Pretrial Reform Task Force

Final Recommendations Report

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Message from the Executive Committee

We are honored to lead Washington's Pretrial Reform Task Force as its Executive Committee. As members of the Washington State Minority and Justice Commission, the Superior Court Judges' Association, and the District and Municipal Court Judges' Association, we are pleased to represent these organizations and work together to find ways to improve pretrial practices in Washington.

We embarked upon this endeavor to improve Washington's pretrial practices in June 2017. Over the past 18 months, we asked stakeholders from across the state to participate in learning more about Washington's pretrial practices and participate in proposing improvements to them. The Task Force's stakeholders worked diligently to learn more about Washington's pretrial systems, local pretrial improvements, and national pretrial reform efforts. We would like to thank the Task Force's stakeholders for their countless hours of work and dedication.

In addition to our diverse stakeholder participants, the Task Force partnered with the Pretrial Justice Institute (PJI), a national organization striving to make pretrial practices safer, fairer, and more effective. We thank them for their support. PJI's technical expertise, encouragement and advice has been invaluable.

In crafting the following report and recommendations, the Task Force addressed the many complex issues related to pretrial practices at the national, state, and local levels. These recommendations serve as an important step towards improved pretrial practices in Washington State.

Sincerely,

Justice Mary I. Yu
Washington State Supreme Court
Minority and Justice Commission

Judge Sean P. O'Donnell
King County Superior Court
Superior Court Judges' Assoc.

Judge Mary Logan
Spokane Municipal Court
District and Municipal
Court Judges' Assoc.

Executive Summary

The Task Force divided into three subcommittees: (1) Pretrial Services; (2) Risk Assessments; and (3) Data Collection. The Executive Committee appointed Chairs to lead the each subcommittee and tasked the respective subcommittees with developing recommendations that address the following issues:

Pretrial Services:

- What services are currently provided to people accused of crimes?
- What are the costs of the pretrial programs?
- Which services are the most effective?

Risk Assessment:

- What are the best practices for assessing risk?
- What are the considerations for adoption of a risk tool?
- How to account for racial and ethnic impact?

Data Collection:

- What are the current state and local pretrial populations?
- How to ensure uniform data collection for those populations?
- How to provide meaningful analysis of that data?

This report outlines the work of and the data collected by the subcommittees. Using the information collected, the subcommittees developed recommendations on best pretrial practices. In weighing their inclusion in this final report, the Executive Committee focused on ensuring items were easily understood and actionable by local jurisdictions. In implementing these recommendations, jurisdictions should strive for: transparency and open communication with their partners; inclusivity of ideas based in evidence-based best practices; and a commitment to begin and follow through on pretrial reforms.

Summaries of each subcommittee's recommendations are below.

RECOMMENDATIONS

Pretrial Services

1) **Governments should bear the cost of pretrial services rather than the accused**: Accused persons cannot and should not be required to incur additional costs or debts as a result of their participation in pretrial services. Pretrial services include, but are not limited to: electronic monitoring, drug and alcohol monitoring, mental/behavioral health treatment, and court reminders.
2) **Court Reminders**: The available research consistently shows that pretrial court date reminders through texts, emails, mail or phone calls are an effective method to reduce the risk of failure to appear, and should be available to all defendants.
3) **Voluntary Service Referrals**: Referrals such as mental and/or behavioral health treatment, vocational services, or housing assistance should be offered to assist defendants maintain court attendance and supervision compliance, and prevent re-arrest. Referrals should be individualized,

offered voluntarily rather than as a condition of release, and should involve little or no cost to the individual.

4) **Stakeholder Involvement**: A local stakeholder group can make actionable recommendations to improve the practices and outcomes of the pretrial system, and can ensure the success of reforms by soliciting input from all participants and by making informed decisions as a team, rather than separate and distinct entities.
5) **Transportation support**: Offering free or subsidized transportation to defendants for court appointments can help ensure low-income people and people with disabilities can attend their court-ordered appointments.

Risk Assessment

The Task Force takes no position on whether local jurisdictions should, or should not, adopt a pretrial risk assessment (PTRA) tool. But the Task Force does recommend that jurisdictions choosing to employ a PTRA consider the following minimum criteria before the adoption or creation of a PTRA.

6) **Identify Desired Goals**: A jurisdiction should clearly identify what it intends to accomplish in order to determine whether the use of a PTRA has been successful in reaching its stated goals, such as reducing the jail population or increasing pretrial release.
7) **Defining Terms**: A PTRA must have clear, operational definitions for "FTA" and "new offense" and jurisdictions should train all court partners on their usage.[1]
8) **Comparative Data**: Jurisdictions should collect data relevant to the identified goals before, during, and after implementation of the PTRA in order to measure the PTRA's performance.
9) **Clarify Interpretations of "Risk"**: Jurisdictions must (a) understand the different kinds of "risk" a tool may measure for (non-violent versus violent offenses), (b) differentiate the factors courts must consider under Washington's criminal rules to address the likelihood of an individual's failure to appear (FTA), danger to the public, or interference with the administration of justice, and (c) have a deep understanding of the risk "scoring" provided by the tool.
10) **Validation for Predictive Accuracy and Race Neutrality**: The PTRA must be validated using local data prior to adoption and periodically throughout its use in order to ensure the PTRA is predicting new (violent)[2] offenses and FTAs with accuracy and precision.
11) **Disproportionate Racial Impact of a PTRA**[3]: Jurisdictions must examine whether the PTRA has or is likely to have a disproportionately negative effect on certain racial, ethnic, or socio-economic groups. This should occur before implementation of the PTRA and then periodically throughout its use.
12) **Community Participation**: The adoption and utilization of a PTRA should be transparent and should engage communities of color, marginalized groups, and victims' rights groups in the development, implementation, and validation of any jurisdiction's PTRA.
13) **Planning and Implementation**: Many organizations, including the National Center for State Courts, have developed materials to help jurisdictions plan for the phases of implementation. A list of

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[1] For example, "FTA" could mean any failure to appear, or only a failure to appear that results in the issuance of a warrant. Similarly, a "new offense" could mean an arrest, a charge, or a conviction. CrR and CrRLJ 3.2 (a)(2)(a) address risk to "commit a violent crime" but do not define how commission of a violent crime is to be measured: arrest, charge or conviction.

[2] Only the PSA measures for commission of a violent offense. *See* above.

[3] More than 100 civil rights organizations have endorsed a letter that sets forth opposition to the use of risk assessment tools and algorithms as a substitution for ending money bail. This "Shared Statement of Civil Rights Concerns" is available here: http://civilrightsdocs.info/pdf/criminal-justice/Pretrial-Risk-Assessment-Full.pdf.

Resources, following the Appendix, provides reports and tools for jurisdictions to use in the planning stages of implementation.

Data Collection

14) **Collect and Record Data**: Jurisdictions should collect and record complete information at all points of the pretrial system, including: defendant demographics; booking and first appearance; release/detention decisions and bail; and, release, new criminal charges and failure to appear.
15) **Data Analysis**: Jurisdictions should conduct data analysis on all pretrial elements related to: time from booking to arraignment; pretrial releases and detentions; and pretrial outcomes.
16) **Data Analysis Results**: Jurisdictions should use the results of the data analysis to evaluate pretrial services and conduct improvements as necessary.
17) **Data Dissemination**: Jurisdictions should provide data analysis to stakeholders and/or the public on a regular basis.
18) **Pretrial Services Data**: If implementing a pretrial program, jurisdictions should collect and analyze at all points of the pretrial services program, to: measure program success, identify areas of improvement, and support adherence to best practices.
19) **PTRA Data**: Jurisdictions that implement a pretrial risk assessment tool should collect data to assess (a) the concurrence between supervision level or detention status and their assessed risk; (b) the percentage of cases with release eligible defendants who received a risk assessment; and (c) percentage of judge's release decisions that differ with a risk assessment tool recommendation.

Introduction

Approach

Washington State's Pretrial Reform Task Force was established on June 22, 2017 with the goals of examining current pretrial practices in Washington and developing consensus-driven recommendations for local jurisdictions to consider when improving their pretrial systems. The Washington State Minority and Justice Commission, Superior Court Judges' Association, and District and Municipal Court Judges' Association co-sponsored this effort. Task Force membership consisted of 55 stakeholders, including representatives from all court levels, all branches of government, community organizations, and the private sector.

An Executive Committee, comprised of a representative each of the sponsoring organizations, led the Task Force. Over 18 months, the Executive Committee hosted regular meetings for all Task Force members. The Executive Committee formed three subcommittees and three work groups that conducted research and made recommendations regarding: (a) pretrial release and effective pretrial services, (b) court practices for assessing risk and reviewing concerns regarding actuarial risk assessment tools, and (c) uniform data collection. The Executive Committee made the final decision as to the Task Force's final recommendations.

Guiding Principles

Underpinning the work of the Task Force was a commitment to reform pretrial practices that have contributed to high rates of pretrial detention while respecting local court culture and practices. In addition to the federal and state constitutional presumptions of innocence and a statewide court rule that presumes release, the Task Force's work and recommendations were guided by three central principles.

- *Improve the implementation of evidence-based practices*
  Under current practices in Washington, many courts have limited information about an individual when making pretrial release or detention decisions and have limited pretrial services to offer as an alternative to jail. As a result, in an effort to ensure community safety, incarceration rates may be unnecessarily high due to an absence of less restrictive alternatives to full incarceration. In other words, but for the lack of pretrial services as an alternative to jail, more people accused of crimes and awaiting trial could safely be released. Up to 77% of the people in Washington's jails are being held pretrial, meaning they have not been convicted of a crime.[4] Decisions to detain individuals have a profound impact on their livelihood, home, and family.

  The federal and state pretrial services field is developing and encouraging the use of evidence-based practices. This includes entities such as the Bureau of Justice Assistance, National Institute of Corrections and private foundations. Washington courts should better understand and implement successful pretrial services, programs, and conditions that are proven to be effective in advancing justice.

[4] *See* figure 4.

- *Support judicial discretion*
  The ability of judges to make individualized decisions based on an individual's actual risk is of paramount importance given the presumption of release and the impact of detention. Judges should be afforded all the information and tools readily available to support their ability to make informed release decisions. The recommendations within this report are not intended to minimize the unique role of a judge or limit judicial discretion. Instead, their purpose is to provide judges with additional support and tools for making pretrial decisions that are in compliance with the federal and state constitution, current laws, and applicable court rules.

- *Maximize justice for all*
  Focusing the following recommendations on the needs of individuals who come into contact with the criminal justice system is critical. That contact starts with pretrial decisions and the very first decision can have significant consequences on a person's job, housing, and family life. Consistent with Washington law and its court rules, the best practice is to ensure the fewest number of people are detained pretrial, with the fewest possible conditions, and without jeopardizing public safety. Accused individuals should not be detained pretrial solely because of their inability to post a bond or pay for their release. Nor should these individuals bear the costs of monitoring if released pretrial. Every entity in the criminal justice system should take steps to ensure that the systems in place and the reforms to be implemented do not have a disproportionate impact on a person because of his or her race, ethnicity, gender, socio-economic position, or otherwise. Finally, pretrial reform efforts should be transparent and their efficacy should be publicly available. If aligned with evidence-based practices and informed judicial decision-making, these pretrial reform efforts can be successful.

Findings and Recommendations

This report describes the findings of the Task Force subcommittees and the Executive Committee's recommendations specific to three areas of focus: pretrial services, risk assessment, and data collection. Stakeholders, unsurprisingly, did not agree on everything. Accordingly, each of the nineteen recommendations are best considered when viewed in the context of all of the other recommendations; none should be viewed as a single attempt at reform. Rather, each should be thoughtfully approached as a part of the collective nineteen recommendations. Jurisdictions should work closely with their stakeholders to assess the needs of their court and communities, and implement appropriate strategies.

Pretrial Services

Washington law and its court rules presume that a person charged with a non-capital offense will be released on their personal recognizance pending trial. Accordingly, courts can only impose pretrial conditions or detention when the risk of failing to appear, committing a violent crime, or obstructing the administration of justice outweighs an individual's liberty interest.

The Task Force researched consensus that, so long as the services do not negatively affect court appearance rates and community safety, the widest variety of pretrial services should be available to courts in order to maximize the number of people eligible for release from pretrial detention and to minimize or eliminate the costs imposed on these individuals.[5] The legal limitations governing the release of an accused, the availability of pretrial services, and effectiveness of those services are discussed in turn below concluding with the Executive Committee's recommendations.

Legal Limitations

Pretrial conditions of release affect an individual's constitutional rights. The Fourth Amendment to the United States Constitution allows the placement of pretrial release conditions if those conditions are reasonably related to a legitimate governmental objective and do not amount to "punishment." If a pretrial condition passes muster under the Fourth Amendment, the condition may but not necessarily will be lawful under Washington's Const. Art. I, Sec. 7. That is because Article I, Section 7 encompasses the privacy expectations protected by the Fourth Amendment and in some cases may provide greater protection to Washington citizens than the Fourth Amendment.[6]

The government has a number of compelling interests that may impact the number and type of pretrial release conditions that may be imposed on an accused person awaiting trial. Some of these compelling interests include: community safety, following court orders, and appearing in court. Pretrial release conditions authorized by CrR 3.2 and CrRLJ 3.2 are intended to further these compelling interests, rather than a means of imposing punishment.

In Washington, Criminal Rule (CrR) 3.2 and Criminal Rule for Courts of Limited Jurisdiction (CrRLJ) 3.2 govern conditions of pretrial release. "Any person, other than a person charged with a capital offense, shall at the preliminary appearance…be ordered released on the accused's personal recognizance pending trial…"[7] This presumption of release may be overcome if the court determines that such recognizance will not reasonably assure the accused's appearance when required, or when there is shown a likely danger that the accused will commit a violent crime, seek to intimidate witnesses, or otherwise interfere with the administration of justice.[8]

If the court determines that the accused is not likely to appear if released on personal recognizance, it may impose a condition or combination of conditions that will reasonably assure appearance.[9] Possible conditions are set out in CrR 3.2(b) and CrRLJ 3.2(b); and the court must impose the least restrictive of these conditions in any given case.[10]

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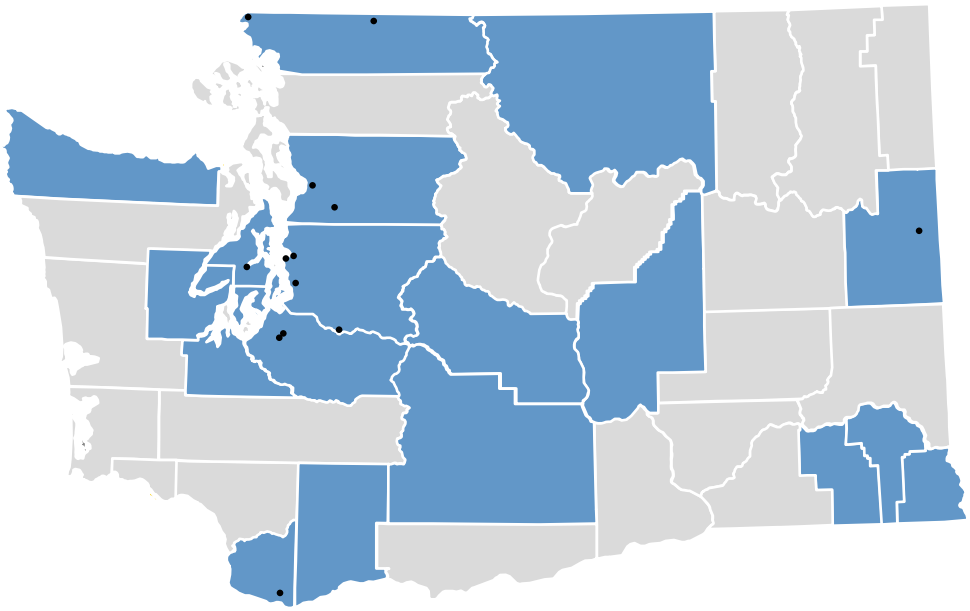
[5] *Id.*
[6] *Blomstrom v. Tripp*, 189 Wn.2d 379, 384, 402 P.3d 831, 834 (2017).
[7] CrR 3.2(a) and CrRLJ 3.2(a).
[8] *Butler*, 137 Wn. App. 515 (2007) (citing CrRLJ 3.2(a) and CrR 3.2(a)).
[9] CrRLJ 3.2(b) and CrR 3.2(b).
[10] *Id.*

CrR 3.2 (d)(10) and CrRLJ 3.2(d)(10) also allow the court to impose any condition other than detention to prevent interference with the administration of justice and protect the community.[11] However, this rule is not without limits. The court may not impose "onerous or unconstitutional" provisions when lesser conditions are available.[12] Doing so is an abuse of judicial discretion.[13]

Availability of Pretrial Services

In a recent survey, there were 32 identified active or former pretrial service programs in Washington State.[14] Pretrial services are clustered in several geographic areas of the state, with the areas of South Puget Sound, Northwest, Southwest and Central Washington generally well covered (see Figure 2). Large gaps in pretrial services were indicated in Eastern Washington and the Olympic Coast.

Figure 2. Geographic Location of Pretrial Service Programs



Washington State Courts with Pretrial Services	
Asotin County District Court	Okanogan District Court
Asotin, Columbia, and Garfield Superior Court	Pacific Municipal Court*
Battle Ground Municipal Court	Pierce County Superior Court
Blaine Municipal Court	Port Orchard Municipal Court
Clallam District Court	Puyallup Municipal Court
Clark County District Court	Seattle Municipal Court
Everett Municipal Court	Skamania County District Court
Everson-Nooksack Municipal Court	Snohomish County*+
Federal Way Municipal Court	Spokane County District Court
Grant County District Court	Spokane County Superior Court
King County Superior Court	Spokane Municipal Court
Kitsap County Superior Court	Thurston County+

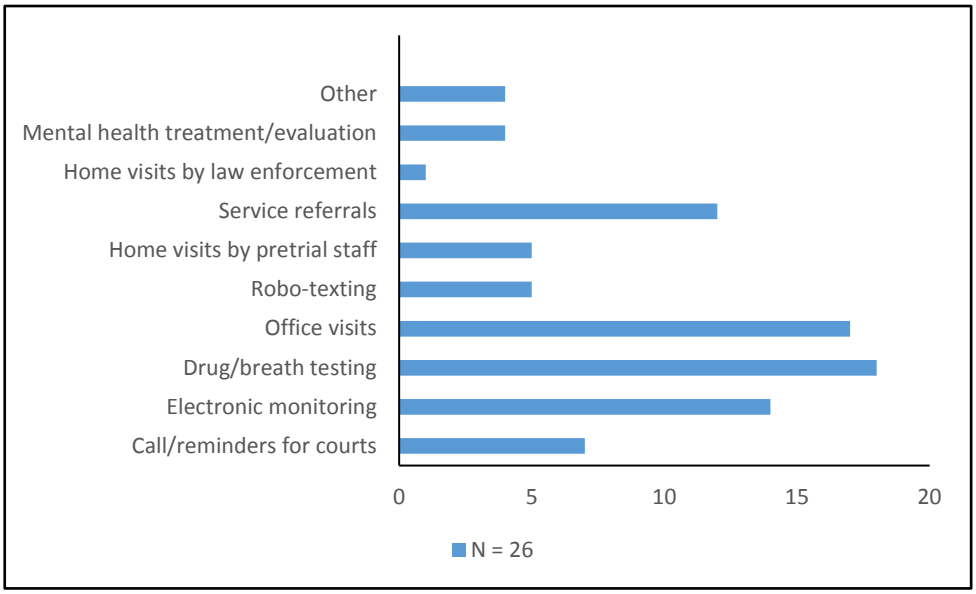
[11] CrRLJ 3.2(d)(10) and CrR 3.2(d)(10).
[12] *Butler*, at 519 (held that conditions that defendant undergo alcohol evaluation and attend three self-help meetings per week were not least restrictive means to ensure defendant's presence in court).
[13] *Id.* at 524.
[14] Superior Court Judges' Association. (September 2018). *Pretrial Services Survey*.

Lake Forest Park Municipal Court	Thurston County District Court*
Lower Kittitas District Court	Upper Kittitas County District Court
Mason County Superior Court*	Whatcom County District Court
Milton Municipal Court	Yakima County Courts
* Indicates the program is no longer active + Unclear in reporting if respondent represented a District, Municipal, or Superior Court	

A major misconception of pretrial reform is that in order to implement change there must be expensive pretrial services programs with multiple employees to staff them. However, many jurisdictions in Washington offer some kind of pretrial services, even without a formal program. The reasons for this vary based on caseload, need, and costs. Yakima County, for example, significantly improved appearance rates and pretrial outcomes by focusing their reform efforts on providing court date reminders and having defense counsel present at the first appearance.

Currently, jurisdictions across Washington offer a wide variety of pretrial services. The Pretrial Services Survey found over 10 different kinds of pretrial services available, shown in Figure 3. Drug and/or breath testing is the most common service, with office visits and electronic monitoring also commonly used by the responding programs. Other types of services offered include ignition interlock monitoring, No Contact Order modifications, pretrial probation monitoring, and bus passes.

Figure 3. Pretrial Service Activities



Effectiveness of Pretrial Services

The Task Force examined some of the more commonly available pretrial services and found limited data on efficacy. The findings are described below. It is critical to note that all pretrial services and/or supervision individually relate to that particular defendant's risk of: (1) failing to appear; (2) committing a violent offense while on pretrial release; or (3) interfering with the administration of justice.

Drug Testing: Limited research shows that although use of drug testing by pretrial programs has increased significantly over the years, the studies that examine their effectiveness are unclear as to whether drug testing improves pretrial outcomes. In other words, defendants that had drug testing as a

condition of pretrial release were no more likely to appear for court or not commit an offense while on release than those who did not have drug testing imposed as part of their release.[15]

Electronic Home Monitoring: Home monitoring and house arrest are the most high-cost and intensive forms of pretrial services. Research results have been mixed – several studies show that electronic home monitoring, as a condition of pretrial release, has not been shown to reduce pretrial failure. It has been suggested that electronic monitoring can be a viable alternative to detention for higher-risk individuals, while achieving similar rates of court appearance and community safety. [16] As with other pretrial services, more research is needed.

Substance Use Disorder Treatment and Other Services: Defendants may benefit from referral services to substance use disorder treatment, mental health services, or other interventions. Evidence points to: (1) focusing those services on defendants at highest risk, with the exception of mental health services which should be offered to all those in need; and (2) tailoring service offerings to individualized risk of pretrial failure to appear or recidivism. Currently in Washington State, treatment services that are offered by pretrial programs are generally not voluntary.[17]

Court Date Reminders: While there may be very little data to support the recommendation of a specific pretrial supervision condition, court date notification reminders have proven to be an exceptionally effective practice that has yielded significant increases in defendant's appearance rates.

Many jurisdictions have adopted this protocol throughout the nation and even here in Washington State reminders have proven to be effective. In New York, text-message reminders improved appearance rates by 26% for low-level offenses.[18] In Washington, Yakima County implemented an automated text and call message reminder as part of the court's case management system. This practice helped Yakima County reach a 75% appearance rate.

Spokane County has also started using an automated text-messaging system that reminds defendants of their upcoming court dates. Their program relies on the Spokane County Public Defenders' Office to send text message reminders to their clients prior to their court dates. Spokane County has already seen improvements to its appearance rates after use of its new communication system.[19]

Pretrial Services Recommendations

Defendants may be required to use pretrial services, whether offered through a formal program or not, to ensure their participation in court appearances and reduce the likelihood of a new charge while on pretrial release. In proposing the following recommendations, the Task Force considered the limited number of evidence-based pretrial services currently available in Washington. These recommendations also consider best practices related to strengthening the pretrial systems that serve the accused.

1) **Government bear the cost of pretrial services**: To ensure equal justice for all and to reduce the imposition of legal financial obligations on those involved in the criminal justice system especially at a pre-adjudication stage, the government rather than individuals should bear the cost of pretrial

[15] *Id*.
[16] Lowenkamp, C.T., VanNostrand, M. (November 2013). *Exploring the Impact of Supervision on Pretrial Outcomes*. Retrieved from: https://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_Supervision_FNL.pdf
[17] Superior Court Judges' Association. (September 2018). *Pretrial Services Survey*.
[18] Cooke, B. Diop, B.Z., Fishbane, A., Hayes, J., Ouss, A. Shah, A. (January 2018). *Using Behavioral Science to Improve Criminal Justice Outcomes*. Retrieved from: http://www.ideas42.org/wp-content/uploads/2018/03/Using-Behavioral-Science-to-Improve-Criminal-Justice-Outcomes.pdf
[19] *Id.*

services. That means that the use of alternative services should not require individuals to incur unnecessary costs or debts. These include, but are not limited to: electronic monitoring, drug and alcohol monitoring, mental/behavioral health treatment, and court reminders.

2) **Court Reminders**: The available research consistently shows that pretrial court date reminders reduce the risk of failure to appear. Text messages, emails, mail, and phone calls are equally effective. This can be a cost-effective and time-efficient method of encouraging defendants with a low flight risk to return on time to court.
3) **Voluntary Service Referrals**: The National Institute of Corrections recommends offering defendants service referrals that may help secure court attendance and supervision compliance, and prevent re-arrest.[20] Such referrals can include, but are not limited to: mental and/or behavioral health treatment, vocational services, or housing assistance. For example, a stable housing environment can improve a defendant's likelihood of timely court appearance. The services offered to defendants should be individualized, voluntarily rather than a condition of release, and should involve little or no cost.
4) **Stakeholder Involvement**: The formation of a stakeholder group representing all stakeholders implementing pretrial practices has led to successful reform efforts locally in Yakima County and across the country. Stakeholders should include, but are not limited to: judges, prosecuting and defense attorneys, pretrial and/or probation services departments, clerks, jail administration, community representatives, members of the bail bond community, and law enforcement. A local stakeholder group can examine all parts of the pretrial system and make actionable recommendations to improve the practices and outcomes of the system. In the Yakima County example, a local workgroup came together to change their practices by moving up the date of arraignment and assigning defense counsel at the first appearance. A well-functioning stakeholder group can ensure the success of reforms by getting buy-in from all participants and by making informed decisions as a team, rather than separate and distinct entities.
5) **Transportation support**: The Task Force strongly encourages jurisdictions to consider offering free or subsidized transportation to defendants for court appointments. Bus, rail, or transit system passes can help ensure low-income people and people with disabilities can make their court-ordered appointments. While this is not a traditional "service" offered by the courts, several jurisdictions in Washington anecdotally report that it is an important feature for defendants in their pretrial systems.

Risk Assessment

Best Practices for Assessing Risk

CrR 3.2 and CrRLJ 3.2 set forth Washington's legal framework for making pretrial release and detention decisions in superior court and district/municipal courts, respectively. These rules establish a presumption of release for all defendants. That presumption may be overcome only upon a showing that there is a likelihood that a defendant will: (1) fail to appear (FTA); (2) commit a new violent offense; or (3) interfere with the administration of justice.

In making each determination, CrR 3.2 and CrRLJ 3.2 set forth specific corresponding factors that the court must consider. For example, when a FTA is at issue judges must consider relevant facts including but not limited to: warrant history, employment, ties to family and the community, enrollment in

[20] *Id.*

school, reputation, character, mental condition, and criminal history. Similarly, when the risk of a violent re-offense is at issue, judges must consider, among others: the nature of the charge, the accused person's criminal record, and his or her past or present threats of violence or use of a deadly weapon.

In a perfect world, judges would have access to all relevant information relating to a specific defendant. In reality, judges often have access to very little information to inform their pretrial release or detention decisions, such as the current charge and sparse details laid out in a probable cause affidavit. Counsel may not be present to represent the interest of the defendant. Judges should receive more information when making pretrial release and detention decisions.

To assist in collecting data to support judges in making these difficult pretrial decisions, jurisdictions often use pretrial risk assessment (PTRA) tools. PTRA tools seek to provide judges with information about how a particular person would likely act. PTRAs are actuarial tools that use data to determine the risk of failure to appear and risk of committing a violent offense while on pretrial release. Several jurisdictions in Washington are actively using pretrial risk assessment tools.

Table 1. Washington Jurisdictions Using Pretrial Risk Assessment Tools

Tools identified:	Number of responses	Jurisdictions
SAFER (Spokane Assessment for Evaluation of Risk)	2	Spokane County Superior Court, unidentified court
PSA (Arnold Foundation Public Safety Assessment)	1	Yakima County*
ASRA (Adult Static Risk Assessment)	2	Whatcom County District Court, Thurston County*
VPRAI (Virginia Pretrial Risk Assessment Instrument)	1	Clark County District Court
Ohio Risk Assessment System – Pretrial Assessment Tool	1	Blaine Municipal Court
Other	3	Lower Kittitas District Court, Pierce County Superior Court, Seattle Municipal Court, Federal Way Municipal Court

A similar trend can be seen nationally and on the federal level. As shown in Table 2, a majority of states (29) have adopted some type of PTRA tool. Federal courts are also using PTRA tools and have specifically adopted the Public Safety Assessment (PSA) as part of their pretrial detention or release determinations.

Table 2. States Using Pretrial Risk Assessments[21]

State/Jurisdiction	**Risk Assessment(s) Used**	**Percent of population covered by risk assessment**
Arizona	PSA statewide	100.0%
California	PSA	2.9%
Colorado	CPAT	87.4%

[21] Source: Administrative Office of the Courts.

Connecticut	locally validated tool	100.0%
District of Columbia		100.0%
Florida	COMPAS, VPRAI, PSA, and a locally validated tool	8.9%
Hawaii	ORAS statewide	100.0%
Illinois	PSA	46.2%
Kansas	locally validated tool	20.1%
Kentucky	PSA statewide	100.0%
Louisiana	locally validated tool	8.4%
Maryland	VPRAI and locally validated tool	27.6%
Michigan	VPRAI/PRAXIS and locally validated tool	27.2%
Minnesota	locally validated tool	22.3%
Nevada	NPR	89.1%
New Jersey	PSA statewide	100.0%
New Mexico	PSA	32.5%
New York	locally validated tool	43.2%
North Carolina	PSA	10.4%
Ohio	ORAS, PSA, and SCPRAI	29.3%
Oregon	locally validated tool	19.5%
Pennsylvania	locally validated tool and PSA	9.6%
Rhode Island	PSA statewide	100.0%
South Dakota	PSA	34.3%
Texas	PSA	16.5%
Utah	PSA statewide	100.0%
Virginia	VPRAI	85.3%
Washington	PSA and SAFER	10.3%
Wisconsin	PSA	25.7%
Federal	PTRA	100.0%

* Any states not listed are not using pretrial risk assessments

There are concerns associated with the use of PTRA tools. Generally, they stem from the fact that PTRA tools consider criminal history as part of the algorithmic calculation of risk. Some argue that implicit and overt racial bias, patterns of policing of minority neighborhoods, and the historical correlation between poverty and crime and the overlap of poverty and race taint criminal histories for persons of color.[22] The argument, therefore, is that the use of criminal history in a PTRA may inadvertently incorporate racial bias, which disproportionately affects persons of color in a structural and institutionalized way.[23] That said, criminal history can be an important criteria in any release decision, and judges are authorized to consider criminal history under CrR 3.2 and CrRLJ 3.2. Judges, however, must take care when applying

[22] *See* Appendix B—report titled, "Risk Assessments and Racial Disproportionality"

[23] Berk, R., Heidari, H., Jabbari, S., Kearns, M., Roth, A. (30 May 2017). *Fairness in Criminal Justice Risk Assessments: The State of the Art*. Retrieved from: https://arxiv.org/pdf/1703.09207.pdf

criminal history to an analysis of future dangerousness, the likelihood of failing to appear, and the likely a defendant will interfere with the administration of justice.[24]

Others argue that algorithmic risk assessments are more accurate at determining risk than humans and have less of a disproportionate impact than if they are not used. Scientists in many fields are creating algorithms that still reduce bias despite using past data that is shaped by historical prejudices. For example, a team of scientists and economists in New York determined that algorithms have the potential to reduce pretrial detention by 41.9% with no increase in crime rates while simultaneously reducing racial disparities.[25]

Yakima County has adopted a PTRA tool with similar results to the New York study. Using a PTRA, Yakima released 20% more people pretrial without impacting public safety or having any material increase in failure to appear for court hearings. Prior to Yakima County implementing a PTRA tool, 49% of Latino/Hispanic defendants were released pretrial, as compared to 64% of white defendants that were released. After implementing the risk assessment tool, Latino/Hispanic defendants were released 26% more frequently and were released at about the same rate as white defendants.[26] Similarly, other racial/ethnic groups, including Native Americans, African Americans, Asians and Pacific Islanders, experienced a 24% increase in the rate of release.[27,28]

Yakima, and other jurisdictions, are also using a decision matrix framework or process to accompany the PTRA tool. A decision matrix can assist judges and other users in the pretrial system to weigh the tool score with other factors that require consideration, for example, if a defendant has a federal detainer. A matrix can also point to appropriate supervision levels for those defendants considered for pretrial release. A matrix does not override judicial discretion or individualized decision-making. It is simply another tool for judges to use in conjunction with a PTRA tool.

The Task Force takes no position on whether PTRAs are appropriate for any one jurisdiction or whether they should be employed uniformly statewide. Instead, we offer a roadmap for jurisdictions intending to adopt or create a pretrial risk assessment tool.

Risk Assessment Tool Considerations

Below are considerations for jurisdictions intending to adopt or create a PTRA tool.[29] For purposes of these considerations, a PTRA means an actuarial tool that uses data to determine the likelihood that a defendant will fail to appear or commit a criminal offense while on pretrial release.[30] These

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[24] Further inquiry is encouraged to provide the judge with more information about the individual's current status as it relates to their criminal history. Questions such as: how old is the criminal history? Are the offenses serious violent offenses? How old is the current charge (delayed prosecution was frequent sometimes due to the person being out of the jurisdiction)? Has something changed since the allegation (for better or worse)? Are there multiple charges? Can all inform the application of criminal history to a release decision?

[25] Miller, A. (26 July 2018). Want Less-Biased Decisions? Use Algorithms. *Harvard Business Review.* Retrieved from: https://hbr.org/2018/07/want-less-biased-decisions-use-algorithms?utm_source=twitter&utm_medium=social&utm_campaign=hbr

[26] Brooker, C.M.B. (November 2017). *Yakima County, Washington Pretrial Justice Improvements: Pre- and Post-Implementation Analysis*. Retrieved from: https://justicesystempartners.org/wp-content/uploads/2018/02/2017-Yakima-Pretrial-Pre-Post-Implementation-Study.pdf

[27] *Id.*

[28] It is critical to note that Yakima County also implemented many other pretrial practices, including providing those charged with counsel at first appearance. Those new practices may have also contributed to the increase in release rates.

[29] The Race and Ethnic Considerations Workgroup advises: "Before undertaking the time and expense of validating a PTRA, jurisdictions should consider other forms as standalone or corollary measures that do not require an algorithmic tool. These measures include increased law enforcement diversion prior to booking, providing low-cost court date reminders, increasing the use of unsecured or court deposit bonds, and ensuring that individuals arrested can be heard promptly after arrest--with counsel-- regarding their ability to pay a given bail requirement."

[30] To date, no PTRA measures for risk of interference with the administration of justice. *See* CrR, CrRLJ 3.2(a)(2)(b).

considerations should provide guidance and identify the minimum criteria for the adoption or creation of a PTRA.

A PTRA is not intended to be the exclusive method for determining risk in making release decisions. Judges must use their own discretion, consistent with CrR 3.2 and CrRLJ 3.2, in any release decision. This Task Force recognizes that any jurisdiction adopting or creating a PTRA must also utilize court rules, statutes, case law, and evidence presented by defense counsel consistent with the presumption of innocence and presumption of release in non-capital cases.

6) **Identify Desired Goals**: A jurisdiction should clearly identify what it intends to accomplish to determine whether the use of a PTRA has been successful. Examples of jurisdictional goals may include: reducing the jail population, increasing pretrial release, reducing racial disparity in the jail population, improving public safety, or improving court appearance rates.
7) **Defining Terms**: A PTRA must have clear, operational definitions for "FTA" and "new offense."[31] Jurisdictions should educate court partners, data analysts/validators, and data entry personnel on these definitions and determine whether the definitions help accomplish the jurisdiction's goals.
8) **Comparative Data**: Jurisdictions should collect data relevant to the identified goals before, during, and after implementation of the PTRA to measure the PTRA's performance and progress toward meeting the jurisdiction's goals.
9) **Clarify Interpretations of "Risk"**:
    a. Risk of Non-Violent versus Violent Offense: Washington law requires release without conditions absent a substantial risk of commission of a violent offense, failure to appear in court or interference with the administration of justice. Jurisdictions should be cautious when using a PTRA that tests for risk of commission of a non-violent offense, because the resulting risk score or risk level could impact the perceived risk of commission of a violent offense.
    b. Differentiate the Risks: The PTRA should, ideally, differentiate among the three types of risks addressed in Criminal Rule (CrR and CrRLJ) 3.2 and provide separate risk scores or categories for each.
    c. Quantify the Risk: The PTRA should quantify the likelihood of outcomes represented by the score or the risk category and not simply prescribe labels like "high," "medium," or "low." All actors in the court system must understand the scores and be able to interpret the results beyond the use of simple labels or descriptors.
10) **Validation for Predictive Accuracy and Race Neutrality**: The PTRA must be validated using local data prior to adoption and throughout its use to ensure the PTRA is predicting new (violent)[32] offenses and FTAs with accuracy and precision. The initial post-implementation validation should be conducted within twelve to eighteen months from the first use of the instrument, or as soon as it has been determined that a sufficient number of cases are eligible for evaluation. Validations should a) measure the instrument's consistency with stated goals, b) test for predictive accuracy and racial neutrality (e.g., the tool does not over- or under-predict risk for different groups), and c) check the statistical significance, predictive power, and racial neutrality of each factor in the PTRA. Revalidations may occur less frequently.

[31] For example, "FTA" could mean any failure to appear, or only a failure to appear that results in the issuance of a warrant. Similarly, a "new offense" could mean an arrest, a charge, or a conviction. CrR and CrRLJ 3.2 (a)(2)(a) address risk to "commit a violent crime" but do not define how commission of a violent crime is to be measured: arrest, charge or conviction.
[32] Only the PSA measures for commission of a violent offense. *See* above.

11) **Disproportionate Racial Impact of a PTRA**[33]: Jurisdictions must examine whether the PTRA has or is likely to have a negative effect on certain racial, ethnic, or socio-economic groups, with particular scrutiny on disproportionality. Release decisions made before, versus decisions made after the adoption of a PTRA, should also be compared. The analysis should include a concurrence rate, which is the rate at which judges follow the recommendations of the decision framework accompanying the PTRA.
12) **Community Participation**: It is crucial that communities of color, marginalized groups, and victims' rights groups are educated and engaged in the development, implementation, and validation of any jurisdiction's PTRA. Transparency should mark any jurisdiction's decision to adopt and use a PTRA.
13) **Planning and Implementation**: Implementation of a risk assessment tool can be complicated. A great deal of planning and coordination is necessary for implementation to be successful. Many organizations, including the National Center for State Courts, have developed materials to help jurisdictions plan for the phases of implementation. A list of Resources, following the Appendix, provides reports and tools for jurisdictions to use in the planning stages of implementation.

Data Collection

The ability to collect accurate data is a critical piece of any reform effort. Data is fundamental when attempting to develop new, effective processes and improve current practices. Washington State does not collect the data necessary to track pretrial practices effectively. Key terms do not have uniform definitions across the state. And, perhaps most importantly, there is no uniform data collection process. As a result, Washington has limited to no statewide data regarding the following:

- Pretrial populations for each jurisdiction, which is necessary to establish a baseline understanding of who is in jail and if any reform efforts had positive outcomes.
- The cost for the current pretrial risk assessment processes and detention to allow for the consideration of the costs and/or savings associated with any new policies.
- The booking date and first appearance date, without which one cannot determine how long a defendant has been in jail at the time of their first hearing.[34]
- Release/detention decisions at the bail hearings (personal recognizance release, bail, or remanded).
- The reasoning for the release/detention decision (flight risk, unpaid bail, immigration hold, etc.).
- The outcome of the bail decision: the data does not distinguish between instances when a defendant remains in detention due to the inability to pay a relatively low bail amount versus a transportation hold, etc.
- Failure to appear rates, which is one of the most critical pieces of information related to pretrial reform. Currently, at the superior court level, the only method available to determine if a FTA has occurred is to triangulate bench warrant data with case filing and adjudication dates.
- Recidivism rates (new crimes committed after arraignment of instant offense).

Washington needs concrete data, based on uniform definitions and obtained through a uniform data collection process, to drive its reform efforts and direct its practices. Data collection needs to be uniform

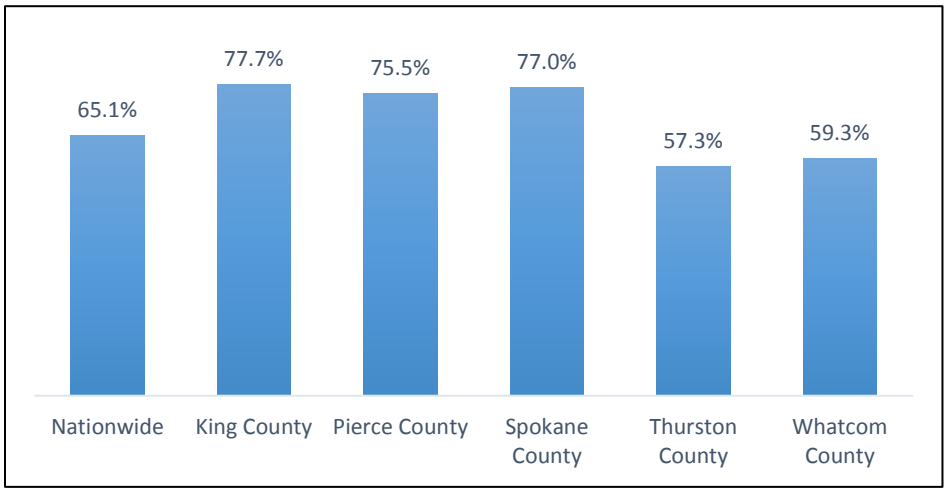
[33] More than 100 civil rights organizations have endorsed a letter that sets forth opposition to the use of risk assessment tools and algorithms as a substitution for ending money bail. This "Shared Statement of Civil Rights Concerns" is available here: http://civilrightsdocs.info/pdf/criminal-justice/Pretrial-Risk-Assessment-Full.pdf.
[34] At least some Sheriffs' Offices collect booking date and first appearance data; however, many of them do not have a way to match the data to a specific case in the court records.

at the jurisdictional and state level. A data repository is necessary to better understand our state's systems on both a micro and a macro level.

Washington strives for a criminal justice system that is safe, just, fair, and equitable for all. Without data, it is difficult to understand how effective pretrial system reforms are once implemented. Perhaps more problematic, without proper data it is difficult to estimate how effective the systems currently in place are. Even without pretrial reforms, the lack of data collection and analysis impacts every jurisdiction, court, and the tens of thousands of people detained pretrial in Washington.

Pretrial Population

Figure 4. Pretrial Jail Population Estimates[35]



Nationally, 65.1% of the average jail population consist of pretrial defendants.[36] In other words, the majority of people in jail have not been convicted of the crime for which they are being held. Similarly, in Washington, recent data shows that the majority of defendants in jail are being held pretrial, and many counties have a pretrial jail population that is higher than the national average. For example, in King County, the average jail population is comprised of 77.7% pretrial defendants. Pierce County has an average jail population that is comprised of 75.5% pretrial defendants. Some counties like Thurston County and Whatcom County have a pretrial jail population that is lower than the national average with pretrial defendants contributing to about 57.3% and 59.3% of the jail population respectively. Although attempts to obtain similar data from several other counties in Washington State were made, the counties either could not compile it in time for this report or stated that they did not collect this information.

Some studies have shown that individuals who do not have the economic resources to post a bond or bail and remain incarcerated pretrial experience far worse outcomes in the criminal justice system compared to similarly situated individuals who can afford bail and are released. In fact, low risk defendants who were detained prior to trial were four times more likely to receive a sentence of imprisonment and three times more likely to be given a longer prison sentence as compared to similarly

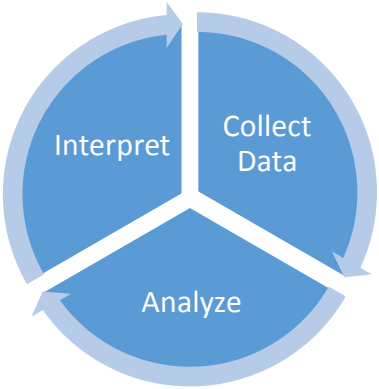
[35] AOC calculations based on source data provided by the listed jurisdictions. The pretrial jail populations represent all trial court levels that feed into the county jail.
[36] AOC estimate based on source data: Zeng, Z. (February 2018). *Jail Inmates in 2016*. Retrieved from: https://www.bjs.gov/content/pub/pdf/ji16.pdf.

situated low risk defendants who were released prior to trial.[37] There is also no dispute that pretrial incarceration disrupts one's job, family life, and places housing at risk.

Data Collection Recommendations

Data is necessary to develop pretrial programs, implement each element of reform, and evaluate progress toward the reform goals of individual jurisdictions and our state. To make an impact, data must be part of a dynamic process to collect available information, conduct analysis, and apply the findings to the pretrial program. Instead of relying solely on personal perceptions about the challenges or opportunities in pretrial programs, data can provide a solid understanding of what is happening in Washington's courts and communities.

Figure 5. Data Analysis Process



The Task Force, acknowledging the opportunity to improve data collection that impacts pretrial systems, has developed the following recommendations.

14) <u>Collect and Record Data</u>: Jurisdictions should collect and record complete information on:

a) Defendant demographics: Jurisdictions will need to collect baseline data, such as defendant demographics (i.e., race/ethnicity, gender, age, and county where charges are filed), type of charges, and assign identifiers to connect pretrial records with AOC criminal history records.
b) Booking date and first appearance date: Jurisdictions can use this information to identify how long jails are holding defendants between initial booking and the first appearance hearing.
c) Release/detention, reason for detention, bail amounts and any changes to bail amounts: Consistent and complete data on release, detention, and bail is necessary to understand who is getting released and who remains detained and how bail relates to those decisions and outcomes.
d) Release date, criminal charges/records and dates, failure to appear warrants and date issued: Jurisdictions need release/detention, release date, and improved superior court failure to appear warrant records to better understand who is succeeding and failing during pretrial. Jurisdictions should have a particular focus on collecting failure to appear rates and recidivism rates.

Data Analysis

[37] Lowencamp, C., VanNostrand, M., Holsinger, A.M. (November 2013). *Investigating the Impact of Pretrial Detention on Sentencing Outcomes.* Retrieved from: https://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_state-sentencing_FNL.pdf

The Task Force recommends the following kinds of analysis are undertaken. These analyses would assist jurisdictions in identifying gaps in existing programs and the establishment of pretrial measures statewide. While there are many other types of analysis that can be conducted, these are essential to establish initially.

15) <u>Data Analysis</u>: Jurisdictions should conduct data analysis on the following areas:

a) Time from booking to arraignment: Jurisdictions should identify how long jails are holding defendants between initial booking and the first appearance hearing. This information is essential for improving the efficiency of the system and conducting related cost-benefit analyses.
b) Pretrial releases and detentions: In order to measure changes in practices, jurisdictions will need to know several items related to release and detention, including:
    - The percent of different release/detention statuses (OR/PR, bail, remanded);
    - The numbers of times bail is being assigned and bail amounts; and
    - The reasons for detention (i.e., flight risk, bail not paid, immigration hold, etc.).

    This analysis will help track who is being detained and released and why. This information is important to helping understand jail populations, as well as potential areas for improvement.
c) Pretrial outcomes: To gain a better understanding of the pretrial population and the impact of pretrial release or detention on the community, jurisdictions should examine release/detention information, failure to appear data, and new charges on a regular basis. Jurisdictions should also collect data before implementation of a pretrial reform practice and compare it against the data that it collected after implementation of the pretrial reform practice so as to measure improvements. In addition, outcomes of the defendant's case should be analyzed based upon their release status.

Data Interpretation

To ensure a robust data analysis process, jurisdictions should use the results of their internal analyses to improve the pretrial services and/or court system in which they operate.

16) Data Analysis Results: Jurisdictions should use the results of the data analysis to evaluate pretrial services and conduct improvements as necessary.

The most productive changes that can be made to programs should be data-driven. Without data, there can be a tendency to rely on anecdotes, personal preferences, or assumptions about what is working within a system and what is not. Changes made to a system without data support can result in unintended consequences and exacerbation of existing problems. Data-driven decision making is necessary to make quality choices that improve processes over time.

17) Data Dissemination: Jurisdictions should regularly provide data analysis to stakeholders and/or the public.

It is often easiest to share program results with internal staff that understand the system realities and any pitfalls of reforms. However, providing some level of data analysis to those outside of courts can be beneficial in several ways. First, it supports transparency. Having performance and outcome measures available for stakeholders supports confidence in the justice system and the implementation of pretrial reforms in the jurisdiction. Second, public performance and outcome

measures support accountability. With many interested parties on all sides of the pretrial reform issue, data analyses that are available and demonstrate how they arrived at their stated conclusions are necessary for communities to have confidence in their results. Third, any support for reforms that are desired will be made stronger with public and stakeholder support, which can be driven by measures that demonstrate the success of pretrial reforms. Establishing a regular interval for release of the performance and outcome measures can assure the public that the results are available and credible.

Pretrial Services Data

Jurisdictions may decide to implement a pretrial service or Pretrial Services department. If so, the Task Force recommends the following areas of data analysis, in addition to those described in the Data Analysis section. This includes, but is not limited to, failure to appear data and new charges for those on pretrial release.

18) <u>Pretrial Services Data</u>: If implementing pretrial programming, jurisdictions should conduct data analysis on the following areas, as applicable:

a) Time from release order to supervision: This is a managerial tool to ensure that the agency/department is processing cases quickly and appropriately.
b) Length of time on supervision: Knowing the length of time on supervision will give a measure of case processing, as well as defendants' performance on supervision.
c) Caseloads per pretrial services case agent: This will be another managerial tool to help ensure the proper number of pretrial service agents. The defendant's risk and/or supervision level should be included in this metric, as risk or supervision level may affect the amount of time required for each case.
d) Responses to compliance and non-compliance with court-ordered conditions: Measuring responses in supervision helps identify areas for improvement and adherence to best or evidence-based practices.
e) Effectiveness at resolving outstanding bench and arrest warrants: An important performance measure to capture some of the ancillary benefits of pretrial services.

Pretrial Risk Assessment Tool Data

Jurisdictions may decide to adopt or use a PTRA tool as part of the pretrial process. Those that are considering PTRA tools should consult the Risk Assessment Considerations outlined in this report (pp. 17-19), noting the Task Force does not make a specific recommendation about the use of PTRA tools.

19) PTRA Data: Jurisdictions that implement a PTRA tool should conduct analysis on the following areas at regular intervals, in addition to the analyses described in the Data Analysis section. This includes, but is not limited to, pre-validation of the PTRA tool with local data and continued re-validation at regular intervals.

a) Concurrence between supervision level or detention status and their assessed risk: This area does not have to be an exact match, as each jurisdiction will identify circumstances or charges that increase or decrease the type of supervision.
b) Percentage of cases that release eligible defendants who received a risk assessment: With this information, the jurisdiction will know how the risk assessment is performing.

c) Percentage of judge's release decisions counter to risk assessment recommendation: In order to properly calibrate the PTRA tool, a jurisdiction must know how often the PTRA tool's recommendations are being followed and what happens in those cases.

Appendices

Appendix A. Pretrial Reform Task Force Charter

Summary of Pretrial Reform Task Force Objectives:

1. Establish a Pretrial Reform Task Force made up of stakeholders who contribute to or are effected by pretrial practices. The Task Force will work collaboratively to understand the current state of pretrial practices and how best to improve those practices. The Task Force will be divided into three subcommittees: (1) pretrial services; (2) risk assessment; and (3) data collection. The focus for each subcommittee and its respective goals are outlined below:

Pretrial Services

FOCUS: What pretrial services are currently provided to people accused of crimes in various jurisdictions throughout Washington?
• Pretrial service agencies—what services do they provide? What pretrial services agencies are there in WA? Where are they housed? How do they function administratively?
• Types of non-financial conditions for release
  ▪ Court reminders—who's doing them? Does it reduce FTAs?
  ▪ Daily/weekly calls
  ▪ Daily/weekly In-person reporting
  ▪ GPS monitoring
  ▪ Electronic home monitoring
• Are costs associated with any non-financial condition for release?
• Diversion and Deflection (social services) programs
• Cite and release alternatives
• Legal authority to impose pretrial conditions for release

Risk Assessment

FOCUS: What are the best practices for assessing risk related to pretrial release or detention decisions?
• Evaluation and analysis of current criteria embedded in Washington's law for assessing risk
  ▪ CrR 3.2 and CrRLJ 3.2—what is the efficacy of using the factors outlined in these rules to assess risk?
• How are judges being educated on the use of CrR 3.2 and CrRLJ 3.2?
  ▪ What are best practices from other jurisdictions to assist judges in assessing risk?
• What do risk assessment tools bring to the table?
  ▪ Comparison of various risk assessment tools (PSA, CPAT, etc.) both within and outside of Washington state.
• Variables used to inform the various risk assessments tools
  ▪ Do the variables increase, maintain, or decrease disproportionality in release decisions?
• Gather the laws and rules related to current bail practices

Data Collection
FOCUS: Research and collect critical data to inform the Pretrial Services and Risk Assessment subcommittees.

- What data needs to be collected?
- How should data be collected (methods)?
- What is the best or most effective use of the data once it's collected?

2. Convene Quarterly Task Force Meetings where the full Task Force will meet to share their progress and subcommittee chairs will be asked to present updates from their respective subcommittees.

3. Convene Monthly Subcommittee Meetings where the subcommittees will meet to share the information that they have collected thus far and determine tasks that need to be accomplished by the next subcommittee meeting. The subcommittee chair will facilitate the conversation and assign the tasks.

4. Produce a comprehensive report outlining the work of and data collected by the different subcommittees. Using the data collected from the subcommittees, the comprehensive report will recommend best pretrial practices to be used throughout Washington State.

Governing Structure:

- Executive Committee: Justice Yu, Judge O'Donnell, and Judge Logan

The Pretrial Reform Task Force's Executive Committee is made up of three leaders from the three co-sponsoring organizations: the Washington State Minority and Justice Commission co-Chair, Justice Mary Yu; the Superior Court Judges' Association President, Judge Sean P. O'Donnell; and the District and Municipal Court Judges' Association Representative, Judge Mary Logan. The Executive Committee serves as the final voice in terms of direction, focus, and work product of the subcommittees.

- Subcommittee Chairs: Judge Rumbaugh, Judge Moreno, Dr. van Wormer, and Dr. Peterson

The Pretrial Reform Task Force's Subcommittee Chairs are made up of four substantive experts in the subject matter relevant to each subcommittee. Mr. Harold Delia is the Chair of the Pretrial Services Subcommittee; Judge Maryann Moreno is the Chair of the Risk Assessment Subcommittee; and Dr. Jacqueline van Wormer and Dr. Andrew Peterson are the co-Chairs of the Data Collection Subcommittee. The Subcommittee Chairs are responsible for coordinating the groups, producing the deliverables, and meeting their deadlines. The Subcommittee Chairs will develop the content of their subcommittee meetings' agendas and create a timeline for when deliverables will become due. The Subcommittee Chairs will also host monthly meetings with their groups and present the data they collect with the Task Force at the quarterly meetings.

- Task Force Members:

The Task Force members are all those who have signed up for, or were appointed to, a subcommittee. The subcommittee members will work under the guidance of that subcommittee's chair to achieve the group's objectives, deliverables, and deadlines. Task Force members must attend their subcommittee meetings as well as the quarterly Task Force meetings.

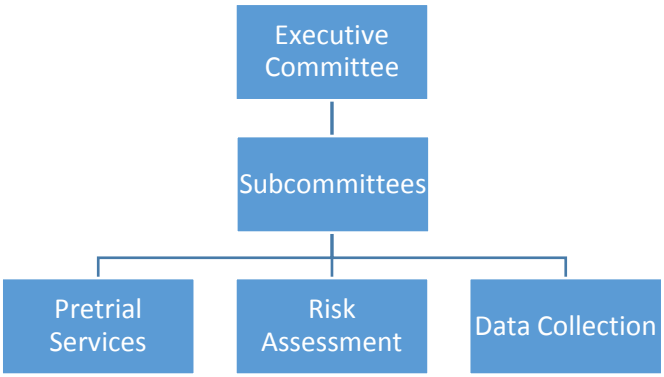
- Staff:

The Pretrial Reform Task Force's staff is made up of two staff persons that will provide staff support to the subcommittees. The staff support will include coordinating the subcommittee's monthly meetings, hosting

the conference call for these meetings, and taking notes during these meetings. The meeting notes will document the tasks that are assigned, tasks in progress, and projects completed, among other things.

Staff also includes the Pretrial Justice Institute (PJI) team: (1) Sue Ferrere- Technical Assistance Manager and this Task Force's "co-pilot"; (2) John Clark- Director of Implementation; (3) Robin Campbell- Director of Communications; and (4) Evita Green- Technical Assistance Associate.

Governing Structure Diagram:[38]



Stakeholder Organizations:

American Civil Liberties Union of Washington
Aladdin Bail Bonds
Attorney General's Office
Administrative Office of the Courts
Clark County Indigent Defense
Columbia Legal Services
District and Municipal Judges' Association
King County Community Corrections Division
King County Council
King County Department of Adult and Juvenile Detention
King County Executive's Office
King County Office of Public Defense
King County Prosecuting Attorney's Office
Minority and Justice Commission
Misdemeanant Corrections Association
Not This Time
Northwest Community Bail Fund
Office of Governor Jay Inslee
Office of the Washington State Auditor
Pierce County Superior Court's Pretrial Services Program

Pretrial Justice Institute
Seattle City Attorney's Office
Seattle Municipal Court's Research, Planning, and Evaluation Group
Snohomish County Public Defenders' Office
Spokane County Public Defenders' Office
Superior Court Judges' Association
Thurston County Superior Court's Pretrial Services Program
Thurston County Prosecuting Attorney's Office
Triton Management Services
Washington State Bar Association
Washington State Center for Court Research
Washington State Association of Counties
Washington Association of Sheriffs and Police Chiefs
Washington State Bail Agents' Association
Washington Defender Association
Washington Institute of Criminal Justice
Washington State Democratic Caucus
Whatcom County's Incarceration Prevention and Reduction Task Force
Yakima County Superior Court's Pretrial Services Program

Proposed Timeline:

Time	Activities
Kick-off: June 2017	Task Force meeting #1
Month 1: August 2017	Subcommittee meetings #1: • Amend the subcommittee objectives as needed • Develop framework for subcommittee functions • Determine what data/ information is needed
Month 2: September	Subcommittee meetings #2: • Independently determine agenda
Month 3: October	Subcommittee meetings #3: • Work on data collection
Month 4: November	Subcommittee meetings #4
Month 5: December	Subcommittee meetings #5
Month 6: January	Subcommittee meetings #6
Month 7: February	Subcommittee meetings #7 Task Force meeting #2: • Subcommittee Chairs will share their data/information
Month 8: March	Subcommittee meetings #8
Month 9: April	Subcommittee meetings #9
Month 10: May	Subcommittee meetings #10

Month 11: June	Subcommittee meetings #11
Month 12: July	Subcommittee meetings #12
Month 13: August	Subcommittee meetings #13
Month 14: September	Subcommittee meetings #14
Month 15: October	Subcommittee meetings #15 Task Force meeting #3 • Subcommittee Chairs will share their data/information
Month 16: November	Subcommittee meetings #16
Month 17: December	Subcommittee meetings #17 Task Force meeting #4 • Subcommittee Chairs will present final recommendations
Month 18: January 2019	Publish final report

Appendix B. Materials Developed by the Racial and Ethnic Considerations Workgroup

The Executive Committee is including this information on Risk Assessments and Racial Disproportionality to ensure that the public has access to the full spectrum of opinions that stakeholders provided to the Task Force. The inclusion of this material does not represent the Executive Committee's endorsement of the views expressed below.

Risk Assessments and Racial Disproportionality—

Submitted by the Racial and Ethnic Considerations Workgroup

This is the report of the Racial and Ethnic Considerations Workgroup, submitted to the Risk Assessment Committee April, 2018.

Reliance on Criminal History

The problem is the racial and ethnic disparities that our criminal justice system has created over time. Research shows that most of us have at least an implicit, meaning unconscious, racial bias. Social scientists term this a "pro-white" bias produced by the "cognitive filtering" that occurs on an unconscious level. That bias exists across all demographic groups, including law enforcement, lawyers, and judges: all decision-makers in the system. Overt racial prejudice also exists. In addition, communities of color are often policed more intensely than white communities, increasing contacts with law enforcement and thus the likelihood of arrest.

According to the Bureau of Justice statistics, young black males are nine times more likely than young white males to be imprisoned.[1]

Because defendants of color tend to have more law enforcement contacts and hence, criminal history, and criminal history is an important factor used in most risk assessments, particularly to predict new criminal behavior, then will use of a risk assessment have a racially disparate impact on minority defendants?[2] Does use of historical crime data to predict new criminal behavior in effect punish the victims of past racism by increasing their risk score and thus likelihood of pretrial detention?

Critics of risk assessments answer in the affirmative and argue that risk thus becomes a proxy for race because of this heavy reliance on criminal history, which is tainted by past race-based decision-making.[3] A more precise description of the relationship between criminal history and race is that they overlap. The degree to which existing institutional racial disparity affects risk scores, and how to mitigate any such disparate effects, is the subject of emerging social science research.[4]

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[1] "Risk Assessment in Criminal Sentencing", John Monahan and Jennifer Skeem, page 38. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2662082##

[2] The Arnold Foundation Public Safety Assessment (PSA), used in the Yakima project and the most commonly used tool in the country, heavily relies on past involvement in the criminal justice system. The PSA predictive factors for violent re-offense are: current violent offense; current violent offense + 20 years of or younger; pending charge at the time of the offense; prior conviction; prior violent conviction. https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=96b14899- 4d9b-0e46-5de2-3761d945f31b&forceDialog=0

[3] "Risk as a Proxy For Race", B. Harcourt (2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1677654 [4] "Fair Prediction with Disparate Impact: A study of bias in recidivism prediction instruments", A. Chouldechova, (2017), https://arxiv.org/pdf/1703.00056.pdf

Currently, there is little empirical research on the effect, if any, of the use of risk assessments on racial disparities in the criminal justice system.[5] However, King County discovered a substantial gap between the risk scores of whites and blacks for risk of new violent crimes and future failure to appear in its 2014 analysis of a pretrial risk assessment designed for King County.[6]

Can a "Race Neutral" Tool Still Result in Disparate Racial Impact?

The widely used Arnold Foundation's Public Safety Assessment (PSA) has been thoroughly tested and the factors it uses to predict outcomes have been found to be "race neutral", or free of predictive bias, according to Pretrial Justice Institute (PJI). [7] According to PJI, this means that "Black and White defendants assessed with the PSA succeed at virtually identical rates".[8] "Race neutral" in this context and in the academic literature mean that whites and persons of color with the same risk score have similar FTA and new criminal offense rates. In other words, the tool has the same predictive accuracy regardless of the defendant's race. Predictive accuracy is used to validate a risk assessment for race neutrality.

There are a couple of related problems here.

First is how determine new criminal behavior. Because of disproportionate policing and race bias among decision-makers, there may be a difference between crimes recorded in criminal history and crimes actually committed. For example, a white defendant in a seldom-policed neighborhood and a black defendant in a vigorously-policed neighborhood could have the same risk scores, even though the white defendant has actually committed more crimes than has the black defendant with whom she shares the same score. The difference is the white defendant got caught less often, perhaps because of policing patterns in that jurisdiction.[9]

Second, "predictive parity" as a test for racial bias, is a different inquiry from the impact of a tool on a racial or ethnic group. In other words, a risk assessment can have predictive parity among groups, yet systematically assign minorities higher average risk scores than whites[10], with the gap in average risk scores between racial groups is due to differences in criminal history. [11]

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[5] "Assessing Risk Assessment in Action", Professor Megan Stevenson, December 8, 2017, https://poseidon01.ssrn.com/delivery.php?ID=660029082067073118115104070119094113007059056088020045126118025097090089104093126005013117053102018063007119112006029115065020112038078013065116004124093119124064026076042099116099113111118090126100126090003081027010028093031068084105072086012006114&EXT=pdf

[6] King County Pretrial Risk Assessment Tool Project, February 2014, by Dr. Robert Barnoski. King County did not adopt the pretrial risk assessment.

[7] https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=5cebc2e7- dfa4-65b2-13cd-300b81a6ad7a

[8] *Id.,* at 5.

[10] Skeem and Lowencamp, Risk, Race and Recidivism: Predictive Bias and Disparate Impact, pg. 25, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2687339&rec=1&srcabs=2662082&alg=1&pos=1

[11] Skeem and Lowencamp, "Risk, Race and Recidivism: Predictive Bias and Disparate Impact", at pg. 25.

Can a Race Neutral Tool Mitigate Judicial Bias?

A validated risk tool can mitigate decision-maker bias. Well-designed algorithms have no prejudices, conscious or unconscious. Black defendants and white defendants with similar recorded criminal histories will have similar risk scores.

So, the question becomes, does the data show that release decisions informed primarily by a risk score show less racial disparity? The preliminary data from the Yakima project indicates the affirmative. Prior to the program, and without use of the PSA, 64 percent of whites were released pretrial compared to 49 percent of Latinos and 41 percent of other races. After the program started and with use of the PSA, the percentage of whites released was 73 percent and the percentage of Latinos released increased to 75 percent and other races increased to 65 percent.[12] How much of this improvement is attributable to the risk assessment is difficult to determine because other improved pretrial practices, i.e., assigning counsel earlier in the process, were also implemented.

The Arnold Foundation reports that use of the PSA in Toledo, Ohio, Lucas County, followed with release of whites and blacks in equal rates. [13] That is promising news. As in Yakima, however, whether this change was due to the PSA or the combined effects of other improved pretrial practices is not known.

Can Race Equity and Predictive Accuracy Coexist in the Same Risk Tool?

Criminal history as a factor in a risk assessment presents a conundrum. Criminal history is one of the strongest predictors of new criminal activity, but it overlaps with race and may contribute to disparate incarceration.

One suggestion is to give less weight to criminal history; to calibrate the tool differently. The challenge would be how to determine the degree to which criminal history is or is not based on past system bias or policing patterns. Elizabeth Drake in her dissertation project terms this, "cumulative disadvantage", and seeks to quantify exactly that. Other academics are exploring algorithms that incorporate a "fairness" or "equity" factor to address any disparate racial impact of using past criminal history to derive risk scores.[14]

If criminal history, regarded by experts as the most predictive factor of future criminal behavior, is given less weight in calculating a risk score, what does that do to the predictive accuracy of the tool? Is the resultant trade-off between accuracy and equity worth it? Then again, criminal history may not accurately reflect actual crime commission anyhow, given disparate policing patterns and past racial bias (structural racism).

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[12] https://www.yakimaherald.com/news/crime_and_courts/study-no-significant-crime-increase-under-yakima- county-pretrial-program/article_dc87b8e4-d274-11e7-8969-239a1b1de844.html

[13] http://www.arnoldfoundation.org/new-data-pretrial-risk-assessment-tool-works-reduce-crime-increase-court- appearances/

[14] See A. Chouldechova, footnote 1, supra.

Public Confidence in the Criminal Justice System

Important to consider in the mix is public confidence in the legal system, particularly that of the minority communities. There is a sizeable gap between whites and other racial groups in the perception of the fairness of our justice system. This cynicism of non-white Washington residents is documented in a 2012 study commissioned by the Washington Minority and Justice Commission, "Justice in Washington State Survey". The study concludes that whites and racial minorities "are on two different ends of the spectrum" regarding the fairness of the courts.

This confidence gap could worsen if minority communities were to regard judges' reliance on a risk tool that is heavily dependent on criminal history as a proxy for race. Such negative perceptions of criminal justice unfairness undermine the legitimacy of the criminal law and the justice system as an institution.[15]

Yet, currently criminal history is a key consideration in pretrial release decisions made by judges.[16] Criminal Rule 3.2 and the corresponding rule for limited jurisdiction courts expressly enumerate criminal history as a consideration for assessing risk of failure to appear and risk of future violent re-offense. CrR 3.2(c) (6), (e) (1). Most judges already weigh past crimes heavily in making release decisions. So, a risk assessment score based largely on criminal history is not a huge change from current practice mandated by court rule.

On the other hand, there is a difference between judges relying on criminal history as one factor under the court rule, albeit an important one, in making release decisions, versus the judiciary adopting an actuarial tool that is heavily reliant on that factor. Would the latter more formally incorporate past racial bias into the criminal justice system, or give the appearance of doing so?

Recommendations

1. The risk tool should be tested to determine the average risk scores it produces, by racial and ethnic group.
2. The risk tool should be evaluated to determine whether it results in more or fewer disparate outcomes than the status quo, i.e., judge decisions made without a risk assessment.
3. The factors the risk tool uses should be examined to determine whether they overlap and hence "double count". For example, using both arrest and conviction data.
4. All factors should be validated for race neutrality as well as correlation with race and ethnicity.
5. The jurisdiction considering using a risk tool should first determine its goals, i.e., reducing the jail population; reducing racial disparity in the jail population; improving on the judicial decision-making and if so, in what regard.
6. The jurisdiction should collect data by race and ethnicity of release decisions made after adopting use of the risk tool, to evaluate for racial impact.

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[15] "Risk Assessment in Criminal Sentencing", Monahan and Skeem, pg. 38, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2662082##

[16] CrR 3.2 also requires a judge to consider whether the defendant poses a risk to interfere with the administration of justice, intimidate or tamper with victims or witnesses. CrR 3.2 (a). For simplicity and economy of language, this writer subsumes the risk of non-interference with justice under violent re-offense.

7. The judges using the risk tool should be educated about its development. They need to understand that the risk scores were developed before any pretrial services were available. For example, a defendant's risk score for failure to appear may be high, but the risk would be mitigated by having court date reminders, or transportation to court, or other pretrial assistance with housing or treatment needs.
8. The jurisdiction should continually monitor the social science research regarding risk assessments and racially disparate outcomes. Integrating a "fairness factor" into the risk tool to reduce racially disparate impact should be considered.

Appendix C. Pretrial Data Analysis – Needs Assessment

Analysis Type	Purpose	Data Currently Collected	Data Gap
Time from booking to arraignment	Identifying how long jails are holding defendants between initial booking and arraignment are essential for improving the efficiency of the system and conducting related cost-benefit analyses.	None.	Booking date and arraignment date.
Release and detentions	To cover several areas, including the percent of those detained and released and the various reasons for detention (OR/PR, bail, remanded); numbers of times bail is being assigned and bail amounts; and reasons for detention (i.e., flight risk, bail not paid, immigration, etc.).	We have some data on bail amounts issued, but the data are not entered consistently.	Release/detention, reason for detention, consistent data on bail being assigned and the amount. We will also need to make allowances for adjustments to bail amounts.
Pretrial Outcomes	To measure what happens to those released pretrial, regarding new offenses and failure to appear warrants.	Criminal charges/records and dates (offense date, charge filing date, adjudication date, case number, county, and type of charge), some failure to appear warrant data (We have failure to appear warrants for the District and Municipal Courts. For Superior Courts, we only know that a bench warrant was issued and the date. The best we can do for those is identify a bench warrant that was issued between the case filing date and adjudication date, not the type of warrant issued.	Release/detention, release date, better Superior Court failure to appear warrant records.

Pretrial Services	Aiding counties and jurisdictions to understand the performance of their pretrial services department/agency and making sure their caseloads are appropriate and manageable.	No statewide data collection for the pretrial supervision or the pretrial agencies/departments already in place around the state.	Date of release order, date supervision begins, number of agents/workers, number of cases, responses and modifications to case outcomes and supervision based upon compliance or non-compliance, and resolution of outstanding warrants.
Risk Assessment Instruments	Measuring how jurisdictions respond to the recommendations of the risk assessment.	No statewide data collection for the risk assessments already in place around the state.	Risk assessment scores, recommended supervision levels, number of release eligible defendants.

Resources

The following is a collection of articles and studies shared among Task Force stakeholders. Their inclusion in this Appendix does not represent the Executive Committee's endorsement of the views and opinions expressed therein.

A Framework for Pretrial Justice: Essential Elements of an Effective Pretrial System and Agency

This document from the National Institute of Corrections describes the fundamentals of an effective pretrial system and the essential elements of a high functioning pretrial services agency. It is designed to serve as a guide for jurisdictions interested in improving current their pretrial systems.

https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=c8bd044e-0215-9ab6-c22e-b1a4de912044

State of the Science of Pretrial Release Recommendations and Supervision

This report from the Pretrial Justice Institute discusses effective strategies to improve the criminal justice system and public safety. It addresses the question of how the pretrial justice system can effectively determine the appropriate pretrial release option for individual defendants.

http://www.ajc.state.ak.us/acjc/bail%20pretrial%20release/sciencepretrial.pdf

State of the Science of Pretrial Risk Assessment

This document is a summary of the Pretrial Justice Institute (PJI) and the Office of Justice Programs' Bureau of Justice Assistance (BJA) meeting regarding the pretrial justice process and what strategies should be implemented in order to be fair and humane to defendants while considering public safety. The document is split into five sections covering the history of pretrial justice, critical issues, process challenges, methodological challenges, and recommendations.

https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=be57ae7c-5239-3950-60f9-0ff13af6e688&forceDialog=0

Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform

This report from the National Institute of Corrections, describes the historical framework of the American bail system, as well as certain broad fundamentals of bail and how they are connected.

https://s3.amazonaws.com/static.nicic.gov/Library/028360.pdf

Pretrial Justice Planning Guide for Courts

The Pretrial Justice Assessment and Planning Guide for Courts is designed specifically for judges and court managers interested in improving their jurisdiction's pretrial practices. The Guide can be used for

statewide and local pretrial reform efforts and provides frameworks to consider. The worksheets are designed as templates that you can modify to reflect the context in which your jurisdiction's pretrial system functions. This resource was developed by the Pretrial Justice Institute and the State Courts Initiative.

https://www.ncsc.org/~/media/Microsites/Files/PJCC/NCSC%20Pretrial%20Justice%20Planning%20Guide%202018%20V2-3.ashx

Using Behavioral Science to Improve Criminal Justice Outcomes

This policy brief outlines the process and results of a joint project with consultant firm ideas42 and the University of Chicago Crime Lab. The project's aim was to develop and test two behavioral approaches to addressing the common issue of failure to appear.

https://urbanlabs.uchicago.edu/attachments/store/9c86b123e3b00a5da58318f438a6e787dd01d66d0efad54d66aa232a6473/I42-954_NYCSummonsPaper_Final_Mar2018.pdf

No Money, No Freedom: The Need for Bail Reform

This paper from the ACLU of Washington's Campaign for Smart Justice discusses problems with the state's current pretrial system and offers broad recommendations for reform.

https://www.aclu-wa.org/bail

Key Features of Holistic Pretrial Justice Statutes and Court Rules

This report from the Pretrial Justice Institute explores aspects of statutes and laws that may help or hinder achieving the three goals of the 3DaysCount campaign: reducing unnecessary arrests that destabilize families and communities; replacing discriminatory cash bail with practical, risk-based decision making; and restricting detention to the small number of defendants who pose an unmanageable threat to public safety or flight, following thorough due process.

https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=743bab92-f9b4-a1f5-dcd8-eab810535231&forceDialog=0

Measuring What Matters: Outcome and Performance Measures for the Pretrial Services Field

This report presents recommended outcome and performance measures and mission-critical data to enable pretrial service agencies to gauge more accurately their programs' effectiveness in meeting agency and justice system goals.

https://s3.amazonaws.com/static.nicic.gov/Library/025172.pdf

Use of Court Date Reminder Notices to Improve Court Appearance Rates

This brief from the Pretrial Justice Center for the Courts describe four approaches to court date notification systems and related data.

https://www.ncsc.org/~/media/Microsites/Files/PJCC/PJCC%20Brief%2010%20Sept%202017%20Court%20Date%20Notification%20Systems.ashx