



## JOINT STATEMENT IN SUPPORT OF THE USE OF PRETRIAL RISK ASSESSMENT INSTRUMENTS

MAY 10, 2017

The United States and all fifty states prohibit excessive bail; forty-eight states have a constitutional or statutory presumption in favor of releasing all but a specified few people before trial.<sup>1</sup> The Fourteenth Amendment to the United States Constitution provides that no state shall “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” “There is no discretion to refuse to reduce excessive bail...,” *Stack v. Boyle*, 342 U.S. 1, 6 (1951). “In our society, liberty is the norm and detention prior to trial or without trial is the carefully limited exception.” *Salerno v. United States*, 481 U.S. 739, 755 (1987).

Yet, despite the existence of the Excessive Bail, Due Process, and Equal Protection clauses, the current system of pretrial detention and release unfairly and disproportionately affects African-American and Hispanic people:

- Statistically, African-Americans are less likely to be released on recognizance than whites.<sup>2</sup>

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<sup>1</sup> <http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-eligibility.aspx>

<sup>2</sup> Estimates based on population statistics from Table 1 in Karen R. Humes, Nicholas A. Jones, and Roberto R. Ramirez, “Overview of Race and Hispanic Origin: 2010,” 2010 Census Briefs, March 2011, [www.census.gov/prod/cen2010/briefs/c2010br-02.pdf](http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf) and jail population statistics from Table 6 in Todd Minton, 2012, p. 6.

- Historically, the rate of detention for African-Americans has been five times higher than whites and three times higher than Hispanics.<sup>3</sup>
- African-Americans have money bail imposed at higher amounts than whites.<sup>4</sup>

While there are concerns that the use of pretrial risk assessment instruments fails to address existing racial bias in the criminal justice system, those **concerns should not be used to deter the use of pretrial risk assessment, but should instead be used to guide protocols** for implementation, data collection and analysis; to identify points in the system which may require amelioration; and to act as the basis for ongoing monitoring by advocates and community groups external to the system. Validated pretrial risk assessment instruments have been shown to **increase rates of pretrial release, including people of color**, while maintaining high rates of court appearance and public safety. For example:

- In Washington, DC, where no one accused of a crime is detained due to inability to pay and 80% of arrestees are African-American<sup>5</sup>, 90% of arrestees are released pretrial without using a financial bond.<sup>6</sup>
- In New Jersey, the recent introduction of a statewide pretrial risk assessment instrument has resulted in pretrial release in 90% of cases, and detention hearings resulting in only 10% of people being held until trial. While the exact impact on African-Americans and Hispanics is not yet known, these populations made up 71% of the jail population before the use of the pretrial risk assessment instrument.<sup>7</sup>
- In 2012, Colorado introduced a pretrial risk assessment instrument into their existing county pretrial services programs for those arrested and booked into jails. In counties that conducted analyses, participation in the pretrial services programs (utilizing pretrial risk assessment) by African-Americans increased the dismissal rate to 34% (compared to 21% for African-Americans with no pretrial services). African-Americans who received pretrial services were more than 1.6 times as likely to have their cases dismissed compared to African-Americans not receiving those services.<sup>8</sup>

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<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Washington Lawyers' Committee on Civil Rights and Urban Affairs, Racial Disparities in Arrests in the District of Columbia, 2009-2011 (2013). [https://www.washlaw.org/pdf/wlc\\_report\\_racial\\_disparities.pdf](https://www.washlaw.org/pdf/wlc_report_racial_disparities.pdf)

<sup>6</sup> Pretrial Services Agency for the District of Columbia, 2016 (FY) Release Rates for DC Pretrial Defendants (March 2017).

[psa.gov/sites/default/files/2016%20Release%20Rates%20for%20DC%20Pretrial%20Defendants.pdf](https://psa.gov/sites/default/files/2016%20Release%20Rates%20for%20DC%20Pretrial%20Defendants.pdf)

<sup>7</sup> Marie VanNostrand, Luminosity in conjunction with the Drug Policy Alliance, New Jersey Jail Population Analysis: Identifying Opportunities to Safely and Responsibly Reduce the Jail Population (March 2013). [www.drugpolicy.org/sites/default/files/New\\_Jersey\\_Jail\\_Population\\_Analysis\\_March\\_2013.pdf](http://www.drugpolicy.org/sites/default/files/New_Jersey_Jail_Population_Analysis_March_2013.pdf)

<sup>8</sup> Jessica Eaglin and Danyelle Solomon, Brennan Center for Justice, Reducing Racial and Ethnic Disparities In Jails: Recommendations for Local Practice (2015).

[www.brennancenter.org/sites/default/files/publications/Racial%20Disparities%20Report%20062515.pdf](http://www.brennancenter.org/sites/default/files/publications/Racial%20Disparities%20Report%20062515.pdf)

- After the introduction of the validated pretrial risk assessment instrument in Multnomah County, Oregon, the new-offense rate for African-American youths dropped from 23 to 13 percent; the African-American release rate at initial screening rose from 44 to 51 percent; and the release rate at preliminary hearings rose from 24 to 33 percent.<sup>9</sup> Before the employment of the pretrial risk assessment instrument, African-American youth were more likely to be detained, and less likely to be diverted than white youths.

The process of validating pretrial risk assessments requires analyzing data and outcomes to ensure that the instrument accurately predicts failure-to-appear rates and new arrests while on pretrial status, with no predictive bias due to race or gender. The pretrial release data studied after implementation of the Laura and John Arnold Foundation's Public Safety Assessment-Court tool used statewide in Kentucky shows that once an arrestee has been classified into one of five categories (low, low-moderate, moderate, moderate-high, and high), the person classified performs at virtually the same percentage, regardless of race, in the areas of making court dates and not committing new criminal activity. The Arnold Foundation reports that "black and white defendants at each risk level fail at virtually indistinguishable rates, which demonstrates that the [pretrial risk assessment tool] is assessing risk equally well for both whites and blacks, and is not discriminating on the basis of race."<sup>10</sup> Likewise, the Virginia Pretrial Risk Assessment Instrument-Revised has also been confirmed as race and gender neutral.

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See also Isami Arifuku & Judy Wallen, Public Welfare Found., *Racial Disparities at Pretrial and Sentencing and the Effect of Pretrial Services Programs* 23, 29, A1 (2012).

<sup>9</sup> The Sentencing Project, *Reducing Racial Disparity in the Criminal Justice System: A Manual for Practitioners and Policymakers* (2008).

<sup>10</sup> Laura and John Arnold Foundation, *Results from the First Six Months of the Public Safety Assessment – Court™ in Kentucky*, p. 4 (July 2014). [www.arnoldfoundation.org/wp-content/uploads/2014/02/PSA-Court-Kentucky-6-Month-Report.pdf](http://www.arnoldfoundation.org/wp-content/uploads/2014/02/PSA-Court-Kentucky-6-Month-Report.pdf).

**Therefore, the American Council of Chief Defenders, Gideon’s Promise, the National Association for Public Defense, the National Association of Criminal Defense Lawyers, and the National Legal Aid and Defenders Association strongly endorse and call for the use of validated pretrial risk assessment in all jurisdictions, as a necessary component of a fair pretrial release system that reduces unnecessary detention and eliminates racial bias, along with the following checks and balances:**

- Data used in the development of pretrial risk assessments must be reviewed for accuracy and reliability;
- Data collection must include a transparent and periodic examination of release rates, release conditions, technical violations or revocations and performance outcomes by race to monitor for disparate impact within the system;
- Data collection should avoid interview-dependent factors (such as employment, drug use, residence, family situation, mental health) and consist solely of non-interview dependent factors (such as prior convictions, prior failures to appear) as intensive studies have shown that when sufficient objective, non-interview factors were present, none of the interview-based factors improve the predictive analytics of the pretrial risk assessment, but significantly increase the time it takes to complete the pretrial risk assessment;<sup>11</sup>
- Defense counsel must be included in the process of selecting a pretrial risk assessment tool for their jurisdiction;
- Pretrial risk assessments should be used as part of a deliberative, adversarial hearing that must involve defense counsel and prosecutors before a judicial officer;
- Defense counsel must have the time, training, and resources to learn important information about the client’s circumstances that may not be captured in a pretrial risk assessment tool and adequate opportunity to present that information to the court;
- Requests for preventive detention by the state must require an additional hearing where the government proves by clear and convincing evidence that no condition or combination of conditions will reasonably assure the person’s appearance in court or protect the safety of the community; and,
- The system must provide expedited appellate review of any detention decision.

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<sup>11</sup> See, “Developing a National Model for Pretrial Risk Assessment,” *LJAF Research Summary*, Nov. 2013, [www.arnoldfoundation.org](http://www.arnoldfoundation.org).