

Preserving the Presumption of Innocence: A New Model for Bail Reform

We propose a bill to reform the bail system that does the following:

- Mandates release, with citation, at the point of arrest for all misdemeanor and non-serious/non-violent felony charges, with limited exceptions.
- Restricts detention only to those who are accused of serious/violent felonies **and** pose a specific and provable threat of harm to others or danger of fleeing to avoid prosecution, again with limited exceptions.
- Requires courts to conduct rigorous hearings with strict due process protections before ordering detention, bail or restrictive release conditions.
- Forbids the use of profile based risk assessment.
- If the court orders some restrictive conditions of release, the county will bear all costs of those conditions.

The new system will draw from existing law, from Article 1, Section 12 of the CA Constitution, and from some provisions of SB 10.

Mandatory Cite and Release for Misdemeanor and Non-serious/non-violent felony charges

All people arrested for misdemeanors or for statutorily defined non-serious/non-violent felonies will be released following arrest after signing a promise to appear in court, with limited exceptions. People fitting this category make up the vast majority of people arrested and held in custody pre-trial. They also make up the vast majority of people who plead guilty in exchange for “time served” deals that place them on probation and give them criminal records. Mandatory cite and release would allow them to fight their cases from out of custody.

California Penal Code section 853.6 requires police to cite and release all misdemeanors, with limited exceptions. This new proposal would expand that section to include relatively less serious felonies. The current section 853.6 contains a variety of provisions that, in practice, give police nearly unlimited discretion to arrest instead of issuing a citation and releasing. This new proposal would remove those loopholes and limit police discretion to arrest to only incidents where there is an observable, provable danger to another person if the arrested person is released, or if the person released has immediately continued the criminal conduct.

The proposed categories of people to be released are taken directly from SB 10. Under SB 10, all people accused of misdemeanors or non-serious/non-violent crimes are to be released pretrial.

However, under SB 10, they would be subjected to a risk assessment and released with conditions determined by the risk assessment tool. Under this proposal, people in these categories will not go into custody at all.

As in SB 10, there could be an exception for certain crimes, including low-level domestic violence, stalking and certain types of child abuse, where there may be a danger releasing a person back into the home. People accused of these crimes will be issued a temporary stay-away order until the court can hold an evidentiary hearing to decide their custody status or issue a more comprehensive order. If the accused has no other place to stay, then police may take this person into custody. Courts would then have to hold a hearing within a short (12 hour) time period.

This release structure ensures that the vast majority of people accused of crimes will not be jailed, even for a few days, during the pretrial phase. They will not need to go into debt to pay a bondsman. Undocumented people will not risk exposure to ICE officials in the jail. Taxpayers will save the costs of jailing people who have not been convicted of any crime.

Detention limited to those who are accused of serious/violent felonies and pose a specific and provable threat of harm to others or danger of fleeing to avoid prosecution.

Preventive detention (held without bail) would not be allowed unless the accused fits the narrow requirements of Article 1, Section 12 of the California Constitution. Section 12 allows preventive detention only for people accused of capital crimes, violent crimes or sexual assaults, if there is clear and convincing evidence that their release is substantially likely to cause serious injury to another person. It allows for preventive detention for any felony defendant if the prosecutor can prove that the accused has threatened serious injury and is likely to carry out that threat.

This proposal would expand that restrictions of Article 1, Section 12 to any setting of bail that is not attainable for the defendant, so that judges could not use money bail as a form of preventive detention, as exposed in the *Humphrey* case. The bill should include a clear definition of affordability. SB 10 originally included a standard mandating that judges could only set bail in an amount that does not create a financial hardship, cause the person to go into debt or require payment a bondsman's fee. This language was removed by amendment, leaving the text dangerously ambiguous on this crucial point. The proposed law would return similar language.

The proposed law would clarify that proof of danger cannot come from a statistical estimate, as is done through profile based risk assessment, and cannot be assumed based solely on the underlying charge. There must be actual evidence. For example, if the accused has made credible threats to harm a witness, then detention may be allowed. Similarly, a likelihood of someone missing a future court date cannot justify pretrial incarceration, while evidence of planning to flee the jurisdiction may.

In evaluating public safety for the release/incarcerate decision, the judge would be required to consider the impact of incarceration on the accused and their family.

Rigorous Due Process Hearings Required.

While police may arrest people accused of statutorily defined serious or violent felonies, they would be entitled to a court hearing within 48 hours to decide release, bail setting or preventive detention.

If the prosecution seeks to detain a person pretrial through bail setting or pretrial detention or to set restrictive release conditions, that person is entitled to a hearing to determine whether that person is a specific danger. That hearing will include the following procedures:

- 1) The accused will have the right to specific, individualized notice of the prosecutor's intent to seek incarceration, bail or restrictive conditions of release, including a statement of all reasons and evidence to be presented to the court.
- 2) The hearing must occur within the time limits for arraignment, unless the accused needs a brief continuance to prepare.
- 3) The prosecutor must present actual evidence to show probable cause to believe the accused committed the alleged crime.
- 4) The accused will have the right to immediate discovery of all evidence used against them.
- 5) The accused will have the right to question and cross-examine all witnesses against them.
- 6) The accused will have the right to remain silent, to testify and to present evidence on their own behalf.
- 7) The accused will have the right to immediate appointment of counsel.
- 8) The accused will have presumption of release with no condition, and the prosecutor will have to prove by clear and convincing evidence that any incarceration or restrictive conditions are warranted.
- 9) If the prosecutor does not sufficiently prove that the accused is a danger to a specific person or person, then the accused is entitled to immediate release.
- 10) The prosecutor may not rely on hearsay evidence or mere offers of proof.
- 11) The accused will have the right to cross-examine witnesses against them.

12) If bail is set, the court must conduct an ability to pay hearing, based on the standard stated above. The bill must not permit any fees to be charged for non-monetary conditions of release for the indigent. The statute must prohibit charging fees for non-financial conditions (such as GPS monitoring or court reminders) for any person who qualifies for court-appointed counsel or is otherwise below 200% of the federal poverty line).

13) The court must state on the record all reasons for ordering pretrial detention or restrictive release conditions in court and in the written record. This record must cite to specific facts within the evidence presented to justify the court's action. The court may not rely on general or boilerplate rational.

14) The accused will be entitled to complete "de novo" review of the court's decision by a different, independent court within five days.

Additional Provisions

- If the court orders some restrictive conditions of release, the county will bear all costs of those conditions.
- The state will allocate funds to public defense attorneys to create pretrial units that will conduct investigation, gather mitigating information and present defense to pretrial incarceration motions. This funding will be in addition to regular funding.
- Counties may establish pretrial services agencies that are completely independent of the judiciary, and police agency or the probation department. These agencies sole function will be to facilitate accused people's efforts to return to court.

No use of profile based risk assessment tools.

Courts will not be allowed to make release, detain or release conditions decisions based on statistical predictions of risk. Courts may not use tools that make such predictions to inform their decisions in any way.