



May 17, 2017

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To: CSAC Administration of Justice Policy Committee

From: Darby Kernan, Legislative Representative  
Stanicia Boatner, Legislative Analyst

Re: **California Bail System and Proposed Reforms**

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The California Legislature is undertaking an effort to reform California's money bail system. With legislation introduced in each house, Senate Bill 10, by Senator Bob Hertzberg and Assembly Bill 42 by Assemblymember Rob Bonta, the goal of both bills is to reform the current money bail system and replace it with a pretrial process (see attached analyses for details on legislation).

The right to bail is in California's Constitution in Article 1, Section 12 where it states:

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.

Currently in California after an individual is booked into jail, the defendant who is awaiting trial may be held in jail or released by law enforcement or the courts. Defendants who post bail offer a financial guarantee to courts that they will appear for mandated hearings.

Various counties have implemented comprehensive pretrial and custody alternatives to address the large number of individuals being held pretrial in county jails. In Santa Cruz County, they have reported saving \$2 million by increasing their pretrial services (see attached report). According to the Santa Cruz County 2016 Probation, Adult Division Annual Report, based on monthly statistics released from the Santa Cruz County Sheriff's Office, the pretrial detainees accounted for about 60% of the total detention facilities population in 2015, and decreased slightly to 59% in 2016, below the state average of 63 percent. The average daily population under pretrial supervision in the community has continued to increase over the last several years; and Santa Cruz anticipates the number to increase exponentially if bail reform continues on its current trajectory. Pretrial assessments provide a guide for balancing an

individual's overall risk to fail to appear, with risk to reoffend while in the community when making release decisions, as opposed to a money based system of posting bond based on current charges.

In 2016, 88.2% of the individuals released to pretrial supervision appeared for court, which is comparable to the previous year. Following a 47% increase in the number of individuals released to pretrial supervision from 241 to 355. Similar to the previous year, more than 75% of defendants released to pretrial supervision pre-arraignment in 2016 appeared for court (43 of 57). In addition, in 2016 93% of defendants released to pretrial supervision completed their period of pretrial supervision with no new offenses.

In conclusion, advocates of the current system argue that the use of bail is a constitutional and effective means of ensuring court appearances, with the added benefit of operating at no cost to the taxpayers. Proponents of reforming the current system argue that release decisions should be based solely on a defendant's risk of failing to appear in court and their risk of reoffending if released while awaiting trial.

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Bail Reform Legislation Discussion  
**Attachment Two**  
California Constitution: Section 12



**\* CALIFORNIA CONSTITUTION - CONS**

**ARTICLE I DECLARATION OF RIGHTS [SECTION 1 - SEC. 32] ( Article 1 adopted 1879. )**

A person shall be released on bail by sufficient sureties, except for:

**SEC. 12.** (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.

*(Sec. 12 amended Nov. 8, 1994, by Prop. 189. Res.Ch. 95, 1994.)*

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Bail Reform Legislation  
**Attachment Three**  
Assembly Bill 42 by Assembly Member Bonta

Date of Hearing: April 18, 2017  
Counsel: Sandra Uribe

ASSEMBLY COMMITTEE ON PUBLIC SAFETY  
Reginald Byron Jones-Sawyer, Sr., Chair

AB 42 (Bonta) – As Amended March 27, 2017

**SUMMARY:** Revises the pretrial release system by limiting pretrial detention to specified persons, eliminating the use of bail schedules, and establishing pretrial services agencies tasked with conducting risk assessments on arrested person and preparing reports with recommendations for conditions of release. Specifically, **this bill:**

- 1) Contains legislative findings and declarations regarding money bail and pretrial release.
- 2) States legislative intent to safely reduce the number of pretrial detainees.
- 3) Repeals Penal Code sections 815a, 1269b, 1270, 1270.1, 1270.2, 1275, 1288, 1289, 1318, and 1319.
- 4) Specifies times for an arrested person to be taken before a magistrate when the arrest date occurs on a Wednesday that is a court holiday.
- 5) States that specified persons may approve and accept an order authorizing pretrial release or admitting to bail, issue and sign an order for the release of a detainee, and set a time and place for the person's appearance before the court.
- 6) Requires each county to establish a pretrial services agency that will be responsible for gathering information about newly arrested persons, conducting pretrial risk assessments, preparing individually tailored recommendations to the court, and providing pretrial services and supervision to persons on pretrial release.
- 7) Requires the pretrial services agency to conduct a pretrial risk assessment of a detainee upon booking into jail, except for those charged with violent felonies, and to prepare a pretrial services report with recommendations for release.
- 8) Prohibits use of pretrial service reports for any purpose other than for decisions on pretrial release. Copies of the report shall be provided to the court, the prosecutor, defense counsel, or the arrested person if not represented by counsel.
- 9) Establishes the following pre-arraignment classifications for release:
  - a) Prohibits pre-arraignment release of a person charged with a serious felony, a violent felony, felony witness intimidation, spousal rape, domestic violence, stalking, violation of protective orders, or any felony while the person was on pretrial release for a separate offense;

- b) Requires the release of persons charged with all other felonies, either with no conditions of release or with the least restrictive conditions deemed necessary; and
  - c) Requires the pretrial release of a person who is arrested and booked for a misdemeanor, rather than cited and released, except if the person is charged with a misdemeanor while on pretrial release. Release is subject to signing a release agreement and no release conditions may be imposed.
- 10) Establishes the following pre-arraignment procedures for release:
- a) The pretrial services agency shall immediately transmit the pretrial services report with recommendations to the court, except as specified;
  - b) The court shall issue an oral or written order for release, either with or without conditions and subject to a release agreement, no later than unspecified hours after receipt of the risk assessment and pretrial services report have been received; and
  - c) The court will release a detainee, regardless of whether the pretrial services report is available. The court can release the detainee with or without conditions of release.
- 11) Provides that, when a person is released before arraignment, either the defendant or the prosecutor may file a motion to amend the release order alleging changed circumstances and requesting different or additional conditions of release at the time of arraignment.
- 12) Authorizes court commissioners to order the pre-arraignment, pre-trial release of arrested persons.
- 13) Allows an officer arresting a person for a bailable felony offense, or for a misdemeanor violation of a domestic-violence restraining order, to file a declaration alleging that he or she has reasonable cause to believe that pre-arraignment pre-trial release with no conditions of release would be insufficient to either ensure the defendant's appearance in court or the safety of the victim and/or his or her family.
- 14) Establishes the following rules for pretrial release at arraignment and for detention hearings:
- a) Requires the court, in making a decision for pretrial release at arraignment or at a detention hearing, to consider the protection of the public, the seriousness of the charged offense, the defendant's prior criminal record, the probability of appearing in court, and the presumption of innocence; but public safety and that of the victim, along with probability of appearance shall be the primary considerations;
  - b) States that, in considering the seriousness of the offense, the factors to be considered are the alleged injury to the victim, alleged threats to the victim or a witness, and alleged use of a firearm or other deadly weapon;
  - c) Imposes upon the court the duty to determine what condition or conditions of release will ensure public safety, the defendant's appearance in court, and facilitate pretrial release. Upon a finding at a detention hearing that no such conditions will reasonably ensure this,

the court's order must provide findings of fact and a statement of reasons;

- d) Requires the court to consider the pretrial agency's risk assessment, report, and recommendations of release, except as specified. If the release decision is inconsistent with the recommendations of the pretrial services agency, the court's order must include a statement of reasons; and
- e) Requires the court to make a pretrial release or detention decision without undue delay, as specified.

15) Establishes the following protocol for pre-trial release at arraignment:

- a) All persons who have not been released before arraignment and who have not been ordered detained will be released using the least restrictive conditions necessary to ensure appearance and public safety;
- b) First, the court shall consider the pretrial services report and any relevant information provided by the prosecutor and the defendant and order release without conditions, subject to the signing of a release agreement. The reason for the decision shall be stated on the record;
- c) If the court determines that pretrial release without conditions will not reasonably assure the person's appearance in court, the safety of the victim, or the public safety, the court shall order pretrial release subject to a release agreement with the least restrictive nonmonetary conditions determined reasonable to ensure court appearance and safety. A statement of reasons for the determination is required; and
- d) If the court determines that the person cannot be released with non-monetary conditions alone, then the court is authorized to set monetary bail, as specified, or a combination of monetary bail and other conditions to assure the defendant's appearance. The court must state its reasons for the determination.

16) Requires the court to set money bail be set at the least restrictive amount necessary to assure the defendant's appearance and to consider the defendant's present ability to pay without substantial hardship, as specified.

17) Prohibits the judge from setting bail in an amount which results in pretrial detention because of inability to pay.

18) States that if the pretrial services report with conditions for release is unavailable, then the court will release the person on the least restrictive conditions necessary to ensure appearance and public safety.

19) Provides that for defendants charged with violent felonies, the risk assessment and report with recommendations will only be prepared if the defendant requests them.

20) Provides that a defendant for who conditions of release have been imposed and who, five days after such imposition continues to be detained because of an inability to meet the conditions of release, is entitled to an automatic review of the conditions, unless he or she



waives such review.

- 21) Allows the prosecutor to file a motion for pretrial detention at any time alleging any of the following:
  - a) The person is charged with a capital crime and the facts are evident or the presumption great;
  - b) The person is charged with a violent felony or a felony sexual assault and the facts are evident or presumption great, there is no condition or combination thereof that would reasonably assure the safety of others, and, there is a substantial likelihood that release would result in great bodily harm to others; or when,
  - c) The person is charged with a felony and the facts are evident or presumption great, the defendant has threatened another with great bodily harm, there is no condition or combination thereof that would reasonably assure the safety of person threatened, and there is substantial likelihood that the person would carry out the threat if released.
- 22) Requires the court, upon the filing of a motion for pretrial detention, to hold a hearing within 48 hours, as specified, unless the defendant waives a hearing.
- 23) Prohibits the court from considering the results of a pretrial risk assessment at a detention hearing.
- 24) Allows the court to order pretrial detention of the defendant only if the court makes all of the findings above, which are consistent with the California Constitution. The standard of proof is clear and convincing evidence.
- 25) Provides that if the person is ordered detained, then the court's order must include findings of fact and a statement of reasons.
- 26) Provides that if the court does not order pretrial detention after a hearing on a motion to detain, then pretrial services shall conduct a risk assessment and issue a report with recommendations for conditions of release, and the court shall order the person released either with or without conditions.
- 27) Provides that when money bail is set, a defendant may execute an unsecured appearance bond, as specified, which may be required to be signed by uncompensated third parties, or may execute a secured bond.
- 28) Defines "unsecured appearance bond" as "an order to release a person upon his or her promise to appear in court and his or her unsecured promise to pay an amount of money, specified by the court, if he or she fails to appear as promised."
- 29) Allows the court to modify a pretrial release order upon a change in circumstances, to change the conditions of release, including the amount of any money bail. A request for modification may be brought by the prosecutor or the defendant.

- 30) Provides that if a person violates the terms and conditions of pretrial release, he or she may be held in contempt of court upon motion of the prosecutor.
- 31) Prohibits a finding that the person is in contempt of court unless the court finds that: (1) there is probable cause to believe the defendant committed a crime while on pretrial release, or there is evidence that the person violated a term of release, and (2) there are no conditions of release to reasonably ensure the defendant will not flee or pose a danger to society, or the defendant is unlikely to abide by any condition of release.
- 32) Requires pretrial services agencies to make every effort to assist pretrial defendant in complying with conditions of release, and must at a minimum, notify defendants of court dates. The agency may also assist defendants in obtaining community services.
- 33) Permits the court to order a pretrial services agency to supervise and monitor the compliance of released defendants.
- 34) Authorizes an unnamed agency to oversee pretrial services agencies, to select a statewide pretrial assessment tool, to develop guidelines, and to provide training and assistance on pretrial release to judges, prosecutors, defense counsel, pretrial services agencies, jail staff, and law enforcement.
- 35) Provides guidelines for the pretrial risk assessment tool which shall be selected by the unnamed agency and for existing pretrial risk assessment tools that comply with these guidelines and that had been in use by counties prior to the effective date of this bill.
- 36) Requires the Board of State and Community Corrections (BSCC), in consultation with the unnamed agency, to develop a plan that establishes statewide requirements for counties related to annual reporting of pretrial release and detention data which must include the percentage of individuals released on pretrial, the percentage of those who fail to appear, those who commit new crimes while on pretrial release, and the rate of judicial concurrence with recommended conditions of release. This data must be disaggregated by race or ethnicity and gender.
- 37) Requires the unspecified agency to use the data reported by counties to monitor the effectiveness of the county's pretrial release policies, standards, and procedures to ensure compliance with state law.
- 38) Requires each county to make publicly available its risk assessment tool guidelines, factors, weights, studies, data upon which validation studies rely, and information about how a risk assessment tool was re-normed.
- 39) Makes conforming changes to other Penal Code provisions.

**EXISTING LAW:**

- 1) Prohibits excessive bail. (U.S. Const., 8th Amend. & Cal. Const., art. I, sec. 12.)

- 2) States that a person shall be granted release on bail except for the following crimes when the facts are evident or the presumption great:
  - a) Capital crimes;
  - b) Felonies involving violence or sexual assault if the court finds by clear and convincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others; and,
  - c) Felonies where the court finds by 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. (Cal. Const., art. I, sec. 12.)
- 3) Lists several factors that the court must consider in setting, reducing, or denying bail: the protection of the public; the seriousness of the charged offense; the defendant's prior criminal record; and, the probability of his or her appearing at trial or hearing of the case. Public safety is the primary consideration. (Pen. Code, § 1275, subd. (a).)
- 4) States that in considering the seriousness of the offense charged, the judge or magistrate shall include consideration of the alleged injury to the victim, and alleged threats to the victim or a witness to the crime charged, the alleged use of a firearm or other deadly weapon in the commission of the crime charged, and the alleged use or possession of controlled substances by the defendant. (Pen. Code, § 1275, subd. (a).)
- 5) Requires the court to consider the safety of the victim and the victim's family in setting bail and release conditions for a defendant. (Cal. Const., art. I, sec. 28, subd. (b)(3).)
- 6) Requires the superior court judges in each county to prepare, adopt, and annually revise a uniform, countywide bail schedule. (Pen. Code, § 1269b, subd. (c).)
- 7) Requires the countywide bail schedule to contain a list of the offenses and the amounts of bail applicable for each. If the schedule does not list all offenses specifically, then the bail schedule shall contain a general clause for designated amounts of bail for the offenses not specifically listed. (Pen. Code, § 1269b, subd. (f).)
- 8) Provides that at the time of issuing an arrest warrant, the magistrate shall fix the amount of bail which, in the magistrate's judgment, will be reasonable and sufficient for the defendant to appear, if the offense is bailable. (Pen. Code, § 815a.)
- 9) Provides that an arrested person must be taken before the magistrate with 48 hours of arrest, excluding Sundays and holidays. (Pen. Code, 825, subd. (a).)
- 10) Authorizes the officer in charge of a jail, or the clerk of the superior court to approve and accept bail in the amount fixed by the arrest warrant, the bail schedule, or an order admitting to bail in case or surety bond, and to issue and sign an order for the release of the arrested person, and to set a time and place for the person's appearance in court. (Pen. Code, 1269b, subd. (a).)

- 11) Authorizes a court to release a person who has been arrested for, or charged with, any offense other than a capital offense, on his or her own recognizance (OR). (Pen. Code, § 1270.)
- 12) Prohibits the release of a defendant on his or her OR for any violent felony until a hearing is held in open court and the prosecuting attorney is given notice and an opportunity to be heard on the matter. (Pen. Code, § 1319.)
- 13) Specifies conditions for a defendant's release on his or her own recognizance (OR). (Pen. Code, § 1318.)
- 14) Authorizes a court, with the concurrence of the board of supervisors, to employ an investigative staff for the purpose of recommending whether a defendant should be released on OR. (Pen. Code, § 1318.1, subd. (a).)
- 15) States that whenever a court has employed investigative staff for the purpose of recommending whether a defendant should be released on OR, an investigative report shall be prepared in all cases involved in a violent felony listed in Penal Code Section 667.5(c), or a felony violation of driving under the influence and causing bodily injury to another person, recommending whether the defendant should be released on OR. The report shall include all of the following:
  - a) Written verification of any outstanding warrants against the defendant;
  - b) Written verification of any prior incidents where the defendant has failed to make a court appearance;
  - c) Written verification of the criminal record of the defendant; and,
  - d) Written verification of the residence of the defendant during the past year. (Pen. Code, § 1318.1(b).)
- 16) Provides that a defendant released on bail for a felony who willfully fails to appear in court, as specified, is guilty of a crime. (Pen. Code, § 1320.5.)
- 17) Specifies that if an on-bail defendant fails to appear for any scheduled court appearance, the bail is forfeited unless the clerk of the court fails to give proper notice to the surety or depositor within 30 days, or the defendant is brought before the court within 180 days. (Pen. Code, § 1305, subds. (a) & (b).)

**FISCAL EFFECT:** Unknown

**COMMENTS:**

- 1) **Author's Statement:** According to the author, “Money bail reform by other states, combined with national and California-specific research on the issue, supports a pretrial system that is not regressive and further strengthens public safety. I am proud to author AB 42 to create a more effective and just replacement for our money bail system, which is broken, discriminatory, and punishes poor people simply for being poor. It’s a system that links freedom with personal wealth and ignores public safety and flight risk.

“With AB 42, and mirror legislation in the Senate, we are developing a system that is a smarter, safer option for thousands of people being held in jail pretrial on nonviolent or misdemeanor charges. A system of pretrial assessment and services will allow our overflowing county jails to target their limited space on those people who are truly a threat to the public or a flight risk for the courts. Overcrowded jails are in no one’s best interest, and the time to act is now.

“Last year, my office conducted a public forum in Oakland examining money bail. I had the chance to see the faces and hear the stories of innocent people who have been severely harmed by the money bail system. People can easily lose their jobs, their homes, and in some cases their kids if they are thrown in jail and can’t afford to pay for their freedom. Beyond the financial burden, people who are locked up while they await trial are more likely to accept a plea deal for a crime they didn’t even commit, just to regain their freedom. There is a better way.

“Defendants who are properly evaluated by the courts and released, with or without conditions, back to their families can keep their jobs and continue providing for their children and loved ones while they await trial. Research from reforms in other states and the District of Columbia have shown that something as simple as a phone call or text message can help make sure a defendant shows up for court. As California voters have shown over the last several election cycles, they want evidence-based solutions that ensure public safety, that give judges greater discretion to make informed decisions, and that use scarce public funds responsibly.”

- 2) **Background:** In California, bail is a constitutional right except when the defendant is charged with: (1) a capital crime; (2) a felony involving violence or sex and the court finds that the person’s release would result in great bodily harm to another; or (3) when the defendant has threatened another and the court finds it likely that the defendant might carry out that threat. The constitution also allows for an arrestee to be released upon a written promise to appear, known as release on own recognizance. The constitution prohibits excessive bail. (Cal. Const. art. I, § 12.)

Courts require many defendants to deposit monetary bail in order to be released from custody. Bail is intended to act as a financial guarantee to the court that the defendant will appear for all required court hearings. An arrestee may post bail with his or her own cash, or may post bail using a bail bond.

Currently, each county sets a bail schedule based exclusively on the charged offense. The bail schedule is used by the arresting officer to allow an arrestee to post bail before his or her court appearance. Once a defendant is brought before the court, there must be an individualized determination of the appropriate amount of bail.

Another function of the bail system is protection of the community. Arguably, the current bail system does not actually address community safety concerns because there is no assessment of risk, at least when bail is posted before the arrestee appears before the court.

- 3) **Challenges Presented by Money Bail System:** There are a number of challenges that the bail system faces. A growing number of people acknowledge that the bail system has a

negative impact on communities of color and those who come from the lower end of the socio-economic spectrum. In short, those who have money have the ability to confront their criminal charges while free from confinement in county jail. Those who are too poor to post bail are forced to remain incarcerated, and are more likely to plead guilty in order to get out of custody. Prior to the initial court appearance, the determination as to who remains detained while awaiting resolution of criminal charges is made based on money, and not whether the person is a present danger to the community or whether he or she will return to court.

The ability to be out of custody while facing criminal charges carries a number of inherent advantages. A defendant who is released on bail is able to carry on with his or her life while awaiting the disposition of the criminal case. For instance, criminal defendants who are out on bail are not only able to maintain employment but they are also encouraged to do so.

The current system results in California jails being crowded with individuals who are occupying jail beds while they are facing criminal charges. Due to overcrowding, jails are often forced to release inmates who have already been convicted and sentenced and should be serving their criminal sentences.

- 4) **Public Policy Institute of California Report on Jail Capacity and Pretrial Inmates:** In 2015, the Public Policy Institute of California (PPIC) issued a report on pretrial release and jail overcrowding. The report noted that as of September 2014, 62% of jail beds were filled with inmates awaiting either trial or sentencing. The report stated that California uses pretrial detention more than the rest of the country. However, the state's high rates of pretrial detention have not been associated with lower rates of failures to appear or lower levels of felony rearrests. In fact, California has had higher rates of both failures to appear and rearrests for non-violent felonies. (*Pretrial Detention and Jail Capacity in California*, S. Tafoya, July 2015, [http://www.ppic.org/main/publication\\_quick.asp?i=1154](http://www.ppic.org/main/publication_quick.asp?i=1154).)

“Given that the legal rationale for pretrial detention is to ensure court appearances and preserve public safety, the data presented here indicate that California may not be getting a good return on the high levels of pretrial detention it has maintained. California's pretrial practices are associated with lower rates of rearrests for violent felonies, but this result may have been achieved at the cost of detaining many defendants who might have safely been released under some form of pretrial supervision. Moreover, as critics of the bail system have long argued, releasing defendants based on their ability to post bail is both inequitable and unnecessarily risky: defendants with financial resources can purchase release even if there is a high risk that they will engage in pretrial misconduct, while low-risk defendants who are poor may be needlessly held in jail.” (*Id.*)

The report found that “pretrial services programs—if properly implemented and embraced by the courts, probation, and the jails—could address jail overcrowding and improve the efficiency, equitability, and transparency of pretrial release decision making.” (*Id.*)

- 5) **Pretrial Services:** According to the California Association of Pretrial Services Website, pretrial services agencies are important because they improve the court's release and detention decision-making process. They also protect public safety by ensuring that only those defendants who can safely be released are released. Use of pretrial services agencies

also increases the use of non-financial release alternatives, which reduces the percentage of pretrial detainees in the jail. Finally, pretrial services agencies can save taxpayer dollars by reducing the costs of jailing pretrial defendants (<http://pretrialservicesca.org/about>)

Services provided by pretrial services can include: jail screening and interviewing of all arrestees; investigation of the arrestee's ties to the community, past record, potential dangerousness to the community, past history of failures to appear, and the seriousness of the current criminal charges; preparation of a written report to the court and the presiding magistrate, summarizing the defendant's ties to the community and a recommendation for or against release; case monitoring of conditions of release and court date notification system for defendants; supervised release for selected defendants; social services referrals for defendants; and follow-up services to locate defendants who have failed to appear and return them to the court system without the unnecessary costs of an arrest. (<http://pretrialservicesca.org/about>)

This bill would require every county to establish a pretrial services agency. The agencies would be tasked with conducting risk assessments on arrested persons, preparing pretrial services reports with recommendation for release. The agencies would also be required to assist pretrial defendants in complying with conditions of release, and must at a minimum, notify defendants of court dates.

This committee has been unable to determine how many out of the 58 counties have pretrial services agencies. Would each county be able to establish the required pretrial services agency by the effective date? Should the effective date of this legislation be delayed to ensure counties can effectively comply with the mandates imposed, particularly since this is such a broad and sweeping change in pretrial practice?

- 6) **Preventative Detention:** This bill prohibits preventative detention except in limited circumstances delineated by the California Constitution, namely (1) if the person is charged with a capital crime; or (2) the person is charged with either a violent felony or a felony sex assault, there is no condition or combination thereof that would reasonably assure the safety of others, and, there is a substantial likelihood that release would result in great bodily harm to others; or (3) when the person is charged with a felony and the defendant has threatened another person with great bodily harm, and there is substantial likelihood that the person would carry out the threat if released.

Other than those three narrow categories, all other defendants must be released at arraignment using the least restrictive means of release, either with no release conditions, non-financial conditions of release, or on money bail, with or without other condition, as a last resort. Additionally, if the court chooses money bail, the bail must be set at the least amount needed to ensure the defendant's appearance in court, and in an amount that the defendant can afford to pay without borrowing money, obtaining a loan, or paying for a bond. The bail amount cannot cause hardship to the defendant. The court is prohibited from setting bail in an amount which results in a defendant's pretrial detention because of inability to pay.

Arguably there are some offenders who do not fall into these narrow categories allowing detention under the California Constitution, but who could nevertheless pose a threat to public safety or a flight risk because of the severity of charges and potential length of

incarceration they face. In such cases, the two considerations for the court in setting money bail could potentially create a conflict. There may be situations where the court believes public safety or flight risk requires setting a significant amount of bail; and yet, the court must also comply with the mandates that the bail be set in amount that will not cause hardship and will not result in detention.

7) **Arguments in Support:**

- a) According to the *American Civil Liberties Union of California*, a Co-sponsor of this bill, “Groups as diverse as the U.S. Department of Justice, the Council of Chief Justices, the American Bar Association, the Movement for Black Lives, the Cato Institute, and Right on Crime have spoken out against discriminatory bail practices across the country. Here in California, in her last two State of the Judiciary addresses, Chief Justice Tani Cant-Sakauye has identified the need for pretrial reform in our state; and a bipartisan coalition of legislators, communities, families, organizations, professors, attorneys, political organizations, judges, and local officials have joined the movement for reform. The time is ripe for change.

“Here in California, about 63% of people in jail in California on any given day (or 46,000 people) are either awaiting trial or sentencing, at a high financial and social cost to taxpayers. Many Californians cannot afford to post bail and so must either stay in jail or pay substantial nonrefundable fees to a bail bond company. These fees are not refunded – even if the court finds that a person is innocent or was wrongfully arrested.

“California’s current bail system is likewise punishing whole families and communities. Over-policing of communities of color results in more arrests, exacting a disproportionate price from these communities. Whole families suffer, as they take on long-term debt to purchase the safety and freedom of a loved one, and women are hit the hardest. According to an Ella Baker Center survey, 83% of family members who take on court-related costs on behalf of loved ones are women.

“Successful models for reform can be found in California and other states. For example, in Kentucky, about 70% of pretrial defendants are released (68% on non-financial releases), 89% make all future court appearances, and 92% are not re-arrested while on pretrial release. Santa Clara County has implemented a successful pretrial services model and has saved \$33 million in six months by keeping 1,400 defendants out of jail. Like with these systems, under the California Bail Reform Act, judges will have access to helpful tools and resources to assist them in their pretrial decision-making. These resources help to protect public safety while reducing the number of people kept in jail after arrest. It is time for California to implement these proven and cost-effective systems across the state.”

- b) According to the *Ella Baker Center for Human Rights*, a Co-sponsor of this bill, “In California, nearly 2/3 of the people sitting in jail are either awaiting trial or sentencing, at a significant cost to the state and vulnerable families. The State spends \$5 million per day to lock up people who are waiting to go to court—totaling more than \$1.8 billion annually. Families are forced to make the difficult decision between covering their basic needs like housing and paying the bail bonds agency. Families that cannot afford the 10% fee often go on payment plans that perpetuate the cycle of poverty. When a person



remains in jail because they cannot afford bail, others may need to fill the financial gap he or she leaves behind, forcing family members to drop out of school to get a job, or quitting a job to take care of children that are left behind.

“Further, people forced to stay in jail because they cannot afford bail face a number of additional obstacles. Many people take coercive plea deals in order to avoid waiting for trial so they can get back to their lives and familial obligations. Research has shown that compared to people who are released prior to trial, those held for their entire pretrial detention have a greater likelihood of being sentenced to jail. Studies have also shown a strong correlation between length of detention and recidivism. Compared to people who were held no more than 24 hours, those held for 8 to 14 days were 51% more likely to go back to jail for another crime. Pre-trial detention as a result of inability to pay bail can also result in loss of employment, housing, child custody rights, etc. Black men are not only less likely to be released on their own recognizance, their bail amounts are also 35% higher on average than white men. Most alarmingly, nearly 80% of all jail deaths in California occur among people who are detained pre-trial.

“People of color are already over-represented in the criminal justice system and current pre-trial detention practices exacerbate these disparities. The current system of bail was designed to most severely impact those who can least afford it. AB 42 provides California with the opportunity to decriminalize poverty, reduce racial disparities, and enhances public safety outcomes.”

#### 8) Arguments in Opposition:

- a) According to the *California District Attorneys Association*, “California’s current pretrial release procedures help to ensure that dangerous defendants are not released to commit new crimes and harm victims and witnesses before trial. Under these procedures, the court already has wide discretion to release a defendant on his or her own recognizance, or to reduce bail for defendants that do not pose such risks. Whatever the deficiencies in the current system, it hardly seems prudent to start from scratch. ...

“There are also tremendous logistical problems with the proposed pretrial release scheme. Under the bill, when Friday is a court holiday, a Wednesday arrestee must be charged by Thursday. So, when someone is arrested on Wednesday at 11:00 p/m/. the police must complete reports, present them to the district attorney on Thursday, and expect the district attorney to make a careful charging decision in time for an afternoon court arraignment. This compressed timeline will undoubtedly result in the release of dangerous individuals.

“Even when given a full two days before arraignment, AB 42 makes it extremely onerous to achieve pretrial detention for dangerous defendants. The district attorney must file a written motion at arraignment, containing myriad required allegation, and be expected to prove those allegations in a contested hearing – all of this within 48 hours of the arrest. The existing bail schedule system allows judges to exercise discretion to raise or lower bail for violent felons, in a sensible period of time.”

- b) According to the *Golden State Bail Agents Association*, “This bill will cost taxpayers more than \$3.8 billion per year. The current bail system operates at no cost to taxpayers. On the other hand, the costs of the pretrial system proposed in this bill this will be

enormous. According to the California Attorney General's Office, there were 1,086,889 adults arrested in California in 2015. This bill mandates that each county create a pretrial services agency that will have enough staff and other resources to evaluate and prepare a timely pretrial risk assessment report for every defendant arrested, with certain exceptions. The cost of evaluating and preparing a timely pretrial risk assessment report for each of these defendants will be unaffordable. ...

"This bill will cause the incarceration of more pretrial defendants because it eliminates the bail schedule. Most counties do not have pretrial services agencies in place and the bail schedule is the only mechanism for recently arrested defendants to get released from jail before their arraignment. Therefore, defendants that could have bailed out of custody under the bail schedule will sit in jail for 48 hours or longer awaiting arraignment.

"This bill is unconstitutional. This bill violates the defendant's rights to bail by sufficient sureties which is guaranteed by the California Constitution. Bail by sufficient sureties means the defendant must have the option to secure release through a bail bond posted by a commercial surety. Several other jurisdictions have considered identical phrasing in their state constitutions and have reached the same conclusion. This bill will force defendants that could afford bail to sit in jail or to agree to onerous pretrial release conditions to get released.

"Eliminating bail as a meaningful option, as this bill does, and substituting an invasive pretrial program which includes conditions like mandatory drug testing, GPS monitoring and onerous reporting requirements, would raise serious constitutional concerns, which are exacerbated if violations of pretrial conditions would create additional criminal exposure for the accused. The Ninth Circuit has held that, in some circumstances, such pretrial release conditions are unconstitutional. In *United States v. Scott*, 450 F.3d 863, 874 (9th Cir. 2005), the defendant agreed to submit to home searches and drug testing in order to obtain pretrial release. But when law enforcement conducted a home search and a drug test of the defendant, the Ninth Circuit suppressed the results because these searches could not pass Fourth Amendment muster 'under any of the three [relevant] approaches: consent, special needs [,] or totality of the circumstances.' *Id.* As an individual merely accused of a crime and presumed innocent, the defendant maintained Fourth Amendment rights that the government could not violate. Even the defendant's consent to the conditions of pretrial release could not render those conditions constitutionally legitimate because the government cannot impose 'unconstitutional conditions' in exchange for government benefits. *Id.* at 866 (citing *Dolan v. City of Tigard*, 512 U.S. 374 (1994))."

- c) According to the *Peace Officers Research Association of California*, "The elimination of bond schedules and the imposition of required risk assessment will delay the process of release for all defendants. Also, by creating a statewide pretrial supervision program, this bill actually requires that no defendant will be required to pay for pretrial monitoring and services. This means that the third party benefit provided to a defendant at no cost to the state or a county government will now have to be borne by county governments.

"Lastly, the study we looked at had FTA's [failure to appear] going up to 70%, which makes sense. Why would anyone actually appear if they have a higher likelihood of

going to jail?”

**9) Related Legislation:**

- a) AB 789 (Rubio) allows a court to approve, without a hearing, own recognizance (OR) release under a court-operated or court-approved pretrial release program for arrestees of specified offenses with three or more prior failures to appear. AB 789 is pending hearing in the Assembly Appropriations Committee.
- b) SB 10 (Hertzberg) is identical to this bill. SB 10 is pending hearing in the Senate Appropriations Committee.

**10) Prior Legislation:**

- a) AB 805 (Jones-Sawyer), Chapter 17, Statutes of 2013, provides that in setting bail, a judge or magistrate may consider factors such as the report prepared by investigative staff for the purpose of recommending whether a defendant should be released on his/her own recognizance.
- b) AB 2388 (Hagman) of the 2013-2014 Legislative Session, required the Judicial Council to prepare, adopt, and annually revise an advisory statewide bail schedule for all bailable felony offenses and for all misdemeanor and infraction offenses, except Vehicle Code infractions, that counties could reference when setting a countywide bail schedule. AB 2388 was held on the Appropriations suspense file.
- c) SB 210 (Hancock), of the 2013-2014 Legislative Session, would have revised the criteria for determining eligibility for pretrial release from custody. SB 210 was ordered to the Assembly Inactive File.
- d) SB 210 (Hancock), of the 2011-12 Legislative Session, required a court to determine, with public safety as the primary consideration, whether a defendant charged with a jail felony is eligible for release on his or her own recognizance (OR). SB 210 failed passage on the Assembly Floor.
- e) SB 1180 (Hancock) of the 2011-12 Legislative Session, was substantially similar to SB 210. SB 1180 was ordered to the Senate Inactive File.

**REGISTERED SUPPORT / OPPOSITION:**

**Support**

American Civil Liberties Union (Co-Sponsor)  
 Anti-Recidivism Coalition (Co-Sponsor)  
 Californians for Safety and Justice (Co-Sponsor)  
 California Public Defenders Association (Co-Sponsor)  
 Ella Baker Center for Human Rights (Co-Sponsor)  
 Silicon Valley De-Bug (Co-Sponsor)  
 Western Center on Law and Poverty (Co-Sponsor)  
 A New Path

A New Way of Life Reentry Project  
All Saint's Church  
Alliance for Boys and Men of Color  
American Academy of Pediatrics  
American Friends Service Committee  
Amity Foundation  
Asian Americans Advancing Justice  
Asian Law Alliance  
Avokids  
Bend the Arc  
Black Women for Wellness  
California Association of Alcohol and Drug Program Executives  
California Attorneys for Criminal Justice  
California Catholic Conference  
California Coalition for Mental Health  
California Coalition for Women Prisoners  
California Federation of Teachers  
California Immigrant Policy Center  
California Labor Federation  
California Latinas for Reproductive Justice  
California Women's Law Center  
California Youth Empowerment Network  
Center on Juvenile and Criminal Justice  
Children's Defense Fund  
City and County of San Francisco  
Coalition for Humane Immigrant Rights  
Communities United for Restorative  
Community Oriented Correctional Health Services  
Contra Costa County Defenders Association  
Contra Costa County Democratic Party  
Contra Costa County Public Defender's Office  
Council on American-Islamic Relations, California  
Courage Campaign  
Didi Hirsch Mental Health Services  
Disability Rights California  
Drug Policy Alliance  
El Grupo  
Essie Justice Group  
Fair Chance Project  
Financial Justice Project, City and County of San Francisco  
Friends Committee on Legislation of California  
Homeboy Industries  
Housing and Economic Rights Advocates  
Human Impact Partners  
Human Rights Watch  
Hunger Action Los Angeles  
John Burton Advocates for Youth  
Los Angeles Regional Reentry Partnership  
Marin County Public Defender's Office

Mental Health America of California  
Mental Health America of Los Angeles  
Monterey County Public Defender's Office  
Napa County Public Defender's Office  
National Alliance on Mental Illness, Los Angeles County Council  
National Association for the Advancement of Colored People, San Jose/Silicon Valley  
National Association of Social Worker's, California Chapter  
National Council of La Raza  
National Immigration Law Center  
Oakland Privacy  
Pangea Legal Services  
Peace United Church of Christ  
People's Life Fund  
Root and Rebound  
Rubicon Programs  
San Francisco Coalition on Homelessness  
San Francisco Public Defender's Office  
San Francisco Senior and Disability Action  
San Jose State University Human Rights Institute  
Santa Barbara County Public Defender's Office  
Solano County Public Defender's Office  
Sonoma County Public Defender's Office  
Strike Debt Bay Area  
Tarzana Treatment Centers  
Temple Beth El  
The Advocacy Fund  
The Kitchen  
T'ruah  
United Advocates for Children and Families  
United Domestic Workers of America, AFSCME Local 3930  
United Food and Commercial Workers, Western States Council  
Urban Peace Institute  
Voices for Progress Education Fund  
W. Haywood Burns Institute  
Western Regional Advocacy Project  
Women's Foundation of California  
Youth for Environmental Sanity  
Youth Justice Coalition  
9 to 5 Working Women

Four Private Individuals

### **Opposition**

Albert Ramirez Bail Bonds  
All-Pro Bail Bonds  
American Bail Coalition  
California Bail Agents Association  
California District Attorneys Association

Golden State Bail Agents  
Fresno County Sheriff-Coroner  
Los Angeles County District Attorney  
Peace Officers Research Association of California  
Professional Bail Agents of the United States  
Sacramento County District Attorney  
San Diego County District Attorney  
Speedy Bail Bonds  
Surety and Fidelity Association of America  
Urban Game Changer

119 Private Individuals

**Analysis Prepared by:** Sandy Uribe / PUB. S. /

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Bail Reform Legislation Discussion  
**Attachment Four**  
Senate Bill 10 by Senator Bob Hertzberg

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**SENATE COMMITTEE ON PUBLIC SAFETY**

Senator Nancy Skinner, Chair

 2017 - 2018 Regular
 

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**Bill No:** SB 10                                 **Hearing Date:** April 4, 2017  
**Author:** Hertzberg  
**Version:** March 27, 2017  
**Urgency:** No   **Fiscal:** Yes  
**Consultant:** SC

**Subject:** *Bail: Pretrial Release*

### HISTORY

**Source:** American Civil Liberties Union of California  
 Anti-Recidivism Coalition  
 California Public Defenders Association  
 Californians for Safety and Justice  
 Ella Baker Center for Human Rights  
 Essie Justice Group  
 SEIU California  
 Silicon Valley De-Bug  
 Western Center on Law & Poverty

**Prior Legislation:** SB 163 (Hertzberg), amended but not referred to Committee (2016)  
 SB 210 (Hancock), failed passage on the Assembly Floor (2014)  
 AB 805 (Jones-Sawyer), Ch. 17, Stats. 2013  
 SB 210 (Hancock), failed passage on the Assembly Floor (2012)  
 SB 1180 (Hancock), failed passage on the Senate Floor (2012)

**Support:** American Academy of Pediatrics, California; American Friends Service Committee; Asian Law Alliance; Bend the Arc: A Jewish Partnership for Justice; Black Women for Wellness; California Attorneys for Criminal Justice; California Catholic Conference; California Coalition for Mental Health; California Latinas for Reproductive Justice; Center on Juvenile and Criminal Justice; Children’s Defense Fund-California; Community Oriented Correctional Health Services; Contra Costa County Democratic Party; Contra Costa County Office of the Public Defender; Courage Campaign; Drug Policy Alliance; El Grupo; Fathers and Families of San Joaquin; Financial Justice Project in the City and County of San Francisco Office of the Treasurer & Tax Collector; Friends Committee on Legislation of California; Human Impact Partners; Hunger Action Los Angeles; John Burton Advocates for Youth; Marin County Office of the Public Defender; Monterey County Office of the Public Defender; Napa County Public Defender; National Association of Social Workers, California Chapter; Oakland Privacy; Peace United Church of Christ; People’s Life Fund; Root & Rebound; Rubicon Programs; San Francisco Public Defender; San Francisco Senior & Disability Action; San Jose/Silicon Valley NAACP; Santa Barbara County Public Defender; Santa Clara County Public Defender; Solano County Public Defender’s Office; Sonoma County Public Defender; Steinberg Institute; Tulare County Public Defender; Temple Beth El; UDW/AFSCME Local 3930; United Food &



Commercial Workers Union; Urban Peace Institute; Voices for Progress Education Fund; Western Regional Advocacy Project; Women's Foundation of California; Youth for Environmental Sanity; 9to5 Working Women; 325 private individuals

Opposition: Association for Los Angeles Deputy Sheriffs; Association for Deputy District Attorneys; California Association of Code Enforcement Officers; California College and University Police Chiefs Association; California Narcotic Officers Association; Golden State Bail Agents Association; Los Angeles County Professional Peace Officers Association; Los Angeles Police Protective League; Riverside Sheriffs' Association; Speedy Bail Bonds; 8 private individuals

### PURPOSE

***The purpose of this bill is to reduce the amount of people held in pretrial detention because of the inability to afford money bail and to require each county to establish a pretrial services agency that meets certain specifications.***

*Existing law* declares that a person shall be released on bail by sufficient sureties, except for:

- Capital crimes when the facts are evident or the presumption great;
- 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
- 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. (Cal. Const., art. I, section 12.)

*Existing law* prohibits excessive bail. (*Id.*)

*Existing law* states that in setting, reducing, or denying bail, the judge or magistrate shall take into consideration the protection of the public, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at trial or hearing of the case. The public safety shall be the primary consideration. (Pen. Code § 1275, subd. (a).)

*Existing law* provides that in considering the seriousness of the offense charged, the judge or magistrate shall include consideration of the alleged injury to the victim, and alleged threats to the victim or a witness to the crime charged, the alleged use of a firearm or other deadly weapon in the commission of the crime charged, and the alleged use or possession of controlled substances by the defendant. (*Id.*)

*This bill* repeals Penal Code section 1275.

*Existing law* authorizes a court, with the concurrence of the board of supervisors, to employ an investigative staff for the purpose of recommending whether a defendant should be released on his or her own recognize. (Pen. Code § 1318.1, subd. (a).)

*Existing law* provides that at the time of issuing a warrant of arrest, the magistrate shall fix the amount of bail which in his judgment will be reasonable and sufficient for the appearance of the defendant following his arrest, if the offense is bailable. (Pen. Code § 815a.)

*This bill* repeals Penal Code section 1318.1.

*Existing law* provides that that an arrested defendant must be taken before the magistrate within 48 hours after arrest, excluding Sundays and holiday. (Pen. Code § 825, subd. (a).)

*This bill* specifies that if the arrest occurs on a Wednesday if the Wednesday is a court holiday, the defendant shall be taken before the magistrate no later than Friday, and if the Friday is a court holiday, the defendant shall be taken before the magistrate no later than Thursday.

*Existing law* authorizes the officer in charge of a jail or the clerk of the superior court to approve and accept bail in the amount fixed by the arrest warrant, schedule of bail, or an order admitting to bail in cash or surety bond and to issue and sign an order for the release of the arrested person and to set a time and place for the appearance of the arrested person in court. (Pen. Code § 1269b, subd. (a).)

*This bill* instead provides that the officer in charge of the jail or the clerk of the superior court may approve and accept an order authorizing pretrial release or admitting to bail and to issue and sign an order for the release of the arrested person and to set a time and place for the appearance of the arrested person in court.

*Existing law* states that it is the duty of the superior court judges in each county to prepare, adopt, and annually revise a uniform countywide schedule of bail for all bailable felony offenses and for all misdemeanor and infraction offenses except Vehicle Code infractions. The penalty schedule for infraction violations of the Vehicle Code shall be established by the Judicial Council. (Pen. Code § 1269b, subd. (c).)

*Existing law* requires the countywide bail schedule to contain a list of the offenses and the amounts of bail applicable for each as the judges determine to be appropriate. If the schedule does not list all offenses specifically, it shall contain a general clause for designated amounts of bail as the judges of the county determine to be appropriate for all the offenses not specifically listed in the schedule. A copy of the countywide bail schedule shall be sent to the officer in charge of the county jail, to the officer in charge of each city jail within the county, to each superior court judge and commissioner in the county, and to the Judicial Council. (Pen. Code § 1269b, subd. (f).)

*This bill* repeals Penal Code section 1269b.

*This bill* provides that a person who is arrested and booked into jail for an enumerated violent felony shall not be considered for release until the person appears before a judge or magistrate for a hearing and states that a pretrial services report shall not be prepared unless the defendant requests a pretrial risk assessment and report.

*This bill* provides that for the following specified offenses, a pretrial services agency shall conduct a risk assessment on a person arrested and booked into jail but the person shall not be considered for release until he or she appears before a judge or magistrate for a hearing:

- A serious felony as defined, except for first degree burglary;
- Intimidating a witness under certain circumstances, spousal rape, domestic violence, or stalking;
- Domestic violence battery;
- Violation of a court order, if the person is alleged to have made threats to kill or harm, engaged in violence against, or gone to the residence or workplace of, the protected party; or
- Any felony committed while the person is on pretrial release for a separate offense.

*This bill* requires, except for when a person is arrested for specified crimes, a pretrial services agency to immediately upon booking conduct a pretrial risk assessment on the arrested person and prepare a pretrial services report with recommendations for conditions of release.

*This bill* provides that a person who is arrested and booked for a misdemeanor, who is not first cited and released with a signed promise to appear in court, shall be released by the pretrial services agency subject to signing a release agreement without further conditions.

*This bill* requires the pretrial services agency to transmit the report with recommendations for conditions of release to the court and requires the court to issue an oral or written order to release the person, with or without release conditions, subject to the person signing a specified release agreement.

*This bill* states that if the pretrial services report is not available, the court shall release the person subject to a release agreement without further conditions or subject to conditions.

*This bill* provides that the fact that the court has not received the pretrial services report shall not preclude pretrial release.

*This bill* authorizes the court in which the charge is pending, upon petition by either party that there has been a change in circumstances, to amend the release order to impose different or additional conditions of release at the time of arraignment.

*This bill* authorizes court commissioners to order the pretrial release of arrested persons prior to arraignment.

Existing law authorizes a court to release a person who has been arrested for, or charged with any offense other than a capital offense, on his or her own recognizance. (Pen. Code § 1270.)

*Existing law* requires a person arrested for a misdemeanor to be released on his or own recognizance unless the court makes a finding on the record that there is no condition or combination of conditions that would reasonably ensure public safety and the appearance of the defendant as required, an own recognizance release will compromise public safety or will not reasonably ensure the appearance of the defendant. Public safety shall be the primary consideration. If the court makes one of those findings, the court shall then set monetary bail and specify the conditions, if any, under which the defendant shall be released. (*Id.*)

*This bill* repeals Penal Code section 1270.

*Existing law* authorizes a court to release a person on bail in an amount that is more or less than the amount contained in the bail schedule, or release the person on his or her own recognizance after conducting a hearing in open court. If bail is set in an amount that is different from that contained in the bail schedule, the judge or magistrate shall state the reasons for that decision on the record. (Pen. Code § 1270.1.)

*This bill* repeals Penal Code section 1270.1.

*Existing law* requires an automatic review, not more than five days from the original order fixing the bail amount, when a person is detained in custody on a criminal charge for want of bail. The defendant may waive this review. (Pen. Code § 1270.2.)

*This bill* repeals Penal Code section 1270.2.

*Existing law* states that in setting, reducing, or denying bail, a judge or magistrate shall take into consideration the protection of the public, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at trial or at a hearing of the case. The public safety shall be the primary consideration. (Pen. Code § 1275.)

*This bill* repeals Penal Code section 1275 and instead creates a pretrial release hearing where a judge or magistrate, in making a determination to release an individual, shall consider the protection of the public, the seriousness of the offense charged, the previous criminal record of the defendant, the probability of his or her appearing at trial or at a hearing of the case, and the presumption of innocence. The public safety, the safety of the victim, and the probability of the accused appearing in court as required shall be the primary considerations.

*This bill* states that in considering the seriousness of the offense charged, the court shall include consideration of the alleged injury to the victim, alleged threats to the victim or a witness to the crime charged, and the alleged use of a firearm or other deadly weapon in the commission of the crime charged.

*This bill* states that it shall be the duty of the court to determine what condition or conditions will ensure the safety of the community, secure the defendant's appearance at trial or at a hearing of the case, and facilitate pretrial release. If, after a hearing, the court finds that no conditions will reasonably assure the defendant's appearance in court or at a hearing of the court and protect public safety, the court shall issue an order explaining what condition or conditions it considered and why those conditions were inadequate.

*This bill* provides that in making a pretrial release decision, the court shall consider the pretrial services agency's risk assessment and recommendations on conditions of release. If the court's release decision is not consistent with the pretrial services agency's assessment and recommendations, the court shall include in its order for release a statement of the reasons.

*This bill* specifies that for persons who had a hearing after the district attorney filed a motion for pretrial detention, the court shall not consider the pretrial services agency's risk assessment and shall instead determine whether the person meets one of the following descriptions in order to keep detained:

- The person is charged with a capital crime;
- The person is charged with a felony involving violence or sexual assault and the person's release would likely result in great bodily harm to another person or persons;
- The person is charged with a felony offense and the person threatened another with great bodily harm and it is likely that the person would carry out the threat if released.

*This bill* provides that, if a person is in custody at the time of his or her arraignment, the judge or magistrate shall consider the pretrial services report and any relevant information provided by the prosecuting attorney or the defendant and order the pretrial release of the person without further conditions, subject to the person signing a release agreement. The reason for this decision shall be stated in the record.

*This bill* states that if a judge or magistrate determines that pretrial release, without conditions, will not reasonably assure the appearance of the person in court, the safety of the victim, or public safety, the judge or magistrate shall order pretrial release subject to a release agreement with the least restrictive further nonmonetary conditions that the judge or magistrate determines will reasonably assure the appearance of the person as required, the safety of the victim, and public safety. The court shall include in its release order a statement of the reasons for its determination.

*This bill* specifies that a court is not required to specify the reasons for ordering the defendant be provided the following services upon release: a reminder notification to come to court or assistance with transportation to and from court.

*This bill* authorizes the court to set monetary bail at the least restrictive level necessary or a combination of monetary bail and other conditions, to assure the appearance of the defendant in court and requires the court include in the release order a statement of the reasons for its determination.

*This bill* requires the court, in setting monetary bail, to conduct an inquiry into a person's ability to pay and to make a finding that the defendant has the present ability to pay the monetary bail set without substantial hardship.

*This bill* provides that a defendant for whom conditions of release are imposed and who, five days after the imposition of the conditions, continues to be detained as a result of an inability to meet the conditions of release, shall be entitled to an automatic review of the conditions by the court. The defendant may waive this review.

*This bill* authorizes a district attorney to file a motion seeking the pretrial detention of a person in certain circumstances, including when a person has been charged with a capital crime, a felony involving violence or sexual assault and the person's release would likely result in great bodily harm to another person or persons, or a felony offense and the person threatened another with great bodily harm and it is likely that the person would carry out the threat if released.

*This bill* provides that if a district attorney files a pretrial detention motion, a hearing shall be held within 48 hours to determine whether to release the person pending trial, unless the person waives the hearing.

*This bill* specifies that a person may be detained pretrial after a detention hearing if the court makes the following findings, which are consistent with the California Constitution:

- The defendant has been charged with a capital crime and the facts are evident or the presumption great;
- The defendant has been charged with a felony offense involving an act of violence on another person, or a felony sexual assault offense on another person, 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 another person or persons; or,
- The defendant has been charged with a felony offense, 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 in the charged case and that there is a substantial likelihood that the person would carry out the threat if released.

*This bill* authorizes a defendant to execute an unsecured appearance bond, which may be required to be signed by uncompensated third parties, or a secured bond in the amount specified by the court.

*This bill* defines an "unsecured appearance bond" to mean an order to release a person upon his or her promise to appear in court and his or her unsecured promise to pay an amount of money, specified by the court, if he or she fails to appear as promised.

*This bill* authorizes a court, after a defendant has been released from custody, amend the release order to change the conditions of release, including any monetary bail, upon a change in circumstances.

*This bill* provides that a defendant who has violated the terms or conditions of release may be held in contempt upon a motion of the prosecuting attorney if the court finds:

- There is probable cause that the defendant has committed a crime while on pretrial release or there is evidence that the defendant has violated any condition of release; and,
- There is no condition or combination of conditions of release that would reasonably assure that the defendant will not flee or pose a danger to any other person or the community or the defendant is unlikely to abide by any condition or combination of conditions of release.

*This bill* requires each county to establish a pretrial services agency that would be responsible for gathering information about newly arrested persons, conducting pretrial risk assessments, preparing individually tailored recommendations to the court, and providing pretrial services and supervision to persons on pretrial release.

*This bill* authorizes an unnamed agency to oversee pretrial services agencies and to provide training and assistance on pretrial release to judges, prosecutors, defense attorneys, jail staff, law enforcement agencies, and pretrial services agencies.

*This bill* provides guidelines for the pretrial risk assessment tool which shall be selected by the unnamed agency or for existing pretrial risk assessment tools that are in compliance with these guidelines and that had been used by counties prior to the effective date of this bill.

*This bill* requires the Board of State and Community Corrections (BSCC), in consultation with the unnamed agency, to develop a plan that establishes statewide requirements for counties related to annual reporting of pretrial release and detention information, which includes at minimum information about the percentage of individuals released on pretrial, the percentage of those who fail to appear, those who commit new crimes while on pretrial release, and the rate of judicial concurrence with recommended conditions of release.

*This bill* requires each county to make publicly available its risk assessment tool guidelines, factors, weights, studies, data upon which validation studies rely, and information about how a risk assessment tool was reformed.

*This bill* states that it is the intent of the Legislature in enacting this act to safely reduce the number of people detained pretrial, while addressing racial and economic disparities in the pretrial system, and to ensure that people are not held in pretrial detention simply because of their inability to afford money bail.

*This bill* makes other conforming changes.

## COMMENTS

### 1. Need for This Bill

According to the author of this bill:

In California, the median bail amount is \$50,000 – five times higher than the national median. On any given day, approximately 60% of people in jail in California are either awaiting trial or sentencing. Many of those in California’s jails are there for no reason other than the fact that they are unable to afford money bail.

Unnecessary pretrial detention compromises defendants’ ability to defend themselves against their accusers and threatens the integrity of the criminal system. Detained defendants are 25% more likely than similarly situated released defendants to plead guilty to a crime. The incentive to get out of pretrial detention is so strong that people even plead guilty to crimes they did not commit. Studies have likewise shown that, holding all other factors constant, individuals who are detained prior to trial suffer from greater conviction rates and more severe sentencing than those who are released prior to trial.

High bail amounts and pretrial detention also disproportionately impact people of color. Studies have shown that bail amounts are 35% higher and 19% higher for African American men and Hispanic men, respectively, than for white men. Among defendants for whom monetary bail is set, Black and Hispanic defendants are twice as likely to be detained pretrial than white defendants. The disparity in drug offenses is even more stark, with the likelihood of detention for Black and Hispanic defendants being 96% and 150% higher respectively, than the odds of detention for white defendants.

In addition to penalizing pretrial defendants, our current money bail system burdens California families as well. Even a short period of pretrial detention can result in loss of employment, housing, and public benefits for the detained person – costs that then must be borne by family members already struggling to make ends meet. Family members who are able to scrape together enough money to pay a non-refundable fee to a for-profit bail company to secure a loved-one's release from jail often end up with long-term debt to the bail company, even when their loved one is innocent of any wrongdoing and is never convicted of a crime. These costs hit women the hardest, with 83% of court-related costs on behalf of a loved one being taken on by women.

...

SB 10 seeks to remedy California's failing pretrial system by reducing reliance on money bail, supporting pretrial defendants with pretrial services, focusing detention resources on those who pose a risk of danger, reducing racial disparities, and ensuring that people are not left in jail simply because they cannot afford to pay for their release. Under SB 10, courts will evaluate whether an individual can be safely released from jail pending trial, and if so under what set of conditions to assure that the person will come to court as required and avoid committing crimes.

SB 10 draws from successful models around the country and in California. For example, Kentucky utilizes a risk-assessment system and no longer relies on commercial bail and releases 70% of its pretrial defendants (68% on non-financial releases). In Kentucky, 89% of released defendants make all future court appearances, and 92% are not re-arrested while on pretrial release. Santa Clara County has implemented a successful pretrial services model and has saved \$33 million in six months by keeping 1,400 defendants out of jail.

## 2. Bail Generally

Existing law provides a process whereby the court may set a bail amount for a criminal defendant. (Penal Code Section 1269b.) Additionally, Section 12 of Article 1 of the California Constitution provides, with limited exceptions, that a criminal defendant has a right to bail and what conditions shall be taken into consideration in setting bail. A defendant may post bail by depositing cash or an equivalent form of currency, provide a security in real property, or undertake bail using a bail bond.

The bail bond is the most likely means by which a person posts bail and is essentially a private-party contract that provides the court with a guarantee that the defendant will appear for a hearing or trial. A defendant pays a licensed bail agent a percentage of the total amount of bail ordered as a non-refundable fee – often an amount in the range of 10%. The bail agent will contract with a surety company to issue a bail bond – essentially, an insurance policy. The bond is issued providing that if the defendant fails to appear, the county will receive the full amount of bail set by the court. The bond is provided to the court and, if accepted, the defendant is released. As designed, the bail system often allows the court to rely on the private sector to ensure appearances and provide a means for the county to be made whole in the event that a person fails to appear.



While the main purpose of a bail bond is to provide some assurance that a defendant will return to court to resolve the pending charges, courts also consider the danger a released defendant will pose to the public or specific persons. Bail is set through a bail schedule that lists preset amounts of bail for various crimes. A committee of judges in each county promulgates the bail schedule for that county. (Pen. Code § 1269b, subd. (c).) A defendant or the prosecution can move the judge presiding over a particular case to raise or lower the amount of bail, or the defendant can request release on his or her own recognizance. (Pen. Code § 1275.) Additional statutory rules apply if the defendant is charged with a serious felony or domestic violence. (Pen. Code § 1270.1.)

The existing bail system has come under scrutiny because of claims that it does not promote public safety and it unfairly penalizes defendants who are poor while allowing defendants who have means to buy their way out of jail. (*California's Bail System Punishes the Poor, and It's Time for the Government to Do Something About It*, Skelton, Los Angeles Times (Jan. 16, 2017) <<http://www.latimes.com/politics/la-pol-sac-skelton-california-bail-system-20170116-story.html>> [as of Mar. 18, 2017].) Lawsuits have been filed across the country, including the cities of Sacramento and San Francisco, under the theory that the current bail system unfairly discriminates against the poor in violation of the Fourteenth Amendment's Equal Protection Clause. (See <<http://equaljusticeunderlaw.org/wp/current-cases/ending-the-american-money-bail-system/>> [as of Mar. 28, 2018].)

The Legislature has responded to the push for bail reform with bills that would implement major changes to the system, such as this bill and AB 42 (Bonta). The Judiciary has separately set up a working group to study current pretrial detention practices and provide recommendations for potential reforms. (*Chief Justice Appoints Working Group to Recommend Changes in Pretrial Detention* (Oct. 28, 2016) <<http://newsroom.courts.ca.gov/news/chief-justice-appoints-working-group-to-recommend-changes-in-pre-trial-detention>> [as of Mar. 18, 2017].)

### 3. Alternative to Bail: Own Recognizance Release

In cases where the defendant is likely to return to court and where the safety of the public or specific persons will not be put at risk, a court can release someone on his or her own recognizance (OR). This includes both felonies and misdemeanors. An OR release is essentially release without payment of bail pending trial or other resolution of a criminal case.

In order to be released on OR,

[T]he defendant signs a release agreement promising to appear at all required court hearings in lieu of posting bail. Before granting an OR release, the judge must evaluate the defendant's flight risk by considering the defendant's ties to the community, whether the defendant has a past record of failures to appear in court, and the possible sentence the defendant faces if convicted. The judge must also evaluate risk to public safety by considering any threats that have been made by the defendant, as well as any record of violent acts.

In counties with active pretrial programs, the judge may consider pretrial reports and recommendations based on interviews and evaluations that assess the defendant's public safety and flight risk. For example, in Marin County, the county probation department contracts with an independent agency that provides pretrial services. Using an evidence-based pretrial risk-assessment tool, agency staff evaluates eligible defendants along three

dimensions: criminal history, employment and residential stability, and drug use. Following a verification process and an evaluation of danger to self or others, the agency prepares a recommendation along with a report. After approval by the probation department, the report is submitted to the court. In addition to supplying the court with recommendations and reports, these programs may also offer a range of conditional release options. These release options may include release on electronic monitoring, release with alcohol monitoring, or release to home detention. If pretrial release is not granted and bail is fixed by the court, realignment legislation also permits the sheriff to authorize the pretrial release of inmates. Under the legislation, a county board of supervisors must first designate the sheriff as the county's correctional administrator and may then authorize the correctional administrator to place pretrial jail inmates who do not pose a significant threat to public safety in an electronic monitoring program when specified conditions are met.

In some instances, an unsentenced jail inmate who has not posted bail may be released due to jail overcrowding. At implementation of realignment, 17 counties were operating under court orders that limit the number of inmates they can hold at one or more of their county facilities. Statewide, in the year before realignment, the average annual jail population was 71,060, and releases due to lack of capacity numbered 6,800 per month for unsentenced inmates and 3,900 per month for sentenced offenders.

(Tafoya, *Assessing the Impact of Bail on California's Jail Population*, Public Policy Institute of California (June 2013), p. 8 (citations omitted).) If a judge determines that a person should not be released on OR, then the judge can set bail with the bail schedule as a guide.

This bill repeals the current section in the Penal Code authorizing OR release and instead implement a new pretrial release procedure that would allow most people to be released, either with or without conditions, or with money bail if the court determines that it is necessary.

#### **4. Ongoing Concerns over County Jail Populations**

The most recently available data from the BSCC shows that the majority of jail inmates are unsentenced, roughly 62 percent of the population. Data shows that California relies more heavily on pretrial detention than the rest of the United States. (Sonya Tafoya, *Pretrial Detention and Jail Capacity in California*, Public Policy Institute of California (July 2015) <[http://www.ppic.org/main/publication\\_quick.asp?i=1154](http://www.ppic.org/main/publication_quick.asp?i=1154)> [as of March 15, 2017].) This dynamic strains the capacity of county jails making it necessary to release sentenced inmates, while people who have not been found guilty of any crimes wait in jail because they have not been released on OR and cannot afford to post bail.

This bill would help relieve jail overcrowding by limiting the persons who could be detained pretrial to offenders who have committed certain violent crimes.

#### **5. The Effect of this Legislation**

This bill makes several changes to the pretrial release procedures in current law.

Existing law requires each county to establish a countywide bail schedule which is used by the jails upon arrest and by the courts during arraignment to determine the amount of bail in each case. This bill does away with the countywide bail schedules and instead provides that upon

arrest and booking into a county jail, the pretrial services agency shall conduct a pretrial assessment on the person and prepare a report that contains recommendations for whether the person should be released without conditions or with the least restrictive condition or conditions. In most cases involving a misdemeanor, the arrested person must be released by pretrial services upon signing a release agreement. In most felony cases, pretrial services will transmit the pretrial services report to an on-call judge, magistrate, or commissioner who will then review the pretrial services report and order that the person be released either without conditions, or with the least restrictive conditions. If a person is arrested for certain specified felonies or misdemeanors involving violence, the person cannot be released until his or her arraignment.

Existing law requires a person to be arraigned on their case within 48 hours, unless the person is arrested on Wednesday night and Friday is holiday which means that a person can remain in jail prior to arraignment for 4 days. This bill requires, if a person is arrested on a Wednesday night and that following Friday is a court holiday, the person to be arraigned on Thursday.

Existing law authorizes a judge to set bail at arraignment or separate bail hearing using the countywide bail schedule as a guide, with the ability to set bail at a higher or lower amount. The judge may also deny bail in certain situations or set bail in an amount that is restrictively high that would result in a defendant remaining in custody. The judge may also use his or her discretion to release a person on OR in any case not involving a capital crime.

As stated above, this bill gets rid of the county bail schedules and instead requires release at arraignment unless a pretrial detention motion is filed by the district attorney. At arraignment, the court is first required to consider releasing the person without any conditions, and if the court determines that releasing the person without conditions will not reasonably assure that the person will come back to court as required and assure that the defendant will not commit new crimes, the court can place nonmonetary conditions on the defendant. These conditions must be the least restrictive and the person cannot be required to pay for any conditions. Only if the court finds that the person cannot be released with nonmonetary conditions in such a way that will reasonably assure that the person will come back to court as required, can the court consider money bail. If the court imposes money bail, it must make a determination that the person has the present ability to pay and that the amount of bail ordered does not cause substantial hardship on the defendant, as defined. This bill authorizes the use of an unsecured bond or a secured bond to make bail.

This bill also provides that a person who is released pretrial may have the order modified by motion of the district attorney or defense based on a change in circumstances. Also, if a defendant has been ordered released but is still in custody after five days due to a condition of release that the defendant cannot meet, the defendant is entitled to automatic review of the order.

This bill only authorizes the pretrial detention of a person if the court finds that the person falls into one of the following categories, which is consistent with the California Constitution provisions on bail:

- The defendant has been charged with a capital crime and the facts are evident or the presumption great;
- The defendant has been charged with a felony offense involving an act of violence on another person, or a felony sexual assault offense on another person, 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 another person or persons; or,

- The defendant has been charged with a felony offense, 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 in the charged case and that there is a substantial likelihood that the person would carry out the threat if released.

Existing law does not require counties to use a pretrial risk assessment tool and does not provide any statewide standards for pretrial assessment tools used by counties. This bill requires an agency, to be later determined, to pick a pretrial assessment tool for counties to use that meet certain specifications that are designed to avoid bias in release decisions. Counties that are already using pretrial assessment tools may continue to use them as long as they meet the required specifications. This bill requires counties to annually report to the state pretrial release and detention information, which includes at minimum information about the percentage of individuals released on pretrial, the percentage of those who fail to appear, those who commit new crimes while on pretrial release, and the rate of judicial concurrence with recommended conditions of release.

This bill requires each county to develop a pretrial services agency that meets the following specifications:

- Uses methods that research has proven to be effective in reducing unnecessary detention and to employ the least restrictive interventions and practices;
- Ensures that services provided are culturally and linguistically competent;
- Ensures that all policies and practices are developed and applied to reduce or eliminate bias based on race, ethnicity, national origin, immigration status, gender, religion, and sexual orientation; and,
- Assists pretrial defendants with complying with their conditions of release and to address noncompliance with pretrial services requirements administratively.

Under existing law, if a person is released on OR and he or she violates the terms of release or is arrested on a new charge, the person's release may be revoked and the court may either set money bail, re-release the person with new conditions or hold the person in contempt. Under the provisions of this bill, if a person is believed to be in violation of a condition of release the court may modify the release order to add conditions. In order to hold a person in contempt, the court must hold a hearing to determine whether there is probable cause that the person has committed a crime while on pretrial release or that the person has violated a condition of release and the court must determine that there is no condition or combination of conditions of release that would reasonably assure that the defendant will not flee or pose a danger to any person in the community, or that the person is unlikely to abide by any conditions of release.

## 6. Arguments in Support

According to Ella Baker Center for Human Rights, a co-sponsor of this bill:

This bill seeks to significantly reduce the reliance on the money bail system that punishes poverty. In its place, the bill establishes a robust pre-trial services program and the usage of a validated risk-assessment tool to determine the safe release of people, pending the resolution of their cases. It is a common sense,

practical approach to enhancing public safety in California and is in line with a growing momentum of jurisdictions across the country to reduce the impact of the predatory money bail system.

In California, nearly 2/3 of the people sitting in jail are either awaiting trial or sentencing, at a significant cost to the state and vulnerable families. The State spends \$5 million per day to lock up people who are waiting to go to court—totaling more than \$1.8 billion annually. Families are forced to make the difficult decision between covering their basic needs like housing and paying the bail bonds agency. Families that cannot afford the 10% fee often go on payment plans that perpetuate the cycle of poverty. When a person remains in jail because they cannot afford bail, others may need to fill the financial gap he or she leaves behind, forcing family members to drop out of school to get a job, or quitting a job to take care of children that are left behind.

Further, people forced to stay in jail because they cannot afford bail face a number of additional obstacles. Many people take coercive plea deals in order to avoid waiting for trial so they can get back to their lives and familial obligations. Research has shown that compared to people who are released prior to trial, those held for their entire pretrial detention have a greater likelihood of being sentenced to jail. Studies have also shown a strong correlation between length of detention and recidivism. Compared to people who were held no more than 24 hours, those held for 8 to 14 days were 51% more likely to go back to jail for another crime. Pre-trial detention as a result of inability to pay bail can also result in loss of employment, housing, child custody rights, etc. Black men are not only less likely to be released on their own recognizance, their bail amounts are also 35% higher on average than white men. Most alarmingly, nearly 80% of all jail deaths in California occur among people who are detained pre-trial.

People of color are already over-represented in the criminal justice system and current pre-trial detention practices exacerbate these disparities. The current system of bail was designed to most severely impact those who can least afford it. SB 10 provides California with the opportunity to decriminalize poverty, reduce racial disparities, and enhances public safety outcomes.

## 7. Arguments in Opposition

According to the Golden State Bail Agents Association:

This bill would require the court to release a defendant being held for a misdemeanor offense on his or her own recognizance unless the court makes an additional finding on the record that there is no condition or combination of conditions that would reasonably ensure public safety and the appearance of the defendant if the defendant is released on his or her own recognizance.

SB 10 would endanger public safety by forcing the release of these high risk misdemeanor defendants without bail. Bail is an important public safety tool because it is paid for by the defendants family and close friends who cosign the bail agreement vouch for the defendant. These cosigners now have a financial incentive to make sure defendant attends all of his or her court dates. It is only

going to court that defendant can be compelled to attend drunk driving and domestic violence intervention programs that can make a positive difference in a defendant's life and end the cycle of domestic abuse or drunk driving.

According to the Los Angeles Police Protective League:

California Chief Justice Cantil-Sakauye has formed the Pretrial Detention Reform Work Group to address the bail issues from a global perspective. Our understanding is that the Work Group's recommendations will be provided to Chief Justice Cantil-Sakauye in December 2017.

In order to assure that any Legislative action is made with full knowledge of the Judicial Council's Pretrial Detention Reform Work Group's recommendation we believe that Senate Bill 10 should be deferred until after those recommendations are available.

-- END --



# Presentation to the California State Association of Counties

May 17, 2017

Sacramento, California

**Jeff Clayton, M.S., J.D.**

Executive Director

American Bail Coalition



# Who Are We, What Do We Do?

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*“Bail is among the oldest of ‘evidence-based’ tools to ensure the defendant’s presence at trial. It is vital to public safety and the integrity of the criminal justice system.”*



May 30, 2013

Letter to Governor Brown and the Legislature on Bail and Pre-Trial Services

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# Who Are We, What Do We Do?

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- California bail agents have over 300,000 defendants out on bail at any one time.
- Those defendants have over 600,000 friends and family members that are legally involved, in addition to the licensed sureties, in the process to monitor, support and insure that the defendants go to court.
- If they don't go to court, these individuals all play a role in the process of returning the defendants to court or custody or otherwise pay a bond forfeiture





## Evidence-Based Practices/“Scientific” Justice System

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A philosophy shift from punishment to rehabilitation

“Using stuff that works?”

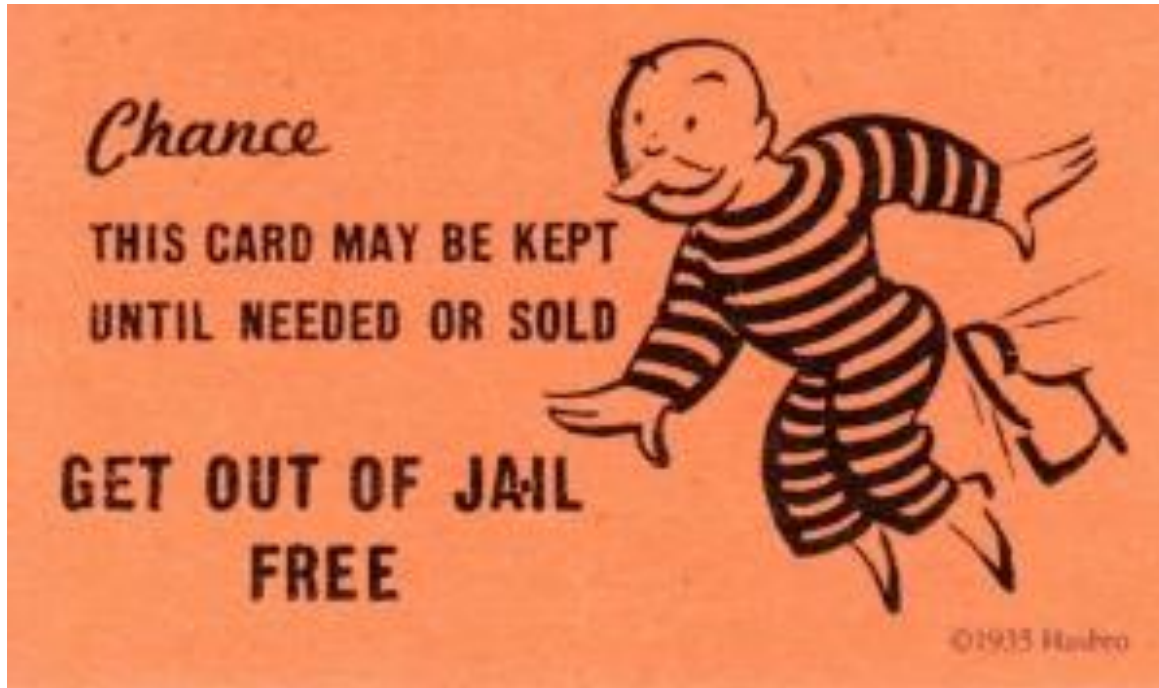
Will never replace human judgment, will only complement and inform it





## Current National Picture

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- 1567, First National Lottery in England—ten schillings
  - Prevented arrest and excused crimes for anything but murder, felonies, piracy, or treason
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# Current National Picture

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- Bond schedules—reduce or eliminate
  - Use computer risk-assessments to help judges sort people
  - More recognizance bonds
  - Reducing/eliminating the use of financial bonds and surety bail agents
  - Using supervision in place of financial conditions
  - Adopting the New Jersey or Washington, D.C. model
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# Current National Picture

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- Increased use of risk assessments, which if used properly, may assist judges in being better informed prior to making a decision on bail
- Most jurisdictions have not taken the step of eliminating all financial conditions or surety bonds but rather create alternatives or supplements to financial conditions
- Kentucky still has financial bail—just no surety bonds—majority of people who were released from jail posted cash up until a couple of years ago—now the number is about 1/3 of all defendants posting a financial bail bond





# Cost Indicators for Local Officials

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- Judicial costs—having bail setting hearings rather than letting the schedule do most of it, obtaining data, conducting risk assessments, increases in bench warrants
- Jail costs—will they increase or decrease?
- Costs of supervision and monitoring—local governments or the State will pick up the tab
- Law enforcement—failure to appear warrants will rise under the current concept of bail reform
- New Jersey Counties sued the State due to the costs of bail reform



# Assumptions in “Pretrial Justice”

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- 70% of people in jail nationally are there “pretrial” and are “innocent,” “have been convicted of no crime,” and “cannot afford their bail” —example, Connecticut: 78% had three or more prior convictions, and 60% had 1 or more prior felony convictions
- ABC has identified at least ten administrative or other legal reasons other than “affordability” of bail that keep people in jail
- Only a real localized jail study at the file level can isolate the magnitude of the problem and what factors, financial or not, drive it





# Assumptions in “Pretrial Justice”

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The following is a snapshot of **10,545** pretrial inmates in the LA County Jail and who are eligible for bail:

- **3,501** already sentenced for another crime – **NO BAIL**
- **2,066** with outstanding warrants – **NO BAIL**
- **2,014** with “no bail” designations – **NO BAIL**
- **1,229** with assaultive crimes – **NO BAIL**
- **386** who are classified as high security – **NO BAIL**

**TOTAL ELIGIBLE FOR BAIL**

**1,349**

**(or 12% ... NOT 70%)**







# ABC Has Proposed Solutions

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- Charge stacking
- Non-monetary holds in low level cases
- Better review procedures to make sure review process from a bond schedule or initial setting is expedited—*City of Riverside*
- California Penal Code needs improvement on due process
- Public-private partnerships—state pay or state contracted surety bail as an insurance product—lift the indigent up, not drag everyone else down
- Bail schedule consistency, transparency and other reforms



# Problems With No Money System

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- It is easy to say we don't want a "wealth-based" bail system
  - Ability to pay is one of a basket of factors, and is a consideration as to whether bail is excessive
  - The cost of bail is marginal compared to all of the other costs that offenders will be expected to pay
  - Typically, third-parties are providing a surety (financial guarantee) to the Courts and the defendant at their own expense—you would be cutting off a private benefit provided to a defendant and the Courts
  - Protects community's associational and familial rights
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# Problems With No Money System

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- Financial conditions should have a role in the system—this option should fit within the framework and not be excluded simply because the proponents of some risk instruments designed them to eliminate financial conditions
  - Eliminating financial conditions means **preventative detention will be used**—clear and convincing evidence, court time, due process, heightened speedy trial requirements—New Jersey
  - Preventative detention in the federal system keeps 64% of all defendants arrested detained with no bail
  - D.C. incarcerates 15-20% of all arrestees with no bail pending trial—what is California's number? New York's is around 10%.
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# Problems With No Money System

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- Too costly to go to a system with *no* financial conditions
- D.C. \$65.2 million to handle pretrial services supervision and evaluation in a city population of 660,000
- California's population is 58 times larger—on per capita basis that is a \$3.8 billion price tag for California to implement such a system
- New Jersey--\$100 million first year, total annual economic cost to the state of New Jersey of \$510 million



# Effectiveness of Surety Bonds

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*“Compared to release on recognizance, defendants on financial release were more likely to make all scheduled court appearances.”*



U.S. DEPARTMENT OF  
**JUSTICE**

## **U.S. Department of Justice**

Bureau of Justice Statistics

*State Court Processing Statistics 1990-2004*

*Release of Felony Defendants in State Courts*





# Bail Systems—Get Local

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- Do not reform California’s bail system based on national talking points—California’s system is truly unique
  - Get to file-level data and analyze it
  - Example—in one county jail in California 30% of all defendants awaiting trial are facing homicide charges
  - Costs at the local level must be considered—the D.C. system may be a fine system, but is it more “fair”?
  - One Judge: “They have a lot of nice bells and whistles down there that would be nice to have, but which we cannot afford.”
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# Bond Schedules—Consistency Needed

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	10851 VC	273.5 PC	288 (a) PC	459 PC	530.5 PC
Alameda (2015)	30,000	50,000	100,000	50,000	30,000
Butte (2017)	15,000	50,000	50,000	50,000	15,000
Contra Costa (2016)	20,000	35,000	100,000	50,000	35,000
Fresno (2016)	15,000	25,000	40,000	30,000	20,000
Imperial (2016)	5,000	50,000	100,000	50,000	5,000
Kern (2017)	10,000	20,000	50,000	25,000	10,000
Los Angeles (2017)	25,000	50,000	100,000	50,000	50,000
Monterey (2016)	10,000	20,000	100,000	10,000	10,000
Orange (2016)	20,000	50,000	100,000	50,000	20,000
Sacramento (2015)	20,000	50,000	100,000	10,000	25,000
San Bernardino (2017)	50,000	50,000	250,000	75,000	50,000
San Diego (2017)	10,000	50,000	100,000	50,000	50,000
San Francisco (2016)	25,000	50,000	150,000	40,000	40,000
Stanislaus (2015)	40,000	7,000	100,000	50,000	25,000
Ventura (2016)	20,000	20,000	50,000	50,000	50,000



# Cost of Supervision and Monitoring

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- It is not free—someone must pay
- Monthly tabs in many jurisdictions can be as high as \$500 (Antonio Green case)
- Even a \$100 a month tab will add up to \$1,000 over 10 months—that is a financial condition of bail, to be borne by a county government or a defendant
- Continuous payments can ensnare defendants—miss a payment, what happens? Re-arrest?
- Who will pay for the indigent? Someone must pay





# Costs of Supervision and Monitoring

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*“You go to the National Association of Pretrial Services Conference, or the American Parole and Probation Association, and in the vendor room is all this technology for tracking.”*

*“They portray it as a great technology, and they tell all these county folks, **“This doesn’t cost you anything; the defendant pays for it all!”***

Cherisse Fanno Burdeen  
Executive Director  
Pretrial Justice Institute



# Senate Bill 10/Assembly Bill 42

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- Each county will be required to create a county pretrial program to: (1) assess all defendants' risk within \_\_\_\_\_ ; (2) supervise defendants; (3) provide and monitor non-monetary conditions of bail (ankle monitors, etc.); (4) provide transportation to court for defendants.
- Costs will be borne by county governments—they can file a claim to be reimbursed later—Commission on State Mandates
- No bail schedules—all bails will have to be set in open court and evidence presented in all cases—judges will blanket defendants with conditions that counties will pay for



# Senate Bill 10/Assembly Bill 42

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- Fugitive recovery borne by local governments
- Right to a bail a person can afford—contrast, current law, right to a bail that is in excess
- No one who bails today can get out of jail until a county program assessed them—this will keep everyone in jail longer at the front end
- Constitutional questions—victims constitutional rights in bail context presuppose current system
- Creation of \_\_\_\_\_ state agency to oversee and regulate work of each county program





# Senate Bill 10/Assembly Bill 42

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- “Ongoing reimbursable state-mandated costs in the hundreds of millions of dollars for each county to establish and administer the pretrial services agencies.”
  - “Ongoing annual costs in the tens to hundreds of millions of dollars for court appointed counsel.”
  - “Ongoing costs in the tens of millions of dollars for the unnamed agency to comply with the provisions of this bill, which include one-time costs for the development of the risk assessment by an unspecified date, and ongoing annual costs to provide monitoring and assistance to pretrial services agencies.”
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## Senate Bill 10/Assembly Bill 42

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- “Unknown but significant savings to counties for reduced incarceration costs.”
- Savings are unlikely to overwhelm the costs
- In New Jersey, one county reduced year over year jail population by 20% but still could not say they achieved any savings
- Risk-based system—SB 10/AB 42 lack the hammer of expanded preventative detention, which has been a key part of the reforms proposed and adopted in other states (NJ, NM)





# Senate Bill 10/Assembly Bill 42

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- Eliminates local control—pretrial services was created to address this very problem of lack of access to bail and allow local governments to manage their jail populations by giving judges other alternatives
- Local governments can carefully weigh the costs and benefits (Santa Clara example)
- Under this legislation, local government programs will be regulated by the state and forced to comply with a host of state regulatory mandates in addition to bearing the costs



**AMERICAN BAIL COALITION**

**We are here to help**

**Thank you for your time**