

Pretrial Law and Procedure: an Overview

HON. J. RICHARD COUZENS
SUPERIOR COURT OF PLACER COUNTY (RET.)

Probable cause determination

- ▶ Arrests without a warrant
- ▶ Probable cause determination made within 48 hrs of arrest
- ▶ On-call magistrate system
- ▶ **County of Riverside v. McLaughlin, 500 US 44 (1991)**
 - ▶ Must be “judicial determination of probable cause”
 - ▶ No “unreasonable delay” after arrest

Arraignment

- ▶ **PC § 825(a):**
- ▶ “[T]he defendant shall in all cases be taken before the magistrate without unnecessary delay, and, in any event, within 48 hours after his or her arrest, excluding Sundays and holidays.”
- ▶ Next court day if falls on Sunday or holidays
- ▶ Next court session if court not in session
- ▶ If arrested on Wednesday after hrs – arraign on Friday

Arraignment

- ▶ Persons on supervision
- ▶ **People v. Williams** 230 CA4th 636
 - ▶ Arrests of parolee
 - ▶ Arraigned within 10 days of arrest
 - ▶ Probable cause hearing within 15 days of arrest
 - ▶ Evidentiary hearing
 - ▶ Applicable to all persons on supervision?

The right to bail – the constitution

- ▶ **Bail in non-capital case is a matter of right**
- ▶ **Cal Const. art I § 12** – “shall be released on bail by sufficient sureties”
- ▶ Ct may consider
 - ▶ Seriousness of the charged offense
 - ▶ Previous criminal record
 - ▶ Probability of appearing in court
- ▶ Ct has discretion to release on OR

Right to bail – the constitution

- ▶ Exceptions (1)
 - ▶ (a) Felony offense with “acts of violence”
 - ▶ (b) Any felony sexual assault
- ▶ AND
 - ▶ “Facts are evident or the presumption great,” AND
 - ▶ “Clear and convincing evidence”
 - ▶ “Substantial likelihood”
 - ▶ “Person’s release would result in great bodily harm to others”

Right to bail – the constitution

- ▶ Exceptions (2)
 - ▶ Any felony offense
 - ▶ “Facts are evident and the presumption great” AND
 - ▶ “Clear and convincing evidence”
 - ▶ Def threatened another with great bodily harm
 - ▶ “Substantial likelihood” threat will be carried out if released

Right to bail - statute

- ▶ **PC § 1271** – “may be admitted to bail before conviction as a matter of right”

Setting bail

- ▶ **Prior to first appearance**
 - ▶ Per amount specified in warrant
 - ▶ If no warrant, per amount set by schedule (unless changed by judge)
- ▶ **After appearance**
 - ▶ As set by a judge

Factors to consider

- ▶ Safety of public and victim
 - ▶ Const. art I, § 28(b)(3), (f)(3), PC § 1275(a)
- ▶ Safety of victim's family
 - ▶ Const. art I, § 28(b)(3)
- ▶ Seriousness of the offense
 - ▶ Const. art I, §§ 12, 28(f)(3), PC § 1275(a)
 - ▶ Injury to victim
 - ▶ Threats to victim or witnesses
 - ▶ Use of firearm or deadly weapon
 - ▶ Use or possession of controlled substances



Factors to consider

- ▶ Previous criminal record
 - ▶ Const. art I, §§ 12, 28(f)(3), PC § 1275(a)
- ▶ Probability of def making court appearances
 - ▶ Const. art I, §§ 12, 28(f)(3), PC § 1275(a)
 - ▶ Ties to community – employment, length of residence, family status
 - ▶ Whether prior FTA's
 - ▶ Potential punishment



Changes to bail

Before arraignment

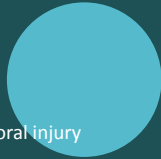
- ▶ PC § 1269c
 - ▶ Lower bail or OR
 - ▶ By def, attorney, friend or family
- ▶ PC § 1269c
 - ▶ Higher bail by law enforcement
 - ▶ Schedule insufficient to secure appearance
 - ▶ Necessary to protect victim or family in DV case
 - ▶ Proceed by declaration



Changes to bail – restrictions

Before arraignment

- ▶ **Special felonies – PC § 1270.1**
 - ▶ Most serious or violent felonies
 - ▶ Witness intimidation
 - ▶ Crimes against spouse – batter, rape, corporal injury
 - ▶ Protective order violations if active threats
 - ▶ Criminal threats
 - ▶ Stalking



Changes to bail – restrictions

Before arraignment

- ▶ Noticed hearing in open court
- ▶ Two-day notice
- ▶ Hearing within time for arraignment
 - ▶ If at arraignment, two-day notice not required
- ▶ **If def charged with serious felony**
 - ▶ **Victim must be given notice**
 - ▶ Opportunity to be heard
 - ▶ **Notice not based on prior request**



Changes to bail – restrictions

Before arraignment

- ▶ Court to consider
 - ▶ Record of past appearances
 - ▶ Potential punishment
 - ▶ Danger posed to others
- ▶ If change granted
 - ▶ Reasons stated on the record
 - ▶ Address issues of any threats to victim or witnesses



Changes to bail – restrictions

Before arraignment

- ▶ If lower setting
 - ▶ Finding of unusual circumstances
 - ▶ Not just good appearance record or no new offenses
- ▶ May grant increase in bail without notice or hearing
 - ▶ Oral or written declaration from police

Changes to bail – restrictions

Before arraignment

- ▶ No release on OR without hearing in open court
– **PC § 1319.5**
- ▶ Anyone on felony probation or parole
- ▶ FTA three or more times, within three years, with warrant issued (except Vehicle Code infractions) and is arrested for:

- ▶ Any felony
- ▶ Any gang crime
- ▶ Any assaultive crime
- ▶ Any theft
- ▶ Any burglary
- ▶ Any offense where def armed with or personally used firearm

Changes to bail

After arraignment

- ▶ Ct may increase at arraignment – **PC §§ 985, 1273**
 - ▶ Not necessary to show “good cause” – **PC § 1289**
 - ▶ Even if def posted bail previously
- ▶ After arraignment and def posted
 - ▶ Change only with “good cause”
 - ▶ Change of circumstances or newly discovered facts

Changes to bail

After arraignment

- ▶ Automatic review – **PC § 1270.2**
 - ▶ Hearing no later than 5 days from date of original order setting bail on complaint
 - ▶ Def may waive right

Methods of posting bail

- ▶ Bail bond – **PC §§ 1269, 1278**
 - ▶ Corporate surety
 - ▶ Private surety
 - ▶ Two residents or landowners in state
 - ▶ Obtained through licensed agent
 - ▶ Sufficient assets
 - ▶ Affidavit re qualifications
 - ▶ Statutory form

Methods of posting bail

- ▶ Cash deposit – **PC §§ 1269, 1295**
 - ▶ Deposited with court or custodial agency
 - ▶ Full amount of setting
 - ▶ Can be check, cashier's check or money order, as authorized by ct
 - ▶ Can be credit card for misdemeanor offense, if approved by Bd of Supervisors

Methods of posting bail

- ▶ Government bonds – **PC § 1298**
 - ▶ Face amount of setting
 - ▶ Ct may refuse if value less than face value
- ▶ Equity in real property – **PC § 1298**
 - ▶ Equity of twice amount of setting
 - ▶ Value verified by appraisal and title report
 - ▶ Promissory note secured by deed of trust

Release on own recognizance

- ▶ Discretionary with court – **Const. art 1 §§ 12, 28(f)(3)**
- ▶ Ct must consider
 - ▶ Safety of victim and victim's family
 - ▶ Any outstanding felony warrants
 - ▶ Any info in OR rept, if prepared

Release on own recognizance

- ▶ Must observe **PC § 1270.1** re crimes of violence
 - ▶ Hearing in open court with two-days' notice
 - ▶ Notice to victim and opportunity to appear
- ▶ No release on violent felony if prior FTA on a felony – **PC § 1319(b)**

Release on own recognizance

- ▶ Statement of reasons
 - ▶ Not required for non-violent felony or misdemeanor
 - ▶ If denial – finding that public safety compromised or won't assure appearance – **PC § 1270(a)**
 - ▶ Is required for violent felony – whether granted or denied – **PC § 1319(c)**
 - ▶ Must be included in court minutes

Release on own recognizance

- ▶ Written promise to appear – **PC § 1318**
 - ▶ Promise to appear
 - ▶ Obey all conditions
 - ▶ Not leave state without permission of court
 - ▶ Waiver of extradition
 - ▶ Understand consequences of violating conditions

Conditions of release

- ▶ Reasonable conditions may be imposed – **PC §§ 1269c, 1318(a)(2)**
 - ▶ Bail or OR
 - ▶ Related to public safety, including, but not limited to future appearances
 - ▶ Felony drug offenses – **York 9 C4th 1133**
 - ▶ Random testing and search and seizure

Conditions of release

- ▶ Misdemeanor drug offenses – **Barbarick 168 CA3d 731**
 - ▶ Random searches not valid
 - ▶ Cf duty of ct to consider public safety – PC § 1270(a)
