Pretrial Detention Reform

RECOMMENDATIONS TO THE CHIEF JUSTICE

PRETRIAL DETENTION REFORM WORKGROUP

OCTOBER 2017

Pretrial Detention Reform Workgroup

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Executive Summary

The Chief Justice established the Pretrial Detention Reform Workgroup on October 28, 2016, to provide recommendations on how courts may better identify ways to make release decisions that will treat people fairly, protect the public, and ensure court appearances. In establishing the Workgroup, the Chief Justice recognized the central role of the courts.

The Chief Justice provided the following guiding principles for the Pretrial Detention Reform Workgroup:

- Pretrial custody should not occur solely because a defendant cannot afford bail.
- Public safety is a fundamental consideration in pretrial detention decisions.
- Defendants should be released from pretrial custody as early as possible based on an assessment of the risk to public safety and the risk for failing to appear in court.
- Mitigating the impacts of implicit bias on pretrial release decision-making should be considered.
- Reform recommendations should consider court and justice system partner resources.
- Nonfinancial release alternatives should be available.
- Consistent and feasible practices for making pretrial release, detention, and supervision decisions should be established.

During the course of its yearlong study, the Workgroup examined the complex issues involved in the current pretrial release and detention system. Members reviewed a wide variety of research and policy materials and heard presentations from state and national experts, justice system partner representatives, the commercial bail industry, state and local regulators, victim and civil rights advocacy organizations, California counties that have experience with pretrial services programs, and jurisdictions outside California that have undertaken pretrial reform efforts.

At the conclusion of this process, the Workgroup determined that California's current pretrial release and detention system unnecessarily compromises victim and public safety because it bases a person's liberty on financial resources rather than the likelihood of future criminal behavior and exacerbates socioeconomic disparities and racial bias.

With the Chief Justice's guiding principles as the framework, the Workgroup developed a set of 10 recommendations. These recommendations seek to achieve a just and fair pretrial release and detention system that balances the protection of public safety with the presumption of innocence and due process. The Workgroup recognizes that the release of any person before trial involves risk—as does every pretrial detention. The challenge is to minimize these risks while achieving the goals of maximizing public safety, court appearance, and release of individuals. With those goals in mind, the Workgroup submits the following recommendations to be considered and implemented as a whole:

1. Implement a robust risk-based pretrial assessment and supervision system to replace the current monetary bail system.

Implement a risk-based pretrial assessment and supervision system that (1) gathers individualized information so that courts can make release determinations based on whether a defendant poses a threat to public safety and is likely to return to court—without regard for the defendant's financial situation; and (2) provides judges with release options that are effective, varied, and fair alternatives to monetary bail.

2. Expand the use of risk-based preventive detention.

Expand the use of preventive detention to ensure that defendants will be detained pending trial in appropriate cases when public safety cannot be addressed through release conditions.

3. Establish pretrial services in every county.

Pretrial services maximize the safety of the community and minimize the risk of nonappearance at court proceedings. Pretrial services must be established in every county and must include the comprehensive use of a validated risk assessment instrument, as well as monitoring and supervision.

4. Use a validated pretrial risk assessment tool.

Use of validated risk assessment tools will provide valuable information to judges to help inform pretrial determinations regarding the defendant's likelihood of reoffending and returning to court, and assist the court in fashioning conditions or terms of pretrial release. Judicial officers must remain the final authority in making release or detention decisions and can override the assessment's recommendation when necessary to protect the public or in the interest of justice.

5. Make early release and detention decisions.

Release and detention decisions should be made early in the pretrial process. A pretrial system that gathers information about a defendant before arraignment will allow for prompt release and detention decision-making, facilitating the early release

of low-risk defendants and detaining, until arraignment, defendants who are unlikely to return to court or who pose a risk to public safety.

6. Integrate victim rights into the system.

The perspective of victims must be fully integrated into the pretrial process and the risks to their well-being addressed in pretrial decision-making. All crime victims have constitutional rights in California, including the right to be heard regarding any pretrial release decision, and their input is essential to a well-functioning system.

7. Apply pretrial procedures to violations of community supervision.

A significant portion of the jail population includes individuals accused of violating the terms and conditions of probation, mandatory supervision, postrelease community supervision, or parole. Legislation and rules of court must be adopted that consider the pretrial release and detention screening procedures for those defendants charged with a violation of supervision conditions.

8. Provide adequate funding and resources.

California's courts and local justice system partners must be fully funded to effectively implement a system of pretrial release and detention decision-making and supervision, with resources for new judges and court staff, local justice partner infrastructure, assessment tools, and training. Both significant initial investment of resources and ongoing funding are essential.

9. Deliver consistent and comprehensive education.

To achieve the goals of public safety and return to court, judges, court staff, local justice system partners, and the community must be educated on the development and implementation of a pretrial release and supervision system and provided with continuing education regarding both implicit and explicit bias to ensure that neither the pretrial system nor any type of assessment perpetuates bias. This education requires time, funding, and most importantly investment in and collaboration among all justice system partners.

10. Adopt a new framework of legislation and rules of court to implement these recommendations.

A structure will be sustainable only if it is built on a solid foundation. To undertake such comprehensive reform, this system must not be grafted onto the current complex statutory framework of monetary bail. Provisions currently in the California Constitution that presume release, permit preventive detention, and protect victims' rights will serve as the bedrock of a reformed pretrial system that balances public safety, release, and return to court. Comprehensive legislation and rules of court

should be adopted to create a system of release and detention that is efficient and does not impose excessive layers of procedural requirements.

If adopted, the reforms envisioned in these recommendations will make major and dramatic changes to California's criminal justice system and will affect the superior courts in every county and all of their justice system partners.

As with any comprehensive reform, it will be successful only if all three branches of California's government join together in its development, implementation, and maintenance. A foundation built on legislation, clear and directive court rules, and adequate and sustained resources with new funding streams is essential to the reform envisioned in these recommendations. These changes will help make California a safer place and the justice system more fair and effective.

Preamble

The Chief Justice of California, in her March 8, 2016 State of the Judiciary address to a joint session of the California Legislature, highlighted the pretrial detention/release system as an area of concern for the judicial branch. The Chief Justice noted that now is an appropriate time to investigate whether the bail system effectively serves its purpose of assuring public safety and appearance of defendants in court or whether a system based on risk assessment would be more effective. She emphasized that "we must not penalize the poor for being poor" and acknowledged that "[t]he good news is that all three branches have already begun work in this area."

In her comments to the Judicial Council on October 28, 2016, the Chief Justice affirmed that she was establishing the Pretrial Detention Reform Workgroup "to provide recommendations on how courts may better identify ways to make release decisions that will treat people fairly, protect the public, and ensure court appearances."

Pretrial detention reform is a complex task. From public policy and constitutional considerations to evaluation of the developing technology surrounding risk assessment tools, reform of the pretrial detention/release system is a multifaceted issue. The recommendations in this report were crafted by the Workgroup after a course of extensive fact-finding. The deliberations during the development of this report were robust, challenging, and tremendously thought provoking. For the members of the Workgroup, these deliberations involved an evolution in thinking.

The Pretrial Detention Reform Workgroup is acutely aware of the resource and operational issues of bail and pretrial detention reform. The Workgroup's purpose was to approach these issues from a policy level, and this report provides that perspective. However, issues of resources, implementation, and ongoing operational challenges were discussed and considered in the deliberations that produced these recommendations for pretrial reform.

The implementation of profound reforms will be demanding and in many cases difficult. One of California's greatest strengths is its tremendous diversity. California's mosaic of people, languages, cultures, geography, and resources makes the state a unique and remarkable place. There will be operational and implementation opportunities and challenges for the state as a whole and for each of California's 58 counties as we make pretrial release and detention reform a reality.

The members of the Pretrial Detention Reform Workgroup express their sincere appreciation to the Chief Justice for the opportunity to work on this critically important issue. They also want to thank the Judicial Council staff for their tireless work and support during this process.

Workgroup Process

The Chief Justice established the Pretrial Detention Reform Workgroup to analyze whether there was a better way to make pretrial release decisions. If so, the Workgroup was to recommend a policy that would promote fairness, protect the public, and ensure court appearances. The Workgroup comprises 11 judges from counties across the state and one court executive officer.

Each member of the Workgroup brings a unique set of experiences and perspectives to this charge. All the members have significant experience with the courts and criminal law, though the number of years they have served on the bench, the size of the court in which they serve, and its geographic location vary. Some members began their legal careers as prosecutors, others worked as public defenders, and several were in private practice. Workgroup members also draw on their past work experience with law enforcement, the legislative branch, nonprofit organizations, criminal defense, and court administration.

Since its initial conference call on November 9, 2016, the Workgroup has met nine times in person, held eight conference calls and webinars, and engaged in numerous e-mail and phone communications.

The Workgroup received in-person presentations from more than 40 speakers, including state and national experts, justice system partners, the commercial bail industry, state and local regulators, victim and civil rights advocates, California counties that have had experience with pretrial services programs, and jurisdictions outside California that have undertaken pretrial reform efforts. (For a full listing of presenters, see Appendix A.)

Education and Information Gathering

Workgroup members initially undertook an exhaustive education in the complex issues involved in efforts to change the current bail system. Members reviewed a wide variety of research and policy materials on pretrial detention and release issues, and an extensive web-based resource site was developed to maintain a catalogue of materials. (For a listing of materials provided, see Appendix B.)

National and state experts provided information on pretrial processes, the history and fundamentals of bail, the elements integral to the consideration of pretrial reform, risk assessment, national pretrial standards, available statistical data about pretrial release in California, and the perspectives of justice system partners and others. Workgroup members acted as neutral information gatherers and maintained a statewide perspective during this phase.

The Workgroup spent considerable time studying the current commercial bail system, the bail bond industry, and its regulation. Representatives from the bail industry provided their suggestions for reform and an overview of the commercial bail system. The

commissioner of the California Department of Insurance (CDI) discussed the role of the CDI as the regulator of the bail industry. (For more information on the CDI, see Regulation of the Commercial Bail Bond Industry, pp. 41–43.) In addition, the chief deputy with the Los Angeles County Office of Inspector General, who is also a former prosecutor for Los Angeles County, provided information about the commercial bail industry and offered his expertise on its operation. Court executive officers (CEOs) from the Superior Courts of Kern, Los Angeles, Shasta, and Ventura Counties were invited to speak to the Workgroup about the court procedures in their small and large counties related to the current monetary bail system. This panel of CEOs explained the courts' operational role in pretrial release and detention and provided detailed information about the bail bond process within the courts, the role of pretrial services monitoring and supervision, and financial considerations and constraints.

The speakers educated the Workgroup about the mechanics of the bail bond process, from the time a person is arrested to the time the case is resolved, including application of bail schedules by jail authorities, arrestee contact with bail agents, the structure of the bail industry, bail fees, bail forfeitures, and the effect of defendants' failures to appear.

Efforts to Incorporate Different Perspectives

The Workgroup heard from multiple justice system partner representatives and advocate groups representing specific populations and/or interests. The presenters were provided in advance with neutral yet detailed questions designed to elicit presenters' experience and ideas regarding various aspects of pretrial release and detention.

In addition to specific questions about process, the Workgroup asked all presenters for their thoughts on California's pretrial detention/release system, whether the current system is satisfactory, and whether changes to the current system are needed. The Workgroup asked presenters to specify what changes they would recommend, if any, and the potential impact of those changes if they were enacted.

Review of Other Pretrial Systems

The Workgroup examined the experiences of jurisdictions that recently adopted changes to their pretrial detention processes or have systems in place that differ significantly from California's current system. Judges and court administrators from Kentucky, New Jersey, New Mexico, and Washington, D.C., presented detailed descriptions of their systems, including how they were implemented. Workgroup members conducted follow-up calls with the pretrial services directors in each of these jurisdictions to gain additional, detailed information and then reported back to the full Workgroup. (For more detail on each jurisdiction, see Appendix E.)

The Workgroup also examined several models of pretrial services programs currently in operation in California. Representatives from Humboldt, Imperial, and Santa Clara Counties—including a judge, a sheriff, and directors of pretrial services—shared information about their pretrial programs.

After careful consideration of all the research, the perspectives and insights of the justice partners and other speakers, and the review of pretrial programs and services, the Workgroup developed its set of recommendations to carry out the directive of the Chief Justice to identify better ways to maximize public safety, return to court, and early release.

Origins of Bail

In this report, the term "bail" is used as it is commonly understood: the money or security a person accused of a crime is required to provide to the court in order to be released from custody, with the purpose of assuring public safety and the defendant's future appearance in court. The vast majority of defendants who are released on bail in California rely on commercial bail bonds to secure their release.

History

The history of bail has been documented extensively, and much has been written about the roots of the bail system in the United States.

Bail began "as a device to free untried prisoners."[1] Originally derived from the Anglo-Saxon period in England before the Norman Conquest, the notion of bail began with the assumption that the penalty for most crimes was a fine paid as compensation to the victim. Bail was the amount of the fine, and the accused could be released on personal sureties, that is, a third party, or surety, who would guarantee the appearance of the accused for trial and the payment of the fine on conviction.[2]

Once capital and corporal punishment began to replace monetary fines as the penalty for most offenses, abuses in the delay between arrest and trial began to emerge. In response to these abuses, the common law right to bail was codified into English law. The principles that an accused is presumed innocent and entitled to personal liberty pending trial were incorporated into the Magna Carta. "Bailable" offenses were defined and criteria set for determining whether a particular person should be released, including the strength of the evidence against the accused and the accused's criminal history.[3] The focus of bail was on release of the accused, with a method to assure appearance for trial. Public safety was not a consideration.

In the United States, the presumption of innocence and right to personal freedom pending trial became the foundation of our current system of bail. Thus, most states have protected, by constitution or statute, a right to bail "by sufficient sureties, except for capital offenses when the proof is evident or the presumption great."[4] From the inception of our bail system, "sufficient sureties" included unsecured bonds and did not

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[1] *State v. Brown* (N.M. 2014) 2014-NMSC-038, p. 8, www.nmcompcomm.us/nmcases/NMSC/2014/14sc-038.pdf, citing Daniel J. Freed & Patricia M. Wald, *Bail in the United States: 1964* (1964), p. 1; and 4 Blackstone's Commentaries 1690 (1769) (Rees Welsh & Co. 1902).

[2] *Id*. at p. 8, citing June Carbone, "Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail" (1983) 34 *Syracuse L.Rev.* 517, 519–520.

[3] *Id.* at p. 9.

[4] *Id.* at p. 9, citing Matthew J. Hegreness, "America's Fundamental and Vanishing Right to Bail*"* (2013) 55 *Ariz. L.Rev.* 909, 916.

contemplate profit or indemnification in the posting of the bond. Money was not a factor in release or detention decisions.

However, by the 19th century, the United States had switched to a surety system in which secured bonds were typically administered through commercial sureties and their agents, and the deposit of money or the pledge of assets became a principal condition of release. Several factors contributed to this development, including "the near-absolute right to bail set forth in the Judiciary Act of 1789 and in most state constitutions, the unavailability of friends and relatives who might serve as personal sureties," and the still vast American frontier that enabled defendants to flee from prosecution.[5]

Introduction of Preventive Detention

Throughout the 20th century, pretrial release and detention continued to evolve and expand in federal and state legislation and case law. Changes included consideration of public safety (in addition to risk of flight) as a constitutionally valid purpose to limit pretrial freedom and revisions in the nature and scope of preventive detention.[6]

In early discussions of bail systems, some commentators raised the issue of the use of bail for "preventive detention" of arrestees considered threats to society.[7] Until the 1960s, this practice was viewed as furthering a *sub rosa* purpose of bail, since the articulated purpose of bail until that time had been only to assure the appearance of a defendant at trial.

Beginning in the 1960s, debate was vigorous over whether community safety should be formally recognized as a factor for judges to consider in setting bail. Preventive detention was first addressed on the national level at the 1964 National Conference on Bail and Criminal Justice, convened by Attorney General Robert F. Kennedy. Under the Bail Reform Act of 1966,[8] persons charged with capital offenses or awaiting sentence or appeal could be detained if the court found that "no one condition or combination of conditions will reasonably assure that the person will not flee or pose a danger to any other person or the community."[9] These were the only circumstances for which judges

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[5] *Id.* at p. 11.

[6] Bail Reform Act of 1966 (Pub.L. No. 89-46, 80 Stat. 214), repealed 1984; Bail Reform Act of 1984 (18 U.S.C. §§ 3141–3150). Other changes during this period included alternatives to the traditional money bail system, use of own recognizance release (discussed on pp. 44–45), and unsecured bonds to reduce the number of pretrial detainees.

[7] "Although it has never been proven, there have been repeated suggestions that the bail setter often sets bail with the intention of keeping a defendant in jail to protect society or a certain individual. That this manipulation of the bail system takes place is practically unprovable, since the bail setter has such wide discretion. If preventive detention serves a beneficial public interest, then it should be frankly recognized and allowed. However, the rights and interests of the defendant should be adequately protected. Under the present bail system the defendant has virtually no protection." John V. Ryan, "The Last Days of Bail," (1968) 58 *J. Crim. L. & Criminology* 542, 548 (fn. omitted).

[8] Former 18 U.S.C. §§ 3146–3152.

[9] Former 18 U.S.C. § 3148.

could consider whether a defendant posed a threat to public safety. Then, in 1970, Congress passed the District of Columbia Court Reform and Criminal Procedure Act of 1970,[10] the first bail law in the country to make community safety an equal consideration to future court appearance in setting bail.

Congress addressed the issue in the federal courts with passage of the Comprehensive Crime Control Act of 1984.[11] This act mandates "pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court … unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community."[12] The act further provides that if, after a hearing, "the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial."[13] The act creates a rebuttable presumption toward confinement when the person has committed certain delineated offenses, including crimes of violence and serious drug crimes.[14]

The provisions in the Bail Reform Act of 1984[15] that permit the use of pretrial detention in limited instances were upheld as constitutional by the U.S. Supreme Court in the 1987 case of *United States v. Salerno*.[16] In *Salerno*, the defendant was arrested and charged with violating the Racketeer Influenced and Corrupt Organizations (RICO) Act. The government moved to have him detained under the 1984 act. At the hearing, the government showed, among other elements, that Salerno headed a powerful crime family. The U.S. District Court granted the government's detention motion, concluding that the government had met its burden. On appeal, the U.S. Court of Appeals for the Second Circuit held that the act was unconstitutional on its face as a violation of due process. The U.S. Supreme Court granted certiorari because of a conflict among the courts of appeals. In its decision, the Supreme Court stated, "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[17] The court determined that pretrial detention may be imposed for arrestees charged with certain serious felonies only when the government demonstrates by clear and convincing evidence, after an adversary hearing, that no release conditions " 'will reasonably

[10] Pub.L. No. 91-358 (July 29, 1970) 84 Stat. 473.

[11] Pub.L. No. 98-473 (Oct. 12, 1984) 98 Stat. 1976.

[12] 18 U.S.C. § 3142(b).

[13] *Id*., § 3142(e).

[14] *Id*., § 3142(e)(3).

[15] 18 U.S.C. §§ 3141–3150.

[16] 481 U.S. 739.

[17] *Id*. at p. 755.

assure … the safety of any other person and the community.' "[18] The court held that in these limited circumstances, preventive detention did not violate the due process clause of the Fifth Amendment or the excessive bail clause of the Eighth Amendment to the Constitution.[19]

By 1999, at least 44 states and the District of Columbia had statutes that included public safety, in addition to risk of failure to appear, as an appropriate consideration in the pretrial release decision. California had anticipated these reforms: in 1982, the voters passed Proposition 4, which provided courts with authority to deny bail to individuals under specified, limited exceptions if they posed a public safety risk.[20]

[18] *Id*. at p. 741.

[19] The "extensive safeguards" noted by the Supreme Court included the following: (1) detention was limited to only "the most serious of crimes"; (2) the arrestee was entitled to a prompt hearing with stringent speedy trial time limitations; (3) detainees were to be housed separately from those serving sentences or awaiting appeals; (4) the "fullblown adversary hearing," which required the government to convince a neutral decision maker by clear and convincing evidence that no condition or combination of conditions of release would reasonably assure court appearance or the safety of the community or any person; (5) detainees had a right to counsel and could testify or present information and cross-examine witnesses at the hearing; (6) judges were guided by statutorily enumerated factors; (7) judges were to include written findings of fact and a statement of reasons for a decision to detain; and (8) detention decisions were subject to immediate appellate review. (Timothy Schnacke, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform* (U.S. Dept. of Justice, National Institute of Corrections, 2014), p. 29, *https://nicic.gov/library/028360*.)

[20] Prop. 4 permitted courts setting bail to consider factors other than the probability that the defendant would appear at trial. In particular, the measure authorized courts to consider the seriousness of the offense and the previous criminal record of the accused, and the proponents of the measure made it clear they intended that public safety should be a consideration in bail decisions. (See *People v. Standish* (2006) 38 Cal.4th 858.)

National Pretrial Trends

Nationwide, there is a growing consensus on concerns regarding the administration of bail in the criminal justice system.[21] A 2007 U.S. Department of Justice (USDOJ) report indicates that states have increased their reliance on commercial surety bail bonds while reducing the use of personal (own) recognizance releases.[22] As a result, the number of pretrial inmates in jail populations has grown at a much faster pace than that of sentenced inmates,[23] despite historically low crime rates.[24] The increase in pretrial inmate populations has raised various concerns about the fairness and efficacy of current bail practices. For example, dismissal and acquittal occurred in 20 percent of cases involving pretrial detainees, which indicates that many of these defendants could have avoided imprisonment altogether if they had been able to post bail.[25]

Pretrial detention may affect many aspects of an individual's life. Even a short period of pretrial detention can threaten a person's employment, housing stability, child custody, and access to health care.[26] Whether a person is detained in custody before trial may also

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[21] See, e.g., John S. Goldkamp, "Judicial Responsibility for Pretrial Release Decisionmaking and the Information Role of Pretrial Services," 57 *Fed. Probation* 28, 30 (1993); Timothy Schnacke, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform* (U.S. Dept. of Justice, National Institute of Corrections, 2014).

[22] Thomas H. Cohen & Brian A. Reaves, *State Court Processing Statistics, 1990–2004: Pretrial Release of Felony Defendants in State Courts* (USDOJ, Bureau of Justice Statistics, Nov. 2007), pp. 1–2, www.bjs.gov/content/pub/pdf/prfdsc.pdf. The report provides statistics on state court felony defendants in the 75 largest U.S. counties between 1990 and 2004.

[23] Currently, 61 percent of inmates have not been convicted, compared to 39 percent who are serving sentences. Todd D. Minton, *Jail Inmates at Midyear 2011—Statistical Tables* (Bureau of Justice Statistics, 2012), www.bjs.gov/index.cfm?ty=bpdetail&iid=4293 (as of Oct. 2, 2017). In California, most of the state's jail population—64 percent, or 46,000 inmates—are unsentenced defendants awaiting arraignment, trial, or sentencing. Sonya Tafoya et al., *Pretrial Release in California* (Public Policy Inst. of Cal., May 2017), p. 5, www.ppic.org/content/pubs/report/R_0517STR.pdf.

[24] The U.S. crime rate rose slightly in 2015 from the year before, but still remains at historic lows. The estimated number of violent crimes rose 3.9 percent from 2014, while the estimated number of property crimes fell 2.6 percent. Violent crime, however, is about 0.7 percent lower than it was five years ago, and 16.5 percent lower than a decade ago. The violent crime rate is almost half the 20-year high reached in 1996. (Federal Bureau of Investigation, *Crime in the United States, 2015* (Sept. 2016), https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/home (as of Oct. 2, 2017).)

[25] Thomas H. Cohen & Brian A. Reaves, *State Court Processing Statistics, 1990–2004: Pretrial Release of Felony Defendants in State Courts* (USDOJ, Bureau of Justice Statistics, Nov. 2007), p. 7, www.bjs.gov/content/pub/pdf/prfdsc.pdf.

[26] See *Barker v. Wingo* (1972) 407 U.S. 514, 532–533 ("The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time. Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious. It is especially unfortunate to impose them on those persons who are ultimately found to be innocent.")

have an effect on case outcomes and sentences. Although the research in this area has produced mixed results regarding the relationship between pretrial detention and the probability of conviction and incarceration,[27] many defendants plead guilty (or no contest) at an early stage in the proceedings to secure their release from custody.[28]

Research indicates that African American and Hispanic defendants are more likely to be detained pretrial than are white defendants and less likely to be able to post money bail as a condition of release.[29] A 2009 study that focused on the effect of race and gender on sentencing in the federal courts found that race had "an indirect effect on sentence severity through its effect on pretrial status."[30] The available data and anecdotal evidence

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[27] Although some studies suggest little impact of pretrial detention on conviction rates (see J. S. Goldkamp, "The Effects of Detention on Judicial Decisions: A Closer Look" (1980) 5 *Just. Sys. J.* 234–257), others find a significant relationship between pretrial detention and the probability of conviction and incarceration. (See Charles E. Ares, Anne Rankin & Herbert Sturz, "The Manhattan Bail Project: An Interim Report on the Use of Pre-trial Parole" (1963), 38 *N.Y.U. L.Rev.* 67–95; Thomas H. Cohen & Brian A. Reaves, *State Court Processing Statistics, 1990–2004: Pretrial Release of Felony Defendants in State Courts* (USDOJ, Bureau of Justice Statistics, 2007).) The New York City Criminal Justice Agency (CJA) found, in a 2008 study, that "detention both increases the likelihood of conviction in felony cases and decreases the chances that the defendant will be offered the opportunity to plead guilty to a nonfelony charge." (See M. Phillips, *Bail, Detention, and Felony Case Outcomes,* Research Brief No. 18 (CJA, 2008).) A 2003 study found that defendants subject to pretrial detention were more likely to be incarcerated, and to receive longer sentences, than defendants who had been released before case disposition. (M. R. Williams, "The Effect of Pretrial Detention on Imprisonment Decisions" (2003) 28 *Crim. Justice Rev.* 299–316.)

[28] Samuel R. Wiseman, "Pretrial Detention and the Right to Be Monitored" (Mar. 2014) 123 *Yale Law J.* 1344: "The difficulty of preparing an adequate defense makes the likelihood of success at trial much lower for pretrial detainees than for those who have secured release and have avoided the stigma of a prison cell. [¶] Faced with these high defense burdens, defendants jailed pretrial often accept plea bargains in lieu of persevering through trial. In some cases, the periods that defendants spend in jail awaiting trial is comparable to, or even greater than, their potential sentences, thus substantially incentivizing quick plea deals regardless of guilt or innocence." (Fns. omitted.)

[29] See, e.g., Meghan Sacks, Vincenzo A. Sainato & Alissa R. Ackerman, "Sentenced to Pretrial Detention: A Study of Bail Decisions and Outcomes" (2014) 40 *Am. J. Crim. Justice* 661; Traci Schlesinger, "Racial and Ethnic Disparity in Pretrial Criminal Processing" (2005) 22 *Justice Quarterly* 170, 187–188; Stephen Demuth, "Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black, and White Felony Arrestees" (2003) 41 *Criminology* 873, 895, 897 (2003); Ian Ayres & Joel Waldfogel, "A Market Test for Race Discrimination in Bail Setting" (1994) 46 *Stanford L.Rev.* 987.

A recent California study found that 38 percent of Latinos and 33.7 percent of African Americans are released pretrial, compared with 48.9 percent of whites and 54.6 percent of Asian Americans. The study noted that differences in pretrial release rates for Latinos and African Americans narrow to less than two percentage points, compared with whites, after accounting for differences in offense characteristics, booking status, and the month and county of booking. (Sonya Tafoya et al., *Pretrial Release in California* (Public Policy Inst. of Cal., May 2017), pp. 14–15.)

[30] C. Spohn, "Race, Sex, and Pretrial Detention in Federal Court: Indirect Effects and Cumulative Disadvantage" (2009) 57 *Kansas L.Rev.* 879–901: "Black male offenders were more likely than all other offenders to be detained pretrial, but black male status did not affect sentencing, net of pretrial status, meaning that black male status indirectly affects sentence severity through pretrial status."

on the effects of pretrial detention have encouraged policymakers in many states to undertake reform.

National Standards and Support for Risk-Based Systems

To address concerns about the inequities and inefficiencies in the current administration of pretrial detention/release, several prominent national groups—including the American Bar Association (ABA),[31] National Association of Pretrial Services Agencies,[32] and National District Attorneys Association[33]—have promulgated standards and best practices for pretrial release programs. These standards are designed to lay out "a framework for striking the necessary balance and developing viable alternatives to the traditional surety bail system."[34] (For descriptions of these standards, see Appendix C.)

More important, judicial leaders nationwide are beginning to conduct thoughtful examinations of bail practices and procedures and the need for pretrial detention reform. Using history, law, national standards, and pretrial research, judicial leaders, in their role as neutral decision makers, have contributed to nationwide efforts to improve pretrial laws and practices.

In 2013, the Conference of State Court Administrators (COSCA) issued a policy paper, *Evidence-Based Pretrial Release*, which urges that "court leaders promote, collaborate toward, and accomplish the adoption of evidence-based assessment of risk in setting pretrial release conditions."[35] COSCA also called for "the presumptive use of non-financial release conditions to the greatest degree consistent with evidence-based assessment of flight risk and threat to public safety and to victims of crimes."

The Conference of Chief Justices (CCJ) also issued a resolution in 2013 endorsing and supporting COSCA's policy. (See Appendix C.) Later, in conjunction with the National Center for State Courts, COSCA and CCJ facilitated the creation of the Pretrial Justice Center for Courts (PJCC), which works closely with the CCJ and COSCA to implement the resolution recommending evidence-based assessment of risk in setting pretrial release conditions and the presumptive use of nonfinancial release conditions consistent with

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[31] *ABA Standards for Criminal Justice: Pretrial Release* (3d ed. 2007), www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.authcheckdam.pdf.

[32] National Association of Pretrial Services Agencies, *Standards on Pretrial Release* (3d ed. 2004), https://napsa.org/eweb/DynamicPage.aspx?Site=napsa&WebCode=standards.

[33] National District Attorneys Association, *National Prosecution Standards* (3d ed. 2009), Standards 4-4.1 to 4-4.5, pp. 56–57, www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf.

[34] *ABA Standards for Criminal Justice: Pretrial Release* (3d ed. 2007), p. 30.

[35] Conference of State Court Administrators, *Evidence-Based Pretrial Release* (2012–2013 Policy Paper), p. 2, http://cosca.ncsc.org/%7E/media/Microsites/Files/COSCA/Policy%20Papers/Evidence%20Based%20Pre-Trial%20Release%20-Final.ashx.

assessments of risk. The PJCC provides a wide variety of information, services, and tools to courts across the country, including offering education and technical assistance, facilitating cross-state learning and collaboration, and promoting the use of legal and evidence-based pretrial practices.[36]

In addition to the recent efforts by COSCA and CCJ, numerous national stakeholder groups—including the American Bar Association, National Association of Counties, American Jail Association, International Association of Chiefs of Police, American Council of Chief Defenders, Association of Prosecuting Attorneys, and American Probation and Parole Association—have endorsed transitioning from traditional money-based bail systems to risk-based systems for detention and release decisions and for setting pretrial release conditions.

Federal litigation challenging the constitutionality of money-based bail systems has also been initiated across the country, including two cases pending in California. (See Appendix D.) Seven of these cases have resulted in consent decrees and court orders that address well-established local bail practices and have encouraged those jurisdictions to revise their pretrial detention and release policies significantly. Together with the resolutions, policy papers, and standards noted above, these cases have prompted increased focus by state and federal policymakers on longstanding bail systems. In response, federal litigation has been initiated challenging recent changes to the pretrial detention/release systems in New Jersey and New Mexico (see discussion in the next section and Appendix D.)

Broad public attention has also been drawn to issues related to the role of money in the justice system, due, in part, to a USDOJ report entitled *Investigation of the Ferguson Police Department*.[37] The report examined the policies and procedures of the Police Department and underscored the role of money in the justice system and the disparate impact of fines, fees, and bail on poor communities. Although the report only tangentially focused on pretrial release and bail issues, it sparked conversations about the criminal justice system, racial bias, and the collection of fees and fines with a focus on revenue collection as opposed to the community's public safety needs.

COSCA and CCJ have formed the National Task Force on Fines, Fees and Bail Practices to address the ongoing impact that these legal financial obligations have on economically disadvantaged communities and to draft model statutes and court rules for setting, collecting, and waiving court-imposed payments.

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[36] Pretrial Justice Center for Courts, *www.ncsc.org/pjcc*.

[37] USDOJ, Civil Rights Division, *Investigation of the Ferguson Police Department* (Mar. 4, 2015), *www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf* (as of Oct. 2, 2017).

During the 2017 legislative session, Senator Kamala D. Harris (D-CA) and Senator Rand Paul (R-KY) introduced the Pretrial Integrity and Safety Act of 2017[38] to encourage states to reform or replace their monetary bail systems. The bill would allocate $10 million over three years to fund federal grants for courts instituting pretrial services and data-driven risk evaluations designed to reduce unnecessary pretrial detention and minimize racial and economic disparities between defendants who are held and those who are released pending trial.

It is against this national backdrop of increased scrutiny of longstanding bail practices that the Workgroup has been conducting its review.

Recent State Reforms

Reform has occurred in many states, including reform resulting from the New Mexico case of *State v. Brown*.[39] The New Mexico Supreme Court found that the defendant had presented the trial court with uncontroverted evidence demonstrating that nonmonetary conditions of pretrial release were sufficient to reasonably assure that the defendant was unlikely to pose a flight or safety risk. The court held that the trial court's requirement that the defendant remain in custody unless he posted a $250,000 cash or surety bond based solely on the nature and seriousness of the charged offense was arbitrary and capricious and an abuse of discretion.

After *Brown*, New Mexico undertook an initiative to revise the state's constitutional provision addressing bail. The initiative, which passed with 87 percent of the vote, provides for preventive detention on grounds of dangerousness or flight risk under limited circumstances and prohibits detaining a defendant solely due to financial inability to post a money or property bond.[40]

In 2014, the New Jersey Legislature, with support from the Governor, passed a package of criminal justice reforms that require a shift from a resource-based monetary bail system to a risk-based system of pretrial detention and release. In addition, the voters in New Jersey approved an amendment to the New Jersey Constitution that permits the pretrial detention of high-risk defendants.[41] These changes have resulted in the minimal use of cash bail.[42] The legislation provided for pretrial monitoring as a release option, without specifying how that monitoring was to be accomplished. The judiciary

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[38] Sen. 1593, 115th Congress (2017–2018).

[39] (N.M. 2014) 2014-NMSC-038.

[40] New Mexico Legislature, Sen. Joint Res. No. 1 (2016), *www.sos.state.nm.us/uploads/files/CA1-SJM1-2016.pdf*.

[41] New Jersey Legislature, Sen. Concurrent Res. No. 128 (July 10, 2014), *www.njleg.state.nj.us/2014/Bills/SCR/128_I1.HTM*.

[42] New Jersey Courts Criminal Justice Reform Information Center, *www.judiciary.state.nj.us/courts/criminal/reform.html*.

established policies and procedures to implement pretrial monitoring and created a Pretrial Services Unit within the criminal division of the New Jersey judiciary. In 2017, the New Jersey Legislature passed Senate Bill 2850[43] and allocated $9.3 million to add 20 superior court judgeships to support New Jersey's criminal justice reforms. (For detailed information on the pretrial systems in Kentucky, New Jersey, New Mexico, and Washington, D.C., see Appendix E.)

Changes in state laws are not limited to the sweeping reforms made in New Mexico and New Jersey. In the past five years, every state legislature has addressed pretrial policy, resulting in more than 500 new enactments.[44] In 2016, state lawmakers in 44 states and the District of Columbia enacted 118 new laws regarding pretrial detention and release. These robust legislative developments demonstrate the continuing interest in changing the procedures that address the pretrial stages of the criminal justice system. (Recent legislative activity on pretrial detention and release in California is described in Appendix F.)

[43] New Jersey Legislature, Sen. Bill 2850 (Dec. 21, 2016), *www.njleg.state.nj.us/2016/Bills/S3000/2850_F1.PDF*.

[44] National Conference of State Legislatures, *State Pretrial Release Legislation* (Jan. 23, 2017), *www.ncsl.org/research/civil-and-criminal-justice/state-pretrial-release-legislation.aspx*.

California's Current Pretrial Release and Detention System

California Criminal Justice Reform Backdrop

California has undergone significant changes to its criminal justice system in the past eight years, with new responsibilities placed on the courts and local justice system partners. Decisions by the Governor, Legislature, and voters substantially altered how California responds to individuals accused and convicted of various crimes. Legislation addressed myriad issues, from where incarcerated offenders serve their sentences to how and by whom offenders are supervised. In addition, voter propositions decriminalized or reduced the penalties for certain low-level offenses. Together, these new laws have changed the composition and size of state prison and local jail populations. (For additional information on each of these legal developments, see Appendix F.) Though significantly affected by these changes to the criminal justice system, courts did not participate directly in their development. With pretrial reform, courts have a responsibility to undertake leadership given their unique role in the pretrial release and detention decisions that impact public safety and the due process rights of the accused, and the procedures that govern that decision-making.

California Law

Pretrial release has been an element of California's legal framework from the earliest days of statehood. California's Constitutions of 1849 and 1879 addressed pretrial release for persons charged with a crime. Two provisions of the current California Constitution—article I, sections 12[45] and 28(f)(3)[46]—govern pretrial release on bail and

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[45] "A person shall be released on bail by sufficient sureties, except for:

"(a) Capital crimes when the facts are evident or the presumption great;

"(b) Felony offenses involving acts of violence on another person, or felony sexual assault offenses on another person, when the facts are evident or the presumption great and the court finds based upon clear and convincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others; or

"(c) Felony offenses when the facts are evident or the presumption great and the court finds based on clear and convincing evidence that the person has threatened another with great bodily harm and that there is a substantial likelihood that the person would carry out the threat if released.

"Excessive bail may not be required. In fixing the amount of bail, the court shall take into consideration the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case.

"A person may be released on his or her own recognizance in the court's discretion."

[46] "Public Safety Bail. A person may be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great. Excessive bail may not be required. In setting, reducing or denying bail, the judge or magistrate shall take into consideration the protection of the public, the safety of the victim, the seriousness of the offense charged, the previous criminal record of the

own recognizance (OR) release.[47] Over several decades, multiple voter initiatives have contributed to the development of these provisions of the California Constitution and have resulted in a complex interplay of directives, statutes, and procedures regarding pretrial release and detention. Case law addressing these constitutional provisions is limited, particularly since 2008 when section 28(f)(3) was reenacted. As a result, there has not been definitive judicial interpretation of the issues raised by the multiple differences between the two provisions.

Although California courts are generally required to grant pretrial release on bail, the state Constitution allows courts to deny release from custody under certain limited exceptions.[48] It also provides courts with discretion to release a person on his or her own recognizance.[49] The state Constitution prohibits excessive bail[50] and requires courts, in setting the amount of bail, to take into consideration the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing in court.[51] The court is also required to take the protection of the public into consideration in setting, reducing, or denying bail. Public safety and the safety of the victim are designated as the primary considerations in determining release on bail.[52]

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defendant, and the probability of his or her appearing at the trial or hearing of the case. Public safety and the safety of the victim shall be the primary considerations.

> "A person may be released on his or her own recognizance in the court's discretion, subject to the same factors considered in setting bail.
>
> "Before any person arrested for a serious felony may be released on bail, a hearing may be held before the magistrate or judge, and the prosecuting attorney and the victim shall be given notice and reasonable opportunity to be heard on the matter.
>
> "When a judge or magistrate grants or denies bail or release on a person's own recognizance, the reasons for that decision shall be stated in the record and included in the court's minutes."

[47] California constitutional and statutory rights to bail are broader than federal rights. (Pen. Code, § 1271; *In re Underwood* (1973) 9 Cal.3d 345.)

[48] In addition to the constitutional exceptions, a defendant subject to a "parole hold" is not entitled to release on bail (*In re Law* (1973) 10 Cal.3d 21, 26), nor are defendants who are subject to an immigration hold or arrested on an extradition warrant (Pen. Code, § 1550.1; *People v. Superior Court (Ruiz)* (1986) 187 Cal.App.3d 686, 692).

[49] Cal. Const., art. I, §§ 12, 28(f)(3); Pen. Code, §§ 1318–1319.5.

[50] Cal. Const., art. I, §§ 12, 28(f)(3). Bail is not considered excessive merely because the defendant cannot post it. (*Galen v. County of Los Angeles* (9th Cir. 2007) 477 F.3d 652 *(Galen)*; *In re Burnette* (1939) 35 Cal.App.2d 358, 360.) However, bail may not be set in an amount which is functionally no bail in a case where bail is mandated. (*Galen,* 477 F.3d 652; *In re Christie* (2001) 92 Cal.App.4th 1105.) The amount of bail may not be set *solely* to insure the defendant's incarceration for improper reasons. (See *Wagenmann v. Adams* (1st Cir. 1987) 829 F.2d 196.)

[51] Cal. Const., art. I, §§ 12, 28(f)(3); Pen. Code, § 1275(a).

[52] Cal. Const., art. I, § 28(b)(3) & (f)(3); Pen. Code, §§ 1270(a), 1275(a); *Gray v. Superior Court* (2005) 125 Cal.App.4th 629; *In re McSherry* (2003) 112 Cal.App.4th 856; *In re Weiner* (1995) 32 Cal.App.4th 441. Section 28(b)(3) also references safety of the victim's family. Other factors that the court may consider in determining the amount of bail include the number of separate offenses charged (*People v.*

The California Constitution provides for release "on bail by sufficient sureties."[53] In the early years of California's statehood, individual personal sureties were used, though beginning in the early 1900s the use of commercial sureties became the most common form of bail release.[54] California courts have not interpreted the constitutional term "sufficient sureties" and the associated statutory authority for release on bail as requiring a particular form of surety.

Before 1974, article I, section 6 of the California Constitution stated that "[a]ll persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great. Excessive bail shall not be required … ."[55]

In the 1960s, California undertook a process to revise its Constitution, recommending revisions to section 6 that replaced the term "bailable" with the phrase "released on bail" and adding a reference to release on one's own recognizance.

The California Constitution Revision Commission provided the following comment to the proposed revisions:

> The commission … proposed an OR clause, which recognized the "well-established practice of releasing persons accused of crimes on their own recognizance." … [¶] … "*The 'Own Recognizance' system presents a desired alternative to the bail system*, which frequently works an injustice on those who cannot afford to post a bail bond. An individual who may be released on his own recognizance is better able to defend himself and to avoid incarceration until proved guilty."[56]

Surety Ins. Co. (1978) 77 Cal.App.3d 533, 537), and the defendant's status as a fugitive (*In re Grimes* (1929) 99 Cal.App. 10, 12). The fact that the defendant has requested a jury trial is not a proper factor for consideration. (Cal. Rules of Court, rule 4.101.)

[53] Cal. Const., art. I, §§ 12, 28(f)(3).

[54] *Ex parte Ruef* (1908) 7 Cal.App. 750; Timothy Schnacke, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform* (National Institute of Corrections, 2014), p. 43, https://nicic.gov/library/028360.

[55] In 1682, Pennsylvania adopted a law granting bail to all persons except when charged with a capital offense "where proof is evident or the presumption great," adding an element of evidentiary fact finding so as to also allow bail even for certain capital defendants. This provision became the model for nearly every American jurisdiction afterward, including California. (Timothy R. Schnacke, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform* (National Institute of Corrections, 2014), pp. 40–41.)

[56] *People v. Standish* (2006) 38 Cal.4th 858, 890–891, citations omitted, quoting Cal. Const. Revision Com., Proposed Revision of Cal. Const., pt. 5 (1971) p. 19.

The proposed changes were included in Proposition 7[57]—adopted by the voters in 1974 as article I, section 12—and remained in effect in that form until the voters passed Proposition 4 in 1982.

Proposition 4, Bail,[58] was proposed in 1982 in response to California Supreme Court decisions holding that the Constitution did not allow preventive detention other than for those charged with a capital offense, and that public safety concerns could not be considered in setting bail.[59] Prop. 4 provided courts with authority to deny bail to individuals under specified, limited exceptions if they posed a public safety risk.[60] The current provisions of section 12 are the same as those adopted by the voters in 1982 in Prop. 4, with the addition of a reference to felony sexual assault offenses to the restrictions on felony offenses involving acts of violence on another person.[61]

In the same 1982 election, voters also passed Proposition 8, Criminal Justice—Initiative Statutes and Constitutional Amendment (known as the Victims' Bill of Rights).[62] Prop. 8 attempted to fully repeal section 12 and replace it with article I, section 28(e), a new provision governing bail and own recognizance release. There were significant differences between the provisions of section 12, as revised by Prop. 4, and those of section 28(e), as detailed below. In 1995, however, the California Supreme Court held that, because Prop. 4 received more votes, the bail and OR release provisions of Prop. 8 did not go into effect.[63]

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[57] Ballot Pamp., General Elec. (Nov. 5, 1974), Prop. 7, pp. 26—27, http://repository.uchastings.edu/cgi/viewcontent.cgi?article=1803&context=ca_ballot_props.

[58] Ballot Pamp., Primary Elec. (June 8, 1982), Prop. 4, pp. 16–19, http://repository.uchastings.edu/cgi/viewcontent.cgi?article=1917&context=ca_ballot_props.

[59] See *In re Underwood* (1973) 9 Cal.3d 345.

[60] "[Proposition 4] permitted courts setting bail to consider factors other than the probability that the defendant would appear at trial. In particular, the measure authorized courts to consider the seriousness of the offense and the previous criminal record of the accused, and the proponents of the measure made it clear they intended that public safety should be a consideration in bail decisions." (*People v. Standish* (2006) 38 Cal.4th 858, 875.)

[61] In 1994, the voters passed Proposition 189, which amended article I, section 12 by inserting "or felony sexual assault offenses on another person."

[62] Ballot Pamp., Primary Elec. (June 8, 1982), Prop. 8, pp. 32–35. http://repository.uchastings.edu/cgi/viewcontent.cgi?article=1917&context=ca_ballot_props.

[63] The effect of the passage of both Prop. 4 and Prop. 8 was addressed by the court in *In re York* (1995) 9 Cal.4th 1133, 1140, fn. 4 and *People v. Standish* (2006) 38 Cal.4th 858. In *In re York,* the court stated that, "Because Proposition 4 received more votes than did Proposition 8, the bail and OR release provisions contained in Proposition 4 are deemed to prevail over those set forth in Proposition 8." In *Standish*, the court provides a detailed discussion of the development of Section 12's bail and own recognizance release provision, and the effect of Proposition 8 and Proposition 4 in the context of Penal Code section 859b. The discussion of the interplay between the two propositions concludes, "[W]e adhere to the view that the amendments to article I, section 12 proposed by Proposition 4 took effect, and that the provisions of article I, section 28, subdivision (e) [now subdivision (f)(3)] proposed by Proposition 8 did not take effect."

Then, in 2008, the voters passed Proposition 9, the Victims' Bill of Rights Act of 2008, known as Marsy's Law.[64] Although Marsy's Law did not directly address article I, section 12 of the Constitution, it did reenact, as section 28(f)(3), Prop. 8's provisions addressing bail and OR release in nearly identical form. Thus, since 2008, both section 12 and section 28(f)(3) have been in effect, but the differences noted below remain. During the nine years since the adoption of Prop. 9, however, there have been no published court opinions interpreting the interplay between section 12's and section 28(f)(3)'s provisions addressing release on bail and own recognizance release.

While section 12 states that "A person *shall* be released on bail" subject to certain exceptions, section 28(e)(3) states that "A person *may* be released on bail."[65] Section 12 makes exceptions for capital crimes, felony offenses involving acts of violence on another person, and felony sexual assault offenses (where the facts are evident or the presumption great and the court finds on the basis of clear and convincing evidence that release would result in great bodily harm to others). Section 28(f)(3) makes an exception only for capital offenses but requires taking into account specified factors, with public safety and "the safety of the victim" as the primary considerations in setting bail or granting own recognizance release. Section 28(f)(3) also (1) requires OR release to be subject to the same factors considered in setting bail; (2) provides that a hearing "may" be held before release of the defendant, with notice to the prosecuting attorney and an opportunity to be heard; and (3) requires that when a judge or magistrate denies bail or release on OR, the reasons for that decision must be stated on the record and included in the court's minutes. Section 28(f)(3) also provides that a victim (in addition to the prosecutor) must be given notice before a person charged with a serious felony is released on bail and has the right to be heard, upon request, at any proceeding involving a postarrest release decision.[66] Given the lack of guidance on the variations between the requirements of section 12 and those of section 28(f)(3), trial courts have the challenge of applying both provisions to their pretrial detention and release decisions.

The Pretrial Phase

The pretrial phase begins with arrest and covers the period from the time a person is cited and released or booked into jail to the period when he or she is charged in a criminal complaint through conviction or dismissal of the case.[67]

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[64] Victims' Bill of Rights Act of 2008, http://vig.cdn.sos.ca.gov/2008/general/text-proposed-laws/text-of-proposed-laws.pdf#prop9.

[65] *People v. Standish* (2006) 38 Cal.4th 858, 877: "Proponents of Proposition 8 would have eliminated the general right to bail, substituting a provision granting courts greater discretion to deny bail, and placing restrictions on access to bail *different* from those proposed by the Legislature in Proposition 4. Proposition 8 explicitly would have imposed these restrictions on OR release, as well."

[66] Cal. Const., art. I, § 28(b)(8) & (f)(3).

[67] Penal Code sections 853.6 and 1270 govern the release of those arrested for misdemeanors. Under most circumstances, law enforcement has the authority to release a misdemeanor arrestee in the field with a

Before booking an arrested person into jail, law enforcement authorities have discretion in most misdemeanor cases to simply "cite" (provide a citation that requires the person to promise to return to court) and release the arrested individual. Once a person has been arrested and is brought to jail, the sheriff or other custodian of the jail has authority under the jail's booking criteria to release the arrestee and give the person a date to appear in court.[68]

During the pretrial period, a defendant may be in custody in the county jail or released pending trial. Pretrial detention typically occurs for one of the following reasons: (1) the defendant is statutorily ineligible for release based on the charged offense, (2) a court has determined that the defendant poses an unmanageable risk to public safety or of flight, (3) a separate "hold" has been placed on the defendant, or (4) the defendant does not have funds available to satisfy the amount of bail set by the court.

Pretrial Population Data

The amount and type of available data on pretrial release and detention in California are limited. Although better data are necessary for a comprehensive assessment of any pretrial system at the state level, the available data are sufficient to offer some insight into the operation of the current system.

According to the Jail Population Trends dashboard of the Board of State and Community Corrections, approximately two-thirds of California's average daily jail population, or nearly 48,000 individuals, are nonsentenced.[69] This number includes individuals who are eligible for release yet are still detained because they have not posted monetary bail (and may be financially unable to do so) and individuals who are ineligible for release.[70]

Estimates of the number of unsentenced defendants who may be eligible for pretrial release vary widely by county. Most counties currently have no means of collecting and/or reporting data about their pretrial populations. Three California counties—Fresno, San Francisco and San Mateo—were able to provide some statistical information.

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citation. However, citations cannot be issued for offenses involving domestic violence or abuse (unless the officer determines there is not a reasonable likelihood that the offense will continue).

[68] Although this phase is important in the pretrial process and there is significant support for programs that divert arrestees from pretrial custody, this phase was beyond the scope of the Pretrial Detention Reform Workgroup's charge. Therefore, the focus of this report is on the period from the point at which an arrestee is booked into jail until the defendant appears for trial.

[69] Board of State and Community Corrections, *Jail Population Trends,* Sentenced and Non-Sentenced Average Daily Population, March 2017, *https://public.tableau.com/profile/kstevens#!/vizhome/ACJROctober2013/About* (as of Oct. 4, 2017).

[70] Factors that might make a person ineligible for release include having a parole or probation hold, immigration detainer, or "no bail" hold for a capital offense charge; serving time on another charge; having an out-of-county warrant; being in the phase after disposition but before sentencing; or having felony charges when a court has made findings about the likelihood that release would result in great bodily harm to others.

Although the exact number of detained individuals who may otherwise be eligible for release is unknown, the data from these three counties indicate that likely there are thousands of individuals eligible for release incarcerated in California jails.[71]

Similarly, research suggests that some high-risk defendants are likely able to post bail and be released. The data indicate that those charged with serious or violent offenses who are able to secure release usually do so by posting bail.[72] Defendants who post bail are generally not subject to any formal pretrial supervision. Although defendants charged with serious or violent offenses often remain in custody with very high levels of bail, hundreds of California defendants charged with serious or violent offenses, and other high-risk defendants, are able to bail out of custody regardless of the threat they may pose to public safety.[73]

In summary, although the available statistical data are limited, information gathered by the Workgroup confirms that some people currently in California jails who are safe to be released are held in custody solely because they lack the financial resources for a commercial bail bond, and other people who may pose a threat to public safety have been able to secure their release from jail simply because they could afford to post a commercial bond.

Release by Law Enforcement

In 2016, there were approximately 79,500 jail bookings in California every month.[74] Jail officials have authority to make certain types of release decisions at booking:

- They are authorized to cite and release those arrested on misdemeanor charges upon completion of booking, with the exception of cases involving domestic violence or abuse.[75]

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[71] Fresno, San Mateo, and San Francisco Counties provided estimates to the Workgroup on the share of unsentenced inmates who are eligible for bail yet detained. These estimates, all from 2015 and 2016, vary from 15 percent in Fresno County to 59 percent in San Mateo County, with San Francisco County in between at 53 percent. Based on the Board of State and Community Corrections estimate of nonsentenced jail inmates (48,000) and the range of county estimates of the release-eligible population, as few as 7,000 or as many as 28,000 nonsentenced inmates who are currently held in custody at any given time may be eligible for release.

[72] Sonya Tafoya, *Pretrial Detention and Jail Capacity in California* (Public Policy Inst. of Cal., July 2015). www.ppic.org/publication/pretrial-detention-and-jail-capacity-in-california/.

[73] Among those booked for violent offenses, 16 percent were released pretrial. Of that 16 percent, over two thirds (68 percent) were released on bail. For high-level felonies, 21.7 percent secured release from custody, and 63 percent of those secured release by posting bail (Sonya Tafoya et al., *Pretrial Release in California* (Public Policy Inst. of Cal., May 2017), www.ppic.org/content/pubs/report/R_0517STR.pdf).

[74] Calculation is by Judicial Council research staff based on Board of State and Community Corrections data from the Jail Profile Survey, https://app.bscc.ca.gov/joq//jps/QuerySelection.asp.

[75] For misdemeanor offenses (except for violations of domestic violence protective orders and other offenses involving threat of harm), Penal Code section 853.6 gives law enforcement discretion to "cite and

- After booking, jail authorities are authorized to release arrestees on bail in the amount set by the bail schedule, except for those charged with a capital crime. This release authority includes individuals arrested for a serious or violent offense.[76] (For discussion of release on bail, see pp. 28–33.)

- For jail facilities operating under a court-imposed population cap, the sheriff is authorized to make capacity releases when the jail exceeds its mandated population threshold (usually 90 percent of rated capacity). Thirty-nine facilities in 19 counties are operating under court-ordered population caps.[77]

- Finally, if no charges are filed within statutory time frames, then the jail must release the arrestee.

Release by Judicial Officer

If a defendant is not released via the citation and release authority or by posting the amount of bail authorized by the bail schedule, a judicial officer will determine pretrial release, typically at arraignment. Although judges generally are not involved in release decisions before arraignment, courts are required to have an on-call magistrate (judge) available at all times, when court is not in session, with responsibility for evaluating requests to reduce or increase bail amounts to a level other than the bail schedule amount, or for own recognizance release.[78] The officer in charge of a jail is required to assist arrestees by providing information and requests to the on-call magistrate.[79] If the person remains in custody, the court must make a decision regarding release at arraignment, which is the defendant's first appearance in court; arraignment must occur no more than

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release" arrestees without taking them into custody. By signing the citation, the arrestee is promising to appear in court at a specified time and place. In addition, those arrested for lower-level felonies may be booked and then "cited out" from facilities that are operating under court orders related to jail overcrowding. Policies that address jail releases due to overcrowding vary from county to county.

[76] Pen. Code, § 1269b.

[77] The counties with caps are: Butte (1), Calaveras (1), El Dorado (2), Fresno (3), Kern (4), Kings (1), Los Angeles (1), Merced (1), Placer (2), Plumas (1), Riverside (4), Sacramento (2), San Bernardino (2), San Diego (4), San Joaquin (2), Santa Barbara (1), Stanislaus (1), Tulare (4), Yolo (1). (Magnus Lofstrom & Brandon Martin, *Key Factors in California's Jail Construction Needs* (Public Policy Inst. of Cal., 2014), p. 2, www.ppic.org/publication/key-factors-in-californias-jail-construction-needs/, citing Board of State and Community Corrections, *Jail Profile Survey; First Quarter Calendar Year 2013*, www.bscc.ca.gov/downloads/2013_1st_Qtr_JPS_full_report.pdf; Sonya Tafoya, *Pretrial Detention and Jail Capacity in California* (Public Policy Inst. of Cal., July 2015), www.ppic.org/publication/pretrial-detention-and-jail-capacity-in-california/, citing Lofstrom & Martin (2014).) In June 2016, 5,908 unsentenced jail detainees and 1,868 sentenced jail detainees were released from detention early because of the lack of capacity in those jails. This is a decrease from the pre–Proposition 47 high in August 2014 of 6,358 unsentenced and 5,486 sentenced detainees released early.

[78] Pen. Code, §§ 810, 1269c.

[79] Pen. Code, § 810.

48 hours after arrest, excluding Sundays and holidays.[80] At arraignment, and for the duration of pretrial detention, the court may set or adjust the bail amount within statutory limitations[81] or release bail-eligible defendants on their own recognizance.[82]

The court has broad discretion in setting the amount of bail; a court's order setting bail will not be invalidated unless there is a clear abuse of discretion.[83] Without a hearing in open court, the court may set bail in an amount that exceeds the bail schedule for a felony offense or for a misdemeanor offense of violating a domestic violence order if a peace officer provides a declaration of facts justifying the increase.[84] The court is authorized to set bail in an amount deemed sufficient to ensure the defendant's appearance, or to ensure the protection of a victim or family member of a victim of domestic violence, and to include terms and conditions that the court, in its discretion, deems appropriate. The court may also release the defendant on his or her own recognizance.[85] The court must hold a hearing in open court before a defendant is released on bail in an amount higher or lower than the bail schedule amount if the defendant is arrested for a violent or serious felony or for other specified offenses involving injury or intimidation.[86] The court may set conditions on bail release.[87]

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[80] Pen. Code, § 825; see *Youngblood v. Gates* (1988) 200 Cal.App.3d 1302.

[81] Pen. Code, § 1270.2.

[82] Pen. Code, §§ 1270, 1318 et seq.

[83] *People v. Norman* (1967) 252 Cal.App.2d 381, 411 (disapproved on other grounds in *McDermott v. Superior Court* (1972) 6 Cal.3d 693, 697). The court must not set bail with the intent of punishing the defendant. (*People v. Gilliam* (1974) 41 Cal.App.3d 181, 191; *In re Newbern* (1961) 55 Cal.2d 500; *Sawyer v. Barbour* (1956) 142 Cal.App.2d 827.) If the court sets bail in an amount either greater or less than the bail schedule amount, or releases the defendant on his or her own recognizance, the court must state reasons in the record and specifically address the issue of threats made against the victim or witness. (Pen. Code, § 1270.1(d); *In re Christie* (2001) 92 Cal.App.4th 1105, 1109–1110.)

[84] Pen. Code, §§ 1269c, 1270.1(e).

[85] Pen. Code, § 1269c.

[86] Pen. Code, § 1270.1(a); Cal. Const., art. I, § 28(f)(3). This provision does not violate equal protection guarantees because there is a rational basis for treating violent offenders differently (*Dant v. Superior Court* (1998) 61 Cal.App.4th 380). The court must grant or deny a motion to reduce bail even in the absence of the required written notice to the prosecutor and defense attorney (*id.* at p. 390).

[87] Cal. Const., art. I, § 28(f)(3). In a felony case, there is a general understanding that the trial court possesses inherent authority to impose conditions associated with release on bail. (*Gray v. Superior Court* (2005) 125 Cal.App.4th 629.) Common conditions of release include geographical restrictions, electronic monitoring, house arrest, alcohol monitoring, and protective orders. In misdemeanor cases, the court may set bail on terms or conditions of release that the court considers appropriate, though the conditions must be reasonable and related to public safety. (Pen. Code, § 1269c; *In re McSherry* (2003) 112 Cal.App.4th 856, 860–863.)

Types of Pretrial Release

Under California law there are three types of pretrial release from custody: (1) release on bail, which involves some form of financial security and may include conditions ordered by the court at the first or any subsequent court appearance; (2) release on one's own recognizance, which is based on the defendant's promise to return to court as required and to obey certain conditions; and (3) supervised release, in which the defendant is released under supervision of a pretrial services program and may by subject to a variety of conditions, including a financial condition. A person may be released on a bail bond in the amount set according to the bail schedule before arraignment without court review.

Bail

When a person has been arrested and booked into jail, posting bail is the process for releasing that person from custody before trial on secured financial conditions.[88] The defendant or interested parties, such as family members, post a bond, cash deposit, or other security to obtain release.[89] In this section of the report, "bail" refers to the use of a commercial surety bond; when bail is in the form of a deposit of money with the court, the term "cash bail" or "deposit bond" is used. Defendants who are "bailable" (eligible to be released from custody) may be released on bail before arraignment (within the first 48 hours after arrest).[90] If the defendant was arrested on a warrant and has not yet appeared in court, bail is in the amount set in the warrant; if there is no warrant, the bail amount is set by the court's uniform bail schedule.[91] If the defendant does not bail out before arraignment, when the defendant appears in court at the first appearance, the judge sets the bail amount in a court order.

Bail Schedules

California law mandates that each of California's 58 superior courts develop a uniform countywide schedule of bail for all bailable felony offenses and for all misdemeanor and infraction offenses except Vehicle Code infractions.[92] As a result, bail schedule amounts for the same offense can vary widely from county to county (see table below). The

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[88] For a defendant's right to bail and exceptions, see California Constitution, article I, sections 12 and 28(f)(3), and see Penal Code section 1271. For discharge from custody on bail, see Penal Code sections 1268–1275.1. For local court responsibility for bail schedules and the basis for bail amounts based on seriousness of charges, see Penal Code section 1269b(d) and (e).

[89] As used in California statutes, the word "bail" may mean the security posted for the defendant's appearance (see, e.g., Pen. Code, §§ 1269c, 1275), the surety or bondsperson who posts the security (see, e.g., Pen. Code, §§ 1269, 1279), or the process of releasing the defendant (see, e.g., Pen. Code, §§ 1268, 1458). The first meaning is the most common.

[90] Cal. Const., art. I, § 28(f)(3).

[91] Pen. Code, § 1269b(b).

[92] Pen. Code, § 1269b(c).

process used to establish bail schedules is determined by each superior court. Courts are required to review these schedules annually.[93]

Bail Amounts for Common Felony Charges per Schedules: 10-County Comparison

Charge	Alameda 2017	El Dorado 2017	Fresno 2016	Imperial 2016	Los Angeles 2017	Napa 2017	San Diego 2017	San Francisco 2016	Santa Clara 2017	Ventura 2016	Range *(in thousands to millions)*
Robbery[1] (First Degree)	100K	50K	25K	100K	100K	100K	100K	75K	100K[2]	100K	$25K–$100K
Corporal Injury to Spouse/Partner[3]	50K	50K	25K	50K	50K	25K	50K	50K	25K	20K	$20K–$50K
Criminal Threats[4]	50K	50K	20K	25K	50K	25K	50K	25K	25K	20K	$20K–$50K
Residential Burglary[5] (First Degree)	50K	50K	30K	50K	50K	100K	50K	100K	50K	50K	$30K–$100K
Vehicle Theft[7]	25K	25K	15K	5K	25K	25K	25K	25K	10K	20K	$5K–$25K

[1] Pen. Code, § 211. [2] Pen. Code, § 212.5(a), in Santa Clara County. [3] Pen. Code, § 273.5. [4] Pen. Code, § 422. [5] Pen. Code, § 459. [6] Health & Saf. Code, § 11378. [7] Veh. Code, § 10851.

Methods of Posting Bail

A person eligible for release has three options for posting bail:

- **Commercial bail bond**. This is the primary method used by California defendants for bailing out of custody. Although noncommercial sureties are permitted, they are rarely used.[94] Commercial bail bonds are underwritten and issued by licensed bail agents who act as the appointed representatives of licensed surety insurance companies.[95]

[93] *Id*. Each court sets its own procedure for how it will prepare, adopt, and annually revise the bail schedule. (Pen. Code, § 1269b(d).) In adopting a uniform countywide schedule of bail for felony offenses, the judges are required to consider the seriousness of the offense charged and to assign an additional amount of bail for each aggravating or enhancing factor. (Pen. Code, § 1269b(e).) If the schedule does not list all offenses specifically, it must contain a general clause for designated amounts of bail appropriate for all the offenses not specifically listed in the schedule. (Pen. Code, § 1269b(f).)

[94] Pen. Code, §§ 1278(a), 1279(1), 1287(a), 1458.

[95] Pen. Code, §§ 1269, 1278. A bail bond is a contract between the surety and the court whereby the court transfers custody of the defendant to the surety in return for the surety's promise to have the defendant in court whenever his or her presence is necessary under risk of forfeiture of the bond. (*People v. Lexington National Ins. Co.* (2007) 147 Cal.App.4th 1192.) These bonds must be accepted by the court if they are executed by a licensed agent of the insurer and issued in the name of the insurer. (Pen. Code, § 1276(a).) Bail bond proceedings are civil, independent of, and collateral to the criminal proceedings. (*People v. American Contractors Indemnity Co*. (2004) 33 Cal.4th 653.)

- Bail agents charge defendants a nonrefundable fee (bail premium)—typically 10 percent of the value of the bond. Generally, the defendant is responsible for the full amount of the bail premium, even when formal charges are never filed in court,[96] charges are dismissed, or the defendant appears in court for all required hearings.

- The court may not accept a bail bond unless convinced that no part of the consideration, pledge, security, deposit, or indemnification is from a felonious source,[97] and must order a hold on the release of a defendant if there is probable cause to believe that the source for the bail funds may have been felonious.[98] If the defendant is found to have willfully misled the court regarding the source of bail, the court may increase the amount of bail.[99]

- **Cash bail (deposit bond)**. The defendant, or any person acting on his or her behalf, may deposit cash with the court (or with the law enforcement agency that has custody of the defendant) in the amount set by the warrant, court order, or bail schedule in lieu of obtaining a bail bond.[100] A personal check, bank cashier's check, or money order may be accepted as payment of misdemeanor bail, and courts may authorize the use of credit cards for a misdemeanor offense.[101] U.S. or State of California government bonds may be deposited with the court in lieu of a cash deposit.[102] A defendant who has posted a bail bond may substitute a cash deposit for the bond at any time before the forfeiture of the bond.[103] The full amount of the cash bond is returned to the defendant by the court at the completion of the case—barring any fines, fees, or processing costs—or for payment of restitution to the victim or a Restitution Fund.[104] Data provided to the

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[96] For example, in *Buffin v. City & County of San Francisco* (N.D. Cal. Oct. 28, 2015, No. 4:15-cv-04959) (see Appendix D), one of the codefendants was detained on $150,000 bail. She was released after 31 hours in jail when her relatives posted one percent of the bail amount, and she signed an agreement to finance the balance of the $15,000 bond fee. Although the district attorney's office subsequently declined to file formal charges, she remains responsible to the bail agent for the balance of the $15,000 bond fee.

[97] Pen. Code, § 1275.1(a).

[98] Pen. Code, § 1275.1(b). A court's noncompliance with Penal Code section 1275.1 does not exonerate a surety's liability and is not a defense to forfeiture of the bail bond. (*People v. Indiana Lumbermens Mut. Ins. Co.* (2011) 192 Cal.App.4th 929.)

[99] Pen. Code, § 1275.1(i).

[100] Pen. Code, §§ 1269b(a), 1269b(b), 1295(a).

[101] Courts must adopt a written policy to accept such forms of payment. (Gov. Code, § 71386(a).) Use of credit cards is subject to approval of the county board of supervisors. (Gov. Code, § 6159.)

[102] Pen. Code, § 1298. Law enforcement agencies are not authorized to accept government bonds as bail. (*Williams v. City of Oakland* (1972) 25 Cal.App.3d 346, 352.)

[103] Pen. Code, § 1296

[104] Pen. Code, §§ 1297, 1463

Workgroup by three courts showed that, over a one-year span, this method of posting bail occurred in less than 2 percent of total cases.[105]

- **Property bond**. The defendant, or any other person acting on his or her behalf, may give equity in real property as security in lieu of a cash deposit.[106] The value of the equity must be determined at a court hearing, and if the court finds that the value of the equity is equal to twice the bail amount, the equity must be accepted as bail.[107] As with cash bail, this method of posting bail is used in a very small percentage of cases. From data provided to the Workgroup by three courts, this method of posting bail occurred in less than 1 percent of total cases over a one-year span.[108]

Bail Bond Exoneration and Forfeiture

"Exoneration," the termination of the bail bond obligation, relieves the surety of liability and typically occurs when the criminal proceedings terminate with a grant of probation or pronouncement of judgment[109] or when the surety surrenders the defendant to custody of the jail.[110] A "Certificate of Discharged Bond" is sent by the court clerk to the bail agent as proof that the bail bond is no longer in effect. This is the end of the court process for the bail agent, the surety, and the defendant.[111]

The bond is "exonerated," and the bail bond agency is released from the obligation to pay the court if:

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[105] Los Angeles County, San Francisco County, and Santa Clara County courts provided one-year estimates of the amount of cash bail posted as compared to bail bonds posted by commercial sureties.

[106] Pen. Code, §§ 1276.5, 1298.

[107] Pen. Code, § 1298.

[108] Los Angeles County, San Francisco County, and Santa Clara County courts provided one-year estimates of the amount of property bonds posted for bail as compared to bail bonds posted by commercial sureties.

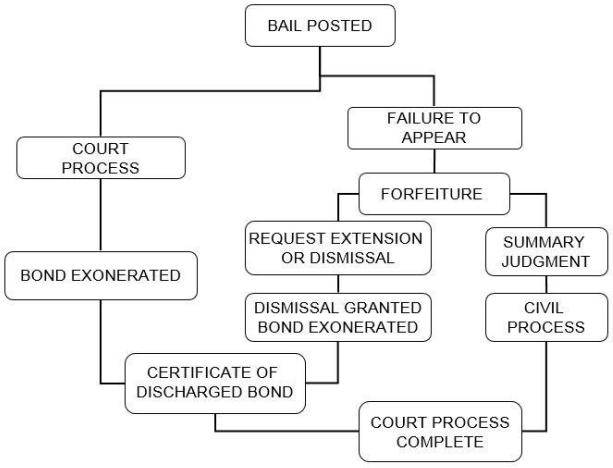
[109] Pen. Code, § 1195. Other common grounds for exoneration include acquittal; if the defendant is arrested on an out-of-county case and no warrant is filed (Pen. Code, § 1116); if the case is dismissed for a speedy trial violation (Pen. Code, § 1384); a grant of deferred entry of judgment (Pen. Code, § 1000.2); placement in a diversion program (Pen. Code, §§ 1001.6, 1001.53); or defendant is remanded to actual custody of the sheriff (e.g., *People v. Lexington National Ins. Co.* (2007) 147 Cal.App.4th 1192, 1199).

[110] Pen. Code, § 1300. A surety may arrest the defendant for the purpose of surrendering him or her (Pen. Code, § 1301).

[111] Bail bond proceedings are civil proceedings, independent of and collateral to the defendant's criminal proceedings. (*People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653.) Exoneration does not relieve the defendant of his or her financial obligation to the bail agent.

[111] Pen. Code, § 1306(a).

- The defendant appears in court for all required hearings;
- The defendant's charges are dismissed or dropped and the defendant no longer needs to appear in court;
- The defendant is rearrested for an additional crime and booked into county jail;
- The defendant fails to appear in court and is successfully located by the bail bond agency; or



Source: California Department of Insurance, Presentation to Workgroup, March 16, 2017.

- The defendant fails to appear in court, and the bail agency is not notified appropriately.

If a defendant fails to appear for arraignment, trial, judgment, or any other occasion when his or her presence in court is lawfully required, and he or she has no sufficient excuse, the court must declare a "forfeiture" of bail.[112] When a defendant does not appear within 14 days of the court date, the court may issue a bench warrant for his or her arrest.[113] If a defendant returns to court (other than by surrender by the bail agent), the court may reinstate bail and order the defendant released again on the same bond.[114]

If the bail agent surrenders the defendant to custody and the court finds no good cause for the surrender, the court may order the agent to return all or part of the bail premium.[115] It

[112] Pen. Code, §§ 1043(e)(2), 1195, 1269b(h), 1305(a), 1306(a); *People v. United Bonding Ins. Co.* (1971) 5 Cal.3d 898, 907; *People v. Amwest Surety Ins. Co.* (2004) 125 Cal.App.4th 547, 550. Bail bond forfeiture results when a court appearance is missed and the surety who put up the bond is required to pay the defendant's outstanding bail amount. A forfeited bond becomes the property of the jurisdiction overseeing the case. After the court has ordered the forfeiture of a bail bond, however, the court can "set aside" or reverse the forfeiture for a variety of reasons (e.g., the defendant appears in court shortly after the court has ordered the forfeiture). A forfeiture that has been set aside does not go into effect.

[113] Pen. Code, §§ 1310, 1312.

[114] Pen. Code, § 1305(c)(4). When a defendant is returned to custody by court action rather than by the surety, the court does not have authority to order the surety to return the bail premium. (*Indiana Lumbermens Mutual Ins. Co. v Alexander* (2008) 167 Cal.App.4th 1544, 1547–1548; *Kiperman v. Klenshetyn* (2005) 133 Cal.App.4th 934, 938–940.)

[115] Pen. Code, § 1300(b).

is illegal for a bail agent to surrender a defendant to custody solely for nonpayment of bail fees.[116]

In California, forfeiture of bail is disfavored. When bail is ordered forfeited, a 180-day process is set into motion. At any point in the process, the bail agent can seek an extension of time while attempting to locate the defendant. The statutes that authorize forfeiture are strictly construed to avoid forfeiture, with specific deadlines for the court to notify the bail agent of a forfeiture.[117] If the court does not meet these deadlines, the bail agent is released from all bond obligations; errors will result in the exoneration of the bond.[118] The bail agent can also file a motion requesting the forfeiture to be vacated, usually due to an oversight by the court or law enforcement.[119]

The forfeiture process may result in:

- *The defendant returning to court.* This may be through the efforts of the bail agent, the defendant turning himself or herself in, or the defendant being picked up by law enforcement on another charge or on a warrant for failure to appear (FTA). The court may set aside the forfeiture, set a new bail amount, and/or reinstate and exonerate the bond.

- *Summary judgment.* At the conclusion of the 180-day period, if the defendant has not returned for a hearing, the court may proceed with a summary judgment against the surety for the amount of the bond plus costs.[120] The district attorney or county counsel is responsible for collecting forfeitures.[121]

California Commercial Bail Bond Industry

The United States is one of only two countries that allow for-profit bail bonding; the other is the Philippines. In California in the late 1800s, for-profit bail bonds became an option for securing release from custody through small, independent commercial bail agents. By the mid-20th century, those independent businesses had become the front-end sales agents for very large national insurance companies. These surety companies, together with bail bond agent associations, began to institutionalize the bail bond industry.

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[116] Cal. Code Regs., tit. 10, § 2090.

[117] See, e.g., *People v. Accredited Surety Casualty Co.* (2014) 230 Cal.App.4th 548, 555.

[118] Pen. Code, §§ 1305, 1306(c); *People v. Aegis Security Ins. Co.* (2005) 130 Cal.App.4th 1071.

[119] For example, the forfeiture letter was mailed more than 30 days after summary judgment, the arrest warrant was never entered into the California Law Enforcement Telecommunications System (CLETS), the defendant is in custody outside of the jurisdiction, etc.

[120] Pen. Code, § 1306(a).

[121] Pen. Code, §§ 1305.3, 1306(e).

Data from the California Department of Insurance (CDI), the state agency that regulates the commercial bail bond insurance industry, confirm that in 2016 there were approximately 3,200 licensed bail agents, approximately 155 bail agencies, and 17 sureties transacting business in California.[122]

At the time of arrest and during the booking process, the arrestee is given the opportunity to make a call to a commercial bail bond company to initiate the process of obtaining a bail bond. Often, a directory of bail agents is posted in jail holding cells. A bail bond agent must be solicited for bail directly by the arrested person, his or her attorney of record, or an adult friend or family member.[123] As private insurance agents, bail bond agents choose their clients based on financial means or other, unstated criteria. For those who have the resources to pay the premium for purchasing the bond, the fee is nonrefundable no matter the outcome of the case, including when a prosecutor never files charges or requests dismissal of all charges.

After completing the underwriting process, the agent provides the detention facility or the court with the bail bond and a power of attorney showing that the agent is duly authorized by the surety. Typically, 20 percent of the bail fee is paid by the bail bond agent to the surety company; 10 percent is placed into a "build-up fund" ("BUF account"), which is held in trust for the agent by the surety and used to cover the cost of any forfeitures; and the remaining 10 percent goes directly to the surety company. The agent provides no money to the court at the time the bond is posted.

Those who purchase or cosign a bail bond—usually the family or friends of the defendant—typically sign a legal contract obligating them to pay the full bail amount if a court date is missed. Occasionally, the bail agent requires the arrested person (or family and friends) to collateralize the full bail amount with real or personal property. If the defendant fails to appear for a court hearing, the bail agent may require the defendant and/or the cosigner to pay for the costs of attempting to locate and return the defendant, including costs assessed by the court and reasonable charges for the services of the bail agent and his or her associates.[124] If the bail is ultimately forfeited, the agent may require payment of the full bail amount, in addition to other costs associated with the failure to appear and bond forfeiture proceedings.[125] If neither the defendant nor the cosigner is able to satisfy these costs with cash, the bail agent may seize and liquidate any collateral

[122] According to the California Department of Insurance, the top five California bail agencies in terms of number of bail agent employees are Two Jinn, Inc. (also known as Aladdin Bail Bonds under the surety Seaview), DMCG, Inc. (also known as Bail Hotline Bail Bonds), All-Pro Bail Bonds, Inc., BBBB Bonding Corporation (also known as Bad Boys Bail Bonds), and Absolute Bail Bonds Corporation.

[123] Cal. Code Regs., tit. 10, § 2079.

[124] Cal. Code Regs., tit. 10, § 2081(d); *People v. V. C. Van Pool Bail Bonds* (1988) 200 Cal.App.3d 303, 305.

[125] Cal. Code Regs., tit. 10, § 2081(e).

(often the home or personal property of the defendant, family, or friends) or may attempt to satisfy the debt through other means.[126]

As average bail amounts have risen significantly over the last two decades, the bail bond industry and the nonrefundable fees charged by bail bond agents have also grown. Some bail bond companies offer credit bail, using the "rebate" law,[127] to allow the defendant to pay a portion of the nonrefundable fee (as low as 1 percent of the bail amount). The bail agent arranges for the defendant to pay the remainder of the 10 percent fee under an installment plan, until the bail premium is fully paid with accumulated interest.[128] Some bail agents require the defendant to collateralize the "credit" portion of the nonrefundable fee, typically in cases of high bail amounts when the bail fee is also substantial.

There are two bail bond agent trade associations in California, Golden State Bail Agents Association[129] and California Bail Agents Association.[130] Both associations are members of the American Bail Coalition,[131] a national trade association "dedicated to the long term growth and sustainability of the surety bail industry."[132] The American Bail Coalition has successfully focused on legislative developments affecting bail across the country, including in California. The American Bail Coalition is a member of the American Legislative Exchange Council (ALEC);[133] William B. Carmichael, chairman of the

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[126] *Id.*, § 2088.2.

[127] A bail agent may choose to negotiate a lower fee by rebating, as included in Proposition 103, the Insurance Rate Reduction and Reform Act, approved by California voters in November 1988. See *Pacific Bonding Corp. v. John Garamendi* (Super. Ct. San Diego County, 2005, No. 815786), www.insurance.ca.gov/01-consumers/170-bail-bonds/upload/Pacific-Bonding-Corp-v-Garamendi.pdf .

[128] Bail bond companies typically charge interest rates on the premiums and payments; if a payment is late, some contracts charge 1.5 percent a month, while others charge the " 'maximum rate of interest allowed by law.' " See UCLA School of Law Criminal Justice Reform Clinic, *The Devil in the Details: Bail Bond Contracts in California* (May 2017), p. 16.

[129] The mission of the Golden State Bail Agents Association, http://gsbaa.org/, is to "(1) Inform citizens and California Government regarding the benefits of the private surety bail bond industry [¶] (2) Increase the market share of private surety bail bonds through the reduction of un-secured pre-trial release throughout the State of California [¶] (3) Represent the interests of the professional bail agents of California [¶] (4) Work to improve business conditions and promote professionalism and integrity throughout California's bail industry [¶] (5) Provide advocacy for private surety bail bonds by promoting legislation that will insure that our industry can provide its essential service of "Insuring That Defendants Appear In Court."

[130] The mission of the California Bail Agents Association, http://cbaa.com/about/, is "to serve and improve the California bail industry through education and discourse with public officials and others that affect the important role of bail in the administration of criminal justice in California."

[131] American Bail Coalition, www.americanbailcoalition.org/about-us/.

[132] *Id.* ("Comprised of the nation's largest surety insurance companies, ABC works with local communities, law enforcement, legislators and other criminal justice stakeholders to utilizes [*sic*] its expertise and knowledge of the surety bail industry to develop more effective and efficient criminal justice solutions").

[133] ALEC, www.alec.org/about/, is America's largest nonpartisan, voluntary membership organization of state legislators dedicated to the principles of limited government, free markets, and federalism.

American Bail Coalition, is the private chair of ALEC's Criminal Justice Reform Task Force[134] and a member of ALEC's Private Enterprise Advisory Council.

Data on California Bail Bond Industry Operations

Beyond basic licensing information, relatively little statewide data are available on the bail industry's operations in California. Bail agents, bail agencies, and sureties are not required to collect or report data on who cosigns and repays bail loans, though the companies are acting as lenders when they arrange for installment payments for the fees. Anecdotal data on the impact of criminal justice fines and fees show that most of these fees are paid by women who are posting bail on behalf of family members;[135] in some instances, a woman may be paying to secure the release of an abusive spouse or partner. Little information is available on repayment plan structures, requirements, and collections processes used by bail bond companies.

Likewise, no statewide data measure the effectiveness of bail bond agencies' services. Bail agents are not required to collect or make public data on the court appearance and failure-to-appear rates of those they insure or the rearrest and new offense rates of the individuals who have purchased their bail bonds.

In 2014, however, useful information was provided as a result of a limited examination conducted by the California Department of Insurance to determine bail activity in the state. The exam focused on calendar years 2011 through 2013 and identified 17 sureties conducting bail business in California. During the three-year period:

- An average of 205,000 bail bonds were executed per year, statewide;
- The face value of bail bonds written during the exam period averaged more than $4.4 billion each year ($4,440,493,079);
- Bail agents working for 13 of the 17 sureties licensed in California collected more than $924 million ($924,654,956) in total gross bail bond premiums, which amounted to an average of more than $308.2 million ($308,218,318) in nonrefundable premium fees collected from defendants, their families, and their friends per year (four sureties could not provide information on their total gross premium amounts); and

[134] ALEC Criminal Justice Reform Task Force, *www.alec.org/task-force/criminal-justice-reform/*.

[135] The Financial Justice Project, Office of the Treasurer & Tax Collector, City and County of San Francisco, *Do the Math: Money Bail Doesn't Add Up for San Francisco* (June 2017), p. 19.

- Bail agents and bail agencies remitted more than $87.2 million ($87,221,865) to their sureties during the same three-year period, an average of $29 million ($29,073,955) per year.[136]

It is rare for bail bond agents to pay forfeitures—the full bail amount if the bonded person fails to appear in court. Forfeiture laws provide bail bond agents with numerous opportunities to avoid paying forfeitures and make the process of initiating and collecting forfeitures labor intensive and complex for the courts.

California's forfeiture statutes require the court to follow strict notification rules and deadlines in order to collect a forfeited bail from a bail bond agent.[137] The procedures required to collect on a forfeiture are so burdensome and costly that they are often not pursued.[138]

For these reasons, relatively little of the bail premium amounts that are forfeited are collected by the courts in forfeiture proceedings. CDI conducted a surety forfeiture analysis for 2012 through 2013 in which one surety had approximately 1,500 forfeitures each of the two years, but forfeitures were actually collected by the court in only 32

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[136] *California Department of Insurance Bail System White Paper*, prepared by the California Department of Insurance and presented by California Insurance Commissioner Dave Jones to the Pretrial Detention Reform Workgroup, March 16, 2017.

[137] See Pen. Code, §§ 1305(b) (bail agent relieved of obligations if court clerk fails to mail notice forfeiture satisfying statute within 30 days), 1306(c) & (f) (bail agent relieved of obligations if summary judgment is not entered against bondsman within 90 days; right to enforcement forfeiture judgment expires after two years), 1308(b) (clerk must serve notice of forfeiture judgment within five days).

[138] Pen. Code, §§ 1305, 1305.4–1305.6, 1306, 1308. The basic forfeiture process is as follows:

- The court may forfeit cash bonds of less than $500 immediately upon an FTA; and for greater amounts, after a 10-day notice and 180-day recovery period.
- The court may forfeit bail bonds after the 10-day FTA notice/180-day recovery period if it follows all legal steps without exception, but often the recovery period is extended 180 days or more if, in the court's discretion, it accepts a bail bond agent's claims of diligent recovery efforts, or if any other technicality arises. The court must exonerate the bond if, within the 180-day or extended recovery period:
  - The defendant is arrested, taken to court, or surrendered by a bond agent, bounty hunter, or any other person;
  - The defendant turns himself in;
  - The court fails to issue a proper FTA and intent to forfeit notice to all parties within 10 days;
  - The court fails to perform and provide proof of proper legal service of the FTA and intent to forfeit notice to all parties within 30 days;
  - The court fails to set and properly notice a hearing within 30 days after the 180-day recovery period;
  - The bond agent shows that the defendant was arrested elsewhere, hospitalized, or otherwise indisposed;
  - The defendant is recovered by warrant arrest (most frequent) and the bond agent shows diligent recovery efforts; or
  - Any of many other statutory technicalities arises.

cases. The total gross premium charged by this surety's agents for 2012 and 2013 was over $51 million ($51,889,943); the total amount of forfeiture payments to the courts by both the bail agents and the build-up fund was $588,095. A second surety examined during this same period had over 1,000 forfeitures for each of the two years, but the court made successful collections in only 19 cases. The total gross premium charged by this surety's agents was also over $51 million ($51,178,376); the total amount of forfeiture payments to the court by the bail agents (there was no contribution by the build-up fund) was $282,484.

The Workgroup received information from three large counties that provide additional perspective on the size and operation of the commercial bail bond industry.

Los Angeles County. From May 2016 to May 2017, approximately $1.73 billion in surety bonds was posted with the Superior Court of Los Angeles County. Because defendants in Los Angeles typically pay an upfront 10 percent fee to purchase the bail bond (or pay a smaller percentage and agree to an installment payment plan for the remainder of the fee), this figure translates to approximately $173 million in nonrefundable dollars paid by defendants to bail agents, not including interest or administrative fees. In that same period, defendants made cash deposits to the court of $13.6 million (less than 1 percent of the $1.73 billion posted in bonds and less than 8 percent of the $173 million in fees paid to purchase those bonds).

In the same one-year period, a total of $3.8 million in bail was ordered forfeited by the court, of which $2.7 million was collected by the courts and county—$1.4 million from surety companies and nearly the same amount, $1.3 million, from forfeited cash bail, even though the amount of cash bail deposited with the court was a tiny fraction of the amount of bail bonds posted.

San Francisco County. Approximately 18,000 to 21,000 individuals are booked into the San Francisco County jail system in any given year. In 2016, 2,652 people posted bail; more than 99 percent used a commercial surety bond and paid the nonrefundable fee. In 2015, a total of over $168 million in bail bonds was posted; in 2016, the total was $149 million. The average bail amount posted was over $56,000; the median bail amount was $43,000, with the largest concentration of bonds between $10,000 and $50,000.[139] Assuming bond payments of up to 10 percent of the total bond amount, San Francisco

[139] The Financial Justice Project, Office of the Treasurer & Tax Collector, City and County of San Francisco, *Do the Math: Money Bail Doesn't Add Up for San Francisco* (June 2017), p. 4, http://sftreasurer.org/sites/default/files/2017.6.27%20Bail%20Report%20FINAL_2.pdf (analysis of bail bonds posted January 1, 2016, through August 31, 2016; data provided by the San Francisco County Sheriff's Department).

County defendants and their families and friends paid between $10 million and $15 million in nonrefundable bail fees in 2015 and 2016.[140]

Contracts between San Francisco County bail agents and their clients are not required to be collected or reviewed. A review by the San Francisco Office of the Treasurer and Tax Collector of six bail contracts provided to the San Francisco Public Defender's Office noted the following information:

- Bond amounts were between $50,000 and $150,000.
- Most agents charged the full 10 percent of the total bond amount, plus a modest fee.
- Almost all cosigners, or indemnitors, were women.
- Most defendants and their families could not afford the full 10 percent up front and made partial payments of between 12 and 35 percent of the fee amount charged by the bail agency.
- Upfront payments ranged from $1,500 to $5,015, and most established monthly payment plans for the remainder of the 10 percent fee.
- Monthly payment plans ranged from $200 to $300 per month for an estimated range of 28 to 50 months.
- Most of the contracts stipulated that the premium (the full 10 percent deposit) is due upon the defendant's release from custody, even if the defendant was improperly arrested, bail is reduced, or the case is dismissed.[141]

San Francisco also reviewed costs to the county associated with failures to appear in court when the defendant has been released from custody on a bail bond. Although it is the responsibility of the bail agency to locate the defendant, the county frequently bears the cost of bringing the individual back to jail. A bail bond agency must notify the county of the individual's location, and law enforcement officers are responsible for returning the individual to jail. At times, this may mean transferring the defendant from a jail in a different county or sending law enforcement officers across county or state lines and paying for their travel and other expenses.[142] Upon a defendant's return to custody, the bond is exonerated.

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[140] *Ibid*. (analysis conducted on bail bonds posted January 1, 2015, through December 31, 2016, provided by the San Francisco County Sheriff's Department; assumes nonrefundable payments up to 10 percent of the total bond amounts).

[141] *Id.* at p. 9.

[142] *Id*. at p. 11.

Bail bond companies have an obligation to pay the full bond to the court when bail has been forfeited, but in San Francisco, it is estimated that bail bond agencies challenge approximately five bail bond forfeitures per month. An estimated 75 percent of these challenges are granted without contest, meaning that the bail agency is released from its obligation to pay.[143] San Francisco estimates that each year bail agents are released from responsibility for millions of dollars in bail owed to the court.

According to San Francisco's accounting system, a total of $128,727 was collected from bail bond agencies in forfeited bonds for 2015 and 2016 combined ($5,152 collected in 2015, and $123,575 in 2016, largely due to a single $80,000 bond, forfeited in September 2016).[144]

Santa Clara County. Approximately 32,000 people were admitted into the Main Jail in 2014, 87 percent involving felony offenses and 13 percent involving misdemeanor offenses: "[E]xcluding those cited and released in the field, released on jail citations, dismissed, or transferred—approximately 35% of defendants were released on money bail; approximately 25% were released on their own recognizance, with or without supervision conditions; and approximately 40% either remained in jail throughout the pretrial period because they were ordered detained or because they did not or could not make bail, or were released by the court, usually after sentencing."[145]

Most defendants in Santa Clara County who are released on bail obtain their release by securing the services of a bail agent and posting a bail bond: "In 2015, bail agents posted 7,599 bail bonds in Santa Clara County for bail amounts totaling $198,068,815. Bail amounts for individual bonds ranged from $100 to $1,500,000, with a mean bail amount of $26,065 and a median bail amount of $15,000. 289 bail bonds—or approximately 3.4% of all bail bonds posted in 2015—were for bail amounts of less than $2,000."[146]

Although precise data are not available for Santa Clara County, its Office of Pretrial Services estimates that, of those defendants who have bail set but remain in county jails throughout the pretrial period (excluding those who are ineligible for release due to warrants in other jurisdictions, parole holds, etc.), 90 percent are detained because they could not obtain a bail bond or otherwise afford to post bail.

Santa Clara County bail agents have stated that a majority of these defendants are unable to obtain a bail bond not because they cannot afford to pay, but because bail bond agents decline to offer them a bond based on a determination that they are unsuitable for bail

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[143] *Ibid*. (citing interview with City Attorney's Office).

[144] *Id*. at p. 12.

[145] County of Santa Clara, Bail and Release Work Group, *Final Consensus Report on Optimal Pretrial Justice* (Aug. 26, 2016), p. 23, available at http://sccgov.iqm2.com/Citizens/Detail_LegiFile.aspx?MeetingID=7963&ID=82867.

[146] *Id*. at p. 24.

because of a high failure-to-appear risk.[147] The county's Office of Pretrial Services uses a locally validated risk assessment tool and has achieved FTA rates of less than 5 percent for defendants on OR and Supervised OR release.[148]

The Santa Clara County Sheriff's Office receives about 140 requests from bail agents each year to recover fugitives who are in custody outside the region or state. The bail agent's risk and responsibility are even lower in jurisdictions such as Santa Clara County where some defendants are required to post bond and are also subject to supervision by pretrial services officers.[149] In such cases, although the bail agent has been paid to ensure the defendant's appearance, it is the county, and not the bail agent, that does most of the work of supervising defendants. The effect of this practice "is to make the pretrial services agency a kind of guarantor for the bail bondsman, in effect subsidizing the commercial bail industry by helping to reduce the risk that a defendant released on money bail will not return for scheduled court appearances."[150]

In Santa Clara County in the first six months of 2017, police arrested 265 people who were never charged with a crime. The director of the Office of Pretrial Services noted that those individuals paid approximately $500,000 in nonrefundable bail bond fees and that those who couldn't afford the fees sat in jail and waited—sometimes for weeks.[151]

Regulation of the Commercial Bail Bond Industry

The Bail Bond Regulatory Act was first adopted in 1937 and provides the statutory framework to regulate the bail bond industry. The California Department of Insurance (CDI) is responsible for regulation of the bail bond industry and for investigating and enforcing the activities of bail agents and their sureties. Generally, Penal Code sections 1299–1306, Insurance Code sections 1800–1823, and California Code of Regulations, title 10, sections 2054–2104 provide the legal basis for regulation of bail bond licenses, bond agents, bounty hunters, and bail transactions.

Under CDI's licensing regulations, individuals must meet the following requirements to receive a bail agent license: be a minimum of 18 years of age; have a picture ID card issued by CDI; be a resident in the state of California; complete a minimum of 20 hours of approved classroom study with an approved curriculum; pass a fingerprint-based

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[147] County of Santa Clara, Bail and Release Work Group, *Final Consensus Report on Optimal Pretrial Justice* (Aug. 26, 2016), p. 34.

[148] *Id*. at p. 32.

[149] *Id*. at p. 40.

[150] *Id*. at pp. 40–41, quoting National Association of Pretrial Services Agencies, *Standards on Pretrial Release* (3d ed. 2004), Commentary to Standard 1.4(g), p. 19, www.pretrial.org/download/performance-measures/napsa%20standards%202004.pdf.

[151] Matt Krupnick, "Bail roulette: how the same minor crime can cost $250 or $10,000," *The Guardian* (U.S. edition) (Sept. 20, 2017), https://www.theguardian.com/us-news/2017/sep/20/bail-disparities-across-the-us-reflect-inequality-it-is-the-poor-people-who-suffer (as of Oct. 5, 2017).

background check; provide a bond in the sum of $1,000; and provide notice of appointment by a surety insurer. Many bail agents have appointments with multiple sureties. Bail fugitive recovery persons ("bounty hunters") must meet education, notice, and conduct requirements but are not licensed by CDI.[152]

CDI's bail regulations require bail agent licensees to file schedules of rates and notices relating to the operation of the business. Licensees are required to keep records for each bail transaction for five years after completion of the transaction.[153] Although bail transaction records are required to be available for inspection by CDI, no records other than those relating to disposition of collateral are required to be kept, and there is no requirement to keep records on bail outcomes (i.e., court appearances and exonerations of bail bonds or failures to appear and forfeitures of bail).

The number and seriousness of bail complaints that CDI has received have significantly increased over the past several years. In 2010, there were 62 complaints, with 45 referrals to prosecutors; in 2015, there were 238 complaints, with 77 referrals to prosecutors. Violations may range from minor violations of the Insurance Code to felony criminal activity. In December 2015, a San Jose bail agent was arrested on suspicion of attempting to extort money from a defendant and her family by charging unwarranted fees and then attempting to foreclose on the family's home.[154] CDI notes that some "unscrupulous bail agents … apprehend arrestees with the intent to extort premium payments."[155]

CDI prosecutes administrative cases against bail agents and works with district and city attorneys to prosecute criminal cases against bail agents.[156] Recent complaints and enforcement actions include receipt of stolen property/contraband in lieu of collected premiums; bribery and money laundering; gang conspiracy and/or criminal enterprise; kidnapping and false imprisonment for purposes of extortion; perjury and filing of false documents; unlicensed activity/illegal solicitation; use of jail inmates and jail staff as recruiters for bail transactions; theft or embezzlement of collateral or premiums; creation

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[152] Pen. Code, §§ 1299–1299.12. Requirements include the following: the person must be at least 18 years of age; must have completed a certified 40-hour power of arrest education course and a minimum of 20 hours of certified classroom prelicensing education; must not have been convicted of a felony (with certain exceptions); and must carry certificates of completion with him or her at all times in the course of performing fugitive recovery duties.

[153] Cal. Code Regs., tit. 10, §§ 2100, 2104.

[154] County of Santa Clara, Bail and Release Work Group, *Final Consensus Report on Optimal Pretrial Justice* (Aug. 26, 2016), p. 41.

[155] California Department of Insurance, "Investigation Division Overview—Types of Violations," *www.insurance.ca.gov/0300-fraud/0200-invest-division-overview/10-violations/* (as of Oct. 5, 2017).

[156] California Department of Insurance news release, "Update: South Bay bail agents targeted in law enforcement sweep" (Sept. 9, 2015), *www.insurance.ca.gov/0400-news/0100-press-releases/2015/release083-15.cfm* (as of Oct. 5, 2017).

of fake bail bonds; website misrepresentation/misdirection; dishonest advertising; and abuse of unmonitored attorney-client jail visiting rooms.[157]

Own Recognizance Release

Pretrial release of a defendant on his or her own recognizance is an alternative to release on bail. Own recognizance release was a "well-established practice" long before it was added to the California Constitution in 1974.[158] A defendant may request the court to grant a release from custody in exchange for a written promise to appear.[159] Any person who has been arrested for or charged with an offense may be granted OR release—other than a person charged with a capital offense or, under limited circumstances, a violent felony—including a defendant arrested on an out-of-county warrant.[160] The court must consider public safety and the safety of the victim in making the determination to release the defendant on OR.[161]

Defendants in custody who are arraigned on a misdemeanor complaint and defendants who appear on a misdemeanor out-of-county warrant are entitled to OR release unless the court makes a finding on the record that OR release will compromise public safety or will not reasonably assure the appearance of the defendant in court as required.[162] If the court makes one of these findings, the court must then set monetary bail and specify the conditions, if any, for the defendant's release. In determining the probability that the defendant will return to court if released on his or her own recognizance, the court must consider the defendant's ties to the community, the defendant's record of appearance at past hearings, and the severity of the possible sentence that the defendant faces.[163]

A hearing must be held in open court before OR release may be granted to a defendant arrested for a serious or violent felony offense (except for residential burglary), and for other specified offenses; or a defendant arrested for a new offense and currently on felony

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[157] *California Department of Insurance Bail System White Paper*, prepared by the California Department of Insurance and presented by California Insurance Commissioner Dave Jones to the Pretrial Detention Reform Workgroup, March 16, 2017.

[158] Cal. Const., art. I., §§ 12, 28(f)(3); Cal. Const. Revision Com., Proposed Revision of Cal. Const., pt. 5 (1971) p. 19. Release on own recognizance is a substitute for bail and the defendant remains in the constructive custody of the court and may be subject to restraints not imposed on the public in general. (*People v. McCaughey* (1968) 261 Cal.App.2d 131.)

[159] Pen. Code, § 1318 et seq.

[160] Pen. Code, §§ 1270(a), 1319(b). A defendant charged with a violent felony, as described in Penal Code section 667.5(c), is not entitled to be released on his or her own recognizance where it appears, by clear and convincing evidence, that he or she previously has been charged with a felony offense and has willfully and without excuse from the court failed to appear in court as required while that charge was pending.

[161] Cal. Const., art. I, § 28(f)(3).

[162] Pen. Code, § 1270(a).

[163] *Van Atta v. Scott* (1980) 27 Cal.3d 424, 438.

probation or parole; or a defendant arrested for a nonviolent felony and who has frequent failures to appear in court.[164]

A defendant may not be released by the court on OR unless he or she signs a release agreement that contains the defendant's promise to appear at all times and places ordered by the court, to obey all reasonable conditions imposed by the court (such as obeying a protective order), not to leave the state without permission of the court, to waive extradition if he or she fails to appear as required and is apprehended outside the state, and to acknowledge that he or she has been advised of the consequences for violation of the conditions of release.[165] "Reasonable conditions" include those that address public safety and that help to ensure subsequent court appearance.

Supervised Own Recognizance Release

When the court grants supervised OR release, the defendant is released from custody on a written promise to return to court for future appearances, under court-ordered conditions that are supervised by a pretrial services officer. Conditions that are subject to monitoring and supervision may include a requirement for regular check-ins with a pretrial services officer, a curfew, prohibitions on alcohol or drug use, stay-away orders, home detention, electronic monitoring, and drug and alcohol testing. A pretrial services officer will monitor compliance with the court-imposed conditions. Failure to comply or to appear at future court dates will usually result in the issuance of an arrest warrant and will become part of a defendant's record. It also may result in a variety of consequences, including return to custody, a harsher sentence in the current case and in future cases, higher bail amounts, or denial of OR release in future cases. In addition, failure to appear in court while out on custody on supervised OR release is a separate crime that can be charged against a defendant as a misdemeanor or felony.

Courts can require a defendant on OR release and charged with a felony drug offense to submit to random drug testing, warrantless search and seizure, and participation in a drug treatment program as valid conditions of release.[166] Supervision officers may refer defendants to appropriate services within the community, such as substance abuse treatment or domestic violence counseling, for intervention that will assist the defendant in successfully completing the period of pretrial supervision. Performance reports may be provided for defendants at the time of sentencing, if requested by the judge. Those who fail to comply with release conditions are returned to court for appropriate sanctions.

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[164] Pen. Code, §§ 1270.1(a), 1319(a), 1319.5.

[165] Pen. Code, § 1318.

[166] Pen. Code, §§ 1270(a), 1318(a)(2); *In re York* (1995) 9 Cal.4th 1133, 1145 (victim protection and prevention against witness intimidation appropriate purposes of OR conditions); *In re McSherry* (2003) 112 Cal.App.4th 856, 861; *People v Sylvestry* (1980) 112 Cal.App.3d Supp. 1, 7. But see *Gray v. Superior Court* (2005) 125 Cal.App.4th 629, 636–643 (bail condition prohibiting defendant from practicing medicine violated defendant's procedural due process rights).

Pretrial Services in California

There is minimal legal authority in California regarding pretrial investigation, assessment and supervision provided by pretrial services. A court, with county board of supervisors' approval, may employ an investigative staff to gather information and provide a recommendation on whether a defendant should be released on his or her own recognizance.[167] In all cases involving a violent felony or felony DUI, if a court has an investigative staff, the staff must prepare a report[168] that recommends whether the defendant should be released on his or her own recognizance. The report must be submitted to the court for review before the hearing.

Many courts request that the pretrial services staff provide recommendations regarding conditions of release in addition to the release recommendation. The majority of California pretrial services programs provide the court with risk assessment information at arraignment, which occurs up to 48 hours after arrest (excluding Sundays and holidays). An arrested person who can post bail is released immediately. Although it is possible for a court to grant OR release before arraignment, typically a person who may be eligible for OR release based on a risk assessment would not be released until the court receives the assessment information and makes that determination at arraignment.

Components of Pretrial Services

Each of California's 58 counties use various elements of pretrial services as described below. A 2015 survey of counties indicated that 46 of the 58 counties have some type of pretrial program and that 70 percent established their programs in the past five years.[169] Pretrial services programs are county-based units, departments, agencies, or organizations that engage with individuals booked into jail. Effective pretrial services programs depend on the active participation of various justice partners, including the court, the sheriff's department, the district attorney's office, the public defender's office, the probation department, and the county's behavioral health and mental health departments. Pretrial services programs often have agreements, policies, or memoranda of understanding with each partner agency that specify their respective roles.

The components and services offered by pretrial services programs vary, but the most common program elements include screening defendants to determine if they are eligible for assessment; conducting an assessment, usually with the use of a validated risk assessment tool; verifying the criminal history and information provided by the arrestee;

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[167] Pen. Code, § 1318.1(a).

[168] The report must include written verification of (1) any outstanding warrants against the defendant, (2) any prior incidents where the defendant has failed to make a court appearance, (3) the criminal record of the defendant, and (4) the residence of the defendant during the past year. (Pen. Code, § 1318.1(b).)

[169] Californians for Safety and Justice and the Crime and Justice Institute, *Pretrial Progress: A Survey of Pretrial Practices and Services in California* (Aug. 2015), http://libcloud.s3.amazonaws.com/211/95/d/636/PretrialSurveyBrief_8.26.15v2.pdf.

providing the results of the risk assessment and collected information to the court; providing recommendations for release or detention, and for potential conditions imposed on release; monitoring court-ordered release conditions; and providing supervision for defendants who are released before trial.

After booking and before arraignment, pretrial services may screen eligible arrestees to determine if they qualify for assessment. Each county determines its own eligibility screening criteria. Some counties assess nearly all individuals booked into jail, some assess only those arrested for misdemeanors, and others assess those charged with felonies but may exclude individuals charged with specific crimes such as domestic violence or crimes involving a weapon.

Examples of conditions that pretrial services may recommend and the court may choose to impose include stay-away orders for specified people or places, drug or alcohol testing, and participation in community programs. Monitoring and supervision may include automated reminders of court dates,[170] periodic check-ins with supervision officers, and electronic monitoring. The court authorizes the imposition of these conditions for defendants on supervised OR release based on their risk level and type of risk. Although policies vary among counties, defendants who gain release by posting bail, including those charged with serious or violent felonies, generally are not supervised by pretrial services and are not required to comply with conditions that require active supervision, such as drug testing and electronic monitoring.

Risk Assessment and Pretrial Supervision

The pretrial release decision, while solely within the discretion of the judicial officer, may be informed by the results of a pretrial risk assessment. Risk assessments frequently involve the use of a pretrial risk assessment instrument (PRAI) designed to elicit information about the defendant that is used to calculate the risk of failure that a given defendant poses if released before adjudication of his or her case. "Failure" by the defendant is defined as rearrest for further criminal violations before adjudication or failure to appear (FTA) for a scheduled court date.[171]

Formal risk assessment tools use large data sets regarding past trends to predict future outcomes. The first PRAI can be traced back to a Manhattan Bail Project experiment in 1961 to test a point scale that used strength of family and community ties as the criteria

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[170] Automated court date reminders have been demonstrated to be effective in reducing failures to appear. Multiple jurisdictions across the country have successfully reduced failures to appear by instituting court date reminder systems. See Sonya Tafoya et al., *Pretrial Release in California* (Public Policy Inst. of Cal., May 2017), p. 16, citing Matt Nice, *Court Appearance Notification System (CANS): Process and Outcome Evaluation* (2006), a report for the Local Public Safety Coordination Council and the CANS Oversight Committee, prepared by the Budget Office of Multnomah County, Oregon.

[171] Charles Summers & Tim Willis, *Pretrial Risk Assessment: Research Summary* (U.S. Dept. of Justice, Bureau of Justice Assistance, 2010), www.bja.gov/Publications/PretrialRiskAssessmentResearchSummary.pdf.

for identifying defendants who were good risks for appearing in court if released before trial. Evaluations of that point scale showed that the use of such objective criteria could be effective in classifying risk of FTA.[172]

Today, as many as 60 PRAIs are in use in jurisdictions across the United States. These tools are diverse in form, length, and content. The simplest tools rely exclusively on criminal records; others add a short defendant interview, integrating the results into a single risk score. Still other tools include more comprehensive risk and needs assessments that require a long interview.[173]

Although different instruments have been used with success in different jurisdictions, in general, research on pretrial assessment conducted over decades has identified these common factors as good predictors of court appearance and/or danger to the community:

- Current charges
- Outstanding warrants at the time of arrest
- Pending charges at the time of arrest
- Active community supervision at the time of arrest
- History of criminal convictions
- History of failure to appear
- History of violence
- Residence stability over time
- Employment stability
- Community ties
- History of substance abuse[174]

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[172] Vera Institute of Justice, *Manhattan Bail Project*, Official Court Transcripts October 1961–June 1962, *https://storage.googleapis.com/vera-web-assets/downloads/Publications/manhattan-bail-project-official-court-transcripts-october-1961-june-1962/legacy_downloads/MBPTranscripts1962.pdf* (as of Oct. 5, 2017).

[173] Sarah Picard-Fritsche et al., *Demystifying Risk Assessment: Key Principles and Controversies* (Center for Court Innovation, 2017), *www.courtinnovation.org/sites/default/files/documents/Monograph_March2017_Demystifying%20Risk%20Assessment_1.pdf* (as of Oct. 5, 2017).

[174] *Ibid.*

At the national level, support for the use of evidence-based practices has been widely embraced. In its resolution endorsing the Conference of State Court Administrators' policy paper on evidence-based pretrial release, the Conference of Chief Justices acknowledges that:

> evidence-based assessment of the risk that a defendant will fail to appear or will endanger others, if released, can increase successful pretrial release without imposing unnecessary financial conditions that many defendants are unable to meet; … [¶] … [and that] imposing conditions on a defendant that are appropriate for that individual following a valid pretrial assessment substantially reduces pretrial detention without impairing the judicial process or threatening public safety.[175]

The American Council of Chief Defenders, Gideon's Promise, the National Association for Public Defense, the National Association of Criminal Defense Lawyers, and the National Legal Aid & Defender Association issued a joint statement strongly endorsing and calling for the use of validated pretrial risk assessment in all jurisdictions, as a necessary component of a fair pretrial release system that reduces unnecessary detention and eliminates racial bias.

In California, many counties already have an agency or unit that provides risk assessments to the court for at least a portion of their defendant population and employs the use of a pretrial risk assessment instrument. In fact, currently six PRAIs are in use in 49 counties throughout California. (For a comprehensive list, see Appendix G.)

The information that is collected and provided to the court before arraignment may vary by county and may include the original booking sheet, a probable cause declaration, a criminal history, and the results of the PRAI. This information is also typically provided to the prosecution and defense as well. The PRAI report may provide the court with the raw score obtained through application of the instrument, or pretrial services may use the results of the instrument to classify defendants based on their flight risk and their threat to community safety.

All risk assessment systems are designed and operate in a similar manner but may rely on somewhat different risk factors and frame their results somewhat differently. The use and deployment of pretrial risk assessment tools is not without controversy and issues. One fundamental challenge with pretrial risk assessment instruments is to ensure that the tools are used to provide evidence-based information on defendants' risk to public safety and

[175] Conference of Chief Justices, Resolution 3: Endorsing the Conference of State Court Administrators Policy Paper on Evidence-Based Pretrial Release (adopted Jan. 30, 2013), *http://ccj.ncsc.org/%7E/media/Microsites/Files/CCJ/Resolutions/01302013-pretrial-release-Endorsing-COSCA-Paper-EvidenceBased-Pretrial-Release.ashx* (as of Oct. 5, 2017). See Appendix C.

failure to appear without impinging on the discretion of the independent judicial officer making the pretrial detention and release decisions.

Although most California counties have implemented some form of pretrial services, the level of provided services varies widely from county to county. Under the current system, most counties have eligibility restrictions on pretrial assessment. Those who are not eligible for assessment nevertheless may bail out of custody without any supervision or monitoring. Those who do meet eligibility requirements also have the option to bail out before or after being assessed, and prior to arraignment. This bail option limits the number of arrestees for whom the court receives risk information and recommendations on release conditions, and reduces the number of out-of-custody defendants who are monitored or supervised. Although the pretrial services currently in place in counties show promising results, these capacity and other restrictions indicate the need to substantially increase the role and scope of pretrial services throughout California.

Recommendations of the Pretrial Detention Reform Workgroup

A just and fair pretrial release and detention system provides due process, recognizes the presumption of innocence, and advances the government's fundamental role in protecting public safety. California's current pretrial release and detention system bases a person's liberty on available financial resources rather than the risk posed to public safety. With the California Chief Justice's guiding principles as the framework, the Workgroup has concluded that California's pretrial release and detention system must be reformed.

The Workgroup recommends implementing a system that maximizes public safety, early release, and return to court while minimizing socioeconomic disparities and bias. This system should uphold the right to liberty and the presumption of innocence and affirm that public safety must not be contingent on the financial resources of the accused. This system should use objective factors to inform the court's detention or release decisions and include meaningful supervision and monitoring. And for those cases in which no condition or set of conditions can assure public safety, the court must have the ability to employ constitutionally approved preventive detention. As noted by the U.S. Supreme Court in *United States v. Salerno* (1987) 481 U.S. 739, 755, in affirming the fundamental right to liberty pending trial and approving the use of preventive detention, "[i]n our society, liberty is the norm and detention prior to trial or without trial is the carefully limited exception."

As the branch of government tasked with ensuring due process while balancing public safety and appearance in court during the course of a criminal case, the judicial branch and the courts are in a unique position to lead this reform. In states that have adopted reforms to the pretrial system, the courts have played an integral role in developing, drafting, and implementing those changes.

The Pretrial Detention Reform Workgroup has made the following recommendations, which should be considered and implemented as a whole and should not be adopted individually:

1. Implement a robust risk-based pretrial assessment and supervision system to replace the current monetary bail system.
2. Expand the use of risk-based preventive detention.
3. Establish pretrial services in every county.
4. Use a validated pretrial risk assessment tool.
5. Make early release and detention decisions.
6. Integrate victim rights into the system.
7. Apply pretrial procedures to violations of community supervision.
8. Provide adequate funding and resources.
9. Deliver consistent and comprehensive education.

10. Adopt a new framework of legislation and rules of court to implement these recommendations.

1. Implement a robust risk-based pretrial assessment and supervision system to replace the current monetary bail system.

A pretrial system that relies exclusively on the financial resources of the accused is inherently unsafe and unfair. The primary goals of an effective pretrial release structure are to maintain public safety and to ensure that defendants appear in court while treating people fairly. However, use of a monetary bail system compromises public safety because release is not premised on the risk posed by a defendant. Rather, use of monetary bail secures the release of the accused without consideration of whether that release poses a danger to the community—thereby allowing potentially dangerous defendants to purchase their release. Once a bond is purchased and posted with the court, few if any conditions of release are imposed on a defendant, who has little to no accountability to the court for pretrial behavior. At the same time, many defendants with limited resources remain in jail because they cannot post bail. In posting bail to gain pretrial release, individuals and their families are often unnecessarily saddled with significant long-term debt regardless of the outcome of the case.

Alternatively, an effective risk-based pretrial assessment and supervision system gathers individualized information about each defendant so that courts can make release determinations based on whether a defendant poses a threat to public safety and is likely to return to court, without regard for the defendant's financial state. Furthermore, because this system includes a supervisory component, judges have release options that are more effective, more varied, and fair alternatives to monetary bail. These options may include weekly contact with a pretrial services officer, drug testing, location monitoring supervision, home confinement, text reminders, protective orders, curfew conditions, referral to specialized services, and supervision for defendants with mental illness, developmental disabilities, and/or co-occurring substance use and mental health disorders. An effective risk-based pretrial system also reinforces judicial authority to issue bench warrants and authorize arrest warrants that allow for release or detention based on facts and findings, and to have those orders properly enforced. The design and implementation of this binary system must specifically address bench and arrest warrants.

The adoption of an effective risk-based pretrial system also provides collateral benefits to the community by preserving scarce jail resources, maximizing public safety, and promoting stability in communities by allowing appropriate individuals accused of a crime to be released and to retain employment, housing, and support of their families during the case, and to remain connected to community resources to address their risk factors.

2. Expand the use of risk-based preventive detention.

In California's current bail system, when an accused person is booked, bail schedules are used to determine whether release from custody will occur without immediate and individual consideration of risk to public safety or likelihood of appearance. With the exception of crimes where no bail is set at the time of booking, this system does not address whether any conditions or set of conditions will adequately protect the public before release. The only factor that decides release before arraignment is whether the accused has the financial resources to post bond in the amount set by the bail schedule.

The current monetary bail system attempts to achieve preventive detention by adopting bail schedules or setting bail in amounts that are prohibitively expensive. Setting high bail amounts has evolved into the only mechanism available when a defendant is dangerous to the public or a flight risk but cannot be preventively detained under the current system. Not only are these practices ineffective in protecting public safety when a defendant has the economic resources to attain release on monetary bail, they also run afoul of constitutional prohibitions on excessive bail. These decisions, made without additional risk assessment information, can also erode confidence in judicial decision-making because they lack transparency and precision.

Expanding the use of preventive detention will ensure that, for the most serious cases, public safety will be addressed by the court before the defendant can be considered for release. In the limited number of cases where no condition or combination of conditions can assure public safety, judges must have the authority to detain individuals in custody to protect the public, victims, and witnesses. The California Constitution upholds preventive detention in certain circumstances when the court makes the requisite findings on the record.[176] Legislation and rules of court must be adopted to provide courts with guidance in making preventive detention decisions under existing authority.

3. Establish pretrial services in every county.

Pretrial services perform two critical tasks for the court. First, they assist courts in making prompt, fair, and effective release/detention decisions by gathering and presenting information about newly arrested defendants and the available release options for use by judicial officers. Second, they supervise those defendants released from pretrial custody by monitoring their compliance with the assigned conditions of

[176] Cal. Const., art. I, §§ 12, 28(f)(3).

release. Thus, pretrial services maximize the safety of the community[177] and minimize the risks of nonappearance at court proceedings. Essential components to an effective pretrial services system include adequate resources, funding, training, education, and outreach.

Pretrial services must be implemented in every county with the comprehensive use of a validated risk assessment instrument. The assessment results should be used as a factor to inform release decisions and levels of supervision. Pretrial services must be well equipped to effectively supervise and monitor people released pending trial. Tools for effective supervision may include court appearance reminders, required check-ins and other monitoring, referrals to drug and alcohol treatment and mental health services, testing for alcohol and drug use, and home detention and electronic monitoring.

The guidelines for pretrial services must be established by the Judicial Council to foster trust and confidence by the courts.

4. Use a validated pretrial risk assessment tool.

Judges are called on every day to make decisions that predict the likelihood that the accused will reoffend or fail to return to court. Comprehensive information is paramount to those decisions and this is enhanced with the information provided by the use of a validated risk assessment. Designed to objectively assess risk and minimize bias, effective risk assessment should inform, but never replace, the discretion of the court. Judicial officers must remain the final authority in making release or detention decisions and can override an assessment's recommendations when necessary to protect the public or in the interest of justice.

A validated pretrial risk assessment tool measures an individual's likelihood of returning to court or committing a new offense during pretrial release based on a variety of established factors. Typically, these instruments weigh static factors of an individual's background—such as history of failures to appear, prior convictions, current charge(s), and age—and assign a risk level based on the weight given to each of the factors.

The results of the risk assessments not only provide greater information during release determinations, but also assist the court in fashioning conditions or terms of pretrial release, including supervision level, drug/alcohol testing, referrals for treatment, or electronic monitoring.

The Judicial Council should adopt rules of court to provide guidance on the proper administration and use of pretrial risk assessments. Those who administer the risk

[177] National Association of Pretrial Services Agencies, *Standards on Pretrial Release* (3d ed. 2004), Standard 3.1.

assessment tools and conduct the assessments must be properly trained. Any risk assessment instrument must be transparent regarding the factors and algorithm used to determine risk levels, and must be validated regularly. Tools that demonstrate any implicit or explicit bias must not be used, and cases involving intimate partner violence or sexual assault require specialized risk assessment.

Individuals with mental health or substance use disorders should be screened for referral to appropriate treatment, services, and resources. Pretrial detention should be used only to protect public safety and not as a way to force treatment.

5. Make early release and detention decisions.

Release and detention decisions should be made at the earliest possible point in the pretrial process. Longer pretrial detentions are associated with the likelihood of subsequent criminal activity, especially for those defendants assessed as low risk. Moreover, defendants who do not have the financial means to secure pretrial release may experience an array of negative impacts, including an adverse effect on defendants' ability to consult with counsel and prepare a defense, financial impacts on their families, less-favorable outcomes at trial and sentencing, and the fiscal burden that pretrial incarceration imposes on society at large.[178]

California should implement a pretrial system that gathers information about a defendant for review before arraignment. Doing so would facilitate the early release of low-risk defendants and the detainment, until arraignment, of defendants who are unlikely to return to court or who pose a higher degree of risk to public safety.

California should adopt these early release and detention procedures through legislation and rules of court. These procedures must preserve due process and promote efficient and effective justice system procedures. As early as practical, courts should be provided with risk assessment scores, criminal history, the facts of the charges, victim input, and recommendations for terms and conditions of release or detention.

These procedures maximize public safety, early release, the likelihood of return, and the judicious use of limited justice system resources. The effective cite-and-release policies and procedures currently used by law enforcement and prearraignment diversion programs should continue to operate to further these goals.

6. Integrate victim rights into the system.

The perspective of victims must be fully integrated into the pretrial process and the risks to their well-being addressed in pretrial decision-making. All crime victims

[178] See *State v. Brown* (N.M. 2014) 2014-NMSC-038, citing H.R. Rep. No. 89-1541 (1966), reprinted in 1966 U.S. Code Cong. & Admin. News, pp. 2293, 2299.

have constitutional rights in the state of California.[179] They have the right to be heard regarding any pretrial release decision, and their input is essential to a well-functioning system. Despite these protections, under the current system, if the accused has the financial resources to secure his or her liberty, it is often without any conditions placed on release.

In the development of the pretrial system, care must be taken to assure that all victims are offered the opportunity to be heard and for their input to be taken into account. Special consideration is required in cases involving intimate partner violence, child abuse, stalking, and sexual assault: the accused may pose a different type and level of threat because perpetrators may be part of the family structure and their incarceration or release can more greatly affect the victim's physical, economic, and psychological well-being, including the pressure to post bail for the accused.

Specialized, validated risk assessment and supervision methods must be used for cases involving these particularly vulnerable populations. Judicial officers must be trained in and mindful of the challenges posed in cases involving crime victims and incorporate that understanding into their pretrial release and detention decision-making. If the accused is released pending trial, appropriate conditions, such as protective orders and electronic monitoring with inclusion and exclusion zones, must be available and ordered, with intensive supervision and monitoring.

7. Apply pretrial procedures to violations of community supervision.

The court often issues "no bail" arrest warrants for those defendants who violate the terms of community supervision. Thirty-nine jails in 19 counties have population caps, and jail population management issues are most acute in these jurisdictions. A significant portion of the jail population includes individuals accused of violating the terms and conditions of probation, mandatory supervision, postrelease community supervision, or parole.

When arrested on a no-bail warrant, a person is held in custody and cannot be released by jail authorities until disposition of the case, which can place a significant impact on limited jail resources. In addition, these defendants are also subject to the previously identified negative impacts of detention. In development of a pretrial system, legislation and rules of court must be adopted that consider the pretrial release and detention screening procedures for defendants alleged to be in violation of the conditions of their supervision.

8. Provide adequate funding and resources.

California's courts and local justice system partners must be fully funded to effectively implement a system of pretrial release and detention decision-making and

[179] Cal. Const., art. I, § 28(b).

supervision, including having resources for new judges and court staff, infrastructure for local justice partners, assessment tools, and training. Adequate funding must be available to ensure effective, accurate, and complete systemic data collection and exchange between justice system partners.

Significant initial investment of resources and ongoing funding are essential. If this system relies on anticipated savings to cover new and continuing costs, it is likely to fail before the public gains any benefits. Without adequate and consistent funding, the system cannot be effective, which may result in a rise in the number of accused who fail to appear in court and an increased risk to public safety.

9. Deliver consistent and comprehensive education.

For a robust pretrial system to succeed, comprehensive and ongoing education is imperative. Judges, court staff, local justice system partners, and the community must be educated on the development and implementation of a pretrial release and supervision system to effectively achieve the goals of public safety and return to court. This education requires time, funding, and most important, investment in and collaboration among all justice system partners.

The Judicial Council should set guidelines for mandatory, ongoing training for the judicial branch, as well as for those administering pretrial assessments and providing recommendations and supervision services.

10. Adopt a new framework of legislation and rules of court to implement these recommendations.

A sustainable structure can only be built on a solid foundation. To undertake such comprehensive reform, this system must not be grafted onto the current complex statutory framework of monetary bail. Provisions currently in the California Constitution that presume release, permit preventive detention, and protect victims' rights will serve as the bedrock of a reformed pretrial system that balances public safety, release, and return to court. Comprehensive legislation and rules of court should be adopted to create the system of release and detention recommended in this report. Issues that are appropriate for rules of court include the proper use of risk assessment information by judicial officers, court procedures for implementing release and detention, and guidelines for pretrial services.

A statutory effective date should be set that provides courts and justice system partners with sufficient time to fully implement this pretrial release and detention reform.

Conclusion

Chief Justice Tani G. Cantil-Sakauye established the Pretrial Detention Reform Workgroup in October 2016 to study California's current pretrial detention and release system and to develop recommendations for any needed changes. In establishing the Workgroup, the Chief Justice recognized the central role of courts.

During the course of its yearlong study, the Workgroup determined that California's current bail system unnecessarily compromises victim and public safety because it bases a person's liberty on financial resources rather than the likelihood of future criminal behavior and exacerbates socioeconomic disparities and racial bias.

The recommendations in this report seek to achieve a just and fair pretrial release and detention system that upholds due process, the presumption of innocence, and the protection of public safety. No one recommendation stands alone. All the recommendations are intended to be viewed and implemented as a whole. If adopted, the reforms envisioned in these recommendations will make major and dramatic changes to California's criminal justice system and will affect the superior courts in every county and all of their justice system partners.

As with any comprehensive reform, it will be successful only if all three branches of California's government join together in its development, implementation, and maintenance. A foundation built on strong and deliberate legislation, clear and directive court rules, and adequate and sustained resources with new funding streams is essential to the reform envisioned in these recommendations. These changes will help make California a safer place and the justice system more fair and effective.

Appendix A: Comprehensive List of Presenters to the Pretrial Detention Reform Workgroup, January–July 2017

National Experts on Effective Pretrial Process, Bail, and Risk Assessment

Dr. Michael R. Jones, Director of Implementation, Pretrial Justice Institute
Dr. Edward J. Latessa, School of Criminal Justice, University of Cincinnati
Mr. Jim Sawyer, Executive Director, National Association of Pretrial Services Agencies (NAPSA)
Mr. Tim Schnacke, Executive Director, Center of Legal and Evidence-Based Practices

Bail Industry and Regulation

Mr. Dan Baker, Chief Inspector, Inspector General's Office, County of Los Angeles
Mr. Jeffrey J. Clayton, Executive Director/Policy Director, American Bail Coalition
Mr. Eric Hubner, Captain, Fraud Division Regional Offices, California Department of Insurance
Hon. Dave Jones, Insurance Commissioner, California Department of Insurance

Judicial Representatives from Other Jurisdictions

Ms. Tara Boh Blair, Executive Officer, Kentucky Department of Pretrial Services
Hon. Martin G. Cronin, Superior Court Judge, Essex County, New Jersey Superior Court
Hon. Truman A. Morrison III, Senior Judge, Superior Court of the District of Columbia
Hon. Nan G. Nash, Chief Judge, Second Judicial District Court, Bernalillo County, New Mexico

Justice System Partners

Chief Mary Butler, President, Chief Probation Officers of California; Chief Probation Officer, County of Napa
Mr. Chuck Denton, President, California Public Defenders Association; Assistant Public Defender, County of Alameda
Sheriff Michael Durant, President, Peace Officer Research Association of California (invited but did not present)
Mr. Stephen Kaplan, County Behavioral Health Directors Association (CBHDA), CBHDA Representative and Director, Behavioral Health and Recovery Services, County of San Mateo
Ms. Darby Kernan, California State Association of Counties (CSAC), CSAC Legislative Representative
Ms. Cris Lamb, President, California Attorneys for Criminal Justice

Commander Tom Madigan, California State Sheriffs' Association (CSSA), CSSA Representative; Alameda County Sheriff's Office
Chief Jennifer Tejada, California Police Chiefs Association (CPCA), CPCA Representative; City of Emeryville Police Department
Mr. Stephen M. Wagstaffe, President, California District Attorneys Association; District Attorney, County of San Mateo

Court Executive Officers

Ms. Sheri Carter, Court Executive Officer, Superior Court of Los Angeles County
Ms. Melissa Fowler-Bradley, Court Executive Officer, Superior Court of Shasta County
Mr. Terry McNally, Court Executive Officer, Superior Court of Kern County
Mr. Mike Planet, Court Executive Officer, Superior Court of Ventura County

Representatives from California Pretrial Programs

Chief Deputy Jamie Clayton, Corrections, Imperial County Sheriff's Office
Chief William Damiano, Chief Probation Officer, Humboldt County
Mr. Garry Herceg, Deputy County Executive, Santa Clara County
Hon. Joyce D. Hinrichs, Presiding Judge, Superior Court of Humboldt County
Hon. Risë Pichon, Judge, Superior Court of Santa Clara County

Public Policy Institute of California (PPIC)—Data Analysis

Ms. Mia Bird, Research Fellow
Mr. Ryken Grattet, Adjunct Fellow
Mr. Viet Nguyen, Research Associate

Victims' Rights

Ms. Domenica Cardenas, Volunteer Victim Advocate, Mothers Against Drunk Driving
Mr. Aaron Fischer, Senior Counsel, Disability Rights California
Ms. Sandra Henriquez, Executive Director, California Coalition Against Sexual Assault
Ms. Marilyn McMullen, Volunteer Victim Advocate, Mothers Against Drunk Driving
Ms. Kathy Moore, Executive Director, California Partnership to End Domestic Violence (invited but did not present)
Ms. Nina Salarno-Besselman, Executive Director, Crime Victims United
Ms. Elizabeth Siggins, Stepping Up Initiative, Council of State Governments Justice Center
Ms. Natasha Thomas, Program Director, Mothers Against Drunk Driving
Hon. Charles E. Wilson, Supervising Judge, Superior Court of Santa Clara County, Family Violence Division

Civil Rights Organizations

Ms. Lenore Anderson, Executive Director, Californians for Safety and Justice
Ms. Margaret Dooley-Sammuli, Criminal Justice & Drug Policy Director, ACLU of California
Mr. Raj Jayadev, Chief Executive Officer, Silicon Valley De-Bug
Mr. Zachary Norris, Executive Director, Ella Baker Center for Human Rights

Private Citizens Impacted by the Pretrial Process

The Pretrial Detention Reform Workgroup also heard from two people personally impacted by the pretrial detention process. One was an individual whose father was killed by a drunk driver who then committed additional crimes while out on bail and awaiting trial. The other person was arrested in Santa Clara County and had a positive experience with the Pretrial Services Department.

Appendix B: Informational Materials Provided to the Pretrial Detention Reform Workgroup

Partial listing; all websites last accessed on September 27, 2017.

National Pretrial Resources

American Bail Coalition, "Resources" (resource articles and bail bond studies), www.americanbailcoalition.org/resources/.

Conference of Chief Justices, Resolution 3: Endorsing the Conference of State Court Administrators Policy Paper on Evidence-Based Pretrial Release (adopted Jan. 30, 2013), http://ccj.ncsc.org/%7E/media/Microsites/Files/CCJ/Resolutions/01302013-pretrial-release-Endorsing-COSCA-Paper-EvidenceBased-Pretrial-Release.ashx.

Conference of State Court Administrators, *Evidence-Based Pretrial Release* (2012–2013 Policy Paper), http://cosca.ncsc.org/%7E/media/Microsites/Files/COSCA/Policy%20Papers/Evidence%20Based%20Pre-Trial%20Release%20-Final.ashx.

William F. Dressel & Barry Mahoney, *Pretrial Justice in Criminal Cases: Judges' Perspectives on Key Issues and Opportunities for Improvement* (National Judicial College, 2013), www.judges.org/wp-content/uploads/pretrial-whitepaper0513.pdf.

National Center for State Courts, Pretrial Justice Center for Courts, *Pretrial Justice Briefs,* www.ncsc.org/Microsites/PJCC/Home/Pretrial-Justice-Briefs.aspx.

National Center for State Courts, *Trends in State Courts 2017—Fines, Fees, and Bail Practices: Challenges and Opportunities*, www.ncsc.org/~/media/Microsites/Files/Trends%202017/Trends-2017-Final-small.ashx.

National Conference of State Legislatures, *Pretrial Policy Law Database: Pretrial Release Conditions* (2016), www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-conditions.aspx.

National Institute of Corrections, *Pretrial Justice: How to Maximize Public Safety, Court Appearance and Release* (2016), https://nicic.gov/library/032719.

Research and Evaluation

Jon Kleinberg et al., *Human Decisions and Machine Predictions* (National Bureau of Economic Research, Feb. 2017), Working Paper No. 23180, www.nber.org/papers/w23180.

Laura and John Arnold Foundation (LJAF), *LJAF Research Summary: Pretrial Criminal Justice Research* (2013), www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-Pretrial-CJ-Research-brief_FNL.pdf.

National Institute of Corrections, *A Framework for Pretrial Justice: Essential Elements of an Effective Pretrial System and Agency* (2017), https://s3.amazonaws.com/static.nicic.gov/Library/032831.pdf.

Megan Stevenson & Sandra Mayson, *Bail Reform: New Directions for Pretrial Detention and Release* (2017), University of Pennsylvania Law School Public Law Research Paper No. 17-18, *https://ssrn.com/abstract=2939273*.

Marie VanNostrand, Kenneth J. Rose & Kimberly Weibrecht, *State of the Science of Pretrial Release Recommendations and Supervision* (2011), Pretrial Justice Institute, www.pretrial.org/download/research/PJI%20State%20of%20the%20Science%20Pretrial%20Recommendations%20and%20Supervision%20%282011%29.pdf.

Risk Assessment

John S. Goldkamp, "Judicial Responsibility for Pretrial Release Decisionmaking and the Information Role of Pretrial Services" (1993) 57 *Fed. Probation* 30.

Laura and John Arnold Foundation (LJAF), *Public Safety Assessment: Risk Factors and Formula* (2016), www.arnoldfoundation.org/wp-content/uploads/PSA-Risk-Factors-and-Formula.pdf.

Edward Latessa et al., *Creation and Validation of the Ohio Risk Assessment System: Final Report*, University of Cincinnati, School of Criminal Justice, Center for Criminal Justice Research (2009), www.ocjs.ohio.gov/ORAS_FinalReport.pdf.

Cynthia A. Mamalian, *State of the Science of Pretrial Risk Assessment* (U.S. Dept. of Justice, Bureau of Justice Assistance, 2010), www.bja.gov/publications/pji_pretrialriskassessment.pdf.

National Institute of Corrections, *Virginia Pretrial Risk Assessment Instrument (VPRAI)* (Virginia Department of Criminal Justice Services, 2009), https://nicic.gov/library/024545.

Sarah Picard-Fritsche et al., *Demystifying Risk Assessment: Key Principles and Controversies* (Center for Court Innovation, 2017), www.courtinnovation.org/sites/default/files/documents/Monograph_March2017_Demystifying%20Risk%20Assessment_1.pdf.

Charles Summers & Tim Willis, *Pretrial Risk Assessment: Research Summary* (2010), Bureau of Justice Assistance, U.S. Department of Justice, www.bja.gov/Publications/PretrialRiskAssessmentResearchSummary.pdf.

Bail

Jeff Clayton, presentation to the Advisory Group on Pretrial Release and Detention of the Connecticut Sentencing Commission (2016), American Bail Coalition.

Council of Economic Advisors Issue Brief, *Fines, Fees, and Bail: Payments in the Criminal Justice System That Disproportionately Impact the Poor* (2015), https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf.

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Eric Helland & Alexander Tabarrok, *The Fugitive: Evidence on Public Versus Private Law Enforcement from Bail Jumping* (2004), 47 *J. Law & Econ.* 93, https://mason.gmu.edu/~atabarro/PublicvsPrivate.pdf.

Michael R. Jones, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option* (2013), Pretrial Justice Institute, www.pretrial.org/download/research/Unsecured+Bonds,+The+As+Effective+and+Most+Efficient+Pretrial+Release+Option+-+Jones+2013.pdf.

Curtis E. Karnow, *Setting Bail for Public Safety* (2008), 13 *Berkeley J. Crim. L.* 1, http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1013&context=bjcl.

Robert G. Morris, *Pretrial Release Mechanisms in Dallas County, Texas: Differences in Failure to Appear (FTA), Recidivism/Pretrial Misconduct, and Associated Costs of FTA* (2013), University of Texas at Dallas, www.dallascounty.org/Assets/uploads/docs/cjab/meetings/2013/DalcoPres_Final_1-28-13.pdf.

Timothy R. Schnacke, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform* (2014), National Institute of Corrections, U.S. Department of Justice, https://nicic.gov/library/028360.

Timothy R. Schnacke, *Money as a Criminal Justice Stakeholder: The Judge's Decision to Release or Detain a Defendant Pretrial* (2014), National Institute of Corrections, U.S. Department of Justice, https://nicic.gov/library/029517.

State of New Jersey Commission of Investigation, *Inside Out: Questionable and Abusive Practices in New Jersey's Bail-Bond Industry* (2014), www.nj.gov/sci/pdf/BailReportSmall.pdf.

Jerry W. Watson & L. Jay Labe, Chapter 8, "Commercial Bail Bonds," in Samuel J. Arena, Jr., Bruce Charles King & Richard E. Towle, *The Law of Commercial Surety and Miscellaneous Bonds* (American Bar Association, 2d. ed 2012), www.americanbailcoalition.org/wp-content/uploads/2016/01/ABA-Bail-Chapter-Commercial-Bail-Bonds.pdf.

California Pretrial Resources

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California Forward/Partnership for Community Excellence, *Pretrial Detention & Community Supervision: Best Practices and Resources for California Counties* (2012), https://caforward.3cdn.net/7a60c47c7329a4abd7_2am6iyh9s.pdf.

County of Santa Clara Bail and Release Work Group, *Final Consensus Report on Optimal Pretrial Justice* (2016), http://sccgov.iqm2.com/Citizens/Detail_LegiFile.aspx?MeetingID=7963&ID=82867.

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Kristy Pierce-Danford & Meghan Guevara, *Creating an Effective Pretrial Program: A Toolkit for Practitioners* (2013), Californians for Safety and Justice, http://libcloud.s3.amazonaws.com/211/9f/a/223/CSJ_pretrial_toolkit.pdf.

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Victims' Rights

National Center for State Courts, Pretrial Justice Center for Courts, *Addressing Victims' Rights in Pretrial Justice Reform* (2015), www.ncsc.org/~/media/Microsites/Files/PJCC/Pretrial%20victims%20issues%20brief%20Final.ashx.

Mental Illness

Council of State Governments Justice Center, *On the Over-Valuation of Risk for People with Mental Illnesses* (2015), https://csgjusticecenter.org/wp-content/uploads/2016/03/JC_MH-Consensus-Statements.pdf.

Hallie Fader-Towe & Fred C. Osher, *Improving Responses to People with Mental Illness at the Pretrial Stage: Essential Elements* (2015), developed by the Council of State Governments Justice Center, https://csgjusticecenter.org/wp-content/uploads/2015/09/Improving_Responses_to_People_with_Mental_Illnesses_at_the_Pretrial_Stage_Essential_Elements.pdf

Pretrial Resources—Other States/Areas

Arizona

Arizona Supreme Court, Administrative Order No. 2014-12, Arizona Code of Judicial Administration § 5-201: Evidence-Based Pretrial Services (adopted Jan. 10, 2014), www.azcourts.gov/Portals/22/admorder/Orders14/2014-12.pdf.

Arizona Supreme Court, *Justice for All—Report and Recommendations of the Task Force on Fair Justice for All: Court-Ordered Fines, Penalties, Fees, and Pretrial Release Policies* (2016), www.azcourts.gov/LinkClick.aspx?fileticket=bmEC0PU-FD8%3d&portalid=74.

Illinois

Supreme Court of Illinois news release, "Illinois Supreme Court Adopts Statewide Policy Statement for Pretrial Services" (Apr. 28, 2017), www.illinoiscourts.gov/media/PressRel/2017/042817.pdf.

Kentucky

Kentucky Court of Justice, Administrative Office of the Courts, Pretrial Services, *Pretrial Reform in Kentucky* (Jan. 2013), www.pretrial.org/download/infostop/Pretrial%20Reform%20in%20Kentucky%20Implementation%20Guide%202013.pdf.

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New Jersey

New Jersey Judiciary, *Criminal Justice Reform Annual Report to the Governor and the Legislature* (2016), www.judiciary.state.nj.us/courts/assets/criminal/2016cjrannual.pdf.

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Appendix C: Codifying Pretrial Standards Nationwide—Professional Standards

In 1964, the **American Bar Association (ABA)** first developed standards on pretrial release as part of its Criminal Justice Standards. In 2002, the ABA approved the inclusion of a standalone volume on pretrial release into the compendium of its criminal justice standards.[1]

Drawing on the experience of individual jurisdictions as well as the ABA standards, the **National Association of Pretrial Services Agencies (NAPSA)**, a membership organization of pretrial services practitioners and others interested in pretrial justice reform, created its Pretrial Release Standards, published in 1978. The standards sought to define realistically achievable goals and sound pretrial release practices. These standards are designed to (1) minimize the use of secure detention for defendants awaiting trial, utilizing detention space only when clearly necessary; and (2) provide for the use of mechanisms that, to the extent reasonably possible, will assure that released defendants will make required court appearances and will not pose an undue risk to the safety of the community and of individual persons.[2]

The **National District Attorneys Association (NDAA)** developed National Prosecution Standards, with commentary, that were most recently updated in 2009. The NDAA Standards include a section on pretrial considerations that addresses screening, charging, diversion, and pretrial release.[3]

These sets of standards have been revised and continue to be reviewed to address emerging issues facing pretrial decision-makers and the changes that have taken place in practices, technology, case law, and program capabilities that have influenced the development of pretrial release programs across the country.

A copy of the **Conference of Chief Justices' 2013 resolution** endorsing and supporting the Conference of State Court Administrators' policy paper, *Evidence-Based Pretrial Release*, follows. The resolution urged "court leaders [to] promote, collaborate, and accomplish the adoption of evidence-based assessment of risk in setting pretrial release conditions."

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[1] ABA Standards for Criminal Justice: Pretrial Release (3d ed. 2007), *www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_toc.html.*

[2] NAPSA Standards on Pretrial Release (3d ed. 2004), *https://drive.google.com/file/d/0B1YIoljVNUF5NmJkY0wzRHR1Tmc/view*.

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CONFERENCE OF CHIEF JUSTICES

Resolution 3

Endorsing the Conference of State Court Administrators Policy Paper on Evidence-Based Pretrial Release

WHEREAS, pretrial judicial decisions about release or detention of defendants before disposition of criminal charges have a significant, and sometimes determinative, impact on thousands of defendants every day; and

WHEREAS, pretrial release decisions add great financial stress to publicly funded jails holding defendants who are unable to meet financial conditions of release; and

WHEREAS, many of those incarcerated pretrial do not present a substantial risk of failure to appear or a threat to public safety, but do lack the financial means to be released; and

WHEREAS, evidence-based assessment of the risk that a defendant will fail to appear or will endanger others, if released, can increase successful pretrial release without imposing unnecessary financial conditions that many defendants are unable to meet; and

WHEREAS, defendants who are detained can suffer job loss, home loss, and disintegrated social relationships, and, according to the Bureau of Justice Assistance, "receive more severe sentences, are offered less attractive plea bargains and are more likely to become 'reentry' clients because of their pretrial detention regardless of charge or criminal history;" and

WHEREAS, imposing conditions on a defendant that are appropriate for that individual following a valid pretrial assessment substantially reduces pretrial detention without impairing the judicial process or threatening public safety; and

WHEREAS, in 2012 the Conference of State Court Administrators (COSCA) adopted a Policy Paper on Evidence-Based Pretrial Release, which concludes with the following recommendations to state court leaders:

- Analyze state law and work with law enforcement agencies and criminal justice partners to propose revisions that are necessary to support risk-based release decisions of those arrested and ensure that non-financial release alternatives are utilized and that financial release options are available without the requirement for a surety;
- Collaborate with experts and professionals in pretrial justice at the national and state levels;
- Take the message to additional groups and support dialogue on the issue;

- Promote the use of data including determining what state and local data exist that would demonstrate the growing problem of jail expense represented by the pretrial population, and that show the risk factors presented by that population may justify broader pretrial release; and

- Reduce reliance on bail schedules in favor of evidence-based assessment of pretrial risk of flight and threat to public safety.

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices commends and endorses the Policy Paper on Evidence-Based Pretrial Release and joins with Conference of State Court Administrators to urge that court leaders promote, collaborate, and accomplish the adoption of evidence-based assessment of risk in setting pretrial release conditions and advocate for the presumptive use of non-financial release conditions to the greatest degree consistent with evidence-based assessment of flight risk and threat to public safety and to victims of crimes.

Adopted as proposed by the CCJ/COSCA Criminal Justice Committee at the Conference of Chief Justices 2013 Midyear Meeting on January 30, 2013.

Appendix D: Recent Federal Bail Litigation

Note: This Appendix was prepared by Judicial Council staff and is intended to provide factual information about relevant current and past cases; the summaries are not intended to take a position on any of the pending litigation.

California

***Buffin v. City & County of San Francisco*[1]**

The plaintiff, Buffin, was arrested and detained on $30,000 bail. Plaintiff alleged that she earned $10.25 an hour and lived with her mother and younger brothers. After two days in jail, she was released when the District Attorney's Office declined to file formal charges. Her coplaintiff, Ms. Patterson, was detained on $150,000 bail. Ms. Patterson alleged that she earned $12.50 an hour providing in-home care services and was the primary caregiver for her grandmother. Ms. Patterson was released after 31 hours in jail when her relatives posted one percent of the bail amount and she signed a commercial bail agreement to finance the balance of the $15,000 bond fee. The District Attorney's Office subsequently declined to file formal charges.

The complaint challenges the San Francisco County Sheriff's use of a bail schedule to detain a person prior to review by a judicial officer. State law imposes a duty on superior court judges to "prepare, adopt, and annually revise a uniform countywide schedule of bail" for all bail-eligible offenses (except Vehicle Code infractions).[2] The sheriff then determines a particular arrestee's bail amount by referencing the bail schedule.[3] Plaintiffs alleged that Penal Code section 1269b is unconstitutional because it requires or permits "wealth-based detention without an inquiry into an individual's ability to make a monetary payment" and has the effect of requiring secured money bail, leading San Francisco to detain individuals solely because they cannot afford the cost of release. In their Motion to Dismiss, the defendants—the City and County of San Francisco, the sheriff, the State of California, and the Attorney General—asserted that 20 years ago a federal court in this district rejected a wealth-based equal protection challenge to California's bail schedule.[4] They argued, inter alia, that California law permits counties to have prearraignment interview programs to facilitate own recognizance release of arrestees, and that San Francisco has such a program.

The initial order in *Buffin* granted the state's motion to dismiss on grounds of sovereign immunity. In its October 14, 2016 order, the court granted San Francisco's motion to dismiss but denied the sheriff's motion with respect to injunctive or declaratory relief,

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[1] (N.D. Cal., Oct. 28, 2015, No. 4:15-cv-04959).

[2] Pen. Code, § 1269b(c).

[3] Pen. Code, § 1269b(a).

[4] *Leach v. Santa Clara County Bd. of Supervisors* (N.D. Cal., Jan. 4, 1995, No. C 94-20438 JW) 1995 U.S. Dist. Lexis 20792 (not reported in F.Supp).

leaving the sheriff as the sole remaining defendant. In her Answer filed on November 1, 2016, the sheriff stated, "The Sheriff is required to enforce the State's law, and she will, unless and until its unconstitutionality is established in the courts. But she is not required to defend it, and she will not." After the sheriff represented that she would not defend the bail laws, the court granted the California Bail Agents Association's (CBAA) Motion to Intervene, but prohibited CBAA from expanding the scope of the action or raising new issues. Discovery is underway in the case, with a hearing on motions scheduled for December 12, 2017.

***Welchen v. County of Sacramento*[5]**

The plaintiff, Gary Welchen, was arrested and detained on $10,000 bail. Plaintiff alleged that he was a 50-year-old former contractor and roofer whose sole source of income was his social security disability payments. Sacramento County, the Attorney General, and the county sheriff were named as defendants. In its order of October 10, 2016, the court denied the Attorney General's motion to dismiss on grounds of sovereign immunity, granted the defendants' motion to dismiss on the equal protection claim, and granted the Motion for a More Definite Statement as to plaintiffs' due process claim. The court noted that the U.S. Supreme Court had held in *United States v. Salerno*[6] that when the government institutionalizes an adult it triggers heightened scrutiny under the due process clause.

In their brief addressing the due process claims, the plaintiffs argued that there is no evidence that inability to pay bail correlates with unmanageable risk of flight or public safety, and that setting bail based on the charges does not constitute an individualized assessment that satisfies due process. In her motion to dismiss, the Attorney General stated that she would defend only the facial constitutionality of California's bail law, and would not defend any application of bail law that could potentially implicate due process concerns by not taking ability to pay or alternative methods of ensuring appearance at trial into consideration.

The sheriff's motion to dismiss argued a county "policy" is nothing more than ministerial compliance with state law and court orders, and that "the true objects of Plaintiff's lawsuit are the allegedly unconstitutional actions of others—the State, which enacted the law requiring a bail schedule and other laws that allow the imposition of money bail, and the judges of the superior court, who establish the amounts in the schedule and set bail in arrest warrants and bail orders in individual criminal proceedings." The hearing on the motions to dismiss was held on January 12, 2017. To date, the court has not issued a ruling on those motions.

[5] (N.D. Cal., Oct. 10, 2016, No. 2:16-cv-00185-TLN-DB).

[6] (1987) 481 U.S. 739.

Two earlier federal court cases are relevant to the *Buffin* and *Welchen* decisions. In 2007, in *Galen v. County of Los Angeles*,[7] the Ninth Circuit Court of Appeals considered the issue of bail from an Eighth Amendment "excessive bail" perspective. In *Galen*, the arrestee was charged with domestic violence and bail was ultimately set at $1 million. Galen brought an action under 42 U.S.C. § 1983 for an excessive bail violation. On appeal, the court held that Galen had not offered evidence that the bail commissioner had enhanced bail for an improper purpose, nor that his bail was excessive in light of the purpose for which it was set, and granted summary judgment.

The court noted that the Supreme Court has directly addressed the Eighth Amendment's "excessive bail" clause only three times.[8] The court relied on the *Salerno* case for its analysis, noting that "*Salerno* makes clear that the Excessive Bail Clause does not bar the state from detaining even noncapital arrestees without bail, or from considering interests other than flight prevention in setting bail."[9] Although the court recognized that the state may not set bail to achieve invalid interests nor in an amount that is excessive in relation to the valid interests it seeks to achieve, the court found that "[t]he plain meaning of 'excessive bail' does not require that it be beyond one's means, only that it be greater than necessary to achieve the purposes for which bail is imposed."[10]

The defendants in *Buffin* referenced an unreported 1995 case, *Leach v. Santa Clara County Board of Supervisors*, decided by the U.S. District Court for the Northern District.[11] The plaintiff in *Leach* alleged that the system of pretrial bail violated the equal protection guarantees of the Fourteenth Amendment by treating rich and poor arrestees differently, and requested a declaratory judgment. The court found that the allegation did not present a cognizable claim because "California's system for pretrial bail is not set up as plaintiff alleges," with bail for each offense set at a high, predetermined, unchangeable amount. The court noted that, although each county in California sets a general schedule of bail, that amount may be reduced or avoided on a showing of good cause, and a magistrate may release a bailable arrestee on his own recognizance.[12] The court held that "[t]he availability of a reduction or elimination of bail shows that there is no systemic

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[7] (9th Cir. 2007) 477 F.3d 652.

[8] See *United States v. Salerno* (1987) 481 U.S. 739; *Carlson v. Landon* (1952) 342 U.S. 524; *Stack v. Boyle* (1951) 342 U.S. 1.

[9] *Galen v. County of Los Angeles* (9th Cir. 2007) 477 F.3d 652, 659.

[10] *Id.* at pp. 661–662.

[11] (N.D. Cal., Jan. 4, 1995, No. C 94-20438 JW) 1995 U.S. Dist. Lexis 20792 (not reported in F.Supp).

[12] *Id.* at p. *12.

equal protection violation"[13] and, in dismissing the suit, noted that the "[p]laintiff may raise his equal protection challenge to bail in the pending state criminal action."[14]

Other States

Since 2015, there have been at least 12 federal civil rights challenges to the money bail system pursued in nine different states brought under 42 U.S.C. § 1983 and 28 U.S.C. § 2201 alleging violations of the equal protection and due process clauses of the Fourteenth Amendment to the U.S. Constitution. Most involved misdemeanant defendants in small towns and cities in the southern United States. For seven of those communities, the litigation resulted in settlement agreements that significantly revised their pretrial release system, reducing or eliminating the use of money bail, providing for own recognizance or release on an unsecured bond, and improving procedures for notifying arrestees of court dates.[15] Other cases continue to be litigated.

***Pierce v. City of Velda City, Missouri*[16]**

In *Pierce v. City of Velda City, Missouri*, the city had a policy and practice of detaining arrestees for at least three days unless they paid a bond amount based on a schedule. The parties entered into a settlement agreement under which the city agreed to end the use of the cash bail system. At the request of the parties, the court agreed to enter a declaratory judgment that stated "no person MAY, consistent with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, be held in custody after an arrest because the person is too poor to post a monetary bond."

***Varden/Jones v. City of Clanton, Alabama*[17]**

In two cases, *Varden/Jones v. City of Clanton, Alabama* and *Walker v. City of Calhoun, Georgia*, the U.S. Department of Justice (USDOJ) Civil Rights Division filed a statement of interest. In *Varden/Jones*, the plaintiff alleged that she was jailed because she was too poor to pay a small amount of bail money as automatically required by the city's bail schedule. The bail schedule provided no option to secure release on own recognizance or by an unsecured bond. In its statement of interest in support of the plaintiffs, USDOJ argued that fixed-sum bail systems are unconstitutional under the equal protection clause of the Fourteenth Amendment, and are also "bad policy." The parties settled the case with

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[13] *Ibid.*

[14] *Id.* at p. *14.

[15] The cases that were resolved with settlement agreements include: *Varden/Jones v. City of Clanton, Alabama; Pierce v. City of Velda City, Missouri; Powell v. City of St. Ann, Missouri; Thompson v. Moss Point, Mississippi; Cooper v. City of Dothan, Alabama; Snow v. Lambert (Ascension Parish, Louisiana); Martinez v. City of Dodge City, Kansas.*

[16] (E.D. Mo. 2015, No. 4:15-cv-570-HEA).

[17] (M.D. Ala. 2015, No. 2:15-cv-34-MHT-WC).

the defendants agreeing to a modified bail schedule and to hold a hearing within 48 hours for those unable to pay bail.

Walker v. City of Calhoun, Georgia[18]

In *Walker v. City of Calhoun, Georgia*, the plaintiff alleged that the city used a "fixed secured money-based detention scheme" that operated to detain the most impoverished misdemeanor arrestees. In January 2016, the court certified the plaintiff class, granted the plaintiff's motion for a preliminary injunction, and ordered the city to implement postarrest procedures that complied with the Constitution. The city appealed to the U.S. Court of Appeals for the Eleventh Circuit.

The USDOJ's Statement of Interest asserted that "a bail scheme that imposes financial conditions, without individualized consideration of ability to pay and whether such conditions are necessary to assure appearance at trial, violates the Fourteenth Amendment." Many *amici* submitted briefs representing a range of perspectives. In June 2017, the district court entered an order granting the Plaintiff's Motion for Preliminary Injunction and ordered the city to institute a process for verifying an arrestee's inability to pay and allowing for own recognizance release. The city filed an appeal to the Eleventh Circuit Court of Appeal seeking review and a motion to stay the proceedings until the appeal is decided. The motion to stay the proceedings pending the resolution of the appeal was granted in August 2017. The preliminary injunction remains in effect. On October 12, 2017, the circuit court granted appellee Walker additional time for filing a responsive brief and ordered that his motion to dismiss the appeal in part for lack of jurisdiction is carried with the case, noting that a final determination regarding jurisdiction will be made by the panel to whom the appeal is submitted after briefing on the merits is completed.

ODonnell v. Harris County, Texas, and Sheriff Hickman[19]

ODonnell v. Harris County, Texas, and Sheriff Hickman, a class action lawsuit filed in May 2016, challenges the "wealth-based" bail detention system in Harris County (Houston). The case is focused on misdemeanants, and although Texas law requires consideration of "the ability to make bail," the plaintiffs assert that bail is routinely set based on a bail schedule with no inquiry into defendants' ability to pay and typically no attorney present at the probable cause hearing. In April 2017, the court granted the plaintiffs' preliminary injunctive relief holding that Harris County's procedures violate the equal protection and due process clauses as a matter of law. The Court stated:

> [C]ourts may impose secured money bail beyond a defendant's ability to pay: (1) in cases of dangerous felony; (2) after finding that no alternative

[18] (N.D. Ga., Jan. 28, 2016, No. 4:15-cv-0170-HLM) 2016 U.S. Dist. Lexis 12305, vacated (11th Cir. 2017) 682 Fed. Appx. 721, notice of appeal filed (11th Cir., July 13, 2017, No. 17-13139).

[19] (S.D. Tex. 2016) 227 F.Supp.3d 706, stay denied pending appeal (5th Cir., June 6, 2017, No. 17-20333) 2017 U.S. App. Lexis 10252.

> to secured money bail can reasonably assure the defendant's appearance or public safety; (3) with the due process of a detention order if the secured money bail in fact operates to detain the defendant. … But they cannot, consistent with the federal Constitution, set that bail on a secured basis requiring up-front payment from indigent misdemeanor defendants otherwise eligible for release, thereby converting the inability to pay into an automatic order of detention without due process and in violation of equal protection.

The court ordered Harris County to immediately start releasing misdemeanor defendants within 24 hours of arrest with the exceptions of defendants who are also charged with felonies, violate a protective order, or are subject to other warrants. The court's order also required bail to be set within a defendant's financial means, and if the defendant cannot afford any bail, the court is required to release the defendant on a personal bond with the bail amount attached. The order went into effect on June 6, after the Fifth Circuit Court of Appeals denied the county's emergency motion to block the district court's preliminary injunction while the appeal is pending. In addition to the briefs of the parties, numerous amicus briefs have been filed, including one by the Conference of Chief Justices. The district court heard argument from counsel and, in its order of September 29, 2017, directed the County to use specific language when providing notice to arrestees. The notice explains that the interview by Pretrial Services gathers information that the court will use when making decisions about eligibility for release on a personal bond or money bail and appropriate conditions of release, and that the Financial Affidavit will be considered by the court in determining ability to pay money bail, determining the amount of money bail, and assessing alternatives to imposing money bail, including a personal bond. The Fifth Circuit Court of Appeals heard oral argument on October 3, 2017.

***Lopez-Valenzuela v. Arpaio*[20]**

Lopez-Valenzuela v. Arpaio is a 2014 case in which the Ninth Circuit Court of Appeals addressed substantive due process in the bail context. In *Lopez-Valenzuela,* the court, *en banc*, reversed the district court's summary judgment in a class action challenging Proposition 100, a ballot measure passed by Arizona voters. Prop. 100 amended the state Constitution to preclude bail for certain serious felony offenses if the person charged had entered or remained in the United States illegally and if proof is evident or the presumption great as to the charge. The court, using a "fundamental right" analysis, held that Prop. 100, and its implementing laws and rules, violated the substantive component of the due process clause of the Fourteenth Amendment.[21]

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[20] (9th Cir. 2014) 770 F.3d 772.

[21] *Id.* at p. 780: "We apply heightened scrutiny here because the Proposition 100 laws infringe a 'fundamental' right. (*Salerno*, 481 U.S. at 750.) The defendants' brief suggests that the Proposition 100 laws do not implicate a fundamental right, because '[b]ail ... is not a fundamental ... constitutional right,' but *Salerno* made clear that what is at stake here is 'the individual's strong interest in liberty,' and the

The Ninth Circuit drew on the U.S. Supreme Court's analysis in *Salerno*, and noted that the court focused on three considerations in holding the Bail Act of 1984 sufficiently tailored to satisfy heightened scrutiny. First, that the challenged provisions addressed "a particularly acute problem." Second, that "[t]he Act operates only on individuals who have been arrested for a specific category of extremely serious offenses," where Congress had "specifically found that these individuals are far more likely to be responsible for dangerous acts in the community after arrest." Third, that the act required "a full-blown adversary hearing" at which the government was required to "convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person."[22] The court in *Lopez-Valenzuela* found that none of those considerations existed with respect to Prop. 100; rather, the court found that Prop. 100 was overbroad, did not limit detention to extremely serious case types, and did not provide for adversarial hearings that would enable an individual determination of each defendant's likelihood of appearance or demonstrable danger to the community if released.

Litigation Addressing Recent Pretrial System Revisions

***Holland et al. v. Rosen et al.*[23]**

Holland is a class action for declaratory and injunctive relief, and damages challenging the Criminal Justice Reform Act (CJRA) that implements a revised pretrial release/detention system in New Jersey. The plaintiffs allege that the challenged act and voter-approved amendment of the New Jersey Constitution constitute a violation of the right to bail, due process, and unreasonable search and seizure.

Plaintiff Brittan Holland was arrested for second-degree aggravated assault on April 6, 2017, and plaintiff Lexington National is a Florida surety insurance corporation licensed to do business in New Jersey. They assert that the CJRA changed the landscape of the state's criminal justice system, replacing a system that guaranteed a monetary bail determination to all defendants, except those in certain capital cases, with a system that authorizes imposition of restrictive conditions such as electronic monitoring and home detention without an opportunity to post monetary bail.

The CJRA creates a five-stage process for courts to follow in making pretrial custody determinations for defendants charged with complaint-warrant offenses.[24] The court is mandated to order the pretrial release of a defendant on personal recognizance or an unsecured appearance bond when the court finds that release would reasonably assure the

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Court was careful 'not [to] minimize the importance and *fundamental* nature of this right' (emphasis added)."

[22] *United States v. Salerno* (1987) 481 U.S. 739, 750.

[23] (D.N.J., June 14, 2017, No. 1:17-cv-00776).

[24] N.J. Stat. Ann. § 2A:162-16d(1); see *State v. Robinson* (N.J. 2017) 160 A.3d 1.

eligible defendant's appearance in court when required, the protection of community safety and of any other person, and that the defendant will not attempt to obstruct the criminal justice process.[25] If the court finds that release on personal recognizance or an unsecured appearance bond will not provide the requisite assurance, the court may order pretrial release subject to the least restrictive condition or combination of conditions.[26]

Following arraignment, and with the agreement of the plaintiff, the court ordered release subject to conditions including home detention, electronic monitoring through a GPS-tracking ankle bracelet, and regular reporting to Pretrial Services. The plaintiffs assert that the conditions were severely disruptive, caused plaintiff Holland to worry about his job security, disrupted his family life and relationship with his son, and that, "under the CJRA, the court was not even allowed to consider the liberty-preserving option of monetary bail before imposing these liberty-restricting conditions on Plaintiff Holland."

On September 21, 2017, the plaintiffs' motion for preliminary injunctive relief was denied, and the plaintiffs appealed to the U.S. Court of Appeals for the Third Circuit. On September 29, 2017, the district court granted the plaintiffs' application for a stay of proceedings pending resolution of the interlocutory appeal to the Court of Appeals.

***Collins et al. v. Daniel et al.*[27]**

Collins is a class action challenging the New Mexico Supreme Court Rules, which implement a revised system of pretrial detention/release following a Senate Joint Resolution and voter-approved amendment of the New Mexico Constitution. The plaintiffs allege the rules were promulgated in violation of the New Mexico Constitution's separation of powers provisions, constitute a violation of the right to bail, and result in deprivation of liberty without due process of law and unreasonable search and seizure. The plaintiffs argue that the rules change the state's criminal justice system landscape by replacing a system that guaranteed a monetary bail determination to all defendants (except those in certain capital cases) with a system that authorizes imposition of restrictive conditions such as electronic monitoring, home detention, drug and alcohol prohibition, and travel limitations, without an opportunity to post a nonexcessive secured bond.

Plaintiff Darlene Collins was arrested for aggravated assault on July 2, 2017; plaintiff Bail Bond Association of New Mexico is a professional membership organization comprised of bail bond businesses licensed to do business and operating throughout

[25] N.J. Stat. Ann. § 2A:162-17a.38.

[26] N.J. Stat. Ann. § 2A:162-17b(1) & (2).

[27] (D.N.M., July 28, 2017, No. 1:17-cv-00776).

New Mexico. They are joined by three state senators and two state representatives. The defendants include the justices of the New Mexico Supreme Court.

In November 2016, the voters of New Mexico voted to amend the Constitution to add language regarding preventive detention and affirming that a person who is not a danger to public safety or a flight risk must not be detained solely because of financial inability to post bond.[28] Following the constitutional amendment, the New Mexico Supreme Court convened an ad hoc committee to recommend modified rules concerning pretrial release; these were adopted in June 2017.

The plaintiffs allege that the new rules barred the jail and the trial court from setting a secured bond for plaintiff Collins unless the court first determined that no combination of nonmonetary conditions would reasonably assure her appearance at arraignment, and that, as result of the denial of the option to post bail, plaintiff Collins was incarcerated for nearly five days and was required to be hospitalized.

Following arraignment, plaintiff Collins was released on a verbal order from the trial court that included a condition prohibiting her from returning to her home. She alleges that the loss of liberty prearraignment was severely disruptive, caused her medical problems and concerns for posttraumatic stress disorder, disrupted her family life, and "made her feel that her life was in jeopardy."

On September 7, 2017, the plaintiffs' motion for preliminary injunctive relief was denied. The judicial defendants then moved for rule 11 sanctions against plaintiffs' counsel.

[28] N.M. Const., art. II, § 13.

Appendix E: Other Jurisdictions

Kentucky

Key Elements

- Commercial bond was abolished in 1976.
- Most defendants are released on own recognizance and/or other nonfinancial means.
- No bail schedules; bail is set in some cases, and a small portion of defendants remain in custody on cash bond.
- No preventive detention in statutory scheme.
- Pretrial Services is a statewide entity, based in the judicial branch.

In 1976, as part of the Bail Bond Reform Act, Kentucky abolished commercial bail and established a unified court system. Kentucky was the first state to implement Pretrial Services on a statewide scale. Kentucky has four tiers of courts and overall authority for court governance in a state entity, the Administrative Office of the Courts. All court funding is through the state; funding of $12.4 million for the statutorily mandated, statewide Pretrial Services system is included in the judicial branch budget. Jails are funded by the counties. Pretrial Services staff are state employees and provide services to all 120 counties in Kentucky. The Chief Justice delegates decisions regarding Pretrial Services to the Director of the Administrative Office of the Courts.

Kentucky's pretrial system is governed by statute, which covers arrest through disposition, including pretrial and bail.[1] The Kentucky Supreme Court also promulgates rules that govern pretrial release and detention, including rule 4 of the Rules of Criminal Procedure and the Judicial Guidelines for Pretrial Release. Local jurisdictions cannot adopt a local order or rule that addresses the substance or process of the pretrial system. The statutory scheme for Kentucky's pretrial system does not provide for preventive detention.

A majority of Kentucky's pretrial defendants are released on own recognizance (OR) or other nonfinancial (NF) means. Some of those released on OR or NF are supervised; bail is set in some cases, and a small portion of defendants remain in custody on cash bond. Kentucky does not have commercial bail bonds. By statute, the court has to consider OR release for the defendant as the first option. If the court does not grant OR release, the second option is an unsecured bond or third-party (family or friend) noncommercial surety bond. For these, the court will set the dollar amount for the bond, but no money is posted with the court at the time of release from custody. If there is a failure to appear, the third party may be held in contempt. If the court does not grant an unsecured or

[1] Ky. Rev. Stat. §§ 431.062–431.068 (Chapter 431).

third-party bond, the court may impose financial conditions, but if the defendant has been determined to be low or moderate risk, the court must state on the record the reasons for the financial conditions. Kentucky also has an option for partially secured bonds in which the court retains 1 percent to 10 percent of the bond amount in escrow to cover the defendant's fines and fees. If the defendant is found not guilty or the case is dismissed, the defendant receives a full refund of the amount posted. The court can release the bond at any time; the money is returned to the defendant when the court converts a financial release to an OR release.

All offenses are "bailable" under the constitution, but Kentucky does not allow for bail schedules. On a new charge without a warrant, a defendant is not permitted to "bail out" of custody. If there is a warrant, then the court can place a financial condition on the warrant and a defendant who posts the bail can be released without an assessment by Pretrial Services, but this is relatively uncommon.

The Kentucky Pretrial Services program has served as a model for other states. After a defendant is arrested by law enforcement with a warrant or on probable cause and booked into county jail, the defendant is contacted by Pretrial Services, which is on duty 24/7 in almost all of Kentucky's counties. The Supreme Court and administrative procedures require a risk assessment to be completed within 24 hours of booking. As part of the risk assessment process, Pretrial Services enters charging documents into the court's case management system and reviews criminal history through the National Crime Information Center and through Kentucky's criminal history database, CourtNet. After criminal history review, Pretrial Services administers a risk assessment to obtain a risk assessment score and conducts a brief interview. Kentucky uses the Arnold Public Safety Assessment-Court (PSA-Court) risk assessment instrument for all defendants with bailable offenses. In the interview, which usually takes two to five minutes, Pretrial Services obtains the defendant's contact information for text and phone call reminders of court dates and other appointments, as well as address, employment information, basic demographics, the number of dependents who live with the defendant, and whether the defendant thinks he or she has a substance-abuse problem. None of the information obtained during the defendant interview factors into the risk assessment. It can take Pretrial Services staff up to 45 minutes to complete all of the elements of a full risk assessment, including background checks.

Pretrial Services recommends OR release in 89 percent of cases involving low-risk defendants, in 60 percent of moderate-risk cases, and in 50 percent of high-risk cases. Kentucky's risk assessment tool aids in determining the likelihood of court appearance and rearrest but it does not score the current charge. The court makes findings on "flight risk" and "danger." Kentucky has low failure-to-appear (FTA) and rearrest rates: for high-risk defendants, 71 percent do not have an FTA and 86 percent are not rearrested during the pretrial period. Although Kentucky has made significant use of pretrial release, there are still a small number of defendants who remain in jail because they cannot post

the amount of the bond imposed by the court, as well as some defendants who are able to secure release by posting very high bonds.

The Chief Justice issued an Order on Administrative Release[2] that provides Pretrial Services with authority, without review by a judge, to release defendants arrested for misdemeanors and low-level felonies where the defendant has a low- to moderate-risk score. This form of administrative release was tested as a pilot program for four years, and then was mandated by Supreme Court order statewide in January 2017. Under the order, if a defendant meets the criteria for administrative release, Pretrial Services must provide the jail with a release order for the defendant to be released from custody.

If a defendant is not released under administrative release, then Pretrial Services presents the assessment information for an initial detention/bail/release decision to on-call judges, either in person or via phone call, without the presence of a district attorney or defense counsel. The judge can release the defendant on OR or can set bail. The court's initial release/detention decision must be made within 24 hours; the average time is 11 hours. Risk assessment scores and reports are retained electronically so all judges can easily access the reports. None of the information obtained by Pretrial Services from the risk assessment can be used by the prosecution in its case-in-chief. Address information obtained from the defendant is provided to law enforcement when there is an FTA.

Depending on the jurisdiction, the court sets bail in approximately 0–30 percent of cases. If bail is set and the defendant cannot post a bond with the court, then the defendant is held until arraignment. A court date is set for the defendant to appear for formal arraignment with the district attorney and defense counsel present. Courts conduct arraignments six days a week, and most arraignments are held within two days.

Judges have full discretion to make pretrial detention/release decisions. Judges can have a defendant return to court at any time to address release status but must hold a hearing. Before arraignment, the court can change OR release to a money bond. After the court makes a determination, counsel can file a motion for a bond review at any time.

Pretrial Services monitors all defendants, whether released on OR or on bond, for FTAs and rearrest. For lower-risk defendants on administrative supervision, Pretrial Services reviews conditions with the defendants, sends court reminders, and requires a standard check-in once per month. For higher-risk defendants, Pretrial Services provides "judicial supervision" in which the court sets specific terms: defendants are required to check in more frequently, and the court can set other conditions such as curfews and drug testing. Pretrial Services conducts a manual NCIC criminal history check on defendants weekly. In Kentucky, 91 percent of pretrial defendants are solely on monitoring, with 9 percent on supervision. Pretrial Services uses more staff for supervising 4,000 pretrial defendants

[2] Supreme Court of Kentucky, Order No. 2017-01, https://courts.ky.gov/courts/supreme/Rules_Procedures/201701.pdf.

than for monitoring the remaining 180,000. Pretrial Services occasionally uses electronic monitoring or home monitoring but does not conduct home visits.

Pretrial Services currently uses a manual court reminder process but will soon begin to send these reminders via auto-texts to all pretrial defendants reminding them of court dates and due dates of fines and restitution. The court is informed of violations: new crimes are reported immediately to the court. If a defendant violates a condition of release, the court can issue a summons, issue a warrant, or not take any action, but the court must hold a hearing if it intends to change the defendant's release conditions.

Kentucky has 84 jails: many are at or near capacity, although the pretrial population is currently approximately 54 percent of jails' average daily population. Eighty percent of jail admissions are probation violations. No jails are currently operating under a federal cap.

New Jersey

Key Elements

- Preventive detention permitted by amendment to state constitution as of 2014.
- Law enforcement officer conducts initial risk assessment at time of arrest.
- Cite and release for low level; for higher level, prosecutor reviews charges, court determines probable cause; release/detention decision for in-custody defendant within 48 hours.
- Pretrial Services program conducts risk assessment, makes recommendations.
- Hierarchy of five release options and 16 conditions (least restrictive option that addresses public safety and risk of failure to appear); minimal use of cash bail.
- For pretrial detention, prosecutor must file motion. Detention motion is scheduled within three days of filing; court must make findings.

In the summer of 2014, the New Jersey Legislature passed, and Governor Chris Christie signed, the Criminal Justice Reform Act.[3] In November 2014, voters approved an amendment to the New Jersey Constitution that permits the pretrial detention of high-risk defendants. The criminal justice reform law required a shift from a resource-based monetary bail system to a risk-based system of pretrial release, with minimal use of cash bail. Under the new system of pretrial release, the financial ability to pay monetary bail is no longer the sole reason a defendant is released or held in jail before trial. Instead, the defendant's risk of failure to appear in court and risk to community safety are the factors considered to make the release decision.

[3] P.L. 2014, c. 31, *www.njleg.state.nj.us/2014/Bills/PL14/31_.HTM.*

The Attorney General developed detailed guidelines for police and prosecutor implementation of Criminal Justice Reform in December 2016 and revised them on May 24, 2017, to incorporate lessons learned from the first three months of operation.[4]

The new legislation sets out a hierarchy of five release options for the court to select when making release decisions, with a guiding principle that the court should impose the least restrictive option that addresses public safety and risk of failure to appear. Among the five release options is release on pretrial monitoring. Also, an additional 13 conditions of release can be ordered.

At the point of arrest, the law enforcement officer completes a routine fingerprinting and criminal history check on the offender, and may complete a preliminary risk assessment using the Arnold PSA-Court risk assessment tool. Before an officer can file charges, the officer must seek approval of the charges from a prosecutor (or police supervisor in some instances).

New Jersey employs a two-tiered system of charges, based on severity. If the defendant is charged on a complaint-summons (the less severe charges), the defendant is cited and released; if the defendant is charged on a complaint-warrant (the more severe charges) and the prosecutor approves of the charge, then a judge or court administrator determines if probable cause exists to approve a complaint-warrant. If a complaint-warrant is issued, the defendant is taken into custody and the court must make a release decision within 48 hours from the defendant's time of entry into jail. In order to accommodate this process, the courts have added a sixth day of first-appearance proceedings on Saturdays.

The Pretrial Services Agency staff then obtains background information and completes the final PSA risk assessment. The staff provides three risk scales to the court at the defendant's initial appearance. These scores indicate the defendant's risk of committing a new offense, the risk of FTA, and the risk of a new violent offense. The Pretrial Services Agency can recommend release on own recognizance (ROR) without any conditions, or release on conditions with up to 14 specified conditions, including electronic monitoring. The recommendation is not binding on the court. In each case, the judge weighs the PSA scales, the recommendation, and any other relevant information presented by the parties to make a decision.

For pretrial detention, the prosecutor must file a detention motion in order for the defendant to be detained before trial. The detention motion will then be scheduled within three days of the filing of the motion. The judge cannot make a detention decision without a request from prosecution. There is a presumption of detention only for murder or any charge with the possibility of life in prison. To detain defendants charged with other offenses, the judge is required to make findings that no combination of conditions

[4] Attorney General Law Enforcement Directive No. 2016-6 v2.0, *www.state.nj.us/lps/dcj/agguide/directives/ag-directive-2016-6_v2-0.pdf.*

or conditions and money bail would address risk. Since January 2017, judges have granted 59 percent of prosecution requests for detainment (through August 31, 2017).

Numerous court rule revisions were required, including a full delineation of the automated procedures by which criminal and municipal complaints are filed in court, as well as procedures for streamlining and accelerating case processing. The new and revised court rules were implemented in two phases. The first phase aimed at improving the way that cases are handled preindictment and postindictment and were adopted by the Supreme Court effective September 1, 2016. The second phase of rule revisions become effective January 1, 2017. Those new and revised rules track the statute and provide that a defendant charged on a complaint-warrant for a first, second, third, or fourth degree crime, or a disorderly person's offense will no longer be able to post bail after arrest, but will instead be taken to the county jail for a risk assessment. The rules also provide the hierarchy of pretrial release and the procedures to address violations of release conditions. Certain defendants, upon motion of the prosecutor, may be subject to a pretrial detention hearing. If the judge makes certain findings and then orders detention, the defendant will remain in county jail.[5]

The Legislature authorized the creation of the "21st Century Justice Improvement Fund," which included an initial $22 million to fund the development, maintenance, and administration of a statewide Pretrial Services Program.[6] In addition, the Legislature authorized $10 million annually to fund the development, maintenance, and administration of a statewide digital e-court information system and $10.1 million annually for distribution for legal services. In 2016, Senate Bill 2850 allocated $9.3 million to authorize 20 additional judgeships to implement the Criminal Justice Reform Act.[7]

The Pretrial Services Program – created to provide statewide pretrial assessments, monitoring, and supervision—is based in the judicial branch. More than 200 court employees were hired to perform the assessments on all arrestees using the Arnold Foundation's automated assessment tool, PSA-Court. Over 29,000 assessments have been performed as of August 31, 2017, and local pretrial services agencies monitor and supervise more than 7,000 defendants statewide.

New Jersey's nonsentenced pretrial jail population dropped 19 percent in the first five months after the new system of pretrial release and detention took effect. Two-thirds of counties saw declines in their jail populations of at least 10 percent, while five counties reduced their jail populations more than 25 percent during the period spanning January 1

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[5] New Jersey Judiciary, *Criminal Justice Reform Annual Report to the Governor and the Legislature* (2016), www.judiciary.state.nj.us/courts/assets/criminal/2016cjrannual.pdf.

[6] P.L. 2014, c. 1 (N.J. Stat. Ann. § 2A:162-25 et seq.).

[7] Available at www.njleg.state.nj.us/2016/Bills/S3000/2850_F1.PDF.

through May 31, 2017, according to data released by the Administrative Office of the Courts. The statistics also showed a nearly 36 percent drop in the statewide jail population when comparing May 31, 2017, to the same date two years earlier.[8]

New Mexico

Key Elements

- 2014 New Mexico Supreme Court decision on imposition of high bail amount.
- State Constitution amended in 2016 to:
  - Provide for preventive detention on grounds of dangerousness or flight risk based on "clear and convincing" evidence presented by the prosecutor; and
  - Prohibit detaining a defendant due solely to financial inability to post bail.
- Authority for pretrial procedures is set by updated Supreme Court rules.
- Delegated authority to detention center and court staff for early release of low-risk misdemeanants.
- Some county-based Pretrial Services conduct risk assessment; provides court with assessments and recommendations; provides supervision of court-imposed conditions.
- Hierarchy of release options courts must consider; bond is the sixth option.
- Bond schedules no longer permitted; commercial bail bond may be used when court imposes financial condition to reduce flight risk.

New Mexico has a unified court system, with 13 district courts in 33 counties. The New Mexico Supreme Court is directive, and while district courts are appropriated set funds, the Administrative Office of the Courts and the Supreme Court are responsible for approving the courts' budgets. New Mexico also has limited jurisdiction magistrate courts in 32 counties staffed by nonattorneys. Bernalillo County (Albuquerque) has a limited jurisdiction court with attorney judges. All aspects of pretrial procedure, including risk assessment, are set by Supreme Court rules that are controlling statewide; the New Mexico Legislature does not have authority to address pretrial release procedures.

In 2012, the director of the Administrative Office of the Courts wrote a paper on pretrial release published by the Conference on State Court Administrators that described New Mexico's bond practices, similar to those in many states, noting that the use of bail with commercial surety bonds was the default form of release even though under statutes and rules the courts were to consider other options.

[8] Initial Release Decisions for Criminal Justice Reform Eligible Defendants, *www.judiciary.state.nj.us/courts/assets/criminal/cjrearlyreport1.pdf*.

The New Mexico Supreme Court's decision in *State v. Brown*[9] found that the trial judge wrongly maintained a $250,000 bond based solely on the charge even though the defendant had demonstrated that nonmonetary conditions of pretrial release were sufficient to reasonably assure that the defendant would not pose a flight or safety risk. As a result of the *Brown* decision, the court created a broad-based task force to assess the pretrial justice system. The Ad Hoc Pretrial Release Committee assessed and made recommendations to the court on measures to bring the pretrial system into compliance with existing law, and to recommend needed changes in practices, rules, statutes, and state constitutional provisions.

Following the work of the ad hoc committee, Chief Justice Charles Daniels spearheaded an initiative to revise New Mexico's constitutional provision addressing bail. The initiative, which passed in November 2016 with 87 percent of the vote, amended the state Constitution to provide for preventive detention on grounds of dangerousness under limited circumstances, and prohibits detaining a defendant solely due to financial inability to post a money or property bond.[10] New Mexico's previous constitutional provision had allowed detention solely for persons charged with capital offenses or felonies with certain preconditions, such as after the conviction of two previous felonies. The constitutional provision's new language allows for the denial of bail for defendants charged with any felony if the prosecutor "proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community."[11] The amendment also assures that low-risk defendants will not be denied release solely due to their inability to pay for secured release.

In July 2017, the New Mexico Supreme Court, on recommendation of a broad-based state bail reform committee, updated its court rules to comply with the new constitutional

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[9] (N.M. 2014) 2014-NMSC-038.

[10] New Mexico Legislature, Sen. Joint Res. No. 1 (2016), *www.sos.state.nm.us/uploads/files/CA1-SJM1-2016.pdf*.

[11] Article 2, section 13 of the Constitution of New Mexico was amended to read:
"All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great and in situations in which bail is specifically prohibited by this section. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

"Bail may be denied by a court of record pending trial for a defendant charged with a felony if the prosecuting authority requests a hearing and proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community. An appeal from an order denying bail shall be given preference over all other matters.

"A person who is not detainable on the grounds of dangerousness nor a flight risk in the absence of bond and is otherwise eligible for bail shall not be detained solely because of financial inability to post a money or property bond. A defendant who is neither a danger nor a flight risk and who has a financial inability to post a money or property bond may file a motion with the court requesting relief from the requirement to post bond. The court shall rule on the motion in an expedited manner."
www.sos.state.nm.us/nmconst2017.pdf.

requirements and to address all aspects of pretrial detention and release. The amendments included evidence-based procedures for (1) conducting detention-for-dangerousness hearings (rule 409); (2) determination of what monetary bond or other release conditions are necessary to address flight risk (rule 401(B)–(F)); (3) clarification that fixed money bail schedules that do not take into account evidence of dangerousness or flight risk cannot be used (rule 401(E)); and (4) clarification that released defendants who fail to appear, commit new crimes, or otherwise violate their conditions of release may have their release conditions strengthened or their pretrial release completely revoked (rule 403).[12]

Rule 408 imposes tighter regulation of procedures for early release by detention center and court employees. The rule provides guidelines and ensures consistent application of delegated early release authority for low-risk arrestees prior to initial court appearances, and eliminates the prior practice of releasing high-risk defendants on fixed money bond schedules before they appear in court for a detention or release hearing. Rule 408(B) allows courts to delegate early release authority to county detention facilities, but only for low-risk arrestees in identified misdemeanor cases, and only if they are not already on pretrial release, probation, or parole. These standardized guidelines neither allow nor require any exercise of discretion or judicial decision-making by detention center employees.

Rule 408(C) and (D) will allow future use of court-approved validated risk assessment instruments and court-supervised own recognizance release programs for early release of other low-risk defendants. Court officials working under court-approved guidelines will make decisions in those cases, based on specific, relevant risk factors. An arrestee may not be released under these provisions if a prosecutor has filed a detention motion and is awaiting a ruling, or after a court has entered a detention order. Arrestees have their cases reviewed for probable cause within 48 hours and to set pretrial release conditions within 72 hours. Arraignments are held five days a week, and judges are on call for release decisions. Release conditions are usually set well before the 72-hour maximum time. Other than when a detention motion is pending, no offenses are precluded from having the court set conditions on OR release.

The updated rules do not prohibit the use of monetary bonds: they continue previous legal requirements that money bonds can be required only when needed to assure court appearance (rule 401), and bail bonds are listed as the sixth option for courts to consider imposing after own recognizance release, supervised release, appearance bonds, and conditions such as electronic monitoring. Commercial bail bonds are allowed where the

[12] Administrative Office of the Courts of New Mexico, *Key Facts and Law Regarding Pretrial Release and Detention* (2017), www.nmcourts.gov/uploads/files/REVISED-Pretrial%20Release%20and%20Detention%20Key%20Facts%209_28.pdf.

court determines that financial security is an appropriate condition, but bail schedules are no longer permitted.

Rule 401 provides that judges should consider, although not be controlled in their release and detention decisions by, the results of a Supreme Court-approved risk assessment instrument. The judge making the initial release decision is provided with the defendant's criminal history, current charge, and risk assessment score. Judges receive the pretrial information electronically from Pretrial Services staff, who monitor the conditions set by the judge and, in some counties, provide court date reminders. New Mexico does not have a statewide Pretrial Services Agency, and not all counties have robust pretrial programs. The defendant appears before the judge (often via video-link) when conditions of release are set. If a defendant remains in custody following the setting of release conditions, the court will arraign the defendant and may modify the original conditions.

No risk assessment instrument has yet been fully tested and approved for statewide use in New Mexico, but a pilot project using the Arnold PSA–Court tool has been authorized in Bernalillo County (Albuquerque). In 2018, the Supreme Court will determine whether to authorize use of the Arnold PSA–Court tool in courts throughout New Mexico after there has been an opportunity to analyze the results of the pilot project in improving judicial predictions of dangerousness and flight risk.

Under rule 409, prosecutors have authority to request preventive detention of high-risk defendants, and judges have authority to grant or deny those requests. In order to obtain an order to deny pretrial release, the prosecutor must prove by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community. The authority to conduct a detention hearing or enter an order denying pretrial release is limited to judges in a court of record (district court judges), and they may do so only after a prosecutor files a motion to detain a defendant without bail.

Updated rule 403 provides judges with explicit authority to amend conditions or to revoke pretrial release entirely for defendants who commit new crimes or violate other conditions while released. New provisions in rule 12-204 provide authority for prosecutors and defense counsel to appeal pretrial release and detention decisions, and obtain prompt rulings.

New Mexico is undertaking an objective assessment of the effect of the new laws on New Mexico crime rates with the intention of developing reliable statistical data. At the same time, the New Mexico courts are providing ongoing judicial training and monitoring on the new constitutional amendment, procedural rules, and pretrial release processes. New Mexico has already determined that comprehensive pretrial reform requires cooperation from trial judges, prosecutors, law enforcement agencies, defense counsel, and counties, which fund the jails.

Washington, D.C.

Key Elements

- Commercial bond was virtually eliminated in 1992, but the law still allows for it; money bail is used in very limited instances for appearance purposes.
- Financial bail cannot be set in amount that results in defendant remaining in jail for public safety reasons.
- Statutory scheme provides for preventive detention, with "clear and convincing evidence standard."
- Pretrial Services Agency (PSA) was established in 1967.
- Defendants are interviewed by PSA and brought to court, usually within 24 hours of arrest.
- Eighty-four percent of defendants are released at initial appearance on Personal Recognizance or Pretrial Services Agency Supervised Release (can include a financial condition).
- Remaining 16 percent in "initial detention" are entitled to a hearing within five days; 64 percent of those are subsequently released; remainder are preventively detained.

In 1963, Washington, D.C., established a pioneer pretrial agency, which began under the auspices of the D.C. Bail Project. The project was later formalized into an agency with the passage of the Bail Agency Act in 1967, and is now known as the Pretrial Services Agency for the District of Columbia (PSA).

Commercial bond was virtually eliminated in 1992, but the law still allows for it. Money bail is used in very limited instances for appearance purposes. The detention statutes were revised to prohibit the court from setting financial bail in an amount that results in the defendant remaining in jail for public safety reasons,[13] which has led to the very limited use of money bail. There are no licensed bond agents in the District.

PSA performs two important tasks for the court. First, it gathers and presents information about newly arrested defendants and available release options for use by judicial officers in deciding what, if any, conditions are to be set for released defendants. Second, it supervises those defendants released from custody during the pretrial period by

[13]D.C. Code § 23-1321(c)(3) states in pertinent part, "A judicial officer may not impose a financial condition under paragraph (1)(B)(xii) or (xiii) of this subsection to assure the safety of any other person or the community, but may impose such a financial condition to reasonably assure the defendant's presence at all court proceedings that does not result in the preventive detention of the person … ."

monitoring their compliance with certain conditions of release and helping to assure that they appear for scheduled court hearings.[14]

In presenting information to the court, defendants usually are interviewed and brought to court within 24 hours of arrest. (D.C. statutes require they be brought to court within 48 hours of arrest.) PSA officers gather and compile local and national criminal justice information on the defendant. They consider the defendant's prior criminal history, current charge(s), criminal justice status, and other attributes in assessing potential public safety risks and/or risk of failure to appear. PSA uses a risk assessment instrument that examines relevant defendant data to help identify the most appropriate supervision levels for released defendants. The assessment scores various risk measures specific to D.C.'s defendant population (e.g., previous failure to appear for court, previous dangerous and violent convictions in the past 10 years, suspected substance use disorder problems, current relationship to the criminal justice system, among numerous others). It then generates a score that assigns defendants to different risk categories to help reduce the risk of failure to appear in court and rearrest.

Within the Washington, D.C., pretrial legal framework, defendants are potentially released at one of two potential "release points" during the life of a case. The initial detention/release point occurs at an arrestee's initial appearance before a judicial officer at arraignment or presentment. At this first appearance, the arrestee can be detained pursuant to one or more of D.C.'s statutory preventive detention provisions, placed on conditional release with PSA supervision, or released on personal recognizance (PR) with no PSA supervision. All releases resulting from this first appearance are collectively referred to as "initial release." According to data collected by PSA, for fiscal year (FY) 2016 (as of March 2017), the initial release rate for all cases (felony and misdemeanor) was 84 percent.[15]

The remaining 16 percent of cases resulted in detention under one or more provisions of the preventive detention statute. This is referred to as "initial detention." Under D.C. law, detained defendants are entitled to a hearing within three to five days of initial appearance to determine whether there are conditions of release that will reasonably assure the defendant's future court appearance and public safety. The result of this hearing can be continued detention, release to PR or PSA supervision, or dismissal of the charge. For FY 2016, of the 16 percent initially detained defendants, 64 percent of the defendants were subsequently released, most at the time of the detention hearing. In some

[14] Pretrial Justice Institute, "The D.C. Pretrial Services Agency: Lessons From Five Decades of Innovation and Growth" (2009), *Case Studies*, Vol. 2, No. 1, www.psa.gov/sites/default/files/PJI-DCPSACaseStudy.pdf.

[15] Pretrial Services Agency for the District of Columbia, *Release Rates for Pretrial Defendants within Washington, DC* (2016), www.psa.gov/sites/default/files/2016%20Release%20Rates%20for%20PSA%20Defendants%20-%20for%20Posting.pdf.

cases, subsequent release can occur later in the pretrial period but prior to case disposition (e.g., if a felony case is not indicted within the statutory timeframe).

At this hearing, both sides are represented and a judicial officer considers the type of crime involved, PSA's report which includes recommendations to the court based on risk assessment outcomes, and arguments of counsel. The judicial officer must make a finding as to "whether any condition or combination of conditions set forth in [D.C. Code § 21-11321(c)] will reasonably assure the appearance of the person as required and the safety of any other person and the community." If the judicial officer finds "by clear and convincing evidence that no condition or combination of conditions will reasonably assure the appearance of the person as required, and the safety of any other person and the community," the judicial officer shall order that the person be detained pending trial, that is, preventively detained.

If the defendant is not preventively detained pending trial, the person may be released on PR or subject to PSA supervision. Defendants under pretrial release are assessed by PSA for substance use disorders and/or mental health needs, and connected with employment, housing, and/or other social services. PSA's Social Services and Assessment Center (SSAC) serves as a comprehensive mental health and substance use disorder treatment screening and assessment center for defendants. SSAC assesses the extent of defendant drug involvement and provides or facilitates treatment as appropriate. For substance-involved defendants, PSA has found that minimizing risk of rearrest and failure to appear for court depends on two key factors: identifying and treating drug use, and establishing swift and certain consequences for continued drug use. PSA has found sanction-based treatment as one of the most effective tools for breaking the cycle of substance use disorders and crime.

PSA maintains three levels of supervision: general supervision, high-intensity supervision, and supervision of specialized populations. Fifty percent of defendants ordered to PSA supervision by the court are under general supervision, with the remainder divided between the High Intensity and the Treatment programs. Defendants in the High Intensity Supervision Program are required to have weekly contact with PSA, drug testing, and location monitoring. Those defendants typically have a curfew condition imposed; if they are noncompliant with the curfew condition, they may be "stepped back" to a period of home confinement. PSA's Treatment Program includes Drug Court and the Specialized Supervision Unit. Drug Court is a voluntary substance use disorder treatment and supervision program for eligible defendants with non-violent misdemeanor and felony offenses. PSA's Specialized Supervision unit provides services and supervision to defendants with mental illness, developmental disabilities, and/or co-occurring substance use and mental health disorders. In administering these services, the unit works collaboratively with D.C.'s Department of Behavioral Health, and designated mental health service providers.

PSA is an independent entity within the Court Services and Offender Supervision Agency, and in 2000 was certified as a federal agency under the Executive Branch.

PSA maintains a staff of over 300 employees, interviews approximately 20,000 defendants per year, and has oversight of approximately 17,000 annually. It adheres to the standards set forth by the American Bar Association, National District Attorneys' Association, and National Association of Pretrial Services Agencies. The agency's stated mission is to promote pretrial justice and enhance community safety. In support of the mission, PSA provides information and a range of options to the court on all cases for the court's decision. This includes using the least restrictive conditions of release to reasonably assure public safety and appearance in court, the use of detention when those assurances cannot be met, and the sparing use of financial, noncommercial bail, although PSA does not include financial conditions in its recommendations to the court.

The services offered by PSA continue to evolve based upon the needs of the court and the public. PSA has incorporated the use of technology for its Drug Testing Management System to automate the collection and analysis of urine samples for the onsite laboratory. PSA uses barcode technology to track each step in the process to assure accurate and timely transmittal of drug test results to the court. For the High-Intensity Supervision Program, electronic monitoring (EM), including wireless cellular EM and Global Positioning System (GPS) technology, is used to monitor high-risk defendants.

Appendix F: California Criminal Justice Reform Backdrop

California Community Corrections Performance Incentives Act of 2009

The California Community Corrections Performance Incentives Act of 2009 (Sen. Bill 678) was designed to alleviate state prison overcrowding and save state General Fund monies by reducing the number of adult felony probationers sent to state prison for committing a new crime or violating the terms of their county-supervised probation, and to meet these objectives without compromising public safety. The act allocates a portion of reduced incarceration costs to county probation departments to support the use of evidence-based supervision practices and achieve a reduction in the number of supervised felony offenders who are revoked to state prison.

The Legislature amended the act several times since its adoption because of the significant changes to criminal law made under Criminal Justice Realignment and Proposition 47, also described it this appendix. These law changes impacted the number of individuals eligible for incarceration in state prison.

A fundamental component of SB 678 is the implementation of evidence-based practices (EBPs) and the statewide use of risk assessment instruments by county probation departments. SB 678 defines evidence-based practices as "supervision policies, procedures, programs, and practices demonstrated by scientific research to reduce recidivism among individuals under probation, parole, or post release supervision."[1]

Criminal Justice Realignment Act of 2011

The Criminal Justice Realignment Act of 2011 (Assem. Bill 109) is one of the most significant criminal justice reforms passed in three decades in California. Prior to "Realignment," the California Legislature and voters had passed numerous bills that increased the number of felonies and the severity of criminal penalties for all types of crimes. The State Corrections budget grew from less than 2 percent of the state General Fund budget in the mid-1980s to more than 10 percent in 2016, with $10.4 billion in annual costs.[2] At the same time, a combined federal lawsuit addressing prison overcrowding in the context of medical and mental health services resulted in a court order that required California to reduce its prison population from 170,000 inmates in

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[1] Judicial Council of Cal., *Report on the California Community Corrections Performance Incentives Act of 2009: Findings from the SB 678 Program* (2016), www.courts.ca.gov/documents/lr-2016-ccc-performance-incentives-act-2009-PC1232.pdf.

[2] Edmund G. Brown, Jr., *California State Budget 2016–17*, Enacted Budget Summary: Public Safety, available at www.ebudget.ca.gov/.

2011 to 110,000 by June 2013, and to maintain an overcrowding rate of no more than 137.5 percent of prison capacity.[3]

In response to these developments, the Legislature passed and the Governor signed AB 109, which made significant changes to the sentencing and supervision of persons convicted of felony offenses. In enacting the realignment legislation, the Legislature declared, "California must reinvest its criminal justice resources to support community-based corrections programs and evidence-based practices that will achieve improved public safety returns on this state's substantial investment in its criminal justice system."[4]

Realignment transferred the supervision, housing, and authority for many felons from the state to the counties. The legislation amended a broad array of statutes requiring that most nonviolent, nonserious, and non–sex offenders serve their prison term in the county jail instead of state prison. For those sentenced to serve their prison term in county jail, Realignment authorized courts to impose a sentence that includes "mandatory supervision," ordering defendants to serve the ending portion of their prison sentence in their community under the supervision of Probation.[5] The law also required Probation to supervise offenders upon their release from state prison after serving a determinate term for a nonviolent and nonserious conviction, called "postrelease community supervision." And for those released from prison after serving a term for a violent or serious offense or who are assessed as a high-risk sex offender and placed on parole, most violations of parole are served in county jail instead of being returned to state prison. Courts are now involved in revocation proceedings for mandatory supervision, postrelease community supervision and parole violations.

Realignment displaced much of the overincarceration problem from the state to the counties. County jail populations rose, exacerbating existing pressures: many overcrowded county jails were already struggling to meet their own court-ordered population caps before Realignment was enacted. Thus, one of the many challenges of Realignment has been the lack of available jail beds for defendants ordered to serve local sentences, as well as parole, postrelease community supervision, mandatory supervision, and probation violators.

However, Realignment has provided counties with flexibility to develop local solutions. The legislation anticipated that counties would invest in community-based supervision and treatment to reduce long-term recidivism. Given that a significant percentage of jail beds are occupied by pretrial detainees, many California counties have recognized that effective pretrial practices are important to the success of Realignment and for improving

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[3] *Coleman v. Brown* (E.D. Cal., Civ S-90-0520-LKK-JFM); *Brown v. Plata* (2011) 563 U.S. 493, available at www.supremecourt.gov/.

[4] Pen. Code, § 17.5(a)(3).

[5] Pen. Code, § 1170(h)(5).

public safety. They have begun to implement or expand pretrial programs that use assessments to determine risk and then release detainees who are at low risk for flight and committing new crimes solely on their own recognizance (OR) or on OR with some form of supervision.

While the effects of Realignment continue to be addressed by the courts and the counties, there have been additional developments that have shaped criminal justice reform, as noted below.

Proposition 47

On November 4, 2014, California voters enacted Proposition 47, the Safe Neighborhoods and Schools Act.[6] The legislation contains four main provisions: (1) reduces the punishment from felony to misdemeanor status for several theft-related offenses and possession of controlled substances for personal use,[7] with exceptions for people previously convicted of specific enumerated offenses, including murder and certain sex crimes; [8] (2) provides that inmates serving felony sentences for these crimes may have their punishments reduced to misdemeanors—a judge may deny an inmate's request for resentencing if the judge determines that the inmate poses an unreasonable risk of danger to public safety; (3) allows individuals with old felony convictions for the specified crimes to amend criminal records to remove the felony and reflect that the crime is now a misdemeanor; and (4) directs financial savings realized from reduced state costs into a new state fund to treat mental illness and drug addiction, reduce truancy, expand diversion, and support crime victims.

Most inmates released from custody pursuant to Prop. 47 were released in the first months of 2015,[9] and by February 11, 2015, California Department of Corrections and Rehabilitation officials announced that the prison population fell below the constitutional threshold established in the federal court order in *Plata v. Brown*.[10] Approximately 4,666

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[6] See California Secretary of State, *The Statement of Vote* (Nov. 4, 2015), available at *elections.cdn.sos.ca.gov/sov/2014-general/pdf/88-ballot-measures.pdf*; and California Secretary of State, *Official Voter Information Guide* (Nov. 4, 2014), available at *vig.cdn.sos.ca.gov/2014/general/pdf/text-of-proposed-laws1.pdf#prop47*.

[7] A "wobbler" is a crime that can be charged either as a misdemeanor or as a felony.

[8] Prop. 47, the Safe Neighborhoods and Schools Act; reclassification of theft and drug possession offenses; *http://www.courts.ca.gov/prop47.htm*.

[9] Stanford Law School, Stanford Justice Advocacy Project; *Proposition 47 Progress Report: Year One Implementation* (Oct. 2015), p. 3.

[10] See Attorney General's Brief, *Brown v. Plata,* Defendants' February 2015 Status Report in Response to February 10, 2014 Order (available at *www.cdcr.ca.gov/News/docs/3JP-Feb-2015/February-2015-Status-Report.pdf*.

people had been resentenced and released from state prison pursuant to Prop. 47 through March 2017.[11]

While Prop. 47 had a significant impact on California's prison population, it has had an even larger impact on county jails. Within three months of the passage of Prop. 47, the combined population of all county jails in California dropped by almost 9,000 prisoners due to resentencing of jail inmates under new Penal Code section 1170.18 and fewer new felony commitments.[12]

Proposition 47 also has led to a reduction in the use of early release, the practice of releasing people before completion of their jail sentences as a way to manage jail populations. The use of early release declined by 65 percent in counties with court-ordered jail population caps during the first year after Prop. 47. The reduced use of early release contributed to a slight increase in average daily jail populations. By the end of the first year, the overall average daily jail population settled around 8,000 people lower than it was just prior to Prop. 47's adoption. By June 2016, the statewide county jail population had begun to increase, but 4,000 fewer people were in custody than the pre-Prop. 47 population.[13]

Proposition 57

Proposition 57, the Public Safety and Rehabilitation Act of 2016, was approved by voters in November 2016. This proposition continued the trend of voter initiatives addressing the criminal justice system. Prop. 57 has three elements:

> (1) requires judges, rather than prosecutors, to determine whether juveniles charged with certain crimes should be tried in juvenile or adult court;
> (2) establishes a parole consideration process for nonviolent offenders who have served the full term for their primary criminal offense and who demonstrate that they should no longer be considered a current threat to public safety; and
> (3) gives inmates incentive and opportunity to earn additional credits for good behavior and participation in rehabilitative, educational, and career training programs.[14]

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[11] As of December 31, 2016. Defendants' January 2017 Status Report in Response to February 10, 2014 Order, *Plata v. Brown* (N.D. Cal., Jan. 17, 2017, No. 3:01-cv-1351-TEH), available at www.cdcr.ca.gov/News/docs/3JP-Jan-2017.pdf.

[12] See Board of State and Community Corrections, *Jail Profile Survey, Fourth Quarter Calendar Year 2014,* www.bscc.ca.gov/downloads/2014_4th_Qtr_JPS_Full_Report.pdf; and Board of State and Community Corrections, *Jail Profile Survey, First Quarter Calendar Year 2015,* www.bscc.ca.gov/downloads/2015_1st_Qtr_JPS_Full_Report.pdf.

[13] Board of State and Community Corrections, "Jail Population Trends," total ADP in November 2014: 78,205; total ADP in June 2016: 74,097.

[14] California Department of Corrections and Rehabilitation can revoke credits (with the exception of Educational Merit Credits) if an inmate violates prison rules. Inmates have the right to appeal any revocation of credit.

Proposition 57 is designed to enhance public safety by emphasizing rehabilitation.[15] The requirement that judges, rather than prosecutors, determine whether juveniles charged with certain crimes should be tried in juvenile or adult court may affect the number of juveniles held in pretrial custody.

Proposition 64

Proposition 64, the California Marijuana Legalization Initiative, was approved by voters and became effective November 9, 2016. Proposition 64 legalizes specified personal use and cultivation of marijuana for adults 21 years of age or older;[16] reduces criminal penalties for specified marijuana-related offenses for adults and juveniles; and authorizes resentencing or dismissal and sealing of prior, eligible marijuana-related convictions. The proposition includes provisions for regulation, licensing, and taxation of legalized use. Proposition 64 also substantially impacts the handling of marijuana-related offenses for juveniles.

The fundamental structure of the sentencing provisions of Prop. 64 is the same as Prop. 47, as both initiatives reduce the penalties for designated offenses and provide a resentencing mechanism for persons sentenced under the old law. A person currently serving a sentence for a conviction of an eligible offense who would not have been guilty of an offense or would have been guilty of a lesser offense under Prop. 64 may petition the court for resentencing or dismissal of eligible convictions. Those who have completed their sentences may file an application to have eligible convictions dismissed and sealed, or redesignated as misdemeanors or infractions.

Proposition 64 explicitly provides for the sealing of records of dismissed convictions for persons who have completed their sentences. Proposition 64 also amends existing provisions that require the destruction of arrest or conviction records for specified marijuana-related offenses two years from the date of conviction.

These provisions of Prop. 64 are likely to have an impact on pretrial detention and release as they will limit the extent to which information about these prior arrests and convictions is available to courts, and it will reduce or eliminate their inclusion in pretrial risk assessments.

California Bail and Pretrial Legislation

Several legislative proposals have sought to expand *pretrial* release options and the use of risk-assessment methodology. For example, Senate Bill 210 (Hancock, 2012) would have required a judge to determine whether a defendant charged with a jail felony

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[15] California Department of Corrections and Rehabilitation Fact Sheet, Proposition 57—Public Safety and Rehabilitation Act of 2016, *www.cdcr.ca.gov/proposition57/docs/prop-57-fact-sheet.pdf.*

[16] Under Prop. 64, the maximum amount of marijuana permitted for personal use is 28.5 grams and a maximum of six plants for cultivation.

offense[17] is eligible for own recognizance release, and set forth a list of factors for the court to consider. Senate Bill 1180 (Hancock, 2012) would have made a number of changes to pretrial release: (1) it defined a program of evaluation and supervision for pretrial own-recognizance release, (2) it required that pretrial release reports include evidence-based risk evaluations, and (3) it presumed that defendants charged with a lower-level felony (those that would result in a county jail rather than state prison commitment under Penal Code section 1170(h)) are eligible for release.

In 2014, Senator Hancock introduced a similar bill, SB 210, which also stalled in the Legislature. In 2013, Assembly Bill 805 (Jones-Sawyer; Stats. 2013, ch. 17) successfully amended the Penal Code to provide that a judge or magistrate may consider the report prepared by investigative staff for the purpose or recommending whether a defendant should be released on own recognizance. Other bills attempted to implement own-recognizance release (Assem. Bill 723; Quirk, 2013) and bail (Assem. Bill 1913; Skinner, 2012) for postrelease community supervision (PRCS) violators.

Two identical bills were introduced during the 2017 legislative session that attempted significant bail reform, Senate Bill 10 (Hertzberg)[18] and Assembly Bill 42 (Bonta).[19] The intent of both bills was "to safely reduce the number of people detained pretrial, while addressing racial and economic disparities in the pretrial system, to ensure that people are not held in pretrial detention simply because of their inability to afford money bail."[20] Assembly Bill 42 stalled early in the process, while Senate Bill 10 became the vehicle for major bail reform in California. Senate Bill 10 would have overhauled the bail system in California to require that all counties establish a pretrial services agency to assess, using risk assessment tools, whether the defendant should be released pretrial, recommend conditions of release, and provide appropriate supervision. Senate Bill 10 became a two-year bill in late August 2017 and can be taken up and considered again by the Legislature in early 2018.

Other past efforts have sought to create a uniform bail schedule: both Assembly Bill 2388 (Hagman, 2014) and Assembly Bill 1118 (Hagman, 2013) would have required the Judicial Council to prepare, adopt, and annually revise a statewide bail schedule. Assembly Bill 1264 (Hagman, 2011) similarly would have established a Statewide Bail Commission required to revise a statewide felony, misdemeanor, and infraction bail schedule annually. All three bills stalled in the Legislature.

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[17] Assembly Bill 109 (Stats. 2011, ch. 15), also known as 2011 Realignment, authorized that low-level felony offenses be subject to incarceration in a county jail rather than a state prison.

[18] *http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB10*.

[19] *http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB42*.

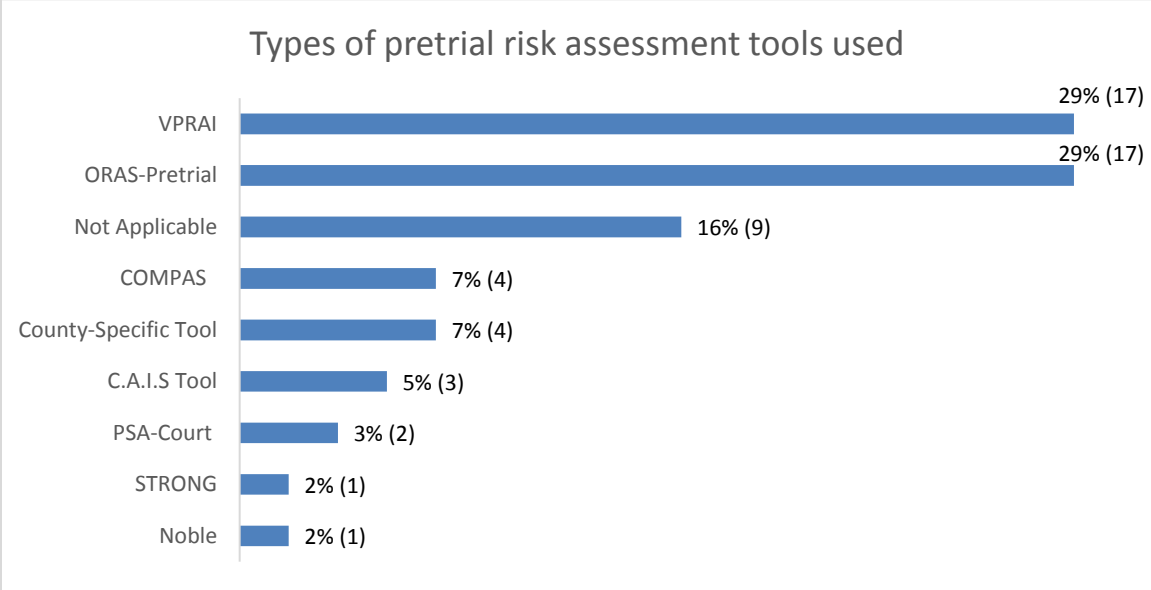
[20] *Id.,* § 2.

Under the commercial surety bail system, bail agents and bail agent corporations are regulated by the Insurance Commissioner. Significant efforts at regulation of the bail industry have failed in the Legislature, while minor changes to education requirements[21] and licensing[22] have been enacted. Failed efforts include Assembly Bill 2449 (Eggman, 2016), which would have added a $10 bond fee charged to all surety companies to fund the Department of Insurance in the investigation of illegal bail practices and create a Bail Education, Investigation, and Prosecution Fund at the Department of Insurance.

[21] Assem. Bill 1515 (Committee on Insurance; Stats. 2015, ch. 348) and Assem. Bill 2303 (Committee on Insurance; Stats. 2012, ch. 786).

[22] Assem. Bill 2782 (Committee on Insurance; Stats. 2010, ch. 400).

Appendix G: Risk Assessment Tools Used in California



County	Type of Pretrial Risk Assessment Tool Used
Alameda	ORAS-PRETRIAL
Alpine	COMPAS Assessment Tool
Amador	VPRAI
Butte	NA
Calaveras	NA
Colusa	NA
Contra Costa	VPRAI
Del Norte	VPRAI—implemented in June 2017
El Dorado	VPRAI
Fresno	VPRAI
Glenn	ORAS-PRETRIAL
Humboldt	ORAS-PRETRIAL
Imperial	C.A.I.S. Tool
Inyo	ORAS-PRETRIAL
Kern	VPRAI
Kings	Noble
Lake	NA
Lassen	ORAS-PRETRIAL
Los Angeles	COMPAS Assessment Tool

County	Type of Pretrial Risk Assessment Tool Used
Madera	C.A.I.S. Tool
Marin	ORAS-PRETRIAL
Mariposa	ORAS-PRETRIAL
Mendocino	ORAS-PRETRIAL (not in use due to staffing issues)
Merced	VPRAI
Modoc	STRONG
Mono	ORAS-PRETRIAL
Monterey	ORAS-PRETRIAL
Napa	ORAS-PRETRIAL
Nevada	ORAS-PRETRIAL
Orange	VPRAI
Placer	VPRAI
Plumas	ORAS-PRETRIAL
Riverside	"Riverside" Pretrial Risk Assessment Instrument (RPRAI)
Sacramento	VPRAI
San Benito	NA
San Bernardino	NA
San Diego	COMPAS Assessment Tool
San Francisco	PSA-Court Tool
San Joaquin	VPRAI
San Luis Obispo	NA
San Mateo	NA
Santa Barbara	VPRAI
Santa Clara	County-Specific Tool (modeled after the VPRAI)
Santa Cruz	PSA-Court Tool
Shasta	VPRAI
Sierra	VPRAI
Siskiyou	VPRAI
Solano	ORAS-PRETRIAL
Sonoma	Sonoma Pretrial Assessment Tool
Stanislaus	NA
Sutter	VPRAI
Tehama	C.A.I.S. Tool
Trinity	VPRAI
Tulare	COMPAS Assessment Tool
Tuolumne	The Tuolumne County Tool
Ventura	ORAS-PRETRIAL
Yolo	ORAS-PRETRIAL
Yuba	ORAS-PRETRIAL

Source: JCC staff contacted each county to confirm use of pretrial risk assessment tool in January 2017 and reconfirmed September 2017.

Appendix H: Glossary

acquittal	A jury verdict that a criminal defendant is not guilty, or the finding of a judge that the evidence is insufficient to support a conviction.
arraignment	The initial step in a criminal prosecution whereby the defendant is brought before the court to hear the charges and to enter a plea.
arrestee	Someone who has been taken into custody by legal authority; a person who has been arrested; also, a person in custody whose release may be secured by posting bail.
bail	The process by which a person is temporarily released, prior to trial, in exchange for security (a bond or property) or money promised for the defendant's future court appearance, or on the defendant's own recognizance. Also can refer to the amount of bond money posted as a financial condition of pretrial release.
bail agent	A bail agent is a person permitted to solicit, negotiate and effect undertakings of bail on behalf of any surety insurer. All bail agents must meet specified bond requirements. Licensees that fail to meet bond requirements are not authorized to transact.
bail bond (appearance bond; personal bond)	A bond given (posted) to a court by a criminal defendant's surety to guarantee that the defendant will appear in court at all future court dates and, if the defendant is jailed, to obtain the defendant's release from confinement. The court will release an arrestee from detention upon posting of the bail bond. The effect of the release on bail bond is to transfer custody of the defendant from the officers of the law to the surety on the bail bond, whose undertaking is to redeliver the defendant to legal custody at the time and place appointed in the bond. Bail bonds are underwritten and issued by licensed bail agents who act as the appointed representatives of licensed surety insurance companies.
bailable offense	A criminal charge for which a defendant may be released from custody after providing proper security.

booking	A procedure following an arrest in which information about the arrest and the suspect are recorded.
case	A judicial proceeding for the determination of a controversy between parties wherein rights are enforced or protected, or wrongs are prevented or redressed, or any proceeding judicial in nature. A case is a single charging document filed in a court containing one or more charges against one or more defendants and constituting the unit of action in court activity following the filing. Charges in two or more charging documents are sometimes combined, or the charges or defendants in one charging document separated, for purposes of adjudication.
capital offense	A crime for which the death penalty may be imposed. Also termed *capital crime.*
cash bail	A sum of money (as opposed to a surety bond) posted to secure a criminal defendant's release from jail.
charge/criminal charge	A formal accusation of an offense as a preliminary step to prosecution.
citation	A police-issued order to appear before a judge on a given date to defend against a stated charge, such as a traffic violation.
commercial/compensated surety	A surety who engages in the business of executing suretyship contracts in exchange for premium. A bonding company is a typical example of a commercial/compensated surety.
complaint	A formal document submitted to the court by a prosecutor, law enforcement officer, or other person, alleging that a specified person or persons has committed a specified offense or offenses and requesting prosecution.
consent decree/order	A court decree that all parties agree to.
conviction	A judgment of guilt against a criminal defendant. A conviction includes pleas of guilty and nolo contendere, and excludes final judgments expunged by pardon, reversed, set aside, or otherwise rendered invalid.

corporate surety	A person, persons, or entity who has entered into a bond (or an agreement) to give surety for another. As a condition of pretrial release, the defendant enters into an agreement that requires a third party, such as a bail bondsman, to promise the payment of the full bail amount in the event that the defendant fails to appear in court. See also *surety bond*.
court order	A written direction or command delivered by a court or judge.
deposit bond	An agreement made by a defendant as a condition of pretrial release that requires the defendant to post a fraction of the bail before he or she is released to the community.
detention	The legally authorized confinement of a person subject to criminal or juvenile court proceedings, until the point of commitment to a correctional facility or until release.
dismissal	The decision by a court to terminate adjudication of all outstanding charges in a criminal case, or all outstanding charges against a given defendant in a criminal case, thus terminating the court action in the case and permanently or provisionally terminating court jurisdiction over the defendant in relation to those charges. Includes nolle prosequi and deferred prosecution.
exoneration	The removal of a burden, charge, responsibility, or duty.
excessive bail	Bail that is unreasonably high considering the risk that the accused will not appear for trial. The Eighth Amendment prohibits excessive bail.
failure to appear	Willful absence without excuse from any court hearing or appointment that the defendant is required to attend.
felony	A serious crime that involves a potential punishment of one year or longer in prison or a crime punishable by death.
financial condition	The monetary condition on which the release of a defendant before trial is contingent, including deposit bond, surety bond, and collateral bond. See also the specific definitions for these bond types.
give bail/post bail	To post security for one's appearance in court.

home detention	A form of confinement and supervision used as a substitute either for imprisonment or as a condition of probation. Except for authorized absences, home detention is a measure in which a person is confined by authorities to his or her place of residence, and restriction is enforced by appropriate means of surveillance by the probation office.
incarceration	Any sentence of confinement, including prison, jail, or other residential placements.
initial appearance or hearing	A criminal defendant's first appearance before a judge or magistrate.
misdemeanor	A criminal offense punishable by a jail term not to exceed one year.
no contest (nolo contendere)	A criminal defendant's plea that, while not admitting guilt, the defendant will not dispute the charge.
nolle prosequi	Latin for "we shall no longer prosecute." The termination of adjudication of a criminal charge by the prosecutor's decision not to pursue the case, in some jurisdictions requiring approval of the court.
own recognizance/ personal recognizance	A pretrial release condition in which the defendant promises to appear at trial and no financial conditions are imposed.
personal recognizance ("own recognizance release")	The release of a defendant in a criminal case in which the court takes the defendant's word that he or she will appear for a scheduled matter or when told to appear. This type of release dispenses with the necessity of the person's posting money or having a surety sign a bond with the court.
personal/voluntary surety	A surety who receives no consideration for the promise to act as a surety.
plea-bargain	A defendant in a criminal proceeding agrees to plead guilty to a charge in exchange for the prosecution's cooperation in securing a more lenient sentence or some other mitigation.
pretrial detention	The holding of a defendant before trial on criminal charges either because the established bail could not be posted or because release was denied.

pretrial release	A defendant's release from custody to the community, for all or part of the time before trial or during prosecution, upon his or her promise to appear in court when required. The defendant may be released on personal (own) recognizance, unsecured bond, or under financial conditions. Pretrial release includes defendants released within two days after arrest and defendants released after posting bail or having release conditions changed at a subsequent hearing.
pretrial revocation	The decision to detain a defendant for violating conditions of pretrial release or for committing a new crime while in a pretrial release status.
pretrial services	An investigation of a [federal] criminal defendant's background, conducted after the defendant has been arrested and charged but before trial, to help the court determine whether to release or detain the defendant pending trial. If the court orders release, a pretrial-services officer supervises the defendant on release.
preventive detention	The detention of a defendant awaiting trial for the purpose of preventing further misconduct.
property/collateral bond	An agreement made as a condition of pretrial release that requires the defendant to post property valued at the full bail amount as an assurance of his or her intention to appear at trial.
restitution	A court requirement that an alleged or convicted offender pay money or provide services to the victim of the crime or provide services to the community.
revocation	Termination of a probation, parole, or mandatory release order because of a rule violation or a new offense, which forces the offender to begin or to continue serving his or her sentence.
risk assessment	The activity of identifying, estimating, and evaluating the probability of harm associated with an activity and determining an acceptable level of risk.
sentence; judgment of conviction	The judgment that a court formally pronounces after finding a criminal defendant guilty; the punishment imposed on a criminal wrongdoer.

surety	An arrangement whereby one party becomes answerable to a third party for the acts of a second party. Customarily an insurance company, the party in a suretyship arrangement who holds himself responsible to one person for the acts of another.
surety bond	An agreement by the defendant as a condition of release that requires a third party (usually a bail bondsman) to promise to pay the full bail amount in the event that the defendant fails to appear in court. A bond which the surety agrees to answer to the obligee for the non-performance of the principal (also known as the obligor).
technical violation	Failure to comply with any of the conditions of pretrial release, probation, or parole, excluding alleged new criminal activity. Technical violations may result in revocation of an offender's release status. Conditions that may be imposed and then violated include remaining within a specified jurisdiction or appearing at specified intervals for drug tests.
unsecured bond	An agreement by the defendant as a condition of pretrial release in which the defendant agrees to pay the full bond amount in the event of nonappearance at trial, but is not required to post security as a condition to release.
unsecured bail bond	A bond that holds a defendant liable for a breach of the bond's conditions (such as failure to appear in court), but that is not secured by a deposit of or lien on property.
violation of pretrial release	Allegation of a new crime or a technical violation while on pretrial release.
warrant/bench warrant	A court order (writ) that directs a law enforcement officer to conduct a search or arrest and bring a person before the judge, such as persons charged with a crime, escaped federal prisoners, or probation, parole, or bond default violators.

Source: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Federal Justice Statistics 2013, Statistical Tables* (March 2017); *Black's Law Dictionary* (10th ed. 2014); and the California Department of Insurance.