

California's Pretrial Legal Landscape: What Next?

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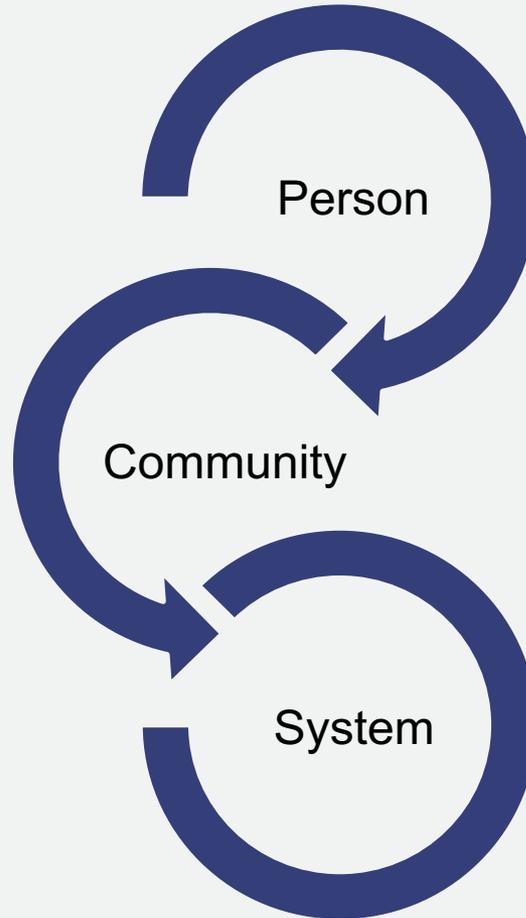
Today's Agenda

- Why Focus on Pretrial Decisions?
- The National Pretrial Legal Landscape: Release, Detention, and Conditions
- Recent Trends: The Use of Money
- California's Pretrial Legal Landscape: Release, Detention, and Conditions
- Panel Discussion: The Role of Pretrial Programs in This Landscape

Why Focus on Pretrial Decisions?

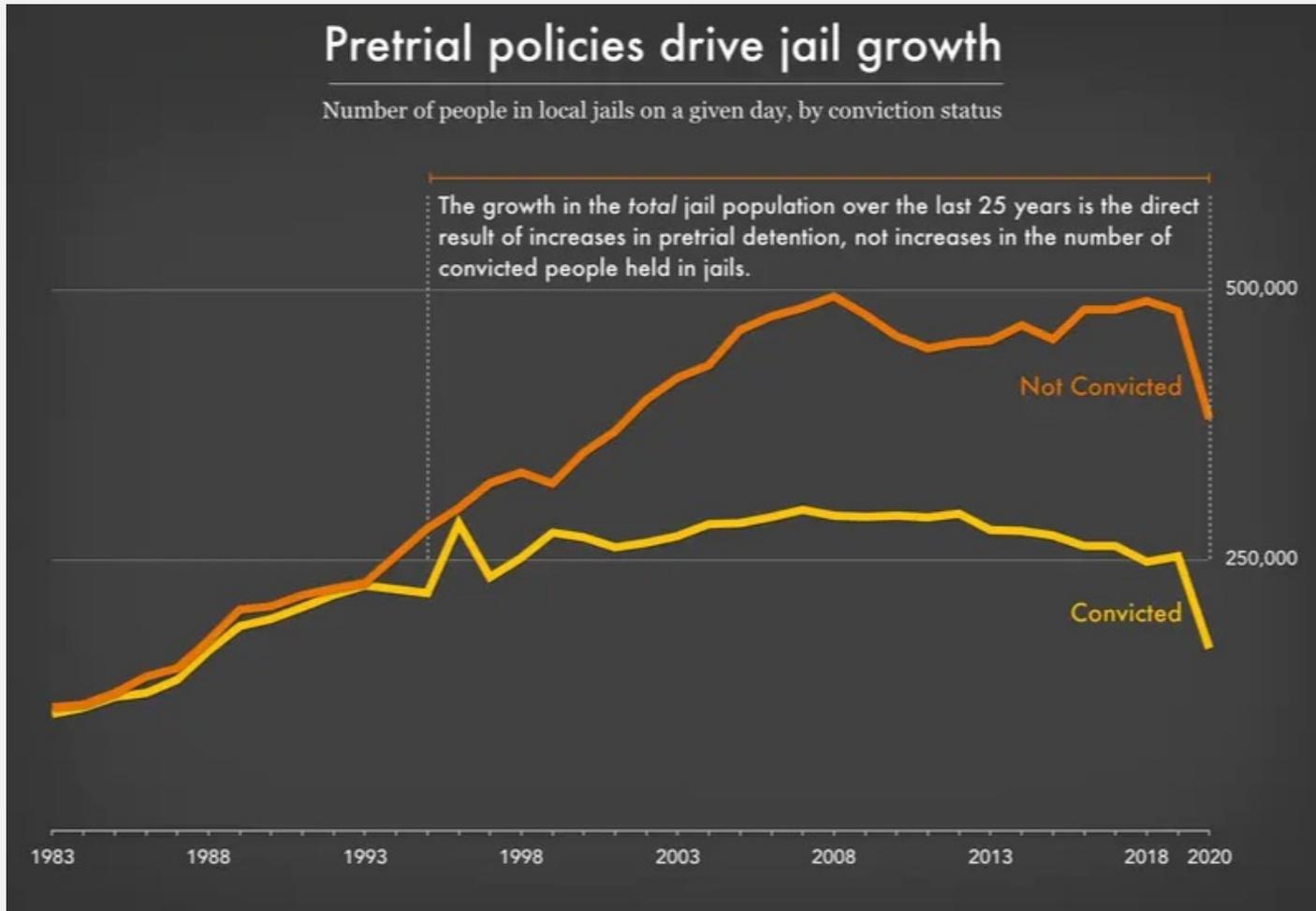
Why Focus on Pretrial Decisions?

- Impacts (+/-) on community safety and well-being
- Weakening of social structure
- Exacerbation of racial and economic disparities



- Loss of employment
 - Loss of housing
 - Disruption of family bonds
 - Increased likelihood of rearrest in the long term
-
- Impacts (+/-) on community safety and well-being
 - Enormous cost (\$14 billion/year)
 - Main driver of jail population

Driver of Jail Population Growth



Impacts of Pretrial Detention

- People detained pretrial are more likely:
 - to plead guilty or be convicted
 - to receive harsher sentences: greater likelihood of incarceration, and longer periods in jail or prison
 - to lose jobs, family, or housing
 - to be rearrested
 - to fail to appear for court

The National Pretrial Legal Landscape: Release, Detention, and Conditions

Constitutional Provisions

- The U.S. Constitution does not directly address when a judge can order that someone be detained before trial
- The only provision touching on this issue is the Eighth Amendment: *Excessive bail shall not be required*



Presumption of Release

The U.S. Supreme Court has held that the **vast majority** of people arrested are entitled to release before trial.

“In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”

*Chief Justice William Rehnquist,
US v. Salerno, 481 U.S. 739 (1987)*

Due Process: 5th and 14th Amendments

- This arises from the Due Process Clauses of the Fifth and Fourteenth Amendments: “No person shall ... be deprived of life, liberty, or property, without due process of law”
- Physical freedom is the most foundational form of liberty
- The state cannot take away that freedom, except in very limited circumstances, such as after a criminal conviction or because of a clear threat to others or oneself—and only after **due process** has been provided

Presumption of Innocence

- People on pretrial status have not been convicted of a crime and are presumed innocent

Absent a right to pretrial release, “the presumption of innocence... would lose its meaning.”

Stack v. Boyle, 342 U.S. 1 (1951)

Bottom Line: Detention Should Be the Last Resort

- Detention before trial should be the **last resort**:
 - Only used when someone is legally eligible for detention and there is no other way to reasonably assure *lack of flight* and *public safety*
 - Only imposed after a hearing with *due process*

Pretrial Release Conditions

Remember: Most people will succeed on pretrial release without any conditions other than a promise to return to court and stay out of legal trouble.



Setting Release Conditions

Two main legal principles:

If any conditions are imposed, they must be the **least restrictive necessary** to provide reasonable assurance of court appearance and public safety.

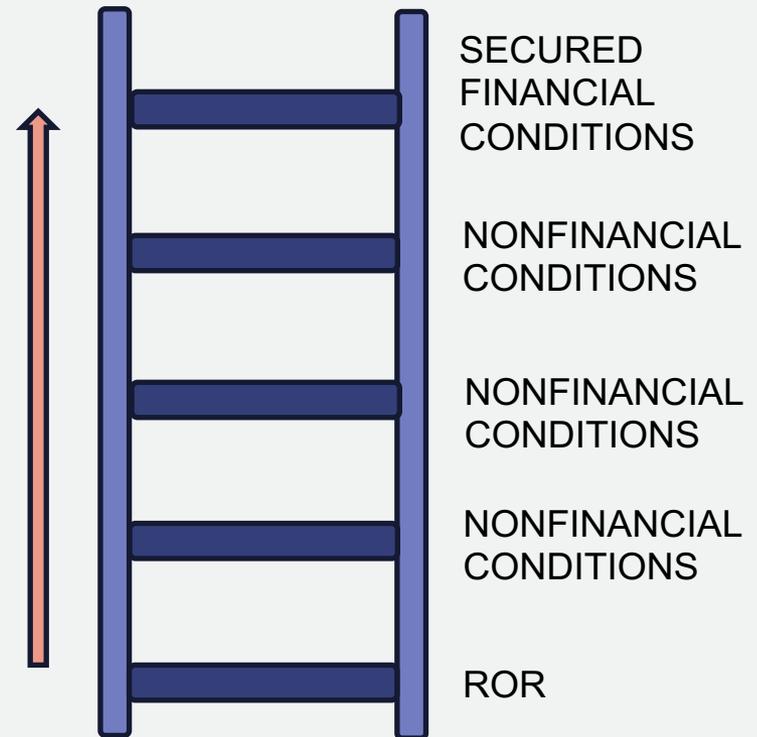
U.S. v. Salerno,
281 U.S. 739 (1987)

Conditions must be **individualized.**

Stack v. Boyle,
342 U.S. 1 (1951)

Least-Restrictive Conditions

- Any conditions—beyond a promise to obey the law and return to court—limit someone’s freedom
- The **starting point** in many state laws and court rules is **release on recognizance**
- If conditions are necessary, the court should not immediately jump to a condition that could result in detention



Individualized Conditions

- Conditions should be imposed based on consideration of a person's **individual circumstances** and likelihood of pretrial success
 - State laws and court rules often set forth factors to be considered
- Financial conditions should only be imposed after determining **what someone can afford**
 - Bond schedules should not be default at first appearance

Recent Trends: The Use of Money

Financial Release Conditions

- Extremely common across the country—and often a default for nearly everyone arrested
 - Not used as the least restrictive
 - Not individualized (bond schedules)
- Financial conditions of release are meant to be just that—conditions of **release**
- But current practices result in **detention** of people likely to succeed on pretrial release simply because they are poor; and the release of those a judge might want detained

Research: Financial Release Conditions

- Are financial conditions of release effective at promoting court appearance?
- Are financial conditions of release effective at promoting public safety?

“The reliable, credible evidence in the record from other jurisdictions shows that release on secured financial conditions **does not assure better rates of appearance or of law-abiding behavior before trial.”**

O'Donnell v. Harris County, 251 F. Supp. 3d 1052 (S.D. Tex. 2017)

Research: Financial Release Conditions

- Secured financial conditions contribute to higher rates of pretrial detention and exacerbate the collateral consequences of incarceration
- Financial release conditions often lead to increased racial and economic disparities in the system
 - Wealth extraction from the most impoverished communities



As a result, jurisdictions are working to reduce reliance on financial conditions, or eliminating them altogether

Major Shift: Elimination or Reduction in Use of Money

Money bond as a release condition to incentivize court appearance

REPLACED WITH



Pretrial services (e.g., court reminders, check-ins, supportive services to help with appearance)

Money bond as a method to detain pretrial

REPLACED WITH



Preventive detention, with a requirement that the prosecution request a detention hearing

Summary: Legal Principles

- Release and Detention
 - Presumption of release
 - Detention as the “carefully limited exception”
- Setting Release Conditions
 - Least-restrictive conditions
 - Individualized conditions
 - Legal and evidence-based issues with the use of financial conditions

Questions...



California's Pretrial Legal Landscape: Release, Detention, and Conditions

Release/Detention: California Constitutional Provisions

- **Article 1, Sec. 12**

- “A person *shall* be released on bail by sufficient sureties” after arrest, except in capital cases and cases involving certain serious violent crimes and credible threats of great bodily harm to another.
- “Excessive bail may not be required. In fixing the amount of bail, the court shall take into consideration 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.”
- “A person may be released on his or her own recognizance in the court’s discretion.”

Release/Detention: California Constitutional Provisions

- **Article 1, Sec. 28 (f)(3)**
 - “A person *may* be released on bail by sufficient sureties” except for capital crimes
 - “Public safety and the safety of the victim shall be the primary considerations” in setting, reducing, or denying bail
 - “A person may be released on his or her own recognizance in the court’s discretion,” taking into account victim and public safety as primary considerations

How to Resolve This?

- ***In re Humphrey* (Cal. Sup. Ct. 2021)**
 - Did not resolve question of which constitutional provision governs release and detention—or whether they can be reconciled
- ***In re Kowalczyk* (pending before Cal. Sup. Ct.)**
 - This question is squarely before the Court

Note: Both cases address the question of whether detention can ever be achieved through unaffordable financial conditions (“money bond”) – we’ll cover that later

Conditions of Release

Mandatory
Conditions of
release per
Cal. Penal Code §
1318(a)



Promise to appear



Obey all reasonable
conditions



Not to leave the state



Waive extradition

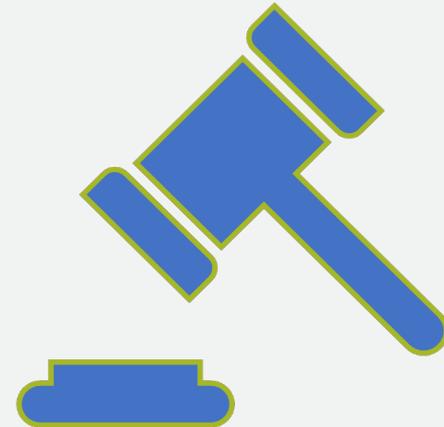


Informed of consequences
and penalties

In re Webb (Cal. Sup. Ct. 2019) & *In re York* (Cal. Sup. Ct. 1995)

Interpreting PC § 1318(a)(2):

- Trial court has authority to impose reasonable conditions related to public safety and court appearance, regardless of whether or not the person is released OR or on financial conditions



Least-Restrictive Conditions

- California law does not contain language requiring that conditions be the “least restrictive necessary” to provide reasonable assurance of court appearance or public safety
- And for felonies, it is generally understood that the court possesses inherent authority to impose conditions
- However, for misdemeanors, people are “entitled to” OR release *unless* the court finds that such release will compromise public safety or will not reasonably assure appearance
- And ROR is available for all non-capital defendants (PC § 1270)

Examples of discretionary conditions of release

Pretrial Monitoring (usually through
Probation)

Supportive Services

Electronic Monitoring

Treatment

Check-ins

Drug Testing

Stay Away/No Contact

Financial Conditions ("Money Bond")

THE BIG QUESTION



*So ... what about
money?*



In re Humphrey (Cal. Sup. Ct. 2021)

“The common practice of conditioning freedom solely on whether an arrestee can afford bail is unconstitutional”

- Court must first consider nonfinancial conditions
- If financial conditions are necessary, “the court must consider the [person’s] ability to pay, along with the seriousness of the charged offense and the arrestee’s criminal record and—unless there is a valid basis for detention—set bail at a level the arrestee can reasonably afford”

In re Humphrey (Cal. Sup. Ct. 2021)

- Appears to contemplate the possibility that financial conditions might be set at an unaffordable level in very limited circumstances—*Kowalczyk* may resolve this question
- If safety or appearance “cannot be reasonably assured if the arrestee is released, it may detain the arrestee only if it first finds, by clear and convincing evidence, that no nonfinancial condition can reasonably protect those interests”
- **Bottom line:** The Court is equating unaffordable money bond to an order of detention, with all the due process protections that a detention order would require
 - **Detention should never be accidental**
 - Open question about how this interacts with California’s constitutional provisions (Secs. 12 and 28)

Financial Conditions: Individualization

- Trend towards requiring greater individualization in decisions made at arraignment about what, if any, release conditions will be imposed
- California law still requires the adoption of bail schedules (PC § 1269b)
- But reliance on bond schedules has been seriously questioned by the Supreme Court, because, per Humphrey:
 - “When making any bail determination, a superior court must undertake an *individualized* consideration of the relevant factors”

Note: Los Angeles “Zero Bail” Policy

- As of October 1, 2023, new pre-arraignment release protocols (PARP) set five release categories:
 - Cite and release for lowest-level offenses
 - Book and release with \$0 bond for many non-violent, non-serious offenses
 - Magistrate review for certain non-violent, non-serious offenses that pose a greater risk to the public: magistrate makes individualized determination of non-financial conditions of release plus \$0 bond; may also hold over for arraignment on basis of public or victim safety or risk of non-appearance
 - Money bond for DV offenses and nearly all serious or violent felonies
 - No pre-arraignment release for capital offenses and certain felonies enumerated in the constitution and PC § 1270.5
- Request for injunction against PARP by over two dozen cities in LA County was rejected in December 2023

Questions...



The Role of Pretrial Programs

Current Context

- Smart, intentional pretrial decisions and strong pretrial programs are more important than ever
- Detention of people who are not a danger to the community does not make the community safer
- Pretrial programs are positioned to help people address their underlying needs and make the community safer

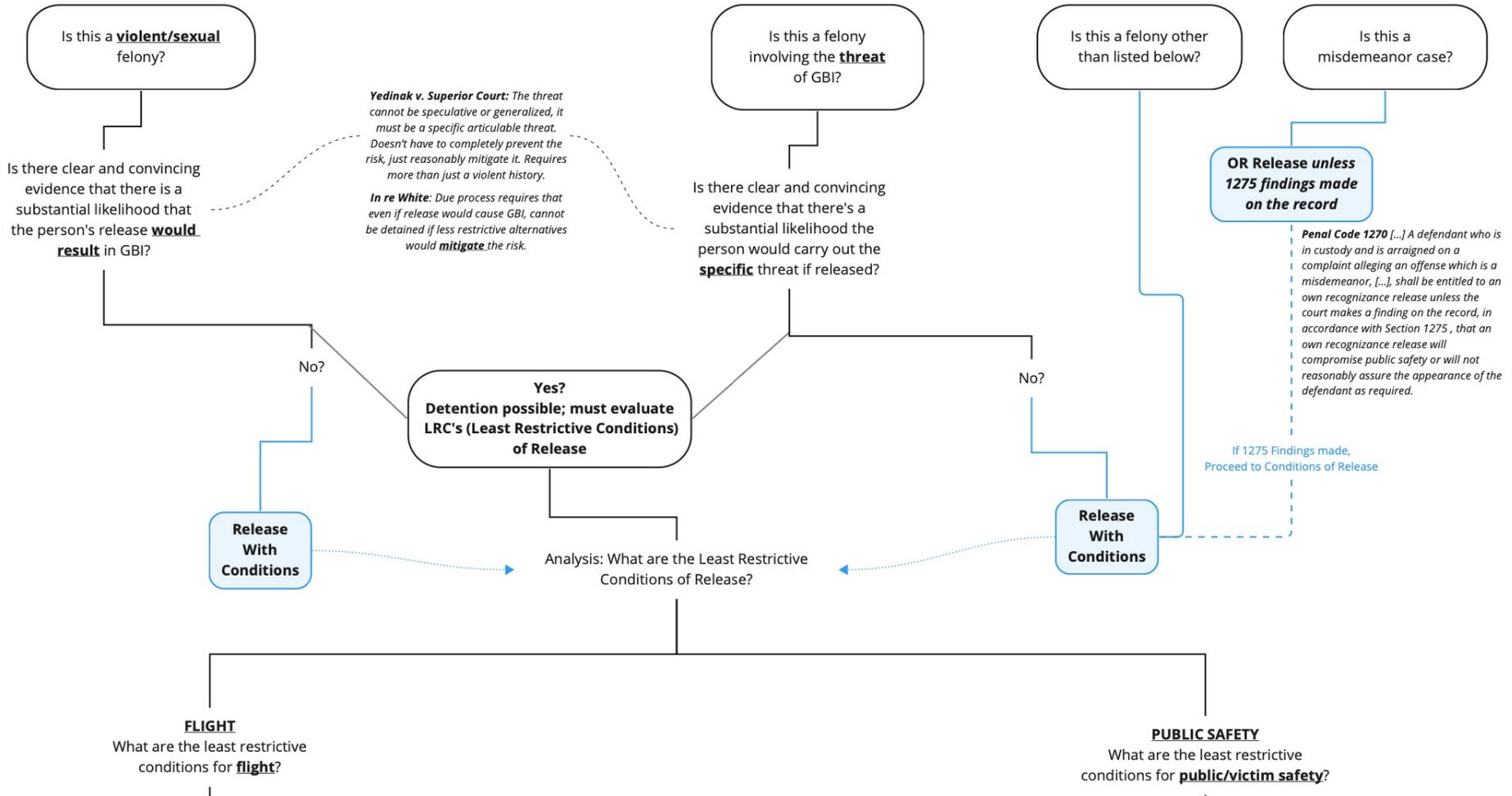
Pretrial Programs

- Play critical role in ensuring courts have release options—and that they order individualized, least-restrictive conditions by, for instance:
 - Offering an alternative to pure OR release or “release” on financial conditions
 - Gathering information about each person—e.g., pretrial assessment scores, criminal history, family and employment information
 - Making recommendations to the court about release conditions and monitoring levels
 - Monitoring those on release and providing services that help them **succeed**
 - And much more ... which is what we turn to now

Pretrial Release Decision Tree

Last Updated 1/30/24 12:00pm

Scan QR Code or visit
<https://bit.ly/PACC-PretrialRelease>
 for the most updated version



FLIGHT
What are the least restrictive conditions for **flight**?

Return to Court, SOR (regular check-ins with pretrial services manager), restriction from leaving town/city/state/designated housing, surrender passport, no drive order, GPS monitoring, attend all court dates in person, home detention (CPAC), etc.

After consideration of the LRC above, is monetary bail also necessary to reasonably assure appearance?

Are there any conditions above, or combinations of other conditions, that would **reasonably** assure the arrestee's appearance in court?

Yes?

Release With Conditions

PUBLIC SAFETY
What are the least restrictive conditions for **public/victim safety**?

4th Waiver, CPO, SAO, SOR, Do not use/possess controlled substances without valid prescription, do not use/possess [weapons, explosives, burglary tools, etc.], do not drive without a valid license and registration, attend 2 self-help meetings a week, completely abstain from the consumption of alcohol, SCRAM/ SCRAM Patch, participate in community services, mental health/drug/alcohol/housing services, GPS monitoring, drug/treatment programs, regular check-ins with pretrial manager, etc.

(Note - Financial Requirements/Cash Bail Not Indicated as Public Safety Tool)

Reem v. Hennessey 2017 WL 6539760 "Equal protection issues do arise, however, where there is no rational relationship between the setting of bail and the state's legitimate interests. This appears to be the case under California's bail scheme when it comes to imposing bail to address public safety concerns. By statute, defendants do not forfeit the bail money they have put up solely by virtue of committing a new offense while out on bail. It follows, then, that it is illogical for a California court to set bail in an effort to mitigate the threat a defendant poses to public safety."

Are there any conditions above, or combinations of other conditions, that would **reasonably** protect the victim/public?

Yes?

Release With Conditions

No?
Has the court set forth the reasons on the record for why **each** condition is insufficient with detail?

Yes

Only now can the court impose pretrial detention

No?

Release With Conditions

*Then court must consider the arrestee's ability to pay **alongside** other nonmonetary conditions.*

In re Brown (2022) 76 Cal.App.5th 296: "The trial court's use of unreasonably high, unaffordable bail to protect the public and past victims from the defendant—that is, setting bail knowing full well that it was the equivalent of a pretrial detention order—is directly at odds with the requirements for a constitutionally valid bail determination as articulated in Humphrey."

In re Humphrey: Cal. Const. prohibits pretrial detention to combat an arrestee's risk of flight unless the court first finds, based on clear and convincing evidence that no conditions can reasonably assure the arrestee's appearance in court

Ohio Risk Assessment System- Pretrial Assessment Tool (ORAS-PAT)

- ORAS-PAT is 7-item assessment tool
- Developed in a sample of 452 defendants from Ohio
- Scored based on an interview and review of administrative records
- Items assess criminal justice, personal/social, and clinical characteristics
- Designed to predict FTA or new arrests
- Demonstrates “good” predictive utility for pretrial outcomes
- Used in at least 13 states and 5 counties within California

Latessa, Smith, Lemke, Makarios, & Lowenkamp (2009)

ORAS-PAT

Risk Factor	Range
1. Age at First Arrest	0 – 1
2. Number of FTA Warrants in Past 24 Months	0 – 2
3. 3 or More Prior Jail Incarcerations	0 – 1
4. Employed At Time of Arrest	0 – 2
5. Residential Stability	0 – 1
6. Illegal Drug Use During Past Six Months	0 – 1
7. Severe Drug Use Program	0 – 1

Public Safety Assessment (PSA)

- PSA is 9-item assessment tool
- Developed in 746,525 cases drawn from 300 jurisdictions
- Scored based on administrative records
- Items assess age and criminal justice characteristics
- Predicts three pretrial outcomes:
 - FTA, new criminal activity, and new violent criminal activity
- Demonstrates “good” predictive utility for pretrial outcomes
- Used in at least 24 states and 21 counties within California

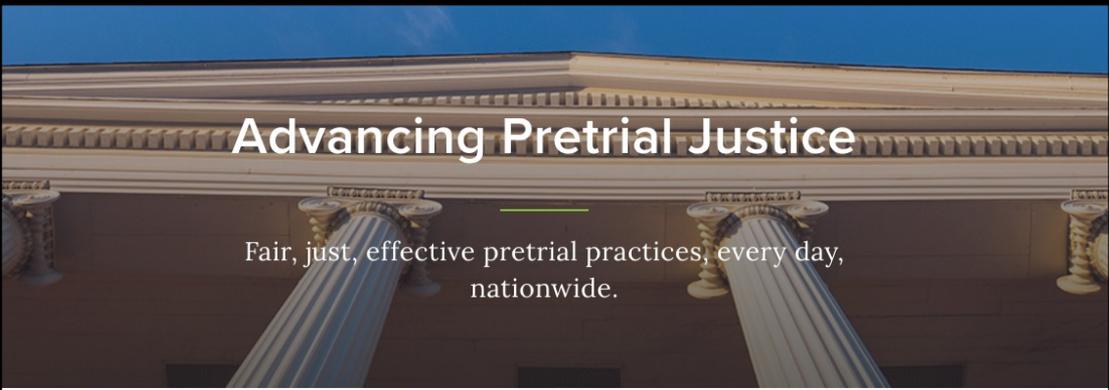
VanNostrand & Lowenkamp (2013)

PSA

Risk Factor	FTA	NCA	NVCA
1. Age at current arrest		X	
2. Current violent offense			X
3. Pending charge at the time of the offense	X	X	X
4. Prior misdemeanor conviction		X	
5. Prior felony conviction	X	X	X
6. Prior violent conviction		X	X
7. Prior failure to appear in the past two years	X	X	
8. Prior failure to appear older than two years	X		
9. Prior sentence to incarceration		X	

Conclusions

- Along with demonstrating comparable predictive utility to the ORAS-PAT, the PSA offers several benefits:
 - Does not require interviews
 - Saves time and ensures ratings for everyone (even refusals)
 - Provides estimates for three different outcomes
 - Including violence
 - Stronger research base
 - More and higher quality research studies
 - Technical assistance available from the Arnold Foundation and Advancing Pretrial Policy and Research (APPR)
 - Potential for automation with technological advances



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Addressing Unmet Needs
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Tanya Anderson · Staff · May '20

Connect with peers, find answers, and share experiences with people working to improve their pretrial justice systems. Tanya Anderson, Senior Manager at the Center for Effective Public Policy and a moderator of the APPR ...

● General

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Training Overview, Participants, and Agenda

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SECTIONS

<p>Training Overview, Participants, and Agenda</p> <p>Your progress</p> 	<p>Before the Training: Intro and Preparation Activities</p> <p>Your progress</p> 	<p>After the Training: Evaluation Survey, Recording, and Slides</p> <p>Your progress</p> 
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