



**Contra
Costa
County**

To: Board of Supervisors
From: David Twa, County Administrator
Date: July 18, 2017

Subject: "Oppose Unless Amended" Position on SB 10 (Hertzberg): Bail: Pretrial Release

RECOMMENDATION(S):

ADOPT an "Oppose Unless Amended" position on SB 10 (Hertzberg): Bail: Pretrial Release, as amended on 7/5/17, a bill that 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, as recommended by the County Administrator.

FISCAL IMPACT:

There is an unknown fiscal impact on the County from the expansion of the County's existing pre-trial program, which is funded with AB 109 revenue in FY 17-18 at the level of \$1.02 million.

BACKGROUND:

At its meeting of March 14, 2017, the Board of Supervisors adopted a "Support" position on AB 42 (Bonta) and SB 10 (Hertzberg), as amended on 1/17/17 and as recommended by the Legislation Committee. The early version of this bill was essentially a "placeholder" that expressed the intent of the Legislature to enact legislation that would safely reduce the

☒ APPROVE

☐ OTHER

☒ RECOMMENDATION OF CNTY ADMINISTRATOR

☐ RECOMMENDATION OF BOARD COMMITTEE

Action of Board On: **07/18/2017** ☒ APPROVED AS RECOMMENDED ☐ OTHER

Clerks Notes:

VOTE OF SUPERVISORS

AYE: Candace Andersen, District II
Supervisor
Diane Burgis, District III
Supervisor
Karen Mitchoff, District IV
Supervisor
Federal D. Glover, District V
Supervisor

NO: John Gioia, District I
Supervisor

I hereby certify that this is a true and correct copy of an action taken and entered on the minutes of the Board of Supervisors on the date shown.

ATTESTED: July 18, 2017

David Twa, County Administrator and Clerk of the Board of Supervisors

By: Stephanie Mello, Deputy

Contact: L. DeLaney,
925-335-1097

cc:

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. The version of the bill as amended on 1/17/17 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.

Since that time, the bill has been amended again on 7/5/17 with a more extensive set of requirements. Given the potential fiscal impact on the County from the required expansion of the County's existing pre-trial program as now required in SB 10, the County administrator recommends the Board's position on the bill be amended to "Oppose Unless Amended," as recommended by the California State Association of Counties.

BACKGROUND: (CONT'D)

**2017 CA S 10: Bill Analysis - 07/10/2017 - Assembly Public Safety Committee,
Hearing Date 07/11/2017**

Date of Hearing: July 11, 2017

Counsel: Sandy Uribe

ASSEMBLY COMMITTEE ON PUBLIC SAFETY

Reginald Byron Jones-Sawyer, Sr., Chair

SB 10

(Hertzberg) - As Amended Ver: July 5, 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) Provides that if a person is arrested based upon a warrant issued in another county, a magistrate in the county of arrest can release the detainee subject to a release agreement, with or without conditions or release, or set monetary bail.
- 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 six hours after receipt of the risk assessment and pretrial services report have been received; and,

c) The court can release the detainee regardless of the fact that a pretrial services report has not been received.

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) Next, if the court determines that pretrial release without conditions will not reasonably ensure 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) Lastly, 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 ensure 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 ensure the defendant's appearance and to consider the defendant's present ability to pay.

17) Defines "ability to pay" as either: (1) the overall capability of the defendant to reimburse the costs, or a portion of the costs, of the legal assistance provided to him or her, including but not be limited to, the defendant's present financial position, the defendant's reasonably discernible future financial position in the next six months including likelihood of obtaining employment, and any other factor or factors that may bear upon the defendant's financial capability; or (2) as defined by the Judicial Council in a Rule of Court developed for this purpose.

18) Defines "least restrictive" as "those release terms necessary to reasonably ensure the appearance of the specific person, the safety of the victim, and public safety, as determined by the court."

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

20) Provides that for defendants charged with violent felonies, the risk assessment and report with recommendations will only be prepared if the defendant requests them. If the defendant requests an assessment and report, it must be completed within 12 hours, and the defendant must be considered for release within 24 hours.

21) 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.

22) Permits the prosecutor, in cases alleging an aggravated white collar crime enhancement, to seek asset forfeiture in order to preserve property or assets in the defendant's control.

23) 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 ensure 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 ensure the safety of person threatened, and there is substantial likelihood that the person would carry out the threat if released.

24) Requires the court, upon the filing of a motion for pretrial detention, to hold a hearing within 48 hours after the filing of the motion, unless the defendant waives a hearing.

25) Requires the prosecutor to provide notice of a pretrial detention hearing to the alleged victim or victim's next of kin, in cases where the defendant has been arrested for a serious felony.

26) Prohibits the court from considering the results of a pretrial risk assessment at a detention hearing.

27) 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.

28) Provides that if the person is ordered detained, then the court's order must include findings of fact and a statement of reasons.

29) 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.

30) 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.

31) 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."

32) 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.

33) 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.

34) Permits the court to order a pretrial services agency to supervise and monitor the

compliance of released defendants.

35) 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.

36) 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.

37) Requires the risk assessment tool to appropriately weigh risk factors, including criminal history, in a manner that ensures accuracy while minimizing racial and economic disparities.

38) 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.

39) 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.

40) 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.

41) 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, Section 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, Section 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, Section 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, Section 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, Section 815a.)

9) Provides that an arrested person must be taken before the magistrate within 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, Section 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, Section 1319.)

13) Specifies conditions for a defendant's release on his or her own recognizance (OR). (Pen. Code, Section 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, Section 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, Section 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, Section 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, Section 1305, subds. (a) & (b).)

FISCAL EFFECT: Unknown.

COMMENTS:

1)Author's Statement: According to the author, "California's current money bail system comes at great cost not only to the detained individual and his or her family, but also to California communities. When wealth and charges alone determine whether or not someone will be released pending trial, community safety suffers. Under a wealth-based, bail-schedule-based system, as long as a person can afford the amount of bail set, that person will typically go free even if the person cannot be safely released. Under this same

system, people who can be safely released often remain in jail and potentially increasing the likelihood that they will commit new crimes once released. Research has shown that detaining low-and moderate-risk defendants, even for just a few days, is strongly correlated with higher rates of new criminal activity both during the pretrial period and years after case disposition. When held even 2-3 days, low risk defendants are almost 40% more likely to commit new crimes before trial than equivalent defendants held no more than 24 hours. When held for 8-14 days, these defendants are 51% more likely to commit another crime within two years after completion of their cases than equivalent defendants held no more than 24 hours."Unnecessary pretrial detention comes at great cost to taxpayers as well. It costs roughly \$114 per day to house a person in jail California. There are 123 jails across the state, with a combined average daily population of 72,500 people. All the while the state and local jurisdictions are wasting taxpayer dollars to detain people who have not yet been convicted of a crime and may not be convicted of a crime, as well as people who, when convicted, will not be sentenced to incarceration. One in three felony arrests did not result in conviction, and only 14% of felony convictions in California result in a prison sentence."Nationwide, people who are unable to meet bail fall within the poorest third of society. In the 75 largest urban counties in the United States, roughly 9 out of every 10 defendants detained pretrial had had a bail amount set but were unable to meet the financial conditions to secure release from jail. When asked whether they could afford an emergency expense costing just \$400, 46% of American adults said they could either not cover the expense, or they would have to cover it by selling something or borrowing money. Nationally, the median bail amount is \$10,000, which represents eight months of pay for the typical detained defendant. "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.

"California should follow the lead of Chief Justice Tani Cantil-Sakauye, the American Bar Association, the U.S. Department of Justice, the Council of Chief Justices, and countless state and local lawmakers, officials, and advocates across the country calling for reform."

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, Section 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.)

"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: Consistent with the California Constitution, this bill allows for preventative detention under the following circumstances: (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 ensure 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 should 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 conditions, as a last resort. Additionally, if the court chooses money bail, the bail must be set at the least restrictive amount needed to ensure the defendant's appearance in court, and in an amount that the defendant can afford to pay. 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 only because of inability to pay.

This bill would define "ability to pay" using the current definition of assessing ability to pay costs of legal representation at the end of trial court process. In that context "ability to pay" is defined as:

"the overall capability of the defendant to reimburse the costs, or a portion of the costs, of the legal assistance provided to him or her, and shall include, but not be limited to, all of the following: (A) The defendant's present financial position. (B) The defendant's reasonably discernible future financial position. In no event shall the court consider a period of more than six months from the date of the hearing for purposes of determining the defendant's reasonably discernible future financial position. Unless the court finds unusual circumstances, a defendant sentenced to state prison, or to county jail for a period longer than 364 days, including, but not limited to, a sentence imposed pursuant to subdivision (h) of Section 1170, shall be determined not to have a reasonably discernible future financial ability to reimburse the costs of his or her defense.

(C) The likelihood that the defendant shall be able to obtain employment within a six-month period from the date of the hearing.

(D) Any other factor or factors that may bear upon the defendant's financial capability to reimburse the county for the costs of the legal assistance provided to the defendant." (See Pen. Code, Section 987.8, subd. (g)(2).)[1]

As recently amended, this bill appears to allow for preventative detention. While the court is prohibited from setting bail in an amount which results in a defendant's pretrial detention solely because of inability to pay, all the court needs do is state other grounds for setting bail in an amount that the defendant cannot afford to pay, for example, based on public safety, the defendant's flight risk, or the safety of the victim.

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 Cantil-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...."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 Ella Baker Center for Human Rights, another 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 use 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."

8)Arguments in Opposition:

a)According to the Judicial Council of California, "The Judicial Council is concerned that SB 10 would infringe on judicial discretion and independence for the following reasons:"Balance of system interests: The council is concerned that SB 10 does not establish a reasonable or realistic balance between the interest in releasing all defendants who can be safely released pretrial, and a concern for public safety (including safety of victims) and the administration of justice (fleeing jurisdiction/failure to appear). Judges have constitutional and statutory responsibility for implementing the law in ways that ensure appropriate consideration for protecting the rights of the accused, protecting the public and victim(s), and providing for the fair and efficient administration of justice. In that regard, the council is concerned that SB 10 would require the pre-arraignment release by the pretrial services agency of any person charged with a misdemeanor (unless the defendant is already on pretrial release), without providing an opportunity for a judge

to determine whether the defendant (who may be charged with a serious misdemeanor, including domestic violence) is a risk to public safety or the safety of the victim(s), or is likely to flee...."Information provided to the court: The bill appears to significantly limit information provided to the judge at pre-arraignment as a basis for the release determination...."Balance between judicial authority and pretrial services authority: Substantial burdens are imposed on judges to justify any departure from recommendations of the pretrial services agency, including requiring courts, if the release decision is inconsistent with the recommendations of the pretrial services agency, to include a statement of reasons...."The Judicial Council is concerned that the bill would impose unrealistic (and unspecified) timelines on courts. The bill would require informed decision-making on timelines that are unrealistic for courts and criminal justice partners. For example, the bill would: (a) require pretrial services agencies to gather and courts to process a significant amount of information regarding a defendant on very tight timelines; (b) require judges to issue findings of fact and a statement of the reasons for imposing each condition that are specific to the person in each case where conditions are imposed; and (c) require up to five pre-arraignment hearings on very tight timelines....

"Finally, the Judicial Council is concerned that SB 10 would create a non-linear and highly complex system. More specifically, the council is concerned that the operational impact on courts would be profound and, without adequate funding, unachievable. The council is also concerned that SB 10 would attempt to graft at least four different release and detention elements onto the current statutory structure for the bail system: risk-based release; unsecured bonds; ability-to-pay determinations; and preventive detention. Further, in many counties, a significant portion of the pretrial population is ineligible for release due to probation or parole holds, immigration (ICE) holds, holds for multiple failures to appear, or other legal circumstances that prevent their release. The council believes that it would be inefficient to use resources to assess defendants, process paperwork, hold hearings, etc. for defendants who will not be eligible for release due to circumstances that arise from legal issues unrelated to the current charge."

b)According to the California District Attorneys Association, "While we agree that California's bail system should be reviewed and opportunities for thoughtful improvement identified, this bill simply goes too far, too fast."As you know, Chief Justice Tani Cantil-Sakauye has put together a Pretrial Detention Reform Work Group to study current pretrial detention practices and provide recommendations for potential reforms. This work group is expected to report back to the Chief Justice with recommendations by December 2017. In light of that timeline, we believe that any legislative efforts to repeal and replace the current bail system are premature."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 take it apart and start from scratch."SB 10 focuses on the costs of incarceration and hardships to the defendant caused by pretrial detention, but wholesale pretrial release has many other costs. When a

defendant fails to appear, there is no bail agent with motivation to go find the defendant. The police have no additional resources to find and arrest defendants who fail to appear - and even those who are apprehended after failing to appear are only be subject to a maximum five-day flash incarceration, following a civil contempt hearing."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, SB 10 makes it extremely onerous to achieve pretrial detention for dangerous defendants. The district attorney must file a written motion at arraignment, containing myriad required allegations, 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."Changing the pretrial release system to address actual injustices is a laudable goal. However, these changes should be careful and measured, particularly for offenses greater than misdemeanors and low-level felonies."

c)According to the Chief Probation Officers of California, "While we generally support and commend your effort to move California away from a system based heavily on money bail and move toward a system based on risk, we have serious concerns with the legislation in its current form from a procedural and operative perspective. In particular, we are concerned that SB 10 would disrupt, and in many cases undo, successful pre-trial programs currently taking place in many counties. ...

"Specifically, SB 10, as currently drafted, inhibits local control and flexibility relative to allowing each jurisdiction to determine who will handle the various parts of the pretrial program including assessments, reports, and monitoring. Rather than a single county pretrial services agency, we believe it is important that each jurisdiction be allowed to determine and assign pre-trial responsibilities through a thoughtful and collaborative process as determined appropriate at the local level...."Additionally, we are concerned about the provisions that set forth a yet to be named statewide oversight entity for assessment tools. Probation strongly supports the use of research-based, and outcome driven, pretrial assessment tools. While we recognize the importance of making sure there are minimum standards a pretrial assessment tool should meet, the determinations on the use of tools should be driven by local decisions and not directed on a statewide basis. Further, while it is important to probation to have a tool that is 'validated' to the local jurisdiction, requiring validation immediately upon implementation of an assessment tool is unrealistic.... A research tool can be very effective and still used in accordance with best practices before enough data is available to validate the tool."

9)Related Legislation:

a)AB 42 (Bonta) was substantially similar to this bill. AB 42 failed passage on the

Assembly Floor.

b)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 a vote on the Senate Floor.

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, would have 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, would have 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)

Essie Justice Group (Co-Sponsor)

SEIU California (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

Access Women's Health Justice

Advokids

Alameda County Democratic Central Committee

All Saints Church

Alliance for Men and Boys of Color

Alliance San Diego

American Academy of Pediatrics

American Friends Service Committee

Amity Foundation

Ann Martin Center

Arts for Incarcerated Youth Network

Asian American Criminal Trial Lawyers Association

Asian Americans Advancing Justice, California

Asian Law Alliance

Bay Area Equal Voice Coalition

Bay Area Resource Generation

Bend the Arc

Black Women for Wellness

Bill Wilson Center

California Association of Alcohol and Drug Treatment Program Executives

California Attorneys for Criminal Justice

California Calls

California Catholic Conference, Inc.

California Coalition for Mental Health

California Coalition for Women Prisoners

California Immigrant Policy Center

California Labor Federation

California Latinas for Reproductive Justice

California Mental Health Planning Council

California Partnership

California Partnership to End Domestic Violence

California State Strong

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

Clergy and Laity United for Economic Justice

Coalition for Humane Immigrant Rights

Communities United for Restorative Youth Justice

Community Oriented Correctional Health Services

Contra Costa County Defenders Association

Contra Costa Democratic Party

Contra Costa County Public Defender

Contra Costa County Racial Justice Coalition

Council on American-Islamic Relations, California

Courage Campaign

David Bohnett Foundation

Disability Rights California

Drug Policy Alliance

Fair Chance Project

Financial Justice Project, City and County of San Francisco Office of Treasurer & Tax Collector

Forward Together

Friends Committee on Legislation of California

Further the Work

Future Justice Fund FWD.us

Greenbridge Corporate Counsel

Harm Reduction Services

Homeboy Industries

Homies Unidos

House Keys Not Handcuffs

Housing and Economic Rights Advocates

Human Impact Partners

Human Rights Watch

Hunger Action Los Angeles

Immigrant Legal Resource Center

Inland Congregation United for Change

John Burton Advocates for Youth

John Gioia, Contra Costa County Supervisor, District One

LA Voice

Law Enforcement Action Partnership

Law Foundation of Silicon Valley

League of Women Voters of California

Legal Aid at Work

Los Angeles Regional Reentry Partnership

Lutheran Office of Public Policy, California

Marijuana Lifer Project

Mental Health America of California

Mental Health America of Los Angeles

Mujeres Unidas y Activas

Napa County Public Defender

National Alliance on Mental Illness, Los Angeles County Council

National Alliance on Mental Illness, Santa Clara County Board

National Association for the Advancement of Colored People, San Jose/Silicon Valley

National Association of Social Workers, California Chapter

National Council of Jewish Women, CA

National Council of La Raza

National Immigration Law Center

National Organization for Women, California

National Organization for Women, Hollywood

Oakland Privacy

Pangea Legal Services

Peace United Church of Christ

People's Life Fund PICO California

Progressive Christians Uniting R Street Institute

Religious Action Center of Reform Judaism and Reform CA

Riverside Temple Beth El

Root and Rebound

Rubicon Programs

San Diego Organizing Project

San Francisco Coalition on Homelessness

San Francisco Public Defender

San Francisco Senior and Disability Action

San Jose University Human Rights Watch

Showing Up for Racial Justice, Peninsula Chapter

Solano County Public Defender

Sonoma County Public Defender

Starting Over, Inc.

Steinberg Institute

Strike Debt Bay Area SURJ Bay Area

Tarzana Treatment Centers

Temple Beth El Jewish Community Center

The Advocacy Fund

The Kitchen T'ruah: The Rabbinic Call for Human Rights

United Advocates for Children and Families United Domestic Workers of America,
AFSCME Local 3930 United Food and Commercial Workers Union, Western States
Council

Urban Habitat

Urban Peace Institute

Voices for Progress Education Fund W. Haywood Burns Institute

William C. Velasquez Institute

Women's Foundation of California

Youth for Environmental Sanity

Youth Justice Coalition 9to5 Working Women 102 Private Individuals

Opposition

Aladdin Bail Bonds

Association for Los Angeles Deputy Sheriffs

Association of Deputy District Attorneys

Brotherhood Organization of a New Destiny

California Association of Code Enforcement Officers

California Bail Agents Association

California College and University Police Chiefs Association

California District Attorneys Association

California Narcotic Officers Association

California State Association of Counties

California Police Chiefs Association

Chief Probation Officers of California

City of Redding

Congress of Racial Equality

Crime Survivors

Crime Victims United of California

Golden State Bail Agents Association

Judicial Council of California

Los Angeles County Professional Peace Officers Association

Los Angeles Police Protective League

Office of the San Diego District Attorney

Orange County Board of Supervisors

Peace Officers Research Association of California

Professional Bail Agents of the United States

Riverside Sheriffs' Association

Three Private Individuals

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[1] The definition of ability to pay for purposes of reimbursing the county for legal services does not fit squarely into the bail context. At a minimum, the references to legal

representation and presumptions of inability to pay due to incarceration should be omitted.

CLERK'S ADDENDUM

Robin Lipetsky, Contra Costa County Public Defender.

ATTACHMENTS

Attachment A: SB 10 Bill Text

Attachment B: CSAC Oppose Unless Amended Letter