concerns. 51

At the time of this article there were a few studies that attempted to predict crime committed by defendants during pretrial release with what Goldkamp described as “marginal degrees of success.” 52 Only rarely had such predictive schemes been independently validated and judges rarely had access to or incorporated such information into bail decisions. 53 Goldkamp saw the need to collect statistics describing rearrests of defendants and to give them to judges as actuarial information that could inform their decision-making approaches. He noted that the current pretrial danger laws had not considered the frontline decision making practices of judges. Although the states of Wisconsin and North Carolina required judges to develop guidelines and policies to implement the aims of bail, these approaches were exceptions. 54

Although the Supreme Court referred to “experienced prediction” in Schall v. Martin, 55 Goldkamp felt that judges were often just guessing in a vacuum. He reasoned that judges have not had the chance to monitor the results of their decisions, or compare their practices with colleagues. He believed that “in the final analysis, hope for affecting the phenomenon of pretrial crime depends on the ability of the bail judge to make an informed decision from within a rational policy framework.” 56
The development of risk assessments and their validation is now seriously underway, providing judges with such a policy framework with which to make decisions. Reference to this development is made in the next section.

Goldkamp continued to evaluate the empirically-based pretrial risk assessment and guidelines developed in Philadelphia in the 1980s. These had been seriously disrupted by the overcrowding litigation. 57

In 1987, the Supreme Court of the United States weighed in on the issue of pretrial release. In U.S. v. Salerno, the Court held that:

“in our society liberty is the norm, and detention prior to trial … is the carefully limited exception.”

This case involved a challenge to the preventive detention required by the Bail Reform Act of 1984 which requires the courts to detain certain arrestees pretrial who are charged with certain serious felonies. 58 The Court of Appeals had held the Act violated substantive due process since it required detention on the basis of future dangerousness. The Supreme Court reversed, holding that the Act was not formulated as punishment of a dangerous individual but as a potential solution to the pressing societal problem of pretrial crimes. The Court found the Act was not excessive since it carefully limits the circumstances for this type of detention to the most serious felonies and requires the Government to demonstrate by clear and convincing evidence, in an evidentiary hearing, that no reasonable conditions of release will assure the safety of any person or the community. Further, the Act provides significant safeguards such as the right to request
counsel, the right to testify, to present witnesses, to proffer evidence and to cross examine
witnesses. In addition, the Act requires specific factors to be considered in making the decisions
regarding detention: the nature and seriousness of the charges, the substantiality of the
Government’s evidence, the nature and seriousness of the danger posed, and the arrestee’s
background and characteristics.

**Philadelphia Pretrial Services; Derailed by the Overcrowding Litigation**

Goldkamp, with Michael D. White of City University of New York, began conducting field
experiments in the 1990s designed to inform Philadelphia’s pretrial release strategies.
Philadelphia was still dealing with overcrowding in its jails, maintaining accountability over
persons released pretrial, and preserving the integrity of the judicial process. A Philadelphia task
force identified the need to design corrective strategies for two types of noncompliant
defendants, the unintentional or disorganized defendant and the intentional, “system-wise”
defendant. The first type was considered to be disorganized, easily confused by the criminal
justice process requirements, irresponsible and distractible, often due to drug and alcohol use.
The latter type was experienced with the system, determined to defy responsibilities hoping to
avoid criminal penalties. The supervision strategies were designed to the least restrictive
methods of interfering with liberty. For the disorganized, the strategies sought to support and
rehabilitate in order to bring about compliant behavior. For the intentional, the strategies were
more deterrent to seek compliance. For the supportive approach, the goal was to educate
defendants about the process and the consequences of non-compliance. For the deterrence
approach, the strategy was to communicate the threat and the use of sanctions.
At the time of the study, court officials described the culture in Philadelphia as one of no consequences for pretrial noncompliance. The researchers targeted higher risk defendants who would normally be held in detention. The City had seen its jail populations rise dramatically from the 1960s and had been under different overcrowding emergency procedures for about twenty-five years, with state and federal court ordered interventions throughout that time. The emergency had become the status quo. In November, 1995, the federal judge issued a temporary stay of the emergency procedures to allow the court to implement improved justice procedures. It was hoped that the alternatives to incarceration plan would result in the termination of the federal court intervention. During the time of the overcrowding emergency, pretrial staff had been diverted from duties at the first appearance stage to the job of identifying those who should be released without supervision under the emergency orders. Judges’ decisions on pretrial release, based on the guidelines that have been described, were disrupted by the population caps and other procedures made by the overcrowding courts. The researchers identified the lesson from those dysfunctional times to be: “simple, unilateral, externally imposed, discretion eliminating mandatory rules could not succeed in solving the system problems contributing to overcrowding.”

While the discretion, authority and perspectives of the local judiciary had to be paramount, unchecked judicial discretion in assigning pretrial confinement was not the answer either. Eventually, the Mayor’s Overcrowding Task Force returned to the judicial guidelines strategy.

The pretrial services researchers in this study believed that earlier studies had not found best practices for supervision nor even a definition of supervision. Supervision seemed to be what it
was assumed to be. Inventing what their supervision strategies would look like, the task force defined supervision as an overall strategy to constrain defendants’ misconduct during pretrial release, based on a number of evidence based strategies. They wanted evidence about the impact of the supervision and the ability to make adjustments based on the evidence. They created four testable elements as follows:

1. Gaining judges’ compliance with the guidelines so that supervision was assigned to the targeted categories.
2. Notification and court reminders in advance for defendants.
3. Education of defendants at the first stages to enlighten them of the requirements of the system.
4. Timely early identification of noncompliant defendants for enforcement to bring them back into compliance.

The first experiment tested the in-court notification at first appearance by placing pretrial services personnel in the courtroom to explain the requirements verbally and then give a card to the defendant with the information and a number to call to an automated phone system within 24 hours. This strategy targeted the disorganized, unintentional defendants.

The use of the auto phone system was designed to test early compliance with instructions to call in as required. The control group in these experiments got none of the attention described above. After a 120 day follow up period tracking failure to appear in court rates and rearrests, this experiment did not show any significant differences between the two groups. The automated phone call in this experiment was a bust due to a malfunctioning auto phone system.
The second experiment involved testing the impact of supervision conditions. The conditions started with the least restrictive and moved to more restrictive. The data previously collected (from the “natural experiment” described in the overcrowding releases) was used to compare the various groups set up under this experiment. The experiment did not show the impact of more restrictive conditions. Overall, however, the findings showed that some minimum supervision improved on the no supervision of those released under the emergency orders. In addition, those defendants who had successful meetings with pretrial services showed significantly lower failure to appear and re-arrest rates than those with unacceptable meeting outcomes. Implementation problems with this experiment were evident in the enforcement aspect regarding those higher risk persons who missed their appointments, i.e. the Warrant Unit responded to less than one fifth of those non-compliant defendants.

The third experiment tested the impact of preventive notification of defendants prior to orientation and court appearance. This experiment was developed to address the finding in the supervision experiment that 53% of the type I and type II supervision defendants failed to report to the pretrial services agency within 3 to 5 days to start their supervision process. This proactive experiment began notification attempts as soon as the results of the preliminary arraignment were known rather than at the pretrial services orientation stage, calling defendants 24 hours before the orientation. The differences between the two groups compared in this experiment were not statistically significant. The major implementation challenge in this experiment was the telephone contact challenge. When the staff actually made contact, almost all of those defendants attended the orientation. Those who had messages left with another person they had given as a
contact had medium rates of attendance but their attendance rates were significantly higher than defendants who received no contact. Failure to appear and re-arrest rates followed the same pattern. Making actual contact with the defendant using this telephone strategy had a beneficial effect. 60

The fourth experiment tested the impact of enforcement on early no shows in bringing noncomplying defendants back into compliance. In this experiment, the early non-compliers were identified and targeted by forwarding their names to the Warrant Unit. That Unit was to call to determine if the defendant was aware of the obligation to report within the following 2 days. If contact could not be made, then the Unit was to go to the residence to speak to the defendant or another person. If that failed, then the Unit was to leave a letter with the specified requirement to report. The examined results showed that very few defendants were contacted by phone or at their residence leading to the conclusion that any threat of consequences was delivered to a small proportion of those intended to receive it. Therefore, this enforcement strategy was not effectively implemented and could not be considered a valid test of this approach.

Overall, the experiments in this study suffered from problems that affected the researchers’ abilities to reach any clear inferences. Implementation problems played a significant role in the study. Two conclusions were drawn. First, as to notification, suggested that, if supervisory staff have an effective means of reaching defendants, then performance will be better. Second, as to the deterrence aspects of pretrial release supervision, the culture of no consequences in Philadelphia due to the overcrowding releases and the inability of judges to follow through on sanctions, led to a “backfire” of the innovation that was intended to help relieve the
overcrowding. The researches felt the criminal justice system’s credibility is damaged by its inability to follow through on the threat of sanctions for offenders who fail to comply with conditions of release.

The challenge faced by the Philadelphia justice system is faced by many other jurisdictions as well: how to set requirements that are meaningful and enforceable and how to devise measured responses that can and will be delivered when violations occur—without resorting automatically to confinement and without overwhelming the fair and rational functioning of the system itself. 61

Subsequent research has shown that court reminders are an evidence based strategy. 62

This Goldkamp/White article goes on to suggest the value of pretrial supervision in the community context and will be discussed in the section of this thesis on support for the use of the larger community in pretrial community supervision.

Results of the Culture of No Consequences

Recommendations from the Pretrial Justice Institute

The final study, really an assessment, that I report here was completed in 2011 by the Pretrial Justice Institute (PJI) supported by the Bureau of Justice Assistance. 63 This assessment was requested by the Chief Justice of the Pennsylvania Supreme Court for technical assistance from PJI. This request came after two publications highlighted the problems within the Philadelphia bail system. The Philadelphia Inquirer reported that about one third of defendants during 2007-08 failed to appear in court for at least one court hearing. The article also noted that there were
about 47,000 bench warrants outstanding for defendants who had failed to appear and been fugitives for at least one year. Further, the City was owed about $11 billion in bail forfeitures from defendants who had missed court dates. The next report was done by the Pew Charitable Trust. This one reported that the Philadelphia prison population (county jails in Pennsylvania are referred to as prisons but are separate from the state prison system) rose 45% from 1999 to 2008, primarily driven by the pretrial population. The report also claimed that magistrates were making it more difficult for defendants to be released pretrial: the percentage of defendants released pretrial without having to post cash bond had fallen, and when cash bonds were set the amount defendants had to pay to secure release had gone up substantially. The Pew report also noted that the magistrates had been departing from the pretrial release guidelines more than half the time. Those guidelines, referred to earlier, were empirically designed in 1982 to help make pretrial decisions more consistent. At the time of their introduction, magistrates deviated from the guidelines less than 25% of the time. The findings cited by the Pew report were similar to findings of John Goldkamp in 2006.

The PJI assessment begins with a description of the ideal process considering national standards set by the American Bar Association. A.B.A. Standards promote the purposes of providing due process for those accused of crime, maintaining the integrity of the judicial process by securing defendants for trial and protecting victims, witnesses and the community from threats, danger and interference. ABA Standards 10.1, 10.2. The Standards presume release, and the selective use of detention without bail, recognizing the need to supervise safely large numbers of pretrial defendants in the community. Important for this assessment is the element of the pretrial release decision making process set forth in A.B.A. Standard 10-1.2:
There should be available a wide array of programs or options to promote pretrial release on conditions that reasonably assure appearance and community safety; and that are tailored to meet the risks posed by individual defendants.

The 2011 PJI assessment reported studies from Washington D.C. and Kentucky showing the following. In Washington D.C. 88% of pretrial defendants got non-financial release; 88% of those made all their court appearances; and 88% had no rearrests while released. 67

In Kentucky, where no commercial bail bonds are allowed but cash bonds similar to those used in Philadelphia are used, a 2010 study showed that 74% of pretrial defendants were released with 92% of those making all court dates and 93% having no rearrests pretrial. 68

The PJI assessment explains the process of pretrial decision making in Philadelphia. The Philadelphia Pretrial Release Guidelines are highlighted as the first use of a guidelines approach and one of the first examples of introducing evidence-based practices into pretrial release decision making. The research upon which they were based was an experimental design using random assignment of cases into control and experimental groups. Use of the Guidelines led to consistency in decisions resulting in equity for defendants who were seen. The consistency was done without resulting increases in failures to appear or re-arrests. 69

The PJI assessment pointed out the problem of no sanctions for non-compliance with pretrial conditions caused by the overcrowding issues. It seemed that there had been no real cost for failures to appear in the system for the past 25 years during the period of the federal courts emergency release orders. This led to magistrates setting higher bonds.
The lack of pretrial supervision options resulted from serious budget cuts for pretrial services. However, the prison budget had doubled in the past ten years. A 2010 Pennsylvania law required defendants sentenced to two or more years to be sent to state prisons. This development had resulted in the end of the emergency releases as the overcrowding eased. Other promising developments noted were the new District Attorney’s assignment of experienced attorneys to make charging decisions that were more appropriate and supportable. The District Attorney’s office purged 20,000 old warrants where witnesses were no longer available or evidence had deteriorated. Now the system seemed to have space to begin to address the problems in pretrial decision making such as these:

1. a large reliance on cash bonds, leading to large numbers of defendants detained pretrial,
2. subsequent jail overcrowding, and
3. the large number of released defendants failing to appear.

The PJI assessment made the following recommendations:

1. Although Philadelphia had been a pioneer in risk assessment validation at the time the guidelines were developed, it was time to begin to plan for a valid study of the pretrial release guidelines.
2. The Court should plan for expansion of pretrial release options tailored to individual risks posed by defendants. Special note was made of defendants who were seriously mentally ill and reference made to the use of Brief Mental Health Screen:

Work should begin with justice decision makers to identify resources to allow access to treatment such as day reporting centers.

3. Implementation of clear objectives outlining swift and certain responses to violations of pretrial conditions and failures to appear. The Court should provide pretrial services with parameters to respond to these violations, i.e. expand the Surrender Room for those with warrants and pursue prosecutions for failures to appear.

4. The Court should take a new stand on failures to appear and deliver a clear message at each stage of the process, from the conclusion of the pretrial interview to each hearing before a judge, and through the media.

5. The Warrant Unit should give priority to warrants issued from the time these new policies take effect.

6. Pretrial staff should be given the opportunity to take advantage of trainings available through the National Association of Pretrial Services Agencies and the National Institute of Corrections.

7. Procedures should be put in place to monitor and document the impacts of changes that are made.

8. Give thorough briefings to judges, prosecutors, defense attorneys and pretrial staff on all changes.
CURRENT BEST PRACTICES REGARDING PRETRIAL PRACTICES

Risk assessments have gained prominence as the best practice to determine conditions of release. The movement away from commercial bail bonding to a more realistic and fair way of conducting business in determining release after arrest has also gained momentum. Court reminders and motivational interviewing are evidence based practices.

I visited Philadelphia in 2014 and spoke to judges and court administrators about the process they were engaged in at that time to update their risk assessment with the help of Dr. Berk of the University of Pennsylvania Law School. A new validation study was underway.

Evidence-Based Practice: Risk Assessments

The use of risk assessments to give judges information to make their decisions regarding the release of individuals from jail is an evidence based practice. The following national organizations support the use of risk assessments: the American Bar Association 71; the American Jail Association 72; the American Probation and Parole Association 73; the International Association of Chiefs of Police 74; the Association of Prosecuting Attorneys 75; the Conference of Chief Justices 76; the National Association of Counties 77; the American Association of Chief Defenders 78; the National Association of Pretrial Services Agencies. 79

Risk assessments bring comfort to the minds of judges. For many of the 21 years while I set conditions of release, I had a booking form with a probable cause statement and little else. In the times that family members or even victims came to court giving me insight into the individual, I
considered myself lucky. When the CCP Pretrial Services began, one of the first challenges was obtaining a validated risk assessment. Validation was very expensive and our court budget had no funds for the required fee. We used a validated instrument from another county in Arizona. I administered the assessment myself and the answers were obtained by self-reporting from the detainees. Eventually, our court administrator persuaded the probation chief to administer the risk assessments with criminal background checks and an interview with the detainee during the weekdays. This process was in line with the prevailing standards of the American Bar Association and the recommendations of the Pretrial Justice Institute. At the time of this writing the judges on weekend duty are the ones administering the risk assessments without the criminal records check.

The latest research by the Arnold Foundation regarding the use of risk assessments without an interview of the defendant (the Public Safety Assessment/PSA Court) has shown that this method is as effective as a predictor as risk assessments with an interview. 80 This method will promote the use of risk assessments since it streamlines the process and minimizes resources that need to be used. However, the face to face interview certainly provides necessary insights when resources are available. In our jurisdiction for example, interviews were not overly burdensome. The more information a judge can have the more informed his or her decision will be.

**Evidence-Based Practice: Court Reminders**

Studies since the Philadelphia attempts at different types of reminders have shown these are an evidence based practice. 81 CCP Pretrial Services has been providing court reminders since it
began. These are now supported by the computer pretrial tracking program (CePretrial) designed by AutoMon. This system is part of the Ce Connect products designed by AutoMon, LLC of Scottsdale, Arizona

**Motivational Interviewing**

Circles has made some progress in using this evidence based technique. The Director of Pretrial Services has had training in her previous job with Head Start and that hopefully flows over into interviews with pretrial participants. This was not measured in the study. The community members attended a training on motivational interviewing provided by a probation officer but we were unable to follow up further on this approach. This is planned for the future.

**SUPPORT FOR USING THE LARGER COMMUNITY IN PRETRIAL COMMUNITY SUPERVISION**

The use of the community at large in criminal justice interventions is not new or unique. How can court systems with limited budgets be expected to carry the burden of all aspects of supervision of those released pretrial? The difficulty of insufficient resources to manage convicted individuals is well known, from jail overcrowding to limited dollars to provide resources. The same is true for pretrial supervision. The following is some of the support for involving the larger community in criminal justice matters.

American Bar Association (ABA) Standards for pretrial services establish a role for pretrial service agencies to “monitor, supervise and assist defendants released pretrial.” 82 The ABA and
the National Association of Pretrial Service Agencies standards urge that agencies should assist persons released pretrial in securing any necessary employment, medical, drug, mental or other health treatment, legal or other needed social services that would increase the chances of successful compliance with conditions of pretrial release. 83 In discussing supporting business practices for pretrial service agencies and the need to determine outcome and performance measures, the National Institute of Correction’s Pretrial Executives’ Network recommends collaborative networks that include the local criminal justice system and the broader community. 84 Support for the broader community approach can be found in articles by William Dressel, former President of the National Judicial College, and Greg Berman of the Center for Court Innovation. 85

Community justice is a growing phenomenon in criminal justice today. Community justice is about partnerships and problem solving. “No criminal justice agency can build partnerships or solve neighborhood problems without investing time and energy in engaging the community.” 86 The Center for Court Innovation has over 20 years of experience with successful community courts such as the Red Hook Community Justice Center, the Midtown Community Court, the Harlem Community Justice Center and the Bronx Community Solutions programs, all in New York state. These community justice programs are engaging residents, merchants, churches and schools in seeking to prevent crime before it occurs and in building new approaches to public safety. The six common underlying principles of these community justice programs include: enhanced information, community engagement, collaboration, individualized justice, accountability, and outcomes. 87
The wisdom of Tom Tyler is appropriate in this discussion: “People obey the law more often if they believe it is legitimate.” Community members contribute to the understanding of those involved in the criminal justice system. They are their neighbors, their peers, their friends. Community members care about the people in trouble in their neighborhoods and the CCP experience shows that these volunteers want to help. Involving the larger community in pretrial service programs is similar in approach to these community justice concepts. Individuals awaiting trial who have community members who care about their situations, take time to explain the court process to them so they understand its legitimacy, and help them get back on track, are more likely to make it to their court dates and refrain from committing other crimes while released pending trial.

The overarching philosophy of the pretrial service program operated by Circles of Peace is one of restorative justice. Restorative justice rebuilds relationships in families, communities and society as a whole. The “Healing Community Model” is a framework of flexibility that builds partnerships, promoting jobs, housing solutions, health, education, substance abuse treatment, paths to citizenship, advocacy, social support and the development of pro-social skills. Mentors are good role models, give wise counsel, introduce mentees to other positive people, and provide encouragement. John Goldkamp and Michael White acknowledged that some of the problems of the criminal justice system cannot be solved by the system alone. They cited with favor community policing, community courts, and other initiatives that deal with community crime problems through community prosecution, community probation, joint problem solving and reintegration. Goldkamp and White considered these innovations to be critical elements in community corrections, and posited that the problems relating to pretrial supervision they found
in Philadelphia could be addressed by a community justice approach to pretrial release. They speculated that supervision efforts could be enhanced through partnerships with community organizations, churches, and neighborhood associations in areas where defendants live. They suggested community based pretrial partnerships in neighborhoods where defendants were being released from police stations after their video arraignments. These researchers saw great promise in developing new, community based collaborations. 90 Premier pretrial justice researcher, Maria Van Nostrand, includes “engaging ongoing support of natural communities” as the sixth principle of community corrections. 91

GOING FORWARD

The researchers are legion and their brilliance has taught us many things to help make better decisions. But, until one sits on that bench, elevated to radiate the impression of higher wisdom, and looks into the eyes of a person accused of some really scary thing, it may be hard to appreciate the weighing of the risk that goes on in the mind of a judge. Judicial discretion will always be part of the decision. The Philadelphia research showed us that judges were following the risk guidelines after their adoption and only deviating from them one fourth of the time. After the stressor of the overcrowding litigation, the number of deviations was over fifty percent of the time, a statistic that is still relevant today. 92 Even if we have the perfect risk assessment, some future stressor (a Get Tough on Pretrial Detention Executive Order?) could persuade judges that their motivations and predictive skills can be trusted better than the validated risk assessments.

The use of evidence based practices is the goal in criminal justice today. In 2009, criminal justice researchers from the University of Cincinnati wrote “Eight Lessons from Moneyball: The High Cost of Ignoring Evidence-Based Corrections. 93 The authors bemoan criminal justice decisions
that are made by those without knowledge of relevant empirical literature and without
knowledge that their decisions may be governed by false criteria. They believed, in 2009, that
with so much at stake in offender reform, community safety and the expenditure of public
monies, the “malpractice of ignoring evidence based interventions” would be hard to defend.
Unlike public officials who may promote new get tough correctional practices and be
congratulated for doing something about crime, judges have to keep level heads and stick to the
evidence, especially when making the important pretrial incarceration decisions.

Judges could be trained in the important findings about the misperceptions of the human mind by
Israeli psychologists Amos Tversky and Daniel Kahneman detailed in Michael Lewis’s recent
book, The Undoing Project. These psychologists argued that peoples’ intuitive expectations
are governed by a consistent misperception of an uncertain world. Their studies focused on
figuring out what the mind does when it is making predictive judgments. Much of this work
came out of the Oregon Research Institute founded by Paul Hoffman in 1960. Hoffman had a
special interest in human judgment and left a university teaching position to found the Institute.
While most of the world was relying on the expert opinions of doctors, judges, investment
advisors, government officials etc., researchers at the Oregon Research Institute were
demonstrating the inability of experts to outperform algorithms when trying to diagnose or
predict behavior. The Oregon researchers felt it was important to figure out how people took
pieces of information and somehow processed them to come up with a decision, especially what
experts did when they rendered judgments. They hoped to be able to spot when and where
human judgment is more likely to go wrong.
Tversky and Kahneman spent time at the Oregon Research Institute building on the research started there. They wrote (and subsequently won a Noble Prize) about the mechanisms of the mind for making judgments and decisions which are useful, but also capable of generating serious errors. Tversky and Kahneman identified certain “heuristics” or “rules of thumb” that lead the mind to make mistakes. *The Undoing Project* explains the interesting heuristics of representativeness, availability, and conditionality, and how they lead to errors in judgment. Tversky and Kahneman wanted to apply their work on prediction to fields outside of psychology so that decisions made by experts in those fields could be:

“significantly improved by making these experts aware of their own biases and by the development of methods to reduce and counteract the sources of bias in judgment.”

11/2/13 The judge received a letter from Jose from rehab:

“Judge, I just want to thank you for listening to my cry for help! I just want to let you know that I’m doing great here. I’m blessed by just being here. I wouldn’t trade this for anything, no money, no jewel is more precious to me than what I’m living, experiencing here, and, yes, I admit to my faults and my actions and I will accept any sanction and sentence that is imposed on me. And I thank you once more for listening and believing in me. And I leave all of this in the Lord’s hands, and yours of course.”

The problem of no validated risk assessment in my jurisdiction will soon be solved. The Chief Justice of the Arizona Supreme Court commissioned a research study to validate a state-wide risk assessment. The Arnold Foundation’s Public Safety Assessment 97 is being tested
throughout the state. Some pretrial circle participants are now only required to attend one circle per month since the PSA makes this assignment at the same time the risk assessment for release is given to the bail decision making judge. Our community members are concerned about this because they feel their ability to have an impact is hampered by the reduction in required attendance. Our Director advises people they can attend voluntarily to the other pretrial circle in the month and some do. We plan to discuss this with the judges when the research is completed and hope to develop a policy that takes into account factors that are not part of the PSA Court. It seems like prediction of risk for release and pretrial monitoring requirements should be evaluated separately.

The pretrial circles are going strong with the same community members. Many more people have been through the program and great stories exist about their progress. Some have failed to complete their requirements, but others have continued to receive the support of the larger community. This year, the Court system has taken full responsibility for the funding of the pretrial services program through grants to the agency.

**Coming Full “Circle?”**

A recent case from the Arizona Supreme Court addressed prerequisites for “offense-specific pretrial detention procedures.” 98 The case involved the provisions referred to earlier in this piece from the Arizona Constitution, Article 2 Section 22, codified in A.R.S.13-3961A 3. This law resulted from the passage of Proposition 103 by the voters of the State of Arizona in 2002 that stated:

> All persons charged with crime shall be bailable by sufficient sureties, except:
1. For capital offenses, sexual assault, sexual conduct with a minor under fifteen years of age or molestation of a child under fifteen years of age when the proof is evident or the presumption great.

Defendant Simpson accepted a plea agreement prior to the Court’s opinion, so the decision applied only to Defendant Martinez. Martinez was charged with sexual conduct with a minor under 15, and as a result of that charge was held without bail. Martinez filed a petition for release on bail which was denied by the trial court after an evidentiary hearing finding sufficient evidence to satisfy the proof is evident and presumption great standard as to the charge. The Court of Appeals reversed the decision, finding that an individualized determination of dangerousness was necessary to hold a person without bail. Both courts used the analysis from the United States Supreme Court in U.S. v. Salerno. The Salerno Court found the 1984 Federal Bail Reform Act allowed certain persons to be held without bond since it was narrowly focused on an acute problem in which the Government interests are overwhelming. The U.S. Supreme Court emphasized three important aspects of the Act which it approved:

1. It applied only to a group that Congress specifically found to be far more likely to commit dangerous acts in the community post arrest.

2. The Government had to show probable cause that the defendant committed the offense, and

3. The Act required the Government to show clear and convincing evidence, in an adversary hearing, that no condition of release can reasonably assure the safety of the community or any person, or an identifiable and articulated threat.
The Arizona Court of Appeals found that exceptions to the Arizona Constitution’s general rule that bail is available must satisfy due process requirements of the United States Constitution. The Arizona law under review only required a sufficient showing that a person accused of sexual conduct with a minor likely committed the offense without addressing dangerousness or the availability of release conditions that could assure the safety of the victim and the community. The Court of Appeals found the provision facially unconstitutional because there was no determination of dangerousness.

The State appealed to the Arizona Supreme Court. That Court also found the law violated the Fourteenth Amendment’s due process guarantee because it was not narrowly focused to protect public safety, but with somewhat different reasoning than the lower court. The Court found that the state’s interest in denying bail in Article 2, Section 22 was of the “highest order” but collided with the fundamental due process right to be free from bodily restraint. Similar to the reasoning in U.S. v. Salerno, the Court found that the government’s “regulatory interest” in community safety can outweigh an individual’s liberty interest. The Court found Proposition 103 was similar to the 1984 Bail Reform Act under scrutiny in Salerno, except that the hearing does not consider if a defendant poses a threat to others, only the evidence regarding the charge. The Arizona Supreme Court reviewed the adoption literature for Proposition 103 and found nothing punitive but rather a focus on public safety.

The Arizona Supreme Court disagreed with the Court of Appeals that the three factors set forth in U.S. Salerno were due process prerequisites for “offense specific pretrial detention procedures” stating “rather they were indices reflecting the Constitutionality of the statute at
issue in Salerno.” To the Court, it was clear that the Constitutionality of a pretrial detention scheme “turns on whether particular procedures satisfy substantive due process standards.” The opinion goes on to discuss the standard of scrutiny required for a mandatory detention law. Usually a statute that infringes a fundamental right requires strict scrutiny—a showing by the government of a compelling interest to which the restriction is narrowly tailored. However, the Court found that this standard has not been consistently applied and that Salerno had not applied strict scrutiny but rather “heightened scrutiny” to the 1984 Bail Reform Act. The Arizona holding found that the first prong of the Salerno test was met because the government’s interest in preventing crime by arrestees is both compelling and legitimate. The second prong was also met since the law operates only on individuals who have been arrested for a specific category of extremely serious offenses. The third prong (a dangerousness hearing) did not seem to be required by the Arizona Court. While in Salerno the Government was required to convince a neutral bail decision maker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person, the Arizona Supreme Court did not read Salerno as requiring an individual determination in every case. If the State chose not to provide such a determination of dangerousness, then the procedure provided “would have to serve as a convincing proxy for unmanageable flight risk or dangerousness.” The conclusion seemed to be that some crimes (like capital offenses or other crimes or the way they were committed) may present such an inherent risk of future dangerousness that bail might be denied by proof evident and presumption great that the defendant committed the crime. The conclusion seemed to turn on the fact that the crime in question in Martinez can be committed by any person of any age and could be consensual, so the evidence of proof evident or presumption great would suggest little about the defendant’s danger to anyone.
The holding of the court was that the “state may deny bail categorically for crimes that inherently demonstrate future dangerousness when the proof is evident and the presumption great that the defendant committed the crime, but may not, consistent with due process, categorically deny bail for those accused of crimes that do not inherently predict future dangerousness.” Because sexual conduct with a minor is not inherently predictive of future dangerousness, the charge could not be one on which a person could be held without bond. Since A.R.S.13-3961 A3 denies bail to all charged with sexual conduct with a minor the court found it unconstitutional on its face. If a person charged with this crime was proven to be dangerous under a hearing provided by another statute in Arizona, 13-3961(D) then that person could be held without bond. The problem with this alternative to a dangerousness hearing is that the hearing under A.R.S.13-3961(D) is held when a person is charged with a felony and:

“the state certifies by motion and the court finds after a hearing on the matter that there is clear and convincing evidence that the person charged poses a substantial danger to another person or the community or engaged in conduct constituting a violent offense, that no condition or combination of conditions of release may be imposed that will reasonably assure the safety of the other person or the community and that the proof is evident or the presumption great that the person committed the offense for which the person is charged.”

While this hearing is certainly what was contemplated in Salerno, it is not automatic, nor something the bail decision maker would set sua sponte, at least in my experience.
This feels like we have come full circle back to Goldkamp’s findings in the 1980’s that judges were deciding bail based on the seriousness of the charge. Is this where we want to be? Hasn’t the research over the last 30 some years taught us that scientifically validated risk instruments that predict flight and dangerousness are the way to go in every case? Judges will always have a hand in the final decision, but will they now be asked to decide whether a law is inherently predictive of future dangerousness? If a legislature decides to provide categories of crimes that it feels are so dangerous that no bond can insure safety of the community, wouldn’t the more prudent procedure include a hearing as required by the 1984 Bail Reform Act and A.R.S. 13-3961(D), and blessed by the United States Supreme Court in U.S. v. Salerno? Surely a fundamental right such as “liberty” requires no less.

The Department of Justice, National Association of Pretrial Agencies and the Pretrial Justice Institute have contributed to pretrial justice knowledge and procedures in large and numerous ways. From the history I have read for this thesis, it appears that the third major attempt at pretrial justice reform is well underway. The issue took the national stage in a Politico sponsored Criminal Justice Reform Panel on July 25, 2016, “An Evening with Alicia Keys.” Alicia Keys, along with Senator Cory Booker, Kamela Harris, the then-Attorney General of California (now United States Senator), Van Jones, founder of the Dream Corps, Cherise Farino Burdeen, CEO of the Pretrial Justice Institute and Adam Foss, co-founder and president of Prosecutor Integrity, discussed current and needed initiatives in the pretrial justice reform efforts.
THE PROBLEM ADDRESSED BY THIS RESEARCH

Santa Cruz County, Arizona has a population of 47,073. Of this population 84.8% are U.S. citizens. The median household income is $40,140 and the median age is 36.5. The most common ethnicity of the population is Hispanic, followed by White. Of the population for whom poverty status is determined, 23.5% of the population live below the poverty line, and the largest share of households has an income of below $10,000. This is higher than the national average of 14.7%. The most common industries in Santa Cruz County by number of employees are retail trade, educational services and wholesale trade. There is a large produce industry handling winter fruits and vegetables. There are 5,122 companies and 17,246 of the civilian population 16 years of age or older is employed. Sixty-six percent of the housing units are occupied by owners, higher than the national average of 63.9%. The percentage of high school or higher graduates is 73.2%

Prior to the Circles of Peace pretrial services experiment, persons released pretrial in Santa Cruz County Arizona, were released on specific conditions of release. For example, they were ordered not to drink alcohol or use drugs, not to have contact with the victim or not to possess weapons. They were also ordered to keep the Court informed if they changed their address. There was no way to monitor these persons to see if they were following the conditions the judge set. Those released rarely notified the Court if they changed their address. The County Attorney often did not file the charges until several months had passed. When the charges were filed, the address was often no longer valid and a warrant was issued for failure to appear. Victims felt that nothing happened to the person who caused them harm. Other crimes were committed during pretrial release. Persons with substance abuse or mental health problems received no help or treatment until their cases were concluded and they were sentenced. This was often many months or years
after the initial offense. Also, some people remained in jail because judges felt that a bond was one way to ensure safety of the victim, witnesses, and the community. With a pretrial services agency judges now feel there is some level of monitoring.

After adjustments discussed below, this research project compares the results of 61 persons released pretrial to a community based PTS program that is operated by a restorative justice agency, Circles of Peace (CCP) with 48 persons released with no pretrial services.

A CCP employee evaluated those persons referred to PTS, conducted a risk assessment which was used to decide the intensity of the program, monitored the persons in the program, and facilitated the restorative justice circles that were used. Community member volunteers participated in the circles, helped participants understand what their court dates were for, advocated for them with their attorneys, helped participants prepare for job interviews, helped connect participants with community resources, and performed other various acts of kindness. A report detailing the person’s attendance at PTS and other relevant information was prepared by the Program Director before each court date and emailed to the judge handling the case, with copies to the prosecutors and defense attorneys.

**DESIGN OF THE PROGRAM**

Those persons who were randomly assigned to the control group received no supervision and their attendance in court for arraignments, pretrial, plea negotiation dates, trials, motion hearings, sentencing or any other court hearings were recorded. Each person was tracked to see if he or she
was arrested or charged with any crimes during pretrial release. Any warrants issued for failure to appear were noted.

Those persons who were assigned to the PT group were required to attend an evaluation within 5 days of their pretrial release, at Circles of Peace, the court’s partner in this project. During the evaluation, a risk assessment was completed. Based on the risk assessment, the person was given a program of reporting to PTS in person and by telephone. The PTS community circle met two times per month and two days per month were used for the director of the program to meet with the person released to assess progress, verify employment or attendance at treatment or other programs recommended by the PTS. The PTS was conducted in the Circles of Peace model which includes community members and support persons from families or friends. Decisions were made by consensus within the group. Evidence based practices were used as follows: risk assessments, programs tailored for the person based on his/her level of risk, some motivational interviewing techniques at intake, community member support in addressing needs, and reminders of court dates. Each person’s attendance at court hearings was tracked. Department of Public Safety data was received to see if the pretrial defendants were arrested or charged with any crimes during pretrial release. Since the data also included subsequent arrest, analyses were completed on this data also. The PTS Director detailed the person’s participation in the program, including attendance, treatment recommended and received, and other notable events that happened during the person’s participation in PTS. This data was analyzed to determine what services were recommended and provided. Persons who had full time employment that prevented them from attending the pretrial circles were allowed to attend less frequently but had to comply with the rest of the requirements of the program.
OBJECTIVE RESEARCH PLAN FOLLOWED

For those assigned to pretrial services, PTS monitored and recorded successful court appearances, failures to appear, arrests or charges while released pretrial. PTS plans were determined by the Circles of Peace and these were monitored for attendance, compliance and progress with the plans. A court clerk kept a spread sheet of all assignments and kept track of court appearances for both groups. The criminal history for all persons in the study was requested and received from the Arizona Department of Public Safety. From these data, arrests during pretrial and after disposition of the case were determined.

Persons assigned to PTS or no PTS met the following criteria:

1. legal residents of the United States
2. arrest/booking charges, or formal charges filed by Complaint, pending in Santa Cruz County
3. felony charges or serious misdemeanors
4. risk assessments showed medium to high risk

TECHNIQUES USED FOR GATHERING DATA

The research data included: the court dates for individuals, dates of arrest on charges in the study; criminal history information from the Arizona Department of Public Safety; spreadsheets created by the court clerk to track court dates, court appearances, failures to appear, and warrants; the PTS spreadsheets kept by the PTS Director detailed appointments, reports to
judges, warrants issued, compliance or no compliance, treatment, education or job referrals, drug testing and results; review of case files when necessary to clarify information.

DETAILS OF THE RESEARCH STUDY

The study started with 156 total subjects. Forty-seven cases had to be removed from analyses: three people who had been assigned to different conditions twice, twenty people who had no charges filed, twenty-one who were not in compliance. Total n is equal to 109 cases, 61 assigned to Pretrial Services and 48 not assigned to pretrial.

The study went on from the fall of 2012 until the end of 2014. The two randomizations were done by me in the courtroom amidst many other happenings, which contributed to a few mistakes. Thus 17 subjects were considered as part of the pilot pretrial cases and not randomized since their assignments were in error.

In the beginning, I assigned people straight from the initial appearance and sometimes before charges were officially filed by the county attorney. Part of my motivation for starting the program was the frustration I felt at the length of time it took to file charges and how many people were lost before their complaints were finally filed. I thought that pretrial services would be one way to keep current with their information and avoid the issuance of a warrant. Some complaints were not filed until months later or even more than a year after the date of arrest. Even the post office does not forward mail after six months. I eventually realized that I should not assign people before their charges were filed.
As already indicated, seventeen of the subjects were not randomly assigned. This was done intentionally in the beginning since my presiding judge wanted me to do some “pilot cases” with assignments to pretrial services. Some others were due to mistakes made in assigning them to the wrong category, thus they were categorized as pilot cases as well.

Results of the t-tests show that there is no difference in number of pretrial arrests \( t(107) = -0.36, p = 0.72 \) or number of later trial arrests \( t(107) = 1.66, p = 0.83 \) between those who were and those who were not randomly assigned to PTS or the control group. Results of the chi-square tests indicate that there is no difference in the proportions of people getting FTAs \( \chi^2(1, N = 109) = 1.44, p = 0.23 \), searching for a job during pretrial \( \chi^2(1, N = 109) = 2.44, p = 0.12 \), or securing a job \( \chi^2(1, N = 109) = 0.11, p = 0.91 \) between those who were and those who were not randomly assigned to PTS or the control group.

It must be acknowledged that the above comparisons entail a very small number of individuals who were not randomly assigned to their groups. As such, the above analyses are considerably “underpowered” from a statistical perspective. Although I do not think there are any substantial reasons why these 17 people would have a significantly different experience from those who were randomly assigned to their groups, I concede that the results of the subsequent statistical analyses must be interpreted with caution.
Results of Claims/Hypothesis Asserted

A restorative justice community based pretrial services program (PTS) may ensure a connection between those released pretrial and the court system, reducing the number of warrants for failure to appear.

The statistical evidence showed that the Circles of Peace Pretrial Services might reduce the likelihood of getting failure to appear warrants during the pretrial period.

A chi-square test was conducted to estimate the likelihood of getting one or more FTAs as a function of participating in PTS. Results indicate that the proportion of people on PTS who had one or more FTA was about 0.08 (or 8%), whereas the same proportion for people who were not assigned to PT was about 0.25 (or 25%). The difference in proportions is statistically significant $\chi^2 (1, N = 109) = 5.76, p=0.02.$

The results of the chi-square test indicate that people who were assigned to PTS were significantly less likely to get one or more FTA, compared to those who were not assigned to PTS. Table 1 below illustrates this finding.
Restorative justice pretrial services may reduce the number of crimes committed by those released pretrial into this larger community based PTS agency.

The statistical evidence showed that Circles of Peace Pretrial Services might reduce the likelihood and number of pretrial arrests. The data was gathered from the criminal histories from the Arizona Department of Public Safety. Further analysis was done on the data received from the Arizona Department of Public Safety comparing subsequent arrests between the two groups.

**Arrests During Pretrial Period**

A series of chi-square tests were conducted to estimate the likelihood of being arrested at all (both pretrial and later) as a function of participating in PTS. For this purpose, the number of arrests variables were recoded to simply reflect whether the person had one arrest or more (1) or not (0).

Results indicate that the proportion of people on PTS who had one or more pretrial arrest was about 0.23 (or 23%), whereas the same proportion of people who were not assigned to PTS was about 0.40 (or 40%). The difference in proportions is marginally significant $\chi^2(1, N=109) = 3.52, p=0.06$. Figure 1 illustrates how the number of people in the PT group who had no pretrial arrests exceeded the number of no arrests that was statistically expected for that group. Similarly, the number of people in the control group who had no pretrial arrests was significantly smaller than the number of no arrests that was statistically expected for that group.
Figure 1 Comparison between expected and actual numbers of pretrial arrests among cases assigned to the PTS and no PTS groups.

Subsequent Arrests (after disposition of case):

No claim was made about the effect of this pretrial services program on subsequent arrests. In fact, the emphasis in pretrial services is on community safety during the pretrial period. Those who believe the presumption of innocence and the negative effects of pretrial incarceration require release pretrial emphasize the need to mitigate danger to the community and assure attendance at court proceedings. Subsequent crime is the bailiwick of sentencing options and probation. Nevertheless, the data was received from the Arizona Department of Public Safety and was analyzed. The findings showed that the pretrial services program had no effect on subsequent arrests after the pretrial period with which we are concerned.
The proportion of people in PTS who had one or more later arrests was about 0.29 (or 29.5%), which is virtually the same as the proportion for people who were not assigned to PTS of 0.29 (or 29%). The difference in proportions is not statistically significant $\chi^2(1, N = 109) < 0.001$, $p=0.97$

The results from the chi-square analyses on arrests suggest that PTS seems to have a small effect on reducing the likelihood of having pretrial arrests, while the impact of PTS on later arrests seems to be minimal.

Given the results reported above, an assessment was done to see if PTS would have a positive impact on not only the occurrence, but also on the actual number of arrests. An independent samples t-test was conducted to assess the difference in mean number of arrests between people assigned to PTS and those who were not assigned to it. Results of the t-test on pretrial arrests was statistically significant $t (107) =1.98$, $p=.05$. People in the PTS generally had fewer pretrial arrests ($M=0.31$) than those who were not in the PTS ($M=0.65$). Similarly, people in the PTS had slightly more later arrests ($M=0.80$) than those who were not in PTS ($M=0.90$). However, this difference did not reach statistical significance $t (107) =0.29$, $p=0.77$.

As corroborated by the t-tests, PTS seems to have a positive impact on both the occurrence and the number of pretrial arrests. However, no support was found linking PTS to reduction of either the occurrence or the number of later arrests.
The community based pretrial services will create community connections that advance the chances of job training, job placement, educational advancement, treatment referrals and other positive factors in the lives of the participants.

Anecdotal evidence shows that community members learned about the criminal justice process so they could explain to the participants the meaning of each type of hearing and the importance of appearing in court. Community members contacted defense attorneys when they felt it was important to convey the message that their clients appeared to be confused about the process and to encourage more communication. The community members conducted stress reduction training during the pretrial circles when participants were expressing anxiety and fear about the criminal process.

The evidence showed that Circles of Peace Pretrial Services increases the chances that people in the program will look for and secure a job. This and other assistance provided to pretrial participants could not be analyzed for meaningful comparisons since the numbers were not sufficient to conduct any statistical analyses. The following is a statement of the type of assistance and the number of participants receiving each. However, the following table clearly shows that participating in the PTS program yielded some positive outcomes for many in the program. (Please keep in mind that some were dropped from the analysis and thus not included in the table because of noncompliance or because they were not charged.)
Table 1

The impact of PTS on a selected set of positive outcomes

<table>
<thead>
<tr>
<th>Outcome</th>
<th>PTS (Proportion of Sample)</th>
<th>No PTS (Proportion of Sample)</th>
</tr>
</thead>
<tbody>
<tr>
<td>At least one FTA*</td>
<td>5 (8%)</td>
<td>12 (25%)</td>
</tr>
<tr>
<td>Searching for a job during pretrial*</td>
<td>23 (38%)</td>
<td>0</td>
</tr>
<tr>
<td>Secured a job*</td>
<td>11 (18%)</td>
<td>1 (2%)</td>
</tr>
<tr>
<td>Mental health evaluation completed</td>
<td>3 (5%)</td>
<td>0</td>
</tr>
<tr>
<td>Mental health treatment</td>
<td>3 (5%)</td>
<td>0</td>
</tr>
<tr>
<td>Drug testing ordered and completed</td>
<td>12 (20%)</td>
<td>0</td>
</tr>
<tr>
<td>Drug treatment</td>
<td>3 (5%)</td>
<td>0</td>
</tr>
<tr>
<td>Entered detox or rehabilitation programs</td>
<td>9 (15%)</td>
<td>0</td>
</tr>
<tr>
<td>Educational program referrals</td>
<td>6 (10%)</td>
<td>0</td>
</tr>
<tr>
<td>Assistance with utility payments(^b)</td>
<td>4(^c) (7%)</td>
<td>0</td>
</tr>
</tbody>
</table>

\(^*\)\(p < .05\).

\(^a\) PTS n = 61, No PT n = 48.

\(^b\) Assistance provided with money from a grant Circles received from United Way/FEMA emergency food/shelter program.

\(^c\) An additional person, who ultimately received no charges, benefited from assistance with utility payments.
It is possible to start a community based pretrial services program with small grant funding and big community commitment. The cost to run this PTS program will be less than the creation of a county department or probation component.

I spoke to the Santa Cruz County Manager in order to gather the estimated costs involved in starting a new county department for pretrial services or, in the alternative, to place the program in the existing probation department. The following amounts came from her projection of costs using the personnel salary schedule and her knowledge of department costs. She was the county’s Finance Director before becoming the County Manager. Table 2 illustrates the costs to start a new pretrial services department or to place pretrial services within the existing probation department.
Table 2

*Projected annual budget for starting a new county department for pretrial services vs. placing the program in the existing probation department in Santa Cruz County*

<table>
<thead>
<tr>
<th>Operating Expenses</th>
<th>New Department</th>
<th>Existing Department</th>
</tr>
</thead>
<tbody>
<tr>
<td>New position of Pretrial Services Director (including EREs)</td>
<td>$56,000</td>
<td>-</td>
</tr>
<tr>
<td>Probation Officer Pretrial Supervisor (including EREs)</td>
<td>-</td>
<td>$64,000</td>
</tr>
<tr>
<td>Receptionist (including EREs)</td>
<td>$33,600</td>
<td>-</td>
</tr>
<tr>
<td>Use of 50% time of a receptionist already part of the department</td>
<td>-</td>
<td>$16,800</td>
</tr>
<tr>
<td>Office space ($12 per square foot at 300 square feet) X 2</td>
<td>$7,200</td>
<td>$0a</td>
</tr>
<tr>
<td>Telephone ($20 per month) X 2</td>
<td>$480</td>
<td>$480</td>
</tr>
<tr>
<td>Computers ($750 per machine) X 2</td>
<td>$1,500</td>
<td>$1,500</td>
</tr>
<tr>
<td>Copier ($300 per month)</td>
<td>$3,600</td>
<td>$0a</td>
</tr>
<tr>
<td>Supplies</td>
<td>$2,000</td>
<td>$2,000</td>
</tr>
</tbody>
</table>

**Grand Total**

<table>
<thead>
<tr>
<th>New Department</th>
<th>$104,380</th>
</tr>
</thead>
<tbody>
<tr>
<td>Existing Department</td>
<td>$84,780</td>
</tr>
</tbody>
</table>

*Note.* a Office space and copier expenses would be shared with the probation department.

The Circles of Peace program began in 2012 with grants from the Santa Cruz Community Foundation and United Way, totaling $8,500. The grants from the Community Foundation and the United Way decreased over the years and the Justice Court provided grants of $10,000 in 2014 and $12,500 in 2014 and 2015. The budget approved for the program for 2017 is $31,739.
Table 3 documents the historical funding for pretrial services and current funding promised for 2017.

Table 3 Historical Funding of Pretrial Services

<table>
<thead>
<tr>
<th>Year</th>
<th>Foundation Grants</th>
<th>Court Grants</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>2012</td>
<td>$8,500</td>
<td>0</td>
<td>$8,500</td>
</tr>
<tr>
<td>2013</td>
<td>$8,000</td>
<td>0</td>
<td>$8,000</td>
</tr>
<tr>
<td>2014</td>
<td>$8,000</td>
<td>$10,000</td>
<td>$18,000</td>
</tr>
<tr>
<td>2015</td>
<td>$7,000</td>
<td>$12,500</td>
<td>$19,500</td>
</tr>
<tr>
<td>2016</td>
<td>$2,000</td>
<td>$12,500</td>
<td>$14,500</td>
</tr>
<tr>
<td>2017</td>
<td>0</td>
<td>$31,739</td>
<td>$31,739</td>
</tr>
</tbody>
</table>

The budget contributions for 2017 include the Santa Cruz County Justice Court, the Nogales Municipal Court, and the Santa Cruz County Superior Court. The costs noted above show that the Circles of Peace Pretrial Services Program is significantly less than the cost of a new county program or placing pretrial services in an existing probation department.
CONCLUSION

The results of the experiment of Circles of Peace, using a restorative justice approach to pretrial services, show that the two goals of pretrial supervision are enhanced by this community based approach. The pretrial group had fewer failures to appear and fewer arrests during the pretrial period. Although this is a small study, the results are encouraging.

As noted in this thesis, there is support in the literature for a community approach for this criminal justice initiative. The community members involved in this program are enthusiastic and engaged in the work of helping others. Those who benefit from the attention of the community members are encouraged to get their lives back on track, take responsibility for their actions, and avoid the criminal justice system in the future. They seem proud of their achievements in pretrial services. The judges are relieved that there is a level of monitoring that did not exist before this experiment. They appreciate the reports received from pretrial services prior to each court date and make a point of talking with the defendants about their progress or their need to improve.

Another encouraging aspect of the study is the fact that the program started and developed on a budget of $8,500 and $8,000 for the first two years. In the political and financial climate of those years it would have been impossible to start a new county department or even place the program in the existing probation department. New hires were not permitted much less new or expanded departments. Not much has changed in the ability to increase government spending. It is a tribute to the Circles of Peace experiment that its Court partners have stepped up this year to expand and fund the entire program.
The concepts in the Pretrial Services Program of Circles of Peace are in line with the other community criminal justice initiatives around the country. Circles of Peace is prepared to provide training in the method. The program is easy to replicate and meet the needs of small jurisdictions like ours with limited resources. The concept that early intervention is not coercive or punitive makes sense in this initial stage of the criminal justice process. I applaud the efforts of the Arnold Foundation funding research to improve outcomes at the “front end” of the criminal justice systems. The outcomes at the other end of the system will surely be improved if help is available in the early stage. Everything can be more accountable with early support. My personal goal of keeping track of persons to avoid later warrants feels somewhat accomplished. Prompter charging would help in this area as well. One of the pushbacks we have encountered is the theory that nothing should be required of those released pretrial until sentencing to avoid violating Constitutional rights. To me this is the best reason for early release without bond unless extreme dangerousness is shown after an adversarial dangerousness hearing. I had a recent meeting in Tucson with the U.S. Pretrial Services for the District of Arizona’s top officials, David L. Martin, Chief U.S. Pretrial Services Officer and Robert Chavez, Deputy Chief. Mr. Chavez confirmed my belief regarding early assistance when he said a pretrial services officer is “part monitoring officer and part social worker.” I could not agree more.

The Circles of Peace method was the subject of a study funded by the National Science Foundation in 2005. New York University’s Dr. Linda Mills and Dr. Briana Barocas compared the restorative justice approach to the treatment of domestic violence with the traditional batterers’ intervention approach. The study showed that the restorative justice approach reduced recidivism in domestic violence crimes. The method was also examined in *Circulos de Paz and the Promise of Peace: Restorative Justice Meets Intimate Violence* in New York
Further research is needed to examine this community based approach in the pretrial services area.

I read a lot of studies and articles preparing for this thesis. This, combined with my 21 years as a bail decision maker has resulted in strong beliefs. I believe the more information that can be given to a bail decision maker, the more informed the decision will be. A recent experience covering for another judge highlighted the importance of getting this right.

It was a light calendar the day I covered and one prisoner had to be seen. I waited for the risk assessment that gave the defendant a score of 3 and recommended release. The charges were threatening to kill his uncle and violation of a protective order against the mother of his two children. There was no evidence that the victims had been contacted or any comments about their positions on release. I called the uncle first. He said he and his wife were afraid because the defendant had attacked and seriously injured his father about a month earlier. No charges had been filed on that assault causing serious injuries. A simple score of 3 told me little about the situation. Both victims agreed to release and stated their intentions to obtain protective orders. I had the time to search for information to make an informed decision to release the defendant. In my prior years on the bench I would rarely have had the time and the interview with the defendant and the input of the victims would have been provided to me by the probation officer conducting the risk assessment. I don’t like the idea of losing this input from an interview.

Jose’s experience in CCP Pretrial Services was beneficial to him, his family and the communities of Santa Cruz County and Nogales, Sonora Mexico.
12/27/13 The judge received another letter from Jose reporting he was still at Victory Outreach doing great and thankful for a second chance.

12/30/13 Jose appeared in court stating he left Victory Outreach and requesting permission to leave the state to attend a family wedding. This was granted and the pretrial was reset for 1/8/2014, later reset for February 12, 2014. Jose was reinstated in pretrial services. He was required to look for a job and report his efforts to PTS. He completed job search forms on 1/13/14 and 2/6/14.

1/13/14 PTS drug test was negative for all substances.

2/12/14 Jose pled guilty to domestic violence threatening and intimidating and was sentenced to attend 26 weeks of domestic violence counseling, 6 months in jail (suspended), 62 hours of community service and certain minimal financial assessments.

Court reviews were held 3/11, 4/15, 6/17, 8/19, 10/28, and 11/25/14.

4/15/14 Jose reported he had secured a job with a local painting company. The judge congratulated him on this and on the good counseling reports she had received.

11/22/14 Jose completed his domestic violence counseling and all other requirements. He told his counselor he wanted to become a volunteer.

3/8/2017 Jose has been sober for over three years. He and Rosa got married last year. Jose still works for the same painting company. He became a minister and practices his preaching on both sides of the border.
FOOTNOTES

4. Carbone, supra note 3
5. Pollock, F. & Maitland, F. The History of English Law (2d Ed. 1898); Schmacke, supra note 2; Carbone, supra note 2
6. Pollock and Maitland, supra; Carbone, supra
7. Carbone, supra note 3
8. Carbone, supra note 3
9. Schmacke, supra note 1
11. Devine, supra note 2
15. Supra note 13
17. Pound, Roscoe, Frankfurter, Felix, eds. “Criminal Justice in Cleveland, Reports of the Cleveland Foundation Survey of Criminal Justice in Cleveland” The Cleveland Foundation (1922)
18. Rational and Transparent Bail Decision Making Moving from Cash-Based to a Risk Based Process, The Pretrial Justice Institute (March 2012)
23. Stack v. Boyle 342 U.S. 1, 5 (1951)
24. Foote, supra note 16
27. Foote, supra note 26p. 960; Rankin, supra note 26 p. 642
29. Goldkamp, John and Gottfredson, Michael R. Guidelines for Bail; An Experiment in Court Reform, Temple University Press, Philadelphia (1985)
32. Sykes, 1958:13
33. Foote, supra note 25
34. Mitchell, 1969:1225; and Hess, 1971:308
35. Foote, supra note 25 p. 979-81
37. Supra, note 29
39. Supra note 29
40. Ares, Rankin and Sturtz, 1963 get cite
47. 18 U.S.C.A. Sec. 3142 (g)(4) (Supp. 1985)
48. Constitution of the State of Arizona Sec. 22(3)
51. Supra note 46
52. Supra note 46 p. 32 fn138
53. Supra note 46 p. 32
55. Supra note 50
56. Supra note 46
60. Supra, note 59 p. 149
61. Supra note 59 page 167
62. Infra note 81
63. Clark, John, Peterca, Daniel, Cameron, Stuart, “Assessment of Pretrial Services in Philadelphia” Pretrial Justice Institute (February 17, 2011)
67. Beaudin, Bruce “The C.C. Pretrial Services Agency: Lessons Learned from Five Decades of Innovation and Growth” An E-Publication of the Pretrial Justice Institute, Volume 2 Number 1
69. Supra note29
70. Supra note 63
74. The International Association of Chiefs of Police, in Collaboration with the Bureau of Justice Assistance and the Pretrial Justice Institute, “Law Enforcement’s Leadership Role in the Pretrial Release and Detention Process” (February 2011)
76. Conference of Chief Justices, “Endorsing the State Court Administrators Policy Paper on Evidence-Based Pretrial Release” Resolution 3, Adopted as proposed by the CCJ/COSCA Criminal Justice Committee at the Conference of Chief Justices (January 30, 2013)
79. Standard 3.1 National Association of Pretrial Services Agencies, NAPSA Standards on Pretrial Release
82. Standard 10-1.10(e), ABA Criminal Justice Standards on Pretrial Release
83. Standard 3.5 (a)(V) NAPSA Standards; Standard 10-1.10 (j); ABA Criminal Justice Standards on Pretrial Release
84. Business Practices for Pretrial Services Agencies; National Institute of Corrections Pretrial Executive Network


87. Supra note 86


89. Trulear, et al supra note 85

90. Supra note 59


95. Supra note 94

96. Supra note 94

97. Supra note 80 (PSA-Court)


100. Supra, note 57

101. Supra, note 98

102. 102. A.R.S.13-3961(D)


### Where, when, and how will recruitment take place (i.e., under what circumstances)?
The persons were referred to the two groups at their arraignments in the Santa Cruz County Justice Court #1 after a risk assessment identified them as medium to high risk and they were otherwise entitled to release under Arizona law.

| N/A, recruitment exclusively through the Justice of the Peace in a randomized manner. |

### What is the background information that supports this research? (Summarize previous work and provide references.)

**BACKGROUND:** Attorney General Robert Kennedy convened a conference of criminal justice experts in 1961 to examine the problem of pretrial detention. The conclusion of the conference was that money was the driving force behind pretrial release and those without money were often detained throughout their pretrial period resulting in loss of jobs, family and other inappropriate social consequences. Fifty years later, Attorney General Eric Holder convened a similar conference which found that not much had changed in that fifty year period. The findings included the facts that two-thirds of inmates in jail are awaiting trial resulting in a cost of 9 billion dollars annually. (National Symposium on Pretrial Justice Summary Report May 31-June 1, 2011 [www.pretrial.org](http://www.pretrial.org)); Implementing the Recommendations of the National Symposium of Pretrial Justice, the 2013 Progress Report, 2014, Pretrial Justice Institute [www.pretrial.org](http://www.pretrial.org))

Defendants who are detained during the pretrial period are four times more likely to be sentenced to jail and over three times more likely to be sentenced to prison with significantly longer sentences than those released pretrial. (Effect of Pretrial Detention on Sentencing, The Laura and John Arnold Foundation Pretrial Criminal Justice Research [www.arnoldfoundation.org](http://www.arnoldfoundation.org))

Those detained pretrial suffer hardships that affect their families, communities and the state. The overuse of pretrial detention is bad for public health and undermines the rule of law while
stunting economic development. *(Presumption of Guilt :The Global Overuse of Pretrial Detention, Open Justice Society, 2014)*

RISK ASSESSMENTS: Current criminal justice philosophy advocates non-financial release of individuals after an evidence based assessment of flight risk and threat to public safety and to victims of crimes. The use of risk assessments that predict court appearance and danger to society are supported by the American Bar Association, the National Association of Pretrial Services Agencies, the National Association of Counties, the International Association of Chiefs of Police, the American Council of Chief Defenders, the Association of Prosecuting Attorneys, and the American Association of Probation and Parole. (2012-2013 *Policy Paper Evidence-Based Pretrial Release, Conference of State Court Administrators*) The practice of risk assessments allows the judge to determine release conditions based on objective factors rather than subjective or gut instincts. Using this scientific approach can minimize biases and inefficiencies in decisions made from personal, unsystematic observations of one’s own experience. Making pretrial release decisions based on little more than the charge and a judge’s gut instinct is dangerous, especially when deciding risk of flight, pretrial misconduct or danger to the community. (Cullen, Frances T., Myer, Andrew J., Latessa, Edward J, *Eight Lessons from Moneyball: The High Cost of ignoring Evidence Based Corrections, Victims and Offenders, 4-197-213 2009*)

Risk assessments have evolved and changed over the past few years. The prevailing philosophy requires that a community have a validated risk assessment which is costly and prohibitive for small jurisdictions. Most require an interview with the defendant which is labor intensive. Recent research by the Laura and John Arnold Foundation has found that a non-interview risk assessment is just as effective as one that requires an interview. This instrument is the PSA-Court and is being piloted in several jurisdictions.
including the State of Arizona. This research project will follow that development and report on its effectiveness in reducing costs. (VanNostrand, Marie, Lowenkamp, Christopher T., *Assessing Pretrial Risk without a Defendant Interview*, November, 2013, www.arnoldfoundation.org)

**PRETRIAL SERVICES COMMUNITY SUPERVISION:** Having a pretrial services agency to monitor defendants released after determination of risk will promote the release without financial conditions that so adversely affects the poor. Judges often set money bail since they are reluctant to release without some monitoring or supervision of the defendant. One of the benefits of pretrial services programs is better informed judges. (*Frequently Asked Questions about Pretrial Decision Making*, ABA Criminal Justice Section note 20 ABA Standards: http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_loc.html)

This study involves individuals who were medium to high risk. Research has shown that pretrial supervision of low risk offenders creates negative outcomes. These low risk individuals should be given court dates and resources should not be used on their supervision. However, medium to high risk offenders do benefit from pretrial supervision and they are significantly more likely to appear in court than those who are unsupervised. For high risk individuals, longer periods of supervision (more than 180 days) were related to a decrease in criminal activity. (*Pretrial Criminal Justice Research* www.arnoldfoundation.org/research/criminaljustice)

Legal evidence based practices in the pretrial area require the protection of defendants’ rights to remain silent and to be presumed innocent. Court reminders are a practice that has been shown to be effective in assuring court appearances. (VanNostrand, Marie, Rose, Kenneth, Weibrecht, Kimberly, *State of the Science of Pretrial Release* www.arnoldfoundation.org/research/criminaljustice)
Court reminders not only reduce failure to appear rates but also result in cost savings and higher confidence and trust in the court system. (Bernstein, Brian H., Tomkins, Alan J., Neeley, Elizabeth M., *Reducing Courts’ Failure to Appear Rates: A Procedural Justice Approach*, May, 2011 USDJ Grant #2008-IJ-CX0022)

**INCLUDING THE LARGER COMMUNITY IN PRETRIAL SERVICES COMMUNITY SUPERVISION:** The American Bar Association has developed extensive standards for pretrial release which have two goals: 1. To assure appearance in court, and 2. To assure community safety. In addition to promoting risk assessments, these standards maintain that pretrial service providers save costs by encouraging pretrial release in appropriate situations. Among other roles of pretrial agencies, the ABA standards recommend the agency monitor, supervise and assist defendants released pretrial. ABA Standard 10-1.10(j) states a pretrial agency should: “assist persons released pretrial in securing any necessary employment, medical, drug, mental health treatment, legal or other needed social services that would increase the chances of successful compliance with conditions of pretrial release.” *(Frequently Asked Questions about Pretrial Release ABA Criminal Justice Section ABA Standard 10.1.10)*

Premier pretrial researcher Maria VonNostrand recommends in her principles for community corrections to: “engage ongoing support of natural communities.” *(State of the Science of Pretrial Release Recommendation and Supervision, Van Nostrand supra)*

Research in the area of community justice supports the use of the larger community in pretrial services supervision. The six principles of community justice include: enhanced information, community engagement, collaboration, individualized justice, accountability and
outcomes. Community policing and community courts are examples of proven methods of improving public safety and the quality of life in neighborhoods. Since community justice is about engaging residents, churches and the larger community to build new approaches to public safety, it is no great leap to say that the community involvement in pretrial services can produce enhanced outcomes. (Berman, Greg, *Principles of Community Justice: A Guide for Community Court Planners*, Center for Court Innovation, Bureau of Justice Assistance, US Department of Justice, 2010) Community justice is about partnerships and problem solving. Mr. Berman, Director of the Center for Court Innovation believes that no criminal justice agency can build partnerships or solve neighborhood problems without engaging the community. (Berman, Greg, Anderson, David, *Engaging the Community: A Guide for Community Justice Planners*, [www.courtinnovation.org](http://www.courtinnovation.org) 2010)

This study will detail the community member support of pretrial services attendees and its effects on their lives.

APPENDIX 1