

## MEMORANDUM

**FROM:** J. RICHARD COUZENS  
Judge of the Placer County Superior Court (Ret.)

**DATED:** April 17, 2020

**RE:** EMERGENCY RULE 4 – EMERGENCY STATEWIDE BAIL SCHEDULE  
[Updated Document]

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On April 6, 2020, as a result of the state of emergency related to the COVID-19 pandemic, and in furtherance of Penal Code section 1269b,<sup>1</sup> the California Judicial Council enacted Emergency rule 4, establishing a statewide emergency bail schedule (EBS) for designated criminal offenses. (See Attachment A for the full rule.) The purpose of this memorandum is to assist in the application of the new emergency bail schedule.

I. Effect of the Judicial Council action

The Judicial Council has created a statewide emergency bail schedule applicable to all felonies and misdemeanors. Specifically, for designated crimes and violations of supervision, the dollar amount of required bail has been reduced to \$0 such that the defendant may be released from custody without the payment of any form of monetary bail. (It is important to distinguish \$0 bail from “no bail” where the defendant may not be released on bail; see discussion of denial of bail, *infra*.) However, with limited exceptions, the emergency rule does not change any of the traditional bail procedures or the ability of a court to exercise discretion related to the setting of bail. For example, nothing in the emergency schedule has eliminated the ability of courts to set bail in an individual case that departs from the schedule if such a departure is necessary to assure the appearance of the defendant and protect public safety. (See, generally, § 1269b, subd. (b).)

Departures from the schedule should be rare and only as absolutely necessary to assure the defendant’s appearance or protect the public. Courts must be mindful of the reason why the Judicial Council created the EBS: to protect the health and safety of inmates,

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<sup>1</sup> Unless otherwise indicated, all statutory references are to the Penal Code.

court and law enforcement personnel, and the public. An increase in bail should only be granted upon good cause shown in the individual case.

## II. Application of the new schedule

The new schedule became effective at 5:00 p.m. on April 13, 2020. (EBS, subd. (b).) It is incumbent on the superior court in each county to revise the county misdemeanor and felony bail schedule in accordance with the new rule and to provide the administrator of any custody facility with the revised schedule. Subdivisions (b)(1) and (b)(2) specify the schedule will apply to all persons currently in custody and all persons thereafter arrested for criminal offenses in the county. Note the emergency rule applies to “every *accused* person” arrested or held in custody. (EBS, subd. (b)(1) and (2); emphasis added.) The reference to the “accused” limits the rule to cases that have “open” crimes or supervision violations. It likely has no application to persons who have been *convicted* of a criminal offense by plea or trial and are awaiting sentencing.

Likely there is little issue about the application of the schedule under subdivision (b)(1) to persons arrested on new charges – the custody facility will apply the new schedule as it has with past schedules. The application of the new schedule to persons already in custody as of 5:00 p.m., April 13, 2020, is more challenging.

### A. Application to persons currently in custody

EBS, subdivision (b)(2), applies the new bail schedule to “every accused person held in pretrial custody.” Accordingly, unless a person is charged with an excluded offense, regardless of the amount of bail previously set, the person is entitled to a resetting of bail at \$0. The mechanics of the process to reset the bail is not dictated by the emergency rule but will largely depend on the technology available in each county and the level of cooperation between the justice partners.

#### **Persons in custody, but not arraigned**

For persons in custody as of the effective date and time who have not yet been arraigned, and where a judicial officer has not otherwise set bail, it will be the responsibility of the custodial officer to re-set the bail in accordance with the emergency schedule, as if the new schedule had been in effect at the time of arrest and booking. (§ 1269b, subd. (b).)

#### **Persons in custody, previously arraigned**

Because bail is addressed and set by the court at arraignment, it is the responsibility of the court to order the resetting of bail for persons who remain in custody after arraignment. (See § 1269b, subd. (b).) It will be necessary for the court to issue either an individual or collective order resetting the bail for eligible defendants.

While nothing in the new rule requires a formal bail review hearing in every case being considered for bail reduction, whatever process is adopted should include a means of giving notice to all parties and counsel, an opportunity to comment on any proposed order granting or denying resetting of bail, and an order to the custodial officer regarding any change in the amount of bail.

Two methods have been suggested for dealing with this process:

1. One county has suggested that the defense bar review its pending cases to determine whether a particular client is eligible for bail reduction. The list is then submitted to the court and counsel for comment.
2. One county has requested the sheriff to provide the court with a list of all persons in pretrial custody. The court then reviewed the cases for eligibility, tentatively dividing the persons into two categories: those persons presumptively eligible for bail reduction and those persons presumptively ineligible for bail reduction. The two lists were then submitted to counsel for comment. If within a specified period there is no objection to the status of a particular inmate, the court will issue either an individual or collective order as indicated in the tentative decision. Any objections or comments are exchanged between the court and counsel; the court enters its ruling and order to the sheriff. The entire process is handled electronically.

### III. Setting of bail

#### A. The amount of bail, generally

Except for the offenses specifically excepted in the rule, the scheduled bail for all felony and misdemeanors is set at \$0. (EBS, subd. (c).) Although the emergency rule does not reference bail setting for enhancements to eligible offenses, unless the enhancement creates a serious or violent felony, likely the enhancement will not have a separate bail setting from the base crime. (See discussion, *infra*, for serious and violent felonies.) The effect of the change in the amount of bail is to permit the release of a qualified defendant without the need to post any cash or property bail, or bail bond. The setting of \$0 bail is to be distinguished from the “no bail” status of persons who are held in custody without the ability to post any form of bail. (See discussion of denial of bail, *infra*.)

Whether an arrested person qualifies for the reduced bail under the emergency schedule will be determined by the pending charges. For the time between arrest and arraignment, bail will be set according to the charges at arrest and booking. From arraignment forward, the charges filed by the prosecution in the complaint or information will determine the proper bail setting.

## B. Excluded offenses

EBS, subdivisions (c)(1) to (13), specify the offenses that are not subject to reduction in bail. For these offenses, the bail will be the amount currently provided in the existing bail schedule for the county. The bail setting will be in the amount provided for the underlying criminal charges, plus any count-specific conduct enhancements and any status enhancements. (EBS, subd. (e)(1).) Nothing in the new rule prohibits the court from exercising its traditional authority in setting bail for excluded crimes lower than schedule, or for any offenses not in conflict with the emergency schedule. (EBS, subd. (e)(2).) The emergency schedule also specifies its provisions are not intended to prevent the court from setting a “no bail” status for a defendant if authorized by the California constitution. (EBS, subd. (d); see discussion of denial of bail, *infra*.)

For the most part, the exclusion will be determined by comparing the discrete charged crime against the list of excluded offenses. For example, all robberies, regardless of how committed, are serious and violent crimes and thus are excluded from the \$0 bail set by subdivision (c)(1) of the emergency rule. Serious and violent crimes, however, also may be charged because of the application of certain conduct enhancements such as the use of weapons or the infliction of great bodily injury. (See, *e.g.*, §§ 667.5, subd. (c)(8), and 1192.7, subd. (c)(8), (23), (31).)

Unless otherwise included as a serious or violent felony, the exclusions do not appear to cover “conspiracies,” “attempts,” or “accessories.”

## C. Bail enhancement

There appears nothing in the emergency rule that would prohibit the court from exercising its traditional discretion in a particular case to increase bail for an included offense under the procedures authorized by Penal Code sections 1269c and 1270.1, subdivision (e). Although the presumptive bail is \$0 under the emergency schedule, nothing in the rule appears to conflict with the traditional authority of the court to adjust the amount of bail to meet particular circumstances of the offense or a defendant’s criminal history. Such an increase, for example, could be ordered by the on-call magistrate under the provisions of section 810, subdivision (a): “The presiding judge of the superior court in a county shall, as often as is necessary, designate on a schedule not less than one judge of the court to be reasonably available on call as a magistrate for the setting of orders for discharge from actual custody upon bail, the issuance of search warrants, and for such other matters as may by the magistrate be deemed appropriate, at all times when a court is not in session in the county.”

The court is also free to independently review the amount of bail at arraignment. While the new schedule provides for the presumptive bail, for good cause the court may depart from that schedule.

D. Setting conditions of release

The court may impose conditions of release, even though the bail amount is set at \$0. In *In re Webb* (2019) 7 Cal.5th 270 (*Webb*), the Supreme Court confirmed the ability of a trial court to impose reasonable conditions of release, even if the defendant has been previously released on scheduled bail. “[W]e conclude that trial courts have authority to impose reasonable conditions related to public safety on persons released on bail. We need not here consider in detail the exact contours of this authority. We stress, however, that, as the concurring justice noted below, this authority is ‘fairly narrow.’ ([Citation.]) Any condition must be *reasonable*, and there must be a sufficient nexus between the condition and the protection of public safety.” (*Webb*, at p. 278, emphasis in original.)

Conditions of release could be imposed by the on-call magistrate under the authority of section 810, subdivision (a). It also would be appropriate under *Webb* to impose the conditions at the time of arraignment.

E. Setting bail for violations of supervision

**Misdemeanor violations**

The emergency schedule specifies bail for violations of misdemeanor supervision is \$0, whether the arrest is with or without a warrant. (EBS, subd. (f)(1).) The bail setting is based on the underlying charge of conviction, not the nature of the violation. Accordingly, if a defendant is on misdemeanor supervision (whether or not for an excluded crime) and the violation is based on the commission of any new crime (whether or not for an excluded crime), bail on the violation is \$0. If the violation is a new substantive crime that is separately charged, however, nothing prevents bail from being set on both the violation of supervision and the new offense.

Note the schedule specifies bail at \$0 for misdemeanor violations whether or not the defendant is arrested by a warrant. While the bail specified in a warrant normally controls over the amount specified in a bail schedule (see § 1269b, subd. (b)), under EBS, subdivision (f)(1), scheduled bail will be \$0. As noted above, however, nothing in the emergency rule prohibits the court from exercising its discretion in an individual case to depart from the schedule if necessary to assure the appearance of the defendant or protect the public.

## Felony violations

Bail for violations of all forms of felony post-conviction supervision is to be set in the amount allowed for the underlying charge of conviction. (EBS, subd. (f)(2).) Accordingly, if the supervision is for an included offense, bail is \$0. If the supervision is for an excluded offense, the bail would be as provided in the county's regular bail schedule for the underlying offense, plus any count-specific conduct enhancements or any status enhancements. The bail setting on supervision violations is governed by the nature of the underlying crime of conviction, not the nature of the violation. Accordingly, if the defendant is on probation for an included offense, bail will be set at \$0, even though the violation is the commission of an excluded offense. However, nothing prohibits the court from setting bail on both the violation of supervision and the new offense, if the latter is separately charged.

The emergency schedule appears to prohibit the court from initially setting a "no bail" status for violations of felony supervision. The presumptive bail would be as provided in the emergency order. As noted above, however, nothing in the emergency rule prohibits the court from exercising its discretion in an individual case to depart from the schedule if necessary to assure the appearance of the defendant or protect the public.

### F. Denial of bail

The emergency rule expressly provides that nothing "restricts the ability of the court to deny bail as authorized by article I, section 12, or 28(f)(3) of the California Constitution." (EBS, subd. (d).) The constitution provides a number of circumstances where the defendant is simply ineligible for bail. The authority of the court to enter such an order has been included in the Supreme Court's pending review of *In re Humphrey* (2018) 19 Cal.App.5th 1006.

### G. Persons who are engaged in a competency determination

Persons who are pending criminal charges with significant mental health issues are in a unique and sensitive situation. If at all possible the justice partners should collaborate on finding suitable alternative placements for these individuals. While a number of these individuals will be eligible for a \$0 bail setting, the unsupervised release of these persons would be problematic on a number of levels.

As noted previously, if the court determines that a \$0 bail setting will not reasonably assure the appearance of the defendant or protect the public, the court has the discretion to depart from the bail schedule. Such a departure could occur pre-arraignment as a result of a request to the on-call magistrate pursuant to section 1269c, or at the time of arraignment.

Finally, the court must also keep in mind that once the proceedings have been stayed to determine the defendant's trial competence, the court lacks jurisdiction to proceed in the criminal case. As observed in *People v. Marks* (1988) 45 Cal.3d 1335, 1337: "We reiterate our recent unanimous holding in *People v. Hale* (1988) 44 Cal.3d 531, 244 Cal.Rptr. 114, 749 P.2d 769 that, once a trial court has ordered a competency hearing pursuant to section 1368, the court lacks jurisdiction to conduct further proceedings on the criminal charge or charges against the defendant until the court has determined whether he is competent. This determination is mandated by the federal constitutional requirement of due process and by unambiguous California statutes." The precise parameters of this restriction are not well defined. (See, e.g., *People v. Cadogan* (2009) 173 Cal.App.4th 1502 [not abuse of discretion to conduct conditional examination in stayed criminal action].) Because of the conflicting message evidenced by *Marks*, *Hale* and *Cadogan*, the court may find it more appropriate not to adjust the bail for these persons.

#### H. Effect of prior strikes on the application of the emergency bail schedule

The fact that an accused person has one or more prior strikes, in itself, will have no effect on whether the defendant is charged with an offense excluded from the emergency schedule. There is no reference to the Three Strikes law in the emergency schedule and merely because a person has a prior strike does not make the underlying crime a serious or violent felony. For a felony to qualify as a serious or violent crime, it must be a *discrete crime* charged in Penal Code sections 667.5, subdivision (c), or 1192.7, subdivision (c), or be a *fact-based* strike because of the way the crime was committed (see, e.g., §§ 667.5, subd. (c)(8) [inflicting GBI or use of firearm], and 1192.7, subd. (c)(8) [inflicting GBI], (23) [use of deadly weapon], (31) [assault with deadly weapon or firearm]).

Sections 667.5, subdivision (c)(7), and 1192.7, subdivision (c)(7), include as a serious or violent felony any crime punishable by life in prison. Although third strike offenders are punishable by life in prison, it is unlikely that third strike crimes will be excluded from the emergency bail schedule, unless the underlying crime itself is a serious or violent felony. In other contexts, appellate courts have declined to apply such an exclusion if the life term is due solely to the defendant's recidivist status. (See, e.g. *People v. Jones* (2009) 47 Cal.4th 566 [gang sentencing]; *People v. Thomas* (1999) 21 Cal.4th 1122 [application of Penal Code § 2933.1]; and *People v. Hernandez* (2017) 10 Cal.App.5th 152 [Proposition 47].) Certainly these cases are potentially distinguishable because none involved the issue of suitability for reduced bail. It also could be argued that exclusion based on recidivist status alone is entirely proper because the potential of increased punishment creates an increased flight risk.

Finally, as previously observed, courts retain the discretion to depart from a bail schedule where good cause is shown – where the scheduled bail is insufficient to assure the defendant’s return to court or protect the public.

I. Warrants

**Persons arrested on a warrant**

The emergency rule has no application to persons arrested on a warrant. Section 1269c, subdivision (a), requires the custodial officer or the clerk of the court to “accept bail in the amount fixed by the warrant of arrest, schedule of bail, or order admitting to bail . . .” Section 1269b, subdivision (b), further provides that bail shall be the amount fixed by the court if there has been an appearance in the case, but if “appearance has not been made, the bail shall be in the amount fixed in the warrant of arrest or, if no warrant of arrest has been issued, the amount of bail shall be pursuant to the uniform countywide schedule of bail. . .” Accordingly, persons arrested on a warrant will be held in accordance with the bail set by the court at the time the warrant was issued. The only exception to this rule, however, is when the warrant is based on a violation of misdemeanor post-conviction supervision. In such circumstances, as noted above, scheduled bail is \$0. (EBS, subd. (f)(1).)

**Issuance of warrants**

In circumstances where the court issues a warrant, nothing in the emergency rule requires the court to issue the warrant in the amount specified in the schedule. There is some indication that a \$0 warrant will not be accepted by the state’s CLETS system; that some dollar amount should be specified. The Department of Justice is aware of this issue and is looking into various solutions.

J. Application to persons on bail, out of custody

On its face, the emergency rule is applicable only to persons “arrested and in pretrial custody,” and persons “held in pretrial custody.” (EBS, subd. (b)(1) and (2).) It does not reference persons who are currently out of custody either on their own recognizance or on some form of posted bail. As stated in its purpose, the rule is “intended to promulgate uniformity in the handling of certain offenses during . . . the pandemic.” (EBS, subd. (a).) The health risk to persons in custody, and custodial and court staff, which is the genesis of the emergency rule, have little application to persons who are out of custody. Accordingly, it is doubtful the courts are under any obligation to conduct bail review hearings or make any adjustment to the bail of persons who are out of custody.

K. Sunset of the emergency rule

The emergency rule will remain in effect until 90 days after the governor declares the end of the state of emergency caused by COVID-19, or until amended or repealed by the Judicial Council. (EBS, subd. (g).)

## **Attachment A: Emergency rule 4. Emergency Bail Schedule**

### **(a) Purpose**

Notwithstanding any other law, this rule establishes a statewide Emergency Bail Schedule, which is intended to promulgate uniformity in the handling of certain offenses during the state of emergency related to the COVID-19 pandemic.

### **(b) Mandatory application**

No later than 5 p.m. on April 13, 2020, each superior court must apply the statewide Emergency Bail Schedule:

- (1) To every accused person arrested and in pretrial custody.
- (2) To every accused person held in pretrial custody.

### **(c) Setting of bail and exceptions**

Under the statewide Emergency Bail Schedule, bail for all misdemeanor and felony offenses must be set at \$0, with the exception of only the offenses listed below:

- (1) A serious felony, as defined in Penal Code section 1192.7(c), or a violent felony, as defined in Penal Code section 667.5(c);
- (2) A felony violation of Penal Code section 69;
- (3) A violation of Penal Code section 166(c)(1);
- (4) A violation of Penal Code section 136.1 when punishment is imposed under section 136.1(c);
- (5) A violation of Penal Code section 262;
- (6) A violation of Penal Code sections 243(e)(1) or 273.5;
- (7) A violation of Penal Code section 273.6 if the detained person made threats to kill or harm, has engaged in violence against, or has gone to the residence or workplace of, the protected party;
- (8) A violation of Penal Code section 422 where the offense is punished as a felony;
- (9) A violation of Penal Code section 646.9;
- (10) A violation of an offense listed in Penal Code section 290(c);
- (11) A violation of Vehicle Code sections 23152 or 23153;
- (12) A felony violation of Penal Code section 463; and
- (13) A violation of Penal Code section 29800.

### **(d) Ability to deny bail**

Nothing in the Emergency Bail Schedule restricts the ability of the court to deny bail as authorized by article I, section 12, or 28(f)(3) of the California Constitution.

**(e) Application of countywide bail schedule**

(1) The current countywide bail schedule of each superior court must remain in effect for all offenses listed in exceptions (1) through (13) of the Emergency Bail Schedule, including any count-specific conduct enhancements and any status enhancements.

(2) Each superior court retains the authority to reduce the amount of bail listed in the court's current countywide bail schedule for offenses in exceptions (1) through (13), or for any offenses not in conflict with the Emergency Bail Schedule.

**(f) Bail for violations of post-conviction supervision**

(1) Under the statewide Emergency Bail Schedule, bail for all violations of misdemeanor probation, whether the arrest is with or without a bench warrant, must be set at \$0.

(2) Bail for all violations of felony probation, parole, post-release community supervision, or mandatory supervision, must be set in accord with the statewide Emergency Bail Schedule, or for the bail amount in the court's countywide schedule of bail for charges of conviction listed in exceptions (1) through (13), including any enhancements.

**(g) Sunset of rule**

This rule will remain in effect until 90 days after the Governor declares that the state of emergency related to the COVID-19 pandemic is lifted, or until amended or repealed by the Judicial Council.