State of California

LITTLE HOOVER COMMISSION

May 30, 2013

The Honorable Edmund G. Brown, Jr.
Governor of California

The Honorable Darrell Steinberg
President pro Tempore of the Senate
and members of the Senate

The Honorable Bob Huff
Senate Minority Leader

The Honorable John A. Pérez
Speaker of the Assembly
and members of the Assembly

The Honorable Connie Conway
Assembly Minority Leader

Dear Governor and Members of the Legislature:

Individuals who are arrested and presumed innocent, and the community at large, which is entitled to have its safety protected, have the right to expect that impartial, independent, and informed judges will determine who and under what conditions bail will be granted and sentences served. Current jail overcrowding, however, has forced sheriffs of the executive branch into the untenable position of making decisions traditionally made by members of the judicial branch of government. This unintended consequence of overcrowding threatens to make California's criminal justice system less reliable, less transparent, and less accountable. In many California counties, sheriffs are routinely setting aside decisions made in courtrooms regarding flight risk, the gravity of offenses, county bail schedules and constitutional rights of detainees and victims of crime because they need to free up bed space for other detainees.[1] This shift of authority due to limited bed space is not well-known to the public and upends commonly held views of due process and the role of the court and criminal procedure.

Jail Overcrowding

The overcrowding problem existed before realignment.[2] However, the addition of a new category of probationers to county criminal justice systems and the requirement to keep more sentenced offenders at the local level has exacerbated the problem in many counties. People now can serve terms of more than a decade in county jail, effectively tying up a bed in a facility designed for short sentences and pre-trial stays.[3] This in turn has raised new concerns about how counties can manage their use of jail beds to maximize public safety, ensure the rights of defendants and protect victims of crime. The situation could become more acute depending on how Governor Edmund G. Brown, Jr., and the Legislature address a federal court order to reduce state prison population by 9,300 more offenders by year end. AB 109, however, lacked requirements to report back on outcomes, giving the state little accountability for the $2 billion it has spent to date.

For some counties, new jail construction may represent a partial solution to overcrowding, albeit an expensive one, after accounting for ongoing operational costs.

Policy-makers, however, have available to them a wider range of options that should be tried first, particularly for large pre-trial populations, which can restore an appropriate balance of authority to county criminal justice systems and aid successful implementation of realignment.

Pre-Trial Detainees

Detainees awaiting trial, who are presumed innocent until proven otherwise, represent the largest category of inmates in county jails. They occupy well more than 60 percent of the state's nearly 80,000 county jail beds statewide, according to the most recent Board of State and Community Corrections survey, though there are important differences among counties.[4] Many pre-trial detainees are poor or mentally ill and remain jailed for weeks, sometimes months.[5] Though not convicted of any crime, they remain incarcerated because they cannot afford to post a bail bond. California's realignment initiative to date lacks guidance on how to reduce this population or incentives to pursue evidence-based practices. Pre-trial release strategies to help manage jail space are not widespread. Where they exist, they vary considerably from county to county – without state oversight, accountability or systematic sharing of best practices.

As these large pre-trial jail populations occupy beds while awaiting court action on charges against them, sheriffs in 17 California counties routinely release parole violators and convicted offenders whom judges have sentenced to specific terms. Some of these sheriffs told the Commission how they also refuse to admit new detainees, invoking the blanket authority invested in them by federal, state and county court orders or consent decrees that limit their county's jail population. The Fresno County Sheriff told the Commission that she releases 40 to 60 offenders early every day, either non-sentenced defendants or convicted offenders. She said the Fresno County jail is 70 percent filled with pre-trial defendants. The Kings County Sheriff described a practice in which he manages the county's jail population by automatically releasing pre-trial detainees for whom judges have set bail at or below a certain target, for example $10,000 or $25,000, when the jail reaches its cap. Sheriffs in an estimated 20 counties with self-imposed jail population caps claim similar authority.[6]

Matt Cate, executive director of the California State Association of Counties and former Secretary of the Department of Corrections and Rehabilitation, told the Commission that California, between state prisons and county jails, has cells for about 200,000 inmates. "Judges can say whatever they want about putting people in those cells," Mr. Cate said. If those cells are not available, either in prison or jail, Mr. Cate said, "Somebody else is going to make some other decision. The Supreme Court has done it regarding prison cells. Sheriffs are doing it. Jail administrators are doing it with jails."

Sheriffs readily admit their discomfort with making such decisions and worry about such actions' impact on public safety. More worrisome, these decisions in most counties are guided by little more than past practice or gut instinct. Such jail releases often occur without benefit of pre-trial services or use of evidence-based practices rooted in correctional science, such as a validated risk and needs assessment. The assessment is a series of questions about risk factors such as antisocial personality, criminal friends, poor family relationships and substance abuse, designed to determine a defendant's needs such as drug treatment and

likelihood to continue a pattern of crime, violence or drug use. Such tools have shown to have a higher predictive value than judgments based on an officer's personal experience.[7] Use of such assessments could go far to make better-informed decisions about who enters and who stays in jail. One of the missions of government is to ensure that jail space is reserved for offenders who represent the greatest danger to the public. Use of the best available science to manage limited bed space is essential to the goal of protecting the public.

The proliferation of early releases without benefit of proven risk assessment tools, the erosion of judicial control and the resulting threat to public safety holds the potential to undermine realignment and its broader policy goals of increasing the use of evidence-based community alternatives to incarceration.

The Commission's examination of how counties manage jail space while implementing realignment began in response to a June 15, 2012, letter from Senator Roderick Wright and five other lawmakers that cited inconsistent application of bail schedules as a key contributor to jail overcrowding. The letter asked the Commission if "expensive" bail schedules might be lowered statewide and standardized, eliminating both the disparity of bail amounts from county to county and the practice of "bail stacking," in which counties combine the individual bail amounts of multiple charges to prevent pre-trial release.

The Commission conducted its study as part of ongoing oversight of Governor Schwarzenegger's 2005 reorganization that created the California Department of Corrections and Rehabilitation (CCDR). As part of its oversight of realignment, the Commission held hearings in November 2012, and March 2013, where witnesses discussed the uses of traditional commercial bail and emerging pre-trial services in management of county jails, as well as the potential for sentencing reform to contribute to realignment's success. Written testimony from the witnesses who participated in hearings is available on the Commission's website at www.lhc.ca.gov.

The hearings and study process lead the Commission to four recommendations to help realignment strengthen California's criminal justice system:

The state should bolster oversight of AB 109 spending. In its September 27, 2011, letter to the Governor and Legislature on the eve of realignment's introduction in California, the Commission stated, "Successful realignment will require continuing state involvement." The Commission continues to call for oversight to encourage accountability and incentives to use best practices. The state has a massive investment in the success of its initiative. State government has directed approximately $2 billion to date to counties to implement realignment. This investment demands accountability and some measurement of performance. To date, the state has no specific standards by which to measure counties as they implement this historic policy shift, nor has it provided incentives for pursuing strategies that have worked at the county level in California. No funds have been earmarked to evaluate whether county approaches fare well or poorly over time. A 2013 Stanford University analysis has suggested that setting aside just 0.1 percent of realignment funding for research would provide approximately $1 million annually for evaluating its accomplishments and setbacks.[8]

Validated risk and needs assessments should be mandatory in each of California's 58 counties. Assessing behavioral risk is a fundamental part of the criminal justice system. It is particularly crucial at the pre-trial stage, where, by law, defendants are presumed innocent until proven guilty. Validated risk and needs assessments have become credible predictors to determine which pre-trial defendants should stay in a county jail and which should be released to the community. When defendants are released, such assessments are helpful to determine what strategies should be pursued and conditions should be required to protect victims, and to mitigate risk that the defendant will fail to appear for court. The most accurate assessment tools, which are not widely used in California, are those that have been statistically validated to reflect the behavioral characteristics of local defendants. Validated risk and needs assessments can help judges make better-informed decisions when setting bail for pre-trial defendants, releasing defendants on their own recognizance, or releasing them to alternative supervision. The use of such data tools can help judges, sheriffs and probation departments make more informed choices when considering jail alternatives, such as electronic monitoring and day reporting. They can be especially helpful when considering early release of inmates due to overcrowding, both at the pre-trial stage, and after an offender has been sentenced. Counties could have benefitted from their use prior to realignment. Now such tools are essential to ensure public safety while managing jail capacity. By one estimate, only 15 to 20 counties use validated risk assessment tools.[9] Far fewer use tools that assess both risk and needs.

State governments have led the way in adopting these tools. Mr. Cate testified that the California State Risk Assessment used in the California state prison system, validated to the characteristics of the state's inmate population, predicted future criminal behavior with 70 percent accuracy. He said that during the past five years, validated risk and needs assessments have become the norm in state prison systems throughout the United States. The Little Hoover Commission previously recommended the use of risk and needs assessments in its 2003 report, "*Back to the Community: Safe and Sound Parole Policies*."

Counties may consider the cost of such tools an unfunded mandate. The use of validated risk and needs assessment tools requires personnel trained to interview detainees at jail intake facilities, verify the answers and compile a report for the court. The state could ease such concerns by designating a portion of AB 109 money for counties to implement validated risk and needs assessment tools. One potential source of money for a fund to incentivize adopting a validated risk-and-needs assessment tool is the additional sales tax revenues covered by Proposition 30 that have been generated by recovering consumer spending. In addition, the state can support counties with technical assistance and research and evaluation of best practices. The state does not have to do this on its own: Testimony by Mr. Cate indicated that several non-state organizations such as the California State Association of Counties, California State Sheriffs' Association and Chief Probation Officers Association of California are investing in training efforts in these tools and other pre-trial services, while state and national foundations have expressed interest in helping counties expand their pre-trial capacity.

This momentum by partners in the criminal justice system is an encouraging indicator. Extensive technical assistance can help counties build and improve pre-trial services and demonstrate their value to superior court judges and prosecutors. This strategy should prove

less costly than jailing thousands of pre-trial defendants. The chief probation officer of Santa Cruz County told the Commission the county has avoided the cost of 12,000 inmate jail days since 2006 through risk-based determinations of who is likely to show up for trial and not reoffend while waiting. The Yolo County Probation Department, with a relatively new program, testified that the daily cost of a supervised own-recognizance release is $5.36, compared with the daily $121 it costs to house a detainee in jail while awaiting court appearances. Statewide, such numbers represent significant savings over time – and an alternative to building new jails, and the costs of operating them. As part of its realignment goal of adopting evidence-based practices for local public safety, the state should create incentives in its AB 109 funding to speed the implementation of validated risk and needs assessment tools.

The Legislature should set criteria for setting bail schedules. The added demand for local jail beds in many counties resulting from realignment has thrown a spotlight on bail schedules across the state. Superior courts each year set bail bond amounts for each offense and post the aggregated list as a schedule. The process usually is led by the presiding judge with input from other local judicial partners. Across counties, bail amounts vary widely for similar crimes – from $5,000 in San Diego County for possession of a narcotic or controlled substance to $25,000 in Tulare County. Defendants to whom the court grants bail typically pay approximately 10 percent of the full bail amount, on a non-refundable basis – to a private bail bond company to "bond out" of jail and to promise to appear for court dates. The bail industry has expressed concern that high bail schedules prevent more defendants from posting bail, adding to jail crowding. The industry makes the case that uniform and lower statewide bail schedules would enable more people to afford bail and relieve jail overcrowding. The Commission also heard testimony about "bail stacking," the practice of combining individual bail amounts for multiple charges in some counties to effectively prevent a defendant from posting bail. Absent a determination that the defendant is likely to flee or presents a threat to public safety, the practice risks the appearance of pre-trial sentencing. This represents another instance of where a pre-trial validated risk and needs assessment could provide the court with valuable information.

The Commission recognizes the need for local courts to have the latitude to set bail schedules to reflect local conditions. It is important for judges to be able to set

How Commercial Bail Works

Defendants typically bail out of jail by paying a bail bond company approximately 10 percent of the bail amount set by a judge or established by the county court system for a particular offense. A defendant, for example, would pay $2,500 to win release on $25,000 bail. The payment is non-refundable.

The bail firm, often backed by an insurance company, assures the court the defendant will show up for court hearings. If the defendant fails to appear, the bail bond company has the power to locate and return the defendant to jail. If unsuccessful, the bail bond company must pay the court the full amount of the bond.

A defendant can often bail out of jail within hours by posting the standard amount required by bail schedules in the county of arrest. Bail can also be set by a judge within 48 hours of arrest at an arraignment where the defendant enters a plea, or at a special bail hearing. The judge has authority to set bail at any amount. As an alternative to commercial bail, Judges – and sheriffs in counties with court-ordered jail population caps – also can release the defendant while court action is pending on the defendant's own recognizance or through an alternative supervision program.

Sources: Bail industry representatives. California Penal Code 825. (a) Staff research.

schedules, rules, and fines in the manner they determine best meets the conditions they see every day. They can be held accountable for these decisions by voters.

In assessing the differences in county bail schedules, however, the Commission is troubled that significant differences in bail for the same offense, often in adjoining counties, may raise Constitutional questions regarding the prohibition of excessive bail. Disparities in bail practices across counties may be exacerbating the problem of jail population management and result in the incarceration of untried defendants who may not pose a flight risk or a threat to public safety, keeping them away from their families and jobs.

The purpose of this study is not to suggest a statewide bail schedule. Our focus is on the interrelationship with bail setting and the critical – and growing – problem of overcrowding in county facilities housing pre-trial detainees, and the use of evidence-based practices in making pre-trial custody determinations. Bail is among the oldest of "evidence-based" tools to ensure the defendant's presence at trial. It is vital to public safety and the integrity of the criminal justice system. It also can be abused.[10] Bail standards must be tied to the specific factual circumstances of the detainee's alleged offense and prior criminal history. They are not a space management tool for our county facilities. The Commission is concerned that the procedures for setting bail, as well as the amounts required to be posted, may drift from its primary purpose, as the counties deal with the realities that there is not space to house pre-trial detainees and convicted offenders.

Rather than seek a statewide standard bail schedule, the Commission recommends that the state establish objective criteria for bail schedules to ensure that bail schedules are consistent in their aims statewide and that courts provide an objective rationale for such practices as bail stacking. The recommended bail criteria could represent a benchmark and require counties that deviate significantly to explain their schedules in an appropriate public format. The effort could also set parameters that discourage excessive bail stacking in individual counties.

Sentencing reform remains critical to realignment's success. The Commission continues to view realignment as an opportunity to examine more than 1,000 sentencing laws in California and will study the issue in the future. Prosecutors and crime victims' advocates have expressed concern that some sentences included in realignment's non-serious, non-violent, non-sexual categories are too lenient, and do not reflect the true risk to the public when these offenders remain at the county level. Others say sentences and enhancements have added punishment beyond what is appropriate to ensure public safety and that the legacy of unexamined tough-on-crime sentencing laws will be chronic overcrowding at jails and prisons.

A 2013 survey by the California State Sheriffs' Association revealed that more than 1,100 individuals are already serving five- to 10-year sentences in county jails.[11] Given that jails are designed for short-term incarceration, this raises the question of whether some of the sentences included in AB 109 should be reassessed, either for revision or re-categorization. The Commission's 2007 study on sentencing in California found that sentences for similar crimes can vary significantly by county and by courtroom.[12] A 2013 Stanford University study suggests that sentencing disparity across counties has likely increased under realignment.[13] Such disparities are inconsistent with an equitable and efficient criminal justice system.

The Little Hoover Commission offers these recommendations while finding much reason for hopeful outcomes as realignment becomes increasingly established in California. The Commission is available to meet with you to discuss further opportunities for improving California and stands ready to assist in ensuring realignment's success.

Sincerely,

Jonathan Shapiro
Chairman

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[1] Matt Cate. Executive Director. California State Association of Counties. Former Secretary, California Department of Corrections and Rehabilitation. March 21, 2013. Testimony to the Commission.

[2] Realignment is a term used to describe the shift of detainees formerly held in state prison to county jails.

[3] California State Sheriffs' Association. February 26, 2013. "Survey of Sheriffs re Long Term Offenders in Jail." Sacramento, CA. http://www.calsheriffs.org/images/SummaryMemoreLongTermSentences021913.pdf. and http://www.calsheriffs.org/images/SURVEYRESULTS.pdf. Accessed February 26, 2013.

[4] Board of State and Community Corrections. May 2013. "Jail Profile Survey. Third Quarter Calendar Year 2012. Survey Results." Sacramento, CA. http://www.bscc.ca.gov/programs-and-services/fso/resources/jail-profile-survey. Accessed May 29, 2013.

[5] Pretrial Justice Institute. March 2012. "Rational and Transparent Bail Decision Making: Moving from a Cash-Based to a Risk-Based Process." Pages 3-4. Washington, D.C. http://www.pretrial.org/Featured%20Resources%20Documents/Rational%20and%20Transparent%20Bail%20Decision%20Making.pdf. Accessed December 10, 2012.

[6] Joan Petersilia and Jessica Greenlick Snyder. April 17, 2013. "Looking past the hype: 10 questions everyone should ask about California's prison realignment." Page 288. Palo Alto, CA. http://www.law.stanford.edu/sites/default/files/publication/406310/doc/slspublic/petersilia-snyder-5(2)%20cjpp-pp266-306-2013.pdf. Accessed April 23, 2013.

[7] The Pew Center on the States. September 2011. "Risk/Needs Assessment 101: Science Reveals New Tools to Manage Offenders." Pages 3 and 5. Washington, D.C. http://www.pewstates.org/uploadedFiles/PCS_Assets/2011/Pew_Risk_Assessment_brief.pdf. Accessed December 12, 2012.

[8] Joan Petersilia and Jessica Greenlick Snyder. See endnote 5. Pages 268-269.
23, 2013.

[9] Garry Herceg. Director. Office of Pretrial Services, Santa Clara County. San Jose. May 29, 2013. Written communication.

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

[11] California State Sheriffs' Association. See endnote 2.

[12] The Little Hoover Commission. January 2007. "Solving California's Corrections Crisis: Time is Running Out." Page 36. Sacramento, CA. http://www.lhc.ca.gov/lhc/185/Report185.pdf. Accessed May 29, 2013.

[13] Joan Petersilia and Jessica Greenlick Snyder. See endnote 5. Page 286.