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IN THE
INDIANA SUPREME COURT

CAUSE NO. 20A-CR-00121

JOHN YEAGER,	)	Appeal from the
	)	Jefferson Circuit Court,
Appellant/Defendant below,	)	
	)	
v.	)	Trial Court Cause No.
	)	39C01-1911-F3-1322
STATE OF INDIANA,	)	Hon. Donald J. Mote,
	)	Judge
Appellee/Plaintiff below.	)	
	)	

INDIANA PROSECUTING ATTORNEYS COUNCIL'S AMICUS CURIAE BRIEF IN SUPPORT OF PETITION TO TRANSFER

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STATEMENT OF INTEREST

The Indiana Prosecuting Attorneys Council (IPAC), supports, trains, and advocates in the interest of Indiana's Prosecutors. Indiana prosecutors represent the State of Indiana at bond hearings and advocate for victims and public safety. Interpretations of bail rules and laws affect prosecutors daily.

This case began when the State of Indiana, through the Jefferson Circuit Prosecuting Attorney's Office, filed charges against John Yeager for Level 3 felony aggravated battery, Level 3 felony battery on a child less than fourteen years old, Level 3 felony domestic battery, and Level 3 felony neglect of a dependent. The alleged victim was the two-year-old child of Yeager's girlfriend. The Jefferson Circuit Court set bail at $250,000, cash only, and denied Yeager's motion to reduce bail. The Court of Appeals reversed, holding that in light of Yeager's Indiana Risk Assessment System Pretrial Assessment Tool (IRAS-PAT) score of zero, he was entitled to be released on recognizance (but with electronic monitoring). Beyond the specific facts of this case, prosecutors throughout the State are highly concerned that the Court of Appeal's opinion placed too much emphasis on Yeager's IRAS-PAT score to the exclusion of other evidence in the record related to Yeager's potential dangerousness to others. Prosecutors believe that the Court of Appeals improperly interpreted and applied Indiana Criminal Rule 26 and statutes regarding bail and pretrial release in reaching its decision, which could negatively impact thousands of cases going forward.

SUMMARY OF ARGUMENT

The Indiana Court of Appeals decision in *Yeager v. State*, No. 20A-CR-00121 (Ind. Ct. App. May 5, 2020) incorrectly interpreted Criminal Rule 26 and the role that the IRAS-PAT

plays in bond decisions. The Supreme Court should grant the State of Indiana's Petition for Transfer and affirm the decision of the trial court.

ARGUMENT

I. RECENT HISTORICAL BACKGROUND: BOND AND PRETRIAL RELEASE

A. The Development of Criminal Rule 26 and the IRAS-PAT

The development of Criminal Rule 26 and the IRAS-PAT began "[o]n December 20, 2013 when the Indiana Supreme Court created a committee 'to study evidence-based pretrial release assessments and to make recommendations to the Court, including proposed new or amended rules and procedures to facilitate the implementation of such recommendations.'" *Order Adopting Criminal Rule 26*, No. 94S00-1602-MS-86 (Ind. Sep. 7, 2016), https://www.in.gov/judiciary/files/order-rules-2016-0907-criminal.pdf. "The . . . committee consisted of five trial judges, two legislators, four probation officers, a county prosecutor, the Chair of the Indiana State Bar Association Criminal Justice Section, and representatives of the Indiana Prosecuting Attorneys Council, and the Indiana Public Defender Council." *Id*. The next year, "Chief Justice Loretta Rush extended the committee's charge to study and enable the implementation of a comprehensive evidence-based pretrial release program . . . and requested that the committee develop a pilot project to assess the feasibility of using a pretrial risk assessment system in pretrial release decisions." Ind. Evidence Based Decision Making (EBDM) Pretrial Work Group, Pretrial Practices Manual, 8 (2018) https://www.in.gov/judiciary/iocs/files/pretrial-work-group-practices-manual.pdf. Jefferson County was among those counties selected. Ultimately, eleven counties became pretrial pilots. *See id*. at 23.

On September 7, 2016, this Court adopted Criminal Rule 26. *Order Adopting Criminal Rule 26*, *supra*. The relevant portions of the rule state:

> (A) If an arrestee does not present a substantial risk of flight or danger to themselves or others, the court should release the arrestee without money bail or surety subject to such restrictions and conditions as determined by the court . . . .
>
> (B) In determining whether an arrestee presents a substantial risk of flight or danger to self or other persons or to the public, the court should utilize the results of an evidence-based risk assessment approved by the Indiana Office of Court Services, and such other information as the court finds relevant.

Crim. R. 26(A) and (B). These subsections were to become effective in all courts on January 1, 2018. *Order Adopting Criminal Rule 26*, *supra*. This deadline was extended to January 1, 2020, but it was effective immediately in the pretrial pilot counties. *Order Amending Criminal Rule 26*, No. 94S00-1701-MS-5 (Ind. Sep. 5, 2017). Thus, it should be noted that the courts in Jefferson County have had time to become acquainted with the rule and how to use it and the IRAS-PAT.

In the criminal justice setting, risk assessments are designed "to identify the expected likelihood of a particular adverse event over a specified period of time . . . for an individual offender." Ralph Serin and Christopher Lowenkamp, Selecting and Using Risk and Need Assessment, 10 Drug Court Practitioner Fact Sheet, National Drug Court Institute (December 2015), p.1 https://www.ndci.org/wp-content/uploads/2018/09/Fact-Sheet-Risk-Assessment.pdf.

Risk assessments identify the characteristics of a group of people that predict the risk of the adverse event. "Statistical risk instruments provide scores that are related to recidivism estimates for groups of offenders. Among a group of offenders assessed as high risk using a validated statistical risk scale, their predicted failure rate will be higher than that of a group of offenders assessed as low risk, and such predictions exceed chance." *Id.* at 3. A risk assessment

score for the adverse event of failing to appear will not indicate, for example, that an individual offender will fail to appear if released pretrial. It will instead indicate that the individual belongs to a group of offenders whose members, more than any other group of offenders, fail to appear. For that reason, some high-risk offenders will not fail to appear and some low-risk offenders will fail to appear. Edward J. Latessa and Brian Lovins, The Role of Offender Risk Assessment: A Policy Maker Guide, 5 Victims & Offenders, 203, 215 (2010) *available at* http://faculty.uml.edu/chigginsobrien/44.327/TOPICS/The%20Role%20of%20Offender%20Risk%20Assessment%20PDF.pdf. "That said, risk scales are not 100 percent accurate; some low-risk cases fail and some high-risk cases succeed. Accordingly, the inclusion of case-specific factors can further refine risk assessment." Serin and Lowenkamp, *supra* at 3.

The Board of Directors of the Judicial Conference of Indiana approved the IRAS-PAT as the pretrial risk assessment tool for Indiana. Board of Dir. of the Judicial Conf. of Ind., Policy of Indiana Risk Assessment System (Aug. 23, 2010, rev. Sep. 14, 2012). The tool was developed in 2008 by the University of Cincinnati for use in Ohio (ORAS-PAT), and it is a validated assessment tool. Pretrial Practices Manual at 74-5. At the time of the implementation of Criminal Rule 26, it had not been validated on Indiana populations, but as part of the EBDM pretrial pilots, the IRAS-PAT now has been validated in two Indiana counties. E. Lowder, S. Paquet,, *et al*; Hamilton County: IRAS-PAT Validation Preliminary Report, (Sep. 2019) https://www.in.gov/judiciary/iocs/files/pretrial-hamilton-validation-report.pdf, and E. Lowder, E. Grommon, and B. Ray, Monroe County: IRAS-PAT Validation Preliminary Report, (Nov. 2018) https://www.in.gov/judiciary/iocs/files/pretrial-monroe-validation-report.pdf. The IRAS-PAT is "designed to assess an offender's risk for failure to appear and risk to re-offend while on pretrial supervision." Policy of Indiana Risk Assessment System. "It is a best practice to complete this

tool to assist in making pretrial supervision decisions." *Id*. It also may be used to assist with bond decisions. *Id*.

The assessment tool collects information in seven domains: age at first arrest, failure to appear warrants in the past twenty-four months, prior jail incarcerations, employment at the time of the arrest, residential stability, illegal drug use during the past six months, and severe drug use. University of Cincinnati, Policy of Indiana Risk Assessment System, 1-3 (Undated). It is important to note that the IRAS-PAT does not assess risk for sexual attraction to children, domestic violence, or danger to self or to others. Although the IRAS-PAT evaluates drug use to a certain extent for purposes of assessing risk of non-appearance, it does not go so far as to determine whether the defendant has a substance use disorder. "There is no 'one size fits all' assessment tool. Some domains or types of offenders will require specialized assessments, such as sex offenders or mentally disturbed individuals." Latesa and Lovins, *supra* at 215.

In implementing Criminal Rule 26, each county, beginning with the pilot counties, is free to develop procedures and protocols according to its available resources, court structure, and criminal justice needs. Pretrial Practices Manual at 16-30. To assist counties, a pretrial practices manual was developed with sample forms, a release and supervision matrix template, and other resources. *Id.* It is fairly typical across all counties for an offender who has not been released on bond to be interviewed by a pretrial services officer in the jail. The pretrial services officer prepares a report and arrives at an assessment score. That score may be interpreted as low, moderate, or high. *Id*. at 13. In some counties, a release matrix may allow the pretrial services officer to authorize a release on recognizance if the scored risk is low and the offender has been charged with a specified offense that has been agreed upon by the collaborative pretrial team that includes the judge, prosecutor, and public defender. In other counties, the matrix exists to guide

the judge to release those low-risk offenders on recognizance without first appearing in court. A pretrial services officer may also recommend the level or extent of supervision if the offender is released.

Release and supervision matrices typically distinguish violent offenses from other offenses for both special consideration in the release decision and increased supervision requirements if released. In fact, a list of statutory violent offenses is found at Appendix D in the Pretrial Practices Manual at p. 78. It was compiled by the Indiana EBDM Pretrial Work Group from several statutory sources defining what is a violent offense. *See, e.g.,* Ind. Code §§ 35-31.5-2-352, 35-47-4-5, and 35-50-1-2. Individual counties are, of course, free to modify that list. Finally, even when there is an agreed-upon matrix for release or supervision based upon risk level, the trial court is not bound by the matrix and has the discretion to deviate from it. "Assessments help guide decisions, but they do not make them – professional discretion is part of good assessment-aided decision making." Latessa and Lovins, *supra*. at 215.

In the Pretrial Practice Manual's "Frequently Asked Questions, Criminal Rule 26" section, the EBDM pretrial workgroup gives the following guidance to judges and attorneys on the general purposes of the Rule:

> 1. What is the primary purpose of Criminal Rule 26 (CR 26)?
>
> *The Rule is intended to improve pretrial practices in Indiana by encouraging trial judges to engage in evidence-based decision making at the pretrial stage.*
>
> * * * * *
>
> 12. Is the court required to eliminate its bond schedule under this Rule?

> *No. The court may continue to utilize its bond schedule when warranted to maximize the likelihood of the arrestee's appearance at trial and for the protection of the public.*
>
> 13. Is the court prohibited from using cash bail under this Rule?
>
> *No. The court may continue to utilize cash bonds when warranted to maximize the likelihood of the arrestee's appearance at trial and the protection of public safety.*

Pretrial Practices Manual *at* 62 – 64 (emphasis added).

B. The IRAS-PAT does not assess a defendant's danger to themselves or others, or the community

The Pretrial Practices Manual clearly defines the limitations of what the IRAS-PAT can assess:

> 5. What is the IRAS-PAT designed to predict?
>
> *The IRAS-PAT is designed to be predictive of both an arrestee's failure-to-appear and risk of violating pretrial supervision by committing a new offense.*

Id. at 62-63. Whereas the IRAS-PAT attempts to categorize defendants based on their likelihood of failing to appear or committing a new crime, those are not the only goals of bond. A legitimate goal of bond is to protect "another person's physical safety" or "the safety of the community." I.C. § 35-33-8-1 and I.C. § 35-33-8-4(b). Criminal Rule 26 explicitly states that an individual should be released on recognizance only if "an arrestee does not present a substantial risk of flight *or danger to self or others . . . ."* (emphasis added).

Because the IRAS-PAT measures the risk that a defendant may re-offend without predicting the type of offense, the Pretrial Practices Manual encourages a trial court to consider other evidence to address the question of whether a person poses a danger to a person or the community.

> 2. Does CR 26 require trial courts to release arrestees from jail without bail and/or pretrial supervision conditions?
>
> *No. The Rule encourages trial courts to use risk assessment results and other relevant information about arrestees to determine if the individual presents a substantial risk of flight or danger to self or others in the community; thereby, informing release decisions and release conditions.*
>
> * * * * *
>
> 10. May the court utilize collateral information to assist with release decision-making?
>
> *Yes. Courts are also encouraged to use other relevant and collateral information such as the probable cause affidavit, victim statement(s), domestic violence screeners, substance abuse screeners, mental health screeners and criminal history to assist in making release decisions.*

Pretrial Practices Manual at 62-63.

It is important to note that some categories of serious crime, such as child molesting, are committed in significant numbers by defendants who will almost always score low risk on the IRAS-PAT. Such defendants often have stable employment, a stable residence, and social support structures that cause them to score low. The use of other evidence is encouraged in these cases. Therefore, it is a good practice and prudent for trial courts to evaluate evidence outside the IRAS-PAT when assessing the risk of "danger to themselves or others" when the defendant is accused of a violent offense. Again, the Pretrial Practices Manual explicitly encourages such evaluation, which may include such things as the probable cause affidavit. The Court of Appeals in its decision finds it to be error for a court to make use of such information, contrary to this guidance.

II. THE COURT OF APPEALS ERRED IN ITS USE OF IRAS-PAT AND APPLYING CRIMINAL RULE 26

A. The Court of Appeals misinterpreted Criminal Rule 26 by relying exclusively on the IRAS-PAT

There is little case law on the use of risk assessments in Indiana. However, this Court has stated:

> As explained below, we hold that legitimate offender assessment instruments do not replace but may inform a trial court's sentencing determinations and that, because the trial court's consideration of the defendant's assessment model scores was *only supplemental* to other sentencing evidence that independently supported the sentence imposed, we affirm the sentence.

Malenchik v. State, 928 N.E.2d 564, 566 (Ind. 2010) (emphasis added).

Malenchik involved the use of the Level of Service Inventory Revised (LSI-R) tool at the sentencing stage. *Id.* at 572. This Court explained:

> While there may be strong statistical correlation of assessment results and the risk or probability of recidivism, the administrator's evaluation as to each question may not coincide with that of the trial judge's evaluation based on the information presented at sentencing. The nature of the LSI-R is not to function as a basis for finding aggravating circumstances, nor does an LSI-R score constitute such a circumstance. But LSI-R scores are highly useful and important for trial courts to consider as a broad statistical tool to supplement and inform the judge's evaluation of information and sentencing formulation in individual cases. The LSI-R manual directs that it is not "to be used as a substitute for sound judgment that utilizes various sources of information." (Citation omitted.)

Id.

Although the decision point at which the risk assessment is used differs, it is clear from *Malenchik* that assessment tools are used properly when they are used to inform a decision, not when they are used as the sole or predominating factor in making a decision. *See also, J.S. v.*

State, 928 N.E.2d 576, 578 (Ind. 2010) ("the LSI-R and similar instruments . . . 'do not replace but may inform a trial court's sentencing determinations'").

The Court of Appeals here applied the IRAS-PAT rotely in reversing the trial court and ordering Yeager's immediate release. "Although Yeager faces four Level 3 felony charges for allegedly battering a two-year-old (and a potentially lengthy sentence if he is convicted), this does not mean that Yeager presents a risk of not appearing. Indeed, the Jefferson County Pretrial Director found no risk." *Yeager* at p. 7. The Court likewise disregarded the prosecution's evidence of the child's injuries and the defendant's connection to those injuries. It concluded that, "the Jefferson County Pretrial Director recommended that Yeager be released to pretrial supervision with the added condition of electronic monitoring. Without any evidence to show that Yeager is a danger, we conclude that the trial court abused its discretion in denying Yeager's motion to reduce his $250,000 cash-only bond." *Id.* at 8.

Criminal Rule 26 encourages the use of the pretrial risk assessment to assist the trial court in making an individualized bail determination while considering all the factors of the offender and the offense. This is a significant departure from a typically charge-based bond schedule that courts tend to apply mechanically without individualized consideration. The Court of Appeals's application of Criminal Rule 26 improperly invites trial courts to substitute systematic use of a bond schedule with systematic use of risk scores.

B. The Court of Appeals misinterpreted Criminal Rule 26 by failing to consider evidence of the charged crime as evidence of danger to another person or danger to the community

Keeping in mind that the safety of any person or the community is a legitimate consideration when setting bond, not just the likelihood of failing to appear, it is important to

emphasize that the IRAS-PAT measures the risk that a defendant may re-offend but does *not* predict the type of offense the defendant may commit. *See* Serin, and Lowenkamp, *supra.* at 1.

The legislature has classified the crimes with which Yeager was charged as violent crimes. As previously noted, the Pretrial Practices Manual includes a list of violent offenses as they are defined as such throughout the Indiana Code. Yeager's charged offenses are on that list and each is defined as such in one or more sections of the Indiana Code. All of the felonies with which Yeager is charged have serious, long-term consequences that indicate a risk to "the safety of the community." The seriousness of the offense, as judged by "the nature and gravity of the offense and the potential penalty faced," is sufficient by itself to "warrant a refusal to reduce the amount of bail." *Winn v. State*, 973 N.E.2d 653, 656 (Ind. Ct. App. 2012) (citing I.C. § 35-33-8-4(b)(7)). The IRAS-PAT does not consider the level of the crime, nor did the Court of Appeals. Ironically, the Court of Appeals's direction on remand that the defendant be ordered to electronic home detention recognizes that Yeager does pose a risk of harm to an individual or to public safety, while insisting that it may not consider the evidence relating to the charged crime.

C. Unless the Indiana Supreme Court grants transfer in this case, trial courts will misapply Criminal Rule 26

The Court of Appeals held that trial courts must disregard evidence of the crime charged in evaluating whether a defendant poses a danger to the community or a person. In so doing, it ruled that the trial court should have ignored the probable cause affidavit, introduced evidence relating to the extent of injuries, and the uncontroverted fact that the child was in Yeager's care. This is contrary to the opinions on point from this Court, the social science behind risk assessment tools, and the acknowledged roles and limitations of the IRAS-PAT identified in the

development of Criminal Rule 26. In effect, the Court of Appeals holds that it will be an abuse of discretion to issue a bond order contrary to a risk assessment.

As discussed above, a legitimate purpose of bail is to protect any person or the community, pursuant to statute and Criminal Rule 26. The Court of Appeals opinion prohibits the trial court from considering the charges and the evidence recited in the affidavit for probable cause. This will turn bond hearings into extensive evidentiary hearings where the prosecutor will attempt to overcome the presumption of innocence by establishing by clear and convincing evidence that the defendant is a danger. Witnesses will be called and cross-examined, including victims and child victims. Court calendars will become clogged with hours-long hearings on bail. Prosecutors will present, and judges will have to sift through, character evidence of defendants for instability and violence, much of which will be uncharged and unproven allegations in an effort to prove danger to a person or the community.

The practical effect of the Court of Appeals holding is that danger to a person or the community will cease to be a consideration for bond. Without considering the charges and the evidence of the charged crime recited in the affidavit for probable cause, a trial court will rarely be able to adequately assess the danger a defendant poses to others. This will lead to absurd results.

For example, if a nineteen-year-old high school student who lives with his parents and has no criminal history, carries a gun into a school, fires it at children, seriously injuring some, he must be released because he cannot be found, on those facts alone, to be a danger to the community. He will score low on the risk assessment tool, as he has a stable residence, parents who will promise to return him to court, and no prior criminal history. Evidence of the alleged crime itself, as the Court of Appeals held, cannot be considered, because that would violate the

defendant's presumption of innocence. A trial court would be compelled to release this young adult without posting bond if the Court of Appeals decision stands.

It is also important to note that judicial discretion and the ability to deviate from a risk assessment in a specific case goes both ways. If a risk assessment has indicated the offender is a high risk to re-offend or to fail to appear, the judge must have the discretion to deviate from the risk assessment calculation. *See, e.g., J.S.*, 928 N.E.2d at 578. Could the judge not use the probable cause affidavit to conclude that a defendant's theft of milk and bread was to feed her children, and release her on her own recognizance despite an elevated risk score? Should a judge not be able to use his or her discretion based on facts alleged in the probable cause affidavit that are favorable to the defendant? Could a trial judge not be persuaded by family assurances of attendance despite an assessment showing a high risk for non-appearance? Could a judge release an offender with a lengthy record of drug offenses to supervision because the offender has spent the last six months in successful treatment at a halfway house? Bail "decisions must reflect a careful weighing of the individualized factors set forth by" state code and applicable court rules. *Odonnell v. Harris Cty.*, 892 F.3d 147, 158 (5th Cir. 2018).

Each application for bail should be judged individually. Prosecutors and defense attorneys should have the ability to argue salient factors outside and apart from the risk assessment, which, as this Court has stated, is a tool to improve the court's decision making but not the only tool. Trial courts should have the discretion to use the risk assessment to inform the release and supervision decision, and should have the discretion to depart from the assessment when other facts compel a different outcome. In this case, the trial court made written findings in which it weighed the pretrial risk assessment and the statutory considerations for bail in I.C. § 35-33-8-4(b). It found that the facts of the offense compelled a result different from the

assessment of risk. Until now, Indiana appellate courts have not found this to be an abuse of discretion.

CONCLUSION

The Court of Appeals erred when it ruled that a trial court abuses its discretion when it overrules the recommendation of a risk assessment based upon the nature of the offense, facts alleged in the affidavit of probable cause, and additional evidence that has a tendency to show that the defendant presents a risk to the physical safety of another person. In doing so, the Court of Appeals elevated the results of the IRAS-PAT risk assessment over the individualized assessment of the trial judge who evaluated the risk assessment along with all the facts before him as mandated by statute and Criminal Rule 26. This Court should grant the State of Indiana's petition to transfer, vacate the decision of the Court of Appeals, affirm the decision of the trial court, and provide guidance on the proper use of IRAS-PAT in making pretrial release and bond decisions.

Respectfully submitted,

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WORD COUNT CERTIFICATE

I certify, in accordance with Ind. Appellate Rule 44(E), that the foregoing brief contains no more than 4,200 words.

s/Glenn R. Johnson
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CERTIFICATE OF FILING AND SERVICE

I certify that on June 19, 2020 the foregoing document was electronically filed using the Indiana E-filing System ("IEFS"). I further certify that on June 19, 2020 the foregoing was served upon counsel of record, via the IEFS, addressed as follows:

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