WRITTEN TESTIMONY PRESENTED TO THE LITTLE HOOVER COMMISSION
REGARDING BAIL REFORM AND PRETRIAL DETENTION

Robin Lipetzky
Chief Public Defender
Contra Costa County

March 21, 2013

I. INTRODUCTION

Thank you for inviting me to provide testimony to the Little Hoover Commission on the important issues of bail equity and pretrial detention in light of public safety realignment. Having spent 22 years as a public defender, and in my role as the Chief Public Defender of Contra Costa County, I have gained some degree of insight on these topics. I am pleased to have the opportunity to share with you my views on these issues. In this written testimony I will endeavor to respond to the questions posed to me by your executive director.

Before turning to the specific question posed by the Commission, let me take a moment to frame the issue of money bail and pretrial detention from the perspective of an advocate for indigent persons held in pretrial detention. By definition, persons held in *pretrial* detention have been accused, but not convicted, of a crime. As such we should bear in mind that these persons are cloaked with the presumption of innocence. Nevertheless, for historical reasons too lengthy to recite here[1], we have developed a system of for-profit bail bonding, and a reliance on bail schedules, that in effect keeps the vast majority of accused indigent persons in custody while they await their day in court. In short, the bail system that now exists in California has outlived its historical purpose and does little to guarantee public safety.

II. SUMMARY OF THE PROBLEM

When I think about the inequities of our current bail system in California, four truths stand out:

1. The current system does not serve the purpose of protecting the public.
2. Financial bail interferes with the fair and appropriate resolution of cases.
3. The current system as applied by judges discourages a focus on factors and circumstances unique to the individual.
4. The current system increases, rather than decreases, recidivism.

---

[1] For a useful summary of the historical underpinnings of our modern bail system see *For Better of For Profit: How the Bail bonding Industry Stands in the Way of Fair and Effective Pretrial Justice*, Justice Police Institute, September 2012 (www.justicepolicy.org) . A similarly useful critique of the commercial bail industry can be found in May 2012 publication of the Center on Juvenile and Criminal Justice entitled *The Commercial Bail Industry: Profit or Public Safety?* available at www.cjcj.org.

I will briefly explain what I mean by each of these statements.

1. Financial bail does not protect public safety

I have seen over and over again in Contra Costa County the stark reality that persons who are dangerous and wealthy are released pretrial with no conditions (by posting bond) while the poor who pose no danger remain locked up while their case is pending.

Let me give you an example. I had a client who shot and killed her abusive boyfriend when he refused to let her leave her apartment, hit her, and was threatening to kill her. This client had a young son in school, was in her early 40's, had no prior record, and was the caretaker for her elderly sick mother. The bail for this client was set at $1 million—according to the bail schedule. This client posed no risk to the public, had lived in the community her entire life, had no prior history of violence, and had both a child and an elderly parent who depended on her. However, because she was indigent, she remained in custody while she awaited trial. By contrast, consider the recent case of a man charged with murder after he was captured on videotape killing his neighbor following a petty argument. That man, because he has financial means, was released pending his trial. [2]

2. Financial bail interferes with the fair and appropriate resolution of cases

The unfairness that results to the indigent population from the current bail system extends beyond the obvious harm caused by the loss of liberty while one's case is pending. The current bail system has a profound effect on the way that cases resolve. It is undisputed that persons who remain in custody pretrial are more likely to give up their right to litigate pretrial issues and have a jury trial. Many indigent clients forced to remain in custody will agree to plead to the charges if they will be sentenced to "time served"—in other words, they will take a deal in order to get out of jail. As a public defender I have had countless clients over the years who should have exercised their right to trial, but who accepted a plea so that they could be released from custody. In a nutshell, California's bail structure results in unjust case dispositions for those without financial means.[3]

---

[2] Many in law enforcement have weighed in on the concern that the system of money bail does little to address issues of public safety. See, for example, a report issued in February of 2011 by the International Association of Chiefs of Police entitled *law Enforcement's Role in the Pretrial Release and Detention Process*. This report lists several examples of law enforcement personnel injured or killed by dangerous persons who were able to post bond. The report is available on the Pretrial Justice Institute's website at www.pretrial.org.

[3] For a nationwide perspective on the impact of pretrial detention on case outcomes, See the American Council of Chief Defenders *Policy Statement on Fair and Effective Pretrial Justice Practices*, June 4, 2011, p. 6.

3. The current system as applied by judges discourages a focus on factors unique to the individual

The statutory bail scheme in California has devolved into a system that discourages courts from considering individual facts and circumstances when setting a bail amount. The lawful function of the bail schedule is to provide law enforcement with a figure to attach to a pending charge such that an individual can secure release prior to being seen by a judge. Penal Code section 1269b. However, once the accused comes before the court, the role of the magistrate should be to set an amount of bail based on factors unique to the individual accused.

Unfortunately, what I have seen in Contra Costa is that judges are loath to deviate from the bail schedule regardless of circumstances unique to the individual charged. In essence, the preset bail schedule has become a *presumptive* bail for each and every defendant. Blind adherence to a bail schedule has become the default; it is expedient, it requires no independent thought, and it provides easy cover for judges who may feel pressure to "set bail according to schedule."

4. The current bail system increases, rather than decreases, recidivism.

The current bail structure effectively ensures that most non-dangerous, indigent persons remain in custody pending resolution of their cases. I have seen the devastating results of this practice first-hand: young people in school must drop out, people lose their jobs and the ability to support their families, people are unable to make rent payments and become homeless—the list goes on. Needless to say, once these people are sentenced and released back into the community they face a much more difficult path to leading a law-abiding life. For obvious reasons, there is a direct correlation between the loss of work and housing and rates of recidivism.

III. QUESTIONS POSED BY THE COMMISSION

Outlined below are my responses to the specific questions posed by the Commission.

1. Equity issues in the current bail system, which involve a disparity of bail amounts from county to county. What role should commercial bail play in managing pre-trial populations? Are there alternatives the state should be exploring to better manage populations in light of the state's prison realignment initiative?

A cursory review of county bail schedules throughout the state reveals the vast discrepancies that exist from county to county. For example, a person charged with a felony petty theft offense in San Francisco faces a bail of $3000; while in Orange County the bail for the same offense is $20,000.

A secondary problem with the way in which bail schedules are set is that in some counties the bail amount is stacked with multiple counts and multiple enhancements. Take for example someone charged with a petty theft with prior convictions. If charged as both a petty theft and a second degree burglary, a bail will be imposed for each charge although they are alternative charges for the same act. The same unfair inflation applies to enhancements: an extra bail amount will be set for each enhancement, even if there are multiple different enhancements alleged for the same act. The result is oftentimes an absurd amount of bail set for a minor offense.

Having pointed out these flaws, however, it is my belief that the solution lies not in tinkering with the nuts and bolts of the bail schedule machinery; we need to build a new machine. In my opinion commercial bail no longer has a viable role to play in the managing the pretrial population. Rather, the state should employ a pretrial services approach that assesses each individual's risk of flight and sets conditions on release accordingly. As for public safety, those individuals who are found by clear and convincing evidence to be a risk to public safety should remain in custody with no bail. Fairness dictates that we no longer use poverty as a measure of danger or flight-risk. The majority of pretrial detainees, regardless of financial means, should be released either with no conditions (low risk of non-appearance) or with appropriate levels of monitoring (medium to high risk of non-appearance). Despite pressure from the commercial bond industry, this approach has already proved successful in other jurisdictions. A handful of states have successfully eliminated the use of commercial bail. [4]

Given the need to focus on the smart management of local jail populations brought about by realignment, the need to manage the pretrial population so as to avoid wholesale incarceration is paramount. California's pretrial detention rates are among the highest in the country. In Contra Costa County we have one of the highest rates in the state.[5] With the increasing number of persons sentenced to local custody under the provisions of AB109, it is fiscally wise and makes public safety sense to utilize our limited local jail space for sentenced offenders rather than for non-dangerous pretrial detainees.

2. **Ways within the existing bail system to make the process of setting bail more transparent while remaining accountable. Do Community Corrections Partnerships have a role in advising judges on bail schedules? What criteria should go into setting bail schedules?**

---

[4] According to a recent three-part NPR report, Illinois, Kentucky, Oregon and Wisconsin have banned commercial bail bondsmen. See *Inmates Who Can't Make Bail Face Stark Options* by Laura Sullivan, June 22, 2010, www.NPR.org.

[5] For a detailed analysis of the current statistics regarding pretrial detention rates in California see Public Safety Realignment: California at a Crossroads, A report by the ACLU of California published March 2012, available at www.aclunc.org/realignment. See also California Forward's excellent report on pretrial detention in California-- *Pretrial Detention & Community Supervision: Best Practices and Resources for California Counties*, September 2012, available at www.cafwed.org/cpe.

The difficulties posed by the existing bail system have less to do with transparency than with application. The bails schedules are set by local judges in accordance with state statutory provisions. Penal Code section 1269b(e). The problem is that judges use the schedule as a crutch to avoid making individually appropriate bail determinations.

Community Corrections Partnerships can play an important role in advising local counties on best practices regarding pretrial services. If tasked to do so, each county's CCP could gather information and make recommendations at the local level for the fair application of pretrial detention alternatives. As noted above, there are a number of states and jurisdictions that have successfully adopted a range of approaches to managing the pretrial detention population without reliance on money bail or commercial bondsmen. The Pretrial Justice Institute, formed by the DOJ, has available a number of studies and resources regarding best practices for pretrial populations.[6] The California Association of Pretrial Services has also published release standards and recommended procedures for pretrial services. In sum, there is no reason for CCPs to get involved in advising judges on bail schedules; rather, the role of the CCP should be to recommend a local pretrial release program that will bring the county in line with best practices.

3. How the state should balance a goal of consistency with the goal of allowing bail schedules to be set to reflect different local conditions

This question presumes the continued viability of local bail schedules. Given my opinion that commercial bail is unnecessary and counter-productive to the goals of increasing public safety and reducing recidivism, I will respectfully refrain from weighing in on this question.

4. The status of validated risk and needs assessment tools in Contra Costa County and what role these tools should play at the county level. What obstacles and challenges do counties face in implementing such tools? Should counties be required to use validated risk and needs assessment tools to manage their pretrial populations?

To date we have not used a validated risk and needs assessment tool in Contra Costa County. However, our CCP has recognized the need to address the issue of pretrial detention by allocating $900,000 from our AB109 funding for a pretrial services program. Our justice partners will soon be undertaking a series of meetings to explore options for our county. Should our county opt to establish a pretrial services program, an integral component of that program will be the use of a validated risk and needs assessment tool. All of the available research suggests that use of a risk and needs assessment tool combined with a pretrial services program is far more successful in ensuring public safety and maintaining the smooth administration of justice than is the reliance on money bail.

---

[6] See the Pretrial Justice Institute website at www.pretrialorg.

The most obvious challenge that counties face, including Contra Costa County, in implementing these tools is very simple: funding. To be effective, a needs assessment tool must be administered in person, one on one, to a detained person within shortly after the arrest. In addition, information obtained from the individual must be verified to be meaningful. All of this requires personnel, planning and infrastructure. Of course the research also shows that by implementing a pretrial services program the county will save money in the long run through a reduction in the local jail population and fewer court appearances.

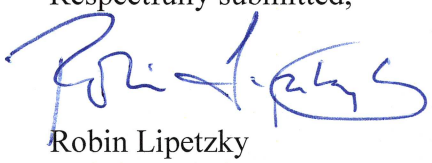
5. How the state can ensure an adequate portion of realignment funding goes to meet the needs of pre-trial programs and services at the same time there are other pressing needs for scarce funding?

The cost of implementing a pretrial services program will vary from county to county, depending on the size of the county and the services already in place. One approach would be to require that a percentage of the overall allotment of AB109 funds be dedicated to pretrial services. Another option would be to require each county to adopt a risk assessment tool but leave it to the CCP to decide how the tool will be administered. As noted above, the evidence from other jurisdictions has shown that a successful pretrial services program, while perhaps costly at the outset, can save money in the long-term.

IV. PROPOSED SOLUTION

I believe that the bail provisions in California should be replaced with a system such as that used in Washington D.C. and a handful of states: a system whereby a pretrial services agency makes recommendations for pretrial release based verified information about the individual charged using a validated risk assessment tool. In Washington D.C., this process has lead to the near elimination of for-profit money bonds. With the use of a comprehensive pretrial services agency, 80% of all defendants in D.C. are released without a money bond; 15% are held without bail; and the remaining 5% have financial bail.[7] If we can see our way to similar reforms in California we can go a long way towards reducing the high level of non-dangerous pretrial detainees in our local jails.

Respectfully submitted,



Robin Lipetzky
Chief Public Defender
Contra Costa County

---

[7] See Case Studies, an e-publication of The Pretrial Justice Institute, Volume 2 Number 1: *The D.C. Pretrial Services Agency: Lessons From Five Decades of Innovation and Growth*