Bail/pretrial release is a Constitutional right.

United States Constitution, Eighth Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.

"This traditional right to freedom before conviction permits unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction.... Unless this right to bail is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." Stack v. Boyle, 342 U.S. 1 (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).

In the recent Statement of Interest of the United States filed in *Varden v. City of Clanton*, No. 2:15-cv-34-MHT-WC, a case about improper bail practices in the State of Alabama, the federal government asserted that "It is the position of the United States that, as courts have long recognized, any bail or bond schedule that mandates payment of pre-fixed amounts for different offenses in order to gain pretrial release, without any regard for indigence, not only violates the Fourteenth Amendment's Equal Protection Clause, but also constitutes bad public policy."

Colorado Constitution, Article II, Section 20, Excessive Bail, Fines or Punishment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.

Colorado Constitution, Article II, Section 19. Right to Bail-Exceptions

(1) All persons shall be bailable by sufficient sureties pending disposition of charges except:
   (a) For capital offenses when proof is evident or presumption is great; or
   (b) When, after a hearing held within ninety-six hours of arrest and upon reasonable notice, the court finds that proof is evident or presumption is great as to the crime alleged to have been committed and finds that the public would be placed in significant peril if the accused were released on bail and such person is accused in any of the following cases:
      (I) A crime of violence, as may be defined by the general assembly, alleged to have been committed while on probation or parole resulting from the conviction of a crime of violence;
      (II) A crime of violence, as may be defined by the general assembly, alleged to have been committed while on bail pending the disposition of a previous crime of violence charge for which probable cause has been found;
      (III) A crime of violence, as may be defined by the general assembly, alleged to have been committed after two previous felony convictions, or one such previous felony conviction if such conviction was for a crime of violence, upon charges separately brought and tried under the laws of this state or under the laws of any other state, the United States, or any territory subject to the jurisdiction of the United States which, if committed in this state, would be a felony; or

2) Except in the case of a capital offense, if a person is denied bail under this section, the trial of the person shall be commenced not more than ninety days after the date on which bail is denied. If the trial is not commenced within ninety days and the delay is not attributable to the defense, the court shall immediately schedule a bail hearing and shall set the amount of the bail for the person.

2.5) (a) The court may grant bail after a person is convicted, pending sentencing or appeal, only as provided by statute as enacted by the general assembly; except that no bail is allowed for persons convicted of:

(I) Murder;

(II) Any felony sexual assault involving the use of a deadly weapon;

(III) Any felony sexual assault committed against a child who is under fifteen years of age;

(IV) A crime of violence, as defined by statute enacted by the general assembly; or

(V) Any felony during the commission of which the person used a firearm.

(b) The court shall not set bail that is otherwise allowed pursuant to this subsection (2.5) unless the court finds that:

(I) The person is unlikely to flee and does not pose a danger to the safety of any person or the community; and

(II) The appeal is not frivolous or is not pursued for the purpose of delay.

(3) This section shall take effect January 1, 1995, and shall apply to offenses committed on or after said date.

The exceptions enumerated in the Colorado Constitution "exclude other exceptions." Palmer v. District Court, 398 P.2d 435, 437 (Colo. 1965).

Reasonable bail must be allowed if district attorney fails to present evidence in opposition to bail of proper nature and kind. Lucero v District Court of Twelfth Judicial Dist., 188 Colo. 67, 532 P.2d 955 (1975).

The Colorado Bail Statutes — 16-4-101, C.R.S., *et seq.*

Overall intent of the new Colorado bail statutes:

- ★ Presume release under the least restrictive conditions unless the defendant can be denied bail[19] under the Colorado Constitution (16-4-103 (4)(a), C.R.S.).
- ★ Individualize all release and detention conditions (16-4-103 (3)(a), (4)(a), (4)(b), and (5), C.R.S.).
- ★ Avoid unnecessary pretrial incarceration (16-4-103(3)(a), (4)(b), and (5), C.R.S.).
- ★ Consider the defendant's pretrial risk to public safety and for failure to appear in court through an empirically developed risk assessment instrument (16-4-103 (3)(b); 16-4-106 (4)(c), C.R.S.; and 16-4-107, C.R.S.).

The following section explains the important provisions of the new bail statutes that all practitioners must know.

Section 16-1-104, C.R.S., Current Definition of Bail

Bail no longer means money. Money is now a financial condition of release. Bail is defined as "a security, which may include a bond with or without monetary conditions, required by the court for the release of a person in custody set to provide reasonable assurance of public safety and court appearance." This is an

19. Under Section 19 of Article II of the Colorado Constitution, the defendant can be denied bail because he/she is charged with a Capital offense or a crime of violence while on probation or parole resulting from a conviction of a crime of violence; or a crime of violence alleged to have been committed while on bail pending the disposition of a previous crime of violence charge for which probable cause has been found; or a crime of violence alleged to have been committed after two previous felony convictions, or one such previous felony conviction was for a crime of violence, upon charges separately brought and tried under the laws of this state or under the laws of any other state, the United States or any territory subject to the jurisdiction of the United States, or any territory subject to the jurisdiction of the United Stated which, if committed in this state, would be a felony.

important change. It mandated the change throughout Title 16, replacing the prior language of "amount of bail and type of bond" language (when bail meant money) to "type of bond and conditions of release" which *could* include money as a condition.

Section 16-4-101, C.R.S., Eligibility/Bailable Offenses

This section mirrors Article II, Section 19 of the Colorado Constitution except for one addition. A section was added in the House of Representatives that allows the court to deny bail in two categories of offenses not enumerated in the Colorado Constitution: Possession of a Weapon by a Previous Offender (POWPO) cases and Sexual Assault on a Child 14 or younger and seven or more years younger than the accused. **These added sections should be challenged as unconstitutional, and severable from the other sections enumerating crimes that are contained in the Constitution.** In legislative testimony, the Attorney General's office testified that this added language was "constitutionally suspect" and case law is clear that the enumerated exceptions to bail in the Colorado Constitution, Article II, Section 19 "exclude other exceptions." *Palmer v. District Court,* 156 Colo.284, 287, 398 P.2nd 435, 437 (1965).

Section 16-4-102, C.R.S., Right to Bail

Essentially the same as the prior law, this section mandates that the court set bail for bailable offenses and encourages the release of constitutionally bailable defendants. It also requires the court to hold "a hearing to determine bond and conditions of release."

Section 16-4-103, C.R.S., Setting and Selection Type of Bond/Criteria

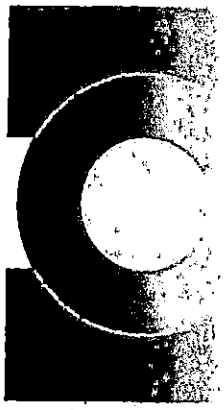
This section is **substantially different from** prior law and contains most of the changes as recommended by CCJJ. The language in this section requires the court to:

- ★ Determine the type of bond and conditions of release;
- ★ Review bond and conditions upon return of an indictment or filing of an information;
- ★ Consider a presumption of release under the least-restrictive conditions unless the defendant is unbailable pursuant to the constitutional preventive detention provisions;
- ★ Individualize the conditions of release (even with bond schedules which, if used, shall consider individualized risk and circumstances);
- ★ Consider the defendant's financial condition or situation;
- ★ Set reasonable financial conditions and set non-statutory conditions to be tailored to address a specific concern;
- ★ Consider ways to avoid unnecessary pretrial detention; and
- ★ Use an empirically-developed risk assessment instrument, as available and practicable.

The section allows the court to consider all traditional bail setting criteria, as they may be appropriate (work, stable employment, ties to the community, etc.) since those factors remain in the statute.

Section 16-4-104, C.R.S., Types of Bond

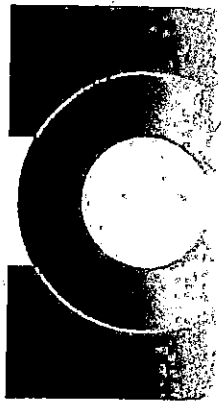
The new statute now lists four bond types, each defined by its restrictive nature. The presumption is that the court should consider the least restrictive bond type first.



The new statute in Section 16-4-104, C.R.S., now lists four bond types, each defined by its restrictive nature. The presumption is that the court should consider the least restrictive bond type first.

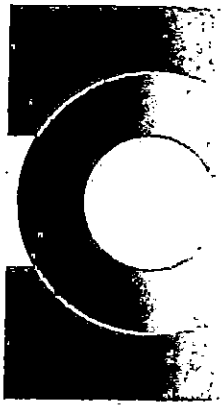
- ★ Subsection (a) bonds are unsecured personal recognizance bonds with only statutorily mandated conditions.
- ★ Subsection (b) bonds are unsecured personal recognizance bonds with additional non-mandatory, tailored conditions.
- ★ Subsection (c) bonds are bonds with conditions that include secured monetary conditions when reasonable and necessary to ensure court appearance or public safety. A 2014 amendment to this section provides that when there is a monetary condition of bond, the method of posting that monetary condition shall be "selected by the person to be released unless the court makes factual findings on the record with respect to the person to be released that a certain method of bond, as selected by the court, is necessary to ensure the appearance of the person in court or the safety of any person, persons or the community." This added section was drafted to address the issues of cash only bonds.
- ★ Subsection (d) bonds are bonds with conditions that include real estate conditions.

Under prior law, district attorneys had to consent to a personal recognizance bond in certain circumstances involving prior convictions, willful failures to appear, and status on another personal recognizance bond. **The changed provision allows the court to grant another unsecured personal recognizance bond as long as additional non-mandatory conditions are placed on the unsecured bond.**



A change to section 16-4-104, C.R.S. allows the court to grant an unsecured personal recognizance bond without consent of the prosecutor in situations that previously required consent, as long as additional non-mandatory conditions are placed on the unsecured bond.

Section 16-4-105, C.R.S., Conditions of Release



Court shall consider other supervision techniques shown by research to be effective for court appearance and public safety. Court (and defense counsel) must make efforts to be educated on the research.

★ This section makes it clear that whatever the conditions of bond, *a bond is only forfeited for failure to appear.*

★ The mandatory statutory conditions from prior law (waiver of extradition, no new offenses, protection order for witnesses) remain in statute.

★ *Requires* the court to conduct a hearing upon motion seeking relief from bond conditions.

★ Allows court to decide what conditions will impact court appearance and public safety.

★ Makes clear that defendant cannot be ordered to treatment as condition of bond without his/her consent, but can be ordered for drug and alcohol testing.

★ Court shall consider other supervision techniques shown by research to be effective for court appearance and public safety. Court (and defense counsel) must make efforts to be educated on the research.

Section 16-4-106, C.R.S., Pretrial Service Programs

Pretrial programs now have their own section outlining that the purpose of pretrial is to assist with court appearance and public safety but also to decrease unnecessary detention.

Also,

★ There is an Advisory Board for pretrial that creates a plan for the program that is submitted to the Chief Judge.

★ This Board may include a bail bondsman who conducts business in the judicial district.

★ Chief Judge shall use evidence-based decision making and make ongoing efforts to establish a pretrial program, if there is none in the district/county.

Section 16-4-107, C.R.S., Hearing after the Setting of Bond Conditions

If the defendant cannot meet the monetary condition of bond seven days after it is set, the defendant may file a written motion for reconsideration of the monetary condition and the court shall conduct a hearing within 14 days.

This section states that, if the defendant cannot meet the monetary condition of bond *seven days* after it is set, the defendant may file a written motion for reconsideration of the monetary condition and the court *shall conduct a hearing within 14 days.* Caveat: the motion must

include additional evidence not initially considered by the court in setting bond. If there is no new evidence, the motion can be summarily denied. Language requires the court to consider the risk assessment, if administered.

Amendments to this section in the 2014 legislative session make it clear that the defendant gets only one "7 day motion" that is required to be heard within 14 days. However, **"nothing in this section shall interfere with the defendant's right to file a motion for bond reduction or change in bond conditions pursuant to 16-4-109, C.R.S."**

Section 16-4-108, C.R.S., When Original Bond Continued

This section contains the same statutory language that existed prior to 2013. The original bond in a case shall continue until final disposition of the case.

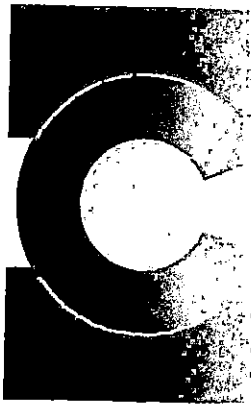
Section 16-4-109, C.R.S., Reduction or Increase of Monetary Conditions of Bond — Change in Type of Bond or Conditions of Bond

Upon motion of either party, the court may increase or decrease the monetary conditions of bond, *with reasonable notice to either party.* The court may not modify a bond *sua sponte*. This section does not require a written motion but also does not require the court to have a hearing within 14 days. The "109" motion should be made early in the process in response to the original bond setting. Counsel should make it clear on the record under what section of 16-4 the bond motion is made.

This section also outlines the authority of the pretrial service agency to seek a warrant for the arrest of a defendant who is in violation of conditions of bond. The DA and surety are notified, but there is no statutorily-required notice to defense counsel.

Section 16-4-110, C.R.S., Exoneration from Bond Liability

This section describes when and how a surety is released from bond liability. It allows the court to order a refund of part of the premium within 14 days of the posting of a bond, if the conditions of bond are changed by the court, to prevent unjust enrichment, but only after a hearing and factual findings.



The court may keep cash posted for bond for payment of fines, fees, court costs, restitution, or surcharges, if the cash bond was posted by the defendant or if the person posting it agrees.

A surety may also be exonerated from bond liability by surrendering the defendant and the court may order a refund of all or part of the premium to prevent unjust enrichment.

Section 16-4-111, C.R.S., Disposition of Security Deposits

This section allows for the court to keep cash posted for bond if the defendant posted the cash himself/herself, or if the person posting the cash agrees, for payment of fines, fees, court costs, restitution, or surcharges. The remainder of the section describes the process for release of any bond security posted with the court.

Section 16-4-112, C.R.S., Enforcement Procedures when Forfeiture not Set Aside

This section describes the forfeiture process for a surety on a secured money bond. Defense counsel is required to receive notice of the forfeiture hearing date.

Section 16-4-113, C.R.S., Bond in Certain Misdemeanor Cases

This section requires the court to grant a personal recognizance bond to persons charged with a class 3 misdemeanor or a petty offense or any offense with maximum penalty of 6 months unless:

- The person fails to properly identify himself; or
- The person refuses to sign a personal recognizance bond; or
- Continued detention is necessary to prevent imminent bodily harm to himself or another person; or
- The person has no ties to the community and there is a substantial likelihood that the person will fail to appear; or
- The person has previously failed to appear after execution of a promise to appear; or
- The person has a warrant or a pending probation or parole revocation.

The Colorado Pretrial Assessment Tool (CPAT)

The use of data, analytics, and technology has had a significant effect on the criminal justice system. Substantial research has led to the development of pretrial risk assessment instruments that assess the factors that correlate to successful pretrial release. Switching from a system based solely on instinct and experience (often referred to as "gut instinct") to one in which judges have access to scientific, objective risk assessment tools could further the criminal justice system's central goals of increasing public safety, reducing crime, and making the most effective, fair, and efficient use of public resources.[4] Defendants who do not threaten public safety and are predicted to appear for scheduled court dates should not remain in jail simply because they cannot afford bail. Jurisdictions such as Kentucky that have been successfully using risk assessment tools have seen the numbers of pretrial detainees drastically lowered while public safety and court appearances have remained constant.

Even before the legislative changes to the bail system, work was underway to develop a risk assessment tool to better inform pretrial release practices in Colorado. A joint partnership of the Pretrial Justice Institute (PJI), the JFA Institute, and ten Colorado counties participated in a study to determine what factors most accurately predict an individual's likelihood of returning to court and remaining arrest-free while out on pretrial release. The organizations studied 1,970 defendants in the ten counties over a period of 16 months. They collected defendants' demographics, residence and employment, mental health and

3. See Appendix 1 for the full text of the CCJJ Bail Subcommittee's recommendations to the full CCJJ, presented on Oct. 12, 2012. The CCJJ was aided in its mission by outside experts such as the Pretrial Justice Institute (PJI).

4. LAURA AND JOHN ARNOLD FOUNDATION, DEVELOPING A NATIONAL MODEL FOR PRETRIAL RISK ASSESSMENT (2013), *available at* http://ncja.org/sites/default/files/documents/LJAF-Developing-a-National-Model.pdf.

substance use/abuse, criminal history and past criminal justice system involvement, and current charges and system involvement. Twelve factors were identified as most statistically significant in predicting an individual's success on pretrial release.

The research was used to develop the Colorado Pretrial Assessment Tool (CPAT), an empirically validated multi-jurisdiction pretrial risk assessment instrument for use in any Colorado jurisdiction and designed to replace any existing pretrial assessments in use in Colorado. The CPAT identifies which defendants are likely to be higher risk to public safety (commit new crimes) and to fail to appear for any court date during the pretrial period.

Colorado courts tested the CPAT in pilot studies. "The early decisions about release and detention, which a judge must usually make with limited and highly subjective information, are among the most critical made by the judiciary, with significant impacts on community safety and fairness to the accused," stated Judge David Prince, Deputy Chief Judge for the Fourth Judicial District of Colorado, after his county agreed to participate in a pilot project to use a risk assessment tool in pretrial release decisions. "This pilot study is a substantial step in improving the quality of these decisions by informing them with objective and meaningful data."

The CPAT, in various forms, is now being used across Colorado in judicial districts that have a pretrial services program. In Mesa County, the law enforcement community, including the prosecutors, use and embrace the evidence-based principles that guide the use of the pretrial risk assessment tool. Other jurisdictions continue to use a bond schedule and use CPAT to deviate from a bond schedule amount. Still others have not yet embraced risk assessment research and use the tool only sparingly.

For a full discussion of the methods used to develop the CPAT, see THE COLORADO PRETRIAL ASSESSMENT TOOL (CPAT), REVISED REPORT (2012), *available at* www.pretrial.org.

CPAT Risk Categories

Pretrial Risk Category	Risk Score	Public Safety Rate	Court Appearance Rate	Percent of Defendants
1 (lower)	0 - 17	91%	95%	20%
2	18 - 37	80%	85%	49%
3	38 - 50	69%	77%	23%
4 (higher)	51 - 82	58%	51%	8%
Average	**30**	**78%**	**82%**	

In the sample used to validate the pretrial instrument, close to 70% of the defendants assessed were in the two lowest risk categories. The court appearance rate for those defendants was 95% for low risk and 85% for medium risk.

CPAT Items and Scoring

Current research in Colorado shows the following twelve factors — included in the CPAT — to be the most predictive in determining whether an individual is likely to return to court and/or reoffend while on release.[5] The information is gathered from defendants through a face-to-face interview as well as database searches. Defenders have the right to obtain and use a copy of the pretrial risk assessment report to be able to address any shortcomings of the report. The *Colorado Pretrial Assessment Tool Administration, Scoring, and Reporting Manual*[6] includes the below chart to explain the CPAT questions and scoring mechanism.

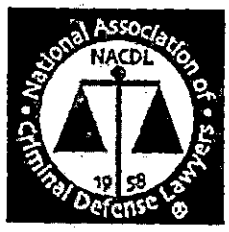
CPAT Item	Scoring	Points
1. Having a Home or Cell Phone	Yes	0
	No, or Unknown	5
2. Owning or Renting One's Residence	Own	0
	Rent, or Unknown	4
3. Contributing to Residential Payments	Yes	0
	No, or Unknown	9
4. Past or Current Problems with Alcohol	No	0
	Yes, or Unknown	4
5. Past or Current Mental Heath Treatment	No	0
	Yes, or Unknown	4
6. Age at First Arrest	This is first arrest	0
	35 years or older, or Unknown	0
	25-34 years	10
	20-24 years	12
	19 years or younger	15
7. Past Jail Sentence	No, or Unknown	0
	Yes	4
8. Past Prison Sentence	No, or Unknown	0
	Yes	10
9. Having Active Warrants	No	0
	Yes, or Unknown	5
10. Having Other Pending Cases	No	0
	Yes, or Unknown	13
11. Currently on Supervision	No	0
	Yes, or Unknown	5
12. History of Revoked Bond or Supervision	No	0
	Yes, or Unknown	4

Note: Items 1 through 5 refer to Stability/Community Ties.Items 6 through 12 refer to Criminal History/System Involvement.

Based on the defendant's score, the individual is assigned to one of four risk categories, corresponding to the likelihood of success on pretrial release. Individuals who are deemed low risk are those who have high court appearance rates and low incidences of reoffending while on release. Those in higher risk categories are more likely to fail to appear for court or have a new filing during their pretrial release period.

5. There is a national debate among defense lawyers and pretrial researchers regarding whether some of these factors may have a disparate racial impact, since many of the factors are impacted by socio-economic status, which may disadvantage minority communities that are, on average, poorer than white communities. These factors may change over time as research develops. Nonetheless, many pretrial risk tools have been empirically tested to ensure they do not overestimate pretrial risk based on race or ethnicity. The CPAT was found not to be biased based on race or ethnicity.

6. Colorado Association of Pretrial Services, The Colorado Pretrial Assessment Tool (CPAT) Administration, Scoring, and Reporting Manual, Version 2 (Jun. 2015), *available at* http://www.pretrial.org/download/risk-assessment/CPAT%20Manual%20-%20CAPS%202015-06.pdf.



NLADA | American Council of Chief Defenders

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.[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, 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.[2]

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[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.

- 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]

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[5], 90% of arrestees are released pretrial without using a financial bond.[6]
- 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.[7]
- 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.[8]

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[3] Ibid.

[4] Ibid.

[5] 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

[6] 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

[7] 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

[8] 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

- 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.[9] 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."[10] Likewise, the Virginia Pretrial Risk Assessment Instrument-Revised has also been confirmed as race and gender neutral.

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).

[9] The Sentencing Project, Reducing Racial Disparity in the Criminal Justice System: A Manual for Practitioners and Policymakers (2008).

[10] Laura and John Arnold Foundation, Results from the First Six Months of the Public Safety Assessment – CourtTM in Kentucky, p. 4 (July 2014). 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;[11]
- 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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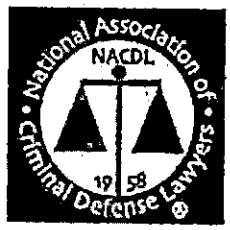
[11] *See,* "Developing a National Model for Pretrial Risk Assessment," *LJAF Research Summary,* Nov. 2013, www.arnoldfoundation.org.



NLADA | American Council of Chief Defenders

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.[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, 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.[2]

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[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.

- 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]

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[5], 90% of arrestees are released pretrial without using a financial bond.[6]
- 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.[7]
- 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.[8]

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[3] Ibid.

[4] Ibid.

[5] 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

[6] 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

[7] 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

[8] 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

- 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.[9] 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."[10] Likewise, the Virginia Pretrial Risk Assessment Instrument-Revised has also been confirmed as race and gender neutral.

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).

[9] The Sentencing Project, Reducing Racial Disparity in the Criminal Justice System: A Manual for Practitioners and Policymakers (2008).

[10] Laura and John Arnold Foundation, Results from the First Six Months of the Public Safety Assessment – CourtTM in Kentucky, p. 4 (July 2014). 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;[11]
- 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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[11] *See,* "Developing a National Model for Pretrial Risk Assessment," *LJAF Research Summary*, Nov. 2013, www.arnoldfoundation.org.