

POINTS AND AUTHORITIES

The District Attorney of Alameda County Presents a Weekly Video Survey of
Criminal Law Approved for Credit Toward California Criminal Law Specialization: #172
The Alameda County District Attorney's Office is a State Bar of California Approved MCLE Provider.

Week Of	Topic	Guest	30 min General
Sept. 4, 2018	California's New Law Abolishing Cash Bail: An Overview	Eric von Geldern	

On August 28, 2018, Governor Brown signed SB 10, which repeals California's existing cash bail system and replaces it with a new law that assesses the risk level of the individual in order to determine whether that person will be released with conditions or detained. The risk to public safety and the risk of failure to appear are at issue.

The law goes into effect on October 1, 2019. In the interim, the California Judicial Council has numerous tasks to complete regarding the implementation of the pretrial risk assessment used to make pretrial release and detention decisions (including training of judges on using it.) Superior courts in this period must, among other things, establish pretrial assessment services.

The new law adds provisions to the Penal Code. For purposes of this early review, P&A will use the term "new law." Below is an overview of some of the features of the new law. P&A will revisit the topic again when the new law goes into effect.¹

A. Pretrial Assessment Services

1. Each superior court must have an entity, division or program referred to a "Pretrial Assessment Services" that will assess the risk level of persons detained for a crime and to make recommendations for conditions of release for those persons pending adjudication of the crime.

2. "Risk" refers to the likelihood that a person will not appear in court as required or the likelihood that a person will commit a new crime if the person is released before the adjudication of the current offense. Risk levels are categorized as low, medium and high.

¹ We've made our best effort to summarize the main points of this new law. However, some provisions are confusing or unclear. Maybe there will be more clarity by October 2019.

3. Prior to arraignment, the Pretrial Assessment Services shall obtain the following information:

a. results of a risk assessment using “validated risk assessment tool,” selected by the superior court from a list of tools maintained by the Judicial Council.

(i) The validated risk assessment tool “shall be demonstrated by scientific research to be accurate and reliable in assessing the risk of a person” as to public safety or failure to appear. The new law states that the Judicial Council shall convene a panel of experts and judicial officers to designate low, medium and high risk levels based upon the scores or levels provided by the validated risk assessment instrument.

b. the criminal charge for which the person was arrested and the criminal history of the person, including history of failures to appear in the last three years.

c. any supplemental information reasonably available as to the risk level.

d. the district attorney shall make a reasonable effort to contact the victim for comment on the person’s custody status.

e. Pretrial Assessment Services will prepare a report with this information.

B. Persons with Misdemeanor Arrests

1. With certain exceptions, a person arrested for a misdemeanor may be booked and released without being taken into custody.

2. If the person is taken into custody, no risk assessment shall be done, and the person must be released within 12 hours of booking.

3. Persons arrested for the following misdemeanors shall *not* be released:

-- Penal Code section 273.5;

-- Penal Code section 243, subd. (e)(1);

-- Penal Code section 273.6 if the detained person is alleged to have made threats to kill or harm, engaged in violence against, or gone to the workplace of, the protected party.

-- Penal Code section 646.9

C. Prearrest Review: Low and Medium Risk Persons

1. Pretrial Assessment Services shall conduct a prearrest review of the facts and circumstances relevant to the person’s custody status, relying on the report discussed above and relevant information provided by the arrested person, law enforcement, any victim, the

prosecution or defense.

2. As to low risk persons, the court shall release the person on his or her own recognizance, prior to arraignment, without review by the court, with the least restrictive nonmonetary condition or combination of conditions that will reasonably assure public safety and the return to court.

3. As to medium risk persons, superior courts – in consultation with Pretrial Assessment Services and other stakeholders (e.g. District Attorney) -- will adopt a local rule that sets forth the review and release standards for persons assessed as medium risk and eligible for prearrest release on their own recognizance or supervised own recognizance [described in the new law as the person promising in writing to appear in court as required].

4. Review of the person's custody status must occur with unnecessary delay, and no later than 24 hours from booking, unless there is good cause to extend it by 12 hours.

D. No Release for Certain Persons

The new law provides that Pretrial Assessment Services shall not release the following persons:

1. A person assessed as high risk;
2. A person arrested for specified section 290 offenses;
3. A person arrested for the misdemeanor offenses listed above in section B of this handout;
4. A person arrested for a felony that includes, as an element of the crime, physical violence, threat of violence, or the likelihood of GBI, or a felony offense in which the person was personally armed or personally used a deadly weapon or firearm, or inflicted GBI;
5. A person arrested for a third offense within the past 10 years of DUI alcohol or drugs or combination, or for an offense with injury to another, or DUI with blood level of .20 or higher;
6. A person with a restraining order violation within the past five years;
7. A person who has three or more warrants for failure to appear within the previous 12 months;
8. A person who, at the time of arrest, was pending trial or sentencing for a misdemeanor or felony;
9. A person who, at the time of arrest, was on any form of postconviction supervision other than informal or court supervision;
10. A person who has intimidated, dissuaded or threatened retaliation against a witness or victim of the current crime;
11. A person who has violated a condition of pretrial release within the last five years;

12. A person who has been convicted – within the past five years -- of a serious felony, under section 1192.7, subd. (c), or a violent felony, under section 667.5, subd. (c).

E. An Opportunity for Pre-Arraignment Review and Release

1. The new law allows courts to conduct prearrestment *reviews* and make release decisions.
2. However, this review and release opportunity does not apply to:
 - a. persons assessed as high risk.
 - b. persons charged with a serious or violent felony as defined in section 1192.7, subd. (c) and 667.5, subd. (c).
 - c. persons, who at the time of arrest, were pending trial or sentencing in a felony matter.
3. The court shall give considerable weight to the recommendations of Pretrial Assessment Services, and shall consider the information provided by law enforcement, the arrested person, any victim, the prosecution or defense.
4. If the court finds the person appropriate for prearrestment release, the arrested person shall be released on the person's own recognizance or on supervised recognizance, with the least restrictive monetary conditions.
5. However, the court may decline to release a person pending arraignment if there is no substantial likelihood that any condition of release will assure the safety of the public or appearance of that person. There is a presumption that no conditions shall suffice if:
 - a. the crime for which the person was arrested was committed with violence, threatened violence or the likelihood of serious bodily injury, or one involving the use of a deadly weapon or firearm, or infliction of great bodily injury;
 - b. At the time of arrest, the person was on post-conviction supervision, as specified;
 - c. The person intimidated, dissuaded, and threatened retaliation against a witness or victim of the current crime;
 - d. the person is currently on pretrial release and has violated a condition of release.

F. Arraignment: Another Review Opportunity

1. If the defendant has not been previously released, he or she will be brought before the judge at arraignment to consider whether there are any conditions that will allow a safe release of the defendant with the least restrictive nonmonetary conditions reasonably assuring the public safety and the defendant's return to court.

2. Pretrial Assessment Services will submit to the court the results of the defendant's risk assessment, the criminal charges and criminal history, and history of failures to appear, any supplemental information as to the defendant's risk to public safety or risk failure to appear, and will make recommendations to the court for conditions of release.

3. The prosecution shall make a reasonable effort to contact the victim, who has the opportunity to be heard, or the victim may submit comments in writing which will be part of the court's record.

4. The new law provides: "At arraignment, the court shall order a defendant released on his or her own recognizance or supervised own recognizance with the least restrictive nonmonetary condition or combination of conditions that will reasonably assure public safety and the defendant's return to court unless the prosecution files a motion for preventative detention in accordance with [the statute.]"

G. The Prosecution's Motion for a Preventative Detention

1. At arraignment, or any time during the criminal proceedings, the prosecution may file a motion seeking the detention of the defendant pending trial, based on the following circumstances:

a. The crime was committed with violence against the person, threatened violence against the person, or the likelihood of serious bodily injury, or was one in which the defendant was personally armed or used a deadly weapon or personally inflicted great bodily injury.

b. At the time of the arrest, the defendant was on any form of post-conviction supervision other than informal probation or court supervision.

c. At the time of the arrest the defendant was subject to pending trial or sentencing on a felony matter.

d. The defendant intimidated or threatened retaliation against a witness or victim of the current crime.

e. There is substantial reason to believe that no nonmonetary condition or combination of conditions of pretrial supervision will reasonably assure protection of the public or a victim, or the appearance of the defendant in court as required.

2. The court will determine whether the defendant shall be released pending the hearing on the preventative detention motion. Otherwise it must be held within three court days of filing the motion.

3. The defendant has a right to counsel, to be heard, and the right to a continuous one-session.

The victim has a right to notice of the proceedings and the right to be heard.

4. There is rebuttable presumption that the person shall not be released if either

a. The current offense is a violent felony, as specified, or committed with violence or with the likelihood of serious bodily injury or involved a deadly weapon, or the defendant personally inflicted GBI; or

b. The defendant is assessed as high risk and either has a prior conviction for a serious or violent felony within the past five years; was pending sentencing for a violent felony or one involving violence or use of a deadly weapon; has intimidated or dissuaded a victim or witness of the current crime; or, at the time of arrest was on any form of post-conviction supervision other than informal supervision.

5. At the hearing on the preventative detention motion, the prosecution shall establish that there is probable cause to believe the defendant committed the charged crimes in those circumstances where there has been no indictment or preliminary hearing, and the defendant challenges the sufficiency of the evidence that he committed the crimes.

6. The court shall order a preventative detention pending trial if it determines by clear and convincing evidence that no non-monetary condition of pretrial supervision will reasonably assure public safety or the appearance of the defendant.

7. Either party may file a writ challenging the decision, and the court of appeal must expeditiously consider the writ.

Suggestions for future shows, ideas on how to improve P&A, and other comments or criticisms should be directed to P&A author Mary Pat Dooley at (510) 272-6249 or marypat.dooley@acgov.org. Technical questions should be addressed to Gilbert Leung at (510) 272-6327. Participatory students: MCLE Evaluation sheets are available on location and certificates of attendance are constructively maintained in your possession in the Ala. Co. Dist. Atty computer banks.