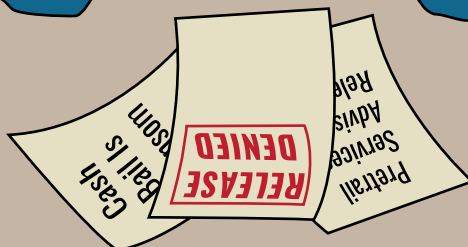


Pretrial Injustice:

How the Pima County Judiciary is Using Pretrial Risk Assessments to Cage People

A Special Report From:





ACKNOWLEDGEMENTS

This report was a labor of love that began nearly a year and a half ago. We could not have made it to this point without the assistance of Pilar Weiss and Puck Lo of the Community Justice Exchange, who provided critical research and feedback throughout this long journey. Also sending a special thanks to our friends at the Chicago Community Bail Fund.



January 2021 Version
© Tucson Second Chance Community Bail Fund
Written by Lola Rainey, JD/LLM
Cover art & report design by Ian Sieg

MEET THE TUCSON SECOND CHANCE COMMUNITY BAIL FUND



Daughter-Mother Team: Tiera Rainey (Director of Programs) and Lola Rainey (Executive Director)

The Tucson Second Chance Community Bail Fund was founded in 2017. Our work grew out of a Black Lives Matter Tucson (BLM Tucson) “Mama’s Day Bailout” campaign that freed jailed Black mothers in order to raise awareness about the inequities and immorality of the cash bail system. The “Mama’s Day Bailout” was a “success”, but it also helped illuminate the need for ongoing cash bail assistance initiatives. As a result, the Second Chance Bail Fund Coalition (made up of local

lawyers, activists, and concerned citizens) was created and would later become the Tucson Second Chance Community Bail Fund in late summer of 2017. As a Black-led abolitionist organization, our mission is to provide bail relief services across Southern Arizona and to ultimately end the practice of pretrial detention in Pima County. We have also been a member of the National Bail Fund Network (which represents over 80+ community and immigrant bail funds across the country) since 2018.

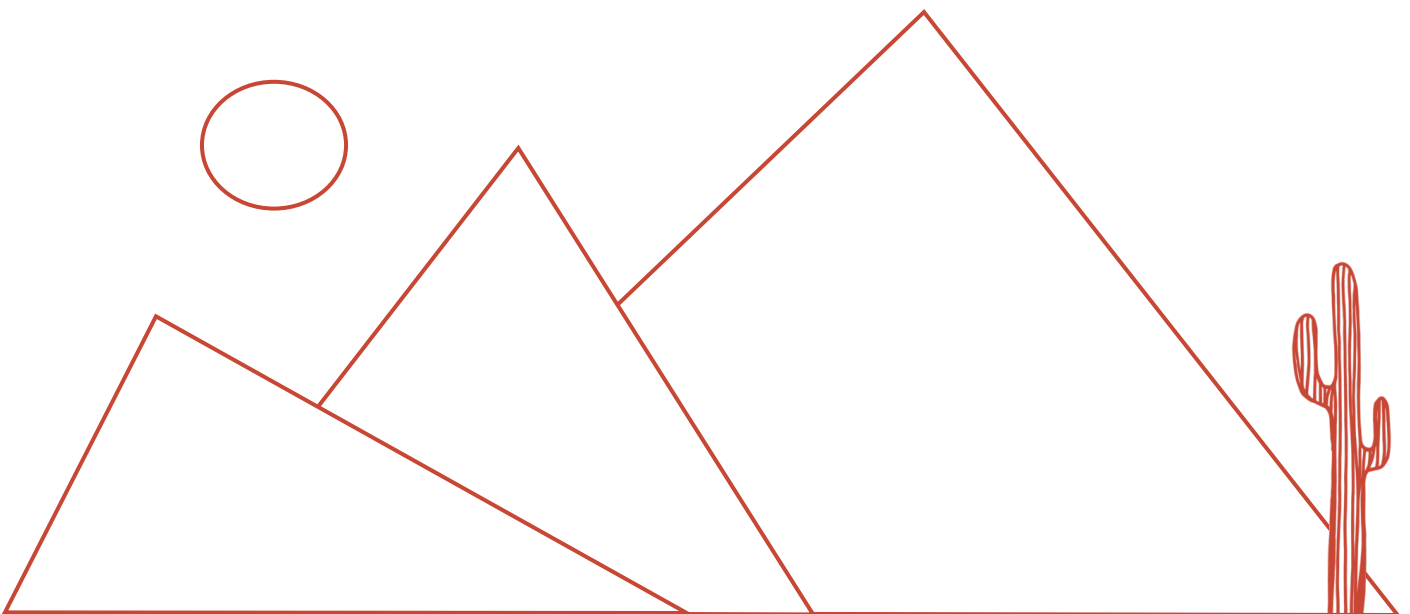
CONTENTS

I Summary

II A Brief History: Pretrial Risk Assessments in Arizona

III The Data

IV Conclusion + Our Ask



I

SUMMARY

On a daily basis, Pima County judges and magistrates keep loved ones caged pretrial while cases often take months or even years to be resolved. Children, housing, and jobs are put on hold as those too poor to buy their freedom remain detained. While criminal justice reform continues to be an area of keen public interest, the reality is that most recent and proposed changes around pretrial justice still criminalize poverty, leaving our most vulnerable communities exposed.

In TSCCBF's inaugural special report, we capture how inequities in the pretrial system continue to be perpetuated by the judiciary in Pima County despite promises of reform. Using data collected through a Freedom of Information Act (FOIA),¹ TSCCBF explores how the Arizona Supreme Court's 2015 mandate requiring state courts to use evidence-based risk assessments tools (RATs) has been ineffective in ending the ongoing criminalization of the poor. While the public have been told RATs are unbiased tools that can overcome judicial bias and help decarcerate jails across the state, the reality is that here in Pima County the subjective decision-making of the judges is still overriding people's ability to get free.

This report's findings show:

Judges in Pima County are **only following recommendations to release defendants without conditions or money bail 44.4% of the time** and instead are recommending supervision conditions and/or detention.

Individuals with release recommendations receive **more punitive pretrial release conditions** than what Pima County Pretrial Services recommends **53.9% of the time**.

People are being detained or required to submit to **increased levels of pretrial supervision** because of arbitrary judicial discretion.



A BRIEF HISTORY: PRETRIAL RISK ASSESSMENTS IN ARIZONA

The presumption of innocence guaranteed by the U.S. Constitution has been eroded in a criminal “justice” system that ties freedom to an accused’s ability to pay ransoms—money bail—to the state and meet their punitive release conditions. Money bail has been one element of the larger practice of pretrial detention where disproportionately poor, black, brown, and indigenous people are held in jail while they await their trial date (or are forced into taking a plea bargain). Money bail is often used in tandem with other supervisory conditions that deny people pretrial liberty and the presumption of innocence.

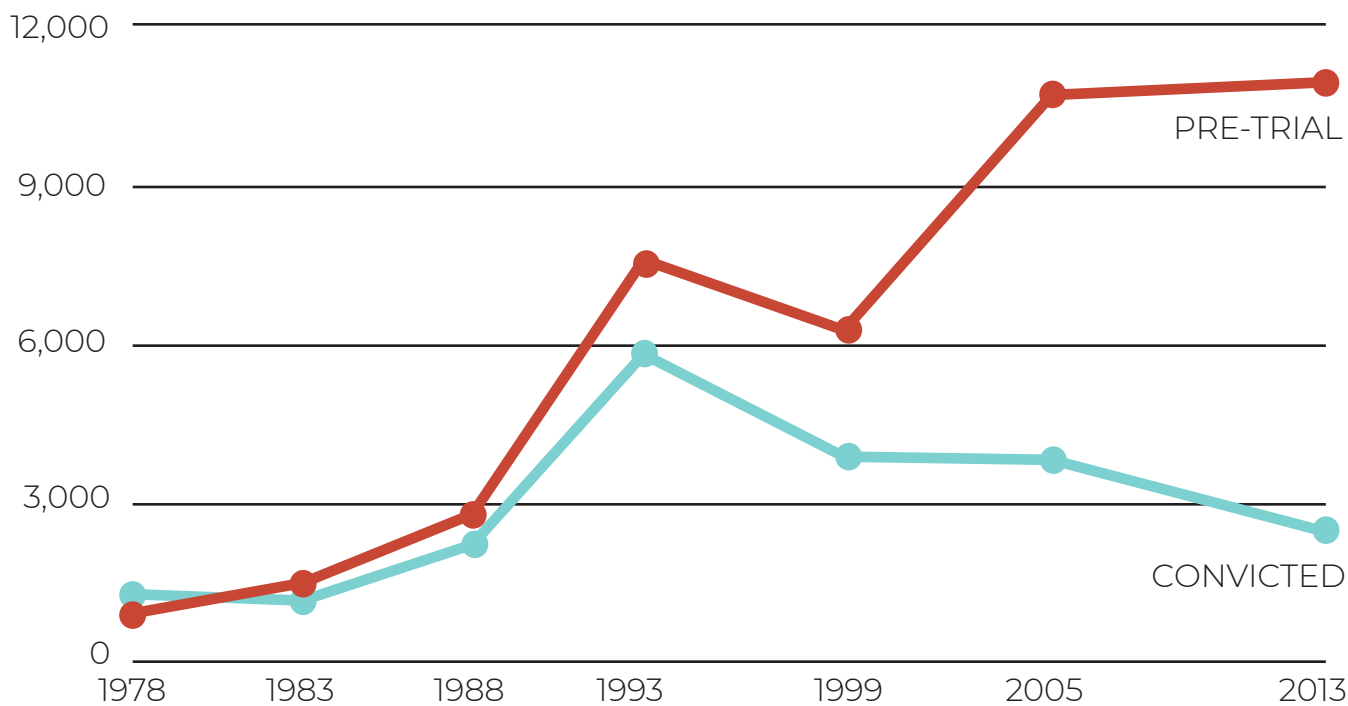
In Arizona, the pretrial environment has been further complicated by the mandated use of risk-assessment tools (RATs) under the theory that they are supposed to create more just pretrial outcomes, something that the data does not support. RATs first took hold in 2009, when the Arizona Supreme Court authorized

the use of “evidence-based” risk assessments at sentencings in criminal cases. The “Offender Screening Tool” (OST) was supposed to assess a defendant’s likelihood of reoffending by using 42 items related to risk/need which were further categorized into nine buckets of supposed behavior predictions.²

The use of the OST in sentencing decisions made Arizona more receptive to seeing risk assessments as “helpful tools” that judges and magistrates could also use to make decisions around pretrial release conditions. In 2015, the Arizona Supreme Court mandated all lower courts operating pretrial service programs to incorporate evidence-based practices (including RATs) to determine both pretrial release conditions and requirements for pretrial release supervision. The Court’s mandate coincided with growing public demand to end money bail—a common form of bail imposed by judges and magistrates—and a misconception that the use of pretrial RATs might lead to a decrease in the use of bail.

The imposition of money bail requires that an accused person wait in jail until they can make a payment to their city or county. As a result of the historically racist and anti-poor enforcement of laws by the police and biased prosecutorial charging policies in Pima County, a disproportionate number of low-income Black, Indigenous, People of Color (BIPOC) are routinely caged in pretrial detention and are regularly unable to post bail. Additional evidence of the racial disparities found in Arizona prisons and jails as well as its explosive expansion of pretrial detention are captured in Graphs 1 and 2.

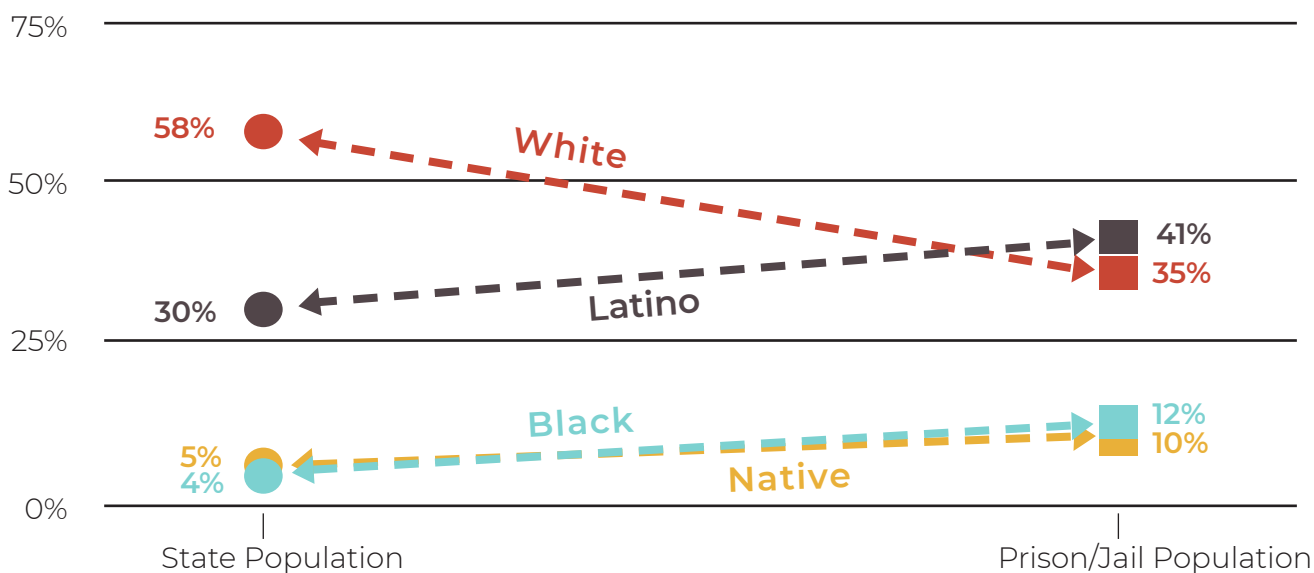
GRAPH 1 — ARIZONA PRETRIAL DETENTION GROWTH



Jail populations were adjusted to remove people being held for federal and state authorities. Our Bureau of Justice Statistics data sources are described at www.prisonpolicy.org/report/jailsovertime.html#methodology

PRISON
POLICY INITIATIVE

GRAPH 2 — RACIAL AND ETHNIC DISPARITIES IN ARIZONA PRISONS AND JAILS



White people are underrepresented in the incarcerated population while Black people, Latinxs, and Native Americans are overrepresented. Compiled from 2010 Census, Summary File 1

PRISON
POLICY INITIATIVE

Arizona's pretrial detention surge, however, was not an anomaly; its numbers have followed national trends where the U.S. jail population has tripled during this time period in large part due to pretrial detention.³ The goal of the Arizona Supreme Court's 2015 mandate was to create more equity in what many have come to understand as a two-tier system of justice.⁴ More specifically, they required the use of pretrial risk assessment tools that are programmed using prejudiced assumptions about "criminogenic behavior" to design computer generated algorithms that claim to accurately predict the likelihood of non-compliant behavior (committing a new crime or not appearing to court). Supporters of the Court's mandate also asserted that pretrial risk assessments would eliminate both the pernicious racial bias responsible for the racial/ethnic disparities observable in local jail populations as well as significantly decarcerate jails.

When the Arizona Supreme Court mandated the use of risk assessments, it did so after entering into partnership with Arnold Ventures, the creators of a algorithmic tool dubbed the "Public Safety Assessment" or PSA. "Arnold Ventures created the PSA as a lower-cost alternative to existing tools, giving jurisdictions that wanted to adopt pretrial risk assessment a ready-made solution that could be implemented in eight months or less."⁵ The PSA uses nine factors from a defendant's history to produce risk scores addressing the likelihood of a new crime being committed, the likelihood of a failure to appear for future court hearings, and if there is an elevated risk of a violent crime.⁶

Although the PSA is one of the most widely used risk assessment tools (it is used in over 40 jurisdictions, comprising more than 15% of the adult population), growing criticisms of the inherent flaws of the tool recently lead the Pretrial Justice Institute (PJI), one of its staunchest national advocates, to issue a statement withdrawing its support declaring, "risk-assessment tools like those

it previously promoted have no place in pretrial justice because they perpetuate racial inequities."⁷

In the five years since the implemented use of pretrial RATs, very little information about their effectiveness has been disclosed to the public. The Tucson Second Chance Community Bail Fund's (TSCCBF) own queries directed to the Pima County Superior Court's Pretrial Services Division were treated as unwelcome intrusions into the cloaked world of judges and magistrates. The way justice is administered by courts should not be shrouded in secrecy. The public has a right to know whether the State Supreme Court's narrative about pretrial risk assessments—that they will decrease the use of money bail, reduce the racial disparities found among defendants held in pretrial detention, and lead to significant jail decarceration— are true.

“THE WAY JUSTICE IS ADMINISTERED BY COURTS SHOULD NOT BE SHROUDED IN SECRECY”

In an effort to “de-mystify” how pretrial risk assessments are used by judges and magistrates in Pima County, and to determine whether these tools perpetuate the very harm proponents claim they eradicate, TSCCBF in partnership with the Community Justice Exchange (CJE) filed a Freedom of Information Act (FOIA) seeking data collected by the Pima County Superior Court on the racial impact of pretrial risk assessment tools. What follows are the key findings from our preliminary analysis of the court data obtained through the FOIA request.

THE DATA

Using the PSA risk assessment tool, Pima County Pretrial Services uses four categories of pretrial release recommendations:

- 1) **Release on own recognizance (ROR):** This category should be unconditional release and no money bail
- 2) **Pretrial Services supervision:** This category could be coupled with money bail and the level of supervision conditions can vary
- 3) **No release on own recognizance (No ROR):** This category could be a range of non-release conditions, money bail, or preventative detention
- 4) **Neutral (no recommendation made)**

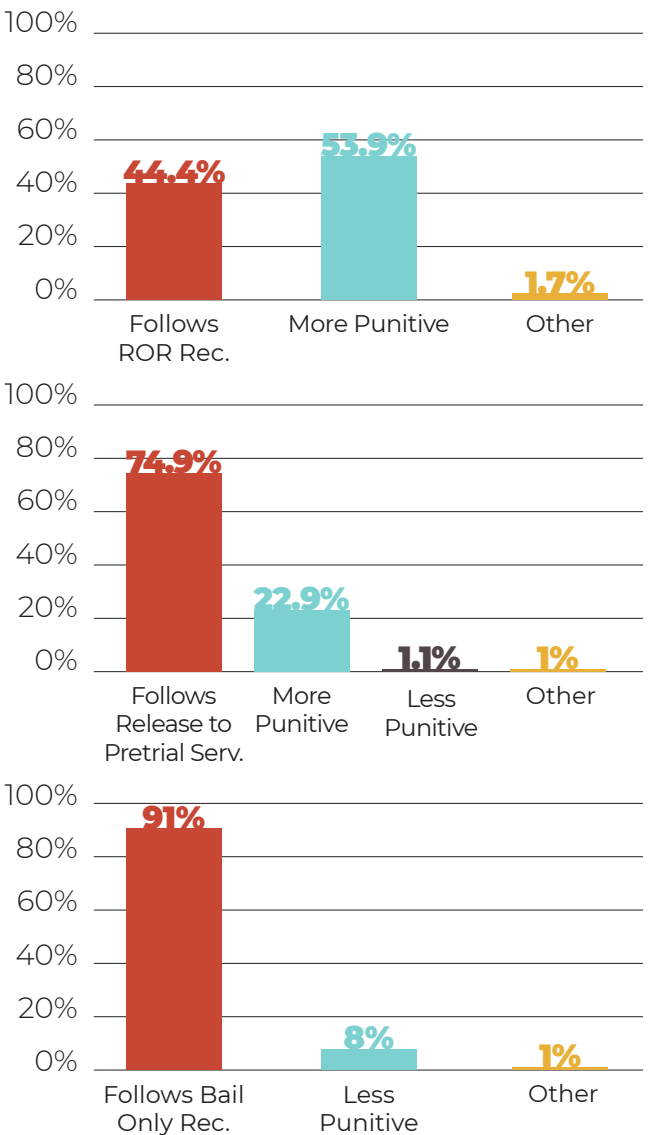
The data obtained via FOIA requests was clear, Pima County Magistrates and Judges are actively **rejecting** Pretrial Services' recommendations, particularly when the recommendation is unconditional release. Instead judges and magistrates are using their discretion and bias to "over-ride" the supposed scientific RAT recommendation.⁸

In fact, our analysis of the court data reveals judges and magistrates in Pima County Superior Court reject the ROR recommendation the **majority of the time**—they only follow Pretrial Services' ROR recommendations 44.4% of the time. **Additionally, ROR recommended defendants often receive more punitive pretrial release conditions 53.9% of the time.**

What this information clearly demonstrates is magistrates and judges in Pima County are not following the recommendations of the pretrial RATs mandated by the Arizona Supreme Court. Worse, judges' and magistrates' refusal to free a majority of defendants recommended for ROR release means **people are being wrongfully detained or required to submit to higher levels of pretrial supervision for purely arbitrary reasons. This includes a much larger group of individuals who are having money bail they cannot afford imposed (rather than ROR) and thus an increased pretrial population.**

Of the five categories of recommendations Pretrial Services gives to judges and magistrates, **two are used more than the others**, showing a clear pattern of judicial preference for "controlling and/or detaining defendants" as shown below:

JUDICIAL RATE OF COMPLIANCE WITH PTS RECS



It is also important to note that the preference of Pima County judges and magistrates for "No ROR Release" recommendations, and the imposition of bail, ultimately disproportionately impacts poor defendants who are typically from BIPOC communities and/or members of other marginalized and over-policed groups.⁹

IV

CONCLUSION

This study began from a simple question—are Pima County judges and magistrates following the pretrial release recommendations made by pretrial services with the PSA and is this leading to decreased pretrial incarceration and decreased racial injustice? The preliminary findings of our data analysis exposed that evidence-based risk assessment tools have not in fact created fairer, nor more just, pretrial release processes. What we have discovered is something more disturbing, the willful rejection of the Arizona Supreme Court’s statewide RATs mandate in favor of continued biased decision making by our local judiciary. Worse, they are overwhelmingly incarcerating defendants who, according to their own pretrial risk assessment guidelines, should be free. Perhaps even more confounding is the fact judges and magistrates’ refusal to release defendants ROR contradicts the Arizona Supreme Court’s original claim that pretrial risk assessments would have an immediate decarceral effect on the jail population. Clearly the courts in Pima County prefer incarceration over decarceration.

Courts are not merely arms of the state, they are also community institutions empowered to do justice by the people. Public trust is integral to this relationship. When magistrates and judges abuse that trust of the public, some measure of accountability is required.

TSCCBF requests an immediate end of court misuse and abuse of the pretrial risk assessment tool mandated by the Arizona Supreme Court. Failure to take action in the coming months to address the flagrant misconduct of judges and magistrates in the setting of pretrial release conditions, as documented in this special report, will only further erode the public’s confidence and trust in the Pima County criminal legal system—a trust that once lost will be difficult to recover.

County leadership should also be fully transparent with all efforts undertaken to develop and implement any “course correction” planned for the courts. In fact, one of the areas that merits greater scrutiny, although it is not a problem specifically identified in our FOIA analysis, is the secrecy surrounding the workings of the courts in Pima County. Such secrecy limits the ability of the public to monitor and safeguard the administration of justice carried out by judges and magistrates appointed to do justice “in their name”.

It is also imperative that broad segments of the community—namely directly impacted group members whose voices and opinions are seldom considered by system actors—be invited to participate in all official efforts to hold the courts accountable. County leadership must ensure that these accountability processes be open to the public rather than continue to allow these critiques to be blunted by ineffective closed-door committees, “law and order” advocates, and other special interest groups opposed to meaningful court change.

The use of the PSA in Arizona courts should ultimately be re-examined. While the the County (and state) insist the Arnold Public Safety Assessment (PSA) is a valid tool that functions to eliminate racial disparities and decrease inequities, there is plenty of evidence outside this particular report that suggests that the decision-making framework it uses is flawed and inherently unreliable. A crucial piece of court accountability requires a long over-due critical assessment of the PSA itself.

ENDNOTES

1

It took over 1 year for TSCCBF's FOIA requests to receive a response from the Pima County Superior Court.

2

Arizona Supreme Court Administrative Order No.2009-543 amending Arizona Code of Judicial Administration sec. 6-201.01: Standard Probation Evidence Based Practice (June 2009).

3

According to data compiled by the Prison Policy Institute, 95% of all jail population growth between 2000-2014 came from pretrial detention.

4

See e.g., [https://www.azcourts.gov/apsd/Evidence-BasedPractice/RiskNeedsAssessment/OffenderScreeningTool\(OST\).aspx](https://www.azcourts.gov/apsd/Evidence-BasedPractice/RiskNeedsAssessment/OffenderScreeningTool(OST).aspx)

5

"How A Tool Help Judges May Be Leading Them Astray", The Appeal (August 8,2019), <https://theappeal.org/how-a-tool-to-help-judges-may-be-leading-them-astray/>

6

Cindy Redcross, Brit Henderson with Luke Miratrix, Erin Valentine, MARCH 2019, "Evaluation of Pretrial Justice System Reforms That Use the Public Safety Assessment Effects in Mecklenburg County, North Carolina" mdrc.org/publication/evaluation-pretrial-justice-system-reforms-use-public-safety-assessment

7

"Algorithms Were Supposed to Fix the Bail System, They Haven't," Wired (February 19, 2020), [www.wired.com/story/algorithms-supposed-fix-bail-system-they-havent/amp](http://www.wired.com/story/algorithms-supposed-fix-bail-system-they-havent/)

8

TSCCBF analyzed three year's worth of pretrial services data, from January 1, 2017-December 31, 2019 encompassing 29,253 records of individuals who had been arrested and then judged by the PSA.

9

According to a Pima County Safety and Justice Challenge sponsored by the MacArthur Foundation, using data from 2011-2014, 80% of the jail population was in pretrial status. 9.6% of those incarcerated were African American (compared to 3.3% of the general population), 40.7% of the jail population was LatinX (compared to 35% of the general population), and 6.7% of the jail population was Indigenous (compared to 2.4% if the general population). Mental illness and substance abuse affected an estimated 60% of the jail population. <http://www.safetyandjusticechallenge.org/wp-content/uploads/2019/01/Pima-County-SJC-Fact-Sheet-2019.dox.pdf>



Connect With Us:



tucsonbailfund.org



[@FreeTucson](https://twitter.com/FreeTucson)



[@FreeTucson](https://www.facebook.com/FreeTucson)