

# Pretrial Release and Detention: A First Look

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# Four Buckets:



# Pretrial Buckets

Categories of offenses and risk levels

- Different levels of review
- Greater scrutiny as risk increases
- Detention based on risk, not lack of money

Cash bail or bail bonds eliminated

- High risk offenders can be detained, regardless of financial resources

Risk determination based on assessment tool, investigation by Pretrial Assessment Services (PAS), and evidentiary hearing

Bucket # 1  
PC § 1320.8

# Misdemeanor Book & Release



Most are not booked, or booked and released within 12 hours

No risk assessment conducted; no court review

Includes arrests with or without warrant

Bucket # 1  
PC § 1320.8

# Misdemeanor Book & Release



- **NOT ELIGIBLE for book and release:**
  - Registerable sex crimes
  - Specified DV crimes and stalking
  - 3<sup>rd</sup> DUI w/in 10 yrs; DUI w/injury; BA of .20 or more
  - Restraining order violation within 5 yrs
  - 3 or more FTA warrants within past year
  - Pending trial or sentencing
  - On any postconviction supervision [except informal]
  - Intimidated, dissuaded or threatened victim or witness
  - Violated condition of pretrial release w/in past 5 yrs
  - Convicted of serious or violent felony within past 5 yrs

# Investigation with Risk Assessment

PC § 1320.9

- PAS investigation for all (except those booked & released)
- Report provided
  - Prior to prearraignment PAS review, if eligible
  - Prior to prearraignment court review, if available and eligible
  - Prior to arraignment for all others

# PAS Investigation Report

PC § 1320.9

Investigation report includes:

- Results of validated risk assessment:
  - Risk level: "low," "medium" or "high"
- Charge, criminal history, FTA history w/in 3 yrs, victim comments, and reasonably available and relevant supplemental information re risk
- Recommendations for conditions of release

No use for any purpose other than pretrial release/detention decision

Bucket # 2  
PC § 1320.10

# Prearraignment Review of Custody by PAS



PAS must conduct investigation and authorize release/detention of **felonies** within 24 hours of booking without prior court review



Release authority applicable to:

1. Low risk defendants (with exceptions)
2. Medium risk defendants (with exceptions)



Bucket # 2  
PC § 1320.10

# Prearraignment Review of Custody by PAS



## ❖ Low and medium risk offenders NOT ELIGIBLE for release by PAS:

- Registerable sex crimes
- Specified DV crimes and stalking
- 3<sup>rd</sup> DUI w/in 10 yrs; DUI w/injury; BA of .20 or more
- Restraining order violation within 5 yrs
- 3 or more FTA warrants within past year
- Pending trial or sentencing
- On any post-conviction supervision [except informal]
- Intimidated, dissuaded or threatened victim or witness
- Violated condition of pretrial release w/in past 5 yrs

Bucket # 2  
PC § 1320.10

# Prearraignment Review of Custody by PAS



## ❖ Low and medium risk offenders NOT ELIGIBLE for release by PAS:

- Convicted of serious or violent felony within past 5 yrs
- Felony offense with elements that include physical violence or threat of physical violence, likelihood of serious injury, personally armed or use of a deadly weapon, personal infliction of GBI
- Arrested for a serious or violent felony
- Assessed as high risk

Bucket # 2

PC § 1320.10

# Prearraignment Review of Custody by PAS



Each court required to adopt local rule [PC § 1320.11]

- Consistent with state Rule of Court
- Set review, release, and detention standards for medium risk persons by PAS
- Provide “effective and efficient” procedure that “protects public safety and respects the due process rights of defendants”
- **May add crimes or factors** to list of **medium risk offenders** not eligible for PAS release – **may not exclude ALL** medium risk offenders

Bucket # 2  
PC § 1320.10

# Prearraignment Review of Custody by PAS



**LOW RISK:** release eligible def on OR on least restrictive conditions reasonably necessary to protect public and assure appearance – **not conditioned on advance court review**

**MEDIUM RISK:** release eligible def on OR or SUPERVISED OR on least restrictive conditions reasonably necessary to protect public and assure appearance – **not conditioned on advance court review**

**Persons not released:** are held for court review [if court opts in] or arraignment

Def not required to pay for conditions of release

Bucket # 2  
PC § 1320.13

# Prearraignment Review of Custody by Court



**At option of the court**, judge can make prearraignment review and release decisions **low and medium risk** arrestees **ineligible for PAS review**

Court can release on OR, SUPERVISED OR with least restrictive conditions, or detain until arraignment

SJO may make decision if authorized by local court

Bucket # 2  
PC § 1320.13

# Prearraignment Review of Custody by Court



**Standard for detention:** 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.”

Consider any relevant and available information and the report and recommendations of PAS – which shall be given “significant weight”

Bucket # 2  
PC § 1320.13

# Prearraignment Review of Custody by Court



Presumption no condition will be sufficient if shown:

1. Crime committed with violence against person, threatened violence, or likelihood of serious bodily injury, or personal use of or armed with deadly weapon or infliction of GBI
2. Def on any post-conviction supervision (except informal)
3. Def intimidated, dissuaded or threatened victim or witness
4. Def on pretrial release and violated condition

Bucket # 2  
PC § 1320.13

# Prearraignment Review of Custody by Court



**Def NOT ELIGIBLE for prearraignment release by ct if:**

1. Def assessed as "high risk"
2. Def charged with serious or violent felony
3. Def pending trial or sentencing in a felony matter



Bucket # 3

PC § 1320.15 -

§ 1320.17

# Review at Arraignment



Applies to persons:

1. Held/released after prearraignment review
2. Charged w/ serious or violent felony
3. Pending trial or sentencing on felony
4. Assessed as high risk

PAS provides info to ct:

1. Report with results of risk assessment
2. Any comments of victim
3. Any reasonably available supplemental info
4. Recommendations re release/detention

Presumption of release with least restrictive nonmonetary conditions that reasonably assure public safety and return to court

**UNLESS DA REQUESTS PREVENTIVE DETENTION HEARING**

Bucket # 3

PC § 1320.18

# Request for Preventive Detention



DA may, at arraignment or any other time, request preventive detention based on:

1. Crime committed with violence against person, threatened violence, or likelihood of serious bodily injury, or personal use of or armed with deadly weapon or personal infliction of GBI
2. Def on any post-conviction supervision (except informal)
3. Def pending trial or sentencing in felony matter
4. Def threatened or intimidated witness or victim of current crime
5. "There is substantial reason to believe that no 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."

Bucket # 3

PC § 1320.18

# Request for Preventive Detention



Ct must determine whether to release or detain pending hearing

- Consider info and recommendations of PAS – giving “significant weight”
- Ct may detain if finds there is “substantial likelihood” no condition or combination of conditions of pretrial supervision will reasonably assure public safety, or the appearance of the defendant
- If no such finding, must release on least restrictive conditions
- Reasons stated on the record



# Preventive Detention Hearing (PDH)

Bucket # 4  
PC § 1320.19-  
§ 1320.21

- PDH within 3 ct days if def in custody; 5 ct days if def not in custody; good cause continuance up to 3 ct days, unless stip
- May be remanded if out of custody
- Parties may stip to hold PDH at arraignment
- Completed at one session
- Right to counsel; appointed counsel if indigent
- Victim given notice and opportunity to be heard



# Preventive Detention Hearing

Bucket # 4  
PC § 1320.19-  
§ 1320.21

## PRESUMPTION OF DETENTION IF:

Crime a violent felony

Crime committed with violence against person, threatened violence, or likelihood of serious bodily injury, or personal use of or armed with deadly weapon or personal infliction of GBI



# Preventive Detention Hearing

Bucket # 4  
PC § 1320.19-  
§ 1320.21

## PRESUMPTION OF DETENTION IF:

Def assessed as high risk AND

- Def was convicted of serious or violent felony in past 5 years
- Def was pending sentencing for a crime of violence, defined above
- Def intimidated or threatened witnesses or victim
- Def was on any form of supervision other than informal probation



# Preventive Detention Hearing

Bucket # 4  
PC § 1320.19-  
§ 1320.21

## FINDINGS AT PDH

Probable cause def committed crime, if no indictment, holding order or waiver, if def challenges sufficiency of evidence

Whether to detain

Permitted by Calif and US constitutions, AND

“Clear and convincing evidence that no nonmonetary condition . . . will reasonably assure public safety or the appearance of the defendant”



# Preventive Detention Hearing

Bucket # 4  
PC § 1320.19-  
§ 1320.21

## FINDINGS AT PDH

If insufficient basis for detention, must release on least restrictive conditions

Findings stated on record





# Preventive Detention Hearing

Bucket # 4  
PC § 1320.19-  
§ 1320.21

## FINDINGS BASED ON EVIDENCE AT PDH:

- Statements of def and victim
- Testimony of def (right)
- Offers of proof
- Argument of counsel
- Any evidence presented at the hearing, including reliable hearsay



# Preventive Detention Hearing

Bucket # 4  
PC § 1320.19-  
§ 1320.21

## REVIEW OF DECISION

Transcript w/in two court days of request, if requested  
“If either party files a writ challenging the decision, the court of appeal shall expeditiously consider that writ”



# Preventive Detention Hearing

Bucket # 4

PC § 1320.19-

§ 1320.21

In determining release or conditions, court may consider:

- Nature and circumstance of crime
- Weight of evidence against def
- Def's past conduct, family and community ties, criminal history, FTA record
- Whether def was under supervision
- Nature and seriousness of the risk to public safety if released
- Recommendation of PAS
- Impact of detention on def's family responsibilities, community ties, employment and education
- Proposed plan of supervision



# Preventive Detention Hearing

Bucket # 4  
PC § 1320.19-  
§ 1320.21

Court may hold new hearing or reopen prior hearing if newly discovered evidence or material change in circumstances and good cause

# Warrants

PC § 1320.22-  
§ 1320.23

Court may issue warrant for violation of conditions or FTA

Court may issue warrant and designate:

- Book and release
- Detain for prearraignment review
- Detain pending arraignment
- Detain pending hearing on violation of supervision

Binding on LEA and jail, not on PAS or court reviewing violation

Warrant designation is one factor for PAS or judge to consider at subsequent hearings

# Transition Issues

- Effective date: October 1, 2019
- Who does the work?
  - **Assessment**: the ct or probation contracting with ct
  - **Supervision**: probation department
- Show me the money!
  - Legislature annually funds courts for PAS
  - Legislature annually funds probation for supervision – only if contracts w/ct for PAS

# Transition Issues

Def on existing bail:

- Persons on bail prior to 10/1/19 remain on bail
- Persons in pretrial custody as of 10/1/19 entitled to review of status
- Persons arrested on warrants after 10/1/19 will be under new provisions

# Transition Issues

## Role of Judicial Council

- Develop rules and forms re:
  - Proper use of risk assessment
  - Elements of validation; ID & mitigate implicit bias
  - Standards of review of release/detention decision
  - Parameters of local rule re medium risk offenders
  - Conditions of pre-trial release
- Maintain list of validated risk assessment tools



# Transition Issues

## Role of Judicial Council

- ID data elements
- Training of judges in coordination with CPOC
- Assist in creating contracts for PAS
- Report to Governor and Legislature every other year

# Transition Issues

## Evaluation of practices:

- Board of State and Community Corrections
- Contract for independent evaluation
- “Particularly . . . the impact of the act by race, ethnicity, gender, and income level”

## References to bail in code:

- After 10/1/19 – all references to “bail” “shall refer to the procedures specified in this chapter”

# QUESTIONS?

With appreciation to  
Judge Lisa Rodriguez