The Pennsylvania Interbranch Commission
for Gender, Racial and Ethnic Fairness

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August 6, 2021

Honorable Mik Pappas
Magisterial District 05-2-31
5750 Baum Boulevard
Pittsburgh, PA 15206

Re: Comments/Recommendations on Rules of Court for Bail, Probation and Incarceration in Allegheny County

Dear Judge Pappas,

On behalf of The Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness ("Interbranch Commission"), we are writing today in response to the request from the Allegheny County Bar Association's Administration of Justice Sub-Committee for stakeholder input into the Rules of Court for Bail, Probation and Incarceration in Allegheny County. We wish to thank you for this opportunity to comment on the impact of certain practices utilized within our criminal justice system which disproportionately impact lower-income defendants - many of whom are racial and ethnic minorities - and can have catastrophic consequences for their lives.

We also wish to commend the ACLU of Pennsylvania for their expansive comments and recommendations on each of the topics of concern. Indeed, we collaborated with them on several of the issues they addressed in their comments and concur with each of their recommendations. Consequently, the focus of our comments will be on a relatively recent practice that was not included in the ACLU report - the use of risk assessment tools by courts to assess whether to incarcerate a defendant prior to trial.

INTERBRANCH COMMISSION:

By way of background, the Interbranch Commission was established in 2005 to implement the recommendations from the Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System (the "Report"), published in 2003 after three years of study.[1] The Report spans 550 pages and covers fourteen individual topics, among them four chapters related to criminal justice: Sentencing Disparities in the Criminal Justice System, Indigent Defense in Pennsylvania, Racial and Ethnic Disparities in the Imposition of the Death Penalty, and Racial and Ethnic Bias in the Juvenile Justice System.

[1] A copy of the report is available at http://www.pa-interbranchcommission.com/_pdfs/FinalReport.pdf.

Over the past sixteen years, the Interbranch Commission has undertaken a wide range of initiatives to address the findings of these four chapters of the original Report, all of which found poorly functioning systems that disparately impacted defendants of color. A few examples of our work include the following:

- We commissioned the first statewide study of Pennsylvania's capital justice system, *Capital Punishment Decisions in Pennsylvania: 2000-2010 Implications for Racial, Ethnic and Other Disparate Impacts,* which resulted in the continuation of a moratorium on executions imposed by the Governor, as well as a series of legislative proposals for additional reforms. We continue to work with legislators on passage of those bills.
- Working with a bipartisan group of Pennsylvania legislators, we produced and submitted a *Memorandum in Support of Reform of the Provision of Criminal Indigent Defense Services in Pennsylvania.* The Memo is currently serving as the basis for bipartisan legislation to overhaul the Commonwealth's chronically underfunded and patchwork system of representation of indigent defendants.
- In 2017, we produced a guide entitled *Ending Debtors' Prisons in Pennsylvania: Current Issues in Bail and Legal Financial Obligations: A Practical Guide for Reform*, to detail gaps in court procedures that result in the incarceration of low-income Pennsylvanians for strictly financial reasons, and to recommend best practices for addressing these problems.
- At the request of one Common Pleas Court President Judge, we drafted local rules on reducing or eliminating the use of cash bail in that county for low-level, non-violent offenders, which we then forwarded to the remainder of President Judges throughout the Commonwealth for implementation.
- We have also been working with legislators to amend the "felony murder" statute to eliminate life-without-parole sentences for young accessories to that offense. Recent studies have found that 70% of the individuals incarcerated for life without parole for felony murder are Black, and that the vast majority of those Black defendants were between the ages of 18 and 20 at the time of the crime.
- On September 23, 2021, our Executive Director, Lisette McCormick, will testify before the PA Board of Pardons in opposition to a new Board policy prohibiting hearings on inmates' applications for clemency when there are outstanding fines, fees, or costs remaining from the underlying conviction.

More specific to our comments today, our work on the use of risk assessment tools began several years ago, when we learned that the Legislature had passed a resolution assigning to the Pennsylvania Commission on Sentencing the task of developing a risk assessment tool to guide sentencing decisions across the state. Since then, we have been collaborating with the Sentencing Commission and national experts on numerous drafts of the tool, including presenting testimony to the Commission during a hearing on their proposed tool. The final version, with which we still have concerns, was approved by the full Sentencing Commission in September 2019 and became effective on July 1, 2020. We have attached our testimony to this letter for your review. Our work on the risk assessment tool was also included in the guide we produced in 2017, referenced above, entitled *Ending Debtors' Prisons in Pennsylvania: A Practical Guide for Reform*, which includes a

section examining the impact of the criteria used in the implementation of risk assessment tools. We have enclosed a copy of the guide for your review as well.

Since then, we have continued to consult with experts on the issue and to follow the results of their recent studies, summarized below. Each of the studies contains critical findings that we believe are essential to the task of the ACBA Committee. In general, the studies found that the use of risk assessment tools has had minimal bearing on community safety and the likelihood of a defendant's future appearance at trial, and has not been shown to decrease racial disparities in pre-trial detention.

EMPIRICAL STUDIES ON RISK ASSESSMENT TOOLS:

One of the first studies to document the impacts of risk assessment in practice was published in 2018 by University of Virginia Professor Megan Stevenson. Entitled "Assessing Risk Assessment in Action," the study was a comprehensive review of Kentucky's pretrial risk assessment system - a system initially regarded as a model on which other jurisdictions could base their own regimes.[2] As the study notes, Kentucky passed a law in 2011 that "mandated use of pretrial risk assessment and declared a presumptive default of immediate, non-monetary release for all low and moderate-risk defendants."[3] On its face, this legislative initiative was a laudable attempt at combatting the pretrial detention of indigent defendants charged with low-level, non-violent crimes. However, despite its good intentions, the law led to only a *minuscule* increase in pre-trial release, an outcome that starkly belied the dramatic efficiency gains predicted by risk assessment's champions.[4] Subsequently, Kentucky chose to adopt the Laura and John Arnold Foundation's Public Safety Assessment tool ("PSA") in 2013, but the state's shift "did not result in any noticeable improvement in outcomes."[5] Significantly, a key factor in the risk assessments' disappointing results was the decision by judges in the state to take advantage of the discretion granted to them by ignoring the presumptive default of non-monetary release in more than two-thirds of cases.[6] Most importantly, and most relevant to the ACBA's current inquiry, that same discretion - a key inhibitor to liberalizing pretrial release - is permitted under Allegheny County's risk assessment system.[7]

Along with the evidence suggesting risk assessment's limited ability to advance the aims for which it was intended, additional research indicates the deleterious impact that risk assessment tools can have on racial equity. A 2018 study entitled "The Scale of Misdemeanor Justice" conducted a first-of-its-kind, comprehensive analysis of misdemeanor criminal justice in the United States.[8] Significantly, it found that "there is profound racial disparity in the misdemeanor arrest rate for almost all offense types."[9] Of even greater import, though, is its discovery that "the variation in

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[2] Megan Stevenson, *Assessing Risk Assessment in Action*, 103 Minn. L. Rev. 303, 308 (2018).

[3] Id.

[4] Id.

[5] Id. at 310.

[6] Id. at 308.

[7] 42 Pa. Cons. Stat. § 2154.7(a) (2019).

[8] Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. Rev. 731, 731 (2018).

[9] Id. at 737.

racial disparity across offense types has remained remarkably constant over the past thirty-seven years."[10] In other words, "the offenses marked by the greatest racial disparity in arrest rates in 1980 are more or less the same as those marked by the greatest racial disparity today."[11] Specifically, the black arrest rate has hovered around 1.7 times the white arrest rate since 1980, and the black-white arrest ratios for drug possession, vagrancy, disorderly conduct, drunkenness, DUI, simple assault, and other offenses has remained relatively stable, too.[12]

As the study suggests, these findings indicate that our misdemeanor justice system - as a microcosm of our criminal justice system more generally - is characterized by structurally racist patterns that have persisted for decades.[13] In short, the consistency of these statistics demonstrates that racism is firmly baked into the criminal justice system; yet, in arriving at scores for individual defendants, risk assessment tools often rely on these very statistics, thereby lending credence to and perpetuating existing racial disparities. The result for even well-meaning risk assessment initiatives is best summarized by an expression frequently used in the literature: "bias in, bias out."

The limitations on relying in good faith on risk assessment instruments do not end there, however. Chief among the problems associated with these instruments is what scholars have called "zombie predictions."[14] This term describes the fact that "predictive models trained on data from older bail regimes are blind to the risk-reducing benefits of recent bail reforms."[15] Stated another way, pretrial risk assessment tools developed on data that do not reflect the changing realities of risk-mitigating reforms will make individualized predictions for defendants that "systematically overestimate risk."[16] Though often overlooked, this problem intuitively makes sense: relying on data from times and places that are materially different from the ones in which the predictions are presently being made will foreseeably lead to inaccurate risk classifications and, therefore, the unjustified detention of individuals who deserve pretrial release.

The problems caused by "zombie predictions" manifest themselves in two specific ways in Allegheny County. First, the very impetus for this letter is the ACBA's interest in responding to systemic inequality and racial oppression in our criminal justice system by drafting recommended changes to local bail rules, among other things. However, the "unfortunate irony at the heart of today's bail reform" is the fact that "today's pretrial risk assessment tools reflect and reinforce the very patterns . . . that new, innovative policies work to change."[17] In other words, so long as Allegheny County continues to use its current risk assessment regime, our efforts to institute the reforms that constitute the subject of this letter will be stymied in a systemic fashion.

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[10] Id.

[11] Id.

[12] Id. at 760-61.

[13] Id. at 770.

[14] John Logan Koepke & David G. Robinson, *Danger Ahead: Risk Assessment and the Future of Bail Reform*, 93 Wash. L. Rev. 1725, 1725 (2018).

[15] Id.

[16] Id.

[17] Id. at 1764.

This problem is pronounced by a second, related issue. To our knowledge, Allegheny County relies at least in part on the Arnold Foundation's PSA tool. However, the PSA was developed "based on nearly 750,000 cases drawn from more than 300 jurisdictions."[18] In short, when a risk assessment tool's developmental sample does not reflect or rely on *local* conditions, there is likely to be a mismatch between the jurisdictions from which the PSA drew its sample and those jurisdictions in which the PSA tool is actually deployed.[19] Unfortunately, the evidence bears this concern out - the rate of failures to appear in the PSA's developmental sample diverged from the rate of failures to appear in jurisdictions where the PSA was subsequently validated.[20] The implication of this mismatch is difficult to overstate: "defendants who are assessed as higher risk [per the PSA], in reality, present a lower risk than expected upon release."[21] Overall, then, not only do standardized risk instruments tend to stymie reform efforts by relying on data gathered during a different *time*; they also inhibit progress by using data pooled from geographically and qualitatively differing *locations*.

Finally, even if we put aside the issue of risk algorithms artificially assessing defendants as higher risk, other problems inhere in the use of such scores. Key among these problems are the findings of a very recent study entitled "Closer than They Appear: A Bayesian Perspective on Individual-Level Heterogeneity in Risk Assessment."[22] Published in February 2021, this study used data from over 460,000 arrests in Kentucky from mid-2014 to the end of 2018 to model the outcome of failure to appear ("FTA") for any court appointment prior to the conclusion of one's case.[23] Crucially, the study found that individuals *within the same risk group* vary widely in terms of the probability of the outcome (e.g., failing to appear).[24] In other words, the probability of FTA even for an individual assigned the same score can vary dramatically, such that a person assigned to the highest risk group is not unlikely to have a probability of the outcome similar to someone in the lower risk groups.[25] This cutting-edge research therefore highlights the fact that risk labels are, in general, weak indicators of the likelihood that an individual will fail to appear for court appointments - one of the main criteria used to assess whether an individual should be released pretrial. Accordingly, far from being talismanic pretrial indicators worthy of supplanting individualized considerations, algorithms' risk scores are prone to the very errors that their development and use was designed to mitigate.

Collectively, these studies demonstrate that risk assessment algorithms are plagued by too many problems to justify their continued use in assessing whether individuals must forego significant liberty interests to be detained pretrial. As you are aware, constitutional doctrine "authorizes pretrial

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[18] Id. at 1758.

[19] Id.

[20] Id. at 1763-64.

[21] Id. at 1764.

[22] Kristian Lum et al., Closer than They Appear: A Bayesian Perspective on Individual-Level Heterogeneity in Risk Assessment 1 (Feb. 2021).

[23] Id. at 2.

[24] Id. at 1.

[25] Id. at 20.

detention only when the government's interest in safety 'outweighs' an individual's interest in liberty."[26] Yet according to survey results published in February 2021, people view incarceration as such "an incredibly harmful experience that they would rather "choose crime-victimization over even short jail stints."[27] This should not be incredibly surprising, given the well-documented, extensive burdens borne by individuals incarcerated even briefly pre-trial - among them, loss of employment, housing, and access to community services.[28] In sum, the risks and harms associated with jailing an individual pre-trial are so extreme that the decision to do so should not turn, even in part, on the score of an algorithm whose development and use is rife with systemic complications.

Because of the conclusion by numerous recent studies that risk assessment tools will perpetuate or even worsen the very problems reform advocates hope to solve, the Interbranch Commission recommends that Allegheny County cease use of its risk assessment regime. In its stead, the Commission suggests changes more carefully and effectively designed to bring about meaningful bail reform.

RECOMMENDATIONS:

First, we strongly recommend that Allegheny County adopts rules that reduce or altogether eliminate money bail, thereby providing for the presumptive, automatic release of broad categories of defendants. Research demonstrates "that pretrial detention itself actually *increases* risk of pretrial rearrest once a defendant is released."[29] The explanation for this is fairly prosaic: even a brief pretrial detention leads to scores of harmful consequences, as detailed above, that readily facilitate recidivism. We also know that money bail is the most common reason *for* a defendant's pretrial detention.[30] Therefore, while new criminal activity is a primary concern of judges when they make pretrial bail decisions, even a partial reliance on the use of money bail counteracts the very safety concerns the County is trying to ensure. Accordingly, we have attached a draft rule that would accomplish the automatic release on recognizance of defendants charged with certain, lower-level crimes, thereby ensuring that large numbers of defendants are positioned to avoid the devastating consequences of pretrial incarceration.

Second, we suggest the adoption of rules that place high procedural burdens on imposing pretrial detention or supervisory conditions.[31] Research shows that encouraging or even requiring robust pretrial detention hearings can play an effective role in reducing the use of pretrial incarceration.[32] Therefore, far removed from the rote assessment of defendants by unreliable risk algorithms, these hearings and procedures allow for individualized considerations and heightened evidentiary

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[26] Megan Stevenson & Sandra Mayson, Pretrial Detention and the Value of Liberty 1 (Feb. 2021).

[27] Id. at 6.

[28] The Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness, Ending Debtors' Prisons in Pennsylvania: Current Issues in Bail and Legal Financial Obligations: A Practical Guide for Reform 4 (July 2017).

[29] Koepke et al., *supra* note 14, at 1769 [emphasis added].

[30] Id.

[31] Id. at 1792.

[32] Id.

standards that honor constitutional doctrine while still furthering bail reform in a significant way. For specific procedural suggestions, please see the suggested local rules we have attached to this document, which outline, among other things, an immediate review by motion for defendants denied bail and the written procedures judges must follow if they deny pretrial release to a defendant.

Finally, even "small changes in the administration of bail can have a substantial impact" on our criminal justice system.[33] Text message or postcard reminders about upcoming court dates, for instance, represent a low-cost, low-tech solution for improving failure to appear rates in Allegheny County. The benefit of this solution lies in recognizing that most individuals do not miss court appointments because of a calculated decision to abscond from the jurisdiction; rather, they fail to appear because of mere forgetfulness or a genuine lack of knowledge.[34] Fortunately, research shows that simple reminders to defendants can make a major difference. Live-caller reminders in Jefferson County, Colorado, postcard reminders in fourteen of Nebraska's counties, and SMS text messages in New York City all helped to reduce FTAs by statistically significant proportions.[35] As explained above, risk algorithms often *overcorrect* for FTAs by assigning defendants artificially high risk scores, thereby incarcerating individuals and never giving them the chance to appear for court appointments. However, by combining the recommendations above with a low-cost system that has been shown to increase attendance at court appointments, Allegheny County gives accused individuals the chance to be released *and* succeed upon release. By all accounts, that is the measure of a justice system that works for everyone.

CONCLUSION:

We recognize that the concept of risk assessment algorithms is well-meaning. As demonstrated above, however, their use entails nearly unavoidable obstacles to the procurement of racial equity in our criminal justice system. In their stead, other meaningful reforms exist - reforms that address the over-use of pretrial detention in a more promising fashion. Ranging from rules that systematically discourage the use of money bail to the institution of a reminder system for individuals awaiting court appointments, these reforms offer a path forward as Allegheny County seeks to address systemic oppression and deliver on its constitutional obligations.

Thank you again for the opportunity to provide input regarding the Rules of Court for Bail, Probation and Incarceration in Allegheny County. Please do not hesitate to contact us with any questions or concerns, and we look forward to continuing to work with the Sub-Committee.

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[33] Id. at 1765.

[34] Id.

[35] Id. at 1766-67.

Respectfully,

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