

Federal Judicial Center
Off Paper Episode 4

Mark Sherman: From the FJC in Washington D.C., I'm Mark Sherman and this is *Off Paper*. The 8th Amendment to the U.S. Constitution prohibits the government from requiring a criminal defendant to pay excessive bail in order to get out of jail before trial. Yet right now, about 450,000 people across the country are in pre-trial detention, and the collateral consequences of detention can affect the defendant's employment status, housing situation, and mental health, just to name a few things.

For about 40 years, the right to reasonable bail in the federal criminal justice system has been administered under the bail reformat, the Pretrial Services Act, and relevant case law. Bail is also a right at the state level but the use of money bail has raised a significant concern about the system's fairness in many jurisdictions. In the face of these controversies, several states, including those as diverse as Kentucky, Colorado, and New Jersey, have changed their laws to reduce the use of money bail. While that may be an improvement, it hasn't cured the problem of inequality in the system. Indeed, money bail hasn't existed in the federal system for decades but federal pretrial detention rates remains stubbornly high even though the vast majority of federal defendants pose

relatively little risk of flight or danger. Why is that, and what more can be done to create federal and state bail systems that are truly fair?

Our two guests have been working on the front lines of the criminal justice system for years trying to answer those questions. Because the problems and solutions are difficult and complicated, we divided our discussion into two parts. In this episode of *Off Paper*, we'll discuss the connection between mass detention and mass incarceration and issues surrounding the use of risk-assessment tools. Then on our next episode, the discussion will turn to bail reform efforts at the state level, issues regarding jails, and the collateral consequences of pretrial detention.

To help us explore all of that we're joined by Chris Dozier, the Chief U.S. Pretrial Services Officer for the district of New Jersey. She's been with the agency for 28 years and has served as chief since 2004. Also joining us is Cherise Fanno Burdeen, chief executive officer at the Pretrial Justice Institute. PJI's mission is to advance safe, fair, and effective pretrial justice practices and policies that honor and protect all people. Cherise has spent over 20 years working to improve public safety policies and practices across the country. We're going to have a cool conversation about some hot stuff folks, so keep it right here and don't touch that dial.

Cherice and Chris welcome to the program.

Female Voice: Thanks a lot.

Female Voice: Thank you.

Mark Sherman: To start us off, I want to read you a quote from an article by Senior U.S. District Judge James Carr, which appeared in the April 2017 issue of *Federal Sentencing Reporter* and I want to get your response to it. So here it is, according to Judge Carr, "Mass incarceration is a consequence in part of mass and often unnecessary pretrial detention. Success on release means less prison time and may mean no prison time at all. Why then are detention rates in so many districts so high while in others they are significantly lower? The causes, I believe are many. And many judges, pretrial services officers, and defense counsel may each have or her own share of responsibility or unnecessary detention and its impact on mass incarceration." Chris, first do you agree or disagree and assuming you at least agree somewhat, tell us why?

Chris Dozier: I most certainly agree. Unfortunately, we have been talking about this discussion for quite some time. That the federal system, while having very good federal law when it comes to pretrial release, unfortunately, we still detain at an extremely high rate. About 50 percent of our population nationally is detained prior to trial. When we remove those illegal aliens from the equation that aren't eligible for

release, it's actually about 75 percent of all the defendants, if you count the illegals. But just focusing on those who are eligible for release and a lot of these cases are low-risk cases, yet a good number of them are detained pretrial as well. So some of the reasons for this since 30-plus years ago in the Salerno decision when preventive detention was established, it's been going up steadily. There have been more violent, drug and gun cases prosecuted in the federal system. The presumption of detention and mandatory minimum sentences has driven this.

But truly, the biggest driver is culture. The culture in individual districts is really the biggest driver of whether they have high release rates or not. Unfortunately, the release rates differ around the nation anywhere from 25 to 85 percent. What we really need to educate our stakeholders is that those who are released do very well. Our non-compliance rates are extremely low. And the evidence speaks to the issue of those who are detained pretrial also tend to get more jail and longer jail sentences at sentencing.

There is federal research that speaks to this issue and detained defendants are not only more likely to get custodial sentences, but they're more likely to fail post-conviction. There's increased recidivism rates post-conviction when defendants are detained pretrial, even very brief periods of time - 24 hours - increases pretrial failure. So that is the

problem that we face and that we've been trying to impact for quite some time now. I think there is a new appreciation of the fact that the release/detention decision is possibly the most important decision in the criminal defendant's process.

I have certainly heard some defense attorney say that and some judges appreciate it. The reason to that is because by having the opportunity for release and to participate in some of the programming that's available to defendants upon release, like treatments and job placements and cognitive behavioral therapy and participation in diversion program and specialty courts, they have the opportunities to put their best foot forward when that time eventually comes for sentencing provided they are convicted. In the federal system, 90-plus percent are convicted.

In fact, there was a New Jersey Supreme Court decision recently that spoke to the issue of the person standing before the judge on the date of sentencing, there was a challenge to whether the judge would consider the person in arrest when in fact it reinforced that that person standing before the judge on the date of their sentence is the person that the judge should take those factors about risks to the community and such into consideration. So I must certainly do agree with that statement.

Mark Sherman: Thank you. So Cherise, I'm interested in your thoughts. From your position at PJI, you're really sort of able to see the whole playing field here both national and federal. What are your reactions to Judge Carr's statement?

Cherise Fanno Burdeen: So like Chris, you know, I definitely agree with Judge Carr's assessment. I think it is the number one thing Chris said is culture. We see all that in the federal system, we see that across the states and in counties across the country as well. Sometimes, regardless of having the best tools at their disposal, jurisdictions will still have a culture of detention. Unlike the federal system, the culture of detention in the states and at the county level is mostly exercised through the application of money bond. So, low amounts of bond are still often resulting in as much detention as maybe some people think that hundreds of thousands of dollars bonds are resulting in detention. But we see as little as \$50 or \$75 or \$100 bonds being set on individuals who have no ability to make that bond resulting in their detention. Often those are low-risk individuals who would perform quite well simply being released on their own recognizance and reminded to come to court.

Mark Sherman: Thank you. So Chris, Judge Carr in his assessment focused specifically on pretrial services officers in addition to judges and defense counsels obviously. I'd like to

drill down with you a little bit in light of your position as chief of New Jersey Pretrial in the federal district court. I wanted to focus with you about the responsibility of pretrial services officers. First, could you articulate that responsibility and talk about whether based on your experience, not just in New Jersey but in federal system generally, whether you think pretrial services agencies and officers, you know, where do you think you're doing well, certainly but where do you think they're doing less well and might be contributing to high detention rates? Here I want to sort of get at that issue, you know, with the culture of the district. I mean if there is significant variation in release and detention rates among the districts and the federal system, what could explain that in terms of the role of the pretrial services officer?

Chris Dozier: Certainly. Pretrial services officers are officers of the court. We work for the judges and we are objective fact finders for the federal judges. We conduct bail investigation to inform the judicial officers prior to the release/detention decision, and we provide objective recommendation regarding the risks of non-appearance or danger that each defendant may present.

Once a recommendation for release is made and the court orders release, officers monitor and supervise those conditions of release. The bad news is that as I expressed before, these

release rates vary significantly across the country. Officer recommendations also vary. We see those recommendations sometimes very consistent with the government's recommendations as well. It concerns about whether the officers were rubber stamping government recommendations or if the officer themselves doesn't really believe in defendants' right to bail and understand the research that demonstrates that our supervision done well addresses those risk factors very well. The vast majority of defendants are low risk and they don't need any oversight at all to show up and remain crime free.

So the concern is in certain districts with the culture, whether officers are responding to the government's recommendation, whether they are anticipating judges' wishes rather than just having conviction in their work and their recommendation and they should stand by those recommendations. Research shows that judges are more likely to release defendants if pretrial recommends it. So they are listening to us. They recently did a bail report study starting with a survey with the judges. It showed that the judges really rely upon our information in their decision making.

It's very important that our own officers believe in our ability to address the risks. We have excellent resources for this supervision practice. I think the good news is that we are starting to take better approach to informing our stakeholders

about our alternatives to detention, about our good outcomes with those supervision and release practices. We are collaborating. The field is collaborating with both our administrative office, probation and Pretrial Service Office in Washington and with the FJC to help educate our stakeholders.

The AO has a DROP program which is Detection Reduction Outreach Program where a team goes out. Peer-to-peer, they are speaking to our judges and our federal prosecutors and our defense bar [sounds like] and our pretrial officers and informing them about our release outcomes. The fact of the matter is, particularly low risk cases, which a great number are in our system are succeeding at rates of 95-plus percent. So judges particularly should be mindful of what the science says. In addition to that, the FJC is doing evidence-based decision making for judges. We're seeing more and more research that's informing us.

For instance, the presumption of detention is the factor that drives high detention in our system. And again, culture in the district when it comes to examples such as this. A district such as New Jersey which releases cases although there is a presumption of detention, we recognize that we can manage those risks very well and those people are getting released and doing very well. In some districts, that won't even interview a

defendant if there is presumption, they've make a decision that it's likely a detention case.

A recent study was done of these cases and they found particularly in lower risk categories that presumption cases were being detained about 20 percent higher. This information was brought to our criminal law committee and they endorsed us going to Congress and asking that the presumptions of detention on certain cases, vast majority being drug cases, be rescinded. It's evidence like that that helps informs our districts. We really need the officers embracing it and having the conviction to take that to the court and to our stakeholders when making good objective assessments and recommendations.

Mark Sherman: Interesting. So, Cherise, I'm interested in your perspective especially because of your knowledge about what's been going on at the state and local level, how those system works. I've always been fascinated by the fact that as professionals, we sometimes make distinctions between federal and state systems as if they don't interact with each other, but of course our criminal justice system nationally is intertwined. For example, it's fairly common for federal pretrial officer to have previous experience working in state systems where detention is the norm. I wonder whether you think that has an impact on detention rates on the federal system.

Cherise Fanno Burdeen: Gosh, that's a good question. I'm not sure. I think a lot of the issues that Chris raised are probably as intertwined as any. I think that the disconnect many people have between the notion that folks are sort of safe enough to be released into the community, will show up for court, and do so without having to put up a financial either sort of ransom as I call it, which is the 10 percent people owe in order to be actually get out of jail pretrial, or this notion that we need to have folks on lots of onerous conditions in order to protect the public and to ensure that people come to court. I think that culture is sort of just pervasive. I would suggest, too, that in many jurisdictions, you see folks working in the system who kind of move between the juvenile and the adult system as well and in some of those cases of culture shock. We've had 25 years of reform in juvenile pretrial detention, and often, people will go into the adult system and see we don't do assessments, we don't have alternatives. This is unusual because last week where I worked - across the street literally - we had all those options available. There's a presumption of non-custodial or non-secure detention for kids.

So I think that, you know, many of these systems should have a lot more interaction and sharing a lot of experience. I know we're going to talk a little bit about New Jersey. I think one of the successful strategies in the cultural awareness or

consciousness raising in New Jersey was about talking about the juvenile state and federal systems as being things that are intertwined and people can learn from the experience and what's been successful.

One other thing that I just want to kind of emphasize that Chris mentioned was around the culture of pretrial services officers. I can't speak to the federal culture of pretrial service offices. But I do know that in jurisdictions across the country, you see very similar concerns. No one wants to go into court, make a recommendation based on an assessment, and essentially have a reaction caused by the court day in and day out where those recommendations are either not aligned with what the court wanted to do anyway or cause you to feel like you're not doing your job well because your compliance rate or your concurrence rate with the court is low.

So I think we eventually end up kind of beating the system actors into compliance with the culture that exists. It's very difficult to change the culture, especially as you're coming into and being trained on the job and you watch the folks ahead of you make recommendations to the court that may not be evidence-based but are viewed positively by the system. So you sort of begin to learn that in order to have a successful day at the office, you essentially are recommending things that the court will accept.

Recently, we've seen this in bail reform across the country where folks go to courses at NAPSA or the National Institute of Correction or at our office and are learning about legal and evidence-based practice. They're having a lot of difficulty going back into their environment and watching kind of the lack of awareness by the system, these things that we're teaching them are the right thing to do. We're noticing that folks are having to decide whether or not they will put forward recommendations that are aligned with evidence-based practice and run the risk actually of running into conflict with their system.

Mark Sherman: So difficult for sure to change the culture in a district or in jurisdiction. However, it sounds like it is happening in some jurisdiction. And so just sort of, you know, drive that point home a little bit, practically speaking, maybe Cherise starting with you and then interested to get Chris' response here, too, in addition to what you've talked about, are there intentional or purposeful things a jurisdiction can do in order to begin to change that culture?

Cherise Fanno Burdeen: I certainly think so otherwise I probably would have left this job a long time ago. I will say that there are a lot of bright spots across the country. We kind of take no credit for anything other than trying to compile the lessons learned by jurisdictions across the country. There

are a number of initiatives and a number of funding sources that are helping jurisdictions move in the direction of implementation of legal and evidence-based practices. I think what we see is sort of a standard change process that a jurisdiction will go through. I kind of hate to make this analogy but it's sort of like the first step to recovery is recognizing you have a problem.

Mark Sherman: I've heard that somewhere before.

Cherise Fanno Burdeen: Yeah. Sometimes, a jurisdiction will realize it has a problem. Either because they're being sued or in actually Judge Carr's hometown where he is a judge in Toledo, you have Lucas County under a federal consent decree for decades now, 40 years or something ridiculous. So there are a lot sometimes of outside pressure that force a jurisdiction to look at what it's doing and its practices. Sometimes it is just a champion who happens to go to a class, go to a lecture, come home, and say I want to know what we're doing. I just learned this stuff and I want to see how it compares to how we're doing things here.

So kind of regardless of the recognition, you can't really sort of tell a jurisdiction it has a problem. It has to come upon that, and you can help it by identifying that as a motivating factor. Sometimes it's about the size of the jail, or wanting to build a new jail, or having too many people

currently in jail, or even the recognition that there is a sub-population within the jail that is either causing an issue or some don't believe they don't belong in there, mental illness, substance abuse, stuff like that.

So some of the bright spots in the country involve jurisdictions looking to see how they compare to legal and evidence-based practice. Identifying for themselves what is our ideal state of pretrial justice in this jurisdiction, and then mapping the distance between where they are now and where they'd like to be and being as concrete as possible about where they'd like to be. Is there some sort of ideal release rate that they're trying to achieve? Is there some ideal racial and ethnic parity issue that they're trying to accomplish? And then what are the tools that are necessary?

I'll just sort of go ahead and raise it now because I can't imagine we'd get through this entire conversation without raising it. But part of the toolbox that we encourage people to populate includes an assessment tool. Pretrial assessment tools today, even though they've been in use for decades in different forms, are causing a lot of conversation around racial disparity and racial bias. But it remains from our perspective an incredibly pragmatic culture change tool. But I first sort of said presumption of detention. You know, in many courts there's this presumption of high risk that everyone must be high risk.

So part of this tool of using an assessment tool is to actually change the culture within the courts on really understanding what low risk most people present with return rates. At least 70 percent are higher even for the, quote, "highest risk folks."

In terms of new criminal activity while on release, even folks who scored the highest number on any assessment tool, whether it's federal, Virginia, the Arnold Foundations' new tool, at most folks are a 50 percent likely to be arrested for a new crime. So the culture of risk in the pretrial stage is sort of exaggerated. And so we try to help jurisdictions kind of walk through this process, show them using their own data what the profile is of the folks that are being arrested. Just to throw in another stat, about 80 percent of people in state courts will qualify for public defender. So we know that the financial wherewithal of people who are being arrested across the country, it is low. So using a tool like money which doesn't have any efficacy anyway ends up just detaining people and making their own situation worse both from collateral consequences but also the outcome of their case.

And then I just want to also put a plug in for kind of this companion tool. The assessment tool is one way folks can kind of see the profile of individuals that they are arresting and booking into their jails. But then being able to transfer that assessment score into a what would we do with that score and

using some sort of artfully derived matrix of charge and assessment score to say, you know, there are not maybe as many options in jurisdictions across the country as the federal system with respect to alternatives to incarceration and services. But most people don't need much. So these matrices that you walk through with stakeholders are also about changing the culture of, if not jail, then 3,700 conditions of release.

You mentioned the 8th Amendment at the top. The excessive bail clause is really about the state having no right to impose upon you conditions that are more than what is required adequately or to reasonably assure your appearance in court and public safety. So trying to help jurisdictions understand that, you know, for most of these people, the minute they enter their plea, you're going to send them home, and send them home on maybe no condition or some low-level conditions of probation. So let's not overdo things now and make it worse and violate the risk-need principle, and let's sort of shift this culture where not only do we like to use money but we also think everybody is really risky.

Mark Sherman: Thank you. Chris, I do want to come back to you to get your reactions about that. But before we do that, I want to take a short break. When we come back, after we get Chris' reaction to the question about what can be done in terms of an intentional or purposeful approach of a district to change

its culture. We'll also be talking with Chris and Cherise more about pretrial risk assessment, how it's used, and what kinds of problems it may have. This is *Off Paper*.

Male Voice: When it comes to making a recommendation and decision about whether to release or detain a defendant charged with a criminal offense, two actors in the federal courts play key roles. The pretrial services officer who conducts the investigation, assesses the defendant's risk, and develops a report containing the recommendation, and the magistrate judge who knows the law, evaluates the officer's report and recommendation, and makes the release or detention decision.

In an effort to assist officers and judges in keeping up with the latest legal and practice developments and empirical research relevant to pretrial work, the FJC is pleased to offer pretrial decision making for magistrate judges and pretrial services officers. FJC educators and peer faculty facilitate this one day in district program. The curriculum provides opportunities for scenario-based experiential learning and interactive discussions among judges, officers, and faculty focusing on alternatives to detention. In district delivery of the program allows it to be customized to the needs of the district.

For more information, go to fjc.dcn probation and pretrial services education page and click on In Person and Blended Programs.

Mark Sherman: Welcome back. Our guests are Chief U.S. Pretrial Services Officer Chris Dozier from the district of New Jersey and Cherise Fanno Burdeen, CEO of the Pretrial Justice Institute. So where we left off, Chris, I had asked Cherise just to sort of give her perspective on what kinds of things can a district do in an intentional and purposeful way to change its culture, if it's currently a culture that's sort of perhaps more predisposed towards detention than release. I wanted to just get your perspective on that, you know, as somebody who has been with the federal system for a long time. We've been using the pretrial risk assessment and we'll talk more about that, you know, for several years.

So what had you seen in a very practical way that districts have done to transform the way they do business to be at least more open to sort of creating a culture of release?

Chris Dozier: Well, I think the most important thing is making pretrial release decisions a focus in the agency and working with the stakeholders to understand what are our practices, what is contributing to it, and what can we do to change it. There's got to want to be a change. But I think having those conversations with the important stakeholders which

is obviously the judges, the federal prosecutors, the defense bar in pretrial is first and foremost. So it may be very simple things that can be done to really help your process such as are you having hearings in the afternoon rather than the morning? Can you if aren't to allow pretrial time to do their work and to give you good thorough information for your decision making. Is the defense bar comfortable with the interview process for pretrial? I know there are some who aren't because they're concerned the information is going to be used against their defendant. I think it's very important to have those discussions about how we really have common goals that we want to get people out as long as we can address the risk and have an understanding that we can address the risk. We do very well in the vast majority of these cases, speaking to the government about not unnecessarily moving toward detention and some of the reasons why and some of their concerns and how you can alleviate some of those concerns.

One of my favorite examples I point to is a U.S. Attorney in a conservative district who spoke on a panel with me. They had a high release rate. And when someone asked her why, she said because I'm a law enforcement officer, and releasing people who can be managed in the community successfully is law. So talking to our prosecutors about using those resources for the right cases, and with officers, are they using the risk

assessment tool in their decision making. If they're not making recommendations consistent with it, are they staffing that with the supervisor to see why and what they may want to do about it, not having knee-jerk reactions to detention. It can be very simple to have a knee-jerk detention reaction because detention means you know where that person is and you're not going to be worried about them going out and harming somebody. But when officers and stakeholders come to understand that there's a very, very low violent recidivism rate in our country, I think that's the big concern that everybody has. But they have to understand the vast majority of these, there is evidence that that will not occur. That's what we have to be mindful of. So making those courageous decisions, those are some simple things.

Some of the bigger things they can do, inviting the administrative office to come in for the DROP program. We have seen in some districts the release rate increased as much as 20 percent after the DROP program has come in. Looking to the FJC in terms of the evidence-based decision making and other programming that can be helpful. Maybe it's a lack of comfort with the alternatives to detention and, therefore, some other programming. FJC is always very eager to come in and help as are PPSO and neighboring districts.

So I think the biggest thing I see is that in many districts, it's just not a focus. And when there is focus and conversation and dialogue, it tends to improve the situation.

Mark Sherman: So I want to turn the conversation now or maybe back to something that Cherise had mentioned before we went to the break, and that is pretrial risk assessment. You know, there's been so much attention focused on this subject over the past few years and it has become somewhat controversial. As Cherise suggested, particularly with regard to issues of alleged race bias of the instruments that are being used. Such instruments are being used both at the federal and in many state systems. While there are similarities, there are differences, too, among the various instruments. They are being used differently in each system. So, again, Cherise could you describe, sort of give us some background on the use of risk assessment in pretrial? It's not something that is necessarily new, but we are hearing a lot about it now. Why the instruments were created, how are they being used across the nation, and what are some of those concerns are and how are those concerns being addressed.

Cherise Fanno Burdeen: Sure, thanks, Mark. I'm not sure how long your listeners have been engaged in pretrial justice work. At the risk of kind of taking folks on a small history tour, I do want to give some historical context for assessments.

Back in the '60s, with the Manhattan Bail Project which some folks might be familiar with, we started a process in the pretrial services justice community of trying to see if we could come up with a set of criteria to make suggestions or recommendation to the court that folks were safe enough to be released. Or at that time, really, it was simply about whether or not they were likely to come back to court since we didn't have danger or public safety added to statutes until the late '80s.

So years and years ago, we had what's called a Vera, the Vera Point Scale. It was our first codified attempt at writing down a list of factors that seemed to be correlated with people who are likely to come back to court. Not a scientifically derived instrument by any means. In fact, really kind of done in a way that probably resulted in a point scale that favored kind of white middle folks and disproportionately impacted poor people and people of color. Nonetheless, it was our industry. It was kind of our world's first attempt at codifying a list of criteria.

You kind of go out through the decades and as we got more sophisticated as a field, we began to employ what we sort of think of as the modern, kind of validated, empirically derived risk assessment model, which, as you said, the federal system uses and has for a long time in places like the Commonwealth of

Virginia has used for a long time, Kentucky has used for a long time. These are tools where data is collected locally and analyzed to highlight and select out the seven or ten factors.

About 10 years ago, we did a publication that kind of laid out all these risk tools side by side trying to compare the factors that were on them and came pretty quickly to the realization that many of these locally derived tools had actually the same seven or ten items on them. Now fast forward again, you have the Arnold Foundation producing a tool based on collecting on these data sets from across the country, including the federal data set to try and create a standard tool for the country that then could be locally validated. Really, kind of try to advance the state of science in assessment and to differentiate between appearance risk and public safety risks. Because these events are so few and far between, that all our best attempts at assessing risks have been with a combined score and not able to differentiate between your likelihood of appearing in court and your likelihood of staying out of trouble.

So a lot of this has been done in the last four or five years as advancement in the science but we've had assessments for very, very long time. The way I tend to describe it now is of all the things the court could consider about me if I were standing before them, hundreds of data points about me, my

demographics, my upbringing, my criminal history, my socioeconomic status, all the things about me. What I want the court to consider about me are only those items, only those seven or eight or nine items which are scientifically related to whether or not I'm likely to come back to court and stay out of trouble pending trial.

So I like to think of assessment tools as tools that kind of pare down the number of items that a court is considering and not just the number of items or the specific items that a court is considering but weights them appropriately. So, in a subjective decision making framework, if Chris is a judge and I'm a judge, we may look at the same seven items but she may feel more strongly about someone's history of failure to appear than I may feel. And I may feel more strongly about certain crime types in someone's history than she may feel. So even if she and I are looking at the same seven or eight items, if we weight them differently, we could come to a different conclusion about the risks presented by the person standing in front of us. So these tools tear down the number of items, the specific items, but they also weight them in a way that's related to the science associated with prediction.

Mark Sherman: So --

Cherise Fanno Burdeen: The controversy --

Mark Sherman: Sorry, go ahead. I think you're getting to what I was going to ask about. Go ahead.

Cherise Fanno Burdeen: Yeah. So the controversy it sort of has come into this notion -- and it's really I think the controversy is focused on the tools today but really the tool is standing in as a proxy for criminal history. So I think what people are rightly raising is that we have racial bias in criminal history in this country. People of color are more likely to be arrested. They are more likely to be charged. They are more likely to be convicted. So they're more likely to have a criminal history. That is not something we can overlook in this dialogue.

But, that said, criminal history has been used for a long time in making an assessment of whether or not someone is likely to flee or poses a risk to the community. And I think assessment tools are an advancement in trying to reduce the amount of bias associated with simply looking at the person standing in front of you and their criminal history. But I do acknowledge that policing practices in this country produce criminal history for people of color more often than whites. So it is an important part of the dialogue.

I think the solution comes in not throwing out this notion of assessment but in the kinds of ways that you implement assessment. So first and foremost, we at the Pretrial Justice

Institute support what we call white box versus black box assessment tools. So the algorithm that's used to produce the score, the research that was used to produce the algorithm, all of that should be public and able to be viewed by other researchers, replicated by other researchers, but also easily understandable to the public.

Part of what people, unfortunately, like about bond schedules is that if I'm arrested for charge X and it is commiserate with dollar amount Y, that is very transparent. It's effective, it's discriminatory, but it's transparent. And the transparency of these tools is important, the ability to add mitigating circumstances and being able to argue from the tool itself like in Kentucky, you know, having defenders train on what the tool means and what it doesn't mean and making cogent arguments on behalf of their clients from the tool I think is an important part of a safeguard.

And then measuring is the last thing I'll say, measuring the outcomes. It's not just about the scores and what the court does with the scores, so kind of harkening back to my earlier statement about having a kind of a guide or decision making framework about what you do in the instance of a particular score on an assessment tool and making sure that the courts don't either consciously or unconsciously overburden people of color with conditions of release that they have no parity with

whites who have the same score. I think ensuring that we follow those outcomes and are assessing all of our results and collecting data through a racial and ethnic lens and making all of that available to the public and engage the public in those conversations and in those policy level decisions around conditions of supervision, I think are an important safeguard to the use of a tool. So you can't just drop a tool in and expect it as a silver bullet. It isn't and it needs careful watching.

Mark Sherman: So Chris, we're very interested to hear your perspective on the use of pretrial risk assessment specifically within the federal system, get your opinion about sort of, you know, how it's being used, some of the issues surrounding it, what some of your observations are in terms of where it's being done well, but again focusing specifically on the federal pretrial risk assessment instrument.

Chris Dozier: Certainly. Well, the federal pretrial has always performed risk assessment. It's the topics in the bail report that we've been doing since it was developed into the Pretrial Services Act. Those same risk factors that we've been looking at all along are pretty much those seven, eight, nine as Cherise mentioned, just maybe weighted differently in different jurisdictions.

We've been looking at those risk factors all along. But now we have a scientifically validated tool to assist us in our

decision making, not to make decisions for us but to assist us in the decision making process. It's based on evidence, not just gut, which is where we were going by before.

So the 2009 study by Luminosity, Dr. Marie van Loskin [phonetic] resulted in the risk principle for the federal system for pretrial and the recognition that low risk cases, when receiving too many alternatives to detention when they're over-conditioned, were more likely to fail. And moderate and higher risk cases with the appropriate alternatives to detention are more likely to succeed. So the picture of the pretrial risk assessment tool was developed from that study and that principle and it's been implemented nationwide.

So it was somewhat controversial at first when it was rolled out back around 2010 or '11. And, admittedly, New Jersey was slow to get on board. I wanted to observe and see what the issues were and how they were worked out before I brought this type of information to my court. I have to say once I started using it and looking at it, I had a great comfort with it. Really, the outcomes, looking at the data, it really correlated perfectly well with the release decisions. Low-risk cases were getting detained at a low rate, if at all. Higher risk cases were getting detained at a higher rate as it should be.

It correlated perfectly with noncompliance. Low-risk cases had low violation rates, higher risk cases had the higher

violation rates, although in federal system even our highest risk cases succeeds still at about 85 percent or so. So I think the recognition that this risk assessment really does give us a great deal of information.

Previously, when we were trying to assess who is high risk, we based it on conditions of release. So if they're on electronic monitoring, they must be our high risk population so we should have less of those cases assigned to an officer. But it's not necessarily true. Some districts are putting electronic monitoring on a much greater rate than I would say they should.

Now, having this risk assessment tool gives us the evidence to make these kinds of determination and be it release/detention decisions or resource determinations. All the districts in the federal system are now using the PTRR because it's connected to our funding so they had to get on the PTRR. But how they're using it to inform them differs. Not all of them are using it before that initial detention release/decision. Whether that's because they find they have time constraints or whether it's because there's no buy-in, I'm not sure. But I think it's certainly something that needs to be examined more closely. And districts really need to understand that it has become a tool that has really been exceptionally helpful to not only the court but us as managers in making decisions.

I can now look at my workload and say, if there a low-risk cases in custody, why is it and delve deeper. I will say there are some cases that that risk assessment tool just cannot pick up every factor there is to consider, and we examined those cases. I think that's a practice that should be happening in every district. That manager should be looking at are low-risk cases being held, are low-risk cases being put on restricted conditions that are unnecessary because if they are, they're more likely to fail. And are high-risk cases being monitored properly, if they're being released?

So our picture is now being validated for supervision so that's a good thing. I think one of the things that a limitation for PTRR is it is one tool for failure to appear and re-arrest and does not have a violence trailer. The good news is we have very low violent recidivism in this country because we primarily release low-risk cases. But that means it's not easy to conduct a study to be able to assess violence in an empirical way.

So I think as we can develop the risk assessment with more granularity, it will be able to even better inform us. But I think it's really important that districts are bringing that information and the results of that study that resulted in that risk principle and that risk assessment tool to their stakeholders and having conversations about what's going on. I

might add there's a significant amount of data available to districts on our JNET, to look at how they are performing. If they're not looking at those H tables, they should take some time to do it and share it with the stakeholders because being able to compare yourselves to white districts or to your circuit averages or the national average or even to your performance in previous years compared to current years, it really helps inform us about what is happening in district and why it is happening. So that's what I recommend.

Mark Sherman: I want to thank you both very much for talking with us.

Female Voice: Thanks for having us.

Female Voice: Thank you.

Mark Sherman: Chris Dozier is the Chief U.S. Pretrial Services Officer for the District of New Jersey, and Cherise Fanno Burdeen is CEO of the Pretrial Justice Institute based in Rockville, Maryland.

In the next episode of *Off Paper*, we'll continue our conversation with Chris and Cherise focusing on bail reform efforts at the state level, issues regarding jails, and the collateral consequences of pretrial detention. I hope you'll join us. *Off Paper* is produced by Paul Vamvas. The program is directed by Craig Batten. I'm Mark Sherman. Thanks for listening. See you next time. [End of file/transcript]