

RESOLUTION 16-07-2017 (REVISED)

DIGEST

Bail Reform: Establish County Pretrial Services Agencies

Adds Penal Code section 1267 and amends sections 1270, 1270.1 and 1275 to augment California's monetary bail system with county pretrial services agencies.

RESOLUTIONS COMMITTEE ANALYSIS

History:

No similar resolutions found.

Reasons:

This resolution adds Penal Code section 1267 and amends sections 1270, 1270.1 and 1275 to augment California's monetary bail system with county pretrial services agencies.

California's system of pretrial release is primarily based on the setting and posting of monetary bail. Currently, each county maintains a bail schedule that assigns a monetary value to the charges and allegations against a defendant. At arraignment, the court may modify the bail amount or release a defendant on his or her own recognizance, after taking into consideration any risk to public safety, the defendant's prior criminal history, and the likelihood of nonappearance. First-time defendants who are charged with non-violent misdemeanors or low-grade felonies are often released with a promise to appear without having to post bail. Defendants often use bail bonds companies, which will post bail on the defendant's behalf after charging a premium, usually 10 percent. At the end of the case, any posted bail is exonerated (returned) to whomever posted it. However, it may be forfeited to the court if a defendant who is out on bond fails to appear and remains a fugitive.

This resolution does not actually eliminate the monetary bail system, but instead calls for each county to create a pretrial services agency, which would largely take over the responsibility of determining whether a defendant should be released.

This resolution is similar to S.B. No. 10 (Hertzberg), which is currently in the Committee on Appropriations and A.B. No. 42 (Bonta) which failed in the Assembly, both of which would accomplish the same objective sought by this resolution.

Discussions are ongoing between the Governor, the Chief Justice, legislators, and other criminal justice stakeholders regarding bail reform. See *Governor Brown, Chief Justice Cantil-Sakauye, Senator Hertzberg and Assemblymember Bonta Commit to Work Together on Reforms to California's Bail System*, Office of Governor (August 25, 2017), available at <https://www.gov.ca.gov/news.php?id=19917>. This resolution adds the CCBA to the list of organizations urging bail reform.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to add Penal Code section 1267 and amend sections 1270, 1270.1 and 1275 to read as follows:

1 § 1267

2 a) Each county shall establish a Pretrial Services Agency. For the purposes of this
3 section, two or more counties can form a Regional Pretrial Services Agency. Each Pretrial
4 Services Agencies shall follow the Standards and Procedures developed by the California
5 Association of Pretrial Services.

6 b) Each Pretrial Services Agency shall:

7 i) supervise all persons released on non-surety release, including release on personal
8 recognizance, personal bond, non-financial conditions, or cash deposit with the court ii) make
9 reasonable effort to provide notice for each required court appearance to each person released by
10 the court

11 ii) serve as a coordinator for other agencies and organizations, which serve or may be
12 eligible to serve as custodians for persons released under supervision and advise the judicial
13 officer as to the eligibility, availability, and capacity of such agencies and organizations

14 iii) assist persons released in securing employment or necessary medical or social
15 services

16 iv) inform the Judicial Officer and the District Attorney of any failure to comply with
17 pretrial release conditions or the arrest of persons released under its supervision and recommend
18 modifications of release conditions when appropriate

19 v) prepare pretrial detention reports, in cooperation with jurisdictional law enforcement
20 agencies and the District Attorney.

21 c) Each Pretrial Services Agency Defendant Supervision Program shall provide services
22 for: general supervision, high-risk supervision, and supervision for special populations.

23 i) “High-Risk Supervision” may include, but is not limited to: weekly contact, drug
24 testing, and/or location monitoring, complying with a curfew, home confinement, and residing in
25 a community-based halfway house.

26 ii) “Supervision for Special Populations” may include, but is not limited to: specialized
27 services for defendants with mental illness, mild mental retardation, and/or co-occurring
28 substance use and mental illness.

29 d) Each Pretrial Services Agency shall use a standardized risk assessment instrument that
30 examines relevant defendant data in order to identify the most appropriate supervision levels for
31 released defendants.

32 i) The Pretrial Services Agency shall recommend the least restrictive non-financial
33 release conditions needed to protect the community and reasonably assure the defendant’s return
34 to court.

35 ii) After receiving representations of the prosecutor, representations of the defense
36 attorney, and considering the Pretrial Services Agency’s release recommendation, a Judicial
37 Officer shall decide whether to release the defendant prior to trial. If the defendant is to be
38 released, the Judicial Officer shall decide which level of supervision is appropriate.

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§ 1270

(a) Any person who has been arrested for, or charged with, an offense other than a capital offense may be referred to the county or regional pretrial services agency for release ~~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, and a defendant who appears before a court or magistrate upon an out-of-county warrant arising out of a case involving only misdemeanors, shall be entitled to a referral to the county or regional pretrial services agency for an own recognizance ~~release~~ unless the court makes a finding on the record, in accordance with Section 1275, that a supervised 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 finds that the defendant is a threat to public safety ~~makes one of those findings~~, the court shall then set bail and specify the conditions, if any, whereunder the defendant shall be released.

(b) Article 9 (commencing with Section 1318) shall apply to any person who is released pursuant to this section.

§ 1270.1

(a) Except as provided in subdivision (e), before any person who is arrested for any of the following crimes may be released on bail in an amount that is either more or less than the amount contained in the schedule of bail for the offense, or may be released on his or her own recognizance, a hearing shall be held in open court before the magistrate or judge:

(1) A serious felony, as defined in subdivision (c) of Section 1192.7, or a violent felony, as defined in subdivision (c) of Section 667.5, but not including a violation of subdivision (a) of Section 460 (residential burglary).

(2) A violation of Section 136.1 where punishment is imposed pursuant to subdivision (c) of Section 136.1, Section 262, 273.5, or 422 where the offense is punished as a felony, or Section 646.9.

(3) A violation of paragraph (1) of subdivision (e) of Section 243.

(4) A violation of Section 273.6 if the detained person made threats to kill or harm, has engaged in violence against, or has gone to the residence or workplace of, the protected party.

(b) The prosecuting attorney and defense attorney shall be given a two-court-day written notice and an opportunity to be heard on the matter. If the detained person does not have counsel, the court shall appoint counsel for purposes of this section only. The hearing required by this section shall be held within the time period prescribed in Section 825.

(c) At the hearing, the court shall consider evidence of past court appearances of the detained person, the maximum potential sentence that could be imposed, and the danger that may be posed to other persons if the detained person is released. In making the determination whether to release the detained person on his or her own recognizance, the court shall consider the potential danger to other persons, including threats that have been made by the detained person and any past acts of violence. The court shall also consider any evidence offered by the detained person regarding his or her ties to the community ~~and his or her ability to post bond.~~

(d) If the judge or magistrate sets the bail in an amount that is either more or less than the amount contained in the schedule of bail for the offense, the judge or magistrate shall state the reasons for that decision and shall address the issue of threats made against the victim or witness,

85 if they were made, in the record. This statement shall be included in the record.

86 (e) Notwithstanding subdivision (a), a judge or magistrate, pursuant to Section 1269c,
87 may, with respect to a bailable felony offense or a misdemeanor offense of violating a domestic
88 violence order, increase bail to an amount exceeding that set forth in the bail schedule without a
89 hearing, provided an oral or written declaration of facts justifying the increase is presented under
90 penalty of perjury by a sworn peace officer.

91
92 § 1275

93 (a) (1) In setting, reducing, or denying bail, a judge or magistrate shall take into
94 consideration the protection of the public, the seriousness of the offense charged, the previous
95 criminal record of the defendant, and the probability of his or her appearing at trial or at a
96 hearing of the case. The public safety shall be the primary consideration. In setting bail, a judge
97 or magistrate may consider factors such as the information included in a report prepared in
98 accordance with Section 1318.1.

99 (2) In considering the seriousness of the offense charged, a judge or magistrate shall
100 include consideration of the alleged injury to the victim, and alleged threats to the victim or a
101 witness to the crime charged, and the alleged use of a firearm or other deadly weapon in the
102 commission of the crime charged, ~~and the alleged use or possession of controlled substances by~~
103 ~~the defendant.~~

104 (b) In considering offenses wherein a violation of Chapter 6 (commencing with Section
105 11350) of Division 10 of the Health and Safety Code is alleged, a judge or magistrate shall refer
106 the defendant to the county or regional pretrial services agency, “High-Risk Supervision”
107 program or “Supervision for Special Populations” program ~~consider the following: (1) the~~
108 ~~alleged amounts of controlled substances involved in the commission of the offense, and (2)~~
109 ~~whether the defendant is currently released on bail for an alleged violation of Chapter 6~~
110 ~~(commencing with Section 11350) of Division 10 of the Health and Safety Code.~~

111 (c) Before a court reduces bail to below the amount established by the bail schedule
112 approved for the county, in accordance with subdivisions (b) and (c) of Section 1269b, for a
113 person charged with a serious felony, as defined in subdivision (c) of Section 1192.7, or a violent
114 felony, as defined in subdivision (c) of Section 667.5, the court shall make a finding of unusual
115 circumstances and shall set forth those facts on the record. For purposes of this subdivision,
116 “unusual circumstances” does not include the fact that the defendant has made all prior court
117 appearances or has not committed any new offenses.

(Proposed new language underlined; language to be deleted stricken)

PROPOSERS: Bar Association of San Francisco

STATEMENT OF REASONS

The Problem: Currently, before trial, if a court finds a person to be a danger to public safety or is considered a flight risk, then the court will set a bail amount. If the person can pay 10 percent of the bail amount, then the person can be released until the next court date. If the person cannot pay the 10 percent, then the person remains in jail. For example, the median bail in California is \$50,000, and the amount required for release is \$5,000. According to the U.S. Federal Reserve,

46 percent of Americans don't have \$400 to pay for an emergency expense and they would have to sell something or borrow money to cover the cost.

From Senator Robert Hertzberg's Press Release about SB 10 (2017):

The presumption of innocence is one of the foundations of the American justice system, but every day thousands of Californians who are awaiting trial are forced to be in jail because they don't have the money to post bail... The current cash bail system is the modern equivalent of debtor's prison.

In California, sixty-three percent of the people in county jails are awaiting trial or sentencing, amounting to 46,000 people per day.

The Solution: Because Washington, D.C.'s Pretrial Services Agency (PSA) provides defendant supervision according to each non-violent defendant's needs, then it has a highly-successful no-money bail system. For example, in Washington, D.C., 85 percent of defendants are released without bail, 90 percent of them show up for their court dates, and 91 percent of them are "law-abiding" while free. As a result, Washington, D.C. saves \$398 million a year in incarceration costs.

See http://www.cleveland.com/metro/index.ssf/2016/05/how_dc_court_reforms_save_398.html. As a result, Washington D.C.'s system is a model that should be followed by the fifty states.

SB 10 (Hertzberg) and AB 42 (Bonta), with identical language, attempt to provide Bail Reform for misdemeanor offenses only. The bills would require the court to consider whether there is any "condition or combination of conditions" for the defendant to meet that would "reasonably ensure public safety and the appearance of the defendant as required." This places the burden on the defendant to promise to supervise himself or herself, if released. SB 10 and AB 42 are not sufficient because they do not include felony offenses and because successful release programs, such as Washington, D.C.'s program, include a formal "defendant supervision" program. This resolution copies Washington, D.C.'s three-tiered structure for providing general supervision, high-risk supervision, and supervision for special populations.

According to the Board of State and Community Corrections, the average daily cost for pretrial detention runs over \$100 per inmate:

http://www.bscc.ca.gov/downloads/Avg_Cost_II_III_12.pdf. And according to the Pretrial Justice Institute, it costs ninety percent less to supervise a defendant in the community than it costs to keep the defendant in jail. Bail reform is not about creating an experiment by releasing more defendants and simply hoping that they will return for trial. Instead, successful bail reform will require each California county to administer a pretrial services agency, as Washington, D.C. has already demonstrated.

IMPACT STATEMENT

The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION

SB 10 (Hertzberg, 2017), Bail: Pretrial Release (identical language to AB 42).

AB 42 (Bonta, 2017), Bail Reform (identical language to SB 10).

See SB 163 (Hertzberg, 2015) Bail Reform (died in Committee).

California Association of Pretrial Services, Release Standards and Recommended Procedures (Feb. 2007).

ABA Standards for Criminal Justice, Third Edition, Pretrial Release, 2007.

Code of the District of Columbia, § 23-1321, Release Prior to Trial; § 23-1322, Detention Prior to Trial, and § 23-1323, Detention of Addict.

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