JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: December 16, 2016

Title
Judicial Council–Sponsored Legislation: Prearraignment Own Recognizance Release Under Court-Operated or Approved Pretrial Programs

Rules, Forms, Standards, or Statutes Affected
Amend Pen. Code, § 1319.5

Recommended by
Policy Coordination and Liaison Committee
Hon. Kenneth K. So, Chair
Criminal Law Advisory Committee
Hon. Tricia Ann Bigelow, Chair

Agenda Item Type
Action Required

Effective Date
December 16, 2016

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Executive Summary

The Policy Coordination and Liaison Committee and Criminal Law Advisory Committee recommend that the Judicial Council sponsor legislation to amend Penal Code section 1319.5 to provide courts with discretion to approve own recognizance (OR) release for arrestees with three prior failures to appear, without holding a hearing in open court, under a court-operated or court-approved pretrial program. Penal Code section 1319.5 requires a hearing in open court before an offender arrested for a felony offense who has previously failed to appear in court three or more times over the preceding three years may be granted OR release. This proposal was developed at the request of courts actively developing and expanding pretrial programs in an effort to address impacts on court calendars as well as the effects of jail overcrowding. The proposal is intended to provide judges with greater flexibility in ordering supervised release, and increase access to justice in the earliest stages of a criminal proceeding.

Recommendation

The Policy Coordination and Liaison Committee and Criminal Law Advisory Committee recommend that the Judicial Council sponsor legislation to amend Penal Code section 1319.5(b)(2)[1], as follows:

- Revise the definition of persons who may not be released on their own recognizance until a hearing is held in open court before a magistrate or a judge to exclude persons arrested for one of the designated offenses who have failed to appear in court as ordered three or more times over the preceding three years, if the person is released under a court-operated or court-approved pretrial release program.

Previous Council Action

In 2014, the Judicial Council supported Senate Bill 210 (Hancock), which, among other things, would have (1) provided that a pretrial OR release investigation report may be prepared for any defendant not charged with a violent felony or driving under the influence with injury; (2) required that a pretrial OR release investigation report include "all results of an evidence-based pretrial risk assessment" concerning the risk the defendant presents to public safety and the probability the defendant will return to court; and (3) required that in setting conditions for pretrial release and in setting, reducing, or denying bail, the court consider the following, in addition to the protection of the public, the defendant's criminal record and the seriousness of the charged offense, as specified. Related to that support, the council noted that jail overcrowding is a very real and continuing problem, which often results in the sheriff, rather than the court, determining which defendants are released from jail pretrial. The council believed that by permitting courts to consider the results of an evidence-based pretrial risk assessment instrument, the bill would have enhanced judicial discretion in determining which defendants to release pretrial, a responsibility that should rest with the courts.

Rationale for Recommendation

Section 1319.5 requires a hearing in open court before an offender arrested for a felony offense who has previously failed to appear in court three or more times over the preceding three years may be granted OR release. In counties where a sizeable portion of those arrested already have multiple FTAs due to jail overcrowding and other factors, the restriction in section 1319.5 constrains judicial discretion and limits courts' efficient use of court-operated or court-approved pretrial release programs to process releases for appropriate defendants during noncourt hours.

Courts are increasingly implementing evidence-based pretrial release programs[2] designed to ensure (1) the court's release decisions are informed by a risk assessment, with recommendations based on county-specific guidelines that establish which defendants are eligible for release; and (2) individuals granted OR release receive appropriate levels of supervision by court-operated or

[1] All statutory references are to the Penal Code.

[2] *Pretrial Progress: A Survey of Pretrial Practices and Services in California*. Californians for Safety and Justice, *http://libcloud.s3.amazonaws.com/211/95/d/636/PretrialSurveyBrief_8.26.15v2.pdf*

court-approved programs rather than being released without any form of supervision. Section 1318 sets forth statutory requirements for defendants who receive court-approved OR release and courts have broad authority to impose additional conditions including, when appropriate, drug testing and electronic monitoring.[3]

Some courts include an OR release component that operates during noncourt hours. On-call magistrates approve OR releases that allow arrestees to return to their jobs and families, while imposing statutory conditions and appropriate levels of supervision. However, these innovative programs have been hindered by the inflexible requirements of section 1319.5, which require a hearing in open court before some arrestees can be granted OR release. During noncourt hours, including weekends and holidays, jail officials may have no option but to release offenders without supervision or court date reminders. Many of those offenders will fail to appear for subsequent court dates, and the dysfunctional cycle of arrest and unsupervised jail release continues. Amending section 1319.5 to allow judges the option to grant OR release to arrestees with three or more FTAs without a hearing in open court if they are released under a court-operated or court-approved pretrial release program will encourage more efficient processing of cases, more appropriate levels of supervision, and a possible reduction in jail overcrowding.

Comments, Alternatives Considered, and Policy Implications

Notable Comments

The proposal was circulated for public comment from April 15 to June 14, 2016. A total of six comments were received: three agreed with the proposed amendments, one did not agree, and two did not indicate a position. Both the Superior Court of Los Angeles County and the Superior Court of San Diego agreed with the proposal.

A commentator from Riverside County Probation Department did not agree with the proposal and suggested that in cases where defendants have more than three FTAs, “it might be wise to make the release after arraignment, after the parties involved can argue their respective cases and the court can take all information into account before making a decision.” The committee declined to revise the proposal, noting that court-operated or court-approved pretrial release programs typically provide risk assessment and other information that incorporate FTAs and data to address concerns regarding court appearance and public safety, and may offer a range of supervision options.

A commentator from the Public Policy Institute of California noted that the proposal may inadvertently increase FTAs if court date reminder systems are not already in place, and suggested that the added discretion provided to the courts should be coupled with a requirement that court-approved, pretrial programs implement court date reminder systems for felony defendants. The committee recognized that many pretrial release programs include a court date reminder system as a useful component but declined to include that as a requirement, leaving implementation to the discretion of the courts.

[3] In re York (1995) 40 Cal.Rptr.2d 308, 9 Cal.4th 1133, 892 P.2d 804

A chart with all comments received and committee responses is attached at pages 7–17.

Alternatives

The committees determined that the proposal was appropriate for recommendation to the Judicial Council and did not consider alternatives to this proposal.

Policy implications

Section 1270 provides that any person who has been arrested for, or charged with, an offense other than a capital offense may be released on his or her own recognizance by a court or magistrate. Section 1319 prohibits courts from granting OR release without a hearing in open court to persons who are arrested for a violent felony. Section 1319.5 prohibits courts from granting OR release without a hearing in open court to any person who: (1) is on felony probation or felony parole; or (2) who is arrested for a felony offense or other specified offenses and has failed to appear in court as ordered, resulting in a warrant being issued, three or more times over the three years preceding the current arrest, except for infractions arising from violations of the Vehicle Code.

This proposal modifies section 1319.5 to allow courts to consider for OR release, without a hearing in open court, arrestees who have failed to appear three or more times in the preceding three years, but only if those courts have court-operated or court-approved pretrial release programs. Further, under this proposal pretrial programs can provide risk assessment and other data to inform the court's release decision, and can implement the level of supervision and other conditions imposed by the court. This minimal expansion will (1) provide courts with discretion to allow these arrestees to more quickly return to their homes, families and employment; (2) help to reduce jail overcrowding; and (3) allow courts to impose terms of supervision and conditions that are otherwise absent when a jail official releases an arrestee in order to comply with a jail population cap. This proposal does not require magistrates to grant OR release, and instead provides magistrates with the discretion to consider granting release to these arrestees when there is a court-operated or court-approved pretrial release program in place.

Implementation Requirements, Costs, and Operational Impacts

No significant implementation requirements, costs, or operational impacts are likely as the proposal simply expands the pool of arrestees eligible to be considered for OR release without a hearing in open court for courts with a court-operated or court-approved pretrial release program. Under the proposal, each court will retain discretion to determine whether to have a court-operated or court-approved pretrial release program. For those courts with a pretrial release program, there likely will be minimal additional costs and operational impacts engendered by adding to magistrates' workload for consideration for OR release the subset of arrestees with three or more FTAs.

Relevant Strategic Plan Goals and Operational Plan Objectives

The proposed amendment to section 1319.5 supports the policies underlying Goal I, Access, Fairness, and Diversity; and Goal IV, Quality of Justice and Service to the Public. Specifically, this proposed amendment supports Goal I, objective 4, "Work to achieve procedural fairness in

all types of cases”; and Goal IV, objective 3, “Provide services that meet the needs of all court users and that promote cultural sensitivity and a better understanding of court orders, procedures, and processes.”

Attachments

1. Text of proposed Penal Code section 1319.5, at page 6
2. Chart of comments, at pages 7–17

Section 1319.5 of the Penal Code is amended, effective January 1, 2018, to read:

1319.5.

(a) No person described in subdivision (b) who is arrested for a new offense may be released on his or her own recognizance until a hearing is held in open court before the magistrate or judge.

(b) Subdivision (a) shall apply to the following:

(1) Any person who is currently on felony probation or felony parole.

(2) Any person who has failed to appear in court as ordered, resulting in a warrant being issued, three or more times over the three years preceding the current arrest, except for infractions arising from violations of the Vehicle Code, and who is arrested for any of the following offenses, unless the person is released under a court-operated or court-approved pretrial release program:

(A) Any felony offense.

(B) Any violation of the California Street Terrorism Enforcement and Prevention Act (Chapter 11 (commencing with Section 186.20) of Title 7 of Part 1).

(C) Any violation of Chapter 9 (commencing with Section 240) of Title 8 of Part 1 (assault and battery).

(D) A violation of Section 484 (theft).

(E) A violation of Section 459 (burglary).

(F) Any offense in which the defendant is alleged to have been armed with or to have personally used a firearm.

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All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
1.	Albert De La Isla Principal Administrative Analyst Superior Court of California, Orange County	N/I	Request for Specific Comments In addition to comments on the proposal as a whole, the advisory committee [or other proponent] is interested in comments on the following: •Does the proposal appropriately address the stated purpose? Response: Yes •Are the proposed revisions an effective way to address the restrictions imposed by Penal Code section 1319.5? Response: Yes The advisory committee [or other proponent] also seeks comments from courts on the following cost and implementation matters: •Would the proposal provide cost savings? If so please quantify. Response: No, this would require more people being supervised and the number of hearings will remain the same in the long run. •What would the implementation requirements be for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management	• No response required. • No response required. • The committee recognizes the proposal may provide cost savings for some courts and justice system partners but not for others. • No response required.

 Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.

	Commentator	Position	Comment	Committee Response
			systems, or modifying case management systems. Response: Training for our Pre-Trial Release staff, procedure updates and training of magistrates. We currently have a pre-trial release program that assesses a score utilizing the VPRAI tool. •Would two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Response: Yes •How well would this proposal work in courts of different sizes? Response: Not well if small courts do not have the resources to conduct interviews prior to arraignment.	• No response required. • The committee notes that the decision whether to implement the proposal is discretionary with each court.
2.	Ronald Miller Chief Deputy Riverside County Probation	N	We reviewed the Judicial Council proposal to amend Penal Code section 1319.5. The proposal essentially provides the court the discretion to approve, without a hearing in open court, OR release for arrestees with three or more prior FTA's. The purpose of the proposed amendment is to alleviate jail overcrowding, improve court calendar impacts and provide more options for the judges in ordering releases and increase access to justice in early states of criminal proceedings.	The committee declines to revise the proposal based on this comment. The committee's proposal requires that approved OR releases are under a court-operated or court-approved pretrial release program. These programs typically provide information the court may use in deciding whether to grant OR release, including risk assessments that incorporate FTA data and other information relevant to ensuring public safety, and may offer a range of supervision options.

	Commentator	Position	Comment	Committee Response
			The primary purpose of pre-trial release is to ensure the defendant appears in court and releases are made with the community's safety in mind. However, it is our opinion that the changes to 1319.5(b)(2) could be interpreted to imply that FTA's are less of a concern when considering pretrial releases. Such an assumption would not be evidence-based. The proposed changes would seem to minimize the significant weight the VPRAI gives to prior FTAs. Indeed, our validated assessment tool (RPRAI) puts even more weight on prior FTAs, in that defendants with two or more prior FTAs (in the last two years) would automatically score a moderate risk (bordering on high). Releases in this situation would constitute an underride for our assessment tool. In such cases, it might be wise to make the release after arraignment, after the parties involved can argue their respective cases and the court can take all information into account before making a decision.	
3.	Orange County Bar Association By Todd Friedland President	A	The proposal suggests amending Penal Code section 1319.5 to provide courts with discretion to approve, without a hearing in open court, own recognizance releases under a court-operated or court-approved pretrial release program for arrestees with	No response required.

	Commentator	Position	Comment	Committee Response
			three or more prior failures to appear. Currently, Penal Code section 1319.5 prevents an arrestee who has failed to appear three or more times over the preceding three years to be released without a court hearing. Historically, defendants could only secure pre-trial release prior to their arraignment by making bail. Recently, many courts have moved away pre-trial release based on bail and have instead implemented pre-trial release programs which assess whether own recognizance release is appropriate for individual defendants based on validated risk assessment tools. The use of these evidence-based practices reduces unnecessary time in custody, allows defendants to continue working and mitigates the financial and social impact of system-involvement on the defendant, his or her family and community generally. This proposal would expand the pool of the defendants who could be screened under a pre-trial release program using evidence-based practices which would further the economic and societal goals of avoiding unnecessary incarceration.	
4.	Shasta County Probation Department by Tracie Neal Chief Probation Officer	N/I	In Shasta County we have a significant number of offenders who are unable to be released and supervised through our Pre-arraignment Supervised Own Recognizance	No response required.

 Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.

	Commentator	Position	Comment	Committee Response
			(PSOR) program due to the current structure of Penal Code Section 1319.5. This is, in part, due to the large number of failures to appear (FTA) our offenders earn in Shasta County. For a number of years, we've experienced a considerable issue with FTAs in our county. Our Community Corrections Partnership Executive Committee has worked to address these issues in a number of ways including creating a compliance team made up of representatives from Probation and other local law enforcement agencies. This team addresses non-compliance with court orders and assists with those offenders who fail to appear in court. In addition, Shasta County law enforcement agencies created "Shasta's Most Wanted", a program that highlights five offenders per week in our local news systems, who have failed to appear in court for various new law and probation/parole violations. To date over 600 offenders have been arrested as a result of this program. We have also created a Supervised Own Recognizance (SOR) program. The SOR program was created to combat two major issues of concern, the significant amount of FTAs and overcrowding in the jail. Over	

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			75% of offenders in our jail are pre-sentence and are often released due to over-crowding before arraignment. This program, run by probation staff, utilizes an evidence-based tool to make a recommendation to the court for release from custody at arraignment and has been successful in reducing the number of FTAs in our county. We have been able to locate, with the assistance of GPS, offenders when they do not appear in court and pick them up and bring them to court. This has saved a considerable amount of the time and resources our court and our justice partners use to process FTAs, locate offenders on warrant, book offenders in the jail and to ensure offenders are moving forward through the court process to sentencing where they are often ultimately placed under probation supervision. Even with this program, there was still a major concern about the number of offenders that were released from the jail after hours and on weekends. As a result of these concerns, the Probation Department worked with the Court to apply for a grant to expand the SOR program to weekends under the PSOR Program. This program utilizes the same evidence based tool as the SOR Program to make recommendations to the court on offenders booked into the jail after	

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			arraignment of Friday and before arraignment on Monday morning. We have faced, however, a difficulty with the current law and the requirement that all offenders with 3 or more FTAs appear before a bench officer at arraignment to be placed on a supervised release program. In looking at a sampling of offenders screened for the PSOR program from January through March 2016, approximately 5.04% of all offenders screened offenders on the weekends have not been able to move forward with the PSOR process due to the amount of FTAs on their record. All of these offenders (52 individuals) would likely have been recommended by Probation to be placed on the program. All of these offenders are flagged in the jail system to be held for recommendation to our SOR program on Monday morning but, due to overcrowding, not all these offenders can be held. Offenders are often released without being able to be placed on the PSOR/SOR program which leaves Probation without the ability to supervise these offenders or a means to reduce FTAs among this population. Often these offenders FTA in court and then subsequently have too many FTAs to qualify for PSOR once again when they are	

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			found and booked into the jail. This cycle can continue over and over with no consequence or ability to hold the offender accountable. A change in the law regarding allowing offenders with multiple FTAs to be placed on a supervised release program without appearing before a bench officer would allow the Probation Department the latitude to evaluate and make recommendations to place offenders appropriate for the programs on supervision under these programs, to potentially include GPS. This higher level of accountability and supervision would increase the number of local offenders that appear for court and are sentenced according to the law. If the proposed changes were to go into effect the Shasta County PSOR program is ready to work with the Court to accept, monitor and supervise those offenders that would not have previously been considered or recommended for the program due to the number of FTAs. As noted, we continue to struggle with over-crowding in the jail and this program allows our county to hold offenders accountable, work toward reducing the number of FTAs in Shasta County as well as decrease the number of court appearances and time it takes to move through the court process to sentencing.	

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5.	Superior Court of California, County of Los Angeles	A	The Criminal Law Advisory Committee proposes amending Penal Code section 1319.5 to provide courts with discretion to approve, without a hearing in open court, OR releases under a court-operated or court-approved pretrial release program for arrestees with three or more prior failures to appear (FTAs). The Request for Comment notes that, "There is growing recognition that, in many cases, the interests of public safety and those of the accused can best be served by appropriate pretrial release, and courts are increasingly implementing innovative pretrial release programs. Pretrial programs can provide courts with a range of release options and encourage the exercise of judicial discretion in imposing an effective level of pretrial supervision, particularly for offenders who may have failed to appear for court hearings in the past. Appropriate pretrial release can also help to address the historic overcrowding of California's jails, a problem that became more significant with criminal justice realignment." In her State of the Judiciary Address to a Joint Session of the California Legislature on March 8, 2016, Chief Justice Tani G. Cantil-Sakauye noted that the legislature had provided funds for 12 court pretrial release programs, and that, "[t]here are interesting studies, and the takeaways from the studies are that in some cases pretrial	No response required.

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			detention actually increases recidivism. And in other types of offenders we found that supervised release is actually as effective as money bail." Given that there are funds for such pre-trial release programs and that the option would be discretionary, there is no objection. Los Angeles County currently has an established release program that is operated by Probation. This proposal would expand the parameters of the existing release criteria.	
6.	Superior Court of California, County of San Diego By Mike Roddy	A		No specific comment
7.	Sonya Tafoya Research Associate Public Policy Institute of California	N/I	Criminal Procedure: Pre-Arraignment Own Recognizance Release Under Court-Operated or Approved Pretrial Programs. Research consistently shows that defendants with prior FTA's are at higher risk of future FTA's. This suggests that the proposal as written may decrease pretrial detention as intended, but may also inadvertently increase FTA's if court date reminder systems are not already in place. The added discretion proposed should be coupled with	The committee declines to revise the proposal based on this comment. The committee recognizes that many court-operated or court-approved pretrial release programs include a court reminder system as a useful component but declines to include court reminder systems as a requirement for this proposed legislation as there are various approaches that courts may implement for successful programs.

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			a requirement that courts or court approved pretrial programs implement court reminder systems for all felony defendants.	