



90474

DATE: March 20, 2018

TO: Board of Supervisors

FROM: James R. Williams, County Counsel
Garry Herceg, Deputy County Executive

SUBJECT: Bail and Release Work Group Recommendations

RECOMMENDED ACTION

Held from February 27, 2018 (Item No. 16): Receive report relating to implementation of Bail and Release Work Group Final Consensus Report on Optimal Pretrial Justice. (County Counsel)

FISCAL IMPLICATIONS

Approval of the recommended action would not result in any immediate costs. In the long term, the costs of implementing these recommendations are expected to be largely or wholly offset by decreased costs associated with reductions in the County's jail population and recidivism rates.

REASONS FOR RECOMMENDATION

In October 2016, the Bail and Release Work Group (BRWG) presented to the Board of Supervisors its *Final Consensus Report on Optimal Pretrial Justice*, containing the results of its two-year study of County policies and practices for screening, bail, incarceration, and supervision of criminal defendants during the pretrial phase; policies and practices in other jurisdictions; and best practices and national standards for bail and pretrial justice. In November 2016, the Board approved 16 of the 18 recommendations in the *Final Consensus Report* for implementation and/or referral and further study by County departments and public agency partners.

In October 2017, the BRWG provided a report to the Board regarding implementation efforts, and regarding its further research and study of several recommendations. The Board directed staff to return in early 2018 with additional information on several items, as well as an overview of the BRWG's timeline and process related to stakeholder involvement. These items are the focus of this report.

1. New Legal Developments

A number of recent case law and statutory developments are likely to advance the BRWG's recommendations aimed at encouraging increased reliance on pretrial supervision and discouraging the practice of ordering money bail.

- ***In re Humphrey* (2018) 19 Cal. App. 5th 1006**

On January 25, 2018, the California Court of Appeal issued a landmark decision in a case brought by a defendant detained because he could not afford to post bail. The court held that (1) a trial court's failure to consider someone's ability to pay and less-restrictive alternatives to money bail violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and (2) a court must apply individualized criteria when setting bail. It explained that the trial court's order, by setting bail in an amount that the defendant could not afford, effectively constituted a pretrial detention order in violation of his due process rights.

As a result of this case, courts are now being asked to hold *Humphrey* bail hearings at which they inquire into and determine a defendant's ability to pay bail *and* consider nonmonetary alternatives to money bail, before they may set a money bail amount. If the court concludes that ensuring the defendant's appearance requires bail in excess of what the defendant can afford, it may impose that amount only based on clear and convincing evidence that no less restrictive alternative will suffice. The California Attorney General recently announced that he will not appeal the appellate court's decision.

Humphrey is already significantly impacting the decisions of the Santa Clara County Superior Court, which is holding the bail hearings required by the new case and, in many cases, has been setting significantly lower bail amounts as a result of its individualized determinations regarding a defendant's ability to pay.

Based on how implementation of this decision plays out, it may obviate the need for several of the other BRWG recommendations, like the creation of a community bail fund.

- ***Buffin v. City & County of San Francisco*, No. 15-4959 (N.D. Cal.); *Dupree v. Hennessy*, No. 18-310 (N.D. Cal.)**

On February 26, 2018, a federal court in San Francisco certified a class action of incarcerated plaintiffs challenging San Francisco's money bail system as unconstitutional. The City and County of San Francisco decided not to defend the case, and the California Bail Agents Association is doing so instead. In a related case filed on January 15, 2018, a similar group of plaintiffs are seeking certification of a class action in their challenge to the San Francisco Sheriff's enforcement of the county's bail schedule.

- ***In re Webb*, No. D072981 (Court of Appeal, Fourth Dist.)**

On January 31, 2018, the California Court of Appeal found that trial courts have no authority to impose release conditions on defendants who have posted reasonable bail for a felony offense. According to the court, when felony defendants post the scheduled bail amount, and neither the court nor any law enforcement officer suggests an increased bail amount is appropriate, the defendants may not be deprived of their right to be free from unreasonable searches and seizures.

- **Senate Bill 10**

Administration and County Counsel have previously provided updates on the status of SB 10, a pending statewide bail reform bill that the Board voted to support. SB 10 would fundamentally change the bail system in California by establishing pretrial services agencies in counties statewide (as this County already has); requiring judges to consider pretrial services recommendations regarding conditions of release for defendants held in pretrial detention; and requiring judges to set monetary bail *only if they determine that non-monetary release will not reasonably ensure the defendant's appearance at future court dates*. SB 10 would also permit defendants for whom bail amounts are set to obtain release by depositing a percentage of the total bail amount, rather than the full amount as is currently required under state law. Finally, the legislation would require judges to consider the defendant's ability to pay in setting bail – just as the *Humphrey* decision now requires. By essentially making monetary bail an option of last resort, reserved for higher-risk cases, SB 10 would significantly advance the BRWG's goals of reducing unjust and unnecessary pretrial release while protecting local public safety.

2. Issuance of Requests for Information

- **Recommendation 2: Explore Feasibility of Public or Nonprofit Alternative to Commercial Bail Bonds**
- **Recommendation 6: Institute a Community Release Project in Partnership with Community-Based Organizations**

BRWG Recommendation 2 involves establishment of a Community Bail Fund to enable low-risk indigent defendants to receive assistance paying money bail to obtain release from pretrial custody, without the non-refundable fees and collection efforts typically associated with surety bail bond agencies. Community bail funds raise money that can be used to post cash bail for eligible defendants—e.g., those with low income who have misdemeanor charges with low bail amounts. If the defendant makes all scheduled court appearances, posted bail is refunded by the court, and the full amount is paid back into the community bail fund to be used for other eligible defendants in the future.

BRWG Recommendation 6 involves creation of a Community Release Project to involve community-based organizations in supporting criminal defendants in making all required court appearances, avoiding re-arrest, and maintaining employment and community relationships during the pretrial phase. The services offered by the Community Release Project would resemble services offered by the Reentry Resource Center.

In October 2017, the BRWG recommended that the Board of Supervisors authorize the issuance of a Request for Proposals (RFP) for the Community Bail Fund and Community Release Project. Instead, the Board directed Administration and County Counsel to issue a preliminary solicitation to identify potentially qualified organizations and to obtain input regarding the optimal structures for both programs. Based on consultation with the Procurement Department, Administration determined that a Request for Information (RFI) would best achieve the Board's goals. On January 2, 2018, Administration issued RFIs for

the Community Bail Fund and Community Release Project with a January 31, 2018 deadline. Three respondents addressed the Community Release Project, and one respondent addressed both the Community Release Project and the Community Bail Fund.

With respect to the Community Release Project, the respondents provided input on:

- how the Project should be structured;
- whether the County should contract separately with a network of providers, or if one organization should serve as a “hub” to receive referrals from the County and match referred clients to specific providers;
- how intake, referral, and compliance monitoring and reporting should be managed;
- what services would ideally be offered through the Project, and how these services would support defendants in making court appearances and avoiding re-arrest;
- how nonprofit participation in a Project might be expanded beyond existing County-contracted organizations;
- whether, and if so, when, community and faith-based organizations participating in the Project should appear at arraignment;
- whether payments from the County should be made on a performance-contingent basis, and if so, what performance metrics should be recognized;
- how long it would take to establish a Project from the date of contract award; and
- how services should be funded.

With respect to the Community Bail Fund, the respondent addressed:

- what qualifications a nonprofit that operates the Fund should have;
- examples of current criminal justice system challenges, and how the Fund should address those challenges;
- what efforts and initiatives the Fund should take to improve public safety;
- what the appropriate eligibility criteria for clients served by the Fund should be (e.g., based on income, charge/charge type, family circumstances, risk of victimization in jail, special health needs, housing status, risk level, and/or other characteristics);
- who should determine eligibility for the Fund (i.e., the court, the County, or the nonprofit operating the Fund);
- how the Fund’s operating costs and revolving bail fund should be funded, and if funding is made on a matching basis, how much initial and ongoing funding would be needed;
- whether the Fund should provide and/or refer clients to services, and if so, what types of services;

- whether defendants who fail to make all required court appearances should be charged a fee, required to perform community service, and/or prohibited from using the Fund in the future;
- whether payments from the County should be made on a performance-contingent basis, and if so, what performance metrics should be recognized; and
- how long it would take to establish the Fund from the date of contract award.

Administration and County Counsel will utilize the responses to craft an RFP for issuance. The Board will be provided with notice prior to issuance of the RFP through the regular monthly report from Administration relating to anticipated RFPs. Consistent with that process, any Board Member who wishes to review the RFP prior to its release may contact the Office of the County Executive to request an off-agenda report. It is anticipated that Administration could release the RFP in June 2018, with proposals due in July 2018, review and evaluation of the proposals in August 2018, and protests (if any) reviewed and responded to in September 2018. Contracts could be awarded in October or November 2018 following further negotiations with successful bidders. These contracts would include provisions to protect personal data and privacy of clients served by the Community Bail Fund and Community Release Project, in compliance with the Penal Code, other privacy laws, and best practices.

3. Rules and Regulations for Release Program through Department of Correction

BRWG Recommendation 11 aims to utilize authority conferred upon the County’s correctional administrator by Penal Code § 1203.018 to release an inmate who has had a bail amount set by the court, but has been unable to post bail, if the inmate has no outstanding holds or warrants and, among other possible conditions, has been in pretrial custody for 30 days or more on a misdemeanor charge. The Penal Code authorizes such a program to offer release on electronic monitoring, and allows the Department of Correction (DOC) to contract with agencies such as the Office of Pretrial Services to provide such monitoring, as well as other specified program services.

The Board directed Administration and County Counsel to consult with the District Attorney’s Office, the Sheriff’s Office, and DOC, and return to the Board with proposed rules and regulations prior to implementation of a pilot program for electronic monitoring release in early 2018. Subsequently, however, the Sheriff’s Office and DOC indicated that they will not be prepared to approve draft rules and regulations of the pilot program until after June 2018. This additional time would allow them an opportunity to determine the impact of other recent policy changes before any additional programs increasing the number of releases from the jail are implemented.

4. Scope of Work for Data Analysis Consultant

- **Recommendation 14: Collect and Share Data on Bail Performance Outcomes**

BRWG Recommendation 14 is to improve collection and sharing of data on bail performance outcomes. The Office of Pretrial Services already collects and publicly presents data on its

client outcomes based on the following objective outcome measures identified by the National Institute of Corrections:

- Appearance rate (percentage of defendants who make all scheduled court appearances);
- Safety rate (percentage of defendants who do not have a new arrest, both for violent and non-violent offenses);
- Rate of technical violations (percentage of defendants who violate their conditions of release);
- Rate of pretrial success (percentage of defendants who make all appearances, have no new arrests, and no technical violations); and
- Concurrence rate (percentage of defendants whose release status/supervision level corresponds with their assessed risk level and/or the Pretrial Services recommendation).

However, similar data from the bail industry is not currently available, hindering the County's ability to conduct a robust comparative analysis of the risk of pretrial failure (failures to appear in court, new arrests, and other violations) across *all* release types. At the June 2017 BRWG meeting, the bail bonds industry indicated that it is willing to share data on bail performance outcomes with the County.

In October 2017, the Board directed that the collection and analysis of this information should be carried out through an independent study that compares outcome measures across release types (e.g., own recognizance/supervised own recognizance, money bail), incorporating demographic data and additional information related to the costs of pretrial detention and recidivism. The Board directed Administration to propose an analytical framework to guide the issuance of an RFP for a criminal justice data consultant to collect and analyze this data and generate a report to the Board.

The analytical framework should be similar to the methodology used in the Cost of Homelessness Study the County undertook in 2015. The data consultant should analyze three years' worth of historical criminal justice data for the County's pretrial population—including *both* those supervised by the Office of Pretrial Services *and* those with private bail bonds—based on the National Institute of Corrections indicators, use a cost benefit model, examine the impact on public safety, and provide recommendations on how the County can mitigate the costs associated with pretrial release options and recidivism. The data consultant can be tasked with collecting the performance data the bail bonds industry stated that it is willing to share, but which the County has not collected to date.

In addition, Administration is currently working with the Pew Charitable Trusts and MacArthur Foundation to conduct a point-in-time cost benefit analysis of the County's criminal justice system, and part of the analysis is looking at 2016 convictions. Preliminary data from this analysis was presented to the Public Safety and Justice Committee at its February 2018 meeting and is attached to this report. Because the study already collects

demographic data including age, race/ethnicity, and charge type/categories as outlined by the FBI Uniform Crime Data Reports, Administration is exploring the possibility of leveraging this data for the requested analysis of pretrial release outcome measures, recidivism, and related costs. After incorporating any Board direction regarding the proposed analytical framework, Administration could release an RFP for a criminal justice data consultant in June 2018, with proposals due in July 2018, review and evaluation of the proposals in August 2018, and protests (if any) reviewed and responded to in September 2018. The RFP would seek respondents who could complete the requested analysis within one year of the contract being awarded. Contracts could be awarded in October or November 2018 following further negotiations with successful bidders. This contract would include provisions to protect personal data and privacy of individuals in the criminal justice system, in compliance with the Penal Code, other privacy laws, and best practices.

5. Validation of the ODARA Tool

- **Recommendation 16: Explore and Employ Domestic Violence-Specific Risk Assessment Tools that Are Validated to Avoid Racial Bias**

In collaboration with the Superior Court, Pretrial Services implemented the use of the Ontario Domestic Assault Risk Assessment (ODARA) in August 2017. This assessment is a 13-question interview which is completed with information from the victim of the case and information available during the client interview. The Domestic Violence Council was presented with the initial completed screenings report in December 2017, which is attached. The report was well-received overall, and the Office of Pretrial Services continues to receive feedback from the Superior Court.

In October 2017, the Board directed Administration to report back regarding validation of the ODARA tool, both in terms of effectiveness at predicting the risk of future domestic assault, and to confirm that it does not exhibit racial bias. Administration is currently identifying a research partner to evaluate the ODARA tool in these respects. Once identified, the Office of Pretrial Services aims to have the ODARA tool validated for effectiveness and against racial bias by October 2018. Depending on the research partner, the Office of Pretrial Services will aim to report these results out to the BRWG meeting in October 2018 or to the Board by the end of the year. The contract with the research partner will include provisions to protect personal data and privacy of individuals in the criminal justice system, in compliance with the Penal Code, other privacy laws, and best practices.

6. In-Field Pretrial Supervision

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

BRWG Recommendation 18 is to explore potential adoption of in-field pretrial supervision—a more intensive program that would include forms of supervision not currently offered by the Office of Pretrial Services, such as home and work visits, contacts with victims, submission to search and seizure requirements, and/or in-field verification of compliance with court-ordered conditions—to enable moderate-risk defendants to be safely released, rather than remaining in custody, or being released on bail with no supervision. Because of

the resource-intensive nature of such a program—including the fact that it could only be carried out by sworn peace officers, and not by unsworn Pretrial Services Officers—Administration and County Counsel recommended that implementation of this recommendation be held pending careful implementation and evaluation of less intensive release options for lower-risk defendants. The Board agreed with this recommendation, and requested periodic reports regarding any new considerations. Currently, Administration and County Counsel are not aware of any new considerations relating to in-field supervision. This recommendation will be revisited and brought back to the October 2018 BRWG check-in meeting for further discussion upon implementation of the other recommendations.

Pending the October 2018 BRWG meeting, Administration and County Counsel recommend that further reports regarding implementation of BRWG recommendations be presented to the Public Safety and Justice Committee, with the exception of specific action items that require approval of the full Board.

7. Other Work Plan Updates

The attached Work Status Update Table provides updates on work plans for BRWG recommendations which the Board previously indicated could be implemented immediately, and those on which the relevant departments and agencies could begin implementation and report directly back to the Board.

8. Timeline and Process of Stakeholder Involvement

- **Research and Analysis of Current County Practices**

Following its creation in February 2014, the BRWG began undertaking the process of gathering information regarding current County practices, needs, and resources. This information 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; and Santa Clara County Superior Court Judge Stephen Manley. 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, DOC, the Probation Department, and the Office of Pretrial Services—provided quantitative and anecdotal data.

- **Consultation with Experts and Officials from Other Jurisdictions**

The BRWG also obtained extensive input from experts and officials in other jurisdictions. Nationally recognized experts in the area of pretrial justice that provided input include members of: the Pretrial Justice Committee Chair of the American Bar Association, the Pretrial Justice Institute, Luminosity Inc. Data Driven Justice Solutions, and The Change Companies. Officials in other jurisdictions who provided input include: the Directors of Multnomah County Pretrial Services, the Director of the Pretrial Services Agency of the District of Columbia, the Assistant Chief of the Pretrial Services Division of the Cook County Probation Department, the Pretrial Services Director of the Kentucky Administrative

Office of the Courts, and Professor W. David Ball of Santa Clara University School of Law and the students in his Bail Policy Lab course.

- **Input from Bail Bond Industry Representatives**

Members of the bail bond industry, along with all members of the public, were provided the opportunity to attend and speak at each publicly noticed meeting of the BRWG. In addition, staff conducted specific and targeted outreach to bail agents in order to ensure an adequate opportunity for input from that industry. Local bail bond agents and industry representatives were invited to two public forums to provide input on bail and pretrial practices in Santa Clara County, including the services they provide to clients with limited financial means, the contractual and financial terms on which they offer bail bonds and related services, and the efficacy of their services in addressing court appearance and public safety issues.

Approximately thirty local bail bond agents from both larger and smaller agencies, as well as representatives from professional organizations such as the California Bail Agents Association (CBAA), attended the first public forum, and approximately fifteen bail agents attended the second public forum.

Every licensed bail agent in Santa Clara County was personally invited to a staff-led public forum regarding the BRWG Report on May 3, 2016. At the Board's direction, staff held a second public forum on May 19, 2016, to solicit additional input from interested bail bond industry members. After the two staff-led public forums, the feedback and information received from the bail industry were incorporated into the BRWG Report. At the BRWG meeting on May 31, 2016 and the Board meeting on June 7, 2016, representatives of the bail bonds industry requested additional time to provide input on the BRWG Report and proposed recommendations. On June 7, 2016, the Board extended the BRWG's term to September 30, 2016, to provide an additional opportunity for input from the bail industry.

In advance of the August 26, 2016 BRWG meeting, the CBAA and the Golden State Bail Agents Association (GSBAA) each provided a written response to the BRWG Report. The CBAA and GSBAA responses were distributed to the BRWG, and CBAA and GSBAA representatives had an opportunity to present at the August 26, 2016 BRWG meeting. After hearing those presentations, asking questions, and discussing issues raised in the reports, the BRWG voted to move the eighteen recommendations contained in the BRWG Report forward for approval by the Board of Supervisors, with modifications to two recommendations based on the feedback received from the bail industry groups. In November 2016, the Board of Supervisors approved the addition of two members to the BRWG representing the bail bonds industry, which were filled for the June 30, 2017 BRWG meeting.

9. Protection of Privacy and Personal Information

The Board also requested that Administration and County Counsel report back regarding means of protecting individuals' privacy and personal data as the BRWG recommendations continue to be implemented.

The release and security of criminal justice data is not only regulated by California state law but also by the County's Public Safety and Justice Executive Leadership Committee (PSJEM). If legal requirements are met, which often includes a review by County Counsel, and release of data is approved by PSJEM, a request is then made to the County's Cyber Security Team. The County's Cyber Security Team has a process in place whereby a risk assessment is conducted before any vendor is authorized to receive sensitive County data. The vendor must complete the "Santa Clara County IT Vendor Security Assurance Requirements" process, which identifies the technical safeguards already in-place and any additional safeguards that may be needed. An example of this is evaluation of a vendor's capability to encrypt County data and at what bit level. If the County's Cyber Security Team determines that the security level is inadequate, the Cyber Security Team would require the vendor to use a higher and more secure level of encryption as a precondition to any release of data. In addition to complying with the requirements of the County's Cyber Security Team, the vendor must also work with the County's Chief Privacy Officer for review and approval of security measures.

With respect to data obtained by contractors, any contracts awarded as a result of RFPs discussed in this report will include a requirement that the contractor ensure the protection of any personal data it obtains from third parties in carrying out its work.

CHILD IMPACT

The recommended action will have a positive impact on children and youth with parents who are involved in the pretrial justice system by developing policies that promote prompt release in appropriate cases and by increasing the positive community impacts associated with a fair, evidence-based pretrial justice system.

SENIOR IMPACT

The recommended action will have a positive impact on seniors and/or their families or caretakers who are involved in the pretrial justice system by developing policies that promote prompt release in appropriate cases and by increasing the positive community impacts associated with a fair, evidence-based pretrial justice system.

SUSTAINABILITY IMPLICATIONS

The recommended action will promote social equity by helping the County and its partners improve the administration of fair, evidence-based pretrial justice.

BACKGROUND

The 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. After its commencement, the BRWG held various public meetings over the course of two years to discuss its research and recommendations regarding pretrial adjudication practices.

On October 4, 2016, the BRWG presented its *Final Consensus Report on Optimal Pretrial Justice* to the Board of Supervisors, which approved 16 of the BRWG's 18 Recommendations for referral, implementation, and/or further study. On November 15,

2016, the Board of Supervisors approved a work plan classifying the 16 approved Recommendations into: (1) those that could be implemented immediately; (2) those on which the relevant departments and agencies could begin implementation and report directly back to the Board; and (3) those which required further study by the BRWG prior to implementation. On June 9, 2017, the BRWG met to consider the Recommendations in category (3), as well as some category (2) Recommendations. The Board also approved the addition of two members to the BRWG representing the bail bonds industry, which were filled for the June 9, 2017 BRWG meeting.

At the June 9, 2017 BRWG meeting, the BRWG considered specific proposals for implementation. The BRWG requested that staff report back to the Board in October 2017 regarding the recommendations that were further reviewed, implementation timelines for all the recommendations, and analysis of how the recommendations fit into the County's public safety and justice work more broadly. At the October 3, 2017 Board meeting, the Board directed staff to return in January 2018 with further information regarding certain items.

CONSEQUENCES OF NEGATIVE ACTION

Implementation of several of the BRWG's recommendations may be hindered, and the BRWG would not be able to report out on its progress.

LINKS:

- Replaces: 89704 : 89704
[February 27, 2018 Board Mtg., Item 16]
- Linked To: 83351 : 83351
[October 4, 2016 Board Mtg., Item No. 9]
- Linked To: 88391 : 88391
[October 3, 2017 Board Mtg., Item No. 13]

ATTACHMENTS:

- Work Status Update Table Regarding Other BRWG Recommendations (PDF)
- January 2018 Report to the Public Safety and Justice Committee on Pew Charitable Trusts & MacArthur Foundation's Preliminary Data for Santa Clara County Results First (PDF)
- January 2018 Pretrial Services Report to the Domestic Violence Council on ODARA Initial Quarter Results (PDF)