DATE: February 18, 2016, Special Meeting
TIME: 3:30 PM
PLACE: Board of Supervisors' Chambers
       County Government Center – 70 West Hedding Street, 1st floor
       San Jose, CA 95110

AGENDA

In compliance with the Americans with Disabilities Act, those requiring accommodations in this meeting should notify the Clerk of the Santa Clara County Bail and Release Work Group no less than 24 hours prior to the meeting at (408) 299-5001, or TDD (408) 993-8272.

Please note: To contact the Commission and/or to inspect any disclosable public records related to an open session item on a regular meeting agenda and distributed by the County to all or a majority of the Board of Supervisors (or any other commission, or board or committee) less than 72 hours prior to that meeting, visit our website at http://www.sccgov.org or contact the Clerk at (408) 299-5001 or 70 W. Hedding Street, 10th Floor, East Wing, San Jose, CA 95110, during normal business hours.

COMMUTE ALTERNATIVES: The Board of Supervisors encourages the use of commute alternatives including public transit, bicycles, carpooling, and hybrid vehicles.

For public transit trip planning information, contact the VTA Customer Service Department at 408-321-2300 Monday through Friday between the hours of 6:00 a.m. to 7:00 p.m., and on Saturday from 7:30 a.m. to 4:00 p.m. Schedule information is also available on the web at www.vta.org.

Bicycle parking racks are available in the James McEntee, Sr., Plaza in front of the County Government Center building. If this Board or Commission does not meet in the County Government Center please contact VTA for related routes.

Opening

1. Call to Order/Roll Call.

2. Public Comment.

   This item is reserved for persons desiring to address the Work Group on any matter not on the agenda. Speakers are limited to the following: three minutes if the Chairperson or designee determines that five or fewer persons wish to address the Work Group; two minutes if the Chairperson or designee determines that between six and fourteen persons wish to address the Work Group; and one minute if the Chairperson or designee determines that fifteen or more persons wish to address the Work Group.

   The law does not permit Committee action or extended discussion on any items not on the agenda except under special circumstances. Statements that require a response may be placed on the agenda for the next regular meeting of the Committee.

3. Approve consent calendar and changes to the Committee's Agenda.

   The consent calendar consists of matters that are routine in nature, requiring only acceptance of written reports by the Work Group. Items of specific interest to the Work Group members may be removed from the consent calendar for questions or discussion. If you wish to discuss any of the consent calendar items, please request that the item be removed from the consent calendar by completing a Request to Speak form and placing it in the container at the front of the room.
Special Agenda - Items for Discussion

   Possible action:
   a. Receive report relating to draft BRWG Report.
   b. Direct the Office of the County Executive and the Office of the County Counsel to further develop the research and/or policy recommendations in the BRWG Report.

5. Consider recommendations relating to collaboration with students at Santa Clara University School of Law (Santa Clara Law). (Office of the County Executive) (ID# 80065)
   Possible action:
   a. Receive report and proposed research questions relating to collaboration with students enrolled in a bail policy course at Santa Clara Law.
   b. Provide feedback regarding the proposed research questions to be answered by the law students in collaboration with the Office of the County Counsel and the Office of the County Executive for presentation to the Bail and Release Work Group.

Consent Calendar

6. Approve minutes of the October 5, 2015 Special Meeting.

Adjourn

7. Adjourn to the next special meeting on a date and time to be determined, in Board of Supervisors' Chambers, County Government Center, 70 West Hedding Street, San Jose, California.
DATE: February 18, 2016

TO: Santa Clara County Bail and Release Work Group

FROM: James R. Williams, Deputy County Executive
Matthew Fisk, Senior Management Analyst

SUBJECT: Bail and Release Work Group First Draft Report

RECOMMENDED ACTION
Consider recommendations relating to Bail and Release Work Group (BRWG) Report. (Office of the County Executive)

Possible action:
   a. Receive report relating to draft BRWG Report.
   b. Direct the Office of the County Executive and the Office of the County Counsel to further develop the research and/or policy recommendations in the BRWG Report.

FISCAL IMPLICATIONS
There are no fiscal implications associated with receiving this report.

REASONS FOR RECOMMENDATION
The BRWG’s core mission is to research and analyze the County’s current policies and practices for incarceration, bail, screening, and supervision of criminal defendants, including defendants in domestic violence cases; review state and national policies and identify best practices; and develop consensus on a set of recommendations for the Board of Supervisors on proposed policy and process reforms in the County. To accomplish this mission, the BRWG will present a research-based report and set of policy recommendations – the BRWG Report – to the Board of Supervisors in June 2016.

The attached BRWG Report – which is still in draft form – was prepared by staff from the Office of the County Executive and the Office of the County Counsel, after obtaining data and information from each of the County’s public safety and justice departments, County partners, and state and national experts on pretrial justice. The draft is designed to encourage
discussion among the BRWG members and progress toward a Report reflecting the BRWG’s consensus research findings and recommendations. After the BRWG reaches consensus, the BRWG Report will be presented to the Board of Supervisors for review and approval of the recommendations.

A large appendix of supporting data and other materials has been developed and is currently being refined. Following the BRWG’s review at subsequent meetings during the spring of 2016, the appendix will be finalized for submission with the completed BRWG Report to the Board of Supervisors. The supporting appendices contain data and statistical information from County departments, information on pretrial practices in other jurisdictions, and a wealth of other materials.

Upon the Board of Supervisors’ approval and adoption, the BRWG’s recommendations will be implemented by County departments and/or presented as recommendations to non-County partners such as the Superior Court. As directed by the Board of Supervisors, future reports on the implementation of the recommendations may be presented to the Public Safety and Justice Committee. A Program Manager from the Office of the County Executive will serve as the coordinator for implementation of the BRWG’s recommendations.

**CHILD IMPACT**
The recommended action would have no/neutral impact on children and youth.

**SENIOR IMPACT**
The recommended action would have no/neutral impact on seniors.

**SUSTAINABILITY IMPLICATIONS**
The recommended action would have no/neutral sustainability implications.

**BACKGROUND**
The County Board of Supervisors created the BRWG in February 2014 to research, analyze, and recommend improvements to current policies and practices for incarceration, bail, screening, and supervision of criminal defendants, including those in domestic violence cases. Since its commencement, the BRWG has held several public meetings to discuss its research and recommendations regarding pretrial adjudication practices. The group’s term is currently set to expire on June 30, 2016, after it presents its recommendations to the Board of Supervisors.
CONSEQUENCES OF NEGATIVE ACTION

The BRWG would not make progress toward producing a consensus research report and set of recommendations to present to the Board of Supervisors.

ATTACHMENTS:

- DRAFT Bail and Release Report for 2-18 (PDF)
County of Santa Clara
Bail and Release Work Group

Consensus Report on Optimal Pretrial Justice
**Bail and Release Work Group Members**

Cindy Chavez, Board of Supervisors  
James Williams, Deputy County Executive  
Orry Korb, County Counsel  
Jeffrey Rosen, District Attorney  
Laurie Smith, Sheriff  
Molly O’Neal, Public Defender  
John Hirokawa, Chief of Correction  
Laura Garnette, Chief of Probation  
Garry Herceg, Director of Pretrial Services  
Greg Iturria, County Budget Director  
Dennis Burns, Palo Alto Chief of Police, Santa Clara County Police Chiefs’ Association  
Hon. Risë Pichon, Presiding Judge, Superior Court  
David Yamasaki, Court Executive Officer, Superior Court  
Angie Junck, Immigrant Legal Resource Center  
Raj Jayadev, Silicon Valley De-Bug  
Zakia Afrin, Maitri  
Teresa Castellanos, County Office of Human Relations  
Kathleen Krenek, Next Door Solutions to Domestic Violence  
Jerry Schwarz, American Civil Liberties Union, Mid-Peninsula Chapter

**Staff**

Office of the County Executive:  
- Matthew Fisk, Program Manager

Office of the County Counsel:  
- Greta Hansen, Lead Deputy County Counsel  
- Kavita Narayan, Deputy County Counsel  
- Laura Trice, Deputy County Counsel
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, 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

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1 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](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.
States – approximately 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 findings and recommendations in this report may be adapted and applied to communities nationwide.

I) Executive Summary of Recommendations

The recommendations contained in this report are aimed at capitalizing on existing County reform efforts to further the goal of advancing pretrial justice; improving access and efficiency in and the pretrial process; eliminating or modifying processes that may have discriminatory impacts and/or negative impacts on public safety; accounting for special considerations in domestic violence cases; and developing the County’s ability to self-audit and make ongoing improvements to its pretrial justice system in the future.

First, existing reform efforts – including the Blue Ribbon Commission on Improving Custody Operations, several system-wide reforms in the behavioral health system of care, and updates to the Superior Court’s data system and the County’s Criminal Justice Information Control (CJIC) system – offer the opportunity to incorporate pretrial justice-focused reforms without devoting a significant amount of additional resources.

Second, the BRWG has identified several access and inefficiency issues in the pretrial process that can readily be improved. These include: delays in arraignments for individuals arrested during weekends or other busy periods; inability to make bail payments at the jail using a credit card, requiring defendants to find a means of obtaining cash or property-based collateral; lack of regular re-reviews of pretrial assessments in appropriate cases to determine whether changed circumstances may now justify a defendant’s release; and lack of a consistent process to ensure that defendant counsel promptly receives all necessary case information. This report recommends concrete solutions to each of these access and inefficiency issues, and recommends state-level legislative advocacy on certain issues.

Third, the report recommends that the County decline to provide pretrial supervision to defendants who are also ordered to pay money bail, in order to avoid a practice that appears to benefit the commercial bail bonds industry, but not defendants, at significant cost to the County. The BRWG also recommends that the County adopt an ordinance prohibiting the establishment, expansion, or relocation of commercial bail bonds businesses in the unincorporated County, as it
did in 2012 for payday lending and check-cashing businesses; and that the County explore the establishment of a County- or nonprofit-run alternative to commercial bail bonds.

Fourth, to address special considerations in cases involving domestic violence-related charges, the BRWG recommends that the County and its law enforcement partners explore the use of domestic violence-specific risk assessment tools to predict and mitigate the risk of ongoing danger in these cases, and incorporate pretrial justice-related considerations into existing County efforts to prevent and address domestic violence.

Finally, to ensure the County and its pretrial justice partners have comprehensive information to enable them to monitor the success of their pretrial practices and make continual improvements, the BRWG recommends that the County collect data on performance outcomes and share that data with the Superior Court and other partners.

II) BRWG Methodology and Summary of Data Gathered

A) Scope of Work and Objectives of the BRWG

The Bail and Release Work Group 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 detainers 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 disparities in pretrial detention, and other potential disparities in the pretrial process. To explore and address these issues, the Board of Supervisors created the Bail and Release Work Group (BRWG) and appointed the following members:

• Cindy Chavez, Santa Clara County Supervisor – Chair
• James Williams, Deputy County Executive – Vice Chair
• Orry Korb, County Counsel
• Jeffrey Rosen, District Attorney
• Laurie Smith, Sheriff
• Molly O’Neal, Public Defender
• John Hirokawa, Chief of Correction
• Laura Garnette, Chief of Probation
• Garry Herceg, Director of Pretrial Services
• Greg Iturria, County Budget Director (formerly Mary Stephens)
• Dennis Burns, Palo Alto Chief of Police, representing the Santa Clara County Police Chiefs’ Association
• Hon. Risé Pichon, Presiding Judge of the Superior Court
• David Yamasaki, Court Executive Officer of the Superior Court
• Angie Junck, Immigrant Legal Resource Center – Immigrant Rights representative
• Raj Jayadev, Silicon Valley De-Bug – Community Safety representative
• Zakia Afrin, Maitri – Domestic Violence Advocacy representative
• Teresa Castellanos, Office of Human Relations – Civil Rights and Immigrant Rights representative
• Kathleen Krenek, Next Door Solutions to Domestic Violence – Domestic Violence Advocacy representative
• Jerry Schwarz, American Civil Liberties Union – Civil Rights representative

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 related support from 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, 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. 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 Manager Kathy Sanchez was 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 Schmacke, Pretrial Justice Committee Chair of the American Bar Association; Cherise Fanno Burdeens, Michael R. Jones, Timothy Murray, and John Clark of the Pretrial Justice Institute; Alec Karakatsanis of Equal Justice Under Law (a non-profit civil rights organization that has filed lawsuits challenging the money bail system); Marie VanNostrand, Ph.D., Justice Project Manager of Luminosity Inc. Data Driven Justice Solutions; and Mike Judnick of The Change Companies (a national publisher and provider of needs and risk assessment, supervision and treatment materials and literature). 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 Valets, 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.


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 a list of relevant research materials is provided in Appendix __.

III) Glossary of Terms

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

2 The County has undertaken a project to replace CJIC with newer technology that can better satisfy the County’s needs.

3 See http://www.pretrial.org/glossary-terms/.
(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.

**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, domestic violence counseling, 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.

**IV) 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. 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.”

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 to obtain a defendant’s release from custody prior to trial or other resolution of his or her criminal charges. Bail essentially operates as a financial guarantee that the defendant will appear for all required court hearings. “Bail set at a figure higher than an amount reasonably calculated to

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6 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 COSCA Report, Glossary.
7 PPIC report, p.7.
fulfill this purpose is ‘excessive’ under the Eighth Amendment.”

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; instead the individual is immediately released and the officer submits 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. 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 violations of protective orders involving domestic violence, may not be eligible for citation and release. 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.

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

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8 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).
10 Id. § 853.6(a)(2)-(3).
11 Id. § 853.6(i).
fingerprinted and photo-processed, information about the arrest will be entered into criminal 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 not required to book arrestees who are cited and released, principally those with scheduled bail amounts of $5,000 or less. The County currently lacks clear and consistent policies regarding booking of these individuals. Because many individuals who obtain jail citations are not booked, information about their arrests may not be included in criminal justice databases, which are relied upon by prosecutors and courts nationwide.

Virtually all arrestees who are not eligible for cite and release; do not post bail with the arresting agency; and 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. Arrestees who do not post bail will remain in custody during this time period and appear in court for a bail hearing within 72 business hours.

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 nolo contendere (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. The offenses for which bail is permitted are known as “bailable” offenses. 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. 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, and do not include consideration of any individual factors relating to a defendant’s risks of failing to appear in court and/or engaging

12 Id. § 853.6 (a)(1), (g).
14 Please refer to Appendix __ for a timeline discussing the historical evolution of bail.
15 Cal. Penal Code § 1269b(c).
16 Id. § 1269b(e).
in new criminal activity if released from custody prior to trial.

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. 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.

A judge’s discretion to set a bail amount based on these general considerations is constrained in cases involving serious or violent felonies; 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.”

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. 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).

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, domestic violence counseling, or compliance with restraining orders. In some cases, a judge may require a defendant both to post bail and to comply with conditions of Supervised OR.

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17 Id. §§ 1269b(b), 1275.
18 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. Cal. Penal Code § 1275(a)(2), (b).
19 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.
20 Cal. Penal Code § 1275(c).
22 Cal. Penal Code, § 1270(a).
23 County of Santa Clara, Office of Pretrial Services, Office of Pretrial Services Overview <https://www.sccgov.org/sites/pretrial/AboutUs/Overview/Pages/Overview.aspx>.
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 conditions, while those who are seeking OR or Supervised OR in lieu of posting bail must wait for a judge to either review their case in chambers, which occurs around the clock with a turnaround time of several hours, or hold an initial court appearance within 72 business hours.

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. 24

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.25 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.26 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 allow for special 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.27 In setting the bail amount and determining whether to order OR, the court is required to consider any alleged threats made by the defendant and any past acts of violence.28 Outside the domestic violence context, these procedures also apply to serious and violent felony offenses.29

B) Posting Bail/Bail Bonds

A defendant who has been granted bail may deposit the full amount directly with the court (or, as discussed above, with the arresting agency or jail, which will remit the bail amount

26 Id. § 1269c.
27 Id. § 1270.1, subds. (a)-(b).
28 Id. § 1270.1, subds. (c)-(d).
29 Id. § 1270.1, subd. (a)(1).
to the court) in cash, federal or state bonds, or real estate equity equivalent to the cash amount. The deposit, less any court costs, fees, fines, or other criminal penalties, will be returned if the defendant attends all required court hearings, but forfeited if he or she fails to appear.

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 of no more than 10% of that amount, plus 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. Bail bond agents typically require clients to offer collateral equivalent to the remaining 90% 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. If the defendant appears for all mandated court hearings, the bail bond is exonerated (i.e., terminated) by the court and the defendant’s collateral is returned by the bail agent, but the 10% fee 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, and the bail agent may be held responsible for paying the court the full bail amount. 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

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. 24.5% of the total number of defendants booked into the jail were released on money bail, while 10.5% were released on their own recognizance with no money bail requirement. 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.scs court.org/documents/criminal_bail.pdf. As of the date this report was prepared, the 2016 bail schedule was not yet available.

30 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.
31 Cal. Penal Code § 1269b(h), 1305.
33 The bail forfeiture process is described below, in footnote 107.
35 Macarthur Foundation Data Capacity Appendix; PTS slideshow.
According to an analysis conducted by the Public Policy Institute of California, the scheduled bail amounts across 12 counties accounting for approximately two-thirds of California’s population increased by approximately 22% from 2002 to 2012. This figure does not include Santa Clara County, so it is unclear whether the County’s 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).

2. County Participants in the Pretrial Process

A number of different 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. Although these agencies strive to coordinate many of their policies, there is currently no uniform policy or guidance to help law enforcement officers determine when to issue a summons rather than making an arrest, when to issue a cite and release rather than bringing an arrestee to the County Jail, and when it is appropriate to book an arrestee who is brought to the jail but eligible for cite and release.

Law enforcement officers may also play an important role in collecting information related to an arrestee’s likelihood to reoffend if released, particularly in the domestic violence context. However, information collected by law enforcement officers may not always be made available 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 for

36 PPIC report, p. 9.
37 PPIC report, p. 15.
38 See Section (VI)(C)(3) for more information about domestic violence risk assessments conducted by law enforcement officers.
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 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. 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. They also handle 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 72 business hours. Currently, the Superior Court holds arraignments Monday through Friday. Due to backlogs that occur as a result of weekend arrests, defendants arrested between Friday and Sunday 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 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.” 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. 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. 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.

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 domestic violence counseling or 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 FTE’s.

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41 Pretrial services officers began interviewing misdemeanants approximately six months ago. Until that time, they interviewed only felony defendants.
42 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.
43 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.
V) Criticisms of Requiring Money Bail and of the Private Bail Bonds Industry

In recent years, numerous associations and organizations have called for reform of the money bail system. Their criticisms 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.” 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.” 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.

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.” 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. Those who have financial

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49 COSCA Policy Paper at p. 4.
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.”

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. 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.

There is a growing consensus that many individuals who are detained solely based on 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 family lives – without risk of endangering their fellow citizens or fleeing from justice.” 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.”

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

Historically, money bail was viewed solely as a means of securing a defendant’s appearance at all court dates. This purpose is reflected in the basic structure of bail statutes, in California and elsewhere: bail is forfeited if a defendant fails to appear for a scheduled court date, and not for any other reason, including the defendant’s non-compliance with conditions of release and/or commission of additional criminal offenses. Yet despite the longstanding use of bail for this purpose, there is little evidence to suggest that the imposition of money bail

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51 COSCA Policy Paper at pp. 4-5.
52 Id. at p. 4.
56 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 is court is lawfully required, or to surrender following affirmance of judgment on appeal).
improves rates of failure to appear (commonly known as “FTA”). In fact, 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. 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.” 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.

There is even less reason to believe that money bail adequately protects public safety or prevents misconduct during pretrial release. California law mandates that public safety and the safety of the victim “shall be the primary considerations” in setting bail. 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.

As Judge Karnow points out, a “central flaw” in setting bail to protect public safety “is that defendants do not forfeit bail when they commit a new offense; they forfeit bail only when they do not appear at a hearing.” Thus, bail provides no direct incentive to refrain from criminal conduct during release. 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.”

Moreover, even where the bail amount reflects factors that better estimate risks of

57 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> (hereafter Law Enforcement’s Leadership Role). A 2007 report from the Bureau of Justice Statistics (BJS) provided data suggesting that defendants released on surety bond or full cash bond had a predicted failure-to-appear rate of 20% compared to 24% for release on recognizance and conditional release, but also specifying limitations of the data. (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>.) After commercial bail bond companies used this data to claim that evidence conclusively demonstrated that surety bonds are the most effective means of pretrial release, 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.” (Bureau of Justice Statistics, Data Advisory: State Court Processing Statistics Data Limitations (2010) <http://www.bjs.gov/content/pub/pdf/scpsdl_da.pdf>; see also Pretrial Justice Institute, Fact Sheet 2008: Understanding the Findings from the Bureau of Justice Statistics Report, “Pretrial Release of Felony Defendants in State Court” (2008) <http://www.pretrial.org/download/pji-reports/PJI%20Response%20to%20the%20BJS%20SCPS%20report%202008.pdf>.)


59 The Price of Freedom at p. 52.


61 See Karnow at p. 2; ABA Standards at p. 111.

62 Karnow at p. 20.

63 Karnow at p. 14; see also Rational and Transparent Bail Decision Making at p. 4.
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 direct relationship between pretrial misbehavior or criminal activity during pretrial release and bail forfeiture; and the low risk of forfeiture in cases involving bail bonds. In addition, for the very poor and the very wealthy, no bail amount is likely to be meaningful. For many of these reasons, the American Bar Association has taken the position that bail should never be used to address public safety concerns.

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%. 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. In California, average bail amounts rose by an inflation-adjusted 22% between 2002 and 2012.

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). Nationwide, unconvicted inmates account for 62.8% of the total jail population. The rate is

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64 Karnow at pp. 2, 19-28.
65 Karnow at p. 25; Pretrial Detention and Jail Capacity at p.5.
66 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.
69 Public Policy Institute of California, Assessing the Impact of Bail on California’s Jail Population at pp. 9-10 (2013) <http://www.ppic.org/content/pubs/report/R_613STR.pdf>. 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.
71 Id., table 3, p. 4.
similar in California (62%), but higher in Santa Clara County (73%). Based on data from November 2014 to November 2015, the County’s Office of Pretrial Services estimates that 64-70% of defendants admitted into County jails are detained throughout the pretrial period, while only 30-36% are released.

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. 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. 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. Although precise data are not available for Santa Clara County, the Office of Pretrial Services estimates that, excluding defendants detained on administrative holds (e.g., due to a warrant for another jurisdiction), well over 90% of unsentenced defendants in County jails are detained because they could not make bail.

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, county governments spent a total of approximately $9 billion annually to detain defendants prior to trial. Studies have found that supervising defendants in the community through a pretrial services program is substantially less costly to counties than keeping defendants in jail prior to trial. In Santa Clara County, the Office of Pretrial Services 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). In 2014-15, average detention

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74 Felony Defendants in Large Urban Counties, 2009 – Statistical Tables, supra, at p. 15 & fig. 13.
76 Id., fig. 4 & p. 7.
lengths within 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. Moreover, as discussed in more detail below, while the County’s increased reliance on OR and Supervised OR has resulted in release of greater numbers of defendants, rates of failure to appear, non-compliance with conditions of release, and pretrial re-arrest have remained steady.

The social costs of pretrial detention are also substantial. 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. Further, because jails in the United States are intended for short-term confinement of those awaiting trial or those convicted of minor offenses, they generally lack inmate-oriented programming that may exist in prisons, which are 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 programs than from time in jail.”

The disruption caused by pretrial detention can also lead to increased reliance on the social safety net and may increase the likelihood that a defendant will reoffend upon release. One recent study of defendants in Kentucky found an association between even short periods of pretrial detention (as little as 2-3 days) and the short- and long-term likelihood that an individual will reoffend upon release – particularly for defendants categorized as low-risk by pretrial services. The Pretrial Justice Institute has also focused on the effects of even short 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.”

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

80 Id.
81 COSCA Policy Paper, supra at p. 4; ABA Standards, supra, at p. 33; County Jails at a Crossroads at p. 2.
82 National Symposium on Pretrial Justice, Summary Report of Proceedings, Remarks from the Honorable Eric H. Holder, Jr., Attorney General, U.S. Department of Justice at 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.
83 COSCA Policy Paper at p. 4; County Jails at a Crossroads at p. 2.
85 Pretrial Justice Institute, 3DaysCount <http://projects.pretrial.org/3dayscount/>.
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.\textsuperscript{86} 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.\textsuperscript{87} Detention may also interfere with a defendant’s ability to work with counsel to develop a defense and to demonstrate that he is a productive member of society who deserves a more lenient sentence.\textsuperscript{88}

B) The For-Profit Bail Bonds Industry

The problems with the money bail system are magnified when defendants are forced to turn to the private bail bond industry to post bail – as is the case for the vast majority of defendants released on bail in Santa Clara County.\textsuperscript{89} 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.”\textsuperscript{90} 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.\textsuperscript{91} 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 private 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.”\textsuperscript{92}

Unlike judges, private bail agents are under no obligation to make release determinations


\textsuperscript{88} CJA Research Brief No. 18, supra, at p.7; ABA Standards, supra, at p. 32.

\textsuperscript{89} 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.

\textsuperscript{90} Justice Policy Institute, For Better or For Profit: How the Bail Bonding Industry Stands in the Way of Fair and Effective Pretrial Justice at p. 11 (2012) \textsuperscript{<http://www.justicepolicy.org/uploads/justicepolicy/documents/for_better_or_for_profit_.pdf> (hereafter For Better or For Profit).

\textsuperscript{91} ABA Standards at pp. 44-45 & p. 30, fn. 3.

\textsuperscript{92} Pannell v. U.S. (D.C. Cir. 1963) 320 F.2d 698, 699 (Wright, J., concurring).
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. 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 secret, without any record of the reasons for these decisions.” A bail agent may refuse to post a bond “for any reason or no reason at all.”

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 private 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. (Indeed, critics have noted that, from the bail agent’s perspective, rearrests while on bond simply create opportunities for “repeat customers.”) Instead, a bail agent’s motivation is largely economic. Since bail agents typically 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. 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.

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 virtually the entire bail amount if he makes all of his court appearances. But defendants who cannot afford to pay their full bail amount upfront must pay a non-refundable fee to secure the services of a bail agent – which will never be recovered, even if the defendant makes all court appearances and/or charges are dismissed. In other words, lower-income defendants who make all court appearances are forced to purchase their freedom for 10% of their bail amount, whereas higher-income individuals who make all court appearances are not required to do so.

The economic consequences for lower-income communities are compounded because bail agents typically require collateral to support a bail bond contract. Often, 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” incurred because of the FTA, including costs assessed by the court for proceedings resulting from the

94 ABA Standards at p. 45.
95 For Better or For Profit at p. 15.
96 For Better or For Profit at pp. 17, 19; ABA Standards at p. 45.
97 Rational and Transparent Bail Decision Making at p. 8.
98 For Better or For Profit at p. 15; Rational and Transparent Bail Decision Making at p. 6.
99 Rational and Transparent Bail Decision Making at p. 6.
FTA. 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. If neither the defendant nor the co-signer is able to satisfy these costs with cash, the bail agent may seize and liquidate the collateral of the co-signer. 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.

Many defendants simply cannot afford to purchase a bail agent’s services. Even if a defendant can afford to pay the 10% non-refundable fee, 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.” 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. Moreover, some reports suggest that the court system has compensated for the commercial bail bond industry by increasing bail amounts – that is, bail may be set at a higher amount on the assumption that defendants need only pay 10% of the bail amount to secure release. 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 10% 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 forfeiture laws that often work in bail agents’ favor. 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 bond from a bail bond agent. The procedures required to collect on a forfeiture are so burdensome and costly that they are often not pursued. As of 2010, an

101 10 Cal. Code Regs. § 2081(e).
102 10 Cal. Code Regs. § 2088.2.
103 For Better or For Profit at p. 15.
104 Public Safety Realignment at pp. 21-22.
105 Baltimore Behind Bars at p. 28.
106 See For Better or For Profit at pp. 15, 26-27, 34-35
107 See Cal. Penal Code §§ 1305(b) (bail agent relieved of obligations if court clerk fails to mail notice of 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_Forge...>
108 For Better or For Profit at p. 35; Cal. Penal Code §§ 1305, 1305.4-1305.6, 1306, 1308. The basic forfeiture process is as follows:
• 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:
estimated $150 million in bail forfeitures had not been collected from California bail bonds companies.\textsuperscript{109} Moreover, 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 and the associated costs and effort.\textsuperscript{110}

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.\textsuperscript{111} 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 appearances.”\textsuperscript{112} 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.\textsuperscript{113}

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

\begin{itemize}
  \item The defendant is arrested, taken to court, or surrendered by a bond agent, bounty hunter, or any other person;
  \item The defendant turns himself in;
  \item The court fails to issue a proper FTA and intent to forfeit notice to all parties within 10 days;
  \item 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;
  \item The court fails to set and properly notice a hearing within 30 days after the 180-day recovery period;
  \item The bond agent shows that the defendant was arrested elsewhere, hospitalized or otherwise indisposed;
  \item The defendant is recovered by warrant arrest (most frequent) and the bond agent shows diligent recovery efforts; or
  \item Any of many other statutory technicalities arises.
\end{itemize}

\textsuperscript{110} For Better or For Profit at p. 15.
\textsuperscript{111} For Better or For Profit at p. 21-22.
\textsuperscript{113} 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.”
first contacted the bail agent to request his services. 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. 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.

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. In Bakersfield, a bail agent and associates were arrested for fraudulently obtaining title 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.

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.” 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, defendants who are unaware of their rights or have a strong need to remain at liberty (to care for a dependent relative, for example) may still be vulnerable to coercion or extortion.

VI) 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


119 For Better or For Profit at p. 42.

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. These tools are designed to supplement judges’ subjective “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. Both the American Bar Association and the National Association of Pretrial Services Agencies recommend the use of objective risk assessment tools to guide judges’ decision-making regarding pretrial release.

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.” 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.

The National Criminal Justice Association Center for Justice Planning has explained that another “goal of pretrial risk assessment is to make risk assessments and subsequent pretrial decisions more consistent across jurisdictions, and to maximize the number of successful pretrial decisions.” To ensure that risk assessment tools remain empirically reliable, they “should be revalidated at regular intervals to ensure they retain their predictive validity” – preferably through studies of their impact in specific jurisdictions because “[w]hat’s predictive in one county is not always found to be predictive in another.”

121 Pretrial Risk Assessment in Virginia at p. 3.
122 LJAF, Developing a National Model for Pretrial Risk Assessment, Appendix C, at 2; Pretrial Risk Assessment in Virginia at p. 3.
125 http://ucjc.utah.edu/wp-content/uploads/PretrialRisk_UpdatedFinalReport_v052013.pdf, p. 2. As discussed below, this has proven to be true in Santa Clara County.
B) County Office of Pretrial Services’ Risk Assessment Tool

In January 2011, the County’s Office of Pretrial Services began using a new pretrial risk assessment tool to assist in predicting defendants’ risk of pretrial failure and making release recommendations to the court.\(^{128}\) The tool was the result of a collaborative effort between the Office Pretrial Services, the Superior Court, the Office of the District Attorney, the Public Defender’s Office, the Department of Correction, and the Sheriff’s Office. The tool was developed in conjunction with the Pretrial Justice Institute based on the Virginia Pretrial Risk Assessment Instrument.\(^{129}\) Pretrial Services Officers use the tool to assess the following information gathered from administrative criminal history records and interviews of individual defendants who have been booked into the County’s Main Jail:

- primary charge type for current arrest (i.e., serious, violent or gang-related felony)
- other pending criminal cases or charges at the time of arrest
- prior criminal history, including two or more prior convictions
- pattern of failing to appear in court (i.e., three or more failures in the past three years, prior convictions for failure to appear or escape, or a discernible pattern of failing to appear)
- history of violence (i.e., two or more prior convictions for crimes defined as violent under the California Penal Code, including physical violence or weapon use)
- length of time at current residence and presence of family in the area
- current employment status or school enrollment
- history of drug abuse
- presence of a victim, and whether the victim is fearful of the defendant’s release\(^{130}\)

The officers enter a defendant’s information into the computerized tool, which generates a risk score of zero to nine points. Scores of zero to two “reflect a low risk level, and equate to recommending release of the defendant, without supervision. Scores of three to four reflect average risk, and equate to recommending release with supervision by the Office of Pretrial Services Supervision Division . . . . Scores of five to six equate to above average risk, and equate to recommending supervised OR or denial of release, in the judgment of the Jail Division Officer based on the circumstances of the defendant and the case. Scores of seven or more are high risk, and should be denied OR Supervised OR.”\(^{131}\)

In 2012, the Pretrial Justice Institute published a report validating the effectiveness of

\(^{128}\) [Link to website]
\(^{129}\) The State of Virginia implemented the Virginia Pretrial Risk Assessment Instrument (VPRAI) statewide in 2003-2004. The tool is applied by county pretrial services officers who assess a defendant after his or her arrest and present information to the court at the time of the defendant’s first appearances. See Pretrial Risk Assessment in Virginia, [Link to website], at 8-9.
\(^{130}\) Id. at 36-37. The final factor is an addition to the factors used in the VPRAI. The State of Virginia undertook a study in 2007 to validate the predictive ability of each factor included in the VPRAI, ultimately eliminating one factor – the presence of outstanding warrants unrelated to the defendant’s current arrest – that does not appear in the revised VPRAI or the tool used by the Office of Pretrial Services. See Pretrial Risk Assessment in Virginia at 8-9, 12-13.
\(^{131}\) [Link to website], at 37.
each element contained in the risk assessment tool at predicting pretrial failure risk in Santa Clara County. And 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. 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 2013. After the passage in California of Proposition 47 in 2014, the number of monthly releases 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 failure to appear or new arrest rates.

The Office of Pretrial Services continuously documents and evaluates its own performance through a series of measures recommended by national-level pretrial justice professional associations. According its records for calendar year 2015, pretrial services officers recommended pretrial release in 83% of jail cases and 67% of court cases, following the risk assessment tool’s criteria in making their recommendations approximately 80% of the time and, per departmental policy, overriding the tool’s conclusions in the other 20% of cases. Overall, in jail cases and court cases combined, judges followed pretrial services officers’ release recommendations approximately 75% of the time, and of the released defendants, 93% were successful – i.e., they did not experience any pretrial failures. The judicial non-concurrence number, however, 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.

C) Other Pretrial Risk Assessment Tools

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

A pretrial risk assessment tool that has gained significant traction nationwide is the Public Safety Assessment-Court (PSA-Court) tool, which was developed by the Laura and John Arnold Foundation with the goal of creating “an easy-to-use, data-driven risk assessment [that] could greatly assist judges in determining whether to release or detain defendants.” A key goal for the Arnold Foundation was to create a tool that – unlike the Office of Pretrial Services

132 PJI report at 7.
133 See 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; id. at 40.
135 PTS slideshow.
tool and the federal PTRA – avoided the need to obtain information through defendant interviews, which it found can be “time-consuming and expensive to conduct” and ineffective “when a defendant refuses to cooperate or provides information that cannot be verified.”\(^{137}\) Instead, the tool can be applied directly by judges, or by pretrial services officers where they exist.

The PSA-Court tool predicts the likelihood of three different pretrial risks: the risk that a defendant will commit a new offense while awaiting trial, the risk that he or she will commit a new violent offense, and the risk that he or she will fail to appear. The tool creates a score of one to six for each of these risk categories, with one indicating the lowest risk and six the highest. According to the Arnold Foundation’s researchers, a score of one means a defendant has a 10% likelihood of failing to appear or committing a new crime pretrial, and a 1.3% likelihood of committing a new violent crime. A score of six means a defendant has a 40% likelihood of failing to appear, a 55% likelihood of committing a new crime, and an 11% likelihood of committing a new violent crime.\(^{138}\)

The PSA-Court tool is based on the following factors, all of which can be assessed using administrative data without a need for individual defendant interviews:

- 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 various jurisdictions across 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).\(^{139}\) San Francisco has recently begun pilot implementation of the tool as well.

According to the Arnold Foundation’s website, it is currently “commissioning extensive, third-party research studies on the PSA-Court tool] to measure its impact.”\(^{140}\) The first such study to be published examines the results of the PSA-Court tool during its first six months of implementation in Kentucky. Prior to adopting the PSA-Court tool statewide in 2013, Kentucky had been using an instrument called the Kentucky Pretrial Risk Assessment, which relied on 12

\(^{137}\) Id.
\(^{138}\) Id. at 3-4.
interview and non-interview-based factors. In reviewing the results of the first six months of the PSA-Court tool’s application, Kentucky researchers reviewed more than 55,000 cases in which defendants were released pretrial. The report does not disclose the rates at which defendants were released (and not released) in each specific risk category under the PSA-Court tool, but explains that the percentage of Kentucky defendants released rose from 68% under Kentucky’s old tool to 70% under the PSA-Court tool, while the incidence of new crimes committed pretrial declined from 10% to 8.5% and failure to appear rates remained unchanged. According to the Arnold Foundation’s report, Kentucky has indicated that administration of the PSA-Court tool requires less time per defendant than the prior tool, but the report does not quantify the exact amount of time savings or the associated cost savings.

According to the Arnold Foundation’s report, the PSA-Court tool had no “discriminatory impact on minorities or women” during its first six months of implementation in Kentucky, as shown by the fact that pretrial failure rates for each respective risk category were virtually identical across racial groups and between men and women. The report does not, however, discuss whether release rates were similar across these demographic categories; whether Kentucky’s previous risk assessment tool resulted in any disproportionate racial or gender-related impacts; or whether researchers could identify which feature(s) of the PSA-Court tool were responsible for its non-discriminatory outcomes.

The PSA-Court tool was introduced in Santa Cruz County on July 1, 2014. A letter from the Santa Cruz County Probation Department to its Board of Supervisors dated August 3, 2015 concluded that “the data [we]re still insufficient to complete a preliminary validation study” of the predictive validity of the PSA-Court tool in Santa Cruz, but noted that during a quarter-long sample period, the failure to appear rate for released defendants was 11.4%, the new criminal activity rate was 2.8%, and the new violent criminal activity rate was 0.7%. The letter stated that defendants’ failure rates “increase[d] incrementally as defendants move[] higher on the [risk] scales. This is exactly how the assessment tool is supposed to work.” Importantly, the letter also stated that use of the non-interview-based PSA-Court tool had allowed officers to complete five times as many assessments of pretrial defendants as they had in prior months.

2. Federal Pretrial Services Risk Assessment (PTRA) Tool

The Federal Pretrial Services Risk Assessment (PTRA) tool, which is applied by federal pretrial services officers through investigations and interviews conducted with individual defendants, was implemented in 2009 after a study sponsored by the Office of the Federal Detention Trustee and the Administrative Office of the U.S. Courts found that the number of federal defendants being detained pretrial, regardless of their risk level, had risen significantly

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141 http://www.ncjp.org/pretrial/universal-risk-assessment
143 Id. at 2.
144 Id. at 4-5.
146 Id.
147 Id. at 2-3.
between 2001 and 2007.\textsuperscript{148}

The PTRA includes 11 factors that contribute to a defendant’s overall risk score, plus nine factors that are unscored and are collected for the purpose of future study and ongoing improvement of the screening tool.\textsuperscript{149} 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

The unscored elements relate to alcohol abuse and ties to a foreign country or person(s).\textsuperscript{150}

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.\textsuperscript{151} 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 and Other Efforts to Prevent Domestic Violence During the Pretrial Period

The U.S. Department of Justice has identified the pretrial period as “a high-risk time for domestic violence victims."\textsuperscript{152} To determine which domestic violence defendants are at high risk of reoffending, 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


\textsuperscript{149} Re-Validation at 6.

\textsuperscript{150} Id. at 6-7.

\textsuperscript{151} Id. at 8.

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. 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). The County’s Office of Pretrial Services does not employ a risk 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 that can be considered by judges as they review domestic violence cases. The Bench Guide lists factors that are associated with an increased risk of homicide in domestic violence relationships and is intended as an informational tool that should not substitute for judicial experience, knowledge, skills, and intuition. 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 committing further abuse using the Lethality Assessment for First Responders tool or a similar assessment during investigations of domestic violence offenses. 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.

In addition to risk assessments, some jurisdictions have taken other measures to protect victims of domestic violence during the pretrial period. Such measures include: creating a dedicated domestic violence unit to ensure that defendants understand their release conditions (including any no-contact orders); implementing streamlined procedures for bringing violators into court for immediate sanctions; requiring law enforcement to complete a domestic violence risk assessment that is provided to the court for consideration in release decisions; providing

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154 See, e.g., Integrating Risk Assessment; Overview of Domestic Violence (DV) Risk Assessment Instruments at p. 6; Waypoint Center for Mental Health Care, Ontario Domestic Assault Risk Assessment <http://odara.waypointcentre.ca/>.

155 Integrating Risk Assessment.


intensive pretrial monitoring for high-risk offenders; and increased contacts with and services for victims. At this time, there is little data or analysis available on the success of these measures in preventing recidivism and ensuring the victim’s safety pending trial.

VII) 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.” 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.”

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 will ensure appearance,” and never “to respond to concerns for public safety,” for which this approach is ineffective. 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.” Pretrial detention should be viewed “as an exception to [the] policy favoring release,” to be imposed only “[w]hen no conditions of release are sufficient to accomplish the aims of pretrial release.”

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

159 ABA Standards, standard 10-1.1.
160 Id., standard 10-1.2.
161 Id., standard 10-1.4(a)-(d).
162 Id., standard 10-1.4(e).
163 Id., standard 10-1.6.
164 Id., standard 10-1.2.
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.165

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

- Socioeconomic, racial and ethnic disproportionality: While 27% of the County’s population is Hispanic, 57% of its inmates are Hispanic. And African-Americans make up 2.5% of the County’s population but 14% of its inmates. Similarly, Hispanic and African-American youth are 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.\textsuperscript{166}

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.

\textbf{B) Sample Reforms from Other Jurisdictions}

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

Kentucky was one of the first jurisdictions to eliminate the commercial bail bonds industry entirely, through statewide legislation enacted in 1976.\textsuperscript{167} 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 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 10% of the deposit amount, if the defendant fulfills his or her promise to appear for all scheduled court hearings.\textsuperscript{168}

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.\textsuperscript{169} 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.\textsuperscript{170}

Although Washington, D.C. has not passed legislation abolishing the commercial bail


\textsuperscript{168} \textit{Id.} § 431.530.

\textsuperscript{169} Or. Rev. Stat. § 135.265; Wis. Stat. § 969.12; \textit{Bail Fail} at p. 40.

\textsuperscript{170} Illinois SB0202 \lt{http://ilga.gov/legislation/fulltext.asp?DocName=09900SB0202enr&GA=99&SessionId=88&DocTypeId=SB&LegID=84162&DocNum=202&GAID=13&Session=&print=true}. 
bonds industry, for-profit bail bonds have effectively been eliminated due to the overwhelming use by courts—in 80% of cases—of pretrial release with no financial conditions. The high number of non-financial releases appears to be possible due to a robust Pretrial Services Agency that screens 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.” 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.”

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.

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. 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 amount of the bond if he or she suffers an FTA.

C) Legal Framework for Potential Reforms

1. Regulating the Commercial Bail Bonds Industry

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.

171 Bail Fail at p. 40.
177 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).
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, no bail bonds businesses could be verified as having locations within the County’s unincorporated areas. Thus, County zoning restrictions would have only a minimal business impact, if any, 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.\(^\text{178}\) 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

   o **Court Deposits**

   California law allows defendants to deposit bail directly with the court by cash, credit card, federal or state government bond, or real property bond.\(^\text{179}\) Direct court deposits allow defendants to avoid the problematic practices of for-profit bail bonds businesses. But unlike in Kentucky and three 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.

   o **Public or Non-Profit 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.”\(^\text{180}\)

   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.”\(^\text{181}\) 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;\(^\text{182}\) or the District Attorney’s

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\(^\text{180}\) Cal. Ins. Code § 1810(b).
\(^\text{181}\) 10 Cal. Code Regs., § 2057(a)(1)-(2).
\(^\text{182}\) 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).
Office, Public Defender’s Officer, Probation Department, or any other agency whose personnel are deemed “officers of the court.”\textsuperscript{183} Given the Office of Pretrial Services’ role in providing investigative reports and recommendations to the court,\textsuperscript{184} 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.

VIII) Recommendations

The recommendations outlined below aim to move the County further in the direction of a risk-based pretrial justice model that enhances fairness, safety, and efficacy for all participants. At the outset, it is important to emphasize that the fiscal and staffing implications of these recommendations would need to be considered by individual 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 in Existing Reform Efforts

A number of ongoing reform efforts in the County, including the Blue Ribbon Commission on Improving Custody Operations and numerous updates to the Behavioral Health system, 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. Eliminate the Practice of Ordering Pretrial Supervision and Money Bail

As noted above, in some cases, courts order defendants to pay money bail and comply with pretrial supervision conditions. In such cases, the County bears the cost of providing pretrial supervision, but the defendant receives none of the benefit in terms of avoiding ineffective, financially damaging, and potentially abusive bail bonds practices. When the County provides supervision under these circumstances, it is also assisting the commercial bail bond industry by providing services that significantly reduce the risk that bond will be forfeited. Although ordering money bail plus pretrial supervision is within the discretion of the court, the Board of Supervisors has the authority to decline to provide pretrial supervision of defendants in cases where money bail is also ordered. The unavailability of pretrial supervision for such defendants should stop the practice of ordering supervision and money bail.


\textsuperscript{184} Cal. Penal Code §§ 1275(a)(1), 1318.1.
3. **Adopt 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 County could 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.

4. **Explore Feasibility of Establishing a Public or Non-Profit 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 met 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 non-profit bail bond alternative, and to bring a feasibility report back to the Public Safety and Justice Committee.

   The exploration should include a review of the approach of the Brooklyn Community Bail Fund, which is a nonprofit organization that pays bail amounts up to $2,000 for indigent defendants to keep them out of pretrial custody and returns such bail funds to its account upon court appearance and compliance.

5. **Improve the Promptness of In-Custody Arraignments**

   As noted above, arrestees held in custody must be brought before a judge for arraignment/initial appearance within 72 business hours. Currently, the Superior Court holds arraignments Monday through Friday. Due to backlogs that occur as a result of arrests made on Friday or over the weekend, defendants arrested on those days may remain in custody until the following Wednesday before a judge makes a bail or release determination.

   In order to address the delays in arraigning defendants arrested during weekends or other busy periods, the Board of Supervisors should recommend that the District Attorney, Public Defender, Office of Pretrial Services, DOC, and Superior Court collaborate to establish procedures for improving the promptness and efficiency of the arraignment process to keep the un-arraigned jail population to a minimum. This might include, e.g., instituting daily in-custody arraignments, including on Saturdays and Sundays; instituting arraignments on Saturdays only; requesting that the Superior Court consider increasing the number of judges performing arraignments on Mondays to clear weekend backlogs; etc.
6. Install Credit Card Machines at the County Jail

Defendants posting bail at the County’s jail facilities in lieu of purchasing a bond from a commercial bail bond agent currently do not have the option of paying bail via credit card. The Board of Supervisors should request that DOC look into the feasibility of obtaining and installing a credit card machine at the County’s jail facilities to allow for credit card bail payments.

7. 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, 25 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 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.

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

The Board of Supervisors should direct the Office of the County Executive and the Office of Pretrial Services to coordinate the collection of empirical data on bail performance outcomes – e.g., pretrial failure rates by bail amount, charge type, and release type – and to provide this data to the Superior Court on an annual basis for its consideration in setting the uniform bail schedule and in making individualized bail and release decisions. This empirical data regarding local outcomes would support the Superior Court in carrying out its duty under state law to set a uniform countywide bail schedule and to make bail and release decisions in individual cases.

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 pretrial processes, such as bail amounts, charge types, release type and conditions of release, in making recommendations to the court.

9. 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 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.

10. Ensure that Defense Counsel Receives all Necessary Case-Related Information in Advance of Court Hearings

Although the District Attorney, Public Defender, and other public safety and justice partners recognize that pretrial justice is best achieved when both parties to a criminal prosecution have access to critical relevant information, technical and other obstacles may prevent public defenders from obtaining full and complete case information prior to arraignment, which would allow them to zealously advocate for their clients’ interests at the bail/release stage. The Board of Supervisors should recommend and direct, respectively, that the District Attorney and the Office of Pretrial Services ensure that, wherever possible, the Public Defender is provided with case information as far in advance of arraignment as possible.

11. Explore and Employ Additional Domestic Violence-Specific Risk Assessment Tools

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 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.

Working in collaboration with the DOC, the Police Chiefs’ Association, and the Superior Court, the Office of Pretrial Services should also explore whether Lethality Assessments completed by law enforcement officers during domestic violence investigations should be considered as part of Pretrial Services’ risk screening process and/or by the Court in making bail and release determinations. The Board of Supervisors should recommend that the Police Chiefs’ Association consider whether to obtain and provide victim contact information to the Office of Pretrial Service, so that it may access information directly from alleged victims more frequently rather than having to rely as often on information provided by defendants.

12. Incorporate Pretrial Considerations into County Efforts to Prevent Domestic Violence

The County is currently engaged in various efforts to prevent domestic violence and to ensure that victims of domestic violence receive appropriate services and assistance. As the County continues these efforts, the Office of Pretrial Services should be involved, and consideration should be given to any special risks that alleged victims of domestic violence may face during the pretrial period, as well as to the role of the Office of Pretrial Services in identifying and mitigating such risks through risk assessments, supervision, and other measures.
13. Engage in State Legislative Advocacy on Pretrial Justice Issues

As explained above, the California 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, 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. Because the full cost of bail is prohibitive for many defendants, thereby requiring them to use commercial bail bonds, the County should engage in legislative advocacy at the state level for a change to the Penal Code that would allow for partial bail deposits with the courts.

The County should also engage in state legislative advocacy on the issue of pretrial detention. State 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. The County should advocate for amendments to state law that give judges more discretion to order pretrial detention based on specific public safety-related factors, which would empower judges to make transparent, consistent decisions to detain dangerous defendants rather than attempting to guarantee detention by setting a high bail amount.

14. Apply an Operations Re-Engineering Approach to Increase Efficiency of the Pretrial System

Operations Re-Engineering is the analysis and redesign of workflows to maximize efficiency and optimize business processes. Its goal is to most effectively and efficiently use, save and reinvest resources to allow for ongoing system improvement. While the County strives to improve its services on an ongoing basis, its resources are often consumed by immediate demands as opposed to long-term, capacity-building solutions.

Hiring a professional consultant well-versed in Operations Re-Engineering in the criminal justice context would allow the County to analyze the pretrial justice system, identify bottlenecks or other inefficiencies, and eliminate them to save time and money. One example of a current inefficiency is the bottleneck in arraigning defendants who are arrested during weekends, which creates costs for both defendants and the County as a result of potentially longer-than-necessary pretrial detention. An Operations Re-Engineering professional could identify other issues and develop proposed solutions.
DATE: February 18, 2016
TO: Santa Clara County Bail and Release Work Group
FROM: James R. Williams, Deputy County Executive
       Orry P. Korb, County Counsel
SUBJECT: Bail and Release Work Group Collaboration with Santa Clara University School of Law

RECOMMENDED ACTION
Consider recommendations relating to collaboration with students at Santa Clara University School of Law (Santa Clara Law). (Office of the County Executive)
Possible action:
   a. Receive report and proposed research questions relating to collaboration with students enrolled in a bail policy course at Santa Clara Law.
   b. Provide feedback regarding the proposed research questions to be answered by the law students in collaboration with the Office of the County Counsel and the Office of the County Executive for presentation to the Bail and Release Work Group.

FISCAL IMPLICATIONS
There are no fiscal implications associated with receiving this report.

REASONS FOR RECOMMENDATION
The BRWG is currently engaged in producing a research report and set of policy recommendations for presentation to the Board of Supervisors. This process involves gathering data and other information on policies and practices in the County, in neighboring jurisdictions, and around the country; analyzing the information and data gathered; and reviewing materials on national best practices for bail and release. Because the time and resources of the Office of the County Executive and Office of the County Counsel, which have been conducting research on behalf of the BRWG, are limited, we have enlisted the assistance of law professor David Ball of Santa Clara Law and a cohort of his students to enhance the quality and depth of the research supporting the BRWG’s report and recommendations.
Professor Ball is currently teaching a Criminal Law and Policy Seminar in which nearly 20 law students are researching legal and policy questions specifically related to bail and release in California – such as how money bail impacts defendants and their families; what factors judges take into account in making bail decisions; how bail schedules vary across counties; how the bail forfeiture process works; and how money bail and pretrial supervision services compare in terms of preventing pretrial failure.

In addition to the questions the students are already working on for their course, the BRWG may refer additional questions that are of particular relevance for its research report and policy recommendations to the Board of Supervisors.

A list of proposed questions is provided below for review and discussion:

- What are the bounds of courts’ discretion in the bail context – e.g., could a court refuse to accept a surety bail bond and order a defendant to pay a cash bond? To what extent have courts exercised the extent of their discretion differently in our County versus other counties?
- Does California law allow courts to impose conditional financial payments – i.e., allow defendants to be released on their own recognizance but to remain on the hook to pay a bail amount if they fail to appear or reoffend prior to trial?
- What County or city business licensing requirements, if any, are desirable for the bail bonds industry, and are legally feasible in light of state law preemption?
- What has been the experience of jurisdictions that have become public bail bond providers?
- What has been the experience of communities where a non-profit organization has become a bail bond provider?
- Does California law allow courts to order that defendants be released without bond if their cases have not been resolved within a set period of time – e.g., 30 days?
- What types of data should the County and its partners be collecting and analyzing in order to improve the administration of pretrial justice?
- How do different types of release compare in performance? – i.e., analyze studies and data on appearance rates, technical compliance, and public safety for cash bond, surety bond, and own recognizance bond releases.
- Compare available national and state pretrial risk assessment tools, including the County’s current tool, with a particular focus on the tools’ effect on pretrial failure rates and time/cost of use per individual.
Do the available tools comply with the recommendations of the American Bar Association and National Association of Pretrial Services Agencies?

**CHILD IMPACT**

The recommended action would have no/neutral impact on children and youth.

**SENIOR IMPACT**

The recommended action would have no/neutral impact on seniors.

**SUSTAINABILITY IMPLICATIONS**

The recommended action would have no/neutral sustainability implications.

**BACKGROUND**

The County Board of Supervisors created the BRWG in February 2014 to research and analyze the County’s current policies and practices for incarceration, bail, screening, and supervision of criminal defendants; review state and national policies and identify best practices; and develop consensus on a set of recommendations for the Board of Supervisors on proposed policy and process reforms in the County. The BRWG’s Work Plan includes “an emphasis on Domestic Violence-related cases.”

Since its commencement, the BRWG has held several public meetings to discuss its research and recommendations regarding pretrial adjudication practices. The group’s term is currently set to expire on June 30, 2016, after it presents its recommendations to the Board of Supervisors.

**CONSEQUENCES OF NEGATIVE ACTION**

The BRWG would not receive research assistance from law students who have an interest and background in research topics related to bail policy.
DATE: October 5, 2015, Special Meeting
TIME: 10:00 AM
PLACE: Board of Supervisors' Chambers
County Government Center – 70 West Hedding Street, 1st floor
San Jose, CA 95110

MINUTES

Opening

1. Call to Order/Roll Call.

Chairperson Chavez called the meeting to order at 10:05 a.m.

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<tr>
<th>Attendee Name</th>
<th>Title</th>
<th>Status</th>
<th>Arrived</th>
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<tbody>
<tr>
<td>Jeffrey F. Rosen</td>
<td>District Attorney</td>
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<td>Laurie Smith</td>
<td>Sheriff</td>
<td>Absent</td>
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<td>Laura Garnette</td>
<td>Chief of Probation</td>
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<td>Molly O'Neal</td>
<td>Public Defender</td>
<td>Present</td>
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<tr>
<td>John Hirokawa</td>
<td>Chief of Correction</td>
<td>Present</td>
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<td>Teresa Castellanos</td>
<td>Office of Human Relations</td>
<td>Absent</td>
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<tr>
<td>Orry P. Korb</td>
<td>County Counsel</td>
<td>Present</td>
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<td>James R. Williams</td>
<td>Deputy County Executive</td>
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<td>Garry Herceg</td>
<td>Director of Pre-Trial Services</td>
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<td>Brian Walsh</td>
<td>Presiding Judge</td>
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<tr>
<td>Cindy Chavez</td>
<td>Chairperson</td>
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<td>Dennis Burns</td>
<td>Police Chiefs Association</td>
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<td>David Yamasaki</td>
<td>Court Executive Officer</td>
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<tr>
<td>Zakia Afrin</td>
<td>Domestic Violence Advocacy</td>
<td>Late 10:10 AM</td>
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<tr>
<td>Raj Jayadev</td>
<td>Community Safety</td>
<td>Present</td>
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<tr>
<td>Angie Junck</td>
<td>Immigrants Rights</td>
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<tr>
<td>Kathleen Krenek</td>
<td>Domestic Violence Advocacy</td>
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<tr>
<td>Jerald Schwarz</td>
<td>Civil Rights Representative</td>
<td>Present</td>
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<tr>
<td>Greg Iturria</td>
<td>County Budget Director</td>
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2. Public Comment. (ID# 78509)

One individual addressed the Commission.
3. Approve consent calendar and changes to the Committee's Agenda.

Commissioner Williams noted an amendment to the minutes clarifying the adjournment time as 12:35 p.m.

3 RESULT: APPROVED AS AMENDED [UNANIMOUS]
MOVER: James R. Williams, Deputy County Executive
SECONDER: Orry P. Korb, County Counsel
AYES: Rosen, O'Neal, Hirokawa, Korb, Williams, Herceg, Walsh, Chavez, Burns, Yamasaki, Afrin, Jayadev, Junck, Krenek, Schwarz, Iturria
ABSENT: Smith, Garnette, Castellanos

Special Agenda - Items for Discussion

4. Consider recommendations relating to discussion at the Santa Clara County Board of Supervisors meeting of September 15, 2015, regarding participation in federal immigration enforcement. (Office of the County Counsel and Office of the County Executive) (ID# 78378)

Possible action:

a. Receive proposal from Dave Cortese, President, Board of Supervisors, to amend Board of Supervisors Policy 3.54 (Civil Detainer Policy).

b. Forward comments from the public and Bail and Release Work Group relating to the proposed amended Civil Detainer Policy to the Board of Supervisors for consideration.

Thirteen individuals addressed the Commission.

In response to inquiries by Commissioner Krenek, Commissioner Hirokawa indicated that an individual's country of birth is asked at the time of arrest, and stated that the Department of Correction does not ask or track immigration status. Chairperson Chavez requested that Administration review the anticipated family impact resulting from the County Board of Supervisors President's proposal.

Commissioner Jayadev expressed concern that probable cause as described in the proposal does not require judicial review and requested that the Commission and the Board of Supervisors consider the impact to community trust.

Commissioner Junck inquired about data sharing policies and expressed concerns relating to accountability. Commissioner Schwarz inquired about staffing and procedural changes required to implement the policy.

Commissioner Afrin inquired about the outreach and education plan for implementing authorities.

Commissioner O'Neal suggested that Administration research the impact of the Priority Enforcement Program in other counties and ensure that the proposal provides due process protections. Commissioner O'Neal further requested to review the draft
Memorandum of Understanding (MOU) between the County and Immigration and Customs Enforcement (ICE), and expressed concerns relating to ICE compliance.

Commissioner Rosen highlighted his written response to the proposal adding felony drunk driving, drug trafficking, drug sales and drug manufacturing to the proposal, and recommended that the County independently determine the criteria relating to notifying ICE of individuals that are in custody, without an MOU with ICE.

Commissioner O'Neal stated that ICE agents already have access to the County Criminal Justice Information Control system, and can view release dates without additional notification from the County.

Commissioner Hirokawa noted that penal codes vary by jurisdiction, which will require the County to determine which codes apply to the proposed policy.

Commissioner Williams indicated that Administration will provide a report to the Board of Supervisors for consideration on October 20, 2015, including comments and issues raised from this meeting of the Bail and Release Work Group. Chairperson Chavez requested that Administration provide the report and related materials as soon as possible prior to Board consideration.

The proposal was received as information, and comments from the public and Work Group were forwarded to the Board of Supervisors for consideration on October 20, 2015.

4 RESULT: FORWARDED [15 TO 0] Next: 10/20/2015 9:00 AM
MOVER: James R. Williams, Deputy County Executive
SECONDER: Greg Iturria, County Budget Director
AYES: Rosen, O'Neal, Hirokawa, Korb, Williams, Herceg, Walsh, Chavez, Burns, Afrin, Jayadev, Junck, Krenek, Schwarz, Iturria
ABSTAIN: Yamasaki
ABSENT: Smith, Garnette, Castellanos

Consent Calendar

5. Approve minutes of the August 31, 2015 Special Meeting.

The minutes were approved as amended, clarifying the adjournment time as 12:35 p.m.

5 RESULT: APPROVED AS AMENDED [UNANIMOUS]
MOVER: James R. Williams, Deputy County Executive
SECONDER: Orry P. Korb, County Counsel
AYES: Rosen, O'Neal, Hirokawa, Korb, Williams, Herceg, Walsh, Chavez, Burns, Yamasaki, Afrin, Jayadev, Junck, Krenek, Schwarz, Iturria
ABSENT: Smith, Garnette, Castellanos
6. Adjourn to the next special meeting on a date and time to be determined, in Board of Supervisors' Chambers, County Government Center, 70 West Hedding Street, San Jose. 

On order of Chairperson Chavez, the meeting adjourned at 11:45 a.m.

Respectfully submitted,

Colin Kutch
Deputy Clerk of the Board