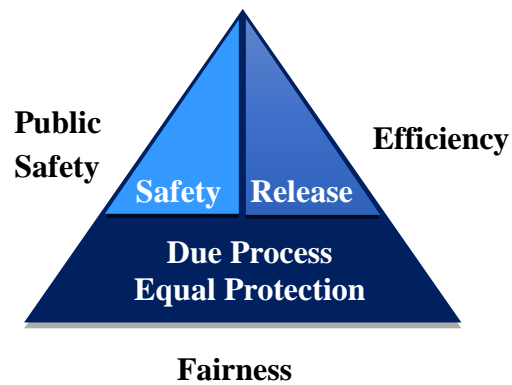


**County of Santa Clara  
Bail and Release Work Group**

**Final Consensus Report on Optimal Pretrial Justice**  
**August 26, 2016**



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<sup>1</sup> Orry Korb, former County Counsel, and John Hirokawa, former Chief of Correction, also served on the Bail and Release Work Group prior to their retirements. Vice-Chair James Williams previously served on the Bail and Release Work Group in his former role as a Deputy County Executive, and Garry Herceg previously served in his former role as Director of Pretrial Services.

## I) Executive Summary

### A) Shifting the Paradigm of Money Bail

As described in this report, “bail” is a deposit or a promise of money or property that is given to a court by a person who has been charged with a crime, or by another person on his or her behalf, in exchange for release from custody while awaiting trial. Although bail was designed to facilitate a person’s *release*, in recent years it has often done the opposite, ensuring that people who cannot afford to pay their bail amounts remain behind bars – for days, weeks, or even months – *before* they have been found guilty of a crime. In the County of Santa Clara’s jail system and nationally, many defendants in pretrial custody are there solely because they were unable to post bail, which – in California – is typically set without regard to a defendant’s ability to pay.

Most defendants in Santa Clara County who obtain release on bail do so by posting bond through a commercial, for-profit bail bond agent. In 2015, bail agents posted nearly 8,000 bail bonds in Santa Clara County, the value of which totaled *more than \$198 million*.<sup>2</sup> For posting these bonds, commercial bail bond agents may have pocketed as much as \$19.8 million in non-refundable premiums in 2015 alone, depending on how much they were able to collect from their clients. But commercial bail bond agents are not the only means of posting bail, which can also be paid directly to the court, eliminating any obligation to a profit-oriented bail agent. In fact, depending on the relevant state law, “bail” can even include an unsecured promise made to a court, and need not involve financial conditions at all.

Criticism of the money bail system and its discriminatory impact on people without financial means has become widespread in recent years. In early 2015, the federal government filed a Statement of Interest in a lawsuit challenging local bail practices, arguing that “incarcerating individuals solely because of their inability to pay for their release” violates the Equal Protection Clause of the United States Constitution.<sup>3</sup> Later that year, United States Attorney General Loretta Lynch remarked, “What is the price of justice? When bail is set unreasonably high, people are behind bars only because they are poor. Not because they’re a danger or a flight risk – only because they are poor.”<sup>4</sup> And in March of this year, the Chief Justice of the Supreme Court of California stated that “it’s time for us to really ask the question whether or not bail effectively serves its purpose, or does it in fact penalize the poor.”<sup>5</sup> As other critics have pointed out, “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

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<sup>2</sup> Shauna Lord, Santa Clara University School of Law, Criminal Law and Policy Blog, *The Santa Clara County Bail Market* <<https://crimlawandpolicy.wordpress.com/2016/03/16/the-santa-clara-county-bail-market/>> .

<sup>3</sup> *Statement of Interest of the United States, Varden v. City of Clanton*, No. 15-0034 (M.D. Ala.), p. 1 <<https://www.justice.gov/file/340461/download>>.

<sup>4</sup> United States Department of Justice, *Attorney General Loretta E. Lynch Delivers Remarks at White House Convening on Incarceration and Poverty*, < <https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-white-house-convening-incarceration-and>>.

<sup>5</sup> Chief Justice Tani G. Cantil-Sakauye, *State of the Judiciary: Address to a Joint Session of the California Legislature* (Mar. 8, 2016) <<http://www.courts.ca.gov/34477.htm>>.

poor may be needlessly held in jail.”<sup>6</sup> For these reasons, a bill called the No Money Bail Act of 2016 was introduced in Congress in February 2016 that would prohibit federal judges from imposing “payment of money as a condition of pretrial release in any criminal case” in federal court, and would discourage the use of money bail under state law by limiting federal funding in states whose laws allow for money bail as a condition of pretrial release.<sup>7</sup>

The discriminatory nature of money bail might be less troubling if bail were shown to be effective at guaranteeing a defendant’s appearance in court or minimizing the risk that a defendant will engage in criminal activity while awaiting trial. This is the traditional thinking around money bail: that being forced to put up money to secure their release gives defendants some “skin in the game” – i.e., an incentive to show up in court and to refrain from pretrial misconduct. But the evidence does not support the notion that bail is more effective than other means at ensuring a defendant will appear for scheduled court dates, much less at preventing defendants from violating court orders or engaging in new criminal activity while they are on pretrial release. This is particularly true for commercial bail bonds, where a defendant pays a non-refundable premium of up to 10% of the total bond amount to a bail agent, which the defendant will never get back even if he or she makes all required court appearances and does not reoffend or violate release conditions.

What the evidence *does* reflect is that most defendants who are released from custody pending trial will appear for their court dates without any financial incentive, and that many of those who miss a court appearance do so for mundane reasons such as lack of reliable transportation, illness, or inability to leave work or find childcare, rather than out of a desire to escape justice.

In addition to being inefficient at achieving its main purposes, the money bail system also racks up significant financial and social costs. The United States Attorney General has estimated that county governments spend a total of *\$9 billion* each year to detain individuals awaiting trial. Some of these individuals remain in pretrial detention based on a court order or other mandatory hold, but many others are held because they could not pay bail. The costs to these defendants are also great. For those who make bail, the amount may pose a significant hardship, and those who make bail by paying a bail bond agent may expose not only themselves, but also family or friends, to financial risk. For those who cannot make bail, the social and financial costs of pretrial detention – which typically lasts about a month in Santa Clara County for misdemeanor offenses and *more than seven months* for felonies – may include job loss, housing loss, loss of access to health care and social services, and negative impacts on family stability.

As they confront these costs, pretrial justice officials around the country are beginning to recognize that many defendants who sit in jail pending trial solely because they cannot afford bail could be released and supervised in their communities – keeping their jobs, housing, and relationships intact and preparing to defend themselves in court – without a negative impact on public safety. In Santa Clara County, the Office of Pretrial Services, which provides pretrial

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<sup>6</sup> Public Policy Institute of California, *Pretrial Detention and Jail Capacity in California* at p.5 <[http://www.ppic.org/content/pubs/report/R\\_715STR.pdf](http://www.ppic.org/content/pubs/report/R_715STR.pdf)> (hereafter *Pretrial Detention and Jail Capacity*).

<sup>7</sup> *No Money Bail Act of 2016*, H.R. 4611 <<https://www.congress.gov/bill/114th-congress/house-bill/4611/text>>.

supervision services to defendants released by the courts on what is called “Supervised Own Recognizance” release, has found that even as the number of pretrial supervisees has risen substantially over the past 15 years, court appearance and pretrial misconduct rates have remained steady or even improved.

Yet, as of 2015, only 10.5% of defendants taken into custody in County jails were granted pretrial release without having to pay bail – usually under supervision by the Office of Pretrial Services. By contrast, in other jurisdictions around the country where the use of money bail and for-profit bail bond agents has largely been eliminated – most notably Washington, D.C. and the State of Kentucky – as many as 80% of defendants taken into custody are granted pretrial release without money bail. Even though they are releasing many more defendants during the pretrial phase, their court appearance and pretrial misconduct rates are equal to or better than those in Santa Clara County. In Kentucky, for example, 90% of defendants released pretrial make *all* scheduled court appearances, and 92% are not charged with any new crimes. In Washington, D.C., where 80% of defendants are released without financial conditions, 88% make all scheduled court appearances and avoid new arrests, and 99% *avoid new arrests for violent crimes*.

Examples from these other jurisdictions show that when criminal justice systems are willing to release a greater percentage of defendants into the community pending trial, but evaluate and mitigate the risk by using effective screening tools to identify those most appropriate for pretrial release and by providing robust pretrial services agencies or other resources for effective supervision, outcomes can remain successful while avoiding the financial and social costs that detention brings.

Numerous County public safety officials have gone on record saying that they believe money bail discriminates against poor defendants and does little to protect public safety. The purpose of this report is to translate those concerns into concrete recommendations that are based on an assessment of national and local research, and designed to reform pretrial detention processes in the County in a manner that better meets the shared desire for a just, efficient, and effective system.

## **B) Recommendations**

In the interest of reducing the negative impacts of money bail while better protecting public safety and the integrity of the court process, the recommendations set forth in this report aim to move the County further in the direction of a risk-based pretrial justice model that improves fairness, safety, and efficacy for all participants. Some, but not all, of the recommendations in this report are already being implemented in other California counties.

A summary of the Bail and Release Work Group’s recommendations is provided here, with more detail below in Section IX.

### **1. Incorporate Pretrial Justice-Related Goals into Existing Reform Efforts**

Challenge: Several ongoing reform efforts in the County – including the Jail Diversion

and Behavioral Health Subcommittee of the Reentry Network, system-wide reforms in the Behavioral Health system of care, and domestic violence prevention efforts through the Domestic Violence Council and other groups – will likely touch upon pretrial justice issues, but are not currently coordinated with the BRWG’s efforts.

Solution: The Board of Supervisors should direct or recommend, as appropriate, that these other efforts specifically consider the pretrial justice-related implications of their work and the recommendations made by the BRWG.

## **2. Explore Feasibility of Establishing a Public or Nonprofit Alternative to Commercial Bail Bonds**

Challenge: For-profit bail bonds providers perpetuate the discriminatory nature of bail by charging non-refundable premiums, and potentially other costs and expenses, that may be out of reach for poor defendants. Yet most defendants who wish to post bail must do so through a bail bond agent because the alternative – a cash bond paid directly to the court – requires immediate payment of the *full* bail amount. Bail agents also may refuse to post bail for certain types of defendants, including those with low bail amounts where there is little profit to be made, or for immigrants with strong ties outside the United States.

Solution: Consistent with state law, the Board of Supervisors should direct the Offices of the County Executive and County Counsel to explore the feasibility of establishing an alternative bail bonds business operated by the County or a non-profit organization, and to report back to the Public Safety and Justice Committee. A public or nonprofit bail bond agent could help meet the need for bail assistance for indigent defendants while avoiding any predatory business practices.

## **3. Engage in State Legislative Advocacy on Pretrial Justice Issues**

Challenge: Several desirable and impactful reforms to the pretrial process require changes to *state* law, rather than changes to County ordinance or policy.

Solution: The County should engage in state-level legislative advocacy on the following issues, which aim to transform California’s pretrial process to make it more just and effective by eliminating or minimizing the use of money bail when less restrictive, non-financial options are available; requiring that money bail be set with regard to a defendant’s ability to pay; and expanding the tools available to judges in making bail and release decisions:

- *Eliminate for-profit bail bonds in California*: follow Kentucky, Oregon, Illinois, and Wisconsin’s examples in passing a state law eliminating the commercial bail bond industry, in conjunction with advocating for laws providing better alternatives – such as partial deposit bonds and unsecured bonds – that can provide equally good or better results in appropriate cases.
- *Adopt reporting requirements for bail bond agents*: if the state does not eliminate the commercial bail bonds industry, advocate for the adoption of reporting requirements on bail agent performance to make agents more accountable to the courts and to aid courts in their pretrial decision-making.



- *Adopt a bail statute aligned with federal law:* The federal bail statute lays out the types of pretrial orders that judges may impose in increasing order of risk, from OR release or release on unsecured appearance bond; to release with appropriate conditions, which may include bail; to pretrial detention. Unlike California law, federal law requires that judges impose the least restrictive appropriate conditions, and also requires bail to be set in relation to ability to pay.<sup>8</sup> To streamline and clarify California’s bail laws and increase reliance on non-monetary release options as opposed to money bail, advocate for a statute in harmony with the federal bail statute.
- *Provide additional guidance to courts in setting bail schedules:* advocate for reforms to bail setting, including establishing a statewide commission to examine the efficacy of bail; adopting more detailed guidance for courts on how to set appropriate bail amounts for particular types of offenses; and/or advocating for other changes to improve uniformity and encourage the use of empirical data in setting bail schedules.
- *Direct court payment of partial bail deposits:* advocate for a change in law to allow partial bail deposits (e.g., 10%) with the courts – which Kentucky, Oregon, Illinois, Wisconsin, and New Jersey already do – so that defendants who cannot afford to pay their full bail amount upfront can post a percentage of that amount and be accountable directly to the court, while achieving equal or better results in terms of court appearance and pretrial misconduct.
- *Unsecured bonds:* advocate for addition to state law of an unsecured bond option – where the defendant is not required to post any money upfront, but signs a promise to pay the full amount of the bond if he or she violates release conditions. In appropriate cases, unsecured bonds can achieve equal or better results than money bail in terms of court appearance and pretrial misconduct.
- *Judicial discretion in ordering pretrial detention:* advocate for amendments to state law that give judges clearer discretion to order pretrial detention – while ensuring procedural safeguards for defendants – where they find that no release conditions can ensure a defendant’s appearance or protect public safety. This would reduce instances in which courts set extremely high bail amounts in order to ensure pretrial detention of high-risk defendants.

#### **4. Encourage Increased Reliance on Pretrial Supervision and Discourage the Practice of Ordering or Maintaining Money Bail in Addition to Pretrial Supervision**

Challenge: Pretrial supervision has been proven to be effective at preventing pretrial criminal activity and technical violations, and ensuring that defendants make all their court appearances. In a small percentage of cases, however, courts order pretrial supervision and *also* require the defendant to post money bail. In these cases, money bail is unnecessary and may have the unintended consequence of exposing defendants to financial harm. And pretrial supervision, which is provided at the County’s expense, may aid the bail bond industry by reducing the risk of forfeiture and increasing the industry’s profit margins.

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<sup>8</sup> 18 U.S.C. § 3142(c)(2).

Solution: To encourage increased reliance on pretrial supervision *instead of* money bail, the Board of Supervisors should direct the Office of Pretrial Services to decline to provide supervision in cases where money bail has also been ordered or posted *and the defendant's bail is not exonerated when pretrial supervision is imposed*. Thus, courts could continue to order pretrial supervision in any appropriate case, even if the defendant has already posted bail, so long as the court exonerates the defendant's bail once pretrial supervision is in place. Pretrial Services would also continue to offer supervision in any case where bail has not been ordered or posted. This policy would give courts flexibility to protect public safety through pretrial supervision orders, while also encouraging decreased reliance on the commercial bail bond industry. Although exonerating bail would not allow the defendant to recover the premium of up to 10% that he or she paid to the bail bond agent, it would relieve the defendant of any further bail-related obligations.

### **5. Adopt Ordinance Prohibiting or Limiting Establishment, Expansion, or Relocation of Commercial Bail Bonds in Unincorporated County**

Challenge: The County's zoning ordinance contains no specific limitations on bail bonds businesses. No bail agents currently have locations in the County's unincorporated areas, but any agents established in the future could engage in predatory practices against County residents.

Solution: The Board of Supervisors should adopt an ordinance barring the establishment, expansion, or relocation of for-profit bail bonds businesses in the County's unincorporated areas – following the model it set in 2012 in amending its zoning ordinance to ban payday lending and check-cashing businesses. A County ordinance code amendment could serve as a model for cities such as San José.

### **6. Institute a Community Release Project in Partnership with Community-Based Organizations**

Challenge: Community-based services have been effective at ensuring successful community reintegration in the reentry context for individuals who are released after serving time in jail or prison. The Office of Pretrial Services refers clients to the Office of Reentry Services in some cases, but limited community-based options currently exist to support and ensure the success of those who are released to live in the community during the pretrial phase.

Solution: Start a Community Release Project, modeled after and incorporated into existing programs offered through the Office of Reentry Services, in which community- and/or faith-based groups will provide supportive services to defendants on pretrial release to help ensure that they appear for all required court hearings and do not reoffend during the pretrial period. In addition to providing additional resources for defendants to help them avoid pretrial failures, a Community Release Project would expand the County's capacity to support the court in offering options for pretrial release that are less restrictive, but no less protective of public safety and the integrity of the court process.

## **7. Accept Credit/Debit Payments for Non-Felony Bail at the County Jail**

Challenge: Defendants who wish to avoid purchasing a bail bond by posting bail directly with the jail or court must pay their *full* bail amount upfront. State law allows county jails to accept credit cards, debit cards, and electronic funds transfers (EFT) for the payment of non-felony bail, reflecting the Legislature’s intent to provide payment methods that “make it easier for people to pay fines, post bail, and to alleviate time spent in jail.”<sup>9</sup> More than ten other counties already allow payment of non-felony bail via credit card, debit card, and/or EFT, but the County does not. Thus, defendants must pay their full bail amounts in cash, which is impractical, if not prohibitive. Likely because of the barriers to doing so, in 2014, only 0.003% of defendants who were released on money bail paid in cash.

Solution: The Board of Supervisors should direct the Department of Correction to explore the feasibility of accepting credit/debit/EFT payments at the County’s jail facilities. The County’s Department of Revenue offers these options for payment of fee and fine balances, which can serve as a model for the Department of Correction.

## **8. Post and Disseminate Information about Own Recognizance (OR) Release, Supervised OR Release, and other Alternatives to Bail Bonds in County Jails**

Challenge: The Department of Correction currently posts advertising for bail bond agents in County jail facilities to assist defendants in finding bail agents and posting bond. But information is not consistently posted about alternatives to bail bonds, including Own Recognizance (OR) and Supervised OR release, and defendants often obtain release on a bail bond before the OR/Supervised OR process can be completed – which, for many defendants, would take only a few hours. Thus, some defendants may post bond simply because they are unaware of other options, though they may be eligible for and would prefer OR or Supervised OR.

Solution: The Board of Supervisors should direct the Department of Correction, in collaboration with the Office of Pretrial Services, to post information about OR, Supervised OR, and other alternatives to bail bonds in all County jail facilities. The Office of Pretrial Services should also ensure that this information is readily accessible to family members or friends seeking to assist pretrial detainees in identifying options for pretrial release.

## **9. Continue to Improve the Promptness of In-Custody Arraignments**

Challenge: Persons arrested over the weekend often wait until the following Wednesday before they appear before a judge for their arraignment/initial appearance. This prolongs pretrial detention periods for defendants at great expense to both those defendants and the County.

Solution: The Board of Supervisors should recommend that the Superior Court, District Attorney, Public Defender, Office of Pretrial Services, and Department of Correction collaborate

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<sup>9</sup> *Two Jinn, Inc. v. Gov’t Payment Serv., Inc.*, 183 Cal. Rptr. 3d 432, 440 (Cal. Ct. App. 2015).

to improve the promptness of arraignments – e.g., by increasing the number of judges holding arraignments on Mondays to clear weekend backlogs and/or prioritizing prompt arraignments in the District Attorney’s Office and Public Defender’s Office.

### **10. Expand and Formalize Pretrial Diversion**

Challenge: Pretrial diversion programs allow District Attorneys to defer prosecution and ultimately dismiss charges for defendants – usually first-time and/or low-level offenders – if they comply with conditions imposed by the court for the diversion period. Pretrial diversion has proven effective at preventing pretrial failures and minimizing disruptions to defendants’ lives, but its use in Santa Clara County is currently limited.

Solution: Recommend that the District Attorney, Public Defender, and Office of Pretrial Services collaborate to expand and formalize pretrial diversion practices.

### **11. Implement an Electronic Monitoring, Home Detention, and/or Work Furlough Program for Pretrial Inmates**

Challenge: The County jail currently houses many defendants who are in pretrial custody solely because they cannot afford to pay bail. Many of these defendants could be released from custody under appropriate conditions without endangering public safety.

Solution: Using the authority granted by Penal Code § 1203.018, the Board of Supervisors should authorize the Chief of Correction to offer an electronic monitoring, home detention, and/or work furlough<sup>10</sup> program to inmates whose release would, in the Chief’s judgment and in consultation with the Office of Pretrial Services, be consistent with public safety, or who have had bail set but have not posted bail after 30 or more days in custody. This would allow the County to release appropriate inmates without a court order where release is consistent with the County’s public safety priorities.

### **12. Complete Targeted Periodic Re-Reviews of Pretrial Assessments**

Challenge: After pretrial assessments are completed for specific defendants, they are not routinely re-reviewed to see if changed circumstances warrant a change in a defendant’s pretrial release status.

Solution: The Board of Supervisors should direct the Office of Pretrial Services to periodically re-review and update assessment reports for an appropriate sub-group of defendants – e.g., those with low bail amounts who have been unable to post bail – on a periodic basis to expedite the release of defendants who may become eligible for release after the initial review.

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<sup>10</sup> A work furlough program allows an inmate to check out of a detention facility temporarily in order to retain his or her preexisting employment in the community while in custody.

### **13. Incorporate Pretrial Justice Issues into Ongoing Data System Updates**

Challenge: The County's data systems, including its Criminal Justice Information Control (CJIC) system, are antiquated and limited in their analytical capability, and hamper the ability of the County's public safety and justice departments and partners to collect, share, and analyze information that would improve the administration of pretrial justice.

Solution: The County is currently replacing CJIC with a more powerful, versatile, and up-to-date system, and the Superior Court is also upgrading its data system. These updates should be responsive to the need to collect data related to the administration of pretrial justice.

### **14. Collect Data on Bail Performance Outcomes and Share with Superior Court and Relevant Public Safety and Justice Officials**

Challenge: Currently, the Office of Pretrial Services collects data on performance outcomes for defendants released on OR and Supervised OR and publicly reports that data each year. But empirical data on other bail performance outcomes – such as pretrial failure rates by bail amount, charge type, and release type – is not routinely collected and shared among system partners such as the Superior Court, District Attorney, and Public Defender.

Solution: The Board of Supervisors should direct the Office of the County Executive and the Office of Pretrial Services to determine the types of performance-oriented data – including data on domestic violence-related offenses – that would be relevant and useful in informing courts' and public safety and justice agencies' decisions regarding bail and pretrial release; to coordinate the collection of this data; and to provide it annually to the Superior Court for use in setting the countywide bail schedule and making bail decisions in individual cases, and to the District Attorney and Public Defender to assist them in making pretrial release-related recommendations to the court.

### **15. Improve Consistency of Citation and Release and Jail Citation Decisions**

Challenge: Existing citation and release guidelines give law enforcement officers substantial discretion to determine whether to release an arrested individual immediately or transport the arrestee to County jail for booking. Likewise, when an arrestee is brought to jail for booking, jail officials retain discretion regarding whether to issue a jail citation and release the individual immediately following booking. Anecdotal evidence suggests that cite and release and jail citation decisions are not uniform and may result in unnecessary costs and delays.

Solution: The Board of Supervisors should recommend that the Santa Clara County Police Chiefs' Association, with the assistance of the Office of Pretrial Services, revise the existing in-field citation and release guidelines to provide more specific criteria to guide officers' discretion and provide regular training on those criteria to all officers. The Board should also direct the Department of Correction to take similar steps similar to review, revise as necessary, and ensure proper training on the jail citation policy.

## **16. Explore and Employ Domestic Violence-Specific Risk Assessment Tools that are Validated to Avoid Racial Bias**

Challenge: Although the Office of Pretrial Services uses a risk assessment tool that considers domestic violence charges as a factor in assessing risk, it does not currently employ domestic violence-specific risk assessment tools to evaluate the risk of either domestic violence-related reoffense or lethality. In addition, although the Domestic Violence Protocol for Law Enforcement requires law enforcement officers to conduct a lethality assessment during domestic violence investigations, anecdotal evidence suggests that the assessment is not always completed and that, when it is, it typically is not provided to Pretrial Services or the court for use in bail and release decisions.

Solution: The Board of Supervisors should direct the Office of Pretrial Services to explore the feasibility of adding domestic violence-specific components to the existing risk assessment, incorporating the lethality assessment used by law enforcement officers in its risk assessments if appropriate, or employing an additional, appropriate domestic violence risk assessment in its screening process to predict and mitigate the risk of ongoing danger and lethality during the pretrial phase. The Board should also direct Pretrial Services and the Department of Correction to work with the Santa Clara County Police Chiefs' Association to explore means of ensuring that lethality assessments are completed by police officers, received by the Department of Correction at booking, and made available to Pretrial Services and the court for use in bail and release determinations if appropriate. The Board should further direct Pretrial Services that any domestic violence-specific risk tool that it recommends for use in bail and release determinations must be free of racial bias.

## **17. Explore Means of Notifying Victims when Defendants Charged with Domestic Violence-Related Crimes are Released Pretrial**

Challenge: Although the pretrial period can present risks for domestic violence victims, those victims are not always notified when defendants charged with domestic violence-related offenses are released pretrial.

Solution: To help domestic violence victims protect themselves and reduce the risk of future violence, the County should explore additional methods of providing notification of defendants' release, including by encouraging and helping victims to register for the Victim Information and Notification Everyday (VINE) system, and by directly providing notification where possible.

## **18. Explore Adoption of In-Field Pretrial Supervision to Provide Additional Safeguards and Protect the Community**

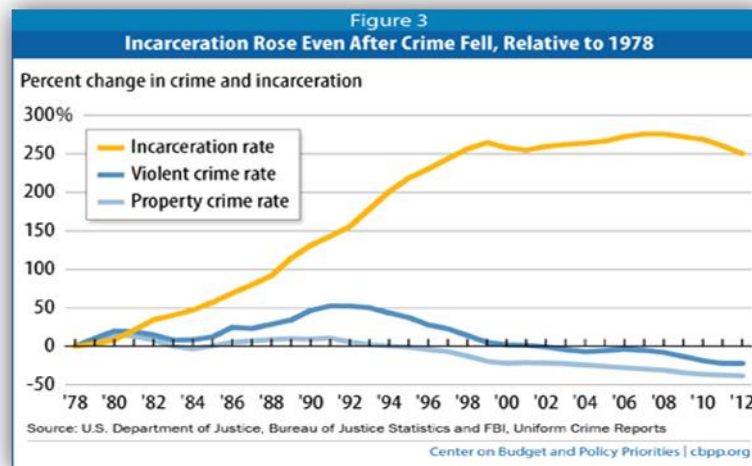
Challenge: The Office of Pretrial Services currently monitors defendants who are released on OR, and provides more intensive supervision of defendants who are released on Supervised OR. Currently, some defendants who are considered too high-risk to qualify for Supervised OR either post money bail if they have the means to do so – in which case they are released without *any* public safety-related supervision conditions – or if they lack the means to

post bail, they simply remain in custody until their cases are resolved. If a more intensive level of pretrial supervision were available, higher-risk defendants who are currently being released on bail *without supervision* could instead be released under the supervision of Pretrial Services, thus enhancing public safety and better protecting the community. At the same time, some defendants who have bail set, but who remain in jail because they are unable to post bail, could be released safely under more intensive supervision by Pretrial Services, thereby facilitating pretrial release while also protecting the community.

Solution: The Board of Supervisors should direct the Office of Pretrial Services to explore providing in-field pretrial supervision – including home, work, and school contacts as necessary and effective; victim contacts; and in-field monitoring of compliance with court-ordered conditions – to higher-risk defendants to enable them to be released safely prior to trial and to provide better protection to the community.

## II) Introduction

The United States faces daunting public safety challenges stemming at least in part from poverty, inequality, unemployment, mental illness, and substance abuse. Over the last two generations, policy makers at the federal, state, and local levels have frequently equated public safety with highly punitive criminal sentencing and detention policies, an approach that has led to dramatic increases in the number of persons incarcerated. The United States comprises only 5% of the world’s population, yet incarcerates over 25% of the world’s prisoners. The incarceration rate in our country – one in 100 adults as of 2009 – is *tenfold* that of many European countries and far exceeds that of any other country in the world. As illustrated below, despite declining crime rates, the United States has significantly increased its incarceration rates and associated costs since the late 1970s:



As policy analysts on both sides of the political spectrum have come to recognize,<sup>11</sup> this is socially and economically irrational. Simply put, mass incarceration provides only a scant public safety benefit, is socially and economically unsustainable, and must be modified through prompt, common-sense, achievable solutions. Indeed, Americans are beginning to realize the intrusive, damaging, costly and stigmatizing effects of incarceration. Its social and fiscal costs overwhelm communities, which rely on the same resources to support other essential public functions like public hospitals, schools, social services, and more. Consequently, communities are seeking ways to reinvest public safety and justice resources into more efficient and fair processes that incarcerate only those persons who pose a threat to public safety.

The pretrial process represents an opportune and effective decision point to target as part of this effort. Roughly one-third of the total population of persons incarcerated in the United States – as many as 750,000 people – are being held in city and county jails, and of this 750,000, about two-thirds are in custody awaiting trial while presumed innocent. The vast majority of these pretrial detainees remain jailed – often for weeks, months, or even years – because they cannot afford to pay money bail to be released.

Against this backdrop, the Board of Supervisors of the County of Santa Clara convened the Bail and Release Work Group (BRWG) in February 2014 to analyze national, state, and local pretrial justice practices and to locate opportunities to optimize the pretrial process in Santa Clara County by enhancing public safety, fairness, court participation, effectiveness, and economy. The goal of this report is to identify and recommend policies and processes that will increase public safety and justice, and will decrease unnecessary pretrial detention and its inherent social and fiscal costs. This is to be accomplished through a collaborative process that will ideally also improve the relationships between public, private, and community entities involved in criminal justice in Santa Clara County. We further hope that the findings and recommendations in this report may be adapted and applied to communities nationwide.

### **III) BRWG Methodology and Summary of Data Gathered**

#### **A) Scope of Work and Objectives of the BRWG**

The BRWG arose from the work of the County's Civil Detainer Work Group, which the Board of Supervisors commissioned to review the public safety impacts of the County's policy of not honoring with civil detainer requests for undocumented immigrants. The work on civil detainees raised broader public safety-related questions about the County's current practices and resources for the pre-adjudication (pretrial) processes of citation, summons, incarceration, bail, release screening, and supervision of all criminal defendants. The Civil Detainer Work Group raised particular concerns about the treatment of domestic violence-related cases, ethnic or racial

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<sup>11</sup> For example, Newt Gingrich, a Republican former Speaker of the House, and Van Jones, a liberal political activist and former advisor to President Obama, have championed the #cut50 campaign, which seeks to reduce the United States' incarcerated population by 50 percent over the next 10 years. See #cut50, *Our Mission & Work*, <<http://www.cut50.org/mission>>. #cut50 emphasizes the bipartisan consensus and increasing public support for non-incarceration-based public safety solutions, as well as the mounting evidence that incarceration rates can be reduced while positively impacting public safety and reducing costs.



disparities in pretrial detention, and other potential disparities in the pretrial process. To explore and address these issues, the Board of Supervisors created the BRWG.

The BRWG worked toward the above objectives with the guidance and support of staff from across many County departments and other non-government organizations. The Office of the County Executive coordinated these efforts and, with the assistance of the Office of the County Counsel, researched and analyzed current local practices and resources, identified best practices, and preliminarily evaluated the viability of implementing improved practices in Santa Clara County. Throughout the project, BRWG members, their staff, and many other individuals provided valuable data and information for the purposes of evaluating, developing, and reaching consensus on achievable improvements to recommend to the Board of Supervisors.

## **B) Report Methodology**

This report is based primarily on quantitative and qualitative data collected by principal researcher Matthew Fisk of the Office of the County Executive, with legal guidance, policy analysis, and research and writing support from Greta Hansen, Kavita Narayan, and Laura Trice of the Office of the County Counsel. The scope of research and analysis included current County practices and resources, secondary research into the literature and data on pretrial practices, and consultation with experts and officials who have implemented pretrial justice reforms in other jurisdictions. Although the BRWG has emphasized the advantages of quantitative data, anecdotal and qualitative information obtained from pretrial justice service providers has proven essential to interpreting and contextualizing the quantitative data. The report therefore relies on a combination of quantitative and qualitative data.

### **1. Research and Analysis of Current County Practices**

Information regarding current County practices, needs, and resources was obtained through interviews with each BRWG member and his or her staff, as well as other public safety and criminal justice stakeholders including the Santa Clara County Domestic Violence Council; Family & Children Services of Silicon Valley; the Santa Clara County Office of Women's Policy, particularly Cindi Hunter; Santa Clara County Superior Court Judge Andrea Flint (who presides over a dedicated domestic violence court); and Santa Clara County Superior Court Judge Stephen Manley (who presides over a court focused on veterans and mental health). In addition, virtually every County entity involved in public safety or criminal justice – including the Office of the District Attorney, the Sheriff's Office, the Public Defender's Office, the Department of Correction, the Probation Department, and the Office of Pretrial Services – provided quantitative and anecdotal data.

Much of the quantitative data provided by County entities is routinely collected and inputted into the county-wide Criminal Justice Information Control (CJIC) electronic record system. Reliance on the CJIC system presents both advantages and limitations. Because CJIC has been in place for 25 years and has been customized to meet the County's needs, it contains a substantial amount of detailed criminal justice data from numerous criminal

justice and public safety entities. At the same time, CJIC is somewhat antiquated and lacks the versatility of newer technology.<sup>12</sup> In addition, because the various criminal justice entities do not input data into CJIC in a uniform format or pursuant to uniform standards, merging and comparing data from different entities proved challenging, and the quality of the resulting data analysis is variable. Nonetheless, CJIC provided a significant amount of data for the report, including data on citations, summons, arrests, original bail amount, bail determination, bond status (i.e, active, exonerated, revoked, forfeited, etc.), conditions of release, convictions, in-custody programs, alternative custody programs, post-release entry/exit points, and various outcomes. CJIC Managers Kathy Sanchez and Mary Snow were instrumental in facilitating the collection and analysis of this data.

## **2. Consultation with Experts and Officials from Other Jurisdictions**

Information for this report was also obtained through consultation with experts and officials in other jurisdictions. The principal researcher contacted and interviewed a number of nationally recognized experts in the area of pretrial justice, including:

- Timothy Schnacke, Pretrial Justice Committee Chair of the American Bar Association;
- Cherise Fanno Burdeen, Michael R. Jones, Timothy Murray, and John Clark of the Pretrial Justice Institute;
- Marie VanNostrand, Ph.D., Justice Project Manager of Luminosity Inc. Data Driven Justice Solutions; and
- Mike Judnick of The Change Companies.

Professor W. David Ball of Santa Clara University School of Law and the students in his Bail Policy Lab course also provided significant research and collaboration.

The principal researcher also contacted and interviewed pretrial services officials and providers in other jurisdictions that have implemented pretrial justice reforms, including Don Trapp and Brian Valetski, Directors of Multnomah County Pretrial Services; Clifford T. Keenan, Director of the Pretrial Services Agency of the District of Columbia; Juan Hinojosa, Assistant Chief of the Pretrial Services Division of the Cook County Probation Department; and Tara Blaire, the Pretrial Services Director of the Kentucky Administrative Office of the Courts. These individuals provided data, written materials, and professional recommendations regarding pretrial justice reform.

## **3. Input from Bail Bond Industry Representatives**

Members of the bail bond industry, along with all members of the public, were provided the opportunity to attend and speak at each publicly noticed meeting of the BRWG. In addition, staff conducted specific and targeted outreach to bail agents in order to ensure an adequate opportunity for input from that industry. Local bail bond agents and industry representatives

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<sup>12</sup> The County has undertaken a project to replace CJIC with newer technology that can better satisfy the County's needs.

were invited to two public forums to provide input on bail and pretrial practices in Santa Clara County, including the services they provide to clients with limited financial means, the contractual and financial terms on which they offer bail bonds and related services, and the efficacy of their services in addressing court appearance and public safety issues. Approximately thirty local bail bond agents from both larger and smaller agencies, as well as representatives from professional organizations such as the California Bail Agents Association (“CBAA”), attended the first public forum, and approximately fifteen bail agents attended the second public forum. They provided written and oral comments, which are cited throughout this report.

In addition, the principal researcher contacted Professional Bail Agents of the United States (“PBUS”), a professional association that represents the interests of bail agents throughout the country through legislative advocacy, education, professional networking, and other activities, to obtain information about its views on bail reform and copies of relevant publications. He spoke with Margaret Kreins, Secretary of PBUS and Vice President of CBAA. Ms. Kreins’s comments are also cited throughout the report.

#### **4. Secondary Research on Pretrial Justice Practices and Reforms**

Finally, the report relies on data and information provided in scholarly literature, government statistical reports, and reports by non-profit organizations that focus on criminal justice policy. This literature is cited throughout the report, and additional research materials are provided in the Appendices.

#### **IV) Glossary of Terms<sup>13</sup>**

##### ***Bail***

The process of releasing a defendant from pretrial custody with conditions – in some instances, the deposit of money or property – to ensure court appearance and/or public safety. Bail (temporary release from custody) ranges from citation and release procedures by police officers in the field to release from a detention facility.

##### ***Bail Agent***

An individual or corporation, licensed by the state, that guarantees a defendant’s appearance in court by promising to pay a financial condition of bond if the defendant does not appear, and charges defendants a non-refundable fee for its services.

##### ***Bail Bond***

Agreement between the defendant, the court, and the bail agent/surety, under which the agent will post a bond with the court to ensure the defendant’s appearance.

##### ***County of Santa Clara***

The County government entity, as distinguished from *Santa Clara County*, which is the geographic region. In this report, “County” (capitalized) means the County of Santa Clara.

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<sup>13</sup> See Pretrial Justice Institute, *Glossary of Terms* <<http://www.pretrial.org/glossary-terms/>>.

***Due Process***

Constitutional guarantee protecting all individuals from arbitrary or unfair government actions and processes.

***Failure to Appear***

When a defendant on pretrial release fails to show up for a scheduled court appearance.

***Pretrial***

The period of time in a criminal defendant's case beginning at arrest and ending at final disposition of the case, whether by trial, plea bargain, dismissal, or other resolution.

***Pretrial Failure***

Collective term referring to failure to appear, commission of new criminal activity, and/or technical violations during a defendant's period of pretrial release.

***Own Recognizance (OR) Release (Non-supervised)***

Pretrial release that does not require the payment of money bail, but instead involves a promise by the defendant to appear for all scheduled court appearances and comply with any other conditions set by the court if released. A pretrial services agency typically remotely monitors defendants by making court date reminder phone calls, reviewing criminal histories, verifying court appearances, and following up on failures to appear.

***Santa Clara County***

The geographic region of the county, as distinguished from *County of Santa Clara*, which is the government entity.

***Secured Bond***

A defendant's promise to appear for court hearings that is guaranteed by a monetary payment posted by the defendant or by another person or entity.

***Supervised OR***

OR Release in which the defendant is supervised, often by a pretrial services agency, to ensure compliance with court-ordered conditions of release, which may include conditions of non-supervised OR release described above as well as mandatory drug testing, substance abuse and/or mental health treatment, electronic monitoring, and other conditions.

***Surety***

A person or entity that is responsible for guaranteeing another person's obligation or promise – in the pretrial context, the defendant's promise to appear for all scheduled court appearances.

***Surety Bond***

Payment by a third-party surety – i.e., a commercial bail bond agent – to guarantee the defendant's promise to appear in court; a variety of secured bond. To obtain a surety bond, a defendant typically must pay a non-refundable premium of up to 10% of the total bond amount as well as collateral (such as title to a home or vehicle, or other property such as jewelry) to

cover the remaining bond amount.

### ***Unsecured Bond***

A defendant's promise to appear for court hearings that is not guaranteed by any monetary payment; includes OR releases.

## **V) Background on Bail and the Pretrial Process**

In the United States, a person who is arrested for a suspected criminal offense will either be detained in jail or released back to the community pending resolution of the criminal charges – whether through dismissal, plea agreement, or trial. The release decision is a critical one that must balance the government's interests in public safety, compliance with court orders, and court participation against the defendant's individual right to liberty. If all defendants were simply detained until trial, pretrial court order compliance, court participation (appearance), and re-offense rates could likely all be guaranteed. However, that guarantee would come at the cost of the presumption of innocence and constitutional guarantee of due process of law, upon which the criminal justice system depends.<sup>14</sup> For these reasons, the United States Supreme Court has long held that “[i]n our society, liberty is the norm, and detention prior to trial . . . is the carefully limited exception.”<sup>15</sup>

The Eighth Amendment to the United States Constitution provides a right against “[e]xcessive bail” in criminal cases. The term “bail” refers to a deposit of money or property, or a promise with no payment made upfront, to obtain a defendant's release from custody prior to trial or other resolution of his or her criminal charges.<sup>16</sup> Bail essentially operates as a financial guarantee that the defendant will appear for all required court hearings.<sup>17</sup> “Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is ‘excessive’ under the Eighth Amendment.”<sup>18</sup> Although the Eighth Amendment specifically prohibits “excessive bail,” it does not mandate the use a money bail-based system of any sort, nor does it guarantee bail in all cases. The federal constitutional right to bail is not an absolute right to a surety bond or other form of money bail, but a right to release from custody in appropriate cases. The California Constitution specifically provides a right to “be released on bail by sufficient sureties” in appropriate cases, and also grants protection against “excessive bail.”<sup>19</sup>

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<sup>14</sup> See *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

<sup>15</sup> *United States v. Salerno*, 481 U.S. 739, 755 (1987).

<sup>16</sup> See Cal. Penal Code §§ 1268 (“Admission to bail is the order of a competent Court or magistrate that the defendant be discharged from actual custody upon bail”), 1269; see also Conference of State Court Administrators, *2012-2013 Policy Paper on Evidence-Based Pretrial Release*, p. 1 <<http://cosca.ncsc.org/~media/microsites/files/cosca/policy%20papers/evidence%20based%20pre-trial%20release%20-final.ashx>> (hereafter *COSCA Policy Paper*).

<sup>17</sup> *Pretrial Detention and Jail Capacity*, p.7.

<sup>18</sup> *Stack*, 342 U.S. at 5. However, bail is not necessarily “excessive” merely because it is set at an amount the defendant cannot afford. See *White v. Wilson*, 399 F.2d 596, 598 (9th Cir. 1968); *In re Burnette*, 35 Cal.App.2d 358, 360-61 (1939).

<sup>19</sup> Cal. Const., art. I, § 12.

## A) Arrest, Detention and Release in California

In California, individuals who are arrested on criminal charges have three potential points of obtaining release from custody while their charges are pending: (1) at the point of arrest; (2) at the point of booking in the local jail; and (3) at the time of initial appearance before a judge.

### 1. Arrest

Many individuals charged with misdemeanor offenses are released immediately following arrest or, in many cases, without an arrest. Immediate release can occur in three ways. First, the law enforcement officer may decide not to arrest the individual, but instead to release him or her and submit a report to the District Attorney, who may issue a summons for the defendant to appear in court if the District Attorney decides to prosecute. Second, an individual who is arrested may be issued a citation for the offense by the arresting officer, sign the citation promising to appear in court, and then be immediately released.<sup>20</sup> This procedure is known as “citation and release” or “cite and release.” Finally, an individual may be arrested, taken to jail, and then issued a citation by jail officials, ordered to appear in court, and immediately released. This is a form of citation and release known as a “jail citation.” Sometimes there is an intermediate step before jail, which is arrest, transportation, and booking/investigation (discussed further below) at a local police station in an effort to gather more information about the defendant and the suspected crime and to make a custody decision.

Individuals arrested for certain misdemeanor offenses, such as domestic violence-related offenses and violations of protective orders involving domestic violence, may not be eligible for citation and release.<sup>21</sup> Law enforcement officers may also deny citation and release to arrestees who are so intoxicated as to pose a danger to themselves or others; require medical examination; were arrested for certain traffic offenses; have outstanding arrest warrants; cannot provide identification; or where cite and release would jeopardize the prosecution or there is reason to believe the arrestee would not appear for court dates.<sup>22</sup>

Arrestees who do not qualify for cite and release – including those charged with certain misdemeanors as described above, and those charged with felonies – may obtain immediate release by posting bail with the arresting agency in a preset amount contained in the countywide bail schedule (discussed further below in Section (V)(B)).

### 2. Booking

After an individual is arrested, he or she may be “booked” – i.e., he or she will be fingerprinted and photo-processed, information about the arrest will be entered into criminal

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<sup>20</sup> Cal. Penal Code § 853.6.

<sup>21</sup> *Id.* § 853.6(a)(2)-(3); *see also* Carlos Barba, Santa Clara University School of Law, Criminal Law and Policy Blog, *Another Tool in the Toolbox for Domestic Violence Pretrial Determinations*, <https://crimlawandpolicy.wordpress.com/2016/04/11/another-tool-in-the-toolbox-for-domestic-violence-pretrial-determinations/>.

<sup>22</sup> Cal. Penal Code § 853.6(i).

justice databases, and those databases will be searched for wants, warrants, and criminal history. As noted above, booking may occur at a city police station, but more commonly occurs at the County jail. Law enforcement and jail officials are required to book arrestees who are taken to jail, including those who are cited and released at the jail.<sup>23</sup>

Most arrestees who are not eligible for cite and release; who do not post bail with the arresting agency; and who are booked at the jail may secure immediate release by posting bail with the jail in the amount set by the countywide bail schedule. These arrestees will be released pending their initial court appearance, which typically occurs within 60 days of their arrest date. During this 60-day period, most defendants released on bail bonds typically are under no formal supervision and are not required to comply with any individualized release conditions. Arrestees who do not post bail will remain in custody during this time period, unless they are released on their own recognizance as described below, and appear in court for a bail hearing within 48 hours, excluding weekends and holidays.

### **3. Initial Court Appearance**

At the initial court appearance, defendants are informed of what crime(s) they are charged with, advised of their constitutional rights, and appointed an attorney if they cannot afford one. Misdemeanors are often adjudicated through a guilty or no contest plea and sentenced at this hearing, but felonies are very rarely adjudicated at this time. If the charges are not resolved, the judge must determine whether, and under what conditions, to release the defendant pending trial. The judge may set a bail amount which the defendant must post in order to obtain release from custody pending trial, release him or her from custody without any money bail requirement, or in limited cases, deny release altogether and order the defendant to remain in custody pending trial. The judge also has broad discretion to impose non-financial conditions of release relating to the nature of the alleged offense and the defendant's criminal history, such as supervision by a pretrial services agency or a no contact order prohibiting the defendant from contacting the victim.

The California Constitution guarantees defendants a right to bail for nearly all criminal charges, with the exception of capital offenses, violent felony offenses, and felony sexual assault offenses.<sup>24</sup> The offenses for which bail is permitted are known as "bailable" offenses.<sup>25</sup> The superior court judges for each county are charged with preparing, adopting, and revising annually a uniform countywide bail schedule for all bailable felony offenses, misdemeanor offenses, and non-Vehicle Code infractions.<sup>26</sup> By law, the bail amounts contained in the countywide bail schedule are presumptive fixed amounts set based on the superior court judges' general assessment of the seriousness of each offense type,<sup>27</sup> and do not include consideration of any individual factors relating to a defendant's risks of failing to appear in court and/or engaging in new criminal activity if released from custody prior to trial.

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<sup>23</sup> *Id.* § 853.6 (a)(1), (g).

<sup>24</sup> Cal. Const., art. I, § 12; *see also* Cal. Penal Code §§ 1270.5, 1271.

<sup>25</sup> Please refer to Appendix A for a timeline discussing the historical evolution of bail.

<sup>26</sup> Cal. Penal Code § 1269b(c).

<sup>27</sup> *Id.* § 1269b(e).

At any time, but usually once a defendant appears in court and the prosecution and defense counsel are present, the judge has discretion to either adjust the scheduled bail amount the defendant has posted with the arresting agency or jail – or, if the defendant has not done so, to set an amount higher or lower than the scheduled amount and/or to impose other conditions of release.<sup>28</sup> In exercising its discretion to set bail in a particular case, the court must consider:

the protection of the public, the safety of the victim, 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. Public safety and the safety of the victim shall be the primary considerations.<sup>29</sup>

The statute offers no guidance to judges on how to define or weigh each of these factors when assessing a defendant’s risk of failing to appear in court and/or endangering public safety.

A judge’s discretion to set a bail amount based on these general considerations is constrained in cases involving serious or violent felonies;<sup>30</sup> in such cases, the judge may not set bail below the amount contained in the countywide bail schedule unless the judge makes a specific “finding of unusual circumstances,” which “does not include the fact that the defendant has made all prior court appearances or has not committed any new offenses.”<sup>31</sup>

In lieu of setting any money bail amount, judges also have discretion to release a defendant on his or her own recognizance, meaning that the defendant need not post any amount of money to obtain release from custody, but instead must sign a release agreement promising to appear for all scheduled court hearings and comply with any other conditions set by the court.<sup>32</sup> An own recognizance release – known as an “OR” – is left to the court’s discretion in felony cases, but most defendants who are accused of misdemeanor offenses are entitled to OR release unless the court finds their release “will compromise public safety or will not reasonably assure the appearance of the defendant as required” at future court hearings (with the exception of certain misdemeanor domestic violence offenses, which are discussed below).<sup>33</sup> The court may also order a supervised own recognizance release (“Supervised OR”) that includes conditions beyond appearing for court dates. The conditions imposed will vary depending on the individual case, and may include mandatory drug testing, substance abuse or mental health treatment, or

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<sup>28</sup> *Id.* §§ 1269b(b), 1275.

<sup>29</sup> Cal. Const., art. I, § 28(f)(3); Cal. Penal Code § 1275(a)(1). In assessing the seriousness of the offense, judges must consider any alleged threats or injury to victims or witnesses; alleged use of a firearm or other weapon; and alleged use or possession of controlled substances. In cases involving drug-related offenses, the judge must also consider the amount of drugs involved and whether the defendant is currently released on bail for a similar offense. *Id.* § 1275(a)(2), (b).

<sup>30</sup> These categories, which are defined in the California Penal Code, include such offenses as murder, manslaughter, robbery, arson, kidnaping, witness intimidation, criminal threats, and extortion.

<sup>31</sup> Cal. Penal Code § 1275(c).

<sup>32</sup> Cal. Const., art. I, §§ 12, 28(f)(3); Cal. Penal Code § 1270(a).

<sup>33</sup> Cal. Penal Code, § 1270(a).



compliance with restraining orders.<sup>34</sup> In some cases, a judge may require a defendant both to post bail and to comply with pretrial supervision conditions.

Because OR and Supervised OR may be granted *only* by a judge – not by an arresting officer or a jail – defendants who are able to post their scheduled bail amount may be released from custody immediately, without any supervision requirements or non-monetary conditions, while those who are seeking OR or Supervised OR through the Office of Pretrial Services in lieu of posting bail must wait for a judge to review their case in chambers, which occurs around the clock. Defendants charged with less serious crimes may be released on OR within several hours of booking. Defendants charged with serious or violent felonies and other serious offenses, including certain domestic violence offenses, may be released on OR at their initial court appearance, within 48 hours of booking, excluding weekends and holidays.<sup>35</sup>

Finally, in very limited cases involving capital offenses or a few serious felony offenses, the court may deny bail altogether and order the defendant to remain in custody pending resolution of his or her criminal charges.<sup>36</sup>

#### **4. Special Considerations in Domestic Violence Cases**

California laws on bail and pretrial release afford special protections during the pretrial process for alleged victims of domestic violence-related offenses. While most individuals who are arrested on misdemeanor charges are cited and released immediately, many of those arrested for misdemeanor domestic violence-related offenses are not eligible for cite and release, and must instead post the scheduled bail amount or appear before a judge to obtain pretrial release.<sup>37</sup> In addition, an arresting officer may seek a higher bail amount for a person arrested on felony charges or for the misdemeanor offense of violating a domestic violence restraining order if the officer believes the scheduled bail amount is insufficient to ensure the defendant's appearance in court or to protect the alleged victim or the alleged victim's family.<sup>38</sup> In such cases, the defendant cannot obtain release immediately by posting a bond with jail officials for the scheduled bail amount. Instead, he or she will be detained either until a judge has set a bail amount or until eight hours have passed after booking without issuance of an order changing the scheduled bail amount.

Domestic violence charges also trigger special judicial procedures for OR and for departures from the bail schedule. For certain domestic violence-related offenses, including misdemeanor charges, the court may order OR release or set a lower or higher bail amount only after providing two days' prior notice to the prosecution and defense, and holding a hearing in open court.<sup>39</sup> In setting the bail amount and determining whether to order OR, the court is

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<sup>34</sup> County of Santa Clara, Office of Pretrial Services, *Office of Pretrial Services Overview* <<https://www.sccgov.org/sites/pretrial/AboutUs/Overview/Pages/Overview.aspx>>.

<sup>35</sup> Cal. Penal Code, § 1270.1.

<sup>36</sup> Cal. Const., art. I, § 12.

<sup>37</sup> Cal. Penal Code § 853.6, subd. (a)(2) & (a)(3).

<sup>38</sup> *Id.* § 1269c.

<sup>39</sup> *Id.* § 1270.1, subs. (a)-(b).

required to consider any alleged threats made by the defendant and any past acts of violence.<sup>40</sup> Outside the domestic violence context, these procedures also apply to serious and violent felony offenses.<sup>41</sup>

In addition to these statutory requirements, the Office of Pretrial Services has a policy of attempting to contact victims before any defendant charged with domestic violence offenses may be considered for OR or Supervised OR release. Pretrial Services attempts to contact victims as early as possible in order to speak to the victim before she or he has experienced any pressure (from the defendant, relatives, friends, or others) to be less forthcoming or to protect the defendant in interactions with law enforcement or pretrial services officers. Pretrial Services officers also provide information about domestic violence resources and services to victims.

## **B) Posting Bail/Bail Bonds**

A defendant who has been granted bail may deposit the full amount directly with the court (or with the jail, which will remit the bail amount to the court) in cash, federal or state bonds, or real estate equity equivalent to the cash amount.<sup>42</sup> The deposit, less any court costs, fees, fines, or other criminal penalties, will be returned to the depositor if the defendant attends all required court hearings, but may be forfeited if he or she fails to appear.<sup>43</sup>

Because many defendants cannot raise the full bail amount upfront, bail is most often satisfied by posting a bond through a commercial bail agent. Pursuant to a civil contract between the defendant and the bail agent, the agent will post a bond with the court for the full bail amount, charging the defendant a non-refundable fee, known as a “premium,” of no more than 10% of that amount. Anecdotal evidence suggests that, in recent years, bail agents in Santa Clara County rarely obtain a 10% premium from a defendant; instead, they often collect 1-2% upfront and may collect the remainder of the 10% in installments. In addition to that initial non-refundable premium, the bail agent may also charge actual, necessary, and reasonable expenses incurred in connection with the transaction, such as guard fees for the first 12 hours following release on bail, notary fees, long distance telephone charges, and certain travel expenses<sup>44</sup> – although bail agents in Santa Clara County have stated that they rarely incur these costs and thus do not pass them on to their clients.

Bail bond agents may require clients to offer collateral equivalent to the remaining percentage of the full bail amount in the form of title to a home, vehicle, or real property; or to deposit actual property such as jewelry. Anecdotal evidence suggests that, in recent years, bail agents in Santa Clara County do not always require collateral, particularly for lower bail bond amounts (i.e., those under \$100,000). One local bail agent stated that as many as 98% of bail

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<sup>40</sup> *Id.* § 1270.1, subs. (c)-(d).

<sup>41</sup> *Id.* § 1270.1, subd. (a)(1).

<sup>42</sup> *Id.* §§ 1295, 1298. As discussed further below in Section (VII)(B), some other states permit defendants to post a portion of the bail imposed – usually 10% – with the court as a guarantee they will appear for their court dates, but California law permits only the full amount to be deposited with the court.

<sup>43</sup> Cal. Penal Code § 1269b(h), 1305.

<sup>44</sup> 10 Cal. Code Regs. § 2081.

bonds are “written on a signature, with no collateral.” But because bail agents are not required to report on the details of their bond transactions, this statement is purely anecdotal, and even when bail agents do not require collateral, they typically require a co-signer or in some cases *multiple* co-signers – usually family or friends who co-sign the bond agreement and may be obligated to pay the full bail amount if the defendant fails to appear.

If the defendant appears for all mandated court hearings, the bail bond is exonerated (i.e., terminated) by the court and any collateral provided by the defendant is returned by the bail agent, but the 10% premium is not refunded. If the defendant fails to appear in court, however, the bond may be forfeited after a lengthy, complex, and time-sensitive legal process,<sup>45</sup> and the bail agent may be held responsible for paying the court the full bail amount.<sup>46</sup> The bail agent, in turn, may seek to recover the full bail amount from the defendant or any co-signers, in some cases by seizing and/or liquidating collateral. The bail agent may also require the defendant to pay for costs associated with the failure to appear, including court costs, attorney’s fees, and the cost of locating and/or surrendering the defendant. Thus, a bail bond obtained through a commercial bail agent is a type of surety bond in which the bail agent acts as the surety guaranteeing the defendant’s appearance for all mandated court hearings. Surety bonds guarantee appearance only – not avoidance of re-arrest pending trial or avoidance of technical violations of release conditions.

## **C) Bail and Release in Santa Clara County**

### **1. Bail Schedule and Bail Bonds**

In Santa Clara County, there were approximately 32,000 admissions into the Main Jail in 2014, of which 87% involved felony offenses and 13% involved misdemeanor offenses. In 2014 – excluding those cited and released in the field, released on jail citations, dismissed, or transferred – approximately 35% of defendants were released on money bail; approximately 25% were released on their own recognizance, with or without supervision conditions;<sup>47</sup> and approximately 40% either remained in jail throughout the pretrial period because they were ordered detained or because they did not or could not make bail, or were released by the court, usually after sentencing. According to the Office of Pretrial Services, those defendants remaining in pretrial custody faced an average detention length of 224 days for felony offenses and 28 days for misdemeanor offenses. Thus, some low-level misdemeanor defendants who are unable to post bail may end up serving most or all of their sentences prior to conviction.

The current bail schedule established by the Santa Clara County Superior Court, which is in effect from January 1 to December 31, 2015, is available online at [http://www.sccscourt.org/documents/criminal\\_bail.pdf](http://www.sccscourt.org/documents/criminal_bail.pdf). As of the date this report was prepared, the 2016 bail schedule was not yet available.

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<sup>45</sup> The bail forfeiture process is described below, in footnote 141.

<sup>46</sup> *Pretrial Detention and Jail Capacity*, pp. 7-8; *People v. Amwest Surety Ins. Co.*, 280 Cal. Rptr. 58, 61 (Cal. Ct. App. 1991). Criticisms of the commercial bail bonds industry are discussed in Section (V).

<sup>47</sup> Of the defendants released on their own recognizance, pretrial supervision and/or other conditions of release were imposed in 77% of cases, while 23% were released with no conditions.

According to an analysis conducted by the Public Policy Institute of California, the scheduled bail amounts across 12 counties that account for approximately two-thirds of California's population increased by approximately 22% from 2002 to 2012.<sup>48</sup> This figure does not include Santa Clara County, so it is unclear whether the local bail schedule follows that trend. But in 2012, the scheduled bail levels for Santa Clara County ranked in the lowest range statewide, falling in the \$14,824-\$24,604 range, compared with \$24,605-\$28,782 for Marin, San Mateo, Contra Costa, and Sacramento Counties; \$28,783-\$33,133 for Alameda, Los Angeles, Santa Barbara, and San Diego Counties; and \$33,134-\$63,781 for San Francisco, San Joaquin, Napa, and San Bernardino Counties (among others).<sup>49</sup> However, many – including those in the bail industry – have opined that California bail schedules are too high for many offenses, and that wide discrepancies among California counties create incentives to commit certain types of offenses (e.g., drug offenses) in one county over another.<sup>50</sup>

Most County defendants who obtain release on bail do so by securing the services of a bail agent and posting a bail bond. In 2015, bail agents posted 7,599 bail bonds in Santa Clara County for bail amounts totaling \$198,068,815.<sup>51</sup> Bail amounts for individual bonds ranged from \$100 to \$1,500,000, with a mean bail amount of \$26,065 and a median bail amount of \$15,000.<sup>52</sup> 289 bail bonds – or approximately 3.4% of all bail bonds posted in 2015 – were for bail amounts of less than \$2,000.<sup>53</sup>

## 2. County Participants in the Pretrial Process

A number of criminal justice officials play a role in bail and release determinations in Santa Clara County.

First, law enforcement officers – i.e., the Sheriff's Office and city police departments – play an initial role in the bail and release process by exercising discretion over whether to arrest an individual in the first instance; when to submit a report to the District Attorney for a possible summons request; whether to cite and release an arrested individual in the field; and whether to bring an arrestee to jail for a jail citation and/or booking. The County Sheriff's Office and 12 other law enforcement agencies operate within Santa Clara County. The Santa Clara County Police Chiefs Association has adopted recommended cite-and-release guidelines intended to achieve consistency in the implementation of cite and release practices in the field and to reduce costs by ensuring that officers do not unnecessarily transport arrestees for booking and processing at County jails. Under the guidelines, however, arresting officers retain a fair amount of discretion, and anecdotal evidence suggests that cite and release practices lack consistency.

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<sup>48</sup> *Pretrial Detention and Jail Capacity*, p. 9.

<sup>49</sup> *Id.*, p. 15.

<sup>50</sup> See Letter from Jonathan Shapiro, Chairman, Little Hoover Commission to Governor Edmund G. Brown, Jr. at pp. 5-6 <<http://www.lhc.ca.gov/studies/216/Report216.pdf>>.

<sup>51</sup> Shauna Lord, Santa Clara University School of Law, Criminal Law and Policy Blog, *The Santa Clara County Bail Market* <<https://crimlawandpolicy.wordpress.com/2016/03/16/the-santa-clara-county-bail-market/>> .

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

The arresting officer's decision whether to cite and release in the field is often critical for arrestees because it can determine whether the arrestee ever spends time in jail. While an individual cited and released in the field may never face detention, an individual who is brought to the jail for booking will remain in custody throughout the booking process – often several hours – even if he or she is subsequently released on a jail citation.<sup>54</sup> Additional training may be required to ensure that arresting officers implement cite and release policies in a uniform manner that is based on arrestees' risk level, and to minimize unnecessary transport and booking of arrestees in County jails.

Law enforcement officers may also play an important role in collecting information related to an arrestee's likelihood to reoffend if released, or the risk of danger and lethality in the context of domestic violence.<sup>55</sup> However, information collected by law enforcement officers may not always be made available in a complete and timely enough manner to the court and other criminal justice officials for use in the bail and release process.

Second, the Office of the District Attorney prosecutes crime within Santa Clara County and exercises its discretion to administer justice in a fair and transparent manner. After a defendant has been arrested, the District Attorney can affect bail and release decisions in a number of ways. Following arrest, and typically before arraignment/initial court appearance, the District Attorney will undertake an initial screening of the case, and may determine that charges should be dropped, reduced, amended, or added. In such cases, the defendant may be released (if charges are dropped) or eligible for release on a lower bail amount (if charges are reduced). Thus, early case screening by the District Attorney's Office can prevent unnecessary or unnecessarily prolonged pretrial detention and the associated costs for defendants and the County. By the same token, early prosecutorial screening can promote necessary detention and/or the imposition of appropriate pretrial release conditions for public safety purposes.

The District Attorney's Office also makes recommendations to the court regarding appropriate bail amounts, whether the defendant is a suitable candidate for OR or Supervised OR, and suggested conditions of release.

Third, the Public Defender's Office provides representation to defendants accused of crimes in Santa Clara County who are financially unable to hire an attorney. Public defenders have a duty to respond immediately to requests for representation. Public defenders are present at arraignments/initial court appearances and represent defendants during bail/release determinations. A public defender may advocate for OR or Supervised OR, where appropriate, or seek to assure that any bail amount set by the court is reasonable and not excessive. In some cases, however, a public defender may have very little information about a defendant's case at the time when the bail/release determination is made. Public defenders may be in a better position to obtain fair pretrial release conditions for their clients in cases where they have been

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<sup>54</sup> Erin Callahan, Santa Clara University School of Law, Criminal Law and Policy Blog, *Bail: How does it work?* <<https://crimlawandpolicy.wordpress.com/2016/03/22/bail-how-does-it-work/#more-208>>.

<sup>55</sup> See Section (VI)(C)(3) for more information about domestic violence risk assessments conducted by law enforcement officers.

able to obtain full information from the District Attorney's Office prior to arraignment.

Fourth, the Department of Correction (DOC) administers the County's jails. Its mission is to serve and protect the citizens of Santa Clara County and the State of California by detaining the people under its supervision in a safe and secure environment while providing for their humane care, custody and control.<sup>56</sup> DOC plays a key role in the pretrial process. When arrestees are brought to jail for misdemeanor offenses, DOC officials determine whether a jail citation should be issued and the arrestee immediately released. Under DOC policy, consistent with state law, an inmate arrested on a misdemeanor charge (typically with a bail amount of \$5,000 or less) generally should be issued a jail citation unless the officer finds the inmate's release would pose an imminent danger to public safety; the charge involves violence or firearms with a prior similar conviction, certain Vehicle Code violations with a prior case or conviction, domestic violence, or a probation violation; or the inmate is intoxicated, unable to identify or care for or identify him or herself, or unwilling to sign a promise to appear in court if released.

DOC also handles the inmate booking process. In addition, DOC officials determine whether an arrestee may be released on bail prior to arraignment and, if so, determine the appropriate bail amount in accordance with the County bail schedule. DOC is responsible for all defendants held in pretrial custody and for processing the release of defendants released on bail, OR, or Supervised OR.

Fifth, the judges of the Superior Court of Santa Clara County – in addition to setting the uniform countywide bail schedule as discussed above – are responsible for determining whether each individual defendant may be released pretrial and on what conditions. If a defendant has neither been cited and released nor posted bail with DOC, the court typically makes a bail/release determination at the defendant's initial court appearance or arraignment. In making a release decision, judges must weigh the potential risk of flight and threats to public safety against the presumption of innocence and the right to liberty. The judge takes into consideration the information provided by the Office of Pretrial Services (discussed further below), the defendant's criminal history, the nature of the charges, and other relevant information. The judge may also entertain requests from the District Attorney or defense counsel to raise and/or lower the bail amount and order specific conditions of release. Although bail decisions are not appealable, they may be reviewed and reconsidered periodically until the case is resolved.

Arrestees held in custody must be brought before a judge for arraignment/initial appearance within 48 hours, excluding weekends and holidays. Currently, the Superior Court holds arraignments Monday through Friday. Due to delays that occur as a result of weekend arrests and the time required for prosecutors to complete their investigation and decide whether to file charges, defendants who are arrested between Friday and Sunday and cannot post a bond for the scheduled bail amount may remain in custody until the following *Wednesday* before a judge makes a bail or release determination.

Finally, the County's Office of Pretrial Services plays a significant role in the

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<sup>56</sup> See Department of Correction home page, < <https://www.sccgov.org/sites/doc/Pages/doc.aspx>>.

administration of pretrial justice and the determination of bail in Santa Clara County. Under California law, in exercising discretion to grant a bail amount higher or lower than the amount set forth in the countywide bail schedule based on the need to protect the public, the seriousness of the offense charged, the defendant's criminal history, and the defendant's likelihood of making future court appearances, a court may consider any information regarding the defendant provided in a report prepared by "investigative staff."<sup>57</sup> The County's Office of Pretrial Services originated in the 1960s as court investigative staff, and continues to serve this function today although it is now a County department rather than an office within the Superior Court.

Pretrial services officers are present at all times in the County's Main Jail, where they immediately interview all defendants booked into the jail on felony charges or on misdemeanor charges that are not eligible for immediate cite-and-release.<sup>58</sup> Based on the information they obtain through the interview and the defendant's records, pretrial services officers recommend OR, Supervised OR, or denial of OR/Supervised OR release.<sup>59</sup> These recommendations are produced and transmitted to the court around the clock, 24/7. The Office of Pretrial Services estimates that the process of conducting an interview, reviewing a defendant's records, and electronically submitting a report to the court takes approximately one hour, and that judges typically respond with a written ruling (which does not require a court hearing) in another hour.<sup>60</sup>

If a defendant is not recommended for OR or Supervised OR, and instead has a bail amount set by the judge at his or her initial court appearance, the court may also use the pretrial services officer's investigation and findings as a guide in setting a bail amount. However, pretrial services officers do not make recommendations regarding bail amounts.

The Office of Pretrial Services also provides pretrial supervision services. For defendants released on OR, this entails minimal monitoring through actions such as making reminder calls or sending reminder letters for future court dates and checking criminal histories to monitor compliance. For defendants released on Supervised OR, supervision officers provide more formal and intensive pretrial supervision, including providing drug testing services; referring clients to other services ordered by the court, such as mental health treatment; monitoring compliance with any other conditions imposed by the court; overseeing electronic monitoring; and providing personal reminders of upcoming court dates. The Office of Pretrial Services currently has 10 full-time equivalent employees (FTEs) in the jail division, 7 FTEs in the court division, 13 FTEs in the supervision division, and 13 FTEs in management, administrative support and administration, for a total of 43 FTEs.

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<sup>57</sup> Cal. Penal Code §§ 1275(a)(1), 1318.1.

<sup>58</sup> Pretrial services officers began interviewing misdemeanants approximately six months ago. Until that time, they interviewed only felony defendants.

<sup>59</sup> The risk assessment tool the Office of Pretrial Services employs in gathering information regarding a specific defendant's characteristics and making recommendations to the court is discussed in Section VII.

<sup>60</sup> The Office of Pretrial Services has indicated that most pretrial agencies do not maintain a 24/7 presence in the local jails, and indeed are often only present Monday through Friday. In jurisdictions with less robust pretrial agencies, court adjudication of release recommendations may take much longer.

## VI) Criticisms of Requiring Money Bail and of the Commercial Bail Bonds Industry

In recent years, numerous associations and organizations have called for reform of the money bail system.<sup>61</sup> In her 2016 State of the Judiciary address, the Chief Justice of the Supreme Court of California, Tani G. Cantil-Sakauye, stated that “it’s time for us to really ask the question whether or not bail effectively serves its purpose, or does it in fact penalize the poor.”<sup>62</sup> Does bail, she asked, “really ensure public safety? Does it in fact assure people’s appearance in court, or would a more effective risk assessment tool be as effective for some cases?”<sup>63</sup> Critics of the money bail system argue that bail does not ensure public safety or appearance in court, and that its harms outweigh any potential benefits. Criticisms of the bail system pertain to both requiring defendants to pay money bail generally and the for-profit bail bond industry more specifically. This section of the report first outlines criticisms of systems that rely heavily on payment of money bail generally, and then turns to specific criticisms of the bail bond industry.

### A) Money Bail System

The money bail system has long been criticized as “unfair, discriminatory against the poor, a primary cause of unnecessary over-incarceration of individuals who do not pose significant risks of nonappearance or public safety, and costly to taxpayers.”<sup>64</sup> The American Bar Association has adopted recommended standards requiring that money bail be used “only when no other less restrictive condition of release will reasonably ensure the defendant’s appearance in court.”<sup>65</sup> And advocates of bail reform have argued that alternatives to money bail, such as presumptive reliance on pretrial release and supervision programs, are not only more equitable, but also can reduce jail overcrowding and lower county jail costs while providing comparable (or even better) protection of public safety.<sup>66</sup>

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<sup>61</sup> See, e.g., *COSCA Policy Paper*, p. 2; Conference of Chief Justices, *Resolution 3: Endorsing the Conference of State Court Administrators Policy Paper on Evidence-Based Pretrial Release* <<http://ccj.ncsc.org/~media/Microsites/Files/CCJ/Resolutions/01302013-pretrial-release-Endorsing-COSCA-Paper-EvidenceBased-Pretrial-Release.ashx>>; International Association of Chiefs of Police, *Resolution on Pretrial Release and Detention Process* <<http://www.iacp.org/ViewResult?SearchID=2472>>; American Probation and Parole Association, *Resolution, Pretrial Supervision* <[http://www.appa-net.org/eweb/DynamicPage.aspx?Site=APPA\\_2&WebCode=IB\\_Resolutions](http://www.appa-net.org/eweb/DynamicPage.aspx?Site=APPA_2&WebCode=IB_Resolutions)>; American Jail Association, *Resolution, Pretrial Justice* <[http://www.americanjail.org/wp-content/uploads/2014/03/Resolutions-08\\_25\\_14.pdf](http://www.americanjail.org/wp-content/uploads/2014/03/Resolutions-08_25_14.pdf)>.

<sup>62</sup> Chief Justice Tani G. Cantil-Sakauye, *State of the Judiciary: Address to a Joint Session of the California Legislature* (Mar. 8, 2016) <<http://www.courts.ca.gov/34477.htm>>.

<sup>63</sup> *Id.*

<sup>64</sup> Dressel & Mahoney, *Pretrial Justice in Criminal Cases: Judges’ Perspectives on Key Issues and Opportunities for Improvement* <<http://www.judges.org/wp-content/uploads/pretrial-whitepaper0513.pdf>>.

<sup>65</sup> American Bar Association, *Standards for Criminal Justice: Pretrial Release*, Standard 10-5.3, subd. (a) (3d ed. 2007) <[http://www.americanbar.org/content/dam/aba/publications/criminal\\_justice\\_standards/pretrial\\_release.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.authcheckdam.pdf)> (hereafter *ABA Standards*).

<sup>66</sup> Public Policy Institute of California, *Assessing the Impact of Bail on California’s Jail Population*, p. 5 <[http://www.ppica.org/content/pubs/report/R\\_613STR.pdf](http://www.ppica.org/content/pubs/report/R_613STR.pdf)> (hereafter *Assessing the Impact of Bail*).



## 1. Discriminatory Impacts of the Money Bail System

Perhaps the most fundamental criticism of money bail is that it creates a system that “[b]y definition . . . discriminates against the poor and working class.”<sup>67</sup> In a system that relies primarily on money bail, economic status becomes a primary factor in determining whether a defendant is released pending resolution of his or her criminal case.<sup>68</sup> This has created “two distinct justice systems: one for the rich and another for the poor.”<sup>69</sup> Those who have financial means can return to their homes, jobs, and families pending trial, while those who lack the ability to pay remain in jail, with attendant consequences on employment, financial stability, family and community ties and well-being, health, and ability to defend against criminal charges (as described in more detail below). For many poor and working class individuals, “[b]ail equals jail as a practical matter.”<sup>70</sup>

At the same time, the factors that make bail especially burdensome for lower-income defendants may also prevent them from obtaining release without financial conditions, such as OR or Supervised OR. “Defendants released on their own recognizance must . . . convince a judge that they have sufficient ‘ties to the community,’” which are “often assessed in terms of employment and stable housing.”<sup>71</sup> Thus, defendants who struggle to maintain employment and housing may be deemed ineligible for OR release due to socio-economic factors – even though they stand to benefit the most from non-monetary forms of release.

Research has shown, moreover, that the money bail system has a disproportionate adverse impact on minority defendants. A study that sampled felony cases between 1990 and 1996 found that only 27% of white defendants were detained throughout the pretrial period because they could not post bail, compared to 36% of African-American defendants and 44% of Hispanic defendants.<sup>72</sup> This disparity may simply reflect the disparate poverty rates among different racial and ethnic groups in the United States, but demonstrates the disproportionate impact of money bail on these communities.<sup>73</sup>

There is a growing consensus that many individuals who are detained solely because of their inability to make bail “could be released and supervised in their communities – and allowed to pursue or maintain employment and participate in educational opportunities and their normal

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<sup>67</sup> American Civil Liberties Union of California, *Public Safety Realignment: California at a Crossroads*, p. 21 (2012) <[https://www.aclunc.org/sites/default/files/public\\_safety\\_realignment\\_california\\_at\\_a\\_crossroads.pdf](https://www.aclunc.org/sites/default/files/public_safety_realignment_california_at_a_crossroads.pdf)> (hereafter *ACLU Public Safety Realignment*).

<sup>68</sup> COSCA Policy Paper at p. 4.

<sup>69</sup> Santa Clara County Human Relations Commission, Justice Review Committee, *Report on the Public Forum for Family and Friends of Inmates*, p. 38 <[http://sccgov.iqm2.com/Citizens/Detail\\_LegiFile.aspx?Frame=SplitView&MeetingID=7190&MediaPosition=9983.047&ID=80776&CssClass=>](http://sccgov.iqm2.com/Citizens/Detail_LegiFile.aspx?Frame=SplitView&MeetingID=7190&MediaPosition=9983.047&ID=80776&CssClass=>)> (hereafter *HRC Report*).

<sup>70</sup> Human Rights Watch, *The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City*, p. 26 <[https://www.hrw.org/sites/default/files/reports/us1210webwcover\\_0.pdf](https://www.hrw.org/sites/default/files/reports/us1210webwcover_0.pdf)> (hereafter *The Price of Freedom*).

<sup>71</sup> *Id.*, p. 38.

<sup>72</sup> *COSCA Policy Paper*, pp. 4-5.

<sup>73</sup> *Id.*, p. 4.

family lives – without risk of endangering their fellow citizens or fleeing from justice.”<sup>74</sup> In many cases, ability to make bail has little or no relationship to a defendant’s likelihood of failing to appear for court dates or jeopardizing public safety prior to trial. As critics have pointed out, “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.”<sup>75</sup> Even for those indigent defendants who do manage to make bail – which typically is not calculated according to ability to pay – scraping together the payment may impose a significant burden on families that is not balanced by any benefit in terms of public safety, technical compliance, or court appearance rates.

## 2. Effect of Money Bail on Public Safety and Appearance Rates

### a. Public Safety

Historically, bail meant conditional release from custody predicated on compliance with terms of good behavior and public safety, up until the turn of the twentieth century when money bail was introduced. Money bail was viewed solely as a means of securing a defendant’s appearance at all court dates, and was not intended to have any effect on public safety.<sup>76</sup> This purpose is reflected in the basic structure of bail statutes, in California and elsewhere: bail may be forfeited if a defendant fails to appear for a scheduled court date and is not recovered within a certain timeframe, and not for any other reason – including the defendant’s non-compliance with conditions of release and/or commission of additional criminal offenses.<sup>77</sup> Given the changing purpose and structure of bail – including its replacement of non-monetary forms of release over time<sup>78</sup> – it is hardly surprising that money bail has not been shown to protect public safety or prevent misconduct during pretrial release.

California law mandates that public safety and the safety of the victim “shall be the primary considerations” in setting bail.<sup>79</sup> But the law provides no guidance on how a court should set a bail amount to address public safety concerns, and many critics – including San Francisco Superior Court Judge Curtis E. Karnow and the American Bar Association – have argued that there is no rational way to do so.<sup>80</sup>

As Judge Karnow points out, a “central flaw” in setting bail to protect public safety “is

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<sup>74</sup> National Symposium on Pretrial Justice, Summary Report of Proceedings, *Remarks from the Honorable Eric H. Holder, Jr., Attorney General, U.S. Department of Justice*, p. 30 <<http://www.pretrial.org/wpfb-file/nspj-report-2011-pdf>>.

<sup>75</sup> *Pretrial Detention and Jail Capacity*, p.5.

<sup>76</sup> See, e.g., Curtis E. Karnow, *Setting Bail for Public Safety*, 13 Berkeley J. of Crim. Law 1, 4-5, 8 (2008) <<http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1013&context=bjcl>> (hereafter *Karnow*).

<sup>77</sup> Cal. Penal Code §1305, subd. (a) (authorizing forfeiture of bail if defendant fails to appear for arraignment, trial, judgment, any other occasion prior to judgment where the defendant’s presence in court is lawfully required, or to surrender following affirmance of judgment on appeal).

<sup>78</sup> Bureau of Justice Statistics, *Pretrial Release of Felony Defendants in State Courts* <<http://www.bjs.gov/content/pub/pdf/prfdsc.pdf>>.

<sup>79</sup> Cal. Const., art. I, § 28, subd. (f)(3); Cal. Penal Code § 1275, subd. (a)(1).

<sup>80</sup> See *Karnow*, p. 2; ABA Standards at p. 111.

that defendants do not forfeit bail when they commit a new offense; they forfeit bail only when they do not appear at a hearing.”<sup>81</sup> As discussed in more detail below, the same “flaw” applies to bail agents who post bail bonds on defendants’ behalf – the bond they post is forfeited only when the defendant fails to appear, not when the defendant commits a new offense. Thus, money bail provides no direct incentive to defendants to refrain from criminal conduct during release, and no direct incentive to bail agents to consider public safety when deciding whether to post a bail bond or in supervising defendants released on bond. Santa Clara County bail bond agents have stated that their primary consideration in deciding whether to post a bond for a potential client is the likelihood that person will make his or her court appearances; they did not mention the likelihood that a client will refrain from engaging in criminal activity as a relevant consideration. Indeed, one local bail agent stated that “bail is only an appearance bond, not a performance bond.”

Another flaw is that bail schedules typically set bail amounts based primarily on the severity of the charged offense, even though “the evidence does not support the proposition that the severity of the crime has any relationship either to the tendency to flee or to the likelihood of re-offending.”<sup>82</sup> And even where the bail amount reflects factors that better estimate risks of reoffending, it is extremely difficult for a court to determine a specific bail amount that the defendant can afford to pay, but will deter criminal activity. Indeed, Judge Karnow has argued that this task is generally “impossible” for many reasons, including the difficulty of setting bail “at the edge of affordability” such that the defendant can obtain release but has a strong incentive to avoid forfeiture; the lack of any relationship between pretrial misconduct and bail forfeiture; and the low risk of forfeiture in cases involving bail bonds.<sup>83</sup> In addition, for the very poor and the very wealthy, no bail amount is likely to be meaningful.<sup>84</sup> For many of these reasons, the American Bar Association has taken the position that bail should *never* be used to address public safety concerns.<sup>85</sup>

## **b. Appearance Rates**

Is money bail more effective at ensuring what it was designed to address – that is, appearance at scheduled court dates? Not necessarily. Although bail has long been used for this purpose, there is little evidence to suggest that the imposition of money bail improves rates of

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<sup>81</sup> Karnow, p. 20.

<sup>82</sup> Karnow, p. 14; see also Pretrial Justice Institute, *Rational and Transparent Bail Decision Making: Moving from a Cash-Based to a Risk-Based Process*, p. 4 <<http://www.pretrial.org/wpfb-file/rational-and-transparent-bail-decision-making-pdf>> (hereafter *Rational and Transparent Bail Decision Making*).

<sup>83</sup> Karnow, pp. 2, 19-28.

<sup>84</sup> Karnow, p. 25; *Pretrial Detention and Jail Capacity*, p.5.

<sup>85</sup> *ABA Standards*, standards 10-1.4, subd. (d) & 10-5.3, subd. (b); see also *id.* at pp. 44, 111-12 (commentary). The ABA standards also prohibit the imposition of financial conditions (i.e., bail) that the defendant cannot satisfy or the use of money bail “as a subterfuge for detaining defendants.” *Id.* at p. 44. Instead, the ABA states that pretrial detention “should only result from an explicit detention decision, at a hearing specifically designed to decide that question, not from the defendant’s inability to afford the assigned bail.” *Id.* In California, however, an explicit detention decision (i.e., denying bail entirely) is not an option except for a small set of felony offenses. See Cal. Const., art. I, § 12.

failure to appear (commonly known as “FTA”).<sup>86</sup> A 2007 report from the federal Bureau of Justice Statistics (“BJS”) provided data suggesting that defendants released on surety bonds or full cash bonds had a predicted FTA rate of 20% compared to 24% for release on OR.<sup>87</sup> Bail bond agents, both national and local, have cited the BJS data to support the notion that the evidence demonstrates commercial bail bonds are the most effective means of pretrial release in terms of avoiding FTA.<sup>88</sup> However, after the bail bond industry began relying widely on its figures for this purpose, BJS issued a data advisory warning that “the data are insufficient to explain causal associations between the patterns reported, such as the efficacy of one form of pretrial release over another.”<sup>89</sup> The advisory notes that one limitation of BJS’s data, among others, is that it “does not have the capacity to distinguish highly functioning pretrial diversionary programs from those operating under limited staffing and budgetary constraints.”<sup>90</sup> Unlike most pretrial services agencies, the County’s Office of Pretrial Services uses a locally validated risk assessment tool and has achieved FTA rates of *less than 5%* for defendants on OR and Supervised OR release.<sup>91</sup>

Santa Clara County bail bond agents stated during the public forums convened by the BRWG that their services are extremely effective at preventing FTA. As one agent put it, “Our system works – we have a 98% success rate.” However, bail bond agents in California are not currently required to gather or report data regarding FTA rates among their clients, and have not provided any local empirical data regarding their rates of pretrial success.<sup>92</sup> And even assuming money bail creates an incentive to appear in some cases, that incentive has likely been reduced following the recent financial crisis, as bail agents are now more likely to accept smaller fees upfront (e.g., 1-2%), without requiring collateral.

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<sup>86</sup> See, e.g., International Association of Chiefs of Police, *Law Enforcement’s Leadership Role in the Pretrial Release and Detention Process* at p. 6 (2011) <[http://www.theiacp.org/portals/0/pdfs/Pretrial\\_Booklet\\_Web.pdf](http://www.theiacp.org/portals/0/pdfs/Pretrial_Booklet_Web.pdf)> (hereafter *Law Enforcement’s Leadership Role*).

<sup>87</sup> Cohen & Reaves, Bureau of Justice Statistics Special Report, *State Court Processing Statistics, 1990-2004: Pretrial Release of Felony Defendants in State Courts* at pp.10-11 (2007) <<http://www.bjs.gov/content/pub/pdf/prfdsc.pdf>>.

<sup>88</sup> See, e.g., Letter dated May 2, 2016 to Board of Supervisors on behalf of Aladdin Bail Bonds from Marc Ebel, Director of Legislative Affairs, Triton Management Services, LLC, at p.1.

<sup>89</sup> Bureau of Justice Statistics, *Data Advisory: State Court Processing Statistics Data Limitations* (2010) <[http://www.bjs.gov/content/pub/pdf/scpsdl\\_da.pdf](http://www.bjs.gov/content/pub/pdf/scpsdl_da.pdf)> (hereafter *Data Advisory*); see also Kristin Bechtel et al., Pretrial Justice Institute, *Dispelling the Myths: What Policy Makers Need to Know about Pretrial Research*, pp. 3-5 <[http://www.pretrial.org/download/pji-reports/Dispelling%20the%20Myths%20\(November%202012\).pdf](http://www.pretrial.org/download/pji-reports/Dispelling%20the%20Myths%20(November%202012).pdf)> (hereafter *Dispelling the Myths*); The Crime Report, *BJS Says It Didn’t Endorse Commercial Bail Bonds* <<http://www.thecrimereport.org/news/crime-and-justice-news/bjs-says-it-didnt-endorse-commercial-bail-bonds>>.

<sup>90</sup> *Data Advisory*, p. 1.

<sup>91</sup> Garry Herceg, Office of Pretrial Services, *Santa Clara County, Report to PSJC on Release Population Trends*, p. 15, Appendix L.

<sup>92</sup> Aladdin Bail Bonds identified one study that analyzed aggregated data from California counties, including Santa Clara County. See Michael K. Block, *The Effectiveness and Cost of Secured and Unsecured Pretrial Release in California’s Large Urban Counties: 1990-2000* (2005). Because the study analyzes aggregate data from several counties, it does not offer conclusions specific to Santa Clara County. Moreover, the study relies on BJS data to draw inferences about the effectiveness of particular forms of pretrial release – despite BJS’ warning that the data should not be used for this purpose. See *Data Advisory*, p. 1; *Dispelling the Myths*, pp. 8-9.

Moreover, studies suggest that most released defendants will appear for court without financial incentive, and many of those who miss one appearance are likely to appear voluntarily within 30 days.<sup>93</sup> Defendants who miss court appearances do so for many reasons unrelated to a desire to avoid justice – including inability to miss work or find child care, or because they “lead chaotic, unstructured lives in which keeping track of commitments is difficult.”<sup>94</sup> In such cases, court date reminders or other assistance from a pretrial services agency may be an equally, if not more, effective means of ensuring appearance.

### 3. Impact of Money Bail on Pretrial Detention Rates

As reliance on money bail has increased, and as bail amounts have climbed, the money bail system appears to have resulted in growing jail populations and unnecessary pretrial detention of individuals who pose little risk, but cannot afford to post bail. In 1990, national data showed that money bail was imposed on approximately 53% of felony defendants. By 2009, that percentage had increased to 72%.<sup>95</sup> At the same time, average bail amounts have increased. Nationwide, average bail amounts for felony defendants more than doubled over a 17-year period, from \$25,400 in 1992 to \$55,400 in 2009.<sup>96</sup> In California, average bail amounts rose by an inflation-adjusted 22% between 2002 and 2012.<sup>97</sup>

This increased reliance on money bail appears to have contributed to growth of local jail populations. According to the Bureau of Justice Statistics, 95% of the overall growth in local jail populations is due to increases in the *unconvicted* population (that is, inmates detained pretrial).<sup>98</sup> Nationwide, unconvicted inmates account for 62.8% of the total jail population.<sup>99</sup> The rate is similar in California (62%).<sup>100</sup> Although the proportion of pretrial inmates in the total jail population appears higher in Santa Clara County (73%), this number is likely an overestimate because the County’s CJIC system reflects a defendant’s most recent charge or status – in other words, a person may be in jail serving a sentence on an older conviction but also have a more

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<sup>93</sup> *The Price of Freedom*, pp. 50-51; Justice Policy Institute, *For Better or For Profit: How the Bail Bonding Industry Stands in the Way of Fair and Effective Pretrial Justice*, p. 25 <[http://www.justicepolicy.org/uploads/justicepolicy/documents/for\\_better\\_or\\_for\\_profit.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/for_better_or_for_profit.pdf)> (hereafter *For Better or For Profit*).

<sup>94</sup> *The Price of Freedom*, p. 52.

<sup>95</sup> Cohen & Reaves, Bureau of Justice Statistics Special Report, State Court Processing Statistics, 1990-2004: *Pretrial Release of Felony Defendants in State Courts*, p.3 <<http://www.bjs.gov/content/pub/pdf/prfdsc.pdf>>; Reaves, Bureau of Justice Statistics, State Court Processing Statistics, *Felony Defendants in Large Urban Counties, 2009 – Statistical Tables*, table 12, p. 17 <<http://www.bjs.gov/content/pub/pdf/fdluc09.pdf>>.

<sup>96</sup> Bureau of Justice Statistics, National Pretrial Reporting Program, *Felony Defendants in Large Urban Counties, 1992*, table 15, p. 20 <<http://www.bjs.gov/content/pub/pdf/Feldef92.pdf>>; *Felony Defendants in Large Urban Counties, 2009 – Statistical Tables*, table 16, p. 19.

<sup>97</sup> *Assessing the Impact of Bail*, pp. 9-10. These amounts were calculated based on bail amounts in county bail scheduled and the frequency of each offense; they do not reflect any judicial departures, upward or downward, from the scheduled bail amounts.

<sup>98</sup> T. Minton & Z. Zeng, Bureau of Justice Statistics, *Jail Inmates at Midyear 2014*, p. 1 <<http://www.bjs.gov/content/pub/pdf/jim14.pdf>>.

<sup>99</sup> *Id.*, table 3, p. 4.

<sup>100</sup> Board of State and Community Corrections, *Jail Profile Survey, First Quarter Calendar Year 2015 Survey Results*, p. 4 <[http://www.bscc.ca.gov/downloads/2015\\_1st\\_Qtr\\_JPS\\_Full\\_Report.pdf](http://www.bscc.ca.gov/downloads/2015_1st_Qtr_JPS_Full_Report.pdf)>.

recent charge that has not yet been adjudicated, in which case the system will record him or her as being in pretrial status.<sup>101</sup>

Most of these individuals remain in jail solely because they could not make bail. National data show that nearly 90% of felony defendants who remained in custody pending trial had a bail amount set but did not post bail.<sup>102</sup> Misdemeanor defendants also face detention due to inability to pay bail, despite lower bail amounts for these charges. In New York City, for example, only 10% of misdemeanor defendants were able to post bail at arraignment; another 27% subsequently posted bail, but only after a period of pretrial detention.<sup>103</sup> Even in cases where bail was set at \$750 or less, more than a quarter of misdemeanor defendants remained in pretrial detention for 7 days or more.<sup>104</sup>

In California, “[p]ublic defenders and private defense counsel across the state report that a substantial number of the pretrial detainees in county jails have bail set, but cannot afford to post bail.”<sup>105</sup> Although precise data are not available for Santa Clara County, the Office of Pretrial Services estimates that, of those defendants who have bail set, but remain in County jails throughout the pretrial period (i.e., excluding those who are ineligible for release due to warrants in other jurisdictions, parole holds, etc.), 90% are detained because they could not obtain a bail bond or otherwise afford to post bail. Santa Clara County bail agents have stated that a majority of these defendants are unable to obtain a bail bond not because they cannot afford to pay, but because bail bonds agents decline to offer them a bond because agents believe they are unsuitable for bail due to a high FTA risk.

#### 4. Costs of Unnecessary Pretrial Detention

Pretrial detention imposes significant monetary and social costs on local governments and their residents that may be needlessly magnified by a money bail system that subjects a growing population of relatively low-risk defendants to incarceration before trial. As of 2010, the federal government estimated that county governments spent a total of approximately \$9 billion annually to detain defendants prior to trial.<sup>106</sup> Supervising defendants in the community through a pretrial services program is substantially less costly to counties than keeping defendants in jail prior to trial.<sup>107</sup> In Santa Clara County, the Office of Pretrial Services

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<sup>101</sup> Board of State and Community Corrections, *Jail Profile Survey, First Quarter Calendar Year 2015 Survey Results*, p. 6 <[http://www.bscc.ca.gov/downloads/2015\\_1st\\_Qtr\\_JPS\\_Full\\_Report.pdf](http://www.bscc.ca.gov/downloads/2015_1st_Qtr_JPS_Full_Report.pdf)>.

<sup>102</sup> *Felony Defendants in Large Urban Counties, 2009 – Statistical Tables*, p. 15, fig. 13.

<sup>103</sup> New York City Criminal Justice Agency, Research Brief No. 14: *Bail, Detention, & Nonfelony Case Outcomes* <<http://www.nycja.org/library.php>>.

<sup>104</sup> *Id.*, fig. 4, p. 7.

<sup>105</sup> California Forward, *Pretrial Detention & Community Supervision: Best Practices and Resources for California Counties*, p. 7 <<https://cafwd.app.box.com/s/cs1z7yi07eiv6q76jsjw>>.

<sup>106</sup> COSCA Policy Paper, p. 4; National Association of Counties, *County Jails at a Crossroads: An Examination of the Jail Population and Pretrial Release*, p. 2 <[http://www.naco.org/sites/default/files/documents/Final%20paper%20County%20Jails%20at%20a%20Crossroads\\_8.10.15.pdf](http://www.naco.org/sites/default/files/documents/Final%20paper%20County%20Jails%20at%20a%20Crossroads_8.10.15.pdf)> (hereafter *County Jails at a Crossroads*).

<sup>107</sup> See, e.g., *Law Enforcement's Leadership Role*, p. 10; Justice Policy Institute, *Baltimore Behind Bars: How to Reduce the Jail Population, Save Money and Improve Public Safety*, p. 30 <[http://www.justicepolicy.org/images/upload/10-06\\_rep\\_baltbehindbars\\_md-ps-ac-rd.pdf](http://www.justicepolicy.org/images/upload/10-06_rep_baltbehindbars_md-ps-ac-rd.pdf)> (hereafter *Baltimore Behind Bars*); Justice Policy Institute, *Bail*

estimates that pretrial supervision costs approximately \$15 per day per defendant, while pretrial detention costs \$204 per day per defendant at the Main Jail and \$159 per day per defendant on average across both County facilities (the Main Jail and the Elmwood Correctional Facility).<sup>108</sup> In 2014-15, average detention lengths in the County were approximately 27-32 days for misdemeanor defendants and 201-235 days for felony defendants. Thus, the County's Independent Management Audit Division estimates that during the six-month period between July 1 and December 31, 2011, the release of those defendants whom the court deemed eligible for OR saved the County \$31.3 million in detention costs.<sup>109</sup> Moreover, as discussed in more detail below, while the County's increased reliance on OR and Supervised OR in recent years has resulted in greater numbers of defendants being released, the rates of FTA, non-compliance with conditions of release, and pretrial re-arrest in the County have remained steady.

The social costs of pretrial detention are also substantial. Even short periods of pretrial detention can result in loss of employment, loss of housing, deterioration of family and social relationships, and reduced access to health care and social services.<sup>110</sup> In November 2015, the Justice Relations Committee of the Santa Clara County Human Relations Commission ("HRC") held a public forum for family members and friends of inmates in the County jail to discuss their experiences with the County jail system. According to a report the HRC submitted to the Board of Supervisors describing that public forum:

Forum testimony from spouses, children, parents, grandparents, and friends of people detained in the jail described how the inability to raise money for bail and lengthy pretrial detention caused numerous problems for defendants and their families, including the following: Inability to travel to work results in job loss, leaving dependent family members and children to fend for themselves. Those unable to pay rent are evicted from their apartments and unable to find alternative housing. Children are separated from their parents, and sick or elderly friends and family may be left to suffer without caretakers.<sup>111</sup>

Further, because jails in the United States were traditionally designed for short-term confinement of those awaiting trial or those convicted of minor offenses,<sup>112</sup> they often lack inmate-oriented programming, spatial accommodations, and medical facilities that may exist in prisons – which were designed for longer-term confinement of those convicted of more serious offenses. As Former U.S. Attorney General Eric Holder has explained, most individuals detained pretrial “could reap greater benefits from appropriate pretrial treatment or rehabilitation

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*Fail: Why the U.S. Should End the Practice of Using Money for Bail*, p. 21

<<http://www.justicepolicy.org/uploads/justicepolicy/documents/bailfail.pdf>> (hereafter *Bail Fail*).

<sup>108</sup> Santa Clara County, Board of Supervisors Management Audit Division, *Management Audit of the Office of Pretrial Services* at p. 11 (2012) <<https://www.sccgov.org/sites/bos/Management%20Audit/Documents/PTSFinalReport.pdf>>.

<sup>109</sup> *Id.*

<sup>110</sup> *COSCA Policy Paper*, p. 4; *ABA Standards*, p. 33; *County Jails at a Crossroads*, p. 2.

<sup>111</sup> *HRC Report*, pp. 36-37.

<sup>112</sup> The purpose of jails has evolved in California following Public Safety Realignment under AB 109, which transferred many lower-level offenders to serve their sentences in county jails rather than state prisons.

programs than from time in jail.”<sup>113</sup>

The disruption caused by pretrial detention can also lead to increased reliance on the social safety net – both by defendants upon release, and by the families they may be unable to support as a result of their detention – and may even increase the likelihood that a defendant will reoffend upon release.<sup>114</sup> Criminal justice practitioners have long believed that incarceration is in and of itself criminogenic, especially for low-risk individuals.<sup>115</sup> A recent study of defendants in Kentucky found an association between periods of pretrial detention as short as two to three days and the short- and long-term likelihood that an individual will reoffend upon release – particularly for defendants categorized as low-risk.<sup>116</sup> The Pretrial Justice Institute has highlighted the harmful effects of even short periods of pretrial detention in its “3DaysCount” campaign, which seeks law and policy changes at the state level to improve pretrial practices. This national campaign is premised on the notion that “[e]ven three days in jail can be too much, leaving low-risk defendants less likely to appear in court and more likely to commit new crimes – because of the stress incarceration places on fundamentals like jobs, housing and family connections.”<sup>117</sup>

Pretrial detention is also associated with less favorable judicial outcomes. Research has shown that detained defendants are more likely to be convicted, less likely to have their charges reduced, more likely to be sentenced to jail or prison, and more likely to receive longer sentences than released defendants – even when other salient factors, such as the type and severity of the charge and the defendant’s criminal history, are accounted for.<sup>118</sup> This research suggests that defendants detained pretrial may experience greater pressure to plead guilty in order to obtain release, and may have less leverage in negotiating plea deals, although in Santa Clara County, the District Attorney’s Office is well aware of this pressure and takes measures to prevent it from unduly influencing plea negotiations.<sup>119</sup> As the HRC report explains, “[f]aced with lengthy

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<sup>113</sup> National Symposium on Pretrial Justice, Summary Report of Proceedings, *Remarks from the Honorable Eric H. Holder, Jr., Attorney General, U.S. Department of Justice*, p. 30 (2011) <<http://www.pretrial.org/wpfb-file/nspj-report-2011-pdf>>. It should be noted that most pretrial justice professionals and public defenders discourage court-mandated participation in treatment or rehabilitation prior to conviction; however, voluntary and confidential participation in such programming can be beneficial for defendants and the community.

<sup>114</sup> *COSCA Policy Paper*, p. 4; *County Jails at a Crossroads*, p. 2.

<sup>115</sup> See, e.g., Arthur R. Angel et al., *Preventive Detention: An Empirical Analysis*, 6 Harv. C.R.-C.L. L. Rev. 300, 352 (1971) (noting that being jailed with criminals “leave[s] many defendants hardened, embittered, and more likely to recidivate once released”); Roger Bowles & Mark Cohen, *Pre-Trial Detention: A Cost-Benefit Approach*, Dep’t for Int’l Dev. 34 (2009) <[http://www.opensocietyfoundations.org/sites/default/files/justice\\_20081124d\\_0.pdf](http://www.opensocietyfoundations.org/sites/default/files/justice_20081124d_0.pdf)>, (noting that pretrial detention “could create a long-term cost of crime itself”).

<sup>116</sup> Christopher T. Lowenkamp, Marie VanNostrand, and Alexander Holsinger, *The Hidden Costs of Pretrial Detention* <<http://www.pretrial.org/download/research/The%20Hidden%20Costs%20of%20Pretrial%20Detention%20-%20LJAF%202013.pdf>>.

<sup>117</sup> Pretrial Justice Institute, *3DaysCount* <<http://projects.pretrial.org/3dayscount/>>.

<sup>118</sup> See, e.g., New York City Criminal Justice Agency, Research Brief No. 18: *Bail, Detention, & Felony Case Outcomes* (2008) at p. 7 <<http://www.nycja.org/library.php>> (hereafter *CJA Research Brief No. 18*); *COSCA Policy Paper*, p. 5; *Rational and Transparent Bail Decision Making*, p. 2.

<sup>119</sup> *CJA Research Brief No. 18*, p. 7; *COSCA Policy Paper*, p. 5; *The Price of Freedom*, p. 32.



periods of pretrial detention while awaiting hearings and trial, many defendants decide to accept plea bargains—thus undermining their rights to a fair and speedy trial.”<sup>120</sup> Detention may also interfere with a defendant’s ability to work with counsel to develop a defense and to demonstrate that he or she is a productive member of society who deserves a more lenient sentence.<sup>121</sup>

## **B) The For-Profit Bail Bonds Industry**

The problems with the money bail system are magnified when defendants are forced to turn to the commercial bail bond industry to post bail – as is the case for the vast majority of defendants who are released on bail in Santa Clara County.<sup>122</sup> The Justice Policy Institute has described for-profit bail bonding as “a system that exploits low income communities; is ineffective at safely managing pretrial populations; distorts judicial decision-making; and gives private insurance agents almost unlimited control over the lives of people they bond out.”<sup>123</sup> The American Bar Association, too, has criticized the industry as “undermin[ing] the integrity of the criminal justice system” and has recommended abolishing the for-profit bail bond industry since 1968.<sup>124</sup> As discussed below in Section (VIII)(B), a handful of states – Kentucky, Oregon, Illinois, and Wisconsin – have taken this step, passing state laws eliminating the commercial bail bond industry.

### **1. Transfer of Release Decisions Away from the Courts**

Critics of the for-profit bail bonds industry emphasize that reliance on commercial bail agents takes control of release decisions out of the hands of the court and other criminal justice officials. By setting bail, a judge *authorizes* release, but whether or not a defendant is *actually* released depends on the willingness of a bail agent to post bond and the ability of the defendant to meet the bail agent’s terms. “The effect of such a system is that the professional bondsmen hold the keys to the jail in their pockets. They determine for whom they will act as surety . . . . The court . . . [is] relegated to the relatively unimportant chore of fixing the amount of bail.”<sup>125</sup>

Unlike judges, commercial bail agents are under no obligation to make release determinations in a transparent manner. To deny bail in non-capital cases, a judge must make a specific finding, based on clear and convincing evidence, that release is substantially likely to result in great bodily harm to others.<sup>126</sup> By contrast, “decisions of bondsmen – including what fee to set, what collateral to require, what other conditions the defendant (or the person posting the fee and collateral) is expected to meet, and whether to even post the bond – are made in

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<sup>120</sup> *HRC Report*, p. 37.

<sup>121</sup> *CJA Research Brief No. 18*, p.7; *ABA Standards*, p. 32.

<sup>122</sup> According to the Office of Pretrial Services, in 2015, a Stanford University student intern conducted a one-month study for the month of July 2015 and reported the posting of 400 surety bonds (i.e., bonds posted by bail agents) and only 6 cash bonds in the County of Santa Clara.

<sup>123</sup> *For Better or For Profit*, p. 11.

<sup>124</sup> *ABA Standards* at pp. 44-45 & p. 30, fn. 3.

<sup>125</sup> *Pannell v. U.S.* (D.C. Cir. 1963) 320 F.2d 698, 699 (Wright, J., concurring).

<sup>126</sup> Cal. Const. art. I, sec. 12; *In re Nordin* 143 Cal.App.3d 538, 543 (1983).

secret, without any record of the reasons for these decisions.”<sup>127</sup> A bail agent may refuse to post a bond “for any reason or no reason at all.”<sup>128</sup>

In fact, the reasons underlying a bail agent’s decision to post bond often have little to do with the goals of pretrial release and detention. Because bail agents are not liable for criminal activity committed by a defendant released on bond, they have little incentive to consider public safety or likelihood of reoffending when deciding whether to post bond.<sup>129</sup> (Indeed, critics have noted that, from the bail agent’s perspective, rearrests while on bond simply create opportunities for “repeat customers.”)<sup>130</sup> Instead, a bail agent’s motivation is largely economic. Since bail agents typically aim to collect fees equal to 10% of the bail amount, they have a financial incentive to seek out defendants with higher bail amounts and may be unwilling to post bonds for low-risk defendants with low bail amounts.<sup>131</sup> There appears to be some variation among bail agents on this point. Several local bail bond agents stated during the public forums the BRWG held to obtain their views that a defendant’s risk of FTA is a more significant consideration for them than the bail amount and the non-refundable premium they are able to charge and collect. But when a Santa Clara University law student privately interviewed bail agents operating in the county, some agents stated that they simply would not bother writing bonds for low bail amounts.<sup>132</sup> If judges are setting bail based on risk, higher-risk defendants may have a better chance of securing release on bond, while lower-risk defendants – whom the judge may have expected to make bail – may remain in custody.<sup>133</sup>

## **2. Discriminatory Impacts of the For-Profit Bail Bonds Industry**

The for-profit bail bond industry also has disproportionate adverse effects on lower-income defendants and their families. A defendant who can afford to post the full bail amount directly with the court will recover almost all of that amount if he makes all of his court appearances. But defendants who cannot afford to pay the full amount upfront must pay a non-refundable premium to secure the services of a bail agent. That premium, typically 10% of the total bail amount (either due immediately or collected in installments), will never be recovered, even if the defendant makes all court appearances and/or charges are dismissed.

The economic consequences for lower-income communities are compounded because bail agents often require collateral and/or co-signers to support a bail bond contract. In many cases, this means that a family member or friend must co-sign the bond and put up his or her own assets – such as a home or personal property – as collateral. If the defendant fails to appear, the bail agent may require the defendant and/or the co-signer to pay for the costs of attempting to secure the defendant’s appearance and any other “actual reasonable and necessary expenses”

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<sup>127</sup> *ABA Standards*, p. 45.

<sup>128</sup> *For Better or For Profit*, p. 15.

<sup>129</sup> *For Better or For Profit*, pp. 17, 19; *ABA Standards*, p. 45.

<sup>130</sup> *Rational and Transparent Bail Decision Making*, p. 8.

<sup>131</sup> *For Better or For Profit*, p. 15; *Rational and Transparent Bail Decision Making*, p. 6.

<sup>132</sup> Shauna Lord, Santa Clara University School of Law, Criminal Law and Policy Blog, *The Santa Clara County Bail Market* <<https://crimlawandpolicy.wordpress.com/2016/03/16/the-santa-clara-county-bail-market/>> .

<sup>133</sup> *Rational and Transparent Bail Decision Making*, p. 6.

incurred because of the FTA, including costs assessed by the court for proceedings resulting from the FTA and reasonable charges for the services of the bail agent and his associates.<sup>134</sup> If the bail is ultimately forfeited (i.e., if the bail agent has to pay the full bail amount to the court) the agent may require payment of the full bail amount, in addition to other costs associated with the FTA and bond forfeiture proceedings.<sup>135</sup> If neither the defendant nor the co-signer is able to satisfy these costs with cash, the bail agent may seize and liquidate any collateral or may attempt to satisfy the debt through other means.<sup>136</sup> Thus, reliance on for-profit bail bonds can have a tremendous adverse impact not only on defendants themselves, but on their families, friends, and communities.<sup>137</sup>

Many defendants simply cannot afford to purchase a bail agent's services. Even if a defendant can afford to pay the non-refundable premium, he or she may not have sufficient collateral support for the full bail amount. Reports indicate that the mortgage crisis exacerbated this problem because "bankruptcies, foreclosures, and plunging home values mean that fewer people are able to use their homes as collateral."<sup>138</sup> In areas like Santa Clara County, where housing prices are extraordinarily high, defendants and their families may not own any real property that can be offered as collateral. Some reports also suggest that the court system has compensated for the commercial bail bond industry by increasing bail amounts – that is, by setting a higher bail on the assumption that defendants will pay only 1-10% of the bail amount to secure release.<sup>139</sup> When bail amounts are inflated, more defendants are forced to rely on the bail bond industry to secure release, and more defendants may be subject to detention because they cannot afford the non-refundable fee or provide sufficient collateral to secure a bond.

In comparison, the economic risks for the bail agent are far less significant. Thanks to powerful lobbying by the bail bonds industry, California, like many other states, has bond exoneration and forfeiture laws that often work in bail agents' favor.<sup>140</sup> For example, California's forfeiture statute contains language promoted by the pro-bail bonds industry group American Legislative Exchange Council (ALEC) that requires the court to follow strict notification rules and deadlines in order to collect a forfeited bail from a bail bond agent.<sup>141</sup> The procedures required to collect on a forfeiture are so burdensome and costly that they are often not pursued.<sup>142</sup> Reports and anecdotal evidence suggest that bail bond companies and surety insurers

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<sup>134</sup> 10 Cal. Code Regs § 2081(d); *People v. V. C. Van Pool Bail Bonds* 200 Cal.App.3d 303, 305 (1988).

<sup>135</sup> 10 Cal. Code Regs. § 2081(e).

<sup>136</sup> *Id.* § 2088.2.

<sup>137</sup> *For Better or For Profit*, p. 15.

<sup>138</sup> *ACLU Public Safety Realignment*, pp. 21-22.

<sup>139</sup> *Baltimore Behind Bars*, p. 28.

<sup>140</sup> *See For Better or For Profit*, pp. 15, 26-27, 34-35

<sup>141</sup> *See* Cal. Penal Code §§ 1305(b) (bail agent relieved of obligations if court clerk fails to mail notice forfeiture satisfying statute within 30 days), 1306(c), (f) (bail agent relieved of obligations if summary judgment is not entered against bondsman within 90 days; right to enforcement forfeiture judgment expires after 2 years), 1308(b) (clerk must serve notice of forfeiture judgment within 5 days); *see also* Center for Media and Democracy, *ALEC Exposed, Bail Forfeiture Notification Act Exposed* <[http://alecexposed.org/w/images/4/41/7A5-Bail\\_Forfeiture\\_Notification\\_Act\\_Exposed.pdf](http://alecexposed.org/w/images/4/41/7A5-Bail_Forfeiture_Notification_Act_Exposed.pdf)>.

<sup>142</sup> *For Better or For Profit*, p. 35; Cal. Penal Code §§ 1305, 1305.4-1305.6, 1306, 1308. The basic forfeiture process is as follows:

take advantage of these procedures to delay or avoid forfeiture judgments. An investigation by the Los Angeles County District Attorney's Office found that some insurers avoided paying bail forfeitures due to insolvency or found ways to delay payment, and District Attorney Steve Cooley estimated that uncollected forfeitures cost Los Angeles County \$30 million over three years.<sup>143</sup>

And when defendants are returned to custody following an FTA, it is more often law enforcement, rather than the bail agent, that is responsible for apprehension. Indeed, Santa Clara County bail agents reported that the number of clients they recover is "low" – estimates ranged from 1% to 20%. Thus, the County or other local agency bears the associated costs and effort.<sup>144</sup> These costs can be substantial, especially if a defendant must be recovered from outside the San Francisco Bay Area or outside the state. The Sheriff's Office receives about 140 requests each year to recover fugitives who are in custody outside the region or state. The cost to the Sheriff's Office for a two-day trip to recover a fugitive is \$4,500, and the cost for a three-day trip is \$7,000 – *not including* salary costs for the deputy sheriff(s) who make the trip as well as support staff time.

The bail agent's risk and responsibility is even lower in jurisdictions – including Santa Clara County – where some defendants are both required to post bond *and* subject to supervision by pretrial services officers.<sup>145</sup> In such cases, although the bail agent is ostensibly paid to ensure the defendant's appearance, it is the County, and not the bail agent, that does most of the work of supervising defendants. The effect of this practice "is to make the pretrial services agency a kind of guarantor for the bail bondsman, in effect subsidizing the commercial bail industry by helping to reduce the risk that a defendant released on money bail will not return for scheduled court

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

<sup>143</sup> Los Angeles Times, *Probes Target Bail Bond Firms* (July 25, 2004) <<http://articles.latimes.com/2004/jul/25/local/me-bail25>>.

<sup>144</sup> *For Better or For Profit*, p. 15.

<sup>145</sup> *For Better or For Profit*, p. 21-22.

appearances.”<sup>146</sup> For this reason, the Standards on Pretrial Release developed by the National Association of Pretrial Services Agencies strongly discourage release conditions that combine a surety bond with supervision by a pretrial services agency.<sup>147</sup>

### 3. Corruption and Coercion in the Bail Bonds Industry

In the worst cases, bail agents have been involved in significant acts of corruption and coercion. For example, California law prohibits bail agents from soliciting business from arrestees, unless the arrestee, an immediate family member, or another designated person has first contacted the bail agent to request his services.<sup>148</sup> But there have been repeated incidents of bail agents flouting these laws by paying inmates to provide information about newly booked arrestees, to recommend the services of a particular bail bonding company, and to distribute leaflets advertising a bail bonding company.<sup>149</sup> In 2015, the Santa Clara County District Attorney participated in an investigation that resulted in the arrest of 31 Bay Area bail agents for paying inmates for phone tips about new arrestees and, in some cases, for posting bail without the permission of the arrestee.<sup>150</sup>

Bail agents have also abused the power they hold over defendants to extort, coerce, or defraud defendants and their families. In Santa Clara County, there have been reports of bail bond companies making false statements about an arrestee’s ineligibility for OR or supervised OR in order to obtain bond fees and prematurely posting bail despite the arrestee’s or family’s instructions to wait for information from the Office of Pretrial Services.<sup>151</sup> In December 2015, a San Jose bail agent was arrested on suspicion of attempting to extort money from a defendant and her family by charging unwarranted fees and then attempting to foreclose on the family’s home.<sup>152</sup> In Bakersfield, a bail agent and associates were arrested for fraudulently obtaining title

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<sup>146</sup> National Association of Pretrial Services Agencies, *Standards on Pretrial Release, Commentary to Standard 1.4(g)*, p. 19 (3d ed. 2004) <<http://www.pretrial.org/download/performance-measures/napsa%20standards%202004.pdf>> (hereafter *NAPSA Standards*).

<sup>147</sup> NAPSA Standard 1.4(g) provides: “Pending abolition of compensated sureties, jurisdictions should ensure that responsibility for supervision of defendants released on bond posted by a compensated surety lies with the surety. A judicial officer should not direct a pretrial services agency to provide supervision or other services for a defendant released on surety bond. No defendant released under conditions providing for supervision by the pretrial services agency should be required to have bail posted by a compensated surety.”

<sup>148</sup> 10 Cal. Code Regs. §§ 2079, 2079.1; *see also* Notice from California Department of Insurance to Bail Licensees re: Reminder of Bail Solicitation Laws (Nov. 13, 2013) <[http://www.insurance.ca.gov/0400-news/0100-press-releases/2015/upload/FINAL\\_BailSolicitationNoticeLicensees.pdf](http://www.insurance.ca.gov/0400-news/0100-press-releases/2015/upload/FINAL_BailSolicitationNoticeLicensees.pdf)>.

<sup>149</sup> *For Better or For Profit*, p. 42; California Department of Insurance, *Update: South Bay bail agents targeted in law enforcement sweep* (Sept. 9, 2015) <<http://www.insurance.ca.gov/0400-news/0100-press-releases/2015/release083-15.cfm>>.

<sup>150</sup> NBC Bay Area, *Inside California’s Historic Bail Bonds Raid* (Sept. 1, 2015) <<http://www.nbcbayarea.com/investigations/Inside-Californias-Historic-Bail-Bonds-Raid-323791211.html>>; San Jose Mercury News, *More Than 30 Bail Bondsmen Targeted in Sting* (Aug. 28, 2015) <[http://www.mercurynews.com/bay-area-news/ci\\_28722347/more-than-30-bail-bondsmen-targeted-sting](http://www.mercurynews.com/bay-area-news/ci_28722347/more-than-30-bail-bondsmen-targeted-sting)>.

<sup>151</sup> Letter from the Office of the District Attorney, Santa Clara County re: False information regarding ineligibility for OR/SORP (June 16, 2014) <[http://www.insurance.ca.gov/0400-news/0100-press-releases/2015/upload/06-16-14WarningLtr\\_SantaClaraBailAgents\\_Redacted.pdf](http://www.insurance.ca.gov/0400-news/0100-press-releases/2015/upload/06-16-14WarningLtr_SantaClaraBailAgents_Redacted.pdf)>.

<sup>152</sup> San Jose Mercury News, *San Jose Bail Agent Arrested on Suspicion of Extortion* (Dec. 19, 2015) <[http://www.mercurynews.com/crime-courts/ci\\_29280847/san-jose-bail-agent-arrested-suspicion-extortion](http://www.mercurynews.com/crime-courts/ci_29280847/san-jose-bail-agent-arrested-suspicion-extortion)>.

to clients' vehicles, homes, and other property through manipulation and coercion, including tricking an illiterate man and his 82-year-old mother into signing documents relinquishing their home and truck.<sup>153</sup>

Critics have also noted that because bail agents have authority to revoke a client's bond and return him to custody at any time, for any reason, the "threat of returning a client to jail can be used by the for-profit bondsman to coerce clients into criminal or sexual behavior."<sup>154</sup> The California Department of Insurance also notes that some "unscrupulous" bail agents "apprehend arrestees with the intent to extort premium payments."<sup>155</sup> Although California law requires bail agents to return the fee paid by the defendant if the court determines that the bail agent lacked good cause to return the defendant to custody,<sup>156</sup> defendants who are unaware of their rights or have a strong need to remain out of custody (to care for a dependent relative, for example) may still be vulnerable to coercion or extortion.

## VII) Risk-Based Pretrial Services Models

In light of the growing consensus that money bail is a poor means of predicting or reducing a defendant's likelihood of "pretrial failure" – i.e., failing to appear in court, engaging in new criminal activity, or otherwise violating the conditions of pretrial release – many jurisdictions around the country, including the County of Santa Clara, have adopted risk-based pretrial services models. These models, in appropriate cases, employ evidence-based risk assessments to help determine whether a defendant poses a sufficiently low risk of pretrial failure to be granted OR or Supervised OR prior to trial, and if the latter, to select conditions of supervision that are specifically tailored to help the defendant avoid pretrial failure.

### A) The Benefit of Risk-Based Assessments

Pretrial risk assessment tools aim to guide and improve the process of predicting a defendant's risk of pretrial failure if he or she is released from custody.<sup>157</sup> These tools are designed to supplement judges' "instinct and experience" regarding a defendant's pretrial failure risk with "research-based objective criteria" for determining risk, and to minimize or eliminate the use of money bail as a purported means of risk reduction.<sup>158</sup> Both the American Bar Association and the National Association of Pretrial Services Agencies recommend the use of

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<sup>153</sup> *For Better or For Profit*, pp. 40-41; The Bakersfield Californian, *Bakersfield bail bondsman busted on suspicion of defrauding clients* (Nov. 22, 2008) <<http://www.bakersfield.com/news/2008/11/22/bakersfield-bail-bondsman-busted-on-suspicion-of-defrauding-clients.htm>>.

<sup>154</sup> *For Better or For Profit*, p. 42.

<sup>155</sup> California Department of Insurance, Investigation Division Overview, *Types of Violations* <<http://www.insurance.ca.gov/0300-fraud/0200-invest-division-overview/10-violations/>>.

<sup>156</sup> Cal. Penal Code § 1300; 10 Cal. Code Regs. § 2090.

<sup>157</sup> Marie VanNostrand and Kenneth J. Rose, *Pretrial Risk Assessment in Virginia*, p.3 <<https://www.dcjs.virginia.gov/corrections/riskAssessment/assessingRisk.pdf>> (hereafter *Pretrial Risk Assessment in Virginia*).

<sup>158</sup> Laura and John Arnold Foundation Research Summary, *Developing a National Model for Pretrial Risk Assessment*, p. 2 <[http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-research-summary\\_PSA-Court\\_4\\_1.pdf](http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-research-summary_PSA-Court_4_1.pdf)>; *Pretrial Risk Assessment in Virginia*, p. 3.

objective risk assessment tools to guide judges' decision-making regarding pretrial release.<sup>159</sup> Additionally, the Joint Technology Committee of the Conference of State Court Administrators, National Association for Court Management, and National Center for State Courts has stated that “[r]isk levels determined through the use of a properly validated evidence-based risk assessment tool are more accurate predictors of pretrial success than money bail or professional discretion alone.”<sup>160</sup> “[A] validated pretrial risk assessment is not a *substitute* for judicial discretion,” but rather an “essential tool” to help inform and guide that discretion.<sup>161</sup>

The process by which a pretrial risk assessment tool is created and validated is important. To develop an assessment tool, specific factors (e.g., the defendant's age or other demographic factors, factors related to criminal history, and factors related to the nature of the offense for which the defendant was arrested) should be analyzed by studying local data to “reveal the combination of factors that, when evaluated together, are the most accurate predictor of a defendant's pretrial risk for that particular locale.”<sup>162</sup> In addition to *predictive* factors, these “analyses [can also] show which information is *not* predictive,” which can prove valuable “to stakeholders who may have assumed or practiced as if these factors were predictive.”<sup>163</sup> To ensure that risk assessment tools remain empirically reliable over time, they also “should be revalidated at regular intervals.”<sup>164</sup> The validation process is discussed with more specificity in connection with some of the risk assessment tools that are described below.

According to the federal Office of Probation and Pretrial Services and the Administrative Office of the U.S. Courts, “[w]hen a risk assessment tool [i]s used, more defendants [a]re released, on less restrictive conditions, *and with no increased in failure-to-appear or rearrest rates*, compared to similar defendants released without use of a risk assessment tool.”<sup>165</sup> Similarly, the University of Utah's Criminal Justice Center has noted that “[a] number of studies have found that pretrial risk assessments can be used to increase the number of pretrial releases from the jail without negatively impacting pretrial outcomes,” and that, with effective risk assessment, up to 25% more defendants could be released pending resolution of their cases without increasing pretrial failure or re-arrest rates.<sup>166</sup> And Chief Justice Cantil-Sakauye recently announced that California's courts, together with the Legislature and the Governor's

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<sup>159</sup> ABA Standards, standard 10-1.10; NAPSA, *Standards on Pretrial Release*, p. 36.

<sup>160</sup> Joint Technology Committee, *JTC Resource Bulletin: Using Technology to Improve Pretrial Release Decision-Making*, p. 1

<<http://www.ncsc.org/~media/Files/PDF/About%20Us/Committees/JTC/JTC%20Resource%20Bulletins/IT%20in%20Pretrial%203-25-2016%20FINAL.ashx>>.

<sup>161</sup> *Id.*, p. 13 (emphasis added).

<sup>162</sup> *Id.*, p. 17.

<sup>163</sup> *Id.*

<sup>164</sup> Utah Criminal Justice Center, *Pretrial Release Risk Study, Validation, & Scoring: Final Report*, p. 3 <[http://ucjc.utah.edu/wp-content/uploads/PretrialRisk\\_UpdatedFinalReport\\_v052013.pdf](http://ucjc.utah.edu/wp-content/uploads/PretrialRisk_UpdatedFinalReport_v052013.pdf)> (hereafter (*Utah Pretrial Release Risk Study*)).

<sup>165</sup> Timothy P. Cadigan, et al., *The Re-validation of the Federal Pretrial Services Risk Assessment (PTRA)*, pp. 3-4 <<http://www.pretrial.org/download/risk-assessment/The%20Re-validation%20of%20the%20Federal%20Pretrial%20Services%20Risk%20Assessment%20%28PTRA%29%20-%20Cadigan%20et%20al%202012.pdf>> (emphasis added).

<sup>166</sup> *Utah Pretrial Release Risk Study*, p. 2. As discussed below, this has proven to be true in Santa Clara County.

office, are reviewing the efficacy of bail in California and considering developing a statewide questionnaire – essentially a condensed risk assessment – for judges to rely on in making pretrial release decisions.<sup>167</sup>

## **B) County Office of Pretrial Services' Risk Assessment Tool**

The County's Office of Pretrial Services began exploring the use of a pretrial risk assessment tool in 2010. The Office of Pretrial Services hired a technical consultant, the Pretrial Justice Institute, and convened a group of local stakeholders including the Superior Court, the Office of the District Attorney, the Public Defender's Office, and the Sheriff's Office to participate in development of the tool. The Office of Pretrial Services began piloting the new pretrial risk assessment tool in January 2011.<sup>168</sup>

In applying the risk assessment tool, Pretrial Services Officers review administrative criminal history records and interview each defendant who has been booked in the County's Main Jail. The officers gather information on a list of demographic factors (defendant's age, marital status, family situation, education level, mental health status, drug abuse status) prior criminal history; prior probation or parole status; prior FTAs; prior prison commitments; current probation status; and presence of two or more current charges, a current domestic violence charge, or a current property charge. Officers then enter each defendant's information into the computerized risk assessment tool, which automatically calculates risk scores with respect to engaging in new criminal activity ("Public Safety Scale"), failing to appear in court ("Court Appearance Scale"), and/or engaging in technical violations ("Technical Compliance Scale"). Based on these calculations, a defendant is deemed "low," "medium," or "high" risk on the County's scoring matrix; the stakeholder group that worked on developing the County's risk assessment tool mutually decided the scoring levels that would result in a "low," "medium," or "high" risk score. Based on these risk levels, Pretrial Services Officers make recommendations to the court for OR release without supervision, Supervised OR, or denial of release. The Office of Pretrial Services plans to revalidate the County's risk assessment tool next year.

In cases involving domestic violence, the Office of Pretrial Services also conducts a supplemental victim interview to determine the defendant's history of abuse and access to firearms, as well as the victim's sense of safety and other information about the victim's relationship with the defendant.<sup>169</sup> To determine appropriate supervision conditions, Pretrial Services also asks the victim for his or her opinion about whether drug or alcohol treatment, anger management, or mental health treatment would be appropriate, and about whether the defendant should be required to have a no-contact order. In addition to interviewing the victim, Pretrial Services also checks the firearms registry to determine whether any firearms are registered to the defendant or the victim. Information obtained through the supplemental victim interview and other research is incorporated into the pretrial report and is provided to the court

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<sup>167</sup> Sacramento Bee, *Is California's Bail System 'Fair to All?' State Chief Justice Asks* <<http://www.sacbee.com/news/politics-government/capitol-alert/article65222262.html>>.

<sup>168</sup> See Board of Supervisors Management Audit Division, *Management Audit of the Office of Pretrial Services* <<https://www.sccgov.org/sites/bos/Management%20Audit/Documents/PTSFinalReport.pdf>>.

<sup>169</sup> Victim interviews are done in all cases involving crimes with victims – e.g., burglary, property crimes.



for consideration in making bail and release decisions. This information may also affect the recommendations made by the Office of Pretrial Services – for example, if a defendant scores as “low risk” on the risk assessment tool, but the victim questionnaire suggests a higher level of risk, Pretrial Services may adjust its recommendations accordingly. As a matter of policy, Pretrial Services attempts to contact and interview victims in all domestic violence cases prior to considering the defendant for release.

In 2012, the Office of Pretrial Services’ risk assessment tool was validated as effectively predicting pretrial failure risk in Santa Clara County. The Board of Supervisors Management Audit Division conducted an audit of the Office of Pretrial Services’ use of the risk assessment tool during approximately its first year of implementation, finding that after implementing the risk assessment tool, the Office of Pretrial Services was able to increase the number of pretrial releases without any concomitant increase in pretrial failure rates.<sup>170</sup> In 2000, prior to the existence of a locally validated risk assessment, approximately 900 defendants per month were released on OR. With the inception of the pretrial risk assessment tool, the number of OR releases rose to about 1,100 per month in 2011, and to a high of about 1,600 per month in 2014. After the passage in California of Proposition 47 in 2014, the average population served by Pretrial Services has settled at approximately 1,400 per month. Throughout each of these periods, the appearance, technical compliance, and re-arrest rates have been equal to or better than in previous years. This bears out the federal government’s assertion that the use of risk assessment tools allows more defendants to be released without increasing FTA or new arrest rates.<sup>171</sup>

The Office of Pretrial Services continuously documents and evaluates its own performance through a series of measures recommended by national-level pretrial justice associations. According its records for calendar year 2015, pretrial services officers recommended release in 85% of jail unit cases (2092 out of 2455) and 76% of court cases (4236 out of 5602).<sup>172</sup> Per a departmental policy that is based on national standards, in making recommendations to grant or deny pretrial release, officers’ recommendations may depart from the risk level calculated by the assessment tool in no more than 15% of cases each month. An officer who wishes to deviate from the tool’s calculations – e.g., by recommending against release for a defendant whom the tool deems low-risk, typically based on the severity of the

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<sup>170</sup> See Board of Supervisors Management Audit Division, *Management Audit of the Office of Pretrial Services*, p.40 <<https://www.sccgov.org/sites/bos/Management%20Audit/Documents/PTSFinalReport.pdf>>. The audit reviewed all four divisions of the Office of Pretrial Services – the jail unit, court unit, supervision unit, and drug testing unit – but the discussion in this report will focus on the jail and court units because of their involvement in the pretrial risk assessment process.

<sup>171</sup> See Timothy P. Cadigan, et al., *The Re-validation of the Federal Pretrial Services Risk Assessment (PTRA)*, pp. 3-4 <<http://www.pretrial.org/download/risk-assessment/The%20Re-validation%20of%20the%20Federal%20Pretrial%20Services%20Risk%20Assessment%20%28PTRA%29%20-%20Cadigan%20et%20al%202012.pdf>> (hereafter *PTRA*).

<sup>172</sup> Officers in the jail unit interview defendants booked in the jail and make recommend regarding pretrial release via written reports that are transmitted around the clock to judges who review them and issue orders within a few hours. Officers in the court unit provide assessment reports and recommendations regarding release options to the court at the time of a defendant’s first appearance/arraignment. Court unit officers also conduct any follow-up investigations and appear for the arraignment hearing to answer questions regarding their recommendations.

charged offense – must provide a written justification in his or her report, which is subject to review by a supervisor. According to the Office of Pretrial Services, court unit officers deviate from the risk assessment’s calculations more often than jail unit officers because a broader range of cases – including higher-level offenses – are eligible for release at the court level while only lower-level offenses are eligible for release at the time of jail booking.

Overall, in jail cases and court cases combined, judges followed pretrial services officers’ release recommendations approximately 75% of the time (with 1,400 instances of non-concurrence in 2015).<sup>173</sup> Anecdotal information from the Office of Pretrial Services and the District Attorney’s Office indicates that judicial non-concurrence typically occurs where the prosecutor discovered additional information that raised concerns not addressed in the pretrial services officer’s analysis and recommendation. The current judicial concurrence rate of 75% is below the 90% rate in effect when the risk assessment tool was first implemented, but it is in line with rates in other jurisdictions with scientifically and locally validated risk assessment tools and is consistent with the purpose of pretrial risk assessment – which is not to *replace* judicial discretion in making bail and release decisions, but to provide supplemental information and actuarial support for those decisions in conjunction with information received from other sources (e.g., police reports, witness statements, in-person witnesses at bail hearings, newly emerging facts, information from court officers, and court rules and statutes).<sup>174</sup>

The Office of Pretrial Services’ role in making recommendations regarding pretrial release can extend beyond defendants’ initial court appearances. In cases where a defendant fails to appear for a court hearing after a history of successfully making court appearances and avoiding criminal activity, the Office of Pretrial Services will sometimes recommend that the court stay (i.e., delay) issuance of a bench warrant for the defendant’s arrest to give Pretrial Services time to make contact with him or her and reschedule the appearance. Thus, a defendant who has suffered an inadvertent FTA can be brought back into compliance without the costs and delays associated with a new arrest on a bench warrant.

The Office of Pretrial Services provides public reports on pretrial outcomes for its clients on an annual basis to a policy committee of the County Board of Supervisors. The most recent report shows that between April 2013 to March 2016, defendants released on OR and Supervised OR made all court appearances more than 95% of the time and avoided rearrest for a new offense approximately 99% of the time.<sup>175</sup> Nearly 93% of defendants made all court appearances, avoided arrests for new offenses, *and* avoided technical violations of release conditions.<sup>176</sup>

Defendants charged with domestic violence offenses make up a substantial minority of the Supervised OR client load. As of March 15, 2016, 1124 defendants were on supervised OR,

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<sup>173</sup> The judicial non-concurrence number does not include cases that were ineligible for release (e.g., defendants with holds, warrants, or an ineligible offense type) or cases rated high-risk by the pretrial risk assessment tool.

<sup>174</sup> See Pretrial Justice Institute, *Blog Post by Jo-Ann Wallace* <<http://www.pretrial.org/promise-practice-risk-assessment-tools/>>.

<sup>175</sup> *Pretrial Services Report to PSJC*, pp. 15, 17, Appendix L.

<sup>176</sup> *Id.*, p. 19.

and 242 of those – or approximately 21.5% – were charged with domestic violence offenses.<sup>177</sup> By contrast, far fewer defendants with domestic violence charges are released on OR *without* supervision. As of March 15, 2016, only 13 defendants on unsupervised OR had domestic violence charges, representing approximately 4.3% of the total OR population. In nearly all cases involving domestic violence, Pretrial Services recommends that the court issue a restraining order, including a no-contact provision, if one is not already in place.

## C) Other Pretrial Risk Assessment Tools

### 1. Public Safety Assessment-Court (PSA-Court) Tool

Many states and localities around the country have adopted the Public Safety Assessment-Court (PSA-Court) tool, which was developed by the Laura and John Arnold Foundation as “an easy-to-use, data-driven risk assessment.”<sup>178</sup> The PSA-Court tool was designed to avoid the need to obtain information through defendant interviews, which some jurisdictions find to be “time-consuming and expensive to conduct,” and ineffective “when a defendant refuses to cooperate or provides information that cannot be verified.”<sup>179</sup> It relies only on reviews of administrative records.

The PSA-Court tool predicts the likelihood of three different pretrial risks: risk of committing a new offense while awaiting trial, risk of committing a new *violent* offense, and risk of FTA.<sup>180</sup> The tool is based on the following factors:

- Did the defendant have another pending criminal case at the time of arrest?
- Did the defendant have an active warrant for failure to appear at the time of arrest, or a history of failure to appear on a previous charge?
- Does the defendant have a prior failure to appear on a traffic violation?
- Does the defendant have prior misdemeanor convictions?
- Does the defendant have prior felony convictions?
- Does the defendant have prior violent crime convictions?
- Was the defendant on parole or probation from a prior felony conviction at the time of arrest?

These factors are subject to change while the tool is being piloted in jurisdictions across

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<sup>177</sup> Statistics provided by the Office of Pretrial Services. These statistics provide a rough snapshot of the proportion of the OR and supervised OR population charged with domestic violence offenses. In some cases, a defendant may be arrested for an offense involving domestic violence, but charged with a violating a general criminal statute (such as assault or criminal threats) rather than a statute specific to domestic violence (such as domestic battery). The statistics provided by the Office of Pretrial Services reflect only defendants charged with specific domestic violence offenses and therefore may not capture all defendants charged with offenses involving domestic violence.

<sup>178</sup> Laura and John Arnold Foundation Research Summary, *Developing a National Model for Pretrial Risk Assessment*, p. 2 <[http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-research-summary\\_PSA-Court\\_4\\_1.pdf](http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-research-summary_PSA-Court_4_1.pdf)>.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*, pp. 3-4.

the country. As of June 2015, the PSA-Court tool had been implemented or was pending implementation statewide in Arizona, Kentucky, and New Jersey; and in counties in Florida, Ohio, Pennsylvania, Washington, Illinois, Wisconsin, North Carolina, and California (Santa Cruz).<sup>181</sup> San Francisco has recently begun pilot implementation of the tool as well.

During the first six months of the PSA-Court tool's use in Kentucky, the percentage of defendants released prior to trial rose from 68% to 70%, while the rate of new crimes declined from 10% to 8.5% and FTA rates remained steady.<sup>182</sup> Kentucky has stated that administration of the PSA-Court tool requires less time per defendant, but has not quantified the exact amount of time saved or the associated cost savings.<sup>183</sup> The Santa Cruz County Probation Department has noted that during the first quarter of its implementation of the PSA-Court tool, pretrial officers were able to complete *five times* as many assessments as they had under their old process.<sup>184</sup>

## 2. Federal Pretrial Services Risk Assessment (PTRA) Tool

In 2009, the federal government began using the Federal Pretrial Services Risk Assessment (PTRA), which is applied by federal pretrial services officers after investigations and interviews conducted with individual defendants. The PTRA uses 11 factors to compute a defendant's overall risk score, plus nine factors that are unscored and collected for the purpose of future study and ongoing improvement of the screening tool. The scored elements are:

- Other pending felony or misdemeanor charge(s)
- Prior felony conviction(s)
- Prior failures to appear
- Current charge
- Seriousness of current charge
- Employment status
- Substance abuse
- Age
- Citizenship
- Education level
- Residence status

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<sup>181</sup> Laura and John Arnold Foundation, *Press Release: More than 20 cities and states adopt risk assessment tool to help judges decide which defendants to detain prior to trial*, <<http://www.arnoldfoundation.org/more-than-20-cities-and-states-adopt-risk-assessment-tool-to-help-judges-decide-which-defendants-to-detain-prior-to-trial/>>.

<sup>182</sup> Laura and John Arnold Foundation, *Results from the First Six Months of the Public Safety Assessment-Court in Kentucky*, pp. 1-2 <<http://www.arnoldfoundation.org/wp-content/uploads/2014/02/PSA-Court-Kentucky-6-Month-Report.pdf>>.

<sup>183</sup> *Id.*, p. 2.

<sup>184</sup> County of Santa Cruz, Probation Department letter to Board of Supervisors (August 3, 2015), pp. 2-3 <[http://sccounty01.co.santa-cruz.ca.us/BDS/Govstream2/Bdsvdata/non\\_legacy\\_2.0/agendas/2015/20150818-666/PDF/020.pdf](http://sccounty01.co.santa-cruz.ca.us/BDS/Govstream2/Bdsvdata/non_legacy_2.0/agendas/2015/20150818-666/PDF/020.pdf)>.

The unscored elements relate to alcohol abuse and ties to a foreign country or person(s).<sup>185</sup>

According to data compiled by federal agencies on approximately 32,000 defendants assessed using the PTRA between 2010 and 2011, pretrial failure rates (combining failure to appear and new criminal activity) for released defendants in the federal system ranged from 1.3% of defendants scoring in the lowest risk category to 11.6% of defendants scoring in the highest risk category.<sup>186</sup> However, the report does not discuss the rates at which federal judges granted pretrial release to defendants in each risk category, so it is unclear how pretrial failure levels compared to overall release numbers.

### 3. Domestic Violence Risk Assessment Tools

The Department of Justice has identified the pretrial period as “a high-risk time for domestic violence victims.”<sup>187</sup> To determine which domestic violence defendants are at high risk of *reoffending* with a new domestic violence-related offense, or pose a significant risk of *lethality* to potential victims, some jurisdictions apply specific domestic violence risk assessment tools, some of which require interviews with the victim and others that can be employed based solely on court and arrest records.<sup>188</sup> Many domestic violence risk assessment tools attempt to predict not merely the risk of reoffending, but the likely *severity* of future offenses, including the risk that the defendant will engage in lethal violence. Multnomah County, Oregon currently uses the Ontario Domestic Assault Risk Assessment (ODARA), which relies on 13 factors to assess the likelihood that a defendant charged with a domestic violence offense will reoffend and the likelihood that future assaults will be more severe.<sup>189</sup> ODARA has been validated for both female and male offenders in heterosexual relationships, and is currently under review for use in same-sex relationships. Law enforcement officers in Maine are now required to complete ODARA and to make its results available to the district attorney and bail commissioner.<sup>190</sup> Other domestic violence risk assessment tools appropriate for pretrial settings include the Domestic Violence Screening Instrument (DVSI-R) and the Spousal Assault Risk Assessment (SARA).<sup>191</sup>

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<sup>185</sup> PTRA, pp. 5-7.

<sup>186</sup> *Id.*, p. 8.

<sup>187</sup> Department of Justice, Office of Justice Programs, National Institute of Justice, *Pretrial Innovations for Domestic Violence Offenders and Victims: Lessons from the Judicial Oversight Demonstration Initiative*, p. 1 <<https://www.ncjrs.gov/pdffiles1/nij/216041.pdf>>.

<sup>188</sup> See, e.g., Battered Women’s Justice Project, *Integrating Risk Assessment in a Coordinated Community Response* <<http://www.bwjp.org/our-work/topics/risk-assessment.html>> (hereafter *Integrating Risk Assessment*); Kristin Bechtel and Bill Woodward, National Institution of Corrections, White Paper, *Overview of Domestic Violence (DV) Risk Assessment Instruments (Frequently Asked Questions)* <<https://s3.amazonaws.com/static.nicic.gov/Library/023364.pdf>> (hereafter *DV Overview*).

<sup>189</sup> See, e.g., *Integrating Risk Assessment; DV Overview*, p. 6; Waypoint Center for Mental Health Care, *Ontario Domestic Assault Risk Assessment* <<http://odara.waypointcentre.ca/>>.

<sup>190</sup> See Carlos Barba, Santa Clara University School of Law, Criminal Law and Policy Blog, *Another Tool in the Toolbox for Domestic Violence Pretrial Determinations*, <<https://crimlawandpolicy.wordpress.com/2016/04/11/another-tool-in-the-toolbox-for-domestic-violence-pretrial-determinations/>>; see also 19-A Me. Rev. Stat. § 4012.

<sup>191</sup> *Integrating Risk Assessment*.

The County's Office of Pretrial Services does not employ a risk assessment or lethality assessment tool specific to domestic violence. However, Judge Sharon Chatman of the Santa Clara County Superior Court worked with Dr. Jacquelyn Campbell, a national leader in domestic violence research, to develop a Bench Guide for Recognizing Dangerousness in Domestic Violence Cases, a lethality assessment tool that can be considered by judges as they review domestic violence cases.<sup>192</sup> Although there is no requirement that judges use the Bench Guide, it may be considered in connection with bail/release determinations, and trainings have been made available for judges who are interested in using it.

The County's Domestic Violence Protocol for Law Enforcement also requires all law enforcement officers in the County to assess domestic violence arrestees' likelihood of danger and lethality using the Lethality Assessment for First Responders tool during the preliminary investigation of domestic violence offenses.<sup>193</sup> However, the Lethality Assessment is primarily used to connect victims with appropriate services and is not typically provided to the court or to Pretrial Services for use in bail/release determinations or recommendations.

## **VIII) Best Practices and Sample Reforms**

### **A) Goals of Best Pretrial Justice Practices**

The American Bar Association Standards for Pretrial Release, first promulgated in 1968 and updated most recently in 2007, establish a number of foundational principles that a government entity's pretrial justice practices should aim to achieve. Under these standards, the basic goals of the pretrial process are "providing due process to those accused of crime, maintaining the integrity of the judicial process by securing defendants for trial, and protecting victims, witnesses and the community from threat, danger or interference."<sup>194</sup> These goals should be achieved by "assign[ing] the least restrictive condition(s) of release that will reasonably ensure a defendant's attendance at court proceedings and protect the community, victims, witnesses or any other person," ensuring that "[t]he court . . . ha[s] a wide array of programs or options available to promote pretrial release."<sup>195</sup>

Following the "least restrictive conditions" model, jurisdictions should "adopt procedures designed to promote the release of defendants on their own recognizance," escalating to the imposition of non-financial conditions of release "only when the need is demonstrated by the facts of the individual case reasonably to ensure appearance at court proceedings, to protect the community, victims, witnesses or any other person and to maintain the integrity of the judicial process"; and escalating to "[r]elease on financial conditions . . . only when no other conditions

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<sup>192</sup> See *Bench Guide for Recognizing Dangerousness in Domestic Violence Cases* <[https://www.isc.idaho.gov/dv\\_courts/conferences/2014/Bench%20Guide%20for%20Recognizing%20Danger%20in%20DVC\\_05.14.pdf](https://www.isc.idaho.gov/dv_courts/conferences/2014/Bench%20Guide%20for%20Recognizing%20Danger%20in%20DVC_05.14.pdf)>.

<sup>193</sup> Police Chiefs' Association of Santa Clara County, *Domestic Violence Protocol for Law Enforcement, 2016*, pp. 23, 57-59 <<https://www.sccgov.org/sites/da/prosecution/DistrictAttorneyDepartments/Documents/LEA%20DV%20Protocol%202016.pdf>>.

<sup>194</sup> *ABA Standards*, standard 10-1.1.

<sup>195</sup> *Id.*, standard 10-1.2.

will ensure appearance,” and never “to respond to concerns for public safety,” for which this approach is ineffective.<sup>196</sup> Judges “should not impose a financial condition of release that results in the pretrial detention of a defendant solely due to the defendant’s inability to pay.”<sup>197</sup> Pretrial detention should be viewed “as an exception to [the] policy favoring release,”<sup>198</sup> to be imposed only “[w]hen no conditions of release are sufficient to accomplish the aims of pretrial release.”<sup>199</sup>

An ideal pretrial justice model should embody the following values, some of which the County is currently carrying out, and others of which should be implemented:

- Consistent policies and practices for arrest, summons, booking, and citation and release of defendants by law enforcement officers and/or jail officials;
- Consistent policies and practices for prompt screening by prosecutors to reduce or dismiss charges, if appropriate, in order to eliminate unnecessary or unnecessarily prolonged pretrial detention;
- Custody decisions that favor pretrial release with the least restrictive conditions necessary, and minimize the need for money bail, especially through the commercial bail bonds industry;
- Objective, verified, scientifically predictive, and locally validated risk assessment tools and corresponding recommendations for all defendants;
- Early defense counsel appointment and access to defense services at initial appearances; and
- Standing, community-wide collaboration with ongoing efforts to monitor and improve the administration of pretrial justice.

An ideal model for implementing best practices in the County’s pretrial justice system is the Collective Impact Model, which was developed at Stanford University and is currently being used in several other County reform efforts. For example, the County Office of Women’s Policy is currently working with a Collective Impact consultant on issues related to intimate partner violence. Other recent examples of Collective Impact efforts in the County are the 2015 Strategic Plan for Cultural Competency and Family, Children and Youth Development; the 2015 Senior Agenda Report; the Partners for Health Program; and Destination Home: a Community Plan to End Homelessness. The Collective Impact model emphasizes a collaborative, cross-sector, community-wide effort to accomplish shared policy goals. Its use in the context of pretrial justice would allow for all of the County’s public safety and justice system partners to retain their autonomy but work together to eliminate gaps and overlaps in services and resources and to enhance community-wide outcomes.<sup>200</sup>

In reviewing the pretrial justice process, the County and its partners should be mindful of the following concerns:

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<sup>196</sup> *Id.*, standard 10-1.4(a)-(d).

<sup>197</sup> *Id.*, standard 10-1.4(e).

<sup>198</sup> *Id.*, standard 10-1.6.

<sup>199</sup> *Id.*, standard 10-1.2.

<sup>200</sup> Stanford Social Innovation Review, *Collective Impact* < [http://ssir.org/articles/entry/collective\\_impact](http://ssir.org/articles/entry/collective_impact)>.

- *Socioeconomic, racial and ethnic disproportionality*: While 27% of the County’s population is Latino, 57% of its inmates are Latino; African-Americans make up 2.5% of the County’s population but 14% of its inmates. Latino and African-American youth are also disproportionately represented in the juvenile justice system.
- *Physical/mental illness, trauma, substance dependence and homelessness*: 25% of the County’s inmates require special mental health management, 25% to 30% take mental illness medications daily, and 10% suffer from serious mental illnesses. Also, 86% of inmates need substance abuse/dependence support. Sadly, 39% of homeless individuals are mentally ill, often recently released from jail and struggling with mental illness.
- *Gender and age-specific conditions and programming needs*: Jail environments are not well-suited to safely house the 214 elderly inmates in County jails today, exacerbating age-related impediments such as immobility, hearing impairment and, vision impairment. In addition, female inmates can benefit from criminal justice solutions developed specifically to address the needs of women.<sup>201</sup>

In light of these concerns, any pretrial reforms should be considered with an eye to their potential impacts on race, age, gender, and sexual orientation equity; cultural competency; immigrant communities; behavioral and physical health; and homelessness.

## **B) Sample Reforms from Other Jurisdictions**

Cities, counties, and states across the country, as well as the federal government, have implemented a variety of pretrial justice-related reforms designed to minimize or eliminate the role of money bail and the commercial bail bonds industry in the pretrial process. A sampling of these reforms and their feasibility in Santa Clara County is provided below.

### **1. State and Local Laws**

Kentucky was one of the first jurisdictions to eliminate the commercial bail bonds industry entirely, through statewide legislation enacted in 1976.<sup>202</sup> To replace the bail bonds industry, the legislature created a statewide Pretrial Services Agency as a division of the courts, which interviews all defendants within 12 hours of arrest, around the clock, and conducts a criminal background check to assess the risk of pretrial failure. Officers then make a pretrial release recommendation to the court, which – as in California – can elect to grant OR, set a suitable bail amount, or keep the defendant in custody pending trial. If the court orders bail, defendants may post bail by depositing 10% of the total amount directly with the court. Unlike bail posted through a commercial bail bond agent, this deposit is refundable, minus court costs of

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<sup>201</sup> See, e.g., Santa Clara County Commission on the Status of Women, *Report by Women’s Jail Monitors: Female Inmates in Santa Clara County & the Need for a Gender Responsive Protocol* <<https://www.sccgov.org/sites/owp/Documents/csw/CSWJailReport2015.Final.pdf>>; Barbara E. Bloom, *Meeting the Needs of Women in California’s County Justice Systems* <<http://www.pretrial.org/download/infostop/Womens%20Toolkit.pdf>>.

<sup>202</sup> See Ky. Rev. Stat. § 431.510.



10% of the deposit amount – i.e., 1% of the total bail amount – if the defendant fulfills his or her promise to appear for all scheduled court hearings.<sup>203</sup> In 2012, 70% of defendants in Kentucky were granted pretrial release, and most of these had no financial conditions associated with their release.<sup>204</sup> The court appearance rate for these defendants was 90%, and the public safety rate (i.e., number of defendants who avoided any new arrests during the pretrial period) was 92%.<sup>205</sup> These pretrial success figures are comparable to those for defendants on pretrial release in Santa Clara County even though many more defendants are released in Kentucky than in Santa Clara County, where only 10.5% of all defendants are granted pretrial release on OR and Supervised OR.

Like Kentucky, three other states – Oregon, Wisconsin, and Illinois – have also banned for-profit bail bonds businesses, replacing them with systems allowing defendants to deposit 10% of their bail amounts directly with the court. Those deposits are returned, less court costs, if the defendants appear for all court hearings.<sup>206</sup> And Illinois recently adopted legislation setting up a pilot program in Cook County under which defendants who remain in custody 72 hours after bail has been set, are unable to post bail or meet other pretrial conditions “due to homelessness,” and are charged with minor theft or trespass offenses must be released without bond – either on OR or under electronic monitoring – if their cases have not been resolved within 30 days.<sup>207</sup>

Although New Jersey has not eliminated the use of commercial bail bondsmen, it also allows defendants to pay deposits of 10% of their bail amounts in most cases, accompanied by a promise to pay the remaining 90% if they fail to appear for required court proceedings, “unless the order setting bail specifies to the contrary.”<sup>208</sup> Additionally, New Jersey’s bail laws provide for a “general policy against unnecessary sureties and detention,” and give courts discretion to release defendants on their own recognizance in any appropriate case.<sup>209</sup>

Amendments to New Jersey law that will take effect on January 1, 2017 also provide that New Jersey’s courts shall “primarily rely[] upon pretrial release by non-monetary means to reasonably assure” court appearance, public safety, and avoidance of technical violations.<sup>210</sup> Under the new law, “[m]onetary bail may be set for an eligible defendant only when it is determined that no other conditions of release will reasonably assure the eligible defendant’s appearance in court when required.”<sup>211</sup>

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<sup>203</sup> *Id.* § 431.530.

<sup>204</sup><sup>204</sup> Pretrial Justice Institute, *Report on Impact of House Bill 463*, p.10 < <http://www.pretrial.org/download/law-policy/Kentucky%20Pre%20Post%20HB%20463%20First%20Year%20Pretrial%20Report.pdf>>.

<sup>205</sup> *Id.*, p. 6.

<sup>206</sup> Or. Rev. Stat. § 135.265; Wis. Stat. § 969.12; *Bail Fail*, p. 40.

<sup>207</sup> *SB0202 Enrolled*

<<http://ilga.gov/legislation/fulltext.asp?DocName=09900SB0202enr&GA=99&SessionId=88&DocTypeId=SB&LegID=84162&DocNum=202&GAID=13&Session=&print=true>>.

<sup>208</sup> N.J. Rules of Court, Rule 3:26-4(g).

<sup>209</sup> N.J. Rules of Court, Rule 3:26-1(a).

<sup>210</sup> N.J. Stats. § 2A:162-15 [pending].

<sup>211</sup> *Id.*

Washington, D.C. also has not passed legislation abolishing the commercial bail bonds industry, but for-profit bail bonds have effectively been eliminated in D.C. due to the overwhelming use of pretrial release with no financial conditions.<sup>212</sup> In Washington, D.C., 80% of defendants are released with no financial conditions – almost always under supervision by the Pretrial Services Agency for the District of Columbia (“PSA”).<sup>213</sup> The PSA screens all arrested defendants and provides the court with recommendations regarding “the least restrictive non-financial release conditions needed to protect the community and reasonably assure the defendant’s return to court.”<sup>214</sup> This includes the “appropriate supervision level” by pretrial officers – from low-risk defendants needing only basic monitoring “to those posing considerable risk and needing extensive release conditions such as frequent drug testing, stay away orders, substance use disorder treatment or mental health treatment and/or frequent contact requirements with Pretrial Services Officers.”<sup>215</sup> 88% of defendants under supervision by the PSA make all scheduled court appearances, 88% avoid new arrests while on pretrial release, and 99% avoid new arrests for violent crimes.<sup>216</sup> Like Kentucky, the outcomes in Washington, D.C. are comparable to those for defendants on pretrial release in Santa Clara County even though a far greater number of Washington, D.C. defendants are granted pretrial release. In other words, Washington, D.C.’s commitment of significant resources to effective pretrial supervision appears to have mitigated any increased risk of pretrial failure from releasing such a high proportion of those awaiting trial on criminal charges there.

In 2015, after a young man committed suicide following three years in pretrial custody after he was unable to pay \$3,000 in bail on theft charges, New York City announced that it was implementing a program allowing judges to replace money bail for misdemeanor and non-violent felony offenses with non-monetary release with supervision options.<sup>217</sup>

Finally, Colorado began a statewide initiative known as the Colorado Improving Supervised Pretrial Release (CISPR) Project in 2012 to review and standardize the pretrial release practices and pretrial risk assessment tools used by counties throughout the state.<sup>218</sup> Because Colorado law requires all bonds to have a financial condition, there is no “pure” OR release in Colorado. Instead, judges use unsecured bonds under which a defendant is not required to post any money with the court *prior* to release, but instead promises to pay the full

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<sup>212</sup> *Bail Fail*, p. 40.

<sup>213</sup> Pretrial Services Agency for D.C., *Court Support* <[https://www.psa.gov/?q=programs/court\\_support](https://www.psa.gov/?q=programs/court_support)>.

<sup>214</sup> *Id.*

<sup>215</sup> Pretrial Services Agency for D.C., *Defendant Information* <[https://www.psa.gov/?q=programs/defendent\\_supervision](https://www.psa.gov/?q=programs/defendent_supervision)>.

<sup>216</sup> National Association of Counties, *Pretrial Services Agency – District of Columbia*, <<http://www.naco.org/sites/default/files/documents/Washington,%20DC%20-%20Pretrial%20Services%20Agency.pdf>>.

<sup>217</sup> Jake Pearson, *New York City Plans to Eliminate Bail for Low-Level or Non-Violent Suspects* <[http://www.huffingtonpost.com/2015/07/08/nyc-bail-reform\\_n\\_7751476.html](http://www.huffingtonpost.com/2015/07/08/nyc-bail-reform_n_7751476.html)>.

<sup>218</sup> Pretrial Justice Institute, *The Colorado Pretrial Assessment Tool*, pp.4-5 <<http://www.pretrial.org/download/risk-assessment/CO%20Pretrial%20Assessment%20Tool%20Report%20Rev%20-%20PJI%202012.pdf>>.

amount of the bond if he or she fails to appear.<sup>219</sup>

## 2. Federal Law

The federal bail statute is very different from California's. Although money bail may be imposed in federal court, the law provides that judges "may not impose a financial condition that results in the pretrial detention of the person" – meaning that bail amounts must be set with regard to a defendant's ability to pay.<sup>220</sup> The federal statute also tiers the pretrial release types that judges may impose in increasing order of risk and specifies that judges should opt for the "least restrictive" effective option:

- First, a judge *must* order a defendant released on OR "or upon execution of an unsecured appearance bond [i.e., a promise to pay upon a pretrial failure, with no money due upfront] in an amount specified by the court," *unless* the judge finds "that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community."<sup>221</sup>
- Second, if the defendant is not appropriate for OR or unsecured bond, the judge must order release "subject to the least restrictive further condition, or combination of conditions," that "will reasonably assure the appearance of the person as required and the safety of any other person and the community."<sup>222</sup> Release conditions may include a requirement to maintain employment; restrictions on travel and place of residence; no-contact orders; curfews; regular reporting to a law enforcement or pretrial services agency; refraining from using drugs or alcohol; undergoing medical or mental health treatment; and/or executing an agreement to forfeit a set amount upon FTA.<sup>223</sup> Although bail bonds are permitted under federal law, in practice "bail bondsmen are rarely used in federal court" and judges more often "set [a] bond amount with conditions that may include co-signers."<sup>224</sup>
- Third, a judge may order temporary pretrial detention of up to 10 days upon a finding that the defendant "may flee or pose a danger to any other person or the community" *and* has certain criminal history or immigration issues. If the appropriate federal, state, local, or immigration official does not take custody before the 10-day period expires, the defendant must receive pretrial release as discussed above.<sup>225</sup>

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<sup>219</sup> Pretrial Justice Institute, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option*, p. 7 <<http://www.pretrial.org/download/research/Unsecured+Bonds,+The+As+Effective+and+Most+Efficient+Pretrial+Release+Option++Jones+2013.pdf>>.

<sup>220</sup> 18 U.S.C. § 3142(c)(2).

<sup>221</sup> *Id.* § 3142(b).

<sup>222</sup> *Id.* § 3142(c)(1)(B).

<sup>223</sup> *Id.* § 3142(c)(1)(B)(i)-(xiv).

<sup>224</sup> Federal Defenders of New York, *Bail and Pretrial Detention FAQs* <<http://federaldefendersny.org/information-for-client-and-families/bond-and-pretrial-detention-faqs.html>>.

<sup>225</sup> 18 U.S.C. § 3142(d).

- Finally, if the judge, after holding a detention hearing in open court, “finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community,” the judge “shall order the detention of the person before trial.”<sup>226</sup> Certain offenses – such as federal crimes of violence and crimes whose maximum sentence is life imprisonment or death – give rise to a rebuttable presumption that pretrial detention is warranted.<sup>227</sup>

## C) Legal Framework for Potential Reforms

### 1. Eliminating or Regulating the Commercial Bail Bonds Industry

Eliminating the bail bonds industry in California – as Kentucky, Oregon, Illinois, and Wisconsin have done – would require a change to California state law. However, at a local level, the County of Santa Clara could regulate the activities of commercial bail bonds businesses – as other jurisdictions have done – in several ways. First, the County has authority under state law to “make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws,” including land use regulations.<sup>228</sup> With this authority, the County could enact zoning restrictions limiting or prohibiting the establishment of commercial bail bonds businesses within the County’s unincorporated areas. As of the issuance of this report, County Communications and California Department of Insurance records show no bail bonds businesses with locations within the County’s unincorporated areas. Thus, County zoning restrictions would have a minimal business impact on the bail bonds industry. Nonetheless, such restrictions might serve as a model for cities within the County, which could enact similar restrictions under their respective land use authority to achieve a broader impact.

Under its business licensing authority, the County could also establish a process for licensing businesses within its unincorporated areas, and use that process to impose licensing requirements and fees on bail bonds businesses.<sup>229</sup> But any such licensing requirements would likewise be limited to any bail bonds businesses within the unincorporated area of the County.

### 2. Establishing Better Alternatives to Commercial Bail Bonds

#### ○ *Court Deposits*

California law allows defendants to deposit bail directly with the court by cash, federal or state government bond, or real property bond.<sup>230</sup> California law also permits defendants to pay

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<sup>226</sup> *Id.* § 3142(e), (f).

<sup>227</sup> *Id.* § 3142(e)(2), (f)(1).

<sup>228</sup> Cal. Const., art. XI, § 7; *Big Creek Lumber Co v. County of Santa Cruz*, 38 Cal.4th 1139, 1151 (2006); *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.*, 56 Cal.4th 729, 743 (2013).

<sup>229</sup> Cal. Bus. & Prof. Code §16100(a); Cal. Ins. Code §§ 1800, 1800.6.

<sup>230</sup> Cal Penal Code §§ 1295, 1298.

bail for any non-felony offense by credit card, debit card, or electronic funds transfer.<sup>231</sup> Direct court deposits allow defendants to avoid the problematic practices of for-profit bail bonds businesses. But unlike in Kentucky and four other states, which allow defendants to post a deposit of 10% of the total bail amount, California law allows only for a deposit of the *full* amount of bail that has been ordered by the court. That law would need to be changed at the state level to allow for partial deposits.

○ ***Public or Nonprofit Bail Bonds Providers***

As Kentucky has done, the County could also establish a public alternative to the private bail bond industry. Under California law, this would require the County to form a corporation meeting the Insurance Code’s statutory requirements for bail bonds providers, including that “[t]he corporation may solicit or negotiate the execution or delivery of bail . . . only through natural persons who hold individual licenses as bail agents”; that “[a]ll shareholders, officers, and directors of the corporation shall be licensed bail agents”; and that all employees, if not individually licensed agents, must at least “meet the requirements for licensure.”<sup>232</sup>

State law prohibits the issuance of bail licenses to individuals “employed by or associated with” either a “court of law in respect to its exercise of its criminal jurisdiction,” or a “public law enforcement agency possessing the power of arrest and detention of persons suspected of violating the law.”<sup>233</sup> Thus, if the County wished to form a corporation to provide a public alternative to the bail bonds industry, that corporation could not be operated by employees of the court; the Sheriff’s Office or any other law enforcement agency;<sup>234</sup> or the District Attorney’s Office, Public Defender’s Officer, Probation Department, or any other agency whose personnel are deemed “officers of the court.”<sup>235</sup> Given the Office of Pretrial Services’ role in providing investigative reports and recommendations to the court,<sup>236</sup> its employees also likely cannot be issued bail licenses, and therefore could not operate the corporation.

Instead of or in addition to a public bail bonds provider operated by the County, a non-profit organization could also establish a not-for-profit alternative to commercial bail bonds, provided that it met the statutory requirements discussed above.

## **IX) Recommendations**

These recommendations are intended to capitalize on existing County reform efforts to further the goal of advancing pretrial justice; improve access and efficiency in the pretrial

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<sup>231</sup> Cal. Gov. Code § 6159(b)(1); *Two Jinn*, 183 Cal. Rptr. 3d at 447.

<sup>232</sup> Cal. Ins. Code § 1810(b).

<sup>233</sup> 10 Cal. Code Regs., § 2057(a)(1)-(2).

<sup>234</sup> See Cal. Gov. Code §§ 26601 (Sheriff has the power of arrest), 26605 (Sheriff has the power of detention); *Pitchess v. Superior Court*, 2 Cal.App.3d 653, 657 (1969) (Sheriff is an officer of the court).

<sup>235</sup> See *Averill v. Sup. Ct. of Madera Cty.*, 73 P.2d 1247, 1247 (Cal. Ct. App. 1937) (district attorney is an officer of the court); *Brookner v. Sup. Ct.*, 76 Cal. Rptr. 2d 68, 73 (Cal. Ct. App. 1998) (same for public defender); *In re Marriage of Gardino*, 156 Cal. Rptr. 883, 886 n.1 (Cal. Ct. App. 1979) (same for probation officers).

<sup>236</sup> Cal. Penal Code §§ 1275(a)(1), 1318.1.

process; eliminate or modify processes that may have discriminatory impacts and/or negative impacts on public safety; account for special considerations in domestic violence cases; and develop the County's ability to self-audit and make ongoing improvements to its pretrial justice system in the future.

At the outset, it is important to emphasize that the fiscal and staffing implications of these recommendations need to be considered by the affected departments and entities, and requests for additional staff or resources should be brought forward to the appropriate decision-makers.

## **1. Incorporate Pretrial Justice-Related Goals into Existing Reform Efforts**

A number of ongoing reform efforts in the County – including the Jail Diversion and Behavioral Health Subcommittee of the Reentry Network, numerous updates to the Behavioral Health system, and efforts of the Domestic Violence Council and other groups to prevent domestic violence and to ensure that victims of domestic violence receive appropriate services and assistance – have a strong potential to touch upon pretrial justice issues. The Board of Supervisors should direct or recommend, as appropriate, that these other efforts specifically consider the pretrial justice-related implications of their work.

## **2. Explore Feasibility of Establishing a Public or Nonprofit Alternative to Commercial Bail Bonds**

Preliminary research indicates that California law would allow for the establishment of an alternative bail bonds business operated by the County or by a non-profit organization, provided that the business meets all the requirements of state law and regulations. The Board of Supervisors should direct the Office of the County Executive and the Office of the County Counsel, in collaboration with appropriate public safety and justice partners, to further explore the legal and operational feasibility of establishing a public or nonprofit bail bond alternative, and to bring a feasibility report back to the Public Safety and Justice Committee.

Although we are not aware of any other California county that currently operates a bail agency, the exploration should include a review of the approaches of a few existing nonprofit community bail funds:

- Bronx Freedom Fund, which posts bail for indigent defendants facing misdemeanor charges and connects them with community services and support to ensure they do not suffer pretrial failures;<sup>237</sup>
- Brooklyn Community Bail Fund, which pays bail up to \$2,000 for indigent defendants;<sup>238</sup> and
- Chicago Community Bond Fund, which pays bail for indigent defendants depending on the amount of bail set and on factors that may make pretrial detention especially harmful – such as a risk of victimization if detained based on LGBT or disability

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<sup>237</sup> See The Bronx Freedom Fund, *About the Fund* <<http://www.thebronxfreedomfund.org/what-we-do/>>.

<sup>238</sup> See Brooklyn Community Bail Fund, *How it Works* <http://www.brooklynbailfund.org/how-it-works-page/>>.

status; special health needs; presence of dependents; and immigration status.<sup>239</sup>

### 3. Engage in State Legislative Advocacy on Pretrial Justice Issues

Several reforms that would have a significant impact on pretrial justice in Santa Clara County require changes to state law. These recommendations involve transforming California’s criminal laws to eliminate or minimize the use of money bail when less restrictive, non-financial options are available; requiring that if money bail is imposed, it should be set according to a defendant’s ability to pay and not be tied to a for-profit bail bonds industry; and improving and expanding the toolkit available to judges in making bail and release decisions.

- **Eliminate for-profit bail bonds in California:** Four states – Kentucky, Oregon, Illinois, and Wisconsin – have passed state laws abolishing the commercial bail bond industry statewide.<sup>240</sup> As discussed in this report, the County should advocate for similar legislation in California, in conjunction with laws providing better alternatives – such as partial bail deposits with the court, unsecured bonds, and increases in pretrial services resources.
- **Adopt reporting requirements for bail bond agents:** If the state does not eliminate the bail bonds industry, the County should advocate for the adoption of stringent reporting requirements to create transparency and to aid courts in their pretrial decision-making. The current lack of any such reporting requirements means that for many high-risk defendants who manage to obtain release on a bail bond, the court and other participants in the pretrial process lack information about outcomes – and thus about the value (if any) that bail bond agents may add.

Reporting requirements to advocate for include: providing the courts with copies of bail agent contracts – which are not currently provided to either the court or the jail on a consistent basis; disclosing how much the agent charges in premiums and fees – including annual APRs on installment plans; disclosing how much its agents earn in commission or salary; reporting on their total numbers and dollar amounts of exonerations and forfeitures; and disclosing the number of rearrests and FTAs among their clients, how/by whom absconding defendants were recovered, and proof of any recovery efforts by the bail agent.

- **Adopt a bail and release statute aligned with federal law:** The federal bail statute clearly lays out the pretrial orders that judges may impose in increasing order of risk, from OR/release on unsecured appearance bond; to release with conditions, which may include bail; to pretrial detention. Unlike California law, federal law also states that judges “may not impose a financial condition that results in the pretrial detention of the person” – i.e., *bail must take into account a defendant’s ability to pay*.<sup>241</sup>

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<sup>239</sup> See Chicago Community Bond Fund, < <https://www.chicagobond.org/>>.

<sup>240</sup> See Or. Rev. Stat. § 135.265; Wis. Stat. § 969.12; *Bail Fail*, p. 40.

<sup>241</sup> 18 U.S.C. § 3142(c)(2).

California’s bail statutes are much more onerous to understand and administer.

Thus, whether or not the state eliminates the commercial bail bond industry, the County should advocate for amendments that bring California law in harmony with federal law in order to bring clarity to the pretrial process, increase reliance on non-monetary pretrial release options, and minimize reliance on money bail.

- **Provide additional guidance to courts in setting bail schedules:** In California, the law gives superior court judges little guidance on how to determine the amounts to include in their annual countywide bail schedules. As discussed above, this leads to situations in which scheduled bail amounts for the same offenses may differ widely among counties. And even within a single county, it may be difficult or impossible for judges to know whether the scheduled bail amount for a particular offense is “appropriate” in light of *actual pretrial failure rates for that offense in that county* and the efficacy of a bail amount in preventing those failures. By contrast, Kentucky has adopted a *statewide* bail schedule for nonviolent felonies and all misdemeanors and infractions, and requiring individual bail-setting for bailable violent felonies.<sup>242</sup>

To improve uniformity and fairness of bail amounts in California, and to enhance judges’ ability to set bail amounts that are commensurate with actual risks, the County – with input from the Superior Court – should advocate for more detailed guidance from the state around bail setting. This could include:

- expressing the County’s support for Chief Justice Cantil-Sakauye’s efforts at statewide bail reform, and advocating for the establishment of a statewide commission to examine the efficacy of bail;
  - adopting more detailed guidance for courts on how to set appropriate bail amounts for specific types of offenses; and/or
  - advocating for other changes related to bail schedules to improve uniformity and to encourage the use of empirical data in setting scheduled bail amounts.
- **Allow direct court payment of partial bail deposits:** As explained above, the Penal Code currently allows defendants to make a deposit of their *full* bail amount with the court in lieu of purchasing a bail bond. Other states, such as Kentucky, Oregon, Wisconsin, New Jersey, and Illinois, have adopted laws allowing defendants to pay a 10% deposit of their bail amount with the court, but to remain “on the hook” for the full amount if they suffer a pretrial failure. This is known as a “partially secured” bond. To make this option available in California, the County should advocate for a change to the Penal Code. This would allow defendants who cannot afford to pay the full bail amount upfront to still have the benefit of paying bail directly to the court, rather than forcing them to use the services of a commercial bail bond agent.

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<sup>242</sup> Ky. Rev. Stat. § 431.540.



- **Allow unsecured bonds:** In states such as Colorado, judges may impose unsecured bonds where a defendant is not required to post any money with the court upfront, but signs a promise to pay the full amount of the bond if he or she has a pretrial failure. If the state does not amend its bail statute to be in harmony with federal law, as recommended above, the County should advocate that this option be added to the Penal Code to make unsecured bonds available for judges to use in appropriate cases.
  - **Improve judicial discretion to order pretrial detention:** If the state does not amend its bail statute to be more in harmony with federal law, which contains specific guidance around ordering pretrial detention, the County should advocate for specific amendments on the issue of pretrial detention. California law currently severely restricts judges' ability to order mandatory pretrial detention, leading to a situation where extremely high bail is sometimes used as a de facto means of ensuring detention. To empower judges to make transparent, consistent decisions to detain defendants who pose unmanageably high FTA and/or public safety risks rather than attempting to guarantee detention by setting a high bail amount, the County should advocate for amendments to state law that give judges more discretion to order pretrial detention based on specific factors discussed in a hearing held in open court. These amendments should be consistent with the ABA Standards, under which the prosecution must "prove[] by clear and convincing evidence that no condition or combination of conditions of release will reasonably ensure the defendant's appearance in court or protect the safety of the community or any person."<sup>243</sup> The federal bail statute and New Jersey's revised statutes provide guidance on this point.
- 4. Encourage Increased Reliance on Pretrial Supervision and Discourage the Practice of Ordering or Maintaining Unnecessary Money Bail in Addition to Pretrial Supervision**

As noted above, in a very small percentage of cases, courts order pretrial supervision but also require the defendant to pay money bail. Examples of scenarios in which this occurs are outlined in the table below:

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<sup>243</sup> *ABA Standards*, standard 10-5.8(a).

<b>Sample Bail + Supervision Scenarios</b>						
<b><u>Arrest</u></b>		<b><u>Initial Appearance</u></b>		<b><u>Release</u></b>		<b><u>Subsequent Appearance</u></b>
Def. posts bail at jail and is released	→	Court orders Supervised OR to ensure public safety				
No bail posted at jail	→	Court denies OR/Supervised OR and sets bail	→	Def. posts bail and is released	→	Court orders Supervised OR to ensure public safety
No bail posted at jail	→	Court orders bail and Supervised OR				

This recommendation is intended to encourage reliance on pretrial supervision, *instead of money bail*, as a means of supervising defendants during the pretrial period. In cases where both pretrial supervision and money bail are imposed, Pretrial Services is already providing supervision to prevent technical violations and new criminal activity and to ensure that the defendant makes court appearances. Money bail – which does not address recidivism or public safety concerns at all, and has not been shown to be more effective than pretrial supervision at ensuring appearance – is unnecessary in these cases. When the County provides supervision under these circumstances, it is assisting the commercial bail bond industry by allowing it to profit from unnecessary bail orders and by providing supervision at the County’s expense that significantly reduces the risk a bond will be forfeited. Moreover, when money bail is ordered on top of pretrial supervision, the defendant receives none of the benefits of avoiding ineffective, financially damaging, and potentially abusive bail bonds practices.

Although ordering money bail plus pretrial supervision is within the discretion of the court, the Board of Supervisors has authority to adopt policies to discourage this practice. Specifically, the Board of Supervisors should direct the Office of Pretrial Services to decline to provide pretrial supervision in cases where either: (1) money bail and pretrial supervision are ordered concurrently, or (2) money bail has already been posted *and the court does not exonerate the defendant’s bail upon ordering pretrial supervision*. The unavailability of pretrial supervision for such defendants should encourage courts to rely solely on pretrial supervision and stop the practice of ordering, or maintaining, unnecessary money bail in addition to pretrial supervision. The BRWG recognizes that, in some cases, the court orders pretrial supervision in addition to bail where the defendant has already posted a bail bond, but the court believes that pretrial supervision is necessary to ensure public safety. In such cases, Pretrial Services would continue to offer supervision, provided that the court exonerates the defendant’s bail in conjunction with ordering pretrial supervision. Thus, the court would retain flexibility to order pretrial supervision in any appropriate case, even where the defendant has already posted bail, as

long as the court exonerates the unnecessary bail. Although exoneration would not require a bail agent to refund the premium or any other fees the defendant has paid (or already owes) for the agent's services, it would ensure that defendants and their families, who often have limited resources, do not incur further financial obligations to the bail agent.

#### **5. Adopt an Ordinance Prohibiting or Limiting Establishment, Expansion, or Relocation of Commercial Bail Bonds in Unincorporated County**

In 2012, the County amended its zoning ordinance to prohibit the establishment, expansion, or relocation of payday lending and check-cashing businesses. The Board of Supervisors should adopt a similar ordinance prohibiting or limiting the establishment, expansion, or relocation of for-profit bail bonds businesses. Although, as discussed above, the County's land use authority is limited to its unincorporated areas, an ordinance code amendment could serve as a model for cities within the County. In 2011, the City of San José adopted an ordinance requiring a minimum distance between any new bail bonds businesses and property zoned for residential use, parks, or schools; a County ordinance that goes farther could empower San José and/or other cities to follow the County's lead.

#### **6. Institute a Community Release Project in Partnership with Community-Based Organizations**

Through its Office of Reentry Services, the County currently offers a number of community-based programs for those who have been convicted and sentenced for criminal offenses. Among other things, these programs include supportive services that are intended to ease the transition back into the community from a custodial setting, and assistance finding a placement for those who have been sentenced to community service in lieu of a custodial sentence. Community organizations can be invaluable in supporting individuals in the reentry context by creating or renewing links between an individual and his or her family and community networks.

Some community-based options currently exist to support those who are released to live the community during the pretrial phase. For example, the Office of Pretrial Services makes a small number of referrals each month to the Office of Reentry Services when it interviews defendants who express concerns about their ability to obtain employment or deal with health issues, and who agree to be assessed by Reentry Services and connected with supports. In addition, the County's Behavioral Health Services Department (BHSD) offers an Offender Treatment Program that supports clients in the criminal justice system who are also receiving drug treatment services through BHSD by providing them with assistance in keeping court and drug treatment appointments and referrals for other supportive services.

Community members and organizations can potentially play a significant role in preventing FTAs and rearrests for defendants released prior to trial by increasing the support defendants receive from people with whom they have preexisting relationships, or by helping them build new supportive networks that are invested in and equipped to assist in their pretrial success. This community support also has the potential to ease pressure on judges to impose money bail for the reason that they feel a defendant will not otherwise be held accountable. In

addition, community involvement has great potential to expand the capacity of the County's existing alternatives to money bail. If the Community Release Project is able to serve some defendants who would otherwise be on Supervised OR administered by the Office of Pretrial Services, then Pretrial Services will have increased capacity to take on some higher-risk defendants who might otherwise be ordered to post money bail.

For those defendants who are ultimately convicted and sentenced to serve time in custody, the relationships and connections built through their participation in the Community Release Project could be utilized on the reentry side to help ensure their successful reintegration after they are released.

The Board of Supervisors should direct the Office of Pretrial Services to work with the Office of Reentry Services to involve community-based organizations, including faith-based groups (such as the Faith-Based Reentry Network), in providing Community Release Project services directed at supporting defendants and their families in achieving pretrial success. Services could include: help remembering court dates and case information; help with obtaining bus passes, child care, and other barriers to attending court; alcohol and drug treatment; mental health treatment; family counseling; and other stabilizing and supportive interventions. The Office of Pretrial Services and/or Office of Reentry Services should also provide information on the Community Release Project to the Superior Court so that the court is aware of the expansion in available alternatives to bail, and should explore whether a list of Community Release Project providers can be made available to all defendants at arraignment.

## **7. Accept Credit/Debit Payments for Non-Felony Bail at the County Jail**

California law authorizes county jails to accept credit cards, debit cards, and electronic funds transfers (EFT) on behalf of the Superior Court for the payment of bail for any non-felony offense. The Legislature created this alternative means of payment to “make it easier for people to pay fines, post bail, and to alleviate time spent in jail.”<sup>244</sup> At least fourteen other California counties – Madera, Marin, Monterey, Orange, Plumas, Sacramento, San Francisco, San Luis Obispo, Santa Barbara (pending), Santa Cruz, Solano, Sonoma, Ventura, and Yuba – contract with financial services companies to provide for credit, debit, and/or EFT payments of non-felony bail in their jails.<sup>245</sup> The California Court of Appeal recently approved these arrangements and confirmed that a financial services company is not required to obtain a bail license to provide credit, debit, and/or EFT services for the payment of bail.<sup>246</sup>

Defendants who wish to avoid purchasing a bail bond by posting bail directly with the jail or court must pay their *full* bail amount upfront. Without the option to make credit, debit, or EFT payments, defendants must pay their full bail amounts in cash, which is not possible for

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<sup>244</sup> *Two Jinn*, 233 Cal.App.4th at p. 1332.

<sup>245</sup> Most of these counties verified their acceptance of credit for bail payments, while Solano, Sonoma, and Ventura Counties were mentioned in a court decision. *See id.* at pp. 1326, 1329.

<sup>246</sup> *Id.* at pp. 1336-43; *see also* General Counsel Adam M. Cole, California Department of Insurance, letter to Robert W. Hicks, Oct. 20, 2010 <<http://www.insurance.ca.gov/0250-insurers/0300-insurers/0200-bulletins/bulletin-notices-commiss-opinion/upload/HicksReTwoJinn20101020.pdf>>.

most. Indeed, paying one's full bail amount upfront in cash is so prohibitive that, in 2014, *less than 0.004% of defendants released on bail* – 102 out of 28,044 – paid their bail in cash. Although the use of credit cards may raise independent financial concerns, those concerns are outweighed by the benefits of credit/debit/EFT payments as compared to use of a bail bond agent. Moreover, while defendants may purchase a bail bond for a fee of only 1% to 10% of the bail amount, defendants paying via credit, debit, or EFT would be required to pay the *full* bail amount upfront.

The County allows certain payments, such as Department of Revenue balances, to be made by credit card, debit card, or EFT. But defendants posting bail at the County's jail facilities currently do not have the option of paying the full bail amount via credit card, debit card, or EFT, as an alternative to purchasing a bond from a commercial bail agent. The Board of Supervisors should direct DOC to look into the feasibility of accepting credit, debit, and EFT payments for non-felony bail at the County's jail facilities.

#### **8. Post and Disseminate Information about Own Recognizance (OR) Release, Supervised OR Release, and other Alternatives to Bail Bonds in County Jails**

For many years, DOC has posted advertising information about bail agents throughout County jail facilities to assist arrestees in identifying available bail agents and posting bail bonds. This information has been compiled, verified, and provided to DOC by a contractor called Jail Advertising Network, f/k/a Partners for a Safer America. The Board of Supervisors, with the BRWG's input, is currently considering whether to renew its contract with Jail Advertising Network and continue posting this information in the jails.

Efforts have been made in the past to post information about some alternatives to bail bonds, including OR and Supervised OR. However, defendants currently may be unaware that OR and Supervised OR release exist as an alternative to bail bonds; others may be unaware of whether they are likely to qualify for OR or Supervised OR. As a result, some defendants may immediately seek the services of a bail agent, even though they may be eligible for and would prefer OR or Supervised OR release. Santa Clara County bail bond agents have estimated that 90% of defendants for whom they post bonds are released within the first few days after arrest – i.e., *before* their initial appearance before a judge, when they may be found eligible for OR or Supervised OR. Anecdotal evidence also suggests that some defendants who are eligible for OR or Supervised OR prior to their initial court appearance – potentially just hours after booking – instead pay for a bail bond before the OR process can be completed. In addition, some defendants may not be aware that they can post bail directly with the jail or court without the services of a bail agent.

To ensure that defendants have sufficient information about alternatives to bail bonds and can make informed decisions about whether to seek the services of a bail agent, the Board of Supervisors should direct DOC, in collaboration with the Office of Pretrial Services, to post information about OR and Supervised OR (including basic information about eligibility and procedures) and other alternatives to bail bonds in prominent locations in all County jail

facilities.<sup>247</sup> DOC and Pretrial Services should also explore how to provide this information to defendants’ families and communities to improve understanding of alternatives to commercial bail bonds. Information about OR, Supervised OR, and other alternatives to bail bonds should be provided regardless of whether DOC continues to post bail agent advertising in the jails.

## **9. Continue to Improve the Promptness of In-Custody Arraignments**

As noted above, arrestees held in custody must be brought before a judge for their arraignment/initial appearance within 48 hours, excluding weekends and holidays. But when arrests are made on Friday or over the weekend, arrestees may remain in custody until the following *Wednesday* before a judge makes a bail or release determination. These delays may occur because the courts are not in session on nights and weekends, or because of time spent on case processing by prosecutors.

In order to address these delays in arraignment, the Board of Supervisors should recommend that the District Attorney, Public Defender, Office of Pretrial Services, DOC, and Superior Court continue their existing efforts to improve the promptness and efficiency of the arraignment process to keep the un-arraigned jail population to a minimum. This might include requesting that the Superior Court consider increasing the number of judges performing arraignments on Mondays and/or following holidays to reduce any delays; and requesting that the District Attorney and Public Defender prioritize and devote resources to prompt arraignment.

The Board of Supervisors should recommend that these parties, as part of their collaboration, balance the desire to minimize pre-arraignment custody stays with the need to provide adequate time for prosecutors to complete their investigations and make charging decisions and for the court to prepare case files and accompanying documents, so that the desire for promptness does not come at the expense of defendants being charged prematurely without an opportunity for full review. In addition, the collaborating parties should take into account the significant budget cuts that have impacted the judiciary’s ability to expand its operations, although state law would permit the court to hold additional court sessions at the courthouse or elsewhere for the purpose of conducting criminal arraignments.<sup>248</sup>

## **10. Expand and Formalize Pretrial Diversion**

Pretrial diversion is a form of deferred prosecution that allows a defendant – usually a

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<sup>247</sup> A pair of law students at Santa Clara University are currently working on drafting proposed signage, which DOC and the Office of Pretrial Services should review.

<sup>248</sup> See Cal. Civ. Proc. Code § 134(a)(3) (courts may “transact[] . . . judicial business on judicial holidays for . . . the conduct of arraignments and the exercise of the powers of a magistrate in a criminal action, or in a proceeding of a criminal nature.”), (c) (“[O]ne or more departments of the court may remain open and in session for the transaction of any business that may come before the department in the exercise of the civil or criminal jurisdiction of the court . . . on a judicial holiday or at any hours of the day or night, or both, as the judges of the court prescribe.”); Cal. Gov. Code § 69740(a) (“[E]ach trial court shall determine the number and location of sessions of the court necessary for the prompt disposition of the business before the court. . . . Nothing in this section precludes a session from being held in a building other than a courthouse.”).

first-time and/or low-level offender – to have his or her prosecution on criminal charges deferred while completing a diversion program that typically includes educational and/or treatment-related conditions.<sup>249</sup> If the defendant successfully completes the pretrial diversion term, the charges will be dismissed, leaving his or her record clean.<sup>250</sup>

Pretrial diversion offers another means of protecting public safety and preventing other pretrial failures while allowing defendants to retain their employment and live with their families while awaiting trial. Additionally, when a defendant is granted pretrial diversion, the court must immediately enter an order exonerating “any bail bond or undertaking, or deposit in lieu thereof, on file by or on behalf of the defendant”<sup>251</sup> – meaning that financial conditions are eliminated.

To standardize and increase the use of pretrial diversion in appropriate cases, the Board of Supervisors should recommend that the District Attorney, in partnership with the Public Defender and the Office of Pretrial Services, establish consistent guidelines for pretrial diversion – including the types of cases in which it should be used, and the department or entity that will provide monitoring of defendants’ compliance with diversion conditions. Pretrial diversion is already robust in the juvenile justice system; thus, the Board of Supervisors should recommend that policies and practices employed in the juvenile system should be reviewed in developing guidelines for the adult system.

### **11. Implement an Electronic Monitoring, Home Detention, and/or Work Furlough Program for Pretrial Inmates**

As noted above, the court may order a defendant who is released on Supervised OR to be subject to electronic monitoring, which is overseen by the Office of Pretrial Services. But a state law enacted in connection with Public Safety Realignment also allows a county board of supervisors to authorize its “correctional administrator” – here, the Chief of Correction – to exercise its discretion to offer an electronic monitoring, home detention, and/or work furlough<sup>252</sup> program to certain inmates who are “being held in lieu of bail” – i.e., have had a bail amount set, but have not posted bail.<sup>253</sup>

First, pretrial release may be offered to *any* inmate when the Chief of Correction determines release “would be consistent with the public safety interests of the community.”<sup>254</sup> Second, the Chief of Correction may release an inmate who has been in pretrial custody for 30 days from the date of arraignment on only misdemeanor charges, or has been in pretrial custody for 60 days on any charges.<sup>255</sup> Both options allow the County to administer pretrial release

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<sup>249</sup> See Cal. Penal Code §§ 1001.1, 1001.50, 1001.52.

<sup>250</sup> *Id.* § 1001.7.

<sup>251</sup> *Id.* §§ 1001.6, 1001.53.

<sup>252</sup> A work furlough program allows an inmate to check out of a detention facility for periods of time (e.g., 9:00 to 5:00 daily) in order to retain his or her preexisting employment in the community while in custody. See, e.g., *id.* § 1208(b).

<sup>253</sup> *Id.* § 1203.018(a), (b).

<sup>254</sup> *Id.* § 1203.018(c)(1)(C).

<sup>255</sup> *Id.* § 1203.018(c)(1)(A)-(B).

according to its own public safety priorities for defendants who are in custody due to an inability to pay bail – including where risk assessments may change based on new information, as discussed in the next Recommendation.

The Probation Department has previously administered work furlough for sentenced inmates, and the County currently offers some limited alternative release options for pretrial inmates through its Custodial Alternatives Supervision Program, which normally supervises sentenced inmates. Sacramento County offers post-conviction work furlough, and is considering offering it to approximately 700 pretrial inmates as well. If this program is formalized and expanded in Santa Clara County, electronic monitoring, home detention, or work furlough could allow more qualifying inmates to be released from pretrial custody, retaining their employment, housing, and/or family relationships, and enabling their families – including domestic violence victims – to retain the financial support they may need to keep their households stable.

Thus, the Board of Supervisors should direct DOC to develop a pretrial release program consistent with the statutory requirements and report back to the Public Safety and Justice Committee. To ensure that pretrial release under this program is consistent with the County’s locally validated risk standards, the Board should direct DOC to collaborate with the Office of Pretrial Services. For example, when the Office of Pretrial Services re-reviews pretrial assessments, as discussed in the next Recommendation, it could contact DOC with names of inmates it has determined present a risk level that makes release appropriate. Conversely, if DOC identifies inmates who are low-risk or have remained in pretrial custody for the 30- or 60-day threshold, it could contract Pretrial Services and ask that an updated risk assessment be done.

## **12. Complete Targeted Periodic Re-Reviews of Pretrial Assessments**

Currently, once Pretrial Services Officers complete a pretrial assessment for a specific defendant and make recommendations to the court regarding that defendant’s pretrial release, the assessment is not always formally re-reviewed in the event the defendant remains in custody. To facilitate releases in appropriate cases, the Board of Supervisors should direct the Office of Pretrial Services to periodically re-review and update its reports on an appropriate, targeted group of arrestees – e.g., those with low bail amounts who have been unable to post bail – on a periodic basis. In other jurisdictions, multi-disciplinary teams comprised of staff from public safety and justice departments conduct such periodic reviews to expedite the release of defendants who may become eligible for release after the initial review.

## **13. Incorporate Pretrial Justice Issues into Ongoing Data System Updates**

County departments and partners have demonstrated a willingness and ability to collect data, but encounter significant technical limitations in doing so. Many, but not all County criminal justice data are inputted into the CJIC system, and most law and justice system partners rely on it operationally. Although CJIC provides partners with some significant data reporting and sharing capacity, 41 years of historical data, and an institutionalized coherence to partner processes, it relies on aging technology and is labor-intensive to use and interpret, and cannot produce much of the information needed for effective justice system management and improvement.



The County is currently replacing CJIC with a more powerful and up-to-date data collection and management tool, and the Superior Court is implementing its own new data system. These system updates should be responsive to the need (discussed in the next Recommendation) to collect relevant data to enable the County and its partners, including the courts, to monitor and improve the administration of pretrial justice and to conduct self-audits on an ongoing basis.

#### **14. Collect Data on Bail Performance Outcomes and Share with Superior Court and Relevant Public Safety and Justice Officials**

Many stakeholders in the pretrial justice system – including the Superior Court, District Attorney, Public Defender, and others – would greatly benefit from the collection and sharing of empirical data on bail performance outcomes, such as pretrial failure rates (i.e., rates of FTA, new arrests for violent vs. non-violent offenses, and technical violations) by bail amount, charge type, and release type, including both release on surety bond and OR/Supervised OR. This information, if provided to the Superior Court on an annual basis, would support the court in carrying out its duty under state law to set a uniform countywide bail schedule by providing an empirical basis on which to conclude that certain offenses carry higher risks of pretrial failure in Santa Clara County. It would also provide judges with additional information to support bail and release decisions in individual cases. Finally, regularly updated data could also provide ongoing reassurance to judges regarding the validity of the Office of Pretrial Services’ assessment tool in predicting defendants’ pretrial risk.

The Board of Supervisors should direct the Office of the County Executive and the Office of Pretrial Services to determine the types of data that would be relevant and useful in informing courts’ and public safety and justice agencies’ decisions regarding pretrial release, bail setting, and flow of inmates through the pretrial process – including, as appropriate, data in domestic violence cases, and data relevant to fairness across different inmate populations (such as race, national origin, native language, age, disability, gender, and sexual orientation); coordinate the collection of this data; and provide it annually to the Superior Court. The Office of the County Executive and Office of Pretrial Services should also provide this data to the District Attorney and Public Defender to enable them to consider the efficacy of existing metrics, such as bail amounts, charge types, release types and conditions of release, in making pretrial release-related recommendations to the court in individual cases.

#### **15. Improve Consistency of Citation and Release and Jail Citation Decisions**

Although the Santa Clara County Police Chiefs’ Association has adopted guidelines to assist arresting officers in making citation and release decision in the field, the guidelines give officers a fair amount of discretion, and anecdotal evidence suggests that citation and release decisions are not being made in a uniform manner. For example, the guidelines give officers discretion to deny cite and release if the officer has reason to believe that the arrestee would not appear for a scheduled court date, but the guidelines offer no factors or criteria for evaluating the likelihood of appearance, leaving officers to make subjective determinations. Thus, law enforcement officers sometimes transport arrestees to the County jail even though they are

eligible for cite and release by the officer, resulting in unnecessary delays and costs associated with the transport and jail processing.

To minimize these unnecessary costs and ensure that eligible arrestees are released promptly, the Board of Supervisors should recommend that the Santa Clara County Police Chiefs' Association, with the assistance of the Office of Pretrial Services, revise the existing guidelines to provide more specific criteria to guide officers' discretion and provide regular training on those criteria to all officers through the Police Chiefs' Association. As an example, the Police Chiefs' Association could consider revising the guidelines to include a requirement that the arresting officer provide a one-to-two-sentence written justification for denying citation and release in the field to any misdemeanor arrestee. The Police Chiefs' Association could also consider working with the Office of Pretrial Services to develop an abbreviated risk screening tool that could be printed on cards carried by officers. Because the Penal Code permits denial of cite and release when there is a reasonable likelihood the arrestee will reoffend, imminently endanger safety, or fail to appear, officers are sometimes required to evaluate risk in the field, and a card-sized screening tool could help guide their discretion and improve consistency.

DOC currently has a jail citation policy that governs citation and release decisions for arrestees who have been brought to the jail and booked (as opposed to in-field citation and release by arresting officers). This policy is similar to the Police Chiefs' Association's guidelines for in-field citation and release. The Board of Supervisors should direct DOC to take steps similar to those described above to review, revise as necessary, and ensure proper training of jail employees on the jail citation policy to ensure that jail citation decisions are made in a consistent manner and that eligible arrestees are released promptly.

#### **16. Explore and Employ Domestic Violence-Specific Risk Assessment Tools that are Validated to Avoid Racial Bias**

A variety of risk assessment tools have been developed to address the unique risks posed by defendants charged with domestic violence-related offenses. The Office of Pretrial Services currently uses a risk assessment tool that considers domestic violence charges as a factor in assessing risk, but it does not employ any of the more comprehensive risk assessment tools developed specifically for domestic violence cases. Moreover, although the Domestic Violence Protocol for Law Enforcement currently requires law enforcement officers to conduct a lethality assessment during domestic violence investigations, anecdotal evidence suggests that officers do not always complete the assessment and that, when they do, the assessment typically is not provided to Pretrial Services or the court for use in making bail and release determinations. Making lethality assessments or other domestic violence-specific risk assessments available to Pretrial Services and the court could result in better-informed bail and release decision-making in domestic violence cases.

The Board of Supervisors should direct of Office of Pretrial Services, in cases involving domestic violence-related offenses, to explore the feasibility of adding components to the existing risk assessment, incorporating the lethality assessment used by law enforcement officers in its risk assessments if appropriate, and/or employing an additional, appropriate domestic violence risk assessment in its screening process to predict and mitigate the risk of domestic

violence-related reoffense during the pretrial phase. In particular, the Office of Pretrial Services should consider lethality assessment tools or components that specifically measure the risk that a domestic violence defendant will engage in lethal violence, and not merely the general risk that a defendant will reoffend. To that end, the Board should also direct DOC and Pretrial Services to work with the Police Chiefs Association to explore means of ensuring that lethality assessments are completed by police officers, received by DOC at booking, and made available to Pretrial Services and the court for use in bail and release determinations if appropriate. This could include taking steps to ensure that officers receive better training on lethality assessments and/or implementing policies at the jail that require arresting officers to attach a copy of the lethality assessment to the probable cause report when any individual arrested for a domestic violence-related offense is booked at the jail.

Recently, concerns have been raised about the potential for racial bias in risk assessment tools that have not been properly validated. Therefore, the Board should direct Pretrial Services that any domestic violence-specific risk tool that it recommends for use in bail and release determinations must be evaluated for and must be free of racial bias.

### **17. Explore Means of Notifying Victims when Defendants Charged with Domestic Violence-Related Crimes are Released Pretrial**

As noted above, the pretrial period can be a high-risk time for domestic violence victims. Yet anecdotal evidence suggests that victims often are not notified when defendants charged with domestic violence-related crimes are released pretrial on bail, OR, or Supervised OR. Ensuring that victims receive notice when an alleged domestic violence offender is released could help victims protect themselves and decrease the risk of future violence.

Currently, the Sheriff's Office uses the Victim Information and Notification Everyday (VINE) system to provide victims of crime with timely and reliable information regarding offenders' custody status. Victims can register for VINE notifications online or by phone. Once registered, victims can receive phone, email, or text message notifications when the alleged offender is released. The VINE system operates 24 hours a day, seven days a week.

To further expand notification to victims, the Board of Supervisors should recommend that the Sheriff's Office work with the Office of Pretrial Services and the Santa Clara County Police Chiefs' Association to explore methods of ensuring that victims receive notice when a defendant charged with domestic violence-related crimes is released pretrial. Specifically, the Board should recommend that these entities consider means of informing victims about VINE and encouraging them to register for notification. This could include revising the Domestic Violence Protocol to require arresting officers to provide information about VINE during domestic violence investigations, and training officers to ensure that such information is consistently provided. In addition, the Board should direct DOC to consider whether there are other actions it could take to notify victims, beyond use of the VINE system.

## **18. Explore Adoption of In-Field Pretrial Supervision to Provide Additional Safeguards and Protect the Community**

As explained above, the Office of Pretrial Services monitors defendants who are released on OR and provides more intensive supervision of defendants who are released on Supervised OR with court-ordered supervision conditions. Currently, defendants who are considered too high-risk to qualify for OR or Supervised OR either post bail and are released immediately – generally *without any supervision* – or simply remain in custody until their cases are adjudicated. In order to increase community safety and provide effective alternatives to money bail, the County should consider providing an additional, higher level of supervision so that such defendants may be released safely, consistent with the best practice of imposing the least restrictive conditions that will ensure court appearance and protect public safety.

If Pretrial Services offered a more intensive level of supervision, higher-risk defendants who are currently being released on bail *without any supervision* could instead be released under the supervision of Pretrial Services, thus enhancing public safety and better protecting the community. At the same time, some defendants who have bail set, but who remain in jail because they are unable to post bail, could be released safely instead of remaining in custody. Thus, enabling Pretrial Services to provide a higher level of supervision would serve both of the BRWG's primary goals: to protect the safety of the community while also ensuring that defendants who can be released safely are able to obtain prompt release, regardless of their financial circumstances.

In addition to office-based supervision currently offered to Supervised OR clients, in-field pretrial supervision would involve elements like community contacts – i.e., home, work, and school visits – as necessary and effective; contacts with victims; randomized in-field substance testing; and in-field verification of compliance with court-ordered conditions, such as no-contact orders and orders to avoid alcohol use or weapon possession. Given the time- and resource-intensity of in-field supervision, pretrial services officers would have the discretion to prioritize their contacts based on risk level and workload, and could recommend appropriate modification of pretrial release conditions to the court.