

SPECIAL DIRECTIVE 20-06

TO: ALL DEPUTY DISTRICT ATTORNEYS

FROM: GEORGE GASCÓN
District Attorney

SUBJECT: PRETRIAL RELEASE POLICY

DATE: DECEMBER 7, 2020

This Special Directive addresses issues of Bail and Own Recognizance in Chapter 8 of the Legal Policies Manual. Effective **December 8, 2020**, the policies outlined below supersede the relevant sections of Chapter 8 of the Legal Policies Manual.

INTRODUCTION

The purpose of this memo is to outline the new policies and protocols that will guide our recommendations for pretrial release and the use of cash bail moving forward. While these policies will take effect immediately, there will be ongoing opportunities for staff to give valuable feedback about how we can best operationalize these changes. We will continually monitor and review data collected on the implementation of these policies and we will regularly review these policies with office staff and members of the community to ensure that they are effective and successful. These new policies capture our shared vision of justice for all in Los Angeles County.

THE UNFAIRNESS OF CASH BAIL

Across the nation, bail reform is a topic of much debate. While some jurisdictions have passed statewide bail reform (New York and New Jersey), others have changed local bail setting practices by reducing reliance on cash bail. Although California voters chose not to implement SB10 through the passage of Proposition 25, the conversation about bail reform remains active and robust.

While it is nearly certain that legislation seeking to eliminate cash bail will once again be put to voters, we will not wait for statewide reform before imposing meaningful changes in the use of cash bail. We must seek to protect the public while ensuring that our practices—particularly with regard to the utilization of cash bail—do not lead to periods of unnecessary incarceration that harm individuals, families and communities.

Cash bail creates a two-tiered system of justice - one where those with financial resources are able to remain free, while those who lack such resources are incarcerated. While most justify the

use of cash bail to incentivize an individual to return to court, evidence suggests that no such incentives are required: it is exceptionally rare that individuals willfully flee prosecution or commit violent felony offenses while released pretrial and the overwhelming majority of people will return to court, even when they have no financial interest at stake.¹ In addition, appearance rates for those people who are not detained are improved when they receive effective court reminders, transportation assistance and referrals to community-based services when they are in need.

Disparities in bail setting, unduly impact low-income communities of color and set the wheels of mass incarceration in motion: individuals detained pretrial are more likely to plead guilty to a case, in turn receiving a criminal record; those with criminal records face obstacles for future employment opportunities; and those people who cannot be employed see their opportunities for economic mobility and advancement severely hindered. The negative impacts of incarceration extend well beyond an incarcerated individual into their families and communities. Jobs are lost, people are evicted and deported, children lose contact with their primary caregivers, and those who were detained return to their communities destabilized by the traumatizing conditions in our jails.

The negative consequences of cash bail have fallen unequally on the shoulders of low-income communities of color in Los Angeles County. Of the 5,885 people detained pretrial in August 2020, 84% were people of color and nearly half (42%) were incarcerated for non-serious, non-violent offenses². These individuals jailed pretrial spend, on average, 221 days in jail³ without having been convicted of a crime. While COVID-19 led to substantial declines in the Los Angeles County Jail population, early releases were not proportionate across all race categories and subpopulations, including those who are most vulnerable. Specifically, while Black people were 29% of the pre-COVID jail population, only 24% of them were released early, and, when looking at the pretrial population with mental health needs, Black and Hispanic people received early release at a significantly lower rate than white people.

The US Constitution guarantees every person – regardless of race, class or origin – the right to be presumed innocent during the pretrial phase of a criminal proceeding. America’s promise is to provide for everyone “equal justice under the law”. While one might argue that pretrial detention doesn’t remove these rights, our detention practices and the use of unaffordable cash bail eviscerates the bedrock of our democracy and undermines our principles of justice, fairness, and equality under the law.

¹ For a pilot project conducted by The Bail Project in Compton, 300 people had bail paid for them. 93% of clients included in the pilot were people of color. The outcomes of the pilots favor own recognizance release: 96% returned for every court date and, of clients whose cases are now disposed, 33% had their cases dismissed and 97% of those individuals who received a conviction required no additional jail time as part of their sentence.

² Charges at the time of booking

³ This reflects the average number of pretrial days spent in jail to-date on 8/19/20, which is likely an underestimate. Many people will remain detained long after the date of analysis. A truer measure would be the average number of days an individual spends from being placed in custody to being released or their case disposed, though such information is not currently available.

It's time for a change. We must adopt a more just approach to prosecution by seeking to undo the legacy of cash bail while still fulfilling our obligations to protect public safety. Freedom should be free.

It is our duty as stewards of public safety to mitigate all public safety risk, and this includes ensuring that our office's prosecutorial actions do not inflict needless harm on court-involved individuals through unnecessary incarceration. We must, and can do better, than to continue to impose cash bail where it is not required, as evidence suggests that cash bail is neither effective nor required to keep communities safe or to ensure return to court for future appearances.

For all the reasons mentioned above, it is time to re-evaluate our policies and procedures regarding the use of cash bail and pretrial detention before conviction. The policies outlined in this memo are merely a starting point as we begin to better balance the well-being of the accused with our obligations to maintain public safety during this pretrial period. By minimizing the utilization of cash bail, reducing unnecessary pretrial detention, seeking the least restrictive conditions of release possible, and utilizing community-based support programs and interventions, the long-term safety of all Los Angeles County residents can be improved and the system will be made more fair and just.

Pretrial release recommendations shall be guided by the following principles and policies:

I. ELIMINATION OF CASH BAIL

- A. The presumption shall be to release individuals pretrial.
- B. All individuals shall receive a presumption of own recognizance release without conditions. Conditions of release may only be considered when necessary to ensure public safety or return to court.
 - 1. Pretrial release conditions, if any, shall be considered in order from least restrictive (No Conditions) to most restrictive (Electronic Monitoring / Home Detention). Release with no condition shall be the initial position. The least restrictive condition or combination of conditions for release must be determined to be inadequate to protect public safety and to reasonably ensure the defendant's return to court before considering the next least restrictive condition.
 - 2. All pretrial release conditions requested shall be reasonably related to the charges, and necessary to protect the public and to reasonably ensure the defendant's return to court.
 - 3. Only after all pretrial release conditions have been thoroughly evaluated and determined to be inadequate to protect public safety and to reasonably ensure the defendant's return to court shall bail or pretrial detention be considered.
- C. Pretrial Detention Procedures
 - 1. Pretrial detention shall only be considered when the facts are evident and clear and convincing evidence shows a substantial likelihood that the defendant's release would result in great bodily harm to others or the defendant's flight.

- a) The substantial likelihood of the defendant's flight may include felony holds from other jurisdictions. Release conditions or detention may be considered for the limited purpose of ensuring the defendant is not removed to another jurisdiction. Considerations shall include but are not limited to a comparison of the seriousness of the charges locally and for the hold, the uncertainty of when the defendant will be returned, and maintaining joinder of co-defendants.
2. DDAs shall not request cash bail for any misdemeanor, non-serious felony, or non-violent felony offense.
3. If pretrial release conditions have been found insufficient to ensure return to court and public safety, DDAs may consider requesting bail at arraignment for:
 - a) Felony offenses involving acts of violence on another person; or
 - b) Felony offenses where the defendant has threatened another with great bodily harm; or
 - c) Felony sexual assault offenses on another person.
- D. When cash bail is being requested under the limited circumstances delineated in this memo, DDAs shall recommend cash bail amounts that are aligned with the accused's ability to pay. There should be a presumption of indigency when the court has determined that a client is entitled to court appearance counsel.
- E. For those individuals who are indigent, DDAs shall avoid the selection of restrictive conditions of release that include fees and costs for their administration (e.g., paying a licensing fee for electronic monitoring) unless no alternative restrictive condition or combination of conditions can be applied to meet the same need.
- F. Conditions of release shall be evaluated based on all available information about the accused. Individuals with underlying conditions, such as behavioral health conditions, shall not receive overly restrictive release conditions based solely on the presence of such issues. Scores from risk assessment tools may never be the sole basis for a recommendation for detention.⁴ All pretrial release conditions requested shall be reasonably related to the charges and necessary to protect the public and ensure the defendant's return to court.
- G. If defense counsel requests a review of release conditions, the DDAs will not oppose defense counsel motion to the court to remove or modify the conditions of release, if the accused's conduct has demonstrated that a threat to a specific identifiable person or persons and/or any evidence of the accused's intention to willfully evade prosecution has been eliminated.

⁴ There are well-documented concerns among social science researchers that risk assessment tools cannot predict what they aim to predict and perpetuate racial bias. See [Technical Flaws of Pretrial Risk Assessments Raise Grave Concerns](#).

H. **Covid-19 Addendum:** Regardless of charge, release with least restrictive conditions is the presumptive position when the accused belongs to a vulnerable/high risk group (as defined by the CDC and the LA County Department of Public Health) where incarceration could result in serious illness or death due to Covid-19 exposure.

II. APPEARANCES AND VIOLATIONS OF CONDITIONS OF RELEASE

- A. DDAs shall not oppose defense counsel’s requests to waive client appearances at non-essential court appearances. The burden of appearing for short, non-consequential hearings can be hugely impactful to individuals who have to arrange to take off from work, arrange for childcare, and find their way to court. Many court appearances require minimal involvement from the accused and due to overburdened court calendars can result in extensive wait times before short appearances are held.
- B. In the event of non-appearance, DDAs will not oppose defense counsel’s request for a bench warrant hold when no clear and convincing evidence exists that the non-appearance occurred as a result of the accused’s willful evasion of prosecution.

III. RETROACTIVITY OF POLICY

DDAs shall not object to the release of anyone currently incarcerated in Los Angeles County on cash bail who would be eligible for release under the policies outlined in this memo.

**TABLE 1
PRETRIAL RELEASE CONDITIONS FROM LEAST TO MOST RESTRICTIVE**

LEAST RESTRICTIVE	● Own Recognizance Release
	● Release to community member, friend, family member or partner with promise to accompany the accused to court
	● Phone/text/online check-ins with designated agency
	● Travel Restrictions - order to not leave state, passport surrender
	● Driving prohibitions or restrictions
	● Stay away order
	● AA/NA meeting attendance (or similar community support groups)
	● Order to surrender weapon(s) to law enforcement

MORE RESTRICTIVE	● Ignition Interlock Device
	● In-person check-ins with designated agency
	● Mental health treatment
	● Alcohol abuse treatment
	● Substance abuse treatment
	● Drug and alcohol testing
	● Residential treatment program
	● Home relocation during case pendency
	● Secure Continuous Remote Alcohol Monitoring
	● Electronic monitoring/GPS
	● Home detention

The policies of this Special Directive supersede any contradictory language of the Legal Policies Manual.