

JOINT STATEMENT: PRETRIAL RISK ASSESSMENT INSTRUMENTS

UPDATED MARCH 2019*

The United States and all fifty states and the District of Columbia (D.C.) prohibit excessive bail; forty-eight states and D.C. have a constitutional or statutory presumption in favor of releasing all but a specified few people before trial.¹ 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, current systems of pretrial detention that rely on money bail irrationally penalize those of limited financial means, are often imposed in an arbitrary and indiscriminate manner, and unfairly and disproportionately affect people of color:

- Statistically, African-Americans are less likely to be released on recognizance than whites.²
- Historically, the rate of detention for African-Americans has been five times higher than whites and three times higher than Hispanics.³
- African-Americans have money bail imposed at higher amounts than whites.⁴

There are also concerns that the use of pretrial risk assessment instruments as an alternative to or in conjunction with the use of money bail fails to address existing racial and ethnic bias in the criminal justice system, and **those concerns should 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.

*On May 10, 2017, ACCD, Gideon’s Promise, NAPD, NACDL and NLADA issued a joint statement endorsing the use of validated risk assessment instruments (RAI)s with a set of necessary checks and balances. The statement was motivated both by a joint concern about the harm and injustice of wealth-based detention and by a recognition that RAIs have played a critical role in addressing unjust pretrial practices in a number of jurisdictions. Based on these successes, our organizations viewed these instruments as important components of the effort to end the use of money bond systems. Since that time, many thoughtful concerns have been raised about the use of RAIs and their potential to exacerbate racial and ethnic disparities in pretrial decision making. In some jurisdictions, public defense organizations and others who work with impacted communities believe they can more effectively pursue fair pretrial justice reform without using RAIs. We recognize that in some instances RAIs can play an important role in helping jurisdictions to replace oppressive systems of wealth-based detention, while in other instances a fairer system of pretrial justice may be achieved without these instruments. We are united in our belief that deference as to whether, and how, to use any risk assessment instrument should be given to local criminal defense and impacted community stakeholders who best understand the needs and circumstances of their own jurisdictions. Our statement is updated to reflect this. As new data, information, and methodologies continue to be developed, we will continue to re-evaluate this issue.

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

² 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 and jail population statistics from Table 6 in Todd Minton, 2012, p. 6.

³ Ibid.

⁴ Ibid.

The process of validating pretrial risk assessments requires analyzing data and outcomes to ensure that the instrument accurately reflects an evaluation of the risk of new arrest or failure-to-appear while on pretrial status, with no predictive bias due to race, ethnicity, or gender.

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 & Defender Association support the use of a validated pretrial risk assessment as a component of a fair pretrial release system, in any jurisdiction where it is evident, based on input from the local criminal defense stakeholders and impacted communities who understand the unique circumstances surrounding pretrial release in their jurisdiction, that it will serve to reduce unnecessary detention and help to eliminate racial and ethnic bias in the outcome of the pretrial decisions, and where it is used along with the following checks and balances:

- Data used in the development of pretrial risk assessments should be reviewed for accuracy and reliability;
- Data collection should include a transparent and periodic examination of release rates, release conditions, technical violations or revocations and performance outcomes by race and ethnicity 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 do significantly increase the time it takes to complete the pretrial risk assessment;
- Local criminal defense stakeholders and impacted communities should be included in the process of selecting a pretrial risk assessment tool for their jurisdiction;
- Any proceedings before a judicial officer in which a risk assessment instrument is utilized should be an adversarial hearing which provides due process protections for the accused, including the right to counsel;
- Pretrial risk assessments should only be used as a measurement tool to help courts determine the least restrictive conditions necessary, not to justify detention;
- Defense counsel should be afforded 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 should 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, with a presumption of release if this standard is not met; and
- The system should provide expedited appellate review of any detention decision.

