



# Pretrial Release in California: Legal Parameters for Evidence-Based Practices

## I. Introduction

The criminal justice system in California has undergone sweeping changes in recent years, including dramatic shifts in the use of state prisons and local jails. As a result, many county justice systems have made significant changes to their policies and practices as they reexamine the role of incarceration within local systems.

Pretrial justice has become a logical area of focus, given that the population of detained defendants awaiting disposition of their cases jumped 12% between 1995 and 2011. By 2011, pretrial detainees represented 71% of the state's jail population – more than 50,000 individuals.<sup>1</sup> By 2014, that number had increased by more than 1,500.<sup>2</sup> Mounting pressures in California to reduce the costs of criminal justice, rebalance the composition of prison and jail populations, protect the public and respect the rights of the accused have increasingly led to calls for more pretrial options based on legal and evidence-based practices:<sup>3</sup>

To inform local decision-making, Californians for Safety and Justice partnered with the Crime and Justice Institute at CRJ to produce two publications on legal and evidence-based pretrial practice in California. This paper examines the state's laws governing pretrial release and detention in order to provide criminal justice professionals, public officials and others with a better understanding of the legal framework within which California's local pretrial systems are administered. It highlights the legal support for and limitations on establishing evidence-based pretrial systems in counties across the state.

The companion paper, *Pretrial Progress: A Survey of Pretrial Practices and Services in California*, explores current practices in the state, based on a survey of county agencies, and offers options for expanding evidence-based pretrial justice.

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## II. Trends in California and Nationally Toward Legal and Evidence-Based Pretrial Justice

Nationally, the shortcomings of bail practices in protecting the public and assuring court appearances have led public officials and policymakers across the country to reconsider pretrial justice. They have turned to the body of research on effective and constitutional options for pretrial decision-making, often referred to as “legal and evidence-based practices.” At the heart of legal and evidence-based pretrial justice is individualized decision-making based on the risk of pretrial misconduct or the failure to appear in court (two goals of pretrial justice codified in federal law).

A growing body of research confirms that risk assessment instruments can reliably predict the probability that a particular defendant will commit a new offense or fail to appear in court.<sup>4</sup> The tool indicates a risk level based on an individual’s assessment score, allowing the court to identify the best conditions to address that risk (e.g., supervised release, release on one’s own recognizance, and, where allowed by law, preventive detention). The most common pretrial risk factors identified in validated risk tools (such as the Virginia Pretrial Risk Assessment Instrument and the Ohio Risk Assessment System) include: prior failures to appear; prior convictions; whether the pending charge is a felony or other charges are pending; employment history; and history of substance abuse.

Support for risk assessment is now widespread, with repeated calls from the American Bar Association, the National Association of Criminal Defense Lawyers, the Conference of Chief Justices, the Conference of State Court Administrators and the International Association of Chiefs of Police for this strategy to supplement or replace monetary bail.<sup>5</sup> Standards promoted by the California Association of Pretrial Services and the National Association of Pretrial Services Agencies also endorse and incorporate guidelines for evidence-based pretrial services programs.<sup>6</sup>

A national movement appears to be underway to focus the pretrial release/custody decision on assessment of risk rather than an individual’s ability to pay. . . . [I]n ten states, courts are instructed to consider the use of risk assessment as part of the pretrial release decision, and in three states, risk assessment is required of all defendants.<sup>7</sup>

Because of its lack of relationship to pretrial misconduct and failure to appear in individual cases, money bail has been a subject of widespread criticism in legal circles for decades. Most notably, the U.S. Supreme Court’s 1951 opinion in *Stack v. Boyle* illustrates this argument that “... the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant. [Those standards] *are to be applied in each case to each defendant.*” (Emphasis added.)<sup>8</sup> More recently, prominent justice organizations like the Conference of Chief Justices and the Conference of State Court Administrators have weighed in with additional criticism of bond schedules:

Many of those incarcerated pretrial do not present a substantial risk of failure to appear or a threat to public safety, but do lack the financial means to be released. Conversely, some with financial means are released despite a risk of flight or threat to community public safety....

Bond schedules seem to contradict the notion that pretrial release conditions should reflect an assessment of an individual defendant’s risk of failure to appear and threat to public safety.<sup>9</sup>

The result has been pretrial system standards that emphasize evidence-based practices instead of money bail to determine who can be safely released into the community. Though this movement toward risk-based decision-making can function as a population- and cost-control mechanism, it is driven fundamentally by research on the lack of efficacy and fairness in money-based systems.

California counties have also been part of this trend, looking to pretrial reform as both a population management strategy as well as an opportunity to uphold the presumption that “liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”<sup>10</sup> Many California counties have significantly reduced jail pressures by implementing pretrial programs that use assessments to determine risk, and then release detainees who are low risk for flight and for committing new crimes on their own recognizance (OR) or on an OR bond with some supervision.<sup>11</sup>

### **III. The Law of Pretrial Release in California**

**Applicable Federal Law.** Most surveys of the law governing pretrial release begin with a summary of the federal constitutional provisions regarding bail and pretrial release, as well as the U.S. Supreme Court decisions interpreting those provisions. While the same approach is followed here, readers should be aware that the operation of California’s local pretrial systems (and the day-to-day practice of judicial officers and criminal justice practitioners across the state) are governed first by the state’s statutes as circumscribed by the California Constitution and, secondly, by the manner in which individual judges exercise their discretionary authority in making release decisions and by applicable local court rules.<sup>12</sup> Moreover, the federal constitutional provision governing bail is narrow in scope, and judicial rulings interpreting it are few and far between. Therefore, this paper will focus primarily on the California Constitution and state statutes governing or limiting bail and pretrial release, and the court decisions that address notable issues regarding the application and interpretation of those statutes.

**Protecting Individual Liberty and Public Safety.** Pretrial justice systems must balance the two inherent demands of pretrial release: respecting the presumption of innocence and protecting the public. For nearly two centuries, the U.S. Supreme Court regarded the sole purpose of bail to be the assurance of a defendant’s appearance in court in accordance with American criminal law’s time-honored presumption of innocence:

From the passage of the Judiciary Act of 1789 ... federal law has unequivocally provided that a person arrested for a noncapital offense shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction ... Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.<sup>13</sup>

Despite this constitutional pronouncement, many legal commentators note that courts have historically set bail for other unstated purposes, including the prevention of defendants from interfering with witnesses, the coercion of guilty pleas by defendants and the protection of the public from the commission of additional crimes by the accused.<sup>14</sup> With Congress’s passage of the Comprehensive Crime Control Act of 1984 and the Supreme Court’s review of that Act in 1987, circumstances changed. In *United States v. Salerno*, the Court concluded that the government’s

interest in preventing crime by an accused person is “both legitimate and compelling,” that Congress can enact restrictions on liberty constituting “permissible regulation” rather than impermissible punishment, that “preventing danger to the community is a legitimate regulatory goal” and, therefore, that the goal of the Bail Reform Act to protect the public is constitutionally permissible.<sup>15</sup> Thus, protection of public safety expressly became the second goal of pretrial release.

*United States v. Salerno* also put an end to the common practice of setting bail for the *sub rosa* purpose of preventative detention for accused persons considered threats to public safety under the guise of assuring defendants’ presence in court. By upholding the Comprehensive Crime Control Act of 1984, which authorized judges to set or deny bail on a finding that release of a defendant “will endanger the safety of any other person or the community,” the Supreme Court authorized a practice that is now carried out in California and nearly every other state.<sup>16</sup>

The Eighth Amendment to the U.S. Constitution, which contains the only reference to bail, does not provide an explicit right to bail or specify which crimes and defendants qualify for bail. The Eighth Amendment simply states: “[E]xcessive bail shall not be required ....” In its 1951 opinion in *Stack v. Boyle*, the U.S. Supreme Court held:

Bail set at a figure higher than an amount reasonably calculated to fulfill th[e] purpose [of assuring the presence of the accused] is ‘excessive’ under the Eighth Amendment. Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant.<sup>17</sup>

As mentioned above, the opinion in *Stack v. Boyle* is also frequently cited as authority for the requirement of an individualized determination of bail in every case.

**The California Constitution.** Article I, § 12 of the state constitution sets forth the basic principles of bail in California in more detail than the Eighth Amendment to the federal constitution. It also limits access to bond or release and provides specific standards for setting bond or releasing defendants based on the nature of the charges:

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

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

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

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

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

A person may be released on his or her own recognizance in the court's discretion.<sup>18</sup>

California's appellate courts have held that, in addition to requiring judicial findings of "clear and convincing evidence" and "substantial likelihood" of harm in Article I, § 12, judges in setting or denying bail must review the specific circumstances in each case alleging violent or serious felony offenses, rather than relying on "a rigid formula susceptible to mechanical application."<sup>19</sup> The appellate courts have also held that trial judges have broad discretion in setting bail or other conditions for pretrial release and that, absent a "manifest abuse of discretion," a judge's bail or release decision will not be overturned.<sup>20</sup>

With the passage of a voter initiative known as Marsy's Law (formally known as the California Victims' Rights Act of 2008), Article I, Section 28(f)(3) was added to the state constitution. That provision states in part: "[i]n setting, reducing or denying bail, ... [p]ublic safety and the safety of the victim shall be the primary considerations."

**California's Statutes.** The state's Penal Code governs the day-to-day administration of California's local bail practices and pretrial systems.<sup>21</sup> While incorporating the provisions of the California constitution, the Penal Code also sets forth detailed standards to guide the exercise of judges' pretrial release authority and specific procedures for reaching release decisions.

**Pretrial Release by Peace Officers.** Under certain circumstances, the California Penal Code authorizes peace officers to release an arrested person on a citation that includes a notice to appear in court at a specified time and date, upon condition that the person sign a written promise to appear in court at the date and time set forth in the citation's notice to appear.<sup>22</sup> The Penal Code's citation procedures apply to misdemeanor arrests in general, including arrests without a warrant, by private citizens and under city or county ordinances.<sup>23</sup> These procedures also apply to arrests for infractions.<sup>24</sup> They do not apply to felony arrests.<sup>25</sup>

A peace officer issuing a citation under these procedures may book the arrested person at the scene or at the arresting agency prior to release. Alternatively, the peace officer may indicate on the citation that the arrested person shall appear at the arresting agency to be booked, or to be fingerprinted prior to the date the arrested person appears in court, and subsequently released on a promise to appear.<sup>26</sup>

If a peace officer makes an arrest without a warrant, it is subject to a probable cause determination. The Fourth Amendment of the U.S. Constitution requires that arrests, with or without a warrant, must be based on "probable cause."<sup>27</sup> Probable cause refers to that level of certainty required before a person may be arrested and held in custody. Without it, a defendant must be released.

Probable cause to arrest means more than a mere suspicion. An arresting officer must be "aware of facts that would lead a person of ordinary care to suspect that the person arrested has committed a crime."<sup>28</sup> The determination of probable cause in cases when arrests are not supported by a warrant is made by a magistrate or judge, either through an on-call procedure after arrest or at

arraignment. In either case, a probable cause determination must be made within 48 hours of an arrest.<sup>29</sup> This time limit satisfies the federal constitutional requirement that the determination of probable cause for a warrantless arrest must be made without delay or unnecessary detention.<sup>30</sup>

**Pretrial Release by the Court.** The Penal Code provides four options for pretrial release: release on bail; release on own recognizance (OR); release under supervision; and pretrial diversion.

1. *Release on Bail.* As noted above, the California Constitution forbids the release of defendants charged with capital offenses or serious violent and sexual offenses when accompanied by the requisite judicial findings in a hearing held in open court.<sup>31</sup> Defendants accused of other felony or misdemeanor offenses “may be admitted to bail before conviction, as a matter of right,”<sup>32</sup> subject to other procedural requirements in the Penal Code.<sup>33</sup>

In cases involving these “bailable” offenses, the court must consider the following factors in setting or denying bail:

- Protection of the public and the victim as the primary considerations;<sup>34</sup>
- Safety of the victim’s family;<sup>35</sup>
- Seriousness of the charges;<sup>36</sup>
- The criminal record of the defendant; and<sup>37</sup>
- The probability that the defendant will appear in subsequent proceedings in the case.<sup>38</sup>

In assessing the last factor, judges may consider the same circumstances that are weighed in determining whether or not to release a defendant on his or her own recognizance: ties to the community, record of employment, length of residence, family status and record of appearing in past cases.<sup>39</sup>

Bail is generally set by a judge or magistrate at the first court appearance of an arrested person. If there is no appearance, bail must be set in the amount set forth in the arrest warrant. If there is no warrant, the amount of bail must be fixed in accordance with a uniform countywide bail schedule, which every Superior Court in the state is required by statute to establish.<sup>40</sup> There is a great deal of discrepancy among bail amounts (as fixed by local uniform bail schedules) for the same crimes by county. For example, the bail amount for a violation of Health and Safety Code § 11378 (methamphetamine possession for sale) ranges from \$5,000 to \$120,000 across California counties.<sup>41</sup>

The countywide bail schedule must account for the seriousness of the offense charged, and allow for any aggravating factors set forth in a complaint.<sup>42</sup> The Penal Code limits which individuals can be released on bail in an amount other than what is specified in the uniform bail schedule without a hearing. It specifically excludes individuals charged with serious felonies as defined in Penal Code § 1192.7(c), violent felonies as defined in Penal Code § 667.5(c), witness tampering and domestic violence.<sup>43</sup>

For instance, if the defendant is arrested for a felony offense or for a misdemeanor violation of a domestic violence restraining order, and there is reasonable cause to believe that the standard bail amount is insufficient to ensure the defendant’s appearance or to protect a victim, a peace officer may request that the court order a higher bail amount.<sup>44</sup> Judges frequently honor these requests, particularly when the offense is aggravated or involves violence.<sup>45</sup> A defendant charged

with certain offenses may also apply to the court for an order of release on bail lower than the standard amount in the uniform bail schedule or for release on his own recognizance.<sup>46</sup>

The vast majority of orders setting bail are entered before disposition of the case. However, after conviction for a non-capital offense, a defendant who has applied for probation or who has appealed may be admitted to bail as a matter of right, pending application for probation or on appeal from judgments imposing a fine or imprisonment.<sup>47</sup> The defendant may be admitted to bail as a matter of discretion in all other cases.<sup>48</sup> The court must order release on bail pending appeal if the defendant demonstrates, by clear and convincing evidence, that he is not likely to flee and that he does not pose a danger to another person or to the community. The defendant must also demonstrate that the appeal raises a substantial legal question not designed merely to delay.<sup>49</sup>

Judges are authorized to impose conditions of release on bail that they consider appropriate.<sup>50</sup> However, they must be reasonable and related to public safety. In *In re McSherry*, the Court of Appeal held that the trial court judge had the authority to impose a condition on the defendant's bail pending appeal of his conviction for multiple counts of misdemeanor school loitering. The condition, requiring the defendant to stay at least 200 yards from places where children congregate, was held to be reasonable and related to public safety in light of the defendant's prior criminal history of child sexual abuse.<sup>51</sup>

The termination of the obligation of bail is known as exoneration. When bail is exonerated, the defendant or surety is no longer liable for the bail amount and is entitled to the return of the deposit. Exoneration typically occurs when the criminal proceedings are terminated in a defendant's favor, such as a dismissal or acquittal, or upon conviction.<sup>52</sup>

If a defendant, without sufficient excuse, fails to appear for a court proceeding in the case, the court must declare a forfeiture of bail or a deposit in lieu of bail, and the defendant or surety is no longer eligible for a return of their deposit.<sup>53</sup> However, the Penal Code requires the court to vacate forfeiture and exonerate bail on its own motion when the defendant is arrested or surrendered into custody within a 180-day period. It is important to note that exoneration of bail can occur when the defendant is released, or when he or she is taken into custody.<sup>54</sup>

2. *Release on Own Recognizance.* Article I, § 12(c) of the state constitution provides that “[a] person may be released on his or her own recognizance in the court’s discretion.” The Penal Code provides more detailed standards and procedures:

Any person who has been arrested for, or charged with, an offense other than a capital offense may be released on his or her own recognizance by a court or magistrate who could release a defendant from custody upon the defendant giving bail, including a defendant arrested upon an out-of-county warrant. A defendant who is in custody and is arraigned on a complaint alleging an offense which is a misdemeanor... shall be entitled to an own recognizance release unless the court makes a finding on the record ... that an own recognizance release will compromise public safety or will not reasonably assure the appearance of the defendant as required. Public safety shall be the primary consideration. If the court makes one of those findings, the court shall then set bail and specify the conditions, if any, whereunder the defendant shall be released.<sup>55</sup>

The Penal Code requires a hearing for OR releases in cases involving serious offenses and individuals with particular criminal histories. The Penal Code also places limits on who can be released on OR without a hearing, specifically excluding persons on felony probation or parole, and persons who have failed to appear in court three or more times within the preceding three years and who are arrested for any felony offense, theft, burglary or any offense in which the defendant was armed or used a firearm.<sup>56</sup> These individuals are eligible for OR release pursuant to a hearing.

At the hearing, the judge must consider evidence of the defendant's potential danger to others and the defendant's ties to the community.<sup>57</sup> The court may also request the preparation of an investigative report recommending whether the defendant should be released on his own recognizance.<sup>58</sup> A defendant released on his own recognizance must agree to appear at all times ordered by the court, comply with all reasonable conditions imposed by the court, not depart the state without leave and waive extradition if he is apprehended outside of California.<sup>59</sup>

*3. Release Under Supervision.* In the face of increasing pressure on county criminal justice systems and jails, the use of court-ordered supervised release as a condition of OR release has gained increasing prominence among the policy options available to local public officials and policymakers. Defendants are often under the supervision of a pretrial services agent, and the supervision is generally accompanied by other conditions such as drug and alcohol testing. Pretrial services staff are also responsible to report on a defendant's compliance with these conditions to the judge who ordered them.<sup>60</sup>

Conditions of pretrial release are authorized by Penal Code § 1318(a)(2). That section authorizes imposition of "reasonable conditions" on a defendant's own recognizance release. The California Supreme Court has interpreted Penal Code § 1318(a)(2) to permit a trial court to impose conditions relating to the furtherance of public safety, including conditions that relate to ensuring subsequent court appearances. In *In re York*, the California Supreme Court held that a trial court can require a defendant charged with a felony drug offense to submit to random drug testing and warrantless search and seizure as conditions of release.<sup>61</sup> Although the conditions did not relate directly to the likelihood that the defendant will attend future court hearings, according to the Court, they clearly related to the prevention and detection of further crime and, therefore, to the safety of the public.<sup>62</sup> Participation in a residential drug treatment program has also been upheld as a valid condition of release.<sup>63</sup>

*4. Pretrial Diversion.* Pretrial diversion refers to the process of postponing prosecution of an offense, temporarily or permanently, at any point in the judicial process, from charging until adjudication.<sup>64</sup> If the defendant performs satisfactorily in a diversion program, criminal charges may be dismissed at the end of the diversion period.<sup>65</sup>

Diversion programs are specifically authorized by statute for persons charged with drug offenses,<sup>66</sup> child abuse and neglect,<sup>67</sup> traffic violations,<sup>68</sup> certain misdemeanors<sup>69</sup> and writing bad checks.<sup>70</sup> Persons with drug abuse problems and cognitive developmental disabilities are also eligible for diversion.<sup>71</sup>

#### IV. Alignment of Legal and Evidence-Based Pretrial Systems with California Law

County officials and other local policymakers who are interested in establishing evidence-based pretrial systems understandably need to know if the programs will be lawful in California. The short answer is “yes;” existing law permits the establishment of pretrial services functions based on the following three reasons.

1) The California Constitution and Penal Code have, for decades, expressly authorized release on own recognizance, which is fundamental to pretrial justice. More recently, releasing defendants under various forms of supervision has become more common.

2) Many evidence-based practices are already widely used in California, including release on own recognizance, release under supervision, validated risk assessment, court date reminders and electronic monitoring. Indeed, according to a recent survey, 42 counties now utilize a pretrial risk assessment, and 38 offer some type of pretrial supervision.

Pretrial services programs, sometimes stand-alone agencies and other times administered by county probation or sheriff’s departments, serve vital functions throughout the pretrial court process. Pretrial staff can:

- Supervise defendants whose release is conditioned upon submitting to court-ordered supervision;
- Conduct interviews to determine whether a defendant is eligible for OR release and whether the defendant’s bail should be modified;
- Administer a standardized screening process for all defendants;
- Verify information collected during interviews;
- Conduct background investigations;
- Assess defendants’ needs for services;
- Present the court with risk assessments using validated risk assessment tools;
- Conduct follow-up reviews for defendants who did not satisfy the original conditions for release; and
- Make recommendations to the court regarding release.<sup>72</sup>

3) Recent legislation has expressly recognized the importance of evidence-based practices in the criminal justice system in general, and the pretrial release process in particular. Penal Code § 17.5, part of the state’s 2011 Public Safety Realignment legislation, declares that “California must reinvest its criminal justice resources to support community-based corrections programs and evidence-based practices,”<sup>73</sup> that individuals with low-level felonies should be referred to programs “which are strengthened through ... evidence-based practices,”<sup>74</sup> and that savings generated through “justice reinvestment ... can be reinvestment in evidence-based strategies.”<sup>75</sup> In June 2013, the State Assembly amended controlling code sections to expressly authorize judges’ use of investigative reports and risk assessment in setting, reducing or denying bail, in addition to the use of investigative reports and risk assessments to determine whether a defendant should be released on OR.<sup>76</sup>

#### V. Legal Limitations on Evidence-Based Pretrial Systems Under California Law

County officials and other local policymakers interested in establishing evidence-based pretrial systems also need to know if current California law limits the use of any evidence-based practices,

and whether legislative changes are required to utilize them. There are legal limitations to some specific practices, while others are clearly allowed under current statute.

**Delegated Release Authority.** There may be legal limitations on the use of some evidence-based practices that are permissible in other jurisdictions. Across the country, a number of trial courts have delegated some of their release authority to specialized pretrial staff, usually with the assistance of a validated pretrial risk assessment tool and frequently limited to releases in cases involving less serious criminal charges.<sup>77</sup> In 2009, approximately 14% of pretrial programs across the country had delegated authority to release certain categories of pretrial defendants, either by statute or by court order.<sup>78</sup>

Under California law governing bail, judges set bail in accordance with constitutional and statutory standards.<sup>79</sup> Judges can also refer to presumptive bail amounts in uniform countywide bail schedules without regard to an individual case or defendant.<sup>80</sup> Arrested persons may also be released from jail without judicial action by posting the bail specified in a uniform bail schedule before criminal charges are filed.<sup>81</sup>

The authority for delegated release is generally explicitly granted by the court within specific parameters. Because the authority to allow release lies with the court – and because the court has the authority to override any delegated release decisions – it can be interpreted as within the intent of the statute. The Release Standards and Recommended Procedures of the California Association of Pretrial Services provide for the delegation of pretrial release authority:

The authority to release a defendant who has been arrested and charged with a crime resides with the court. The court should not delegate this authority to a pretrial services agency, program, or officer without specific guidelines, consistent with the laws and rules concerning judicial authority in the jurisdiction that govern the exercise of delegated authority. Pretrial programs with delegated release authority should have detailed specific guidelines for making the release decisions provided or approved by the court.<sup>82</sup>

Based on a strict reading of the Penal Code, delegation of judicial release authority to program staff arguably violates Penal Code § 1275(a), which appears to place the discretion to fix bail exclusively with judges, and expressly sets forth the factors that judges must consider. The delegation of release authority to pretrial staff may also conflict with these statutes when a staff member increases the amount of bail above the presumptive amount in the county's uniform bail schedule without a court order supported by the staff member's affidavit. Program staff are usually employed by probation or sheriff's departments and, therefore, are considered law enforcement. Penal Code §§ 1269c and 1270.1(e) require law enforcement to submit an affidavit and obtain a court order in order to increase bail above the presumptive amount in a uniform countywide bail schedule.

A delegation of authority to pretrial staff to grant OR release and set conditions for that release also may arguably be inconsistent with Article I, § 12 of the California Constitution and Penal Code § 1270, which both indicate that the discretion to grant OR release lies with the court. In addition, Penal Code § 1318 refers to orders of the court in setting forth the contents the defendant's "signed release agreement," which is a prerequisite to OR release.

It is important to note, however, that there is nothing in California statute that prohibits pretrial staff from conducting assessments and making recommendations to the court regarding bail decisions. It is the delegation of release authority that is questionable under current law.

**Bond Schedules.** While this paper has made clear that there are many ways California counties can implement legal and evidence-based pretrial practices within current requirements for county bail schedules, adhering strictly to a money-based bail system without evidence-based practices is inconsistent with research – and has not been proven to achieve legally established goals of bail decision-making. Though California judges have the authority to set bail conditions outside of the bond schedule (because the bond amount is the presumptive term of release at booking and first appearance), courts should understand that there is no relationship between money bond and an individualized determination of risk of failure to appear and pretrial misconduct.<sup>83</sup> Alternately, California law contains other provisions to hold defendants accountable beyond financial terms of release. In the event that a defendant commits a new crime or fails to appear for court, any new crimes committed by an accused person and/or a failure to appear can be charged as separate crimes under current law.<sup>84</sup>

## [V. Conclusion](#)

Current California law offers significant opportunities for counties to pursue legal and evidence-based practices, and to tailor those practices to fit local needs. Despite certain legal limitations, many California counties have implemented robust pretrial strategies within the confines of current statute, including the use of cite and release, risk assessment, pretrial supervision and diversion. However, as the movement toward legal and evidence-based practices continues, county and state policymakers have the opportunity to bridge the divide between what research documents as effective and what current California law allows.

### [About Californians for Safety and Justice](#)

Californians for Safety and Justice is a nonprofit project of the Tides Center working to replace prison and justice system waste with common sense solutions that create safe neighborhoods and save public dollars. As part of that work, our Local Safety Solutions Project supports innovative efforts by counties to increase safety and reduce costs by providing toolkits, trainings, peer-to-peer learning and collaborative partnerships.

### [About the Crime & Justice Institute \(CJI\) at Community Resources for Justice \(CRJ\)](#)

The Crime & Justice Institute (CJI) at Community Resources for Justice (CRJ) works with local, state and national criminal justice organizations to improve public safety and the delivery of justice throughout the country. With a reputation built over many decades for innovative thinking, unbiased issue analysis, and a client-centered approach, CJI can help organizations achieve better, more cost-effective results for the communities they serve.

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<sup>1</sup> Search of Jail Profile Survey, Board of State and Community Corrections, Sacramento, CA (Aug. 13, 2015) (search for “facility”, “2011” from “Jan” to “Dec”, all agencies, “Unsentenced males” and “Unsentenced females”).

<sup>2</sup> Search of Jail Profile Survey, Board of State and Community Corrections, Sacramento, CA (Aug. 13, 2015) (search for “facility”, “2014” from “Jan” to “Dec”, all agencies, “Unsentenced males” and “Unsentenced females”).

<sup>3</sup> The California Legislative Assembly, in the context of probation supervision under Public Safety Realignment, has defined evidence-based practices as “... policies, procedures, programs and practices demonstrated by scientific research to reduce recidivism.” CAL. PENAL CODE § 17.5.

<sup>4</sup> PRETRIAL JUSTICE INSTITUTE, RATIONAL AND TRANSPARENT BAIL DECISION MAKING: MOVING FROM A CASH-BASED TO A RISK-BASED PROCESS 27-33 (2012).

<sup>5</sup> See AMERICAN BAR ASSOCIATION, A.B.A. STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE (3rd ed. 2007); ARTHUR W. PEPIN, 2012-2013 POLICY PAPER: EVIDENCE-BASED PRETRIAL RELEASE (Conference of State Court Administrators 2013); SUSAN WEINSTEIN, LAW ENFORCEMENT’S LEADERSHIP ROLE IN THE PRETRIAL RELEASE AND DETENTION PROCESS (International Association of Chiefs of Police 2011).

<sup>6</sup> See e.g., Standards 10-4.2(f) and (g):

The pretrial services investigation should include factors related to assessing the defendant’s risk of flight or of threat to the safety of the community or any person [and] should focus on assembling reliable and objective information ... organized according to an explicit, objective and consistent policy for evaluating risk and identifying appropriate release options.

AMERICAN BAR ASSOCIATION, *supra* note 5, at 11; and Standard 2.1 in CALIFORNIA ASSOCIATION OF PRETRIAL SERVICES, RELEASE STANDARDS AND RECOMMENDED PROCEDURES 8 (Feb. 2007)(“[T]he [pretrial services] agency or program collects and presents information needed for the court’s release/detention decision prior to first appearance [and] makes assessments of risks posed by the defendant ... .”); see *also* Standard 3.4 in NATIONAL ASSOCIATION OF PRETRIAL SERVICES AGENCIES, STANDARDS ON PRETRIAL RELEASE 60 (3rd ed. Oct. 2004).

<sup>7</sup> SARAH LAWRENCE, MANAGING JAIL POPULATIONS TO ENHANCE PUBLIC SAFETY: ASSESSING AND MANAGING RISK IN THE POST-REALIGNMENT ERA 9 (Stanford Criminal Justice Center 2013).

<sup>8</sup> 342 U.S. 1, 5 (citation omitted). The Eighth Amendment’s provision regarding bail and the Supreme Court’s holdings interpreting that provision were made applicable to the states in *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971).

<sup>9</sup> Arthur W. Pepin, 2012-2013 Policy Paper: Evidence-Based Pretrial Release 3 (Conference of State Court Administrators 2013)

<sup>10</sup> Chief Justice William Rehnquist in *U.S. v. Salerno*, 481 U.S. 739, 755 (1987).

<sup>11</sup> PARTNERSHIP FOR COMMUNITY EXCELLENCE, PRETRIAL DETENTION & COMMUNITY SUPERVISION: BEST PRACTICES AND RESOURCES FOR CALIFORNIA COUNTIES 4 (California Forward 2012).

<sup>12</sup> See e.g., Lori S. Stuart, *Securing or Preventing Out-of-Custody Status*, in CALIFORNIA CRIMINAL LAW AND PROCEDURE AND PRACTICE §5 (California CEB 2013); The Rutter Group, *Bail*, in CALIFORNIA CRIMINAL PROCEDURE §4 (Thomson Reuters Dec. 2013).

<sup>13</sup> *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (citations omitted).

<sup>14</sup> *Id.*

<sup>15</sup> *U.S. v. Salerno*, 481 U.S. 739, 746-749 (1987).

<sup>16</sup> See *id.* at 752-55.

<sup>17</sup> See 342 U.S. 1, 5 (1951) (citations omitted). The Eighth Amendment’s provision regarding bail and the Supreme Court’s holdings interpreting that provision were made applicable to the states in *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971).

<sup>18</sup> CAL. CONST. art. I, § 12.

<sup>19</sup> *In re Nordin*, 143 Cal.3d 538, 544 (1983).

<sup>20</sup> *People v. Norman*, 252 Cal.2d 381, 411 (1967).

<sup>21</sup> See CAL. PENAL CODE §§ 1268-1309.

<sup>22</sup> See CAL. PENAL CODE § 853.5.

<sup>23</sup> CAL. PENAL CODE §§ 853.6(a) and 853.6(h).

<sup>24</sup> CAL. PENAL CODE § 853.5.

<sup>25</sup> CAL. PENAL CODE § 853.85 states “This chapter shall not apply in any case where a person is arrested for an offense declared to be a felony.”

<sup>26</sup> CAL. PENAL CODE § 853.6(g).

<sup>27</sup> *Wong Sun v. U.S.*, 371 U.S. 471, 479 (1963).

- <sup>28</sup> People v. Price, 1 Cal.4th 324, 420 (1991).
- <sup>29</sup> Delays beyond 48 hours can only be justified by extraordinary circumstances and may never be longer than seven days. CAL. PENAL CODE § 825.
- <sup>30</sup> County of Riverside v. Mc Laughlin, 500 U.S. 44, 45 (1991).
- <sup>31</sup> CAL. CONST. art. I, § 12; CAL. PENAL CODE §§ 1270.1, 1270.5, and 1275.
- <sup>32</sup> CAL. PENAL CODE § 1271.
- <sup>33</sup> See e.g., CAL. PENAL CODE §1275.
- <sup>34</sup> CAL. CONST. art. I, §§ 28(b)(3) and (f)(3); CAL. PENAL CODE § 1275(a).
- <sup>35</sup> *Id.*
- <sup>36</sup> CAL. CONST. art. I, §§ 12 and 28(f)(3); CAL. PENAL CODE § 1275(a).
- <sup>37</sup> *Id.*
- <sup>38</sup> *Id.*
- <sup>39</sup> Van Atta v. Scott, 27 Cal.3d 424, 438 (1980).
- <sup>40</sup> CAL. PENAL CODE § 1269b(b).
- <sup>41</sup> SONYA M. TAFOYA, ASSESSING THE IMPACT OF BAIL ON CALIFORNIA'S JAIL POPULATION 17 (Public Policy Institute of California 2013).
- <sup>42</sup> CAL. PENAL CODE § 1269b(e).
- <sup>43</sup> CAL. PENAL CODE § 1270.1(a).
- <sup>44</sup> CAL. PENAL CODE § 1269c.
- <sup>45</sup> See CAL. PENAL CODE §§ 985, 1269c, 1270.1, 1270.2 and 1273.
- <sup>46</sup> CAL. PENAL CODE § 1269c.
- <sup>47</sup> CAL. PENAL CODE § 1272(1) and (2).
- <sup>48</sup> CAL. PENAL CODE § 1272(3).
- <sup>49</sup> CAL. PENAL CODE § 1272.1.
- <sup>50</sup> CAL. PENAL CODE § 1269c.
- <sup>51</sup> 112 Cal.4th 856, 860-863 (2003).
- <sup>52</sup> CAL. PENAL CODE §§ 1384, 1195, and 1166.
- <sup>53</sup> CAL. PENAL CODE §§ 1305(a) and 1269b(h).
- <sup>54</sup> CAL. PENAL CODE §§ 1305(c)(1) and (2).
- <sup>55</sup> CAL. PENAL CODE § 1270(a).
- <sup>56</sup> CAL. PENAL CODE § 1319.5(b).
- <sup>57</sup> CAL. PENAL CODE § 1270.1(c).
- <sup>58</sup> CAL. PENAL CODE § 1318.1.
- <sup>59</sup> CAL. PENAL CODE § 1318a.
- <sup>60</sup> See Standard 2.1 in CALIFORNIA ASSOCIATION OF PRETRIAL SERVICES, *supra* note 6, at 8 (“[T]he [pretrial services] agency or program collects and presents information needed for the court’s release/detention decision prior to first appearance [and] makes assessments of risks posed by the defendant ... .”); see also Standard 3.4 in NATIONAL ASSOCIATION OF PRETRIAL SERVICES AGENCIES, *supra* note 6, at 60. CAL. PENAL CODE § 1203.018 also authorizes correctional administrators to release inmates who have been held for at least 60 days post arraignment (or 30 days post-arraignment on a misdemeanor) on electronic monitoring. Those individuals are still under the authority of the jail.
- <sup>61</sup> In re York, 9 Cal.4th 1133 (1995).
- <sup>62</sup> *Id.* at 1145.
- <sup>63</sup> People v Sylvestry, 112 Cal.3d Supp. 1, 7 (1980).
- <sup>64</sup> CAL. PENAL CODE § 1001.1.
- <sup>65</sup> CAL. PENAL CODE § 1001.7.
- <sup>66</sup> CAL. PENAL CODE § 1000.8

<sup>67</sup> CAL. PENAL CODE §§ 1000.12 and 1001.70.

<sup>68</sup> CAL. PENAL CODE § 1001.40.

<sup>69</sup> CAL. PENAL CODE § 1001.51.

<sup>70</sup> CAL. PENAL CODE § 1001.60.

<sup>71</sup> CAL. PENAL CODE §§ 1000 and 1001.21.

<sup>72</sup> See Standards 2.1 and 2.3 in CALIFORNIA ASSOCIATION OF PRETRIAL SERVICES, *supra* note 6, at 8-9.

<sup>73</sup> CAL. PENAL CODE § 17.5(a)(4).

<sup>74</sup> CAL. PENAL CODE § 17.5(a)(5).

<sup>75</sup> “Justice Reinvestment” is defined as “a data-driven approach to reduce corrections and related criminal justice spending and reinvest savings in strategies designed to increase public safety. CAL. PENAL CODE § 17.5(a)(7).

<sup>76</sup> CAL. PENAL CODE § 1318.1(b).

<sup>77</sup> See *e.g.*, Standard 1.9 in NATIONAL ASSOCIATION OF PRETRIAL SERVICES AGENCIES, *supra* note 6, at 23 (recommending a limitation on delegating judicial release authority to cases involving “relatively minor charges”).

<sup>78</sup> PRETRIAL JUSTICE INSTITUTE, 2009 SURVEY OF PRETRIAL SERVICES PROGRAMS 22 (Aug. 11, 2009).

<sup>79</sup> See CAL. PENAL CODE § 1275a. The judge must consider the protection of the public, the seriousness of the offense charged, the defendant’s criminal record and his or her probability of appearing in subsequent court proceedings.

<sup>80</sup> CAL. PENAL CODE § 1269b(c) and (d).

<sup>81</sup> CAL. PENAL CODE § 1269b(b).

<sup>82</sup> Standard 2.3 in CALIFORNIA ASSOCIATION OF PRETRIAL SERVICES, *supra* note 6, at 9.

<sup>83</sup> See *e.g.*, PRETRIAL JUSTICE INSTITUTE, RATIONAL AND TRANSPARENT BAIL DECISION MAKING: MOVING FROM A CASH-BASED TO A RISK-BASED PROCESS 16 (Mar 2012).

<sup>84</sup> See CAL. PENAL CODE § 1320(a) and (b) and 1320.5.