UTAH JUDICIAL COUNCIL
STANDING COMMITTEE ON PRETRIAL RELEASE AND SUPERVISION
MEETING AGENDA

Via Webex
October 7, 2021 – 12:00 p.m. to 2:00 p.m.

12:00	Welcome and Approval of Minutes	Action	Tab 1	Judge Harmond
12:05	Committee Business - *2022 meeting schedule* - *Judicial Council changes to committee membership composition*	Information		Staff
12:10	Updates: - *Data Collection Subcommittee* - *Rules of Procedure Subcommittee* - *SLCo. / 3rd District 48-hour IA Program* - *Legislative Pretrial Workgroup* - *PSA Rescore*	Discussion		Committee and Staff
12:50	Public Safety Assessment – Annual Review: - *PJI Case Against Risk Assessment Instruments* ***(A)*** - *Open Letter to PJI* ***(B)*** - *Responsible Use of the PSA* ***(C)***	Discussion	Tab 2	Committee and Staff
1:25	Ability-to-Pay Matrix – Annual Review: - *Feedback on Recommended Amounts* - *As-designed vs. As-used*	Discussion	Tab 3	Committee and Staff
2:00	Adjourn			

COMMITTEE WEB PAGE: https://www.utcourts.gov/utc/pretrial-release/

UPCOMING MEETING SCHEDULE:
Meetings are held via Webex on the first Thursday of each month from 12:00 noon to 2:00 p.m. (unless otherwise specifically noted):

November 4, 2021
December 2, 2021
January 6, 2022
February 3, 2022
March 3, 2022

April 7, 2022
May 5, 2022
June 2, 2022
July 7, 2022
August 4, 2022

September 1, 2022
October 6, 2022
November 3, 2022
December 1, 2022

TAB 1

Minutes – July 1, 2021

NOTES:

UTAH JUDICIAL COUNCIL
STANDING COMMITTEE ON PRETRIAL RELEASE AND SUPERVISION
MEETING MINUTES

Via WebEx
July 1, 2021 – 12:00 p.m. to 2:00 p.m.

DRAFT

COMMITTEE MEMBER:	ROLE:	PRESENT	EXCUSED
Judge George Harmond, *Chair*	District Court Judge	•	
Judge William Kendall	District Court Judge		•
vacant	Juvenile Court Judge		--
Judge Brendan McCullagh	Justice Court Judge	•	
Judge Jeanne Robison	Justice Court Judge	•	
Josh Graves	Prosecutor	•	
Cara Tangaro	Defense Attorney	•	
Captain Corey Kiddle	County Sheriff	•	
Commissioner Lorene Kamalu	County Representative	•	
Andrea Jacobsen	Pretrial Services		•
vacant	Insurance Dept.		--
Tom Ross	CCJJ		•
Wayne Carlos	Commercial Surety		•
vacant	Senator		--
Representative Karianne Lisonbee	Representative	•	
Richard Mauro	IDC	•	
Keisa Williams	Court General Counsel	•	

STAFF:
Keisa Williams
Michael Drechsel

(1) WELCOME AND APPROVAL OF MINUTES:

Judge Harmond welcomed the committee to the meeting.
The committee considered the minutes from the May 6, 2021 meeting.
Judge Robison moved to approve the draft minutes; Judge McCullagh seconded the motion.
The committee voted unanimously in support of the motion. The motion passed.

(2) UPDATE – SALT LAKE COUNTY TIME-TO-FILE AND INITIAL APPEARANCE PROCEDURES:

Mr. Graves provided an update to the committee regarding this project. He reported that they had worked out some remaining issues. A standing order was finalized in early June. All non-DV misdemeanors are being processed under a two-day filing period, and that seems to have been operationalized well. The Salt Lake County jail has provided good training. The hope is to do some analysis because there has been an uptick in the

numbers on the daily failure-to-file reports from the jail. There are still a significant number of cases where prosecutors haven't received police reports in time to file charges.

Mr. Mauro explained two positives that he has observed from this process. First, lower level offenses are more frequently being handled with summonses. Second, this has resulted in smaller in-custody calendars for those lower-level offenses.

Captain Kiddle explained things have been going well for the jail in this process, and thanked the relevant people for the constant communication and collaboration.

(3) UPDATE – DATA COLLECTION SUBCOMMITTEE:

Mr. Samuelson provided an update on subcommittee efforts. The subcommittee has been meeting regularly. They continue to work toward two products. One is the integrated pretrial dashboard for public consumption. The other is focused on functional data directed toward practitioners. There has been incremental progress.

Mr. Hutchings explained that he continues to work on securing funding for the PSA updates that have previously been discussed and approved by the committee. He expressed a desire to continue working with other counties (specifically mentioning Washington and Davis counties). He continues to coordinate with CCJJ and GOPB. If he needs additional information from the courts as part of these requests, he was directed to contact Mr. Drechsel, who will be staffing this committee moving forward. He is hopeful that funding could be secured in the coming months, possibly during a special session.

Mr. Samuelson explained that there will be a need for a data analyst in each jurisdiction that engages in this work. One of the products that is being worked on is a very technical document specifically for data analysts so that the work can be replicated in other areas around the state, with confidence that the efforts can result in "apples-to-apples" data comparisons.

Commissioner Kamalu expressed commitment to have Davis County be involved in the effort to identify and understand this pretrial data in her county.

(4) UPDATE – LEGISLATIVE PRETRIAL REFORM WORKGROUP:

Judge Harmond informed the committee that Mr. Drechsel will be staffing this committee moving forward. Judge Harmond asked Mr. Drechsel to provide an update to the committee members regarding the most recent work performed by the legislative pretrial reform workgroup. Mr. Drechsel pointed out that the legislative workgroup has involved Rich Mauro, Josh Graves, Judge Harmond, Representative Lisonbee, Ranae Cowley, and others in attendance at the meeting today. As a result, any report on the workgroups efforts should be a group report. Mr. Drechsel reported that the workgroup will not be meeting in July or August. This will allow for groups to consider all that has been discussed so far, and for conversations about the work to be had among the various groups involved in the work.

Mr. Drechsel explained that the workgroup had just been provided with the first working draft. Mr. Drechsel emphasized that this is very much a rough draft and that the committee members should expect significant changes. Mr. Drechsel explained that there were a number of topics that have been discussed or are on the workgroup's radar, but are not included anywhere in the current working draft, but may possibly be included in a future draft, including: proceedings related to citations, identification of appropriate pretrial release conditions, expansion of collecting SIDs and other data tracking for reporting and analysis, revisions related to bond forfeiture processes, and clarification on motions for detention. Mr. Drechsel also reported that the Office of Legislative Research and General Counsel has indicated they will be conducting research on the use of bail

schedules, ability-to-pay issues, and related issues. With the previous disclaimer and caution (also echoed by Mr. Mauro), Mr. Drechsel then shared with the committee the working draft (dated June 22, 2021), walking through the various provisions included in that document. Feedback from committee members included:

- having definitions of core terms in statute are appreciated and assist in common understanding;
- the statutes should address (and harmonize with jail policies) how to handle the situation where an arrested person who is court-ordered to be released is still under the influence, and therefore continues to pose a danger to others or themselves;
- the "own recognizance" release authority granted to sheriffs from HB1006 in the June 2021 special session (codified in 77-20-3.2) may need to be revised:
    - to accommodate booking practices in several (all?) jails because there is no meaningful window of time between the individual being booked into the jail and submission of the PC statement from the arresting officer;
    - to apply the subsection (4) exception language (re: agreements regarding release to pretrial, etc.) to the justice courts; and
- It is important that the statutes accurately differentiate between the role of magistrate and the role of judge and use both terms when it is relevant.

After reviewing the working draft, and soliciting any additional insights or feedback from committee members, Mr. Drechsel identified one other issue that has been a topic of conversation within the legislative workgroup. Mr. Drechsel explained that that there have been questions and concerns raised regarding the number of $0 recommendations indicated on the matrix (for FTA 1, FTA 2, and FTA 3). In total, half of the matrix is populated with $0 recommendations for all income levels, even for FTA risk that is squarely in the "B" grade range (80%-90% appearance). This has been a topic of concern for some members of the workgroup. Mr. Drechsel suggested that the committee may consider whether, based upon this feedback, it would be wise to revisit the recommended amounts. Judge Harmond suggested that the committee should include further discussion on the ability-to-pay matrix at a future meeting, hopefully informed by any relevant data that is available. Mr. Drechsel suggested that it may be possible to secure data on how judges are using the ability-to-pay matrix, including how frequently the recommended amounts are utilized and the rate of deviation from the recommendations (both higher and lower amounts). It would also be possible to look at how the imposed monetary amounts correlate with FTA risk levels identified in the PSA (for cases where a PSA was generated). This could help with an assessment of how the matrix as a tool is designed compared with how it is used. If the design is of concern to some stakeholders AND the matrix is regularly being used in a way that deviates from that design, perhaps that is cause for further reason to consider further refinements to the tool.

Ms. Williams noted that no tool is perfect (including the ability-to-pay matrix) and that continuing adjustments and refinements should be expected along the way. Part of the discussion should always include careful consideration of the many research studies on the costs associated with incarcerating low-risk individuals, and how those costs are often higher to the citizens of the state than the costs associated with failure to appear (which costs are typically measured in delay of court proceedings and law enforcement efforts to arrest on warrants). Costs of incarcerating a low-risk individual for even a few days include driving up short-term and long-term recidivism rates, as well as the loss of housing, employment, custody of children, etc.

Mr. Mauro suggested that it may be premature to look at the ability-to-pay matrix because there is a pending discussion in the workgroup about a bail schedule. Some of the important, as-of-yet-unanswered questions include if there is both a bail schedule and an ability-to-pay matrix, which one controls and when does each one apply? He suggested that we look at some data regarding the matrix and wait to see what will happen legislatively.

Judge Harmond noted that this is partly a question of perception. The costs of incarcerating an individual who cannot afford to pay a monetary condition of release are typically more amorphous than seeing an individual

released on a monetary amount that is perceived as being too low. There appears to be a fundamental misunderstanding in the workgroup. Courts across the nation (both state and federal) have concluded that in imposing a monetary condition, courts are mandated to assess an individual's ability to pay. As an example, in the workgroup there were recent references to the California bail schedule, without recognition that that bail schedule had recently been the subject of a California Supreme Court opinion that took issue with how that bail schedule had been used / applied in California. It is important that the committee to continue to discuss the ability-to-pay matrix and the concerns that are out there.

Mr. Drechsel shared that Ms. Liu and Mr. Samuelson had recently presented to the legislative workgroup. During that presentation, Mr. Samuelson had been asked to identify what number of individuals were presently being held pretrial in Salt Lake County Jail solely on a monetary condition. He was able to identify that there were around 80 individuals being held on a monetary condition that should have permitted them to be released for a few hundred dollars. Mr. Drechsel couldn't remember the specific numbers that had been shared during that presentation, but noted that using this method, there may be a way to determine if there is a threshold or cutoff where people no longer continue to be held. Consideration of that data may also inform the design of the matrix.

(5) ADJOURN

Before adjourning, Judge Harmond pointed out that he had intended to mention at the beginning of the meeting that Representative Karianne Lisonbee was recommended by the Speaker of the House (Brad Wilson) and was appointed by the Judicial Council as a member of the committee. He looked forward to having her involvement in this committee and welcomed her publicly. The meeting adjourned at approximately 1:50 p.m. The next meeting is scheduled to be held on August 5, 2021, starting at 12:00 noon.

TAB 2

Public Safety Assessment – Annual Review

NOTES:

A

Pretrial Justice Institute
November, 2020

The Case Against
Pretrial Risk Assessment Instruments

KEY TAKEAWAYS

- Pretrial risk assessment instruments (RAIs) are constructed from biased data, so the RAIs perpetuate racism.
- RAIs are not able to accurately predict whether someone will flee prosecution or commit a violent crime.
- RAIs label people as "risky" even when their odds of success are high.
- RAI scores inform conditions of release, but there is no proven connection between RAI scores, specific conditions, and pretrial success.

Pretrial risk assessment instruments (RAIs) are actuarial tools intended to estimate two key outcomes for those who are released pending trial: the likelihood that someone will fail to appear for court, and the likelihood that someone will be arrested for a new crime before the disposition of their case. The use of RAIs is a topic of great debate among criminal justice practitioners, community advocates, formerly incarcerated people, policymakers, and academics. Some see them as an important tool for facilitating pretrial release, while others argue that they perpetuate racial bias and unfairly label people as "risky."

In 2020, after an extensive period of reflection, the Pretrial Justice Institute released a statement opposing RAIs. First and foremost, that position was driven by a strengthening commitment to racial equity and a conviction that the tools do not adequately address the biases inherent in the system. Underscoring this new position, though, was the understanding, based on research, that these tools are not able to do what they claim to do—accurately predict the behavior of people released pretrial and guide the setting of conditions to mitigate certain behaviors. RAIs simply add a veneer of scientific objectivity and mathematical precision to what are really very weak guesses about the future, based on information gathered from within a structurally racist and unequal system of law, policy and practice. This paper interrogates the role that RAIs are supposed to play in advancing pretrial justice, and how they fall short.

I. RAIs CANNOT RELIABLY PREDICT FLIGHT FROM PROSECUTION

The most basic tenet of pretrial justice is that people need to appear in court to face the charges against them. The initial concern, centuries-old, was that people would flee the jurisdiction to avoid prosecution, and the purpose of bail was to address this risk of flight. But RAIs are not constructed to estimate the likelihood of flight.[1] Instead, they are constructed to estimate the likelihood of a "failure to appear"—and they typically treat past failure to appear, regardless of the reason, as a valid predictor of future failure.

RAIs do not—*cannot*—distinguish between an actual flight from prosecution and missed court appointments. The omission of "true flight" from RAIs reflects the use of readily available data such as failures to appear or bond forfeitures, which do not make distinctions among types of nonappearance, and the fact when "tools promise only to predict nonappearance broadly, they can claim greater success than if the tools purported to predict the narrower and more serious categories of risk."[2]

RAIs do not distinguish between people who have the means to flee the jurisdiction to avoid justice and people without resources who have problems coming to court due to transportation or housing instability, child care or employment issues. The inclination and ability to flee prosecution is a relatively rare event in criminal court.[3] Data show that only three percent of all released people charged with felonies do not appear in court at all and are not returned to court after a year.[4] More plainly, most people lack the means to flee. Over one-third of people (36%) who had one arrest in the preceding 12 months had annual incomes below $10,000. That percentage increased to nearly half (49%) among people who are arrested multiple times in a year—a population that represents more than one-fourth of people who are jailed.[5]

People who are poor face greater obstacles to appearing in court than those who have greater access to resources. Forgoing paid time, risking employment, finding childcare, and accessing reliable transportation are just some of the barriers experienced by people with low-paying jobs and few resources. This issue is compounded by higher rates of poverty among Black, Latinx,

> RAIs simply add a veneer of scientific objectivity and mathematical precision to what are really very weak guesses about the future.

and Indigenous people. Acknowledging and addressing these barriers could raise court appearance rates.

Even if RAIs could be revised to focus on the risk of willful flight, they cannot predict this behavior to a level of accuracy that justifies the restriction of liberty on individuals. Consider that the predictive accuracy for the failure to appear model of the Public Safety Assessment, developed by Arnold Ventures, is 0.644, where 0.5 is considered a coin flip and 1.0 is perfect prediction.[6] While some have argued that in the criminal justice arena, 0.64 to 0.7 is acceptable predictive power for pretrial assessments,[7] many disciplines consider a score of less than 0.7 to have poor discriminatory power.[8] Rather than accept this lower standard of predictive power, it should be rejected as a basis for depriving people of their right to pretrial liberty and presumption of innocence. The mere existence of this information perpetuates the conflation of flight with nonappearance, and encourages the corresponding use of incarceration or restrictive conditions.

II. RAIs CANNOT RELIABLY PREDICT VIOLENT CRIME

The second basic tenet of pretrial justice is protecting the public from danger. The concern is that people will commit an act of violence in the community while awaiting trial. But RAIs do not actually estimate the likelihood of this outcome. Instead, most existing pretrial RAIs estimate the likelihood of any new arrest, regardless of whether it involves an accusation of violence. According to the Court Statistics Project, in 2018, misdemeanors made up 77% of criminal cases in state trial courts, and felonies made up 23%. Of those cases, a small percentage made up "person" cases, i.e., those cases involving bodily harm, including homicide. Person cases made up 9% of misdemeanor cases, and 18% of felony cases.[9]

Because violence is rare, RAIs do not—*cannot*—reliably predict future arrest for violence. Being charged with an act of violence while awaiting trial has always been a second "statistically rare event" that cannot be accurately predicted. In Washington, DC, where 88 percent of all people are released before trial, the percentage of people who remain arrest-free is 89%. Of those who are released, only 1% are arrested for a violent crime.

Even if RAIs could be revised to focus on the risk of willful flight, they cannot predict this behavior to a level of accuracy that justifies the restriction of liberty on individuals.

When RAIs do attempt to identify people who are more likely to commit a crime of violence, rates of rearrest for violence are quite low even among the "high risk" group. The Public Safety Assessment, developed by Arnold Ventures, contains a flag suggesting someone is at a higher risk for being arrested for what they label a "New Violent Criminal Activity." However, more than 9 times out of 10, people who receive that flag are not arrested for a violent offense while on pretrial release.[10] High risk designations are also biased against Black people. A study of 175,000 people arrested in New York City found that looking at a hypothetical classification of high risk and no actual re-arrest, 23% of Black defendants would have been classified as high-risk and flagged for detention, compared with 17% of Hispanic defendants, and only 10% of white defendants.[11]

III. FACTORS EMPLOYED BY RAIs REFLECT AND PERPETUATE STRUCTURAL RACISM

RAIs are presented as "objective" or "race neutral" because the items are statistically validated as predictive of court appearance and new crime. However, when the data used for that statistical analysis reflect bias against Black, Latinx, Indigenous and poor people, the resulting tool is inherently biased as well.

Structural and individual biases in policing practices make it more likely that Black people will be stopped, searched, subjected to force and arrested than white people for the same behavior.[12] RAI developers have attempted to mitigate bias using statistical techniques that identify racial differences in specific items on the tool. These analyses have resulted in incremental improvements by removing items that are overtly biased, like whether someone owns or rents their home. Still, a tool that can accurately "predict" biased outcomes, such as the likelihood of arrest, is more of a reflection of the system than it is of the person.[13]

Each RAI uses a different combination of factors and weighting of factors. The table on the next page includes some commonly used factors and how each factor reflects bias.

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Bias in Pretrial Risk Assessment Instruments

FACTOR	HOW IT IS BIASED
Age at first arrest	Police are more likely to arrest Black people, even after controlling for factors such as seriousness of the offense and prior record, according to a meta-analysis of 23 research studies looking at arrests between 1977 and 2004.[14] Thirty percent of Black men have experienced at least one arrest by age 18, compared to 22% of white males. This differential increases with age.[15]
Current charge	A 2020 study from Harvard Law School found that one factor, racial/ethnic differences in the initial charge, accounted for 70 percent of racial disparities in sentence length; which were approximately 5 months longer for Black and Latinx people than white people, among those sentenced to incarceration.[16] A 2017 study of 48,000 misdemeanor and felony cases in Wisconsin found that white people were 25 percent more likely to have their top charge dropped or reduced by prosecutors than Black people.[17]
Employment	Employment as a factor is highly biased against Black people. Since 1954, when the Bureau of Labor Statistics began tracking these numbers, the unemployment rate for Black people has consistently been twice that of white people.[18]
Drug use	Black and white people use and sell drugs at approximately the same rates, but Black people are 2.7 times more likely to be arrested for drug-related offenses.[19] Moreover, Black and Latinx people are more likely to be incarcerated for drug-related offenses than white people.[20]
Pending charge at time of arrest	A study of 10,753 cases in San Francisco over a three-year period revealed cases involving Black people take longer to resolve. On average, cases for Black people took 90 days to process, compared to 77.5 days for white people (making it more likely for a Black person that a charge would be pending in the event of arrest).[21]
Prior convictions (for violence)	People with felony convictions (which do not exactly match to arrests for violence) account for 8% of all adults and 33% of the Black adult male population, and likely reflect police sweeps and mass arrests executed disproportionately in neighborhoods of color.[22] At the same time, Black people are more likely to be wrongfully convicted than white people. Half of people exonerated for murder and 59% of people exonerated for sexual assault are Black people; ninety percent of people framed in large-scale police scandals are Black.[23]
Prior sentence to incarceration	A study of men charged with felonies in urban U.S. counties calculated that the cumulative effects of bias in the criminal legal system made the probability of going to prison 26% higher for a Black man, and 30% for a Latino, than that of a white man charged with a felony.[24] A literature review on race and sentencing found that Black and Latino people were much more likely to be disadvantaged in the decision to incarcerate than whites, and this initial disparity was greater than the subsequent decision around how long to incarcerate.[25]

IV. RAI SCORES PUT A MISLEADING EMPHASIS ON CALCULATED RISK

Constructors of RAIs have always reminded users that RAIs are actuarial tools and do not give the court specific, individualized information about the person facing charges. They create categories that reflect their similarity to others "like them." As shown above, it is not possible to reliably predict willful flight or arrest for a violent crime, so RAIs are designed to estimate the likelihood of any missed court appearance or new arrest. **Many RAIs even combine risk of missing court and risk of any rearrest into a single risk of "pretrial failure."** Most RAIs focus on the likelihood of failure rather than the likelihood of success, which creates a misleading perception of risk, and combining risk of missing court and risk of any arrest does not decrease that likelihood. As shown earlier, many factors are biased against Black and Latinx people.

Within the label of "risk," RAIs rate the probability of success or failure using various units. Some have just three levels of risk, typically labeled "Low," "Medium," and "High," while others have four, five or six levels of risk. Either way, these boundaries are artificially drawn. They can be cut-points set by the researchers who conducted the study that developed the tool, or they can be negotiated by a policy team based on local risk tolerance. Cut-points may also be based on interests of court systems that are unrelated to the rights of an accused individual, such as case flow needs or jail population management. One group may set the boundaries of each risk level one way, and another group may set them another way.

In California, for example, four counties developed their own RAIs; 18 counties use the Virginia Pretrial Risk Assessment Instrument; 17 counties use the Ohio Risk Assessment System tool; four counties use the COMPAS (Correctional Offender Management Profiling for Alternative Sanctions) and two counties use the Public Safety Assessment.[26] This patchwork shows how variable justice can be even though RAIs purport to be "evidence-based." Two similarly-situated people, just a few miles apart, will be treated differently depending on what county they are in.

> When the data used for that statistical analysis reflect bias against Black, Latinx, Indigenous and poor people, the resulting tool is inherently biased as well.

Court Appearance and Arrest Rates Based on Risk Levels

Colorado presents its rates in terms of public safety (no arrest) and court appearance. New York looks only at court appearance. Other tools consider both arrest rates and failure to appear, or a combination of the two.

Name of Tool	Lowest Risk	Medium Risk	Highest Risk
RAIs based on likelihood of success			
Colorado Pretrial Assessment Tool (CPAT) CPAT has four risk categories	91% – Public safety rate 95% – Court appearance rate	69–80% – Public safety rate 77–85% – Court appearance rate (representing the two middle categories)	58% – Public safety rate 51% – Court appearance rate
New York City Criminal Justice Release Assessment New York considers appearance only This assessment has four recommendations based on the score.	For all charge types, release on recognizance is recommended for those whose scores suggest appearance rates of 82.3–93%.	Depending on the charge type (misdemeanor, non-violent felony, or violent felony), release on recognizance or consideration of all options may be considered for those whose scores suggest appearance rates of 71–76%.	For all charge types, release on recognizance is not recommended for those whose scores suggest appearance rates of 41.7–63%.
RAIs separating risk of arrest and failure to appear			
Federal Pretrial Risk Assessment (PTRA) PTRA has five risk categories	0.3% – Arrest for violent offenses 0.7% – Failure to appear	1.3% – Arrest for violent offenses 2.5% – Failure to appear	2.9% – Arrest for violent offenses 4.6% – Failure to appear
Public Safety Assessment (PSA) As validated on data from Kentucky PSA has six risk categories	3.9% – New criminal arrest 7.5% – Failure to appear	10.9–15.1% – New criminal arrest 13.9–19.8% – Failure to appear (representing the two middle categories)	26.3% – New criminal arrest 32.1% – Failure to appear
RAIs combining risk of arrest and failure to appear			
Virginia Pretrial Risk Assessment Instrument – Revised (VPRAI-R) VPRAI-R has six risk categories	6.1% – Any failure rate	14.9–21.4% – Any failure rate (representing the two middle categories)	37.1% – Any failure rate
Ohio Risk Assessment System - Pretrial Assessment Tool (ORAS-PAT) ORAS-PAT has three risk categories	5% – Any failure rate	18% – Any failure rate	29% – Any failure rate

V. RISK ASSESSMENTS CAN DRIVE UNNECESSARY AND UNPROVEN SUPERVISION (AND DETENTION)

How "risk levels" are defined has serious implications for those being assessed. Some state statutes or court rules require certain actions or decisions based on whether a person scores a "Low," "Medium," or "High" on the RAI. This has a cascading effect; a higher risk designation can result in more intensive levels of supervision, an increased likelihood of returning to jail on a technical violation, and higher fees related to supervision conditions—all consequences that have very real impacts on people's lives. Most counties with pretrial services reported that they charged people fees for some type of pretrial service, such as drug testing, surveillance technologies or supervision, which can lead to a cycle of debt.[27] Very little data exists about how race factors into the setting and enforcement of non-financial pretrial release conditions.

Subjective designations of high, medium or low risk are used to legitimize conditions of pretrial release, such as supervision, drug testing, and electronic monitoring, and contribute to our nation's mass supervision and surveillance crisis. In most jurisdictions, the results of an RAI are applied in a decision making framework or matrix to determine the level of supervision. Typically, the score and the most serious charge are used together to determine the supervision/surveillance to which a person will be subjected.

Notably, courts should not use the results of an RAI to determine detention; that decision should be made in a separate hearing with full due process protections. However, according to the PJI 2019 Scan of Pretrial Practices, many jurisdictions ***do*** use the RAI to determine detention. Nearly three out of four counties (73 percent) that had a pretrial assessment tool reported using them to make the "release or detain" decision.[28]

There is little research demonstrating that supervision conditions actually improve court appearance and public safety; what information is available on specific conditions, such as drug testing and electronic monitoring, shows they are not effective but are rapidly expanding in their usage. On a more nuanced level, there is no research showing that specific conditions are appropriate for people with specific RAI scores. Instead, the type and dosage of supervision

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are determined by policy, and can vary widely across jurisdictions. If the pretrial field took the approach that no specific condition could be assigned unless it was proven effective, then supervision and surveillance would be virtually obsolete.[29]

Even the color-coding used by decisonmaking frameworks or matrices seem designed to provoke alarm. Below is an example of a matrix used by Denver Pretrial Services Investigation Unit as of 2018. Note the use of the color red for maximum supervision. Moreover, the levels of supervision shown were created by policy makers and practitioners in Colorado, not derived from any research showing these specific conditions are related to any "risk" purportedly assessed.

Denver Pretrial Supervision Guidelines-Misdemeanor and Felony Offenses

Primary Charge and CPAT Category *Enhancers* *(move up one level of supervision)* → → →	•Non VRA Misdemeanors	•NonVRA Felonies	•VRA Misdemeanors	•Misdemeanor DV •Indecent Exposure	•VRA Felony Crimes •Felony DV •DF1 •Burglary of a Dwelling	•Felony Sex Offenses
• *Currently supervised on felony probation, parole, or pretrial supervision for any criminal offense* • *Two or more pending felony cases or misdemeanor assault cases within one year of current offense date* • *Offense Involves a knife or a firearm in current charge* • *High ODARA score (7+)* • *Felony Child Abuse or Felony Sex Assault on a Child*						
Category 1 *Score: 0 to 17 (87% Success)* *91% Public Safety, 95% Court Appearance*						
Category 2 Score: 18 *to 37 (71% Success)* *80% Public Safety, 85% Court Appearance*						
Category 3 Score: *38 to 50 (58% Success)* *69% Public Safety, 77% Court Appearance*						
Category 4 Score: **5***1 to 82 (33% Success)* *58% Public Safety, 51% Court Appearance*						

No Pretrial Services Supervision	Administrative (Adm)	Enhanced (Enh)	Intensive w/EM Monitoring (Int)	Maximum Supervision Restrictions
Statutory Conditions Only	Court Reminder Calls Only	Court Reminder Calls	Court Reminder Calls	Court Reminder Calls
	Notification of New Arrest	Notification of new arrest	Notification of new arrest	Home Confinement
	Telephone check ins after court appearances	Check-in physically after court appearances	Check-in physically after court appearances	Electronic Monitoring/Surveillance
		Telephone check ins 1 to 4x per month (30 days)	Alcohol/ GPS/ Home Monitoring*	Check-in physically after court appearances
			Curfew/Employment Leave Only*	
		Case Management meetings 1 to 2x per month (30 days)	Case Management meetings 1 to 4x per month (30 days) Telephone Check Ins As Needed	
		Substance Testing if ordered	Substance Testing if ordered	

Denver Pretrial Decision Making Framework, as presented to the Colorado Supreme Court Bail Blue Ribbon Commission, August 16, 2018.

The Virginia Pretrial Risk Assessment Instrument-Revised (VPRAI-R) Praxis, as presented to the Pretrial Services Stakeholder Group, June 11, 2018, contains six different types of outcomes, raising questions of whether these modifications actually make a difference. The outcomes include release with no supervision, release with supervision monitoring (court reminder and criminal history check before every court date), three levels of supervision monitoring with increasing frequency and compliance verification, and detention.

Charge Category	Non-Violent Misdemeanor	Driving Under the Influence	Non-Violent Felony	Violent Misdemeanor	Violent Felony or Firearm
Level 1 (0-2 points)	**Release** With no Supervision, (Monitoring if Supervision Ordered)	**Release** With no Supervision, (Monitoring if Supervision Ordered)	**Release** With no Supervision, (Monitoring if Supervision Ordered)	**Release** With no Supervision, (Monitoring if Supervision Ordered)	**Release** With Supervision Level II
Level 2 (3-4)	**Release** With no Supervision, (Monitoring if Supervision Ordered)	**Release** With Supervision Monitoring	**Release** With Supervision Monitoring	**Release** With Supervision Monitoring	**Release** With Supervision Level III
Level 3 (5-6)	**Release** With Supervision Monitoring	**Release** With Supervision Monitoring	**Release** With Supervision Level I	**Release** With Supervision Level I	**Detain** (Level III if Supervision Ordered)
Level 4 (7-8)	**Release** With Supervision Level I	**Release** With Supervision Level I	**Release** With Supervision Level II	**Release** With Supervision Level II	**Detain** (Level III if Supervision Ordered)
Level 5 (9-10)	**Release** With Supervision Level II	**Release** With Supervision Level II	**Release** With Supervision Level III	**Detain** (Level III if Supervision Ordered)	**Detain** (Level III if Supervision Ordered)
Level 6 (11-14)	**Detain** (Level III if Supervision Ordered)	**Detain** (Level III if Supervision Ordered)	**Detain** (Level III if Supervision Ordered)	**Detain** (Level III if Supervision Ordered)	**Detain** (Level III if Supervision Ordered)

Praxis accompanying the Virginia Pretrial Risk Assessment Instrument - Revised (VPRAI-R)

CONCLUSION

It is time to transform pretrial reform. As an organization that was deeply involved in the proliferation of RAIs, PJI has spent years wrestling with the research on pretrial risk prediction. Our central concerns now focus on the civil rights implications of the tools, the items on them, and the ways in which courts are using these and other tools of reform that do not prioritize racial equity.

One major tenet in a racial equity transformation is reckoning with intention versus impact. What was intended to support courts in better making decisions that honored the presumption of innocence and held "detention as the carefully guarded exception" has had a devastating impact on Black, Indigenous and Latinx communities. The consequences are reflected in the data on mass pretrial detention and mass pretrial surveillance, often followed by forced pleas[30] or dropped charges.[31]

If RAIs cannot predict the risk of fleeing prosecution and risk of violence against a specific person or group; ***and*** they reflect systemic issues such as difficulty in keeping court appointments, case processing, and over-policing; ***and*** they are being used to legitimize an expansion of surveillance, then we have an obligation to interrogate their use. Even relatively successful attempts to produce "race equal" outcomes in RAIs cannot address the racialization of what is criminalized and how we police. Subjective assessment of the very same items on an RAI—due to requirements in statute or court rules, or simply based on professional experience—will only reproduce these effects in a less transparent manner.

Pretrial justice requires a radical reconstruction, which prioritizes racial equity in the presumption of innocence and pretrial liberty, and commits to long-term racially equitable solutions.[32] The Leadership Conference on Civil and Human Rights and the Civil Rights Corps have proposed a vision that prioritizes upfront investments in community programs and social services, including additional resources for education, housing, employment, health care, social-emotional supports, while protecting the pretrial rights of people and requiring collection of pretrial data relating to release, detention and race to empower communities to make change. This broader view of what constitutes public safety is not only more equitable, but has the potential to make our communities safer in the short and long-term by providing opportunities to thrive and prosper.

It is time to put away RAIs and forge an approach that does not perpetuate racial inequality, court involvement, debt or poverty, or create barriers to pretrial liberty and the presumption of innocence. The focus should be on implementing a very narrow detention net and providing robust detention hearings that honor the charge of the Supreme Court forty years ago.[33] And we must prioritize helping people succeed—from assistance with court appointments to connecting people to support services—while addressing the needs of all people victimized by crime.

ENDNOTES

1 Gouldin, L. (2018). Defining Flight Risk. *University of Chicago Law Review* 85, 677, 716.
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B

Open Letter to the Pretrial Justice Institute

Re: Response to PJI's Position on the Abolition of Pretrial Risk Assessment Instruments

Recently the Pretrial Justice Institute (PJI) re-issued its former statement that argues that all pretrial risk assessment instruments (PRAIs) be abolished.[1] Their rationale is understandable but fails to account for the state of the scientific evidence on PRAIs.

Specifically, PJI claims that all PRAIs are racially biased against Black, Latinx, Indigenous, and low-income people, and where implemented, will serve to increase the current level of racial and ethnic disparity in the nation's jails. PJI further explains its reasoning as follows:

> "Underscoring this new (PJI) position, though, was the understanding, based on research, that these tools are not able to do what they claim to do—accurately predict the behavior of people released pretrial and guide the setting of conditions to mitigate certain behaviors. RAIs simply add a veneer of scientific objectivity and mathematical precision to what are really very weak guesses about the future, based on information gathered from within a structurally racist and unequal system of law, policy and practice."

PJI's preferred system would be as described below:

> "The focus should be on implementing a very narrow detention net and providing robust detention hearings that honor the charge of the Supreme Court forty years ago.[33] And we must prioritize helping people succeed—from assistance with court appointments to connecting people to support services—while addressing the needs of all people victimized by crime."

We agree with these goals and believe that the use of PRAIs are not incompatible with achieving them. Instead, PRAIs are one strategy that can be used to support pretrial reform efforts. They certainly are not the only approach, nor should their use preclude other pretrial reforms. However, their use can support the effectiveness of other reform efforts by providing empirical evidence to inform a presumption of release, elimination of money bail, improved representation at pretrial proceedings, provision of pretrial services, diversion to community-based programs, and, ultimately, reductions in rates of pretrial detention.

PJI has concluded, in contrast with scientific evidence, that use of a reliable and valid PRAI precludes reductions in pretrial detention and increases racial and ethnic disparities. Here is what the science says about PRAIs:

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[1] THE CASE AGAINST PRETRIAL RISK ASSESSMENT INSTRUMENTS (Pretrial Justice Institute. 2020). https://university.pretrial.org/viewdocument/the-case-against-pretrial-risk-asse

1. There is a large body of social science evidence showing that objective, reliable and valid risk assessment instruments are more accurate in assessing risk than professional human judgements alone.[2] In the world of pretrial detention where over 10 million people are jailed each year after arrest, the court must quickly review the defendant's prior record, current charges, and other relevant factors to make an initial determination—usually in the span of a few minutes—on the suitability and conditions of release. Evaluation of risk is a fundamental component of pretrial release decisions and will occur with or without the implementation of PRAIs. Objective and valid PRAIs are a more efficient, transparent, and fairer basis for making that assessment than a judge haphazardly and quickly scanning a myriad of documents. The benchmark here is not perfection but rather improving upon unaided human judgment, which is universally acknowledged to introduce racial and other biases.

2. PJI bases the argument that PRAIs are racially biased on a single study (ProPublica) of a single instrument (COMPAS) in a single jurisdiction (Broward County, Florida) that did not actually focus on outcomes during the pretrial period.[3] Moreover, several studies have shown that ProPublica's analysis was flawed and misleading.[4] There are many studies of other PRAIs in other jurisdictions that have tested for racial bias in prediction but do not replicate these results.[5]

3. PJI asserts that racial bias in prediction will necessarily perpetuate racial disparities in pretrial decisions, but this is not supported by research. Determining whether PRAIs perpetuate racial disparities requires comparing PRAI-informed decisions to those made without the use of PRAIs.[6] Scientific evidence shows that even when PRAIs perform

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[2] PAUL E MEEHL, CLINICAL VERSUS STATISTICAL PREDICTION (University of Minnesota Press. 1954);William M Grove, et al., *Clinical versus mechanical prediction: A meta-analysis*, 12 PSYCHOLOGICAL ASSESSMENT 19(2000). J. Jung, et al., *Simple rules to guide expert classifications*, 183 STATISTICS IN SOCIETY 771(2020);Z. J. Lin, et al., *The limits of human predictions of recidivism*, 6 SCIENCE ADVANCES eaaz0652(2020).

[3] Julia Angwin, et al., *Machine Bias*, PROPUBLICA, May 23, 2016. 2016;Jeff Larson, et al., *How We Analyzed the COMPAS Recidivism Algorithm*, see id. at.

[4] Anthony W Flores, et al., *False Positives, False Negatives, and False Analyses: A Rejoinder to Machine Bias: There's Software Used across the Country to Predict Future Criminals. And It's Biased against Blacks*, 80 FEDERAL PROBATION 38(2016);William Dieterich, et al., COMPAS Risk Scales: Demonstrating Accuracy Equity and Predictive Parity (2016);Jeff Larson & Julia Angwin, *Machine Bias: Technical Response to Northpointe*, PROPUBLICA, July 29, 2016. 2016;Cynthia Rudin, et al., *The Age of Secrecy and Unfairness in Recidivism Prediction*, 2 HARVARD DATA SCIENCE REVIEW (2020). Alexandra Chouldechova, *Fair Prediction with Disparate Impact: A Study of Bias in Recidivism Prediction Instruments*, 5 BIG DATA 153(2017);Avi Feller, et al., *A computer program used for bail and sentencing decisions was labeled biased against blacks. It's actually not that clear*, THE WASHINGTON POST, 2016.

[5] Sarah L. Desmarais, et al., *Predictive Validity of Pretrial Risk Assessments: A Systematic Review of the Literature*, CRIMINAL JUSTICE AND BEHAVIOR (2020);Douglas B. Marlowe, et al., *Employing standardized risk assessment in pretrial release decisions: Association with criminal justice outcomes and racial equity*, 44 LAW AND HUMAN BEHAVIOR 361(2020).

[6] Gina M Vincent & Jodi L Viljoen, *Racist Algorithms or Systemic Problems? Risk Assessments and Racial Disparities*, CRIMINAL JUSTICE AND BEHAVIOR (2020);Jennifer Skeem & Christopher Lowenkamp, *Using algorithms to address trade-offs inherent in predicting recidivism*, 38 BEHAVIORAL SCIENCES & THE LAW 259(2020).

somewhat better for one group or another, their use can improve upon pretrial decisions made without PRAIs for all defendants.[7]

4. The argument that PRAIs increase pretrial detention rates is inconsistent with the contemporary science. Several recently published studies show decreases in pretrial detention rates in decisions that use PRAIs compared to those that do not.[8]

5. The statement that PRAIs "cannot reliably predict violent crime" is not supported by the scientific literature. Instead, research studies show that several PRAIs predict new violent crime during the pretrial period at levels much better than chance and in keeping with risk assessment instruments used in other contexts.[9]

6. It is because of studies of PRAIs that we know that the vast majority of defendants who are released (75-85%)—regardless of race, ethnicity, or income—will not be re-arrested and or fail to appear for their next court hearing. Even smaller numbers (5% or less) will be re-arrested for a violent crime and even a smaller percent, still, will be convicted of violent crime while on pretrial release. With these statistics, defense counsels can more effectively argue for the release of their clients.

7. We know that within the criminal justice system and many other areas of American society, bias exists. These biases exist in the deployment of police, arrest policies, charging decisions, pretrial decisions, and sentencing practices. So any assessment that relies on the data used by criminal justice agencies will have some level of bias, whether conducted using PRAIs or completed by judges in the absence of PRAIs.[10] At least with the use of PRAIs—and in contrast with unstructured judicial discretion—the weighting and role of these data sources in evaluations of risk are clear and transparent.[11]

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[7] Evan M. Lowder, et al., Improving the accuracy and fairness of pretrial release decisions: A multi-site study of risk assessments implemented in four counties (National Institute of Justice ed., Bureau of Justice Programs, U.S. Department of Justice 2020). Christopher T. Lowenkamp, et al., *Replication and Extension of the Lucas County PSA Project*, (2020).

[8] Evan M. Lowder, et al., *Effects of pretrial risk assessments on release decisions and misconduct outcomes relative to practice as usual*, JOURNAL OF CRIMINAL JUSTICE (2020);Marlowe, et al., LAW AND HUMAN BEHAVIOR, (2020);Jodi L. Viljoen, et al., *Impact of risk assessment instruments on rates of pretrial detention, postconviction placements, and release: A systematic review and meta-analysis*, 43 see id. at 397(2019);Evaluation of Pretrial Justice System Reforms That Use the Public Safety Assessment: Effects of New Jersey's Criminal Justice Reform. No. 1(2019);Evaluation of Pretrial Justice System Reforms That Use the Public Safety Assessment: Effects in Mecklenburg County, North Carolina. No. 1(2019).

[9] Desmarais, et al., CRIMINAL JUSTICE AND BEHAVIOR, (2020). Sarah L Desmarais, et al., *Performance of recidivism risk assessment instruments in U.S. correctional settings*, 13 PSYCHOLOGICAL SERVICES (2016).

[10] Vincent & Viljoen, CRIMINAL JUSTICE AND BEHAVIOR, (2020);Sandra G Mayson, *Bias In, Bias Out*, 128 THE YALE LAW JOURNAL 2122(2019).

[11] Sharad Goel, et al., *The Accuracy, Equity, and Jurisprudence of Criminal Risk Assessment*, (2018).

For these reasons, the implication for policy is not to abolish PRAIs but to ensure that any form of bias in the assessment process is reduced as much as possible. This can be achieved by adopting the following practices:

a. *Due Process and Transparency*. The scoring and results of any PRAI completed on any individual must be fully disclosed to that person, with an ability to contest its accuracy.

b. *Reliability*. All PRAIs must undergo regular reliability tests to ensure that defendants are scored in a uniform and consistent manner regardless of who is doing the assessment.

c. *Validity.* All PRAIs should be tested using appropriate research methods to ensure they are properly identifying risk to re-offend and/or fail to appear in court during the pretrial period.[12] PRAIs should not be tested on new criminal behavior that occurs after cases have been disposed. Further, future validation studies should strive to use additional measures of criminal behavior as the outcome, such as convictions, filed charges, or even self-report, especially for more serious crimes.

d. *Tested on the Local Population.* Research has shown that a PRAI will perform best if it is tested on its local population rather than a population from another city or state. Consequently, PRAIs that have been developed in other jurisdictions need to be re-tested in the local jurisdiction and adjusted accordingly.

e. *Tested for Racial and Gender Bias in Prediction*. PRAIs must ensure that there is little (if any) racial and gender bias in the risk assessment process. This may be accomplished by ensuring that the outcome predicted by a PRAI is not skewed by race or gender relative to the actual event of concern. When there is evidence of bias in the predictions produced by PRAIs, that strategies are implemented to make the process more fair;[13] for example, by limiting reliance on factors that serve as proxies for race, gender, or income, and focusing on the currently charged offense(s) and prior behaviors within time limits (e.g., felony convictions in the past 10 years).[14] As for reliability, tests of racial and gender bias in prediction should be conducted regularly.

f. *Use in the Pretrial Release Decisions.* PRAIs were not designed to be, nor should they be, the sole determinate of any pretrial release decision or replace judicial decision-making. Instead, they should inform decisions by aiding in the identification of the low-risk

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[12] STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING (American Educational Research Association, American Psychological Association, National Council on Measurement in Education. 2014);J. P. Singh, et al., *Reporting guidance for violence risk assessment predictive validity studies: the RAGEE Statement*, 39 LAW AND HUMAN BEHAVIOR 15(2015);Kevin S Douglas, et al., *Research methods in violence risk assessment*, *in* RESEARCH METHODS IN FORENSIC PSYCHOLOGY (Barry Rosenfeld & Stephen D Penrod eds., 2011).

[13] Richard A. Berk & Arun Kumar Kuchibhotla, *Improving Fairness in Criminal Justice Algorithmic Risk Assessments Using Conformal Prediction Sets*, ARXIV: APPLICATIONS (2020).

[14] Kristin Bechtel, et al., *Identifying the predictors of pretrial failure: A meta-analysis*, 75 FEDERAL PROBATION 78(2011).

> defendants from the few that present greater risk. Given that most detained defendants are suitable candidates for release based on the criteria of flight risk and danger to the community, there should be a presumption of release.[15]

As suggested above, there are many PJI points with which we agree; in particular, that PRAIs should not be used to make pretrial release decisions unilaterally, that communication of PRAIs results should describe likelihood of success, and that the definition of failure to appear in court should be refined. We also agree that, in some jurisdictions, adoption of a PRAI often does not lead to reductions in pretrial population, but only because judges are unwilling to release defendants, regardless of risk.[16] When judges use the results of PRAIs to inform their pretrial decisions, research shows that rates of pretrial release often increase.

Based on PJI's position, all pretrial (and subsequent) hearings would bar consideration of information on current charge(s) and criminal history because they are biased, which begs the question: what would pretrial decisions be based on? At least for the foreseeable future, information on criminal justice involvement and assessments of risk will continue to be introduced and considered in pretrial decisions, as a matter of law and policy. Indeed, most pretrial decisions are currently based upon state law and bail schedules that require consideration of some combination of current charge(s), criminal history, prior failures to appear in court, and ties to the community.[17]

Abolishing PRAIs and allowing judges to return to—or, more accurately, to continue—the practice of making subjective judgments of what constitutes risk would be a major step backwards. While the use of PRAIs will not eliminate pretrial detention and racial bias, they are a step in the right direction. They also are easier to fix than biased human decision-making.[18] A review of the full body of scientific evidence on PRAIs supports this viewpoint.

For further discussion of the potential role of PRAIs in pretrial reform, civil rights concerns related to their use, and potential implications of using AI in this context, see the issue briefs developed as part of the MacArthur-supported Pretrial Risk Management Project: Sarah L. Desmarais and Evan M. Lowder, *Pretrial Risk Assessment Tools: A Primer for Judges, Prosecutors, and Defense Attorneys*; David G. Robinson and Logan Koepke, *Civil Rights and Pretrial Risk Assessment Instruments*; and Alexandra Chouldechova and Kristian Lum, *The Present and Future of AI in Pre-Trial Risk Assessment Instruments*. All are available at http://www.safetyandjusticechallenge.org/resources/

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[15] MELISSA HAMILTON, RISK ASSESSMENT TOOLS IN THE CRIMINAL LEGAL SYSTEM – THEORY AND PRACTICE: A RESOURCE GUIDE (National Association of Criminal Defense Lawyers. 2020).
[16] Marlowe, et al., LAW AND HUMAN BEHAVIOR, (2020).
[17] AMBER WIDGERY, THE STATUTORY FRAMEWORK OF PRETRIAL RELEASE (National Conference of State Legislatures. 2020).
[18] Berk & Kuchibhotla, ARXIV: APPLICATIONS, (2020).

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C

APPR ADVANCING PRETRIAL POLICY & RESEARCH

Best Practices in Pretrial: Responsible Use of the Public Safety Assessment

DATE: June 2021

PRESENTER: Matt Alsdorf & Jessica Ireland

Guidance from AV and APPR

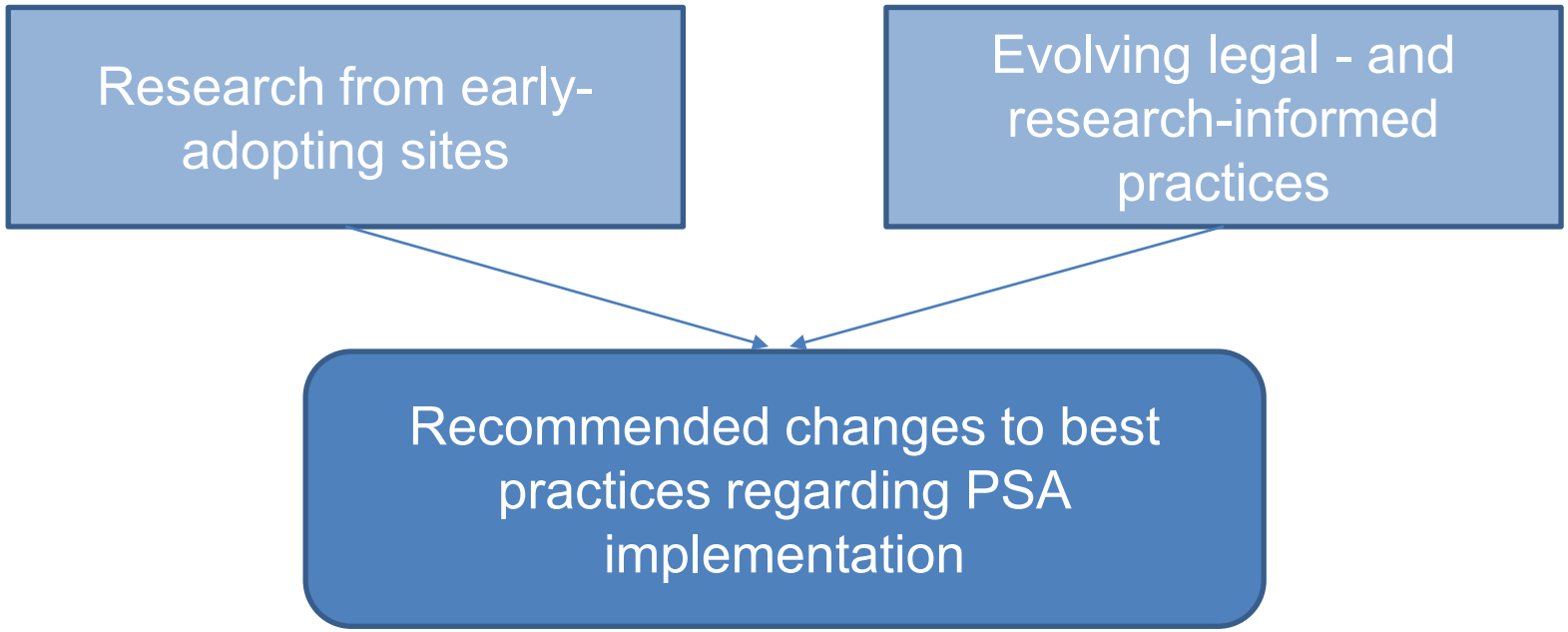
Responsible Use of the Public Safety Assessment: Guidance from Arnold Ventures and APPR

April 7, 2021

Advancing Pretrial Policy and Research (APPR) is a national initiative that works to improve pretrial systems in ways that maximize fairness, equity, efficiency, and community well-being and safety.[1] Fundamental to APPR are pretrial policies and practices that honor the legal presumption of release, are research-informed, and recognize that the vast majority of people will return to court and remain law-abiding during the pretrial period. Pretrial release decisions, then, should not be punitive in nature—rather, they should focus on helping people succeed pretrial. Moving jurisdictions away from their reliance on jail and financial conditions of release is part of this transformation. An actuarial pretrial assessment, such as the Public Safety Assessment (PSA), can also play a positive role in advancing pretrial justice when it is part of a comprehensive approach to system change.

Background on the Guidance

- PSA – a validated actuarial pretrial assessment tool – was developed in 2013 by AV (then LJAF)
- It was implemented in select early-adopting sites alongside a Decision-Making Framework



Responsible Use of the PSA

Recommended best practices include:

1. Do not include recommendations of detention in any matrix
2. Do not include recommendations of financial release conditions in any matrix
3. Avoid using provocative colors (esp. orange or red) in any matrix
4. Replace DMF with RCM and eliminate charge-based “bump-ups”

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Recommended best practices include:

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3. Avoid using provocative colors (esp. orange or red) in any matrix
4. Replace DMF with RCM and eliminate charge-based “bump-ups”

Detention Omitted from Any Matrix

The constitutional right to release: The U.S. Supreme Court has held that the vast majority of people arrested are entitled to release before trial.

"In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."

U.S. v. Salerno, 281 U.S. 739 (1987)

Absent a right to pretrial release, "the presumption of innocence… would lose its meaning."

Stack v. Boyle, 342 U.S. 1 (1951)

Detention Omitted from Any Matrix

- The U.S. Constitution does not directly address when a judge can order someone **detained** before trial.
- There are Due Process-based **limits**, including:
  - Detention is a **last resort**—and only permitted when no conditions of release will provide a reasonable assurance that the person will not flee or commit a serious offense
  - Detention is permitted only after **full due process**
- State law and court decisions typically provide guidance on when detention is permitted in a given state.

Detention Omitted from Any Matrix

Together, this legal landscape means that:

- Detention should be determined by fed'l legal principles & state "eligibility net," rather than PSA scores
- Detention should never be the default. And a constitutional detention determination may **not be possible** at first appearance

Therefore, do not recommend detention in a release conditions matrix based on PSA scores.

Responsible Use of the PSA

Recommended best practices include:

1. Do not include recommendations of detention in any matrix
2. **Do not include recommendations of financial release conditions in any matrix**
3. Avoid using provocative colors (esp. orange or red) in any matrix
4. Replace DMF with RCM and eliminate charge-based "bump-ups"

Money Omitted from Any Matrix

Remember: Most people will succeed on pretrial release without any conditions other than a promise to return to court and stay out of legal trouble.

Money Omitted from Any Matrix

How should a judge set release conditions? Two main legal principles:

- If any conditions are imposed, they must be the **least restrictive necessary** to provide reasonable assurance of court appearance and public safety
- Any pretrial release conditions must be **individualized**

Money Omitted from Any Matrix

Three main legal principles of *financial* release conditions:

- Financial conditions may not be used to **intentionally detain**
- **Unaffordable financial conditions** will be subject to increased scrutiny
- A person's **ability to pay** must be assessed before setting financial conditions

Financial conditions should never be a default. And they must be individualized, if they're used at all. Therefore, they do not belong in a release conditions matrix.

Financial Release Conditions: Research

- Are financial conditions of release effective at promoting court appearance?
- Are financial conditions of release effective at promoting public safety?

"The reliable, credible evidence in the record from other jurisdictions shows that release on secured financial conditions **does not assure better rates of appearance or of law-abiding behavior before trial.**"

O'Donnell v. Harris County, 251 F. Supp. 3d 1052 (S.D. Tex. 2017)

Financial Release Conditions: Reality

- Financial conditions of pretrial release are extremely common across the country—and sometimes are a default applied to nearly everyone who is arrested.
- But this is beginning to change through litigation, legislation, and local policy improvement

Responsible Use of the PSA

Recommended best practices include:

1. Do not include recommendations of detention in any matrix
2. Do not include recommendations of financial release conditions in any matrix
3. **Avoid using provocative colors (esp. orange or red) in any matrix**
4. Replace DMF with RCM and eliminate charge-based "bump-ups"

Avoid Provocative Colors in Any Matrix

- Vast majority of people succeed on pretrial. Colors such as orange and red may needlessly raise concern and imply dangerousness.
- Recommended approach is to individually review cases and consider possible supports people may need to help them succeed while on pretrial release.

Avoid Provocative Colors in Any Matrix

Failure to Appear (FTA) Scaled Score	1 91% Likely Arrest-Free	2 85% Likely Arrest-Free	3 78% Likely Arrest-Free	4 68% Likely Arrest-Free	5 55% Likely Arrest-Free	6 47% Likely Arrest-Free
1 89% Likely to Appear						
2 85% Likely to Appear						
3 81% Likely to Appear						
4 73% Likely to Appear						
5 69% Likely to Appear						
6 65% Likely to Appear						

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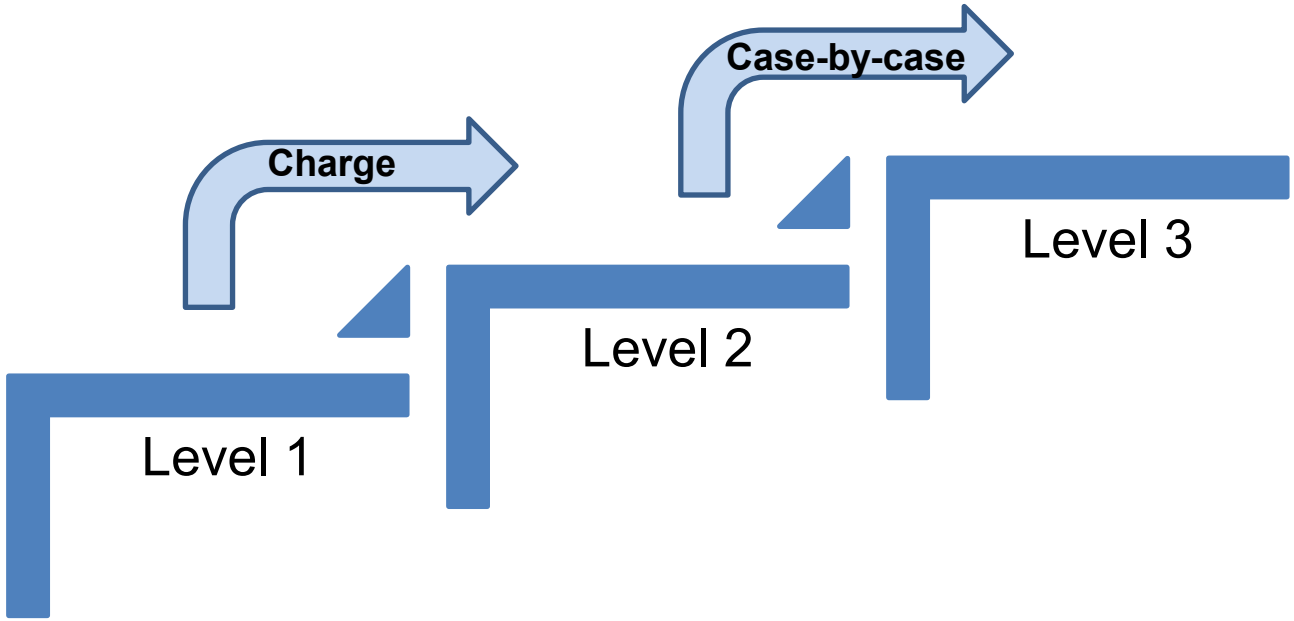
Eliminate Charge-based "Bump-ups"

- Pretrial decisions should be *individualized* and not based on charge



Replace DMF with RCM

The Release Conditions Matrix has two sections:

1. a grid, which is a structured tool that matches a person's scores on the two PSA scales (FTA and NCA) to presumptive levels of *pretrial release*

2. a table that lists the conditions associated with each pretrial release level

Replace DMF with RCM

Grid of Release Levels

Failure to Appear (FTA) Scaled Score	New Criminal Activity (NCA) Scaled Score					
	1 91% Likely Arrest-Free	2 85% Likely Arrest-Free	3 78% Likely Arrest-Free	4 68% Likely Arrest-Free	5 55% Likely Arrest-Free	6 47% Likely Arrest-Free
1 89% Likely to Appear	Release Level 1	Release Level 1				
2 85% Likely to Appear	Release Level 1	Release Level 1	Release Level 1	Release Level 1	Release Level 2	
3 81% Likely to Appear		Release Level 1	Release Level 1	Release Level 1	Release Level 2	Release Level 3
4 73% Likely to Appear		Release Level 1	Release Level 1	Release Level 1	Release Level 2	Release Level 3
5 69% Likely to Appear		Release Level 2	Release Level 2	Release Level 2	Release Level 2	Release Level 3
6 65% Likely to Appear				Release Level 3	Release Level 3	Release Level 3

Table of Release Conditions

	Pretrial Release Level		
Release Activities and Conditions	1	2	3
Mandatory Statutory Conditions	Yes	Yes	Yes
Court Date Notifications	Yes	Yes	Yes
Criminal History Checks Once per Month		Yes	Yes
Check-in Once per Month			Yes
Other Case-Specific Conditions			If court-ordered

Translating Principles into Practice

1. Create a committee
   - Judges, prosecutors, defense lawyers, pretrial services
2. Items for committee to discuss:
   - Legal principles
   - Research
   - Inventory pretrial resources
   - Local data (if available)
3. Prepare the matrix (grid and table)
4. Monitor implementation

TAB 3

Ability-to-Pay Matrix – Annual Review

NOTES:

Code of Judicial Administration, Appendix J.

ABILITY-TO-PAY MATRIX - PRETRIAL RELEASE

November 23, 2020

2021 Poverty Guidelines

ANNUAL INCOME	Poverty Level			
Family Size	≤ 100%	101% - 150%	151% - 199%	200+%
1	$ 12,880.00	$12,881 - $19,320	$19,321 - $25,759	$ 25,760
2	$ 17,420.00	$17,421 - $26,130	$26,131 - $34,839	$ 34,840
3	$ 21,960.00	$21,961 - $32,940	$32,941 - $43,919	$ 43,920
4	$ 26,500.00	$26,501 - $39,750	$39,751 - $52,999	$ 53,000
5	$ 31,040.00	$31,041 - $46,560	$46,561 - $62,079	$ 62,080
6	$ 35,580.00	$35,581 - $53,370	$53,371 - $71,159	$ 71,160
7	$ 40,120.00	$40,121 - $60,180	$60,181 - $80,239	$ 80,240
8	$ 44,660.00	$44,661 - $66,990	$66,991 - $89,319	$ 89,320
9	$ 49,200.00	$49,201 - $73,800	$73,801 - $98,399	$ 98,400
10	$ 53,740.00	$53,741 - $80,610	$80,611 - $107,479	$ 107,480
For each add'l person add $4,540				
78B-22-202				

If monetary bail is deemed a least restrictive, reasonably available condition necessary to ensure appearance, below is the recommended amount:

	Poverty Level:	≤ 100%	101% - 150%	151% - 199%	200+%
PSA FTA Risk Score (Appearance Rate**):	**FTA 1** (90%)	$0	$0	$0	$0
	FTA 2 (85%)	$0	$0	$0	$0
	FTA 3 (80%)	$0	$0	$0	$0
	FTA 4 (69%)	$100	$250	$750	$1,000
	FTA 5 (65%)	$250	$500	$1,250	$2,500
	FTA 6 (60%)	$500	$1,000	$2,500	*$5,000

***Avg appearance rate for individuals with the same risk score in the PSA validation study.*

Notes:

Utah Code §77-20-1(4)(c): "If the court determines a financial condition, other than an unsecured bond, is necessary to impose on an individual as part of the individual's pretrial release, the court shall consider the individual's ability to pay when determining the amount of the financial condition."

*Setting monetary bail is a highly fact dependent decision. The recommended amounts do not reflect the maximum amount a judge may order. Judges should ordinarily impose monetary bail based on a person's ability-to-pay. However, judges continue to have the same discretion to deviate from the recommended amounts as they had under the Uniform Fine and Bail Schedule, provided judges conduct an individualized assessment of ability-to-pay and risk. For example, if the defendant's income is higher than 200% of the poverty level and the circumstances surrounding the arrest or charge indicate a significant flight risk, a judge might determine that a higher monetary amount is necessary to incentivize that particular defendant to appear in court.

The purpose behind all forms of financial release (secured bond, unsecured bond, cash, etc.) is to incentivize an individual to appear in court. There is no rational relationship between money and public safety, so the criminal activity scores on the PSA are not factored into the recommended dollar amounts. No financial condition is recommended when the FTA score is below 4 because the likelihood of appearance for scores 1-3 is very high (1 = 90%, 2 = 85%, 3 = 80%), compared to a significant drop starting at FTA 4 (4 = 69%, 5 = 65%, 6 = 60%).

If the individual and/or the circumstances surrounding the case indicate a public safety risk, non-financial conditions should be considered in lieu of or in addition to financial conditions of release. If the individual poses a *significant* public safety risk, determine whether they are eligible for a no-bail hold under Utah Code §77-20-1(2). Under Utah Code §77-20-1(8), there is a presumption of detention if the individual is charged with criminal homicide or any offense for which the term of imprisonment may include life. Judges may delay issuing a pretrial status order if a prosecutor files a motion for detention under Utah Code §77-20-1(6).

Note: Surety bail agents are only liable for bringing a defendant to court. They are not liable if the defendant commits a new offense. In fact, if the defendant commits a new crime while out on a secured bond, the agent may be released from its obligations.

The maximum recommended amount is $5,000 because:

1. There is a presumption of own recognizance release;
2. The court is directed to determine the "least restrictive" condition necessary to "reasonably ensure" appearance in court;
3. Even for those with the highest FTA risk (FTA 6), the likelihood of appearance is still relatively high at 60%;
4. Collateral consequences of an over-reliance on money can include loss of housing, loss of jobs, loss of custody, car repossession, interruption in medication and medical care, etc.;
5. Holding low-risk defendants for even 2-3 days increases their risk of recidivism by almost 40% compared those held no more than 24 hours; and
6. Public safety risk will be considered separately and, in addition to, failure to appear risk.

The ability-to-pay matrix may be used to determine monetary bail amounts for every financial condition type including cash, credit/debit cards, secured bonds, and unsecured bonds.