



An Analysis of Pre-Trial Services and Risk Assessment Instruments Used in Montgomery County

Through the Lens of a Global
Pandemic and Racial Equity

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About the Fellow



Mira Singhal is originally from Pittsburgh, PA and will be entering her second year of a dual-degree masters program at the University of North Carolina at Chapel Hill. As a Public Administration and City & Regional Planning student, her work involves the intersectionality of community development and good governance. Some of her interest areas include housing policy, food security, racial justice and data visualization.

Prior to her graduate studies, Mira earned her B.A. in Political Science and Urban Studies at Ohio Wesleyan University before serving as a Peace Corps Volunteer for three years in Senegal, West Africa working in agriculture and data visualization.

ACKNOWLEDGEMENTS

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DISCLAIMER

This report is limited in scope due to the constraints of teleworking over the entirety of the Summer Fellowship Program and the limited duration of the program. This report is the outcome of an independent summer fellow research project and does not necessarily represent the views of the Montgomery County Council, the Department of Correction and Rehabilitation or any other individuals referenced within the document.

Definitions

Risk Assessment Instruments (within the scope of criminal justice)- Algorithms that use socioeconomic status, family background, neighborhood crime, employment status, and other factors to reach a supposed prediction of an individual's criminal risk an future behavior either on a scale from "low" to "high" or with specific percentages [1]

Pre-Trial Risk Assessment Instrument (PRAI) - A tool which uses a variety of variables and algorithms to reach a prediction of a defendant's potential flight risk and/or future criminal behavior (recidivism rate) [2]

Algorithm- A set of instructions designed to perform a specific task

Recidivism Risk- The likelihood that a defendant will re-offend before trial

FTA- Failure to Appear at Trial

Pre-Trial- Period of time after an individual is charged with a crime but before the trial occurs

Pre-Trial Justice- The balance of honoring the presumption of innocence; the right to non-excessive bail; and all other legal and constitutional rights afforded to accused persons awaiting trial and the need to protect the community; maintain the integrity of the judicial process, and assure court appearance [3]

Pre-Trial Services- Functions and services performed before committing a person to trial; often involves screening services, investigation into the defendant's backgrounds, case management, and supervision until the defendant returns to court

Jail- Short-term facility, for individuals awaiting trial or conviction

Prison- Long-term facility, for convicted individuals

Static Risk Factors- Historical factors that can predict recidivism and cannot be changed such as age at first offense and prior criminal history[4]

Dynamic Risk Factors/Criminogenic Needs- Potentially changeable factors, such as substance abuse and negative peer associations [5]

Executive Summary

Background

In the past few years, criticism has surfaced over racial biases present in pre-trial risk assessment instruments (PRAIs) used to recommend defendants for release, causing heated debate among criminal justice experts. The recent criticism of PRAIs deepening racial inequity in pre-trial decisions and services coupled with the County's current focus on racial equity and social justice creates a unique opportunity to re-evaluate the tools used to make these recommendations.

Within the Montgomery County Department of Correction and Rehabilitation, the Pre-Trial Services division (PTS) is responsible for “assessing newly arrested defendants for the possibility of release into the community while awaiting trial and for subsequently supervising those defendants safely in the community.”[7] When recommending an individual for a pre-trial release program, a risk assessment reporting form is used to rank the risk of the newly arrested with a final recommendation choice: 1) Detain, 2) Supervised Release, 3) Non-Supervised Release or 4) Case Disposition. The recommendation is then given to a judge who ultimately decides the pretrial release outcome of the defendant.

PRAIs are just one tool of many used to determine the future of an individual, directly influencing not only their employment and family, but also their emotional, mental, physical and financial stability. The increased awareness of institutional racism within the justice system offers Montgomery County an opportunity to re-evaluate their Pre-Trial Services and use of PRAIs.

This report analyzes the use of PRAIs and provides recommendations for ensuring increased accountability and racial equity when determining pre-trial release. Recommendations will also be offered related pre-trial accommodations due to Covid-19. Montgomery County was a pioneer in implementing pre-trial services to defendants in 1972. However, it is pertinent the County continues to evaluate and improve the current system and tools being used, particularly through the lens of racial equity and social justice.

“For those of us who work in justice, it’s time to acknowledge that most reform efforts have failed because of our fundamental unwillingness to name and address racism in the system.”

–Pretrial Justice Institute
BLM Statement, June 2020 [6]

Scope of Research

This project was primarily a qualitative analysis of pre trial services and the use of PRAIs by examining the following questions:

- What are pre trial risk assessment instruments?
 - How are PRAIs used in pre trial release recommendations?
 - What are the consequences of using PRAIs?
- How has Covid 19 impacted Pre Trial Services?
 - How can the County continue to provide pre trial services during a global pandemic?
- How have PRAIs impacted racial equity?
 - How can Montgomery County assess its pre trial services and tools from a lens of racial equity and social justice?
- How can Montgomery County better monitor and evaluate its data to look for implicit racial bias?

Key Findings

The majority of this research focused on the availability of data related to Pre-Trial Services in Montgomery County and the use of PRAIs to make recommendations for pre-trial release. Based on desk-based research, the following findings were uncovered:

- Montgomery County created a “Pre-Trial Release Risk Instrument” in 2007 with the assistance of Dr. James Austin, *Austin and Associates*. It was last validated in 2019 and is currently under review. At the moment, there are no materials publicly available on the scope of the instrument and how it is validated, nor evidence of any kind of external validation. The instrument is not available to the public.

“35% increase in recommendations for release by the Pre-Trial Assessment Unit and a corresponding decrease in its jail population.”

- Since implementing the PRAI into Pre-Trial Services, Montgomery County has seen a “35% increase in recommendations for release by the Pre-Trial Assessment Unit and a corresponding decrease in its jail population.”[8]
- On average, **over 96% of defendants appeared for all court dates** and only 2.4% had new arrests. [9]
- There is limited publicly available data related to pre-trial release in Montgomery County, none of which can be disaggregated by race, gender or other variables (Sources: Data Montgomery, Vera Institute of Justice).

Summary of Recommendations

Covid-19	Short Term	Long Term
<ul style="list-style-type: none">• Suspend co-pays for pre-trial detainees seeking treatment/ testing for Covid-19 symptoms• Provide masks and soap at no cost• Reduce or subsidize cost of phone calls for pre-trial detainees• Increased depopulation order of pre-trial detainees	<ul style="list-style-type: none">• Terminate or subsidize fees for pre-trial release programs• Create impact assessment survey after pre-trial release recommendations are made• Create specific risk assessment tools for different types of offenses	<ul style="list-style-type: none">• Discuss transparency law regarding use of pre-trial tools• Re-validate risk assessment tool using updated measures and external validation• Collect/analyze data on demographics of participants recommended for pre-trial supervision programs

Data Highlights

PROGRAM PERFORMANCE MEASURES

Montgomery County Pre-Trial Performance Measures

All records per page

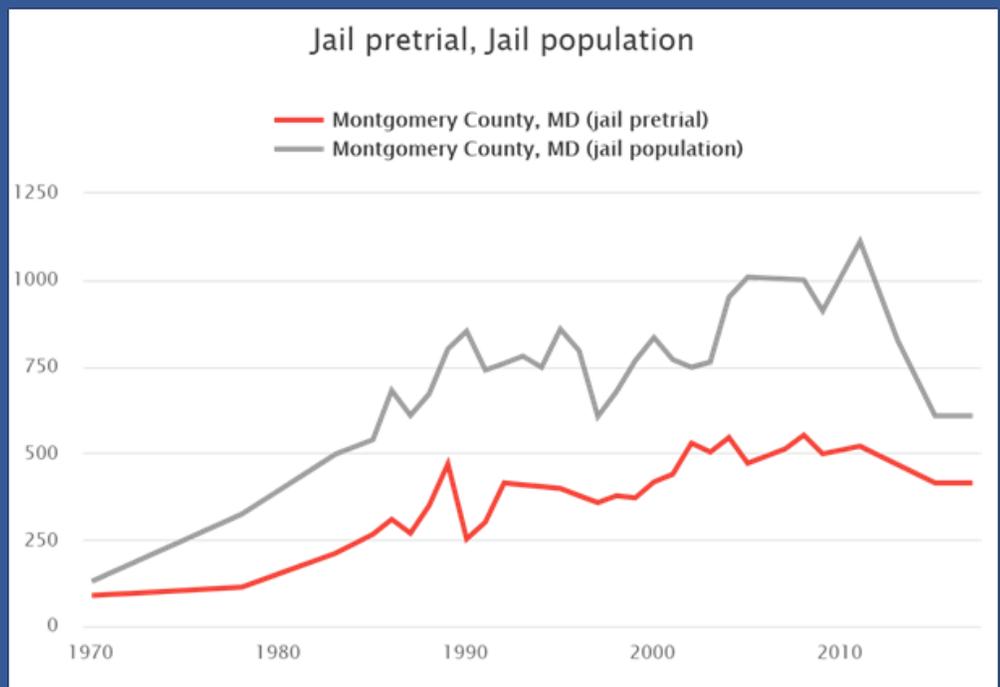
Search:

Program Performance Measures	Actual FY18	Actual FY19	Estimated FY20	Target FY21	Target FY22
Court appearance rate while under supervision	95.3%	96.3%	95.7%	95.7%	95.7%
Average daily caseload under Pre-Trial supervision	1,717	1,630	1,710	1,710	1,710

Showing 1 to 2 of 2 entries

Next →

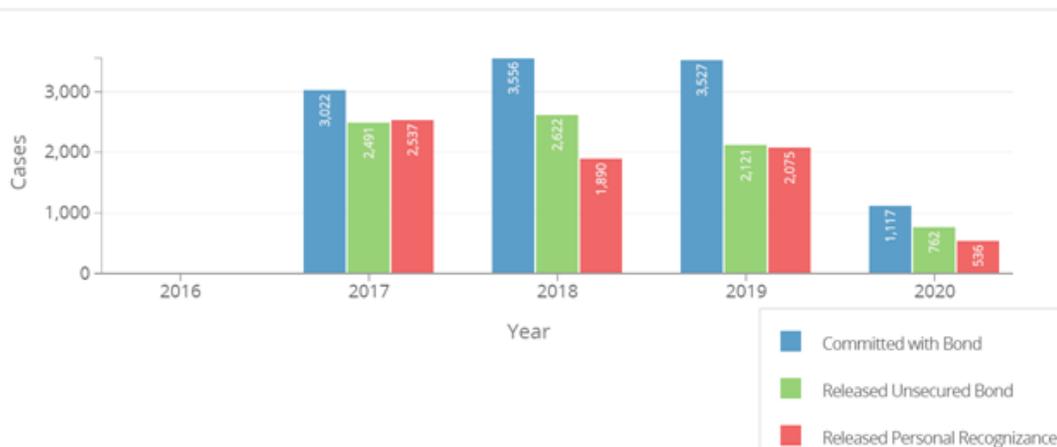
Based on the graph, there is a steep decline in jail population in 2011, however the decrease in jail pretrial numbers is not proportional.



Source: Vera Institute of Justice

Terms of Release from Central Processing

(Committed with Bond, Released Unsecured Bond, Released Personal Recognizance)



Montgomery County provides data on the terms of release from Central Processing, although it cannot be disaggregated based on specific demographics, or in terms of who enters into Pre-Trial Services programs.

Source: DataMontgomery

Background on Pre-Trial Services and Risk Assessment

What is a Pre-Trial Risk Assessment Instrument (PRAI)?

“A pretrial risk assessment instrument (PRAI) can be used to classify defendants based on their flight risk and their threat to community safety. At the pretrial stage, defendants may be classified into one of four categories: 1. Low risk—individuals who can be released with little or no supervisory conditions with reasonable assurances that they will appear in court and will not threaten community safety. 2. Moderate risk—individuals who can be released with conditions placed on them with reasonable assurances that they will appear in court and will not threaten community safety. 3. High risk—individuals who can be released only with the most stringent conditions placed on them with reasonable assurances that they will appear in court and will not threaten community safety. 4. Highest risk—individuals who cannot be released with any reasonable assurance that they will appear in court or that they will not be a threat to community safety” (VanNostrand and Rose, 2009).[10]

While all PRAIs differ slightly in their classifications, they all forecast outcomes based on historical data and typically offer a classification or specific percentage related to criminal risk and future behavior of the assessed individual. In some cases, the score or classification of the assessed individual is shared, while other PRAIs simply offer the suggested recommendation to the judicial officer.

PRAIs were first created to “protect the safety of the community or any person”[11] by identifying any factors in an individual’s life which might increase the risk for recidivism before going to trial. The factors used to measure an individual’s potential future criminal activity include, but are not limited to:

- **Age**
- **Education**
- **Employment**
- **Address**
- **Prior Criminal Activity**
- **Mental Health**
- **Drug/Alcohol Abuse**
- **Open Cases**
- **First Arrest**
- **Leisure Activities**
- **Family Relationships**
- **Peer Associations**
- **Attitude**

THE EVOLUTION OF RISK ASSESSMENT

Risk assessment and the history of predicting an individual’s criminal trends can be traced to the early 1900s, long before algorithms and “evidence-based” prediction were created. Individual staff members in the field of criminal justice would use their professional judgement to determine the likelihood of an individual complying with the parole conditions. The subjective nature of this method led to the development of quantitative and evidence-based risk assessment instruments over four generations, as displayed in the image below [12].

The historical framework of risk assessment is valuable when evaluating the accuracy, fairness, transparency, and effectiveness within the assessment process. Using evidence-based predictions; however, which focus on algorithms and probability, still does not ensure pre-trial release outcomes are exempt from the internal, institutional biases also found in the subjective judgement from earlier generations of risk assessment.

1) Professional Judgements	2) Actuarial Predictions Using Static Features	3) Dynamic Factors & Needs Assessment	4) Integration with Case Management
<ul style="list-style-type: none"> • Relied on personal training and experience • Subject to human error and cognitive biases 	<ul style="list-style-type: none"> • Originated in the 1920s • Numeric predictions for analyses of static risk factors • More structured, objective, and accurate • Unable to capture dynamic risk factors in an individual's attitude, behaviors and needs over time 	<ul style="list-style-type: none"> • Incorporates criminogenic needs and dynamic risk factors • Focuses on rehabilitation efforts based on level of risk and potential changeable criminogenic needs 	<ul style="list-style-type: none"> • Emphasizes the structured monitoring of individuals over time to maximize treatment and supervision benefits • Focuses on responsivity considerations and appropriate interventions • Integrates case planning and risk management efforts

Pre-Trial Justice Explained:

“When a person is arrested, the decision to release or detain him or her pending trial is a critical step in the justice process. The judicial officer (e.g., judge, magistrate, commissioner, or hearing officer) must decide whether to release the defendant on personal recognizance or unsecured appearance bond, release the defendant on a condition or combination of conditions, or detain the defendant for a temporary or extended period of time. Pre-trial justice policies and practices exist to provide due process to the accused, eliminate inappropriate detention, and maintain community safety.[13]

Effectively balancing the presumption of innocence, the assignment of the least restrictive intervention for defendants, and the need to ensure community safety while minimizing defendant pre-trial misconduct is the challenge afforded pre-trial justice. Whether this balance is reached and how pre-trial justice is administered has significant ramifications for both the defendant and the community. For the community at-large, the pre-trial decision affects how limited jail space is allocated and how the risks of non-appearance and pre-trial crime by released defendants are managed. The pre-trial decision also affects defendants’ abilities to assert their innocence, negotiate a disposition, and mitigate the severity of a sentence.” [14]

HOW ARE RISK ASSESSMENTS USED IN PRE-TRIAL SERVICES?

While risk assessments are common throughout multiple stages of the trial process, they are often utilized during the pre-trial stage. After an individual is arrested, a PRAI can be used to determine if the individual can be released or detained based on 1) risk of failing to appear in court and 2) the likelihood of committing another crime before their court date while out on release. A variety of factors are analyzed to create a score which places the individual in one of several categories such as “low risk,” “moderate risk,” and “high risk” for re-offending. Based on the defendant’s score, justice system responses can be customized to address any case management needs. PRAIs are just one of several resources a judicial officer can use to make the ultimate decisions for pre-trial release.



While PRAIs are publicized as being able to predict an individual’s likelihood of pre-trial success, the tool itself cannot make individualized predictions. Instead, it is the conglomeration of data from multiple individuals, which creates a forecasted “aggregate group risk” score. The risk score relates more to the shared traits an individual has with the data within the group that was studied to create the instrument. The score “provides no information about how a specific individual will behave if released.” [15] Like the era of professional judgement, PRAIs are often criticized for being subjectively biased, specifically when it comes to race, gender, age or socioeconomic status which is why it is necessary to consistently re-validate and increase the data points within the proposed PRAI.

Validating Risk Assessment Tools

“Through a process called validation, jurisdictions can test their tools to make sure they are still calculating accurate risk scores for defendants — and treating people of different races fairly. Experts vary on how often jurisdictions should validate — some say every five years, some say every two — but they agree it’s something that should happen regularly” -Angela Roberts and Nora Eckert, Capital News Service [16]

Because PRAIs can significantly impact both an individual’s future, as well as the public safety of the community, the instrument must be validated to ensure the suggested risk classifications accurately represent the defendant's potential risk. However, as with PRAIs, the term “validated” does not have a standard definition, nor is validation always required. Broadly speaking, according to Cynthia Mamalian, who authored *The State of the Science of Pre-Trial Risk Assessment*, “validation assesses the extent to which a tool measures what it is intended to measure, typically court appearance and new arrest. While some validation processes review a tool for possible race or gender disparities, many do not,” leading to concerns over standardization methods within PRAI. [17]

In addition to a lack of standardization when validating instruments, there is concern over the reliability of PRAIs which can be categorized into:

- **Inter-rater reliability** which means that two different staff members applying the instrument to the same offender will reach the same score and risk classification and
- **Intra-rater reliability which** refers to whether the same rater will obtain the same score and risk classification with repeated assessments of the same offender, given no changes in the circumstances of the offender. [18]

If the instrument is not reliable, the risk classification (low, medium, high or a percentage ranking) is likely to vary depending on who completes the assessment, which can lead to subjective bias. Confirming reliability before validity ensures the integrity of the different risk classifications.[19] It becomes even more challenging to ensure reliability when variables within the instruments are subjective, poorly defined, or require information that is difficult to access.[20] Like humans, these instruments can also make errors.

A study found that recidivism rates predicted by a commonly used PRAI, *COMPAS*, was “no more accurate than those of ordinary people recruited through a crowdsourcing site and provided with short descriptions of arrestees. [21] Based on the margins of error used to rate PRAIs, which are called “Area Under the Curve” (AUC), the value “ranges from .50 to 1.00, with .50 being no better than chance, and with 1.00 meaning perfect prediction. By current industry standards, a tool with an AUC of .60 to .70 is considered acceptable, and an AUC of 0.7 or higher is considered good. [22]

In other words, even the best tools err 30 to 40 percent of the time.” [23] While most communities focus their attention on false-negative predictions (the instrument suggests the offender will not recidivate, but does) due to public safety concerns, attention should also be focused on false-positives (incorrect predictions that offenders will commit new crimes). The detrimental impacts of being denied pre-trial release, such as mental, emotional, social and financial hardships, can affect an individual in the long-term. [24] Tolerance of error should be discussed when implementing and validating a PRAI. If an instrument is able to be properly validated, it can provide a more objective assessment, therefore helping ensure equity, justice and sound supervision practices within the pre-trial release procedure.

The ambiguity when validating a PRAI often stems from the designers of these instruments who do not disclose critical information about its design and consider it proprietary information. Explanations of the various data points or how the instrument designates the different risk classifications is often not revealed. [25] PRAI designers are not always subject to public records requests and can choose not to disclose the raw data used to create the tool, making it even more challenging to audit and validate the tools used by pre-trial services.

Montgomery County's PRAI is validated by its creator. To date, no external validation of the tool has been made publicly available. The Stanford Pre-Trial Risk Assessment Factsheet is one way the County can externally audit and compare its PRAI to others used throughout the country.

Critics of Risk Assessment Instruments

Not surprisingly, because of the proprietary nature of PRAIs, many criminal justice institutions and scholars oppose the use of PRAIS on the basis of racial inequality and the potential to violate an individual's right to fair due process.

PRE-TRIAL JUSTICE INSTITUTE

In February of 2020, Pre-trial Justice Institute (PJI) reversed their position on using PRAIs as a tool stating they "now see that pre-trial risk assessment instruments, designed to predict an individual's appearance in court without a new arrest, can no longer be a part of our solution for building equitable pre-trial justice systems[...] Regardless of their science, brand, or age, these tools are derived from data reflecting structural racism and institutional inequity that impact our court and law enforcement policies and practices." [26]

SONJA STARR

PROFESSOR AT THE UNIVERSITY OF MICHIGAN LAW SCHOOL

Argues that "risk assessment" factors based on demographic, socioeconomic background and family characteristics may not serve its intended goal of reducing incarceration because mass incarceration already has a racially disparate impact, which means that "risk assessment" algorithms produce higher risk estimates, all other things equal, for subgroups whose members are already disproportionately incarcerated. [27]

ELECTRONIC PRIVACY INFORMATION CENTER

Primary criticisms include the proprietary nature of risk assessment instruments, developed by technology companies that refuse to disclose the inner workings of the "black box." Trade secret and other IP protection defenses have been given to demands of the underlying logic of the systems. In March 2019, Idaho became the first state to enact a law specifically promoting transparency, accountability, and explainability in pre-trial risk assessment instruments. The law prevents a trade secrecy or IP defense, requires public availability of 'all documents, data, records, and information used by the builder to build or validate the pre-trial risk assessment tool,' and empowers defendants to review all calculations and data that went into their risk score. [28]

Re-Evaluating PRAIs and Services

Re-evaluation of the PRAIs and services used by the County is imperative because the evolution of risk assessment is not static. The accuracy and validation of PRAIs vary greatly and should be scrutinized on a regular basis, especially when institutions which had previously supported such tools reverse their opinion on them.[29] Recent criticism over the presence of racial biases in PRAIs led the Pretrial Justice Institute (PJI) to reverse their support for such tools. Dr. James Austin, the designer of Montgomery County's PRAI tool, released a rebuttal toward PJI's criticism. The PRAI used within Pre-Trial Services should be re-evaluated to ensure justice and accountability, especially under the context of Dr. Austin's lack of design transparency and outward opposition to the PJI's position.

Certain PRAIs penalize defendants for having previous arrests, even if they do not result in convictions. In Baltimore, Black people are arrested at a rate disproportionate to their population in the city. According to Vera Institute, the same can be said for Montgomery County. So even if the PRAI does not attribute points based on a defendant's race, certain factors like disproportionate arrest rates or harsher convictions on people of color can lead to a statistical disadvantage when using PRAIs to influence pre-trial release.

Based on a study in 2018 by Capital News Service, research showed that the risk form used by Montgomery County relies on factors like employment and education level, which can be biased against people of color.[30] Based on Montgomery County's PRAI, the instrument "drops a point from the risk scores of defendants who are employed. But the unemployment rate for black Marylanders was about four percentage points higher than for white Marylanders at the start of 2018, according to the Bureau of Labor Statistics." [31]

While employment status is required to be considered when determining bail/pre-trial release, education level is not. However, in Montgomery County, the PRAI instrument "subtracts a point from a defendant's score if they have a high school degree or higher. Last year, the high school graduation rate for white students was seven percentage points higher in the county than it was for black students, according to the Maryland State Department of Education." [32] While there are several sections in the risk form, subtracting even two points can significantly alter an individual's recommendation to be detained or offered supervised release. Due to the consequence of using factors like employment and education level, the County should be meticulously tracking metrics to prove the risk instrument provides fair and accurate scores across different demographics, specifically race.

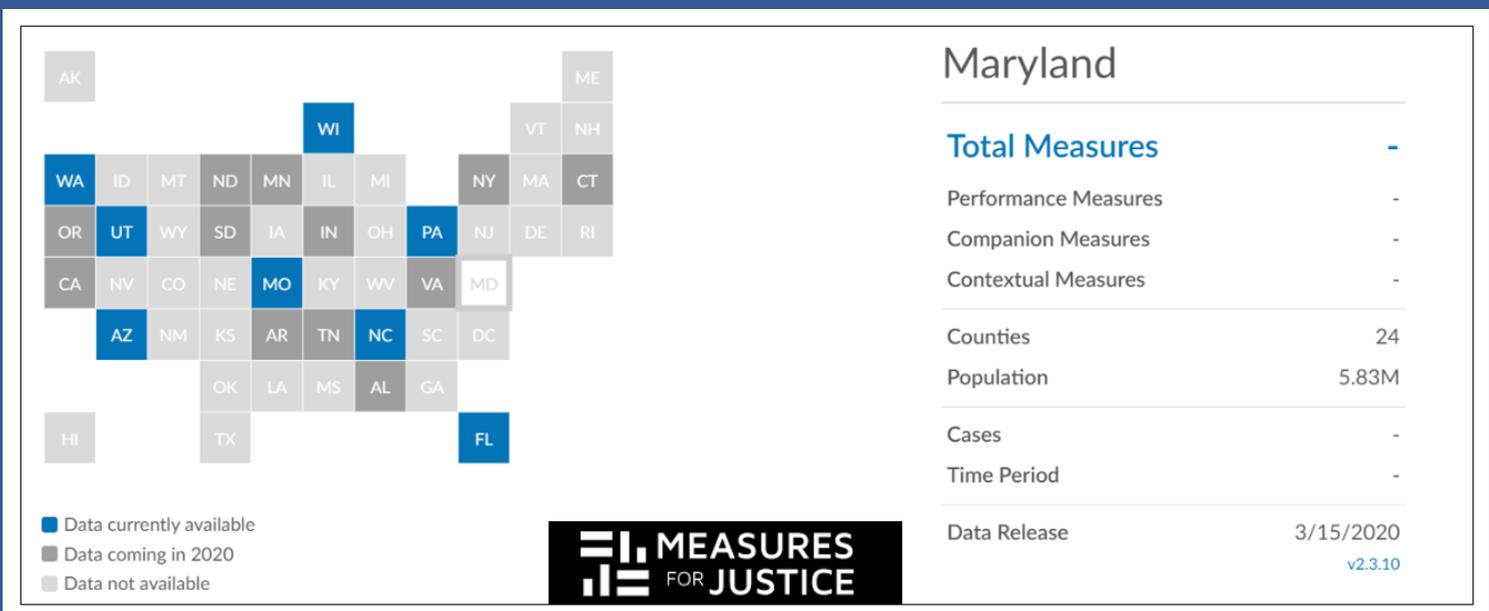
The Most Commonly Used Pre-Trial Risk Assessment Tools

Tool	In use in at least these jurisdictions	Population potentially impacted
PSA	5 states + 59 counties	56.3 million people
VPRAI	43 counties	19.9 million people
VPRAI-R	1 state + 16 counties	14.3 million people
ORAS-PAT	5 states + 48 counties	31.4 million people
COMPAS	11 counties	4.3 million people

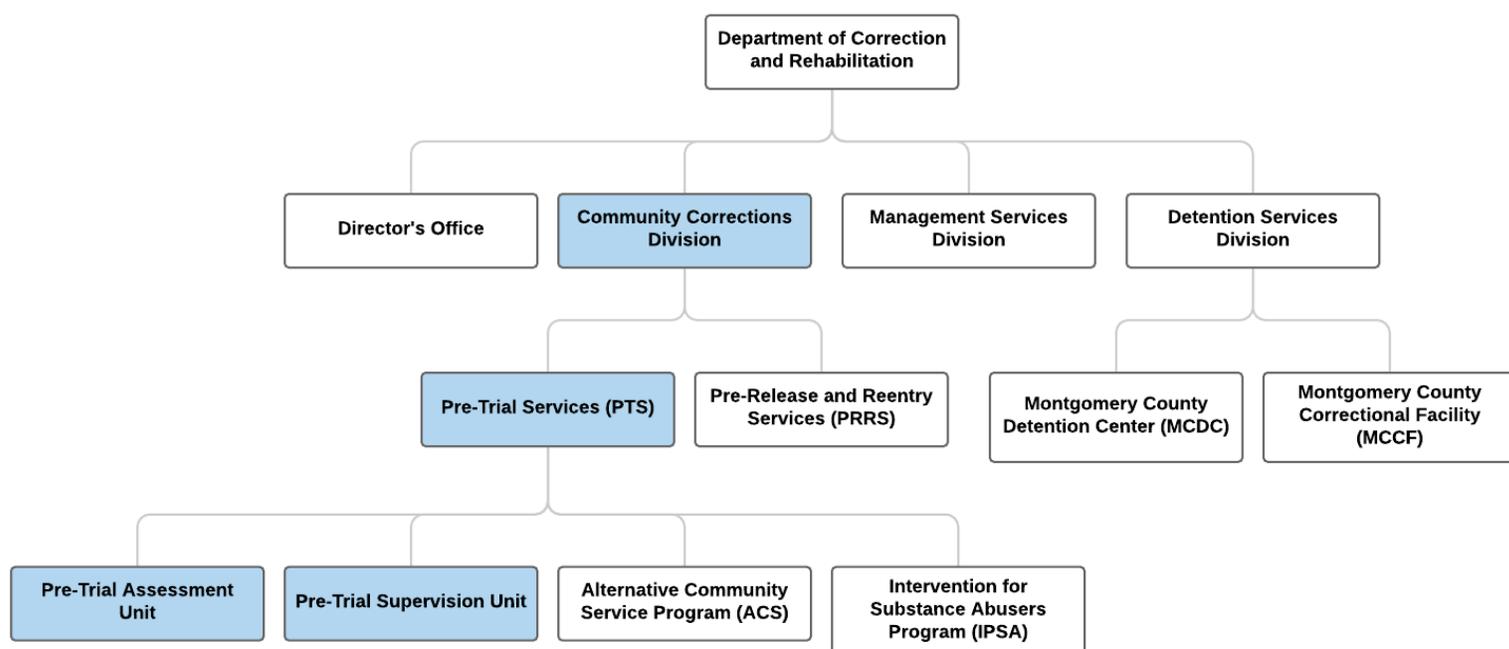
Mapping Pretrial Justice

Statistics

- 49 counties across 22 states use a locally-developed or county-specific tool
- Over 60 jurisdictions, including several states, utilize risk assessment instruments.
- 25% of people in the United States live in a jurisdiction that uses a PRAI [33].
- One of every five of the 2.3 million people in U.S. jails/prisons is a person awaiting trial.[34]
- Arrestees jailed for 48 hours can lose their employment, housing, and custody of their children, the economic effects of which ripple well beyond the arrestee’s family. Several studies have demonstrated that "being jailed directly increases an individual’s likelihood of being convicted, and, once convicted, the likelihood of a harsher sentence." [35]



The map above depicts data currently available related to one of the follows categories: Pre-trial Measures, Case Resolution Measures, Post-Resolution Measures. At present, Maryland does not have any such data available.



Analysis of Montgomery County Pre-Trial Services and Risk Assessment Tools

The Montgomery County Department of Correction and Rehabilitation was established in 1972 and is managed by professionals in the correctional field.[36] Pre-Trial Services is one of several programs designed to provide resources to defendants.

There are four independent programs within the Pre-Trial Services division:

- **Pre-Trial Assessment Unit**
- **Pre-Trial Supervision Unit**
- **Alternative Community Service Program (ACS)**
- **Intervention for Substance Abusers Program (IPSA)**

"The Pre-Trial Services is responsible for assessing newly arrested defendants for the possibility of release into the community while awaiting trial and for follow through with supervising those defendants safely in the community. The Pre-Trial Services Division also supervises those defendants who are offered diversion from trial in return for satisfactorily completing a community services or substance abuse program."

Pre-Trial Assessment Unit

"The Pre-Trial Assessment Unit is housed at the Montgomery County Detention Center and is responsible for interviewing those who have been newly arrested and have been unable to make bond. Staff verifies personal information, analyzes criminal histories, and formulates recommendations to the Court to enable the judge to make informed bond decisions. Recommendations are made with public safety as the main priority."

As mentioned above, pre-trial services and risk assessment are typically used for the goal of standardizing recommendations regarding pre-trial release to decrease subjective biases and be more consistent across the board. Risk assessment also maintains a secondary goal of maximizing the success rates of pre-trial releases.[37]

In 2007, the County worked with Dr. James Austin, *Austin and Associates*, to create a risk assessment tool for pre-trial release based on data at the county level. Over the past decade, similar versions of the County's risk tool have been utilized in additional Maryland jurisdictions such as Baltimore County and St. Mary's County. The County's risk assessment tool was re-validated last year (2019) and is currently under review. The review period provides the County an opportunity to account for any racial or subjective biases when providing pre-trial services.

Legislation Related to Pre-Trial Services in Montgomery County

According to the Montgomery County Codebook, there is no legislation related to transparency of the PRAI used in pre-trial services. In Maryland, courts are required to consider "the recommendation of any Pre-Trial Release Services program that has made a risk assessment of the defendant in accordance with a validated risk assessment tool and is willing to provide an acceptable level of supervision over the defendant during the period of release if so directed by the judicial officer." [38] Mapping Pre-trial Justice provides a [list](#) of state laws related to risk assessment tools which can be found in the Appendix.

Challenges Within Montgomery County's Pre-Trial Services

EXTERNAL VALIDATION

Currently there is no evidence that Montgomery County uses any external validation on its PRAI. There is greater risk for subjective/racial bias when a tool is created and validated by the same source.

TRANSPARENCY

The PRAI is not available to the public, nor is the validation techniques used on it. Montgomery County does not yet have a law related to transparency within the tools used in Pre-Trial Services, even though several states in the U.S already do.

DATA COLLECTION

While there is data related to annual jail pretrial population and terms of release from central processing, there is no data related to pre-trial services or pre-trial release based on race, gender, or other demographics. With such limited data, the County cannot truly determine the impact of using the PRAI.

DATA ANALYSIS

With limited data comes limited analysis. Similar to the recommendation made in the 2014 Master Facilities Confinement Study, Montgomery County needs to dedicate a research specialist to be responsible for on-going data analyses to better understand the strengths and weaknesses of Pre-Trial Services. Investing in an in-house analyst "will enhance and maximize the proactive evidence-based planning and program development that already exists"



The Impact of Covid-19 on Pre-Trial Services

Since the onset of Covid-19 in March of 2020, recommendations to physically distance and avoid contact with other individuals in close proximity has impacted the way Pre-Trial Services interacts with recently charged individuals and case management of supervised pre-trial release individuals. While utilizing electronic mediums to fill-out and share the risk assessment tool recommendations is a fairly standard practice, ensuring safe case management requires additional attention. Based on best practices offered from the American Bar Association and the Centers for Disease Control and Prevention, Montgomery County can continue to provide the necessary pre-trial services while ensuring the health and safety of all those involved.[39]

Impact of Covid-19 on Pre-Trial Services, Staff, and Detained Individuals:

- Limited social distancing options due to crowded living conditions in detention/correctional facilities
- In most cases, detained persons are not permitted to leave the facility.
- Some settings, particularly jails and detention centers, have high turnover, admitting new entrants daily who may have been exposed to Covid 19.
- The ability of detained persons to exercise disease prevention measures (e.g., frequent hand washing) may be limited and is determined by the supplies provided in the facility and by security considerations.
- Detained persons may hesitate to report symptoms of COVID 19 or seek medical care due to co pay requirements, stigma and fear of isolation.
- Options for medical isolation for people with COVID 19 are limited and vary depending on the type and size of facility.

Best Practices for Maintaining Pre-Trial Services and Case Management During a Pandemic

- Communicate with other correctional facilities in the same geographic area to share information including disease surveillance and absenteeism patterns among staff.
- Provide a no-cost supply of soap to detained persons, sufficient to allow frequent hand washing.
- Implement lawful alternatives to in-person pre-trial appearances/case management supervision where permissible.
- Consider suspending co-pays for detained persons seeking medical evaluation for possible Covid-19 symptoms/treatment.
- Consider reducing or temporarily eliminating the cost of phone calls for detained persons, as well as increasing telephone privileges to promote mental health and reduce exposure from direct contact with community visitors.
- Consider testing individuals for Covid-19 before release, particularly if they will be released to a congregate setting or to a household with persons at increased risk for severe illness from Covid-19.
- Provide individuals about to be released with Covid-19 prevention information, hand hygiene supplies, and cloth face coverings.
- Consider an increased depopulation order of pre-trial detainees during a pandemic. [40]

While Covid-19 has impacted the traditional ways pre-trial units can provide services to recently convicted individuals, it is still possible to do so in a more physically distanced way, making it safer for both the case officer and detained individual. A shift to remote/electronic services also allows for easier data collection, monitoring and evaluation in the long-term.



(Brian Stauffer for The Washington Post)

How have Pre-Trial Services Impacted Racial Inequity?

While the initial goal of PRAIs, creating fairer, more objective pre-trial release decisions, seemed like a good strategy to ensure accountability of the justice system, some critics have argued that it has done little to impact racial disparity. Historically, Black and Brown defendants have been more likely to stay in jail until trial, as opposed to white defendants.[41] Data from the US census, shows that “nearly 7 in 10 (69%) detainees were people of color, with Black (43%) and Hispanic (19.6%) defendants especially overrepresented compared to their share of the total U.S. population.”[42]

According to Wendy Sawyer, Research Director at the Prison Policy Initiative, the available research suggests that [43]:

- **In large urban areas, Black felony defendants are over 25% more likely than white defendants to be held pretrial.**
- **Across the country, Black and brown defendants are at least 10-25% more likely than white defendants to be detained pre-trial or to have to pay money bail.**
- **Young Black men are about 50% more likely to be detained pre-trial than white defendants.**
- **Black and brown defendants receive bail amounts that are twice as high as bail set for white defendants – and they are less likely to be able to afford it.**
- **Even in states that have implemented pre-trial reforms, racial disparities persist in pre-trial detention.**

McIntyre & Baradaran’s analysis of 1990-2006 State Court Processing Statistics data concludes that Black defendants are over 25% more likely to be held pre-trial than white defendants. Even after controlling for age, gender, and a number of conceivably legally-relevant factors (most serious charge, prior arrests, etc.), Dobbie & Yang (2019) find that over half (58%) of the 39 sampled counties had higher rates of pre-trial detention for Black defendants than for white defendants. In five counties, the unexplained racial gap was over 20%. [44]

PRAIs used in both New Jersey and Kentucky have shown that while “some reforms have helped reduce pre-trial populations, they’ve had little or no impact on reducing racial disparities.”[45] In New Jersey, once money bail was all but terminated, “the total pre-trial population dropped significantly, but the racial composition of the pre-trial jail population changed very little.”[46] Kentucky fared even worse after requiring the use of a PRAI; racial disparity in pre-trial release rates actually worsened.

The lack of data and objective policy analysis associated with the use of PRAIs allows racial disparities deeply engrained in these systems to continue. Data is pertinent when trying to understand the grips of systemic racism within the justice system. Montgomery County needs to begin rigorous data collection on its Pre-Trial Services and conduct a quantitative and qualitative analysis of its Pre-Trial Services process and assessments. Montgomery County is not the only county challenged to provide data on pre-trial services. Nationally the lack of data prevents states from understanding and assessing how racial disparities within pre-trial services have been impacted by PRAIs. Resources related to collecting pre-trial release data is listed under Helpful Resources on page 29 in the Appendix.

Covid-19 Related Recommendations

The following recommendations are based on suggestions from the CDC and subject matter experts [47]. Their ability to be implemented in Montgomery County's Pre-Trial Release Services should be discussed thoroughly before proceeding.

- Suspend co-pays for defendants seeking testing/treatment for Covid-19
- Provide masks and soap at no cost to all detained persons
- Reduce or temporarily eliminate cost of phone calls for defendants
- Implement lawful alternatives to in-person pre-trial appearances/case management supervision
- Provide all pre-trial service reports/assessments electronically
- Consider testing individuals for Covid-19 before pre-trial release
- Consider an increased depopulation order of pre-trial detainees

Short-Term Recommendations

- Require detailed explanation when a PRAI assessor’s recommendation for/against release is not followed.
 - Forces judges to be held more accountable for their decisions and the motivations behind them.[48]
- Implement kiosks for remote case management and limit face-to-face interactions between case managers and defendants.
- Update performance measures to include demographics of pre-trial release recommendations and diversion program participation, rather than just average case load and court appearance rates.
- Terminate or significantly reduce user fees for pre-trial release programs and any GPS and electronic monitoring services during a pandemic.
 - “Secured money bond results in poverty-driven detention, but it’s not the only reason that people have their pretrial liberty denied. When people are required to pay fees for pretrial supervision, electronic monitoring, or other conditions of release, those who don’t have money to buy their freedom will remain in jail. Often, these fees are ongoing, so even people who are otherwise successful in the community can have their liberty revoked due to inability to pay fees.[49]”
- Create multiple risk assessment instruments to be used for:
 - General recidivism
 - Sexual recidivism
 - Violent recidivism
 - Pretrial misconduct

One standard risk assessment form is not able to properly determine the flight risk of an individual and properly enforce public safety when situations involving domestic or sexual violence compared to drug possession are vastly different in mitigating factors.

Short-Term Recommendations Cont.

- Collect data on the outcome and impact of pre-trial release decisions of defendants who were recommended or denied pre-trial release.
 - Create an individual assessment survey with topics related to employment, mental and physical health, financial security and community engagement.

The County should carefully monitor behavior and outcomes of all Pre-Trial Services to understand the impacts of Pre-Trial Services and detention. This data will ultimately be key in assessing whether the risk form generates the impacts the County aspires to achieve.[50]

- Complete the Stanford Pretrial Risk Assessment Factsheet (RAF) created by Stanford Law School as a standardization instrument to externally validate the tools used by Montgomery County Pre-Trial Services. Compare Montgomery County's tool to other PRAIS such as PSA, CPAT, ORAS-PAT, PRRS-II, and VPRAI. Refer to the blank RAF in the Appendix for more detail.
 - "We developed the Risk Assessment Factsheet (RAF) as a structured, consistent set of key questions regarding important aspects of the design, deployment, an evaluation of pretrial risk assessment tools that stakeholders can use to obtain meaningful information about those tools... The blank RAF template provides a straightforward, standardized mechanism for stakeholders to use to conduct such audits and comparisons of any pretrial risk assessment tool they choose. The completed RAFs include detailed answers on the template, carefully gathered and assembled by our team and then verified with the appropriate RAF developer." [51]

Long-Term Recommendations

- Re-validate the risk assessment instrument every two years using updated measures to ensure racial equity.
 - Standardize the validation process and allow multiple sources to validate it
 - Share results publicly.
- Conduct a racial equity impact study focused on the demographics of defendants who are denied/recommended for bail, Pre-trial supervision programs, Alternative Community Service (ACS), or Intervention Program for Substance Abusers (IPSA).
 - Query data based on race and gender, sort and analyze data annually across groups.
- Discuss being more transparent in the use of PRAIs by creating a transparency law/clause within the Montgomery County Code. Increased transparency and accountability ensure due process and fair validation of the PRAI and data. Idaho's transparency and accountability law can be used as a model, which can be found in the Appendix.
 - "Idaho became the first state to pass a law specifically promoting transparency, accountability, and explainability in pre-trial risk assessment tools...The law prevents a trade secrecy or IP defense, requires public availability of "all documents, data, records, and information used by the builder to build or validate the pretrial risk assessment tool," and empowers defendants to review all calculations and data that went into their risk score. The law became effective on July 1, 2019." [52]

"A tool can't change policing practices or racial discrepancies in the job market or education system. And pre-trial services can't be expected to eradicate all unfairness in the criminal justice system without cooperation from judges, attorneys and police."

Concluding Remarks

While the scope of this paper focuses on PRAs and the racial impact of Pre-Trial Services, the other units within the Pre-Trial Services Division, and entire correctional facility need to be assessed to determine the extent of racial biases. Utilizing a PRAI is only one tool which determines the fate of an arrested individual. From the initial arrest to the final sentencing, each of the decisions made can contain subjective bias.

Montgomery County needs to monitor and analyze the data at every level of its criminal justice system to recognize and amend racial disparities within the community. Racial disparity persists because it is “built into policies... and reinforced through decisions.” [53] There is no simple fix when facing systemic racism, and to be “race-neutral” is not enough. It is a community wide effort which includes deep personal reflection, education, acknowledgement and compassion.

MIRA SINGHAL

SUMMER FELLOW 2020

APPENDIX

Idaho Statute 19-1910:

PRETRIAL RISK ASSESSMENT TOOLS

“(1) All pretrial risk assessment tools shall be transparent, and:

- (a) All documents, data, records, and information used by the builder to build or validate the pretrial risk assessment tool and ongoing documents, data, records, and written policies outlining the usage and validation of the pretrial risk assessment tool shall be open to public inspection, auditing, and testing;
 - (b) A party to a criminal case wherein a court has considered, or an expert witness has relied upon, a pretrial risk assessment tool shall be entitled to review all calculations and data used to calculate the defendant’s own risk score; and
 - (c) No builder or user of a pretrial risk assessment tool may assert trade secret or other intellectual property protections in order to quash discovery of the materials described in paragraph (a) of this subsection in a criminal or civil case.
- (2) For purposes of this section, "pretrial risk assessment tool" means a pretrial process that creates or scores particular factors in order to estimate a person’s level of risk to fail to appear in court, risk to commit a new crime, or risk posed to the community in order to make recommendations as to bail or conditions of release based on such risk, whether made on an individualized basis or based on a grid or schedule.”[1]

APPENDIX

Stanford Factsheet Template; Stanford Law School

RISK ASSESSMENT FACTSHEET TEMPLATE [insert name of risk assessment]

LAST UPDATED:

REVIEWED BY:

Who created the risk assessment? Are they a public or private organization?

How large was the training data set?

How was the training data set collected and assembled (i.e., what jurisdiction(s) is it from)?

Over what time frame was the data collected?

What factors (i.e., defendant characteristics) were included in the data set? This question pertains to all the factors that was available about defendants, not necessarily all the factors that were used to train or develop the model.

Does the dataset include instances of defendants who were detained? If so, does the data include outcomes for those people (i.e., did the data account for counterfactual estimation; if so, how)?

Are there any known issues or errors with the data?

In what year was the risk assessment created?

What factors, among all the factors in the training data, were considered in the development of the risk assessment? If not all factors were considered, how were those that were considered chosen?

How were factors that were considered ultimately chosen for exclusion or inclusion in the final model (the risk assessment itself)?

Does the final model include as a factor(s) arrests that did not lead to convictions? Does the final model include socioeconomic factors such as housing and employment status? Does the final model include personal health factors such as mental health or substance abuse? [split up into multiple questions if relevant info is available]

How were weights assigned to each factor included in the final model? (rounding correlation coefficients, Burgess Method, etc.)

APPENDIX

Stanford Factsheet Template; Stanford Law School

How does the final model define outcomes (i.e., during the model development process, was there a distinct outcome defined for each type of failure (failure to appear, new crime, new violent crime, etc.) or were outcomes compounded?

What does the output of the model look like (i.e. a score on a scale of 1-10, etc.)?

Does the model output risk level designations or convert raw scores into risk level designations such as "low risk," "moderate risk," and "high risk"?

What proportion of samples in the training data set failed at each risk score and/or level (for example, what percentage of people with a score of 5 or a label of "moderate risk" actually failed to appear)?

Did the model developers assess the predictive validity of the model? If so, how (reported AUC, FPR, TPR, etc.)?

Where is the risk assessment used?

Are the factors and weights of the risk assessment publicly available?

Does the risk assessment cost money for a jurisdiction to adopt?

Does the adoption of the risk assessment require training? If so, by who?

Does the risk assessment come with any sort of software or software package?

Does the risk assessment involve or require an in-person interview?

How does the risk assessment account for missing information?

Has the risk assessment been analyzed on non-training data for predictive validity? Has the risk assessment been analyzed with training data or non-training data with regard to performance for different race groups? Has the risk assessment been analyzed with training data or non-training data with regard to performance for different genders? If so, by who, when, and using what data?

Information retrieved from: [list sources]

The Risk Assessment Factsheet Template was created by students and researchers at [Stanford Law School Policy Lab](#) and is licensed under a [Creative Commons Attribution 4.0 International License](#). Attribution under this license must be provided to the [Stanford Law School Policy Lab](#).



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APPENDIX

NEVADA PRETRIAL RISK (NPR) ASSESSMENT			
Assessment Date: ____/____/____	Assessor: _____	County: _____	
Defendant's Name: _____	DOB: ____/____/____	Case/Booking #: _____	
Address: _____	Contact Phone#: _____	# of Current Charges: _____	
City State Zip			
Most Serious Charge: _____	Initial Total Bail Set: \$ _____		
Demographic Information (optional): Gender: Male _____ Female _____			
Race: Hispanic _____ White _____ Black _____ Asian _____ Nat. Amer. _____ Other/Unknown _____			
SCORING ITEMS			SCORE
1. Does the Defendant Have a Pending Pretrial Case at Booking?			
a. Yes - 2 pts. If yes, list case # and jurisdiction: _____			
b. No - 0 pts.			_____
2. Age at First Arrest (include juvenile arrests)		First Arrest Date: ____/____/____	
a. 20 yrs. and under - 2 pts.			
b. 21-35 yrs. - 1 pt.			
c. 36 yrs. and over - 0 pts.			_____
3. Prior Misdemeanor Arrests (past ten years)		Total # of Misdemeanor Arrests: _____	
a. Two or less - 0 pts.			
b. Three or more - 2 pts.			_____
4. Prior Felony/Gross Misd. Arrests (past ten years)		Total # of Felony/GM Arrests: _____	
a. None or one - 0 pts.			
b. Two or more - 2 pts.			_____
5. Prior Violent Arrests (past ten years)		Total # of Violent Arrests: _____	
a. None - 0 pts.			
b. One or more - 2 pts.			_____
6. Prior FTAs (past 24 months)			
a. None - 0 pts.			
b. One FTA Warrant - 1 pt.			
c. Two or more FTA Warrants - 2 pts.			_____
7. Employment Status at Arrest			
a. Verifiable Full/Part-time Employment - 0 pts. (e.g. Self-employed, Disabled and receiving benefits, Student, Retired, Military, Stay at Home Parent, etc.)			
b. Unemployed - 2 pts.			_____
8. Residential Status			
a. Nevada Resident - living in current residence 6 months or longer - 0 pts.			
b. Nevada Resident - not lived in same residence 6 months or longer - 1 pt.			
c. Homeless or non-Nevada Resident - 2 pts.			_____
9. Substance Abuse			
a. Other - 0 pts.			
b. Prior multiple arrests for drug use or possession/alcohol/drunkenness - 2 pts.			_____
10. Verified Cell Phone			
a. Yes - 0 pts. If yes, list #: _____			
b. No - 2 pts.			_____
TOTAL SCORE:			_____
Risk Level (Circle One): LOW (0-4 pts.) MODERATE (5 - 10 pts.) HIGHER (11+ pts.) OVERRIDE?: Yes ____ No ____			
Override Reason(s): Mental Health _____ Disability _____ Gang Member _____ Flight Risk _____			
Prior Record More Severe than Scored _____ Prior Record Less Severe Than Scored _____			
In past five years, Prior Successful Pretrial Supervision _____ Other, explain: _____			
Final Recommended Risk Level: LOW _____ MODERATE _____ HIGHER _____			
Supervisor/Designee Signature: _____			Date: ____/____/____

HELPFUL RESOURCES

- [Stanford Pretrial Risk Assessment Tools Factsheet Project](#)
- [Types of PRAI tools based on topic](#)
- [Commonly used PRAIS](#)
- Data Collection Assistance:
 - [Statistical Analysis Centers](#)
 - MacArthur Foundation's national [Safety and Justice Challenge](#)
 - [Baltimore](#) is currently part of this program
 - Arnold Ventures recently launched the [National Partnership for Pretrial Justice](#), advancing a variety of [pretrial justice projects](#) across 35 states.
 - [Measures for Justice](#) is developing a broad, publicly-accessible database of county criminal justice data; currently it offers data from 6 states, with data from 14 more states expected in 2020
- [How Race Impacts Who is Detained Pretrial](#)

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