

Pretrial Committee Meeting Minutes

October 19, 2020 9:30-11:30am

- I. Welcome and Introductions – Committee Chair Judge Mark Spitzer was unable to join the meeting due to a trial. Dan Miller, Drug Resource Prosecutor at the Indiana Prosecuting Attorneys Council and former co-chair of the Pretrial Workgroup, led the meeting as Judge Spitzer’s designee.

Committee Members in Attendance:

- Judge Lori Quillen – Owen Circuit Court 1
- Magistrate Jason Custer – Allen Superior Court
- Judge Mary Ellen Diekhoff – Monroe Circuit Court 5
- Judge Annie Christ – Marion Superior Court G24
- Magistrate Daniel Moore – Tippecanoe Circuit and Superior Courts
- Christine Kerl – Chief Probation Officer, Marion County
- Stephanie Ruggles – Director, Hamilton County Pretrial Services
- Bernice Corley – Executive Director, Indiana Public Defenders Council
- Troy Hatfield – Deputy Chief Probation Officer, Monroe County
- Steve Luce – Executive Director, Indiana Sheriffs’ Association

Additional Attendees:

- Judge Thomas Felts – Allen Circuit Court
- Bill Carmichael – President/CEO, American Surety Company
- Marianne Halbert – Criminal Justice Director, NAMI Indiana
- Vicki Becker – Elected Prosecutor, Elkhart County
- Chuck Phillips – Pretrial Coordinator, Starke County
- Dr. Evan Lowder – Assistant Professor, George Mason University
- Melanie Golumbeck – Chief Probation Officer, Porter County
- Susan Bentley – Chief Probation Officer, Hendricks County
- Kim Maus – Assistant Chief Probation Officer, Bartholomew County

IOCS Staff:

- Angie Hensley-Langrel
- Jamie Bergacs
- Michelle Shorter
- Chris Biehn
- Lindsay Carter
- Lora Moeller
- Rachael McKee
- Janelle Johnson

- Lisa Thompson
- Sam Goodson

II. Pretrial Background and History – Dan Miller

This is a newly formed Committee and, while some have been longtime members of the previous EBDM Pretrial Workgroup, many are new. To ensure we are all starting from the same foundation, this meeting will provide an orientation to the history and evolution of pretrial in Indiana.

The Committee to Study Evidence-Based Pretrial Release was created in 2013 under Chief Justice Brent Dickson. At that time, the Committee was charged with examining and evaluating pretrial risk assessment tools being used by courts across the country. In 2014, Chief Justice Loretta Rush expanded the Committee's charge to include studying and enabling implementation of an evidence-based pretrial system in Indiana and developing a pilot to assess feasibility of using a risk assessment in pretrial release decision making.

Indiana joined the Evidence Based Decision Making Initiative through the National Institute of Corrections in 2015, along with six counties. Through system mapping, the State Team and all counties identified pretrial as a change target.

Technical assistance became available through NIC and the Committee to Study Evidence-Based Pretrial and EBDM merged, with a Pretrial Workgroup continuing the work of the Committee under the EBDM State Team. Five additional counties were added, and the pretrial pilot began in 2016. Pilot counties were guided by detailed expectations developed by the State Team and informed by NIC's Framework for Pretrial Justice, as well as technical assistance through NIC. Information regarding the pilot is available in the Pretrial Practices Manual on the Indiana Pretrial Release web page.

The pilot included a research component, primarily focused on validation of the Indiana Risk Assessment System - Pretrial Assessment Tool (IRAS-PAT), which is ongoing. Additional research projects, such as the pretrial supervision study reviewed at the August 10 Pretrial Workgroup meeting, also focus on the pilot counties. These additional research projects continue, as well.

In 2017 the Indiana Supreme Court adopted Criminal Rule 26. CR26 encourages courts to release arrestees who do not pose a substantial flight or public safety risk without monetary bail or surety "subject to such restrictions and conditions as determined by the court" and counties should "utilize the results of an evidence-based risk assessment" when determining risk. There is a distinction between CR26 and the activities of the pilots as well as the expectations for counties seeking certification – the pilot project and the certification rules encompass much more than is outlined in CR26 and require counties to develop comprehensive pretrial systems in line with legal and evidence-based practices and essential elements as outlined by NIC.

Throughout development, Indiana's state and local level teams have looked to nationally recognized sources to inform expectations and practices. NIC's Framework for Pretrial Justice and technical assistance through NIC has been a significant part of this. Indiana has had the opportunity to send many state and local stakeholders to NIC's Pretrial Executive Orientation, both in Colorado at their training center as well as hosting faculty in Indiana to provide the training twice, in August 2017 and April 2019.

The National Association of Pretrial Services Agencies (NAPSA) is another valued resource. NAPSA published the first Pretrial Release Standards in 1978 and the most recently updated version was released this year. NAPSA holds an annual conference for pretrial professionals and local teams and stakeholders are encouraged to attend when possible.

Indiana also has relationships with researchers who are evaluating Indiana's implementation and practices, as noted earlier. The IRAS-PAT is being validated in all eleven pilot counties and researchers have expanded their scope to evaluate supervision practices, racial disparities in pretrial, and other issues. Dr. Brad Ray of Wayne State University and Dr. Evan Lowder of George Mason University have been lead researchers on pretrial-specific projects and remain engaged.

Ms. Goodson (IOCS) noted that research has been an integral part of Indiana's development and implementation from the beginning and this focus has, in many ways, made the state a leader in pretrial reform. The national conversation around pretrial is ongoing and concerns are frequently raised regarding the use of risk assessments and other pretrial practices. These concerns often stem from jurisdictions that implement assessment tools and other practices in the absence of research and validation. The concerns raised by national groups are not without merit, and Indiana's stakeholders work hard to ensure that those concerns are acknowledged, that data drives our development and implementation, and that practices are evaluated to mitigate and address concerns as much as possible.

III. Pretrial Practices Manual – Sam Goodson

The Pretrial Practices Manual was developed as part of the pilot process and outlines legal foundations of pretrial in Indiana and nationally, current research and best practices, data points being collected by the pilots, and information on each pilot county. The Manual is available for review on the Indiana Pretrial Release web page.

The manual has not been updated in some time and moving forward the Committee will likely be asked to review this document and consider updates and revisions to ensure it remains a useful resource for counties.

IV. Pretrial Rules and Certification Update – Jamie Bergacs

In 2019, the official pretrial pilot phase was nearing an end and discussions began regarding next steps for pretrial. After considering a variety of options the decision was made to

develop and implement a voluntary certification process, modeled on the Problem-Solving Court certification process already in place. The EBDM Pretrial Workgroup formed a subcommittee – made up of representatives from relevant disciplines including prosecution, defense, judicial officers, pretrial coordinators, and others – to develop the Pretrial Services Rules. The draft rules were piloted in the summer of 2019 to evaluate the applicability of the rules and process to counties. IOCS staff visited five counties (four pilots, one non-pilot) and a summary of this pilot certification was developed for the Pretrial Workgroup. Following that, the rules were posted for public comment in the fall of 2019 before making final revisions. Judge Spitzer presented the final draft to the Judicial Conference Board of Directors in December 2019. The Board approved the rules and they went into effect January 1, 2020.

As discussed earlier, the Pretrial Services Rules go beyond Criminal Rule 26 and require counties to work toward full implementation of best practices in pretrial. Expectations include forming a local policy team, use of a structured decision making process (also known as a release matrix) to guide release decisions, use of least restrictive conditions and adherence to the risk principle, dedicated pretrial staff to supervise defendants as ordered by the court, and presence of defense counsel at initial hearings. The IOCS Certification Team is responsible for completing certification reviews, evaluating counties against the rules and the expectation of a best faith effort to move toward and implement best practices, with acknowledgement that there are often barriers to overcome and progress may take time. Both the IOCS Certification team and partner agencies, including IPAC and IPDC, have been and remain available to provide support and technical assistance to counties as needed.

Pilot counties have received grant funding from IOCS to support implementation. New counties may need additional funds to work toward implementation of best practices such as dedicated pretrial staff and defense counsel at initial hearings. Grant funding from IOCS is available to counties that are certified or are in the planning stages.

IOCS began receiving letters of intent shortly after January 1, at this time there are 26 counties in the planning stages and four – Grant, Hamilton, Jefferson, and Monroe – provisionally certified. The provisional certificate is valid for six months; prior to the expiration of the provisional certificate a full certification review is scheduled and, once completed, that certification is valid for up to three years.

V. Committee Activities and Role – Sam Goodson

With the adoption of the Pretrial Services Rules by the Judicial Conference Board of Directors, the Pretrial Workgroup that functioned under EBDM has been transformed into a Judicial Conference Committee. In recognition of the multidisciplinary nature of pretrial and the contributions of many stakeholders over the years, this Committee's makeup is unique among Judicial Conference Committees. Members include not only judicial officers but also pretrial coordinators and representatives from the Public Defenders Council, the

Prosecuting Attorneys Council, the Division of Mental Health and Addiction, and the Sheriff's Association. Each of these stakeholder groups are essential to implementation of effective pretrial systems at the local level and, as such, their perspectives are important within the Committee. In addition to the appointed members, Committee meetings remain open to members of the former EBDM Pretrial Workgroup; while these individuals are not formal or voting members, their perspectives and input remain valuable and are encouraged.

The primary work of the Committee will focus on issues related to the Pretrial Services Rules, certification, and related activities. Upcoming agenda items will include finalizing and approving the pretrial staff orientation required by the Rules, providing guidance on issues that come up during the certification process, and considering rule revisions if needed.

Additionally, the Committee will likely be called upon to support the work of the Justice Reinvestment Advisory Council (JRAC). Last year's Jail Overcrowding Task Force Report and the JRAC Report on Bail Reform and Pretrial Issues identified a variety of recommendations; advancing this work now falls to JRAC and it is expected that the Committee will be called upon, as there is likely to be overlap with pretrial.

Additionally, the Committee will review and approve research reports, as the EBDM Pretrial Workgroup has done historically. Currently there are three county-level validation report drafts that the Committee will review (Allen, Jefferson, and Hendricks), with more planned in the coming months. In addition, future research conducted by Dr. Lowder on behalf of IOCS will come through the Committee for review.

VI. Questions and Other Business

Ms. Becker (Prosecuting Attorney, Elkhart County) requested that the Committee consider adding a standing agenda item regarding pretrial news, to ensure the Committee remains aware of and responsive to the national conversation regarding pretrial.

VII. Adjourn

The next Pretrial Committee meeting is scheduled for Monday December 14 from 9:30am-11:30am. The meeting will take place via Zoom.

Pretrial Release Committee Meeting Minutes
December 14, 2020
9:30-11:30

I. Welcome and Introductions

Committee Chair, Judge Mark Spitzer, called the meeting to order and welcomed members and guests. Persons in attendance were as follows:

Committee Members:

- Judge Mark Spitzer, Committee Chair, Grant Circuit Court
- Shelby Bear, Pretrial Director, Jefferson County
- Bernice Corley, Executive Director, Indiana Public Defenders Council
- Magistrate Jason Custer, Allen Superior Court
- Judge Mary Ellen Diekhoff, Monroe Circuit Court 5
- Troy Hatfield, Deputy Chief Probation Officer, Monroe County
- Christine Kerl, Chief Probation Officer, Marion County
- Stephen Luce, Executive Director, Indiana Sheriff's Association
- Magistrate Daniel Moore, Tippecanoe Courts
- Judge Lori Quillen, Owen Circuit Court 1
- Stephanie Ruggles, Director, Hamilton County Pretrial Services
- Magistrate Paul Singleton, St. Joseph Superior Court

Additional Attendees:

- Vicki Becker, Elkhart County Prosecutor
- Susan Bentley, Chief Probation Officer, Hendricks County
- William Carmichael, President, American Surety Company
- Chris Cunningham, Director, Grant County Community Corrections
- Senior Judge Felts, Indiana Office of Court Services
- Lakisha Fisher, Pretrial Coordinator, Grant County
- Melanie Golumbeck, Chief Probation Officer, Porter County
- Marianne Halbert, Criminal Justice Director, NAMI Indiana
- Evan Lowder, Assistant Professor, George Mason University
- Kim Maus, Assistance Chief Probation Officer, Bartholomew County
- Devon McDonald, Director, Indiana Criminal Justice Institute
- Dan Miller, Drug Resource Prosecutor Indiana Prosecuting Attorneys Council
- Chuck Phillips, Pretrial Coordinator, Starke County
- Melissa Stephenson, Director, Grant County Correctional Services

IOCS staff in attendance included, Diane Mains, Angie Hensley-Langrel, Jamie Bergacs, Diane Haver, Chris Biehn, Lora Moeller, Lindsay Carter, Rachael McKee, and Janelle Johnson.

II. Approval of October 19, 2020 Meeting Minutes

The October 19, 2020 meeting minutes were presented. Members of the committee unanimously approved the meeting minutes.

III. Validation Studies

Dr. Evan Lowder provided a brief overview of the Indiana Risk Assessment System – Pretrial Assessment Tool (IRAS-PAT) validation studies that began in 2017. Reportedly, the screening tools utilized in Allen County, Hendricks County, and Jefferson County presented overall good findings. Dr. Lowder noted consistent interaction with representatives in each jurisdiction and found accuracy for all three tools. Committee members moved and seconded to approve the studies as presented in the meeting materials (attached) and to post the studies on the public pretrial website. All committee members approved the studies as presented and to post the studies on the public pretrial website.

IV. Certification Report

Ms. Jamie Bergacs reported that no new pretrial agency certifications have been issued since the last pretrial committee meeting. There are currently four certified pretrial agencies.

V. In the News

As reported, the Pretrial Justice Institute (PJI) recently issued a formal statement arguing to abolish the utilization of all pretrial risk assessment instruments (PRAIs) based on the rationale that all PRAIs present racial and economic bias against minorities and low-income populations. An academic response to PJI's statement was presented (attached) by Dr. Lowder, which is in support of the Pretrial Release Committee's commitment to uphold the use of PRAIs. While the academic response acknowledges concerns of disparity, it was noted that minorities are better represented when a risk assessment tool is utilized rather than no tool being utilized altogether. Dr. Lowder explained that the co-authors' position is from the research community and they will share with the committee any developments or responses from PJI.

Stephen Luce reported that the Indiana Sheriff's Association is working to develop a jail management system that will house jail data from across the state in one hub. Devon McDonald reported that prior to deploying the new system, it will be important to capture what data points will be needed for pretrial. It was recommended that the identification of pretrial data points be considered as a future agenda item for the Pretrial Release Committee.

VI. Misdemeanant Cases/Proposed Legislation

As reported, Senator Tallian introduced proposed legislation that mandates the release from custody of misdemeanor offenders and asked for feedback from the Pretrial Release Committee. Specifically, Senator Tallian asked for the preference of, and guidance from, the committee. Concern was raised that some jails overwhelmingly house offenders facing misdemeanor cases filed in the city courts at disproportionate rates than those of the filings in the county courts. Committee members agreed that such instances may be addressed through the certification process of pretrial agencies on an as-needed basis. However, such process will not capture those counties not seeking certification. It was also suggested that the concern may be resolved if misdemeanor charges are handled through cite and release. Because a consensus was not reached, committee members moved and seconded to state the concerns of the committee in a written memo to Senator Tallian. All committee members approved the motion. Judge Spitzer committed to drafting the memo.

VII. Language Access

Angie Hensley asked the committee to weigh in on their experiences with accessing the language line during the pretrial phase. Committee members asked if barriers are in place that prevent the utilization of language line and if a revision to the Pretrial Release Rules should be considered to include a language access plan as part of a certification requirement. Committee members moved and seconded to request that Lun Pieper, IOCS Staff Attorney for the Commission on Race & Gender Fairness and Language Access, review the Pretrial Release Rules and provide a recommendation to the committee as to whether or not the rules should include the above provision or to provide insight as to whether or not there are additional ways by which access is ensured. Angie Hensley committed to reaching out to Lun Pieper.

VIII. Pretrial Supervision with no Charges Filed

Committee members engaged in a thorough discussion to address how each respective pretrial agency addresses pretrial supervision requirements when no charges have been filed. As noted, an inmate may be held for up to 48 hours without charges filed and should be released after 48 hours if no charges have been filed. The discussion centered on what level of supervision may be imposed on individuals during the pretrial phase that have not had charges filed against them and the appropriate length of time such supervision conditions may be imposed. Reportedly, Hamilton County has a written policy and procedure that was developed in partnership with the local prosecutor's office. In short, the certified pretrial agency has delegated release authority and if charges are not filed within 60 days, the individual is moved to non-reporting status. The pretrial agency will periodically request status updates from the prosecutor's office. Stephanie Ruggles agreed to share the Hamilton County Pretrial Services Agency's written policy and procedure and also expressed openness to suggestions from the committee after its review.

IX. Prosecution and Defense Counsel at Initial Hearing

Jamie Bergacs presented to the committee that some counties seeking pretrial certification have encountered challenges to obtain active and committed defense representation during initial hearings. IOCS sought the opinion of the committee as to whether barriers of the like should prevent an agency from achieving certification. Committee members moved and seconded to allow for granting a provisional certification in such instances when a good-faith plan is set forth by the pretrial agency to acquire appropriate representation. Further, both IPAC and the Public Defender's Council agree to provide assistance to agencies faced with such challenges. All committee members were in favor of the motion.

X. Proposed 2021 Meeting Dates, Eastern Time Zone

The following meeting dates and times were announced for 2021:

- February 12 @ 9:30-11:30 a.m.
- April 9 @ 9:30-11:30 a.m.
- June 11 @ 9:30-11:30 a.m.
- August 13 @ 9:30-11:30 a.m.
- October 8 @ 9:30-11:30 a.m.
- December 3 @ 9:30-11:30 a.m.

XI. Other Business

Dan Miller announced his retirement from IPAC, effective December 31, 2020. At this time, a committee replacement has not been determined. Dan Miller requested to remain involved with the Pretrial Release Committee as a non-voting member.

Attachments

Allen Validation Final Report



Adobe Acrobat
Document

Hendricks Validation Final Report



Adobe Acrobat
Document

Jefferson Validation Final Report



Adobe Acrobat
Document

Academic Response to PJI



Adobe Acrobat
Document

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:

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

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

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

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/>

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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