# California Bail Reform Betrayal:
## A Section-by -Section Analysis of SB 10

The new bill completely deletes the existing bail framework and completely deletes the proposed framework of the original version of SB10. In its place, it envisions a system in which judges have vast discretion to simply incarcerate people pretrial with no possibility of release. It envisions a system in which arrested people are assessed for their suitability for release using risk assessment tools which are known to have inherent racial and class bias and arbitrary scoring systems that can justify as much or as little detention as the judges desire.

A Pretrial Assessment Services ("PAS") agencies, part of probation departments, are responsible for this risk assessment. If a person is low risk or medium risk, they may be released with ("supervised OR") or without ("OR") conditions. PAS decides those conditions from a menu supplied by the Judicial Council correlating to risk level. This decision is made before arraignment, without counsel and, in many cases, without judicial review. Those who are not released will have their custody status decided at arraignment by a judge based on the PAS' recommendation, which includes the risk assessment and other information, primarily information from law enforcement.

A prosecutor may seek to have the judge preventively detain a person if that person's crime is violent or if the prosecutor believes that there are no set of conditions that can reasonably assure the person's return to court or guarantee public safety. This standard is extremely loose and essentially grants prosecutors and judges nearly unlimited discretion to preventively detain. The preventive detention hearing is not well defined and can include police reports, hearsay statements, arguments of counsel, and statements of alleged victims who are not in court or subject to cross-examination. The hearing procedure gives judges the ability to order preventive detention with few procedural restrictions.

The Judicial Council oversees implementation, including the use of the risk assessment tools. There are a couple of off-hand mentions of racial bias in the legislation, but no actual mandates that it be addressed in the implementation of the tool. There is call for a study of bias by 2023, but no requirement that courts collect data that would allow an effective audit for bias. There is no provision for any sort of community-based input on implementation. In fact, the entire scheme is overseen exclusively by systems professionals—primarily judges and probation officials. There is no outlet for input by any directly impacted people, community organizations, civil rights organizations or even public defenders and other defense attorneys.

The data collection and oversight mandated in the bill is all about measuring the efficiency of the implementation of the tools and not about measuring their fairness. There is nothing in this bill that requires, necessitates or even considers lowering the rate of pretrial incarceration. It is simply a new management tool for the judiciary.

SECTION 1
Replacing SB10's statement of intent which discussed the negative impacts of money bail on communities, families, individuals and tax payers, including decrying it's racial and class based harms, as well as its corrosive effect on our system of justice, the new bill simply says its intent is "to permit preventive detention of pretrial defendants."

This statement of intent makes clear that this bill is not about bail reform. It is about enhancing judges' power to use pretrial detention to make the incarceration system more efficient.

1320.7
The bill creates "Pretrial Assessment Services" divisions of probation departments to oversee the assessment, detention and release of people accused of crimes. They will use risk assessment tools to divide people into high, middle and low risk categories. Risk is defined as risk of not returning to court (different from actual risk of flight from the jurisdiction) and risk of committing a new crime (measured by risk of re-arrest, which is greatly determined by police behavior). The tools are supposed to be "accurate" and "reliable" but those terms remain undefined. There is a line that says "minimize bias," but nothing in the bill expands on what that means.

1320.8
People charged with misdemeanors are to be released within 12 hours of booking without assessment, unless they fit an exception from 1320.10(d), in which case they will be assessed and likely detained. These exceptions are extremely broad and include if the person is assessed as "high risk." This conflicts with the provision that the person not be assessed. It could me that the person has been assessed as "high risk" in the past.

1320.9
The PAS is to gather information, including the risk score, the person's criminal and FTA history, and any supplemental information that "addresses risk." As this investigation is pre-arraignment, only wealthy people will already have an attorney, which means that information gathered by the PAS will come almost exclusively from law enforcement and will only favor incarceration. That information includes statements from alleged victims, transmitted to the PAS by the prosecutor.

The criminal history excludes any arrests that did not result in conviction if they are over ten years old. Therefore, the assessment will include arrests not resulting in conviction that are less than ten years old.

The PAS prepares this report and gives it to the court. It will also go to defense attorney and prosecutor, meaning a negative report is likely to be used in other aspects of the case, especially sentencing.

1320.10
Low risk people are to be released with the "least restrictive non-monetary conditions." PAS decides, with no explicit instruction or limit on their discretion, what those conditions are. This means that they can easily impose burdensome and unnecessary condition on released people, including electronic monitoring or reporting requirements. They have financial incentives to impose conditions.There is no judicial review unless the defendant makes a motion to the court. Middle risk people may be similarly released, with or without conditions, though courts may review the decision. Defendants will not pay for conditions of release.

PAS may not release people found to be high risk. Given the adjustability of the risk assessment scoring system, this means courts can set the tools so that a vast majority of people will not be released pre-arraignment.

In addition to high risk people, there are a variety of "no release" carve-outs, including: people accused of sex crimes; people accused of misdemeanor domestic violence, stalking or restraining order violations; people ac-

cused of any felony with violence or threats as an element, or if the person possessed a weapon; those accused of third time DUIs or having high blood-alcohol; people already under supervision, regardless of how minor the new crime is; those with accusations of witness intimidation; those with strike priors, regardless of how minor the new charge is; those with current strike charges.

This section forbids release for someone who has violated a condition of release within the past five years. This means that even technical violations of release conditions can disqualify a person from future release even for completely unrelated or minor charges. This provision may incentivize judges to add excessive conditions and probation officers to report more minor, technical violations.

The section forbids release for anyone who has been arrested for a restraining order violation within the past five years. Even if the arrest was wrongful or the restraining order invalid, it will prevent release. It forbids release for anyone arrested with a pending case, no matter how minor the pending case or the new arrest are, and forbids release for anyone on supervision, again no matter how minor the new arrest is.

1320.11
This section requires each county's courts to adopt local rules with release/detain and review standards, including giving the PAS authority to incarcerate middle risk people.

Courts may make rules that expand the list of "no release" offenses and factors from section 1320.10. This allows local courts almost unlimited discretion to override the risk assessment tools' ability to recommend release.

1320.12
PAS is to do a pre-arraignment review. It must consider the risk assessment. It must consider information from law enforcement, the prosecutor, the alleged victim and the defendant. Again, since the defendant won't have a lawyer at this stage, the information will likely only come from law enforcement and the victim and will favor incarceration.

If appropriate for release, PAS will impose least restrictive conditions (per their discretion). Conditions come from a list of options created by the Judicial Council.

1320.13
The court may review PAS pre-arraignment decisions, but may not release high risk people, those with strikes or with pending cases. They must give "significant weight" to the risk assessment, but also must consider what law enforcement, the victim, prosecutor and defendant say. Practically speaking, even someone with a low or middle risk score will likely be incarcerated if the arresting officer asks for incarceration or if the prosecutor says the victim wants incarceration.

The court may refuse pre-arraignment release if it finds "a substantial likelihood that no condition or combination of conditions of pretrial supervision will reasonably assure public safety or the appearance of the person as required." This formulation, in practical effect, gives the court complete discretion to refuse release.

1320.14
The court can modify conditions of release on 24 hour notice, on its own motion or on request from defense or prosecutor. Defendants who don't have lawyers yet will be unlikely to make these requests, while prosecutors will do so easily.

1320.15
At arraignment, PAS will submit a report with the risk assessment, criminal history, charge information, any supplemental information and recommendations for release, incarceration and condition.

1320.16
Prosecutors are to give alleged victims notice of the arraignment. Victims may speak in court or prosecutors can simply tell the judge what the victim said. This will result in prosecutors frequently telling the judge that the victim wants the accused person incarcerated, which will be a justification to do so, regardless of risk score.

1320.17
There is to be a presumption of release at arraignment. This presumption means nothing as there is nothing to stop a judge from exercising discretion to incarcerate.

1320.18
At any time during the course of the case, though most likely at arraignment, the prosecutor can file a motion requesting preventive detention, based on the following:
1) it is a crime of violence, threats, weapons or great bodily injury (this may apply to simple possession of a weapon);
2) the defendant was already on supervision;
3) the defendant has a pending case;
4) the defendant has intimidated a witness;
5) there is "a substantial likelihood that no condition or combination of conditions of pretrial supervision will reasonably assure public safety or the appearance of the person as required."

The first four possible reasons for preventive detention are all somewhat limiting. The last is completely discretionary and based on no discernible standard other than the prosecutor's and judge's subjective belief. The result will be a massive increase in preventive detention based on this discretion as a replacement for de facto preventive detention by setting high bail. This provision alone defeats the justice-based goal of bail reform.

The court can decide to hold someone in custody prior to the preventive detention hearing.

1320.19
This section spells out the procedures for preventive detention hearings. The hearing must be held within three days if the person is in custody, but either prosecutor or defense can ask for up to three more days, or both can agree to more time. They can also agree to have the hearing on the day of arraignment. If a defense attorney is lazy or simply believes the judge will rubber-stamp detention, they may agree to have the hearing at arraignment, avoiding the work required to prepare for and hold a real hearing. This likelihood threatens to revert these hearing into an exact replica of the current cursory bail hearing. Judges will know that if they simply disregard the defense at these hearings, many lawyers will effectively waive them. (Yes, you who work in the courts know exactly what I'm talking about here. And don't pretend you don't.)

The defendant has the right to counsel at these hearing. The alleged victim has the right to be heard and can be heard through the prosecutor simply repeating their statement.

1320.20
There is a rebuttable presumption for preventive detention, meaning release will be nearly impossible, if the charge is a violent felony (regardless of risk), if the person is high risk and the crime is violent or if the person has a pending violent charge. Any person with a "violent" conviction in the past ten years will be presumed preventively detained regardless of the seriousness of the new charge. That means a person with such a prior may be held without possibility of release if accused of driving without a license or some other extremely minor violation.

The prosecutor must show "probable cause" to believe the defendant committed the crime, though that showing may be made through arguments of counsel, police reports or hearsay declarations, not through a real evidentiary hearing.

The preventive detention decision is not based on a strict evidentiary hearing with cross-examination or other procedural rights that increase fairness, but on arguments of counsel, input from the victim (in person or written), the PAS report and risk assessment, police reports and other hearsay. This lack of due process protections will make it easy for the judge to simply read the arrest report or listen to the prosecutor and make the discretionary findings to order preventive detention.

This section mentions the US and California constitutional requirements behind preventive detention, but both are fairly vague and do not appear to require specific due process.

The factors the court is to consider in making the preventive detention decision are fairly vague and likely will give judges plenty of opportunity to exercise their discretion. They include: circumstances of the crime, weight of the evidence, the defendant's "past conduct," family and community ties and criminal (including FTA) history; if the defendant is on supervision; impact on community safety; impact on defendant's family, job or education; risk assessment score; plan for supervision.

1320.21
The court, defense or prosecutor may re-open the preventive detention hearing at any time if there is a change of circumstance from the time of the original decision.

1320.22
The court may issue an arrest warrant for any claim of a violation of release conditions. For example, if a GPS monitor malfunctioned and the violation is reported, the judge could order arrest.

1320.23
The arrest warrant may forbid booking and release, but must state reasons why.

1320.24
The Judicial Council will have complete control over implementation and there is no mechanism for community or other input. Judicial Council will create rules of court for this implementation.

This includes implementation of the risk assessment tools. This section has some language about the intended purpose of the tools. It says safety and due process rights. It mentions defendants' needs, though there is nothing in the bill that addresses this. It also says the tools should consider local resources and "maximizing efficiency." This phrase is particularly troubling, as these tools' main function is to efficiently operate the court machinery, as opposed to enhance justice.

This section mentions identifying and mitigating implicit bias, but is completely vague about how or what that even means in this context.

Judicial Council is to set standards for authorizing detention and establish release conditions related to the risk categories.

These are the main functions of the tools and their control is solely given to the judiciary.

Judicial Council will also decide what data must be collected, including the list in this section. The list does not include breaking down categories by race, gender, ethnicity or economic class. The categories of data are targeted at understanding the efficiency of the system, including breaking down the numbers assessed, the numbers detained, the numbers released, the numbers missing court dates, the numbers preventively detained.

Without the race, gender, class breakdown, there will be no way to assess the fairness of the system, only its efficiency. It appears that this data will be used to determine allocation of funding, not to actually reform the system.

Courts are to report information to the Judicial Council about their local rules, about the risk factors used and estimates of the amount of time it takes to make detention/release decisions.

The Judicial Council will collect data, train judges, consult with probation departments, approve risk assessment tools, report on outcomes to the legislature and governor and estimate the time of decision-making. They will also convene a panel of "experts."

1320.25
The panel of experts will include three judges and three people with "subject matter experience," charged with designating risk levels. One person is to have experience with the impact of bias in the tools. This may mean that they are centralizing the setting of risk scoring, though that is unlikely. This panel will be hand picked by the Chief Justice and dominated by the judiciary. It will likely include law enforcement or other systems actors. Again, no community oversight.

1320.26
The PAS are to be established by the courts. Unless the probation department refuses this role, PAS will be a division of probation. Smaller counties can combine to form regional agencies.

1320.27
There will be an annual assessment of the cost of implementation, based on the numbers of people arrested, the cost of the risk assessment, cost of release/incarcerate decisions and pretrial services. The legislature will allocate funding to local court systems. This system may give courts incentive to inflate their numbers. It will certainly take money away from community needs like schools and housing and put it into the law enforcement function of the courts.

1320.28
The legislature is to assess funding needs for probation for their supervision of people released pretrial, based on the numbers released and the levels of supervision. The bill is clear that this funding will supplement, not supplant, current funding levels. Again, there are incentives to inflate numbers supervised, and this takes money from community needs.

1320.29
This section provides a similar funding boost for the judiciary, based on the volume of cases, including the volume of preventive detention hearings.

1320.30
BSCC is to contract with a research entity for an independent evaluation of the impact on race, gender, ethnicity and economic class by 2023. Clearly, this evaluation is not prioritized in the legislation. There is no provision to limit who BSCC contracts or to guide the audit. There is no guarantee that the proper data will exist to conduct the study.

1320.31
Sentenced prisoners should have priority in jail. This bill is not about decarceration in any way. Moving pretrial prisoners out allows for more incarceration of sentenced prisoners.

1320.32
This bill would replace any other bail law.

1320.33
It will be retroactive. It is to start 7/1/19

1320.34
Judicial Council is to train on implementation.