

October 26, 2020

Via Email: khoward@vscc.virginia.gov

Kristen Howard
Executive Director
Virginia State Crime Commission
1111 East Broad Street, Suite B036
Richmond, VA 23219

Dear Ms. Howard:

We write as members of the Virginia Pretrial Justice Coalition, which is a diverse coalition of groups that are interested in making our Commonwealth's pretrial system fairer and more just. Thank you for reaching out to us for feedback on documents relating to the Crime Commission's final report for its Pretrial Data Project.

Based on the limited information shared with us, we have several questions and concerns about the Pretrial Data Project's process for reporting information. As we have expressed in prior communications, transparency and access should be at the core of any use of data. Without making the underlying data available to researchers and the public, there is no way for our organization or any other to reasonably assess the Crime Commission's analysis, conclusions, or recommendations. Further, any failure to make the data public, prevents other researchers from examining other correlations and considering other explanations for the trends and patterns identified by the VSCC. Our Coalition still has these concerns as the Crime Commission is set to release its final report. We once again urge the members of the Commission to make this data public so that there can be a robust, informed discussion of the state of the Commonwealth's pretrial practices as well as the Commissions' conclusions and recommendations.

In regard to specific questions and feedback on the documents you provided, many of our concerns relate to the application of the Pretrial Safety Assessment (PSA) These concerns and questions include:

- 1) In Table 6, the headings state "% Risk of Failure to Appear" and "% Risk of New Criminal Activity". It is not clear what percentage risk this table is refereeing to. Is the percent of defendants in this data set who received a particular score, the associated percentage of risk of non-appearance/new crime arrests for each scaled score, or something else?

We raise this question as, to our knowledge, while the PSA does use the label Risk Level 1-6, the Assessment does not equate those levels to a particular percentage of likelihood of non-appearance or likelihood of being arrested for a new criminal charge. . Instead jurisdictions are supposed to conduct validation studies to determine what those rates might be for their community. To our knowledge, this instrument has not been validated for Virginia as whole or in any individual jurisdiction within the Commonwealth. Generally, it is concerning that we are using an unvalidated instrument to assess the health of our pretrial system.

- 2) The Table treats the Failure to Appear (FTA) and New Criminal Arrest (NCA) data points as separate, independent factors. While has its own score, in practice the two factors are considered together in a matrix. The matrix considers the interrelation between the two factors utilizing a locally developed “Release Conditions Matrix”. This is similar to the PRAXIS instrument used in conjunction with the VPRAI. The two factors (FTA and NCA) are never addressed independently as a judge is required to look at both when making a bail determination. It appears that the data will be provided looking only at the risk levels independently. We are concerned that this may be misleading as it is divorced from the way the tool is used in practice.
- 3) The PSA uses detailed instructions for how to score the instrument. Although on their surface these factors seem readily accessible (such as whether a person has a prior failure to appear charge or was previously incarcerated) and can be done without an interview of the accused, some of those factors are subject to additional considerations that either require further individual case investigation or information.

For example, the PSA has a unique definition of what is a “prior failure to appear” It is unclear how or if the Commission staff addressed factors such as whether (i) the FTAs in a person’s record was for missing a probation violation hearing or(ii) the FTA happened while the person was confirmed to have been incarcerated. In both of these instances the non-appearance is not defined as a Prior FTA under the PSA’s rules. Similar concerns arise as to how the Commission determined sentence length as the PSA factor defines a sentence in very specific terms based upon active time imposed for an individual case. It is unclear from any of the materials provided what the Commission’s methodology was in scoring some of the individual PSA factors.

- 4) The tables address the release status of the people in the cohort who were in each PSA risk level, but none of the documents appear to correlate outcomes with those differing risk levels. How many individuals with a scaled FTA score of 1 appeared for all their court hearings? How many were not arrested for a new criminal charge? It would also be helpful to have information about the success of the cohort members in a particular PSA risk level broken down by release type. That would allow users to compare those in FTA risk level 1 who were released on a secured bond or an unsecured bond, or with or without pretrial supervision. As stated above, the easiest way to permit this type of inquiry would be to publicly release the data in an easily searchable format.
- 5) The PSA instrument itself includes a New Crime of Violent Arrest Flag (NCVA):. Proponents of the use of the PSA typically highlight the fact that the PSA allows a distinction between those who may be arrested again for a low level property offense from those who pose a more significant risk to the community because they are at a greater risk to be arrested for a new crime involving violence. It does not appear that this part of the tool was addressed during this project, despite it being an important part of the PSA. Why was the NCVA Flag not included?

Your email also included a request for the types of relationship between variables we would like to see addressed in the main report. Our concern here is that reports are limited by scope and space. Advocates, researchers, and the public would ideally like to be able to compare most of the available data points against each other. For example, the current format does not appear to allow consideration of outcomes based on PSA risk level and bond type (i.e. does a person with a PSA FTA Risk Level 1 perform better or worse if they are also under pretrial supervision? If they pay a secured bond or are released on unsecured bond?)

Prior research asserts that individuals who experience more than 3 days in detention prior to being released on bond experience worse case outcomes than those released within the first 48 hours following arrest. Is that the case in Virginia? Is that impact mitigated or exacerbated by whether a person is on pre-trial supervision or is required to pay a secured bond? Are there differing outcomes for different groups based on race, gender, age, or other demographic factors? Making the underlying data fully transparent is the only way to completely address the relationships between these variables. Most importantly, without access to all of the data, those of us reviewing the report will not be able to test an alternative hypothesis for the observations the report makes.

Finally, now, more than ever, it is critical to have information about the race and ethnicity of the members of the cohort. Table 3 includes race information, but does not include ethnicity information, for example, members of the cohort who identify as Latinx. Without this information, there is a possibility that it will look like the outcomes are less racially disparate than they actually were if members of the Latinx population were separated out from the racial categorizations. Relatedly, will there be a notation in the report regarding the lack of racial data, for example, that the failure to collect racial and ethnic data means that no assessment on whether there are disparate outcomes based on race can be made? We will know the racial breakdown of the cohort, but not for any of the other variables listed in the report.

The racial makeup of the overall population in a county is often vastly different than the racial makeup of those who are involved in the criminal legal system. Is there any local level racial data beyond census data, that can be provided, such as racial composition of the jail population, or arrest rates, that can provide any information of whether there are disparities that should be examined?

Members of our coalition are happy to speak to you or other members of the Commission staff about our concerns. We are also anxious to know more about the final report for the project and what recommendations the Commission staff will have based on these results. Our Coalition is on the forefront of advocating for the increased collection of data in the pretrial space across the Commonwealth. We have also been the leading advocates for substantive pretrial system reform for the past several sessions of the General Assembly. We are happy to work with the Commission staff or the Commission members to help to ensure that the results of this project are as useful as possible moving forward.

Sincerely,

ACLU of Virginia

Justice Forward Virginia
Legal Aid Justice Center
National Association of Criminal Defense Lawyers

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