
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2019 - 2020 Regular

Bill No: SB 36 **Hearing Date:** March 26, 2019
Author: Hertzberg
Version: March 13, 2019
Urgency: No **Fiscal:** Yes
Consultant: SC

Subject: *Pretrial Release: Risk Assessment Tools*

HISTORY

Source: Anti-Recidivism Coalition
Californians for Safety and Justice
Ella Baker Center for Human Rights
NextGen California
Service Employees International Union (SEIU) California
Western Center on Law and Poverty

Prior Legislation: SB 10 (Hertzberg), Ch. 244, Stats. 2018
AB 42 (Bonta), failed passage on Assembly Floor, 2017
AB 789 (Rubio), Ch. 554, Stats. 2017
AB 805 (Jones-Sawyer), Ch. 17, Stats. 2013
SB 210 (Hancock), failed passage on Assembly Floor, 2012
SB 1180 (Hancock), failed passage on Senate Floor, 2012

Support: California Public Defenders Association; Center on Juvenile and Criminal Justice;
Disability Rights California; National Association of Social Workers, California
Chapter

Opposition: None known

PURPOSE

This bill requires each pretrial services agency that uses a pretrial risk assessment tool to maintain specified data and to make specified information regarding the tool publicly available.

Existing law authorizes the officer in charge of a jail, or the clerk of the superior court to approve and accept bail in the amount fixed by the arrest warrant, the bail schedule, or an order admitting to bail in case or surety bond, and to issue and sign an order for the release of the arrested person, and to set a time and place for the person's appearance in court. (Pen. Code, 1269b, subd. (a).)

Existing law authorizes a court or other magistrate who could release a person from custody upon giving bail to release a person who has been arrested for, or charged with, any offense other than a capital offense, on the person's own recognizance (OR). (Pen. Code, § 1270.)

Existing law states that a person charged with a misdemeanor is entitled to an OR release unless the court makes a finding on the record, with public safety as the primary consideration, that an OR release will compromise public safety or will not reasonably assure the appearance of the defendant as required. If the court makes one of those findings, the court shall then set bail and specify the conditions, if any, under which the defendant shall be released. (*Id.*)

Existing law prohibits the release of a defendant on their OR for any violent felony until a hearing is held in open court and the prosecuting attorney is given notice and an opportunity to be heard on the matter. (Pen. Code, § 1319.)

Existing law specifies the following conditions for a defendant's release on their OR:

- 1) The defendant's promise to appear at all times and places, as ordered by the court or magistrate and as ordered by any court in which, or any magistrate before whom the charge is subsequently pending;
- 2) The defendant's promise to obey all reasonable conditions imposed by the court or magistrate;
- 3) The defendant's promise not to depart this state without leave of the court;
- 4) Agreement by the defendant to waive extradition if the defendant fails to appear as required and is apprehended outside of the State of California; and,
- 5) The acknowledgment of the defendant that he or she has been informed of the consequences and penalties applicable to violation of the conditions of release. (Pen. Code, § 1318.)

Existing law authorizes a court, with the concurrence of the board of supervisors, to employ an investigative staff for the purpose of recommending whether a defendant should be released on OR. (Pen. Code, § 1318.1, subd. (a).)

Existing law states that whenever a court has employed investigative staff for the purpose of recommending whether a defendant should be released on OR, an investigative report shall be prepared in all cases involved in a violent felony listed in Penal Code Section 667.5(c), or a felony violation of driving under the influence and causing bodily injury to another person, recommending whether the defendant should be released on OR. The report shall include all of the following:

- 1) Written verification of any outstanding warrants against the defendant;
- 2) Written verification of any prior incidents where the defendant has failed to make a court appearance;
- 3) Written verification of the criminal record of the defendant; and,
- 4) Written verification of the residence of the defendant during the past year. (Pen. Code, § 1318.1, subd. (b).)

This bill requires each pretrial services agency that uses a pretrial risk assessment tool to collect and retain all of the following information regarding any pretrial risk assessment tool that it uses:

- 1) Input information, including, but not limited to, both of the following:
 - a) The age, gender, ethnicity, and arrest offense for each individual assessed using the pretrial risk assessment tool; and,
 - b) The total number of individuals assessed.
- 2) Performance measures, including, but not limited to, all of the following:
 - a) The number of interviews and assessments conducted on eligible booked individuals;
 - b) The number of assessed individuals, aggregated by risk level;
 - c) The number of cases in which the detention or release recommendation by the agency conducting the assessment does not conform with the release or detention decision of the judicial officer;
 - d) The rate at which the pretrial assessment staff conducting the assessments follows pretrial risk assessment criteria when recommending release or detention; and,
 - e) The rate at which judicial officers follow the detention or release recommendation of pretrial risk assessment staff.
- 3) Outcome measures, including, but not limited to, all of the following:
 - a) The percentage of assessed individuals who make all scheduled court appearances.
 - b) The percentage of assessed individuals who are not charged with a new offense during the pretrial stage.
 - c) The percentage of assessed individuals who are not arrested for a new offense during the pretrial stage.
 - d) The ratio of assessed and supervised individuals whose supervision level or detention status corresponds with their assessed risk of pretrial misconduct.
 - e) The percentage of assessed individuals who violated conditions of release that resulted in revocation of pretrial release; and,
 - f) The percentage of assessed and released individuals who appear for scheduled court appearances, are not charged with any new offense during pretrial supervision, and did not receive a court remand.
- 4) All of the following additional data:
 - a) The number of individuals released, aggregated by release types, ordered during a specified timeframe;

- b) The number of supervised defendants divided by the number of pretrial officers or case managers;
- c) The time between the pretrial services agency's assumption of supervision of an individual and the end of supervision of the individual; and,
- d) The proportion of pretrial defendants who are detained at any point throughout pretrial case processing.

This bill provides the following definitions for the purposes of this bill:

- 1) "Pretrial risk assessment tool" means an instrument used to determine the risks associated with individuals in the pretrial context;
- 2) "Pretrial services agency" means an agency or organization designated by the county to conduct pretrial risk assessments and provide other pretrial services to defendants; and,
- 3) "Validated" means that the overall input criteria and each individual input criterion for a risk assessment tool have been evaluated, calibrated, and normalized using statistical methods to optimize accuracy and have been demonstrated by scientific research to be accurate and reliable in assessing the risk of a person failing to appear in court as required or the risk to public safety due to the commission of a new criminal offense if the person is released before adjudication of their current criminal offense and to minimize bias.

This bill requires any pretrial risk assessment tool used by a pretrial services agency to be validated on a regular basis, but no less frequently than once every six months and provides that a pretrial services agency may coordinate with the Judicial Council to validate a pretrial risk assessment tool.

This bill states that in order to increase transparency, a pretrial services agency shall, with regard to a pretrial risk assessment tool that it utilizes, make the following information publicly available:

- 1) Line items, scoring, and weighting, as well as details on how each line item is scored, for each pretrial risk assessment tool that the agency uses; and,
- 2) Validation studies for each pretrial risk assessment tool that the agency uses.

This bill requires a pretrial services agency to, when selecting which pretrial risk assessment tool to utilize, consider if the agency would be able to comply with the information that is it required to make publicly available if that tool was selected.

This bill requires Judicial Council to maintain a list of pretrial services agencies that have satisfied the validation requirements and transparency requirements pursuant to this bill.

This bill states that it is the intent of the Legislature in enacting the provisions of this bill to understand and reduce biases based on race, ethnicity, gender, economic circumstances, and behavioral or developmental disabilities in pretrial release decision making.

This bill makes various Legislative findings and declarations related to the pretrial release system and risk assessment tools.

COMMENTS

1. Need for This Bill

According to the author of this bill:

Currently, 49 of 58 California counties use one of eight different pretrial risk assessment instruments to help determine the likelihood that an arrestee will commit a new offense prior to trial, or miss his or her next court date. Generally, these tools use large data sets regarding past trends to predict future outcomes, and assist judges in making release or detention decisions prior to a defendant's trial. However, despite their widespread use, these tools lack the transparency necessary for honest evaluation and elimination of disparate outcomes, and counties are under no obligation to collect the data necessary to ensure their accuracy.

2. Own Recognizance Release

In cases where the defendant is likely to return to court and where the safety of the public or specific persons will not be put at risk, a court can release the person on their own recognizance (OR). This includes both felonies and misdemeanors. An OR release is essentially release without payment of bail pending trial or other resolution of a criminal case.

In order to be released on OR,

[T]he defendant signs a release agreement promising to appear at all required court hearings in lieu of posting bail. Before granting an OR release, the judge must evaluate the defendant's flight risk by considering the defendant's ties to the community, whether the defendant has a past record of failures to appear in court, and the possible sentence the defendant faces if convicted. The judge must also evaluate risk to public safety by considering any threats that have been made by the defendant, as well as any record of violent acts.

In counties with active pretrial programs, the judge may consider pretrial reports and recommendations based on interviews and evaluations that assess the defendant's public safety and flight risk. For example, in Marin County, the county probation department contracts with an independent agency that provides pretrial services. Using an evidence-based pretrial risk-assessment tool, agency staff evaluates eligible defendants along three dimensions: criminal history, employment and residential stability, and drug use. Following a verification process and an evaluation of danger to self or others, the agency prepares a recommendation along with a report. After approval by the probation department, the report is submitted to the court. In addition to supplying the court with recommendations and reports, these programs may also offer a range of conditional release options. These release options may include release on electronic monitoring, release with alcohol monitoring, or release to home detention. If pretrial release is not granted and bail is fixed by the court, realignment legislation also permits the sheriff to authorize the pretrial release of inmates. Under the legislation, a county board of supervisors must first designate the sheriff as the county's correctional administrator and

may then authorize the correctional administrator to place pretrial jail inmates who do not pose a significant threat to public safety in an electronic monitoring program when specified conditions are met.

In some instances, an unsentenced jail inmate who has not posted bail may be released due to jail overcrowding. At implementation of realignment, 17 counties were operating under court orders that limit the number of inmates they can hold at one or more of their county facilities. Statewide, in the year before realignment, the average annual jail population was 71,060, and releases due to lack of capacity numbered 6,800 per month for unsentenced inmates and 3,900 per month for sentenced offenders.

(Tafoya, *Assessing the Impact of Bail on California's Jail Population*, Public Policy Institute of California (June 2013), p. 8 (citations omitted).) If a judge determines that a person should not be released on OR, then the judge can set bail with the bail schedule as a guide.

3. Pretrial Services

According to the California Association of Pretrial Services website, pretrial services agencies are important because they improve the court's release and detention decision-making process. They also protect public safety by ensuring that only those defendants who can safely be released are released. Use of pretrial services agencies also increases the use of non-financial release alternatives, which reduces the percentage of pretrial detainees in the jail. Finally, pretrial services agencies can save taxpayer dollars by reducing the costs of jailing pretrial defendants. (See < <http://pretrialservicesca.org/home-page/pretrial-services/> > [as of Mar. 13, 2019].)

Services provided by pretrial services can include: jail screening and interviewing of all arrestees; investigation of the arrestee's ties to the community, past record, potential dangerousness to the community, past history of failures to appear, and the seriousness of the current criminal charges; preparation of a written report to the court and the presiding magistrate, summarizing the defendant's ties to the community and a recommendation for or against release; case monitoring of conditions of release and court date notification system for defendants; supervised release for selected defendants; social services referrals for defendants; and follow-up services to locate defendants who have failed to appear and return them to the court system without the unnecessary costs of an arrest. (*Id.*)

The majority of pretrial services in California is provided by county probation departments. Other agencies that provide pretrial services include the county courts, sheriffs' departments and non-profit organizations. (Alameda County Probation Department, *Pre-Trial Program Transition* <http://www.acgov.org/board/bos_calendar/documents/DocsAgendaReg_3_8_18/GENERAL%20ADMINISTRATION/Regular%20Calendar/Final%20ACPD%20Pre_Trial%20Program%20Transition.pdf> [as of Mar. 15, 2019].)

This bill would require pretrial services agencies to comply with requirements such as collecting and maintaining specified data and making certain information publicly available. This bill also requires regular validation of risk assessment tools in order to ensure accuracy.

4. Status of Bail Reform in California

In 2018, the Legislature passed and the Governor signed into law SB 10 (Hertzberg), Chapter 244, Statutes of 2018. SB 10 would, beginning October 1, 2019, eliminate the use of cash bail and bail bonds for pretrial release and expand the use of risk-based pretrial release. After SB 10 was signed into law, a referendum to overturn SB 10 qualified for the November 2020 statewide ballot which in effect halts the implementation of the law until the referendum is decided.

(McGough, *The fate of California's cash bail industry will now be decided on the 2020 ballot*, Sacramento Bee (Jan. 17, 2019)

<<https://www.sacbee.com/news/state/california/article224682595.html>> [as of Mar. 5, 2019].)

Separately, a state appellate court ruled that a judge must consider an individual's ability to pay bail as well as consider alternatives to bail that could ensure public safety and the individual's appearance in court. This case is currently pending review at the California Supreme Court. (*In re Humphrey*, review granted May 24, 2018, S247278.)

This bill does not amend the provisions enacted by SB 10. Rather, this bill requires existing pretrial services agencies to comply with its provisions.

5. Argument in Support

According to Western Center on Law and Poverty:

Currently, 49 out of California's 58 counties use one of eight different risk assessment instruments in their pretrial processes. Regardless of the outcome of the 2020 referendum on SB 10, we expect the adoption of risk assessment tools to be used in pretrial detention decisions will increase throughout 2019, as court decisions continue to indicate the need to eliminate money bail. [Fn. omitted.] This is why it is important to establish statewide standards to ensure these processes are fair, just and unbiased.

A 2017 study by a workgroup commissioned by the California Supreme Court recommended abolishing money bail by statute and replacing it with validated risk assessment tools. Despite this recommendation and the widespread adoption of these tools, there is still currently no statewide standard, nor any requirement regarding the transparency of their inner workings, making them far less accountable to their communities. Moreover, counties are under no obligation to maintain individualized data on the tools' inputs and outputs, complicating any effort to honestly evaluate them and protect against discriminatory outcomes.