



JUDICIAL COUNCIL OF CALIFORNIA

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CIRCULATING ORDER MEMORANDUM TO THE JUDICIAL COUNCIL

Circulating Order Number: CO-20-11

Title

Criminal Procedure: Emergency Bail Schedule

Rules, Forms, Standards, or Statutes Affected

Repeal Cal. Rules of Court, emergency rule 4

Recommended by

Hon. Marsha G. Slough, Chair, Executive and
Planning Committee

Hon. David M. Rubin, Chair, Judicial Branch
Budget Committee and Litigation
Management Committee

Hon. Kyle S. Brodie, Chair, Technology
Committee

Hon. Marla O. Anderson, Chair, Legislation
Committee

Hon. Harry E. Hull, Jr., Chair, Rules
Committee

Action Requested

VOTING MEMBERS ONLY: Submit votes
by responding to the transmittal email.

Please Respond By

June 10, 2020

Date of Report

June 8, 2020

Contact

Shelley Curran, Criminal Justice Services
415-865-4013

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Executive Summary

The Judicial Council adopted a temporary emergency statewide COVID-19 bail schedule on April 6, 2020, to mirror statewide emergency health and safety rules and orders issued by the Governor and county health departments. The COVID-19 bail schedule (California Rules of Court, emergency rule 4) was designed to safely reduce county jail populations and help “flatten the curve” of the rising number of COVID-19 cases during statewide shelter-in-place orders. At the time, the county jails were considered COVID-19 vectors that endangered not only inmates, but the public, litigants, corrections officers and law enforcement, court staff, and all of their families. At the time, the California Department of Corrections and Rehabilitation (CDCR) had stopped receiving convicted inmates housed in county jails, prompting some local sheriff offices

to adopt “cite and release” policies for low-level offenses. In two months conditions have changed: CDCR will now accept convicted inmates from county jails, Governor Newsom has implemented a four-phase framework for reopening California counties.¹ Counties that meet criteria specified by the California Department of Public Health can be granted a variance by the Governor and begin reopening. As of June 5, 51 counties have received a variance and are reopening.² In addition, local governments are also loosening the restrictions in their local orders and businesses are reopening.³

The chairs of the Judicial Council’s six internal committees now recommend that the council reflect these changed statewide and local circumstances by repealing the statewide COVID-19 bail rule and directing the courts to adopt bail schedules based on local conditions, including the retention of the COVID-19 bail schedule if it reflects local health needs. In addition, the chairs recommend that the Judicial Council support the Chief Justice’s action to rescind the extension of time for arraignment in provision 2 of the March 30, 2020 order, to ensure that defendants who are detained pending arraignment are brought before a judicial officer for speedy review of their custody status.

Recommendation

The chairs of the Judicial Council’s six internal committees recommend that the Judicial Council:

1. Repeal emergency rule 4 of the California Rules of Court, the statewide COVID-19 Emergency Bail Schedule, effective June 20, 2020.
2. Direct the superior courts that upon repeal of the statewide COVID-19 Emergency Bail Schedule:
 - The countywide bail schedule that was in effect on April 5, 2020, becomes effective, unless the court adopts a revised bail schedule; and
 - Bail is not required to be reset for any person for whom bail was set in accordance with the COVID-19 Emergency Bail Schedule.
3. Support the action of the Chief Justice to rescind the provision in her March 30, 2020 order, in which she authorized courts to issue implementation orders to extend the time period provided in section 825 of the Penal Code within which a defendant charged with a felony offense must be taken before a magistrate from 48 hours to not more than seven days.

¹ Update on California’s Pandemic Roadmap, <https://www.gov.ca.gov/wp-content/uploads/2020/04/Update-on-California-Pandemic-Roadmap.pdf>

² County Variance Information, <https://covid19.ca.gov/roadmap-counties/#track-data>

³ See, e.g., “California’s Reopening: See what’s open and what’s still shut down by county,” San Francisco Chronicle (May 29, 2020), <https://projects.sfchronicle.com/2020/coronavirus-map/california-reopening/>.

The text of repealed emergency rule 4 is attached at pages 9-11.

Relevant Previous Council Action

On March 27, 2020, the Governor issued an order⁴ giving the Judicial Council of California and the Chief Justice authority to take necessary action to respond to the health and safety crisis resulting from the COVID-19 pandemic, including by adopting emergency rules that otherwise would be inconsistent with statutes concerning civil or criminal practice or procedures. The Governor's order also suspended statutes to the extent that they would be inconsistent with such emergency rules. Under that order, the council adopted emergency rules 1–11 on April 6, 2020.⁵

Among these rules, the Judicial Council adopted emergency rule 4, which established a statewide COVID-19 Emergency Bail Schedule that set presumptive bail at \$0 for most misdemeanors and lower-level felonies, with specified exceptions, but did not change any of the traditional bail procedures or the ability of a court to exercise discretion related to the setting of bail. Under the emergency rule, courts retained their ability to adjust bail in an individual case if necessary to assure the appearance of the defendant and protect public safety. Rule 4 was to remain in effect until 90 days after the Governor declared that the state of emergency related to the COVID-19 pandemic is lifted or until the rule was amended or repealed by the Judicial Council.

Analysis/Rationale

Background

The COVID-19 pandemic and state of emergency

As stated more fully in the April 4, 2020 report to the Judicial Council proposing emergency rules 1–11,⁶ the United States is the epicenter of a global pandemic caused by the COVID-19 virus. As of June 4, 2020, the U.S. Centers for Disease Control and Prevention reported there were over 1.8 million cases in this country, with over 100,000 deaths;⁷ and California's Department of Public Health reported over 117,000 cases in the state, with over 4,000 deaths.⁸

⁴ Executive Order N-38-20, <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.27.20-N-38-20.pdf>.

⁵ The council also subsequently adopted emergency rules 12-13 by circulating order.

⁶ Judicial Council of Cal., Internal Com. Chairs Rep., *Judicial Branch Administration: Emergency Rules in Response to the COVID-19 Pandemic* (Apr. 4, 2020), <https://jcc.legistar.com/View.ashx?M=F&ID=8233133&GUID=4CE2DDDF-426E-446C-8879-39B03DE418B3>.

⁷ U.S. Centers for Disease Control and Prevention, "Coronavirus Disease 2019 (COVID-19), Cases in the U.S.," www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html.

⁸ Cal. Dept. of Public Health, "California COVID-19 by the Numbers," news release (May 27, 2020), www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/ncov2019.aspx#COVID-19%20by%20the%20Numbers.

On March 4, 2020, Governor Gavin Newsom proclaimed a state of emergency in California as a result of the COVID-19 pandemic.⁹ On March 19, 2020, Governor Newsom issued a statewide shelter-in-place order¹⁰ with limited exceptions for emergency and essential critical infrastructure services. In addition, several counties have issued local shelter-in-place orders that are more restrictive than the statewide order issued by the Governor.

On March 24, the Governor issued an order to suspend the intake of all incarcerated persons into adult state prisons and Division of Juvenile Justice facilities at the county level for a minimum of 30 days, which impacted county jail and juvenile detention facility populations.¹¹ This order was later extended to May 25, 2020.

The spread of the virus hit California's inmate population as well as staff members in the prison and county jail systems. Many inmates had ongoing court cases, and courts could not be assured that safe social distancing was maintained with the transport of in-custody defendants and the holding cells adjacent to or within courthouses.

The Board of State and Community Corrections reports that between February 29, 2020 and May 23, 2020, California jail populations dropped 22,000 statewide, from over 72,000 inmates to approximately 50,000, although there was wide variation between counties with some reducing their jail population by 60 percent and others by 10 percent.

Penal Code section 1269b(c) states that it is the duty of the superior court judges in each county to prepare, adopt, and revise on an annual basis a uniform countywide schedule of bail for felony, misdemeanor and infraction offenses except Vehicle Code infractions. In developing the local bail schedules, judges take into account the seriousness of the crime. (Pen. Code, §1269b(d).)

Current rule

Based on the unprecedented COVID-19 pandemic conditions across the state, and the concerns about jails as vectors for infection within communities, and in concert with the Governor's statewide shelter-in-place order, the council adopted emergency rule 4 at its April 6, 2020 meeting. The emergency rule was intended to promulgate uniformity in release and detention of arrestees throughout the state and to safely reduce jail populations and protect justice system personnel and public health.

In adopting emergency rule 4, the Judicial Council acted to protect the vital role of superior courts in balancing public safety and public health by working with other government officials to reduce harm, save lives, and "flatten the curve" of the pandemic. The Judicial Council recognized one way to achieve this balance was to assist courts in safely reducing jail

⁹ State of emergency proclamation, www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf.

¹⁰ Executive Order N-33-20, <https://covid19.ca.gov/img/Executive-Order-N-33-20.pdf>.

¹¹ Executive Order N-36-20, <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.24.20-EO-N-36-20.pdf>

populations by permitting more persons accused of misdemeanors and other lower-level offenses to be released from jail custody prior to arraignment, either on own-recognizance release or on \$0 bail. Although the EBS set presumptive bail at \$0 for most misdemeanors and lower-level felonies, with specified exceptions, it retained county bail levels for serious and violent offenses, domestic violence and stalking offenses, DUI, looting, and a few other offenses. Emergency rule 4 also retained court authority and discretion in setting bail and did not change the courts' traditional bail procedures.

The Judicial Council recognized that this action would reduce health risks and exposure to defendants, counsel, jail and court staff, and to the larger community. These actions, taken to reduce local jail populations, were consistent with (1) the policy of the California Department of Corrections and Rehabilitation (CDCR) to not accept the transfer of convicted individuals from county jails to state prisons, and (2) the decisions of superior courts to greatly reduce the use of court facilities.

Emergency rule 4 mandated each superior court, effective no later than April 13, 2020, to apply the statewide EBS to every accused person thereafter arrested and in pretrial custody, and to every accused person who was then held in pretrial custody and charged with an offense covered by the schedule. Under the EBS, bail was presumptively set at \$0 for all misdemeanor and most lower-level felony offenses (with 13 listed exceptions), although courts retained their traditional authority to deviate from the schedule to set an amount necessary to assure appearance by the defendant and protect the public. The exceptions in the EBS included serious felonies, as defined in Penal Code section 1192.7(c); violent felonies, as defined in Penal Code section 667.5(c); driving under the influence offenses; offenses such as those involving domestic violence, or stalking, or requiring sex offender registration; and other offenses of particular concern.

The rule provided that each superior court's countywide bail schedule remained in effect for all offenses other than those addressed in the EBS, including setting bail for court-specific conduct enhancements and any status enhancements. The rule also required bail to be set under the EBS for violations of misdemeanor and felony probation, parole, postrelease community supervision, or mandatory supervision. Emergency rule 4, as adopted, remains in effect until 90 days after the Governor declares that the state of emergency arising from the COVID-19 pandemic is lifted, or until amended or repealed by the Judicial Council.

In an earlier action, on March 28, 2020, the Judicial Council authorized and supported the Chief Justice in issuing statewide orders to, among other things, extend the time period provided in Penal Code section 825 for the time in which a defendant charged with a felony offense must be taken before a magistrate for arraignment from 48 hours to not more than seven court days. The Chief Justice issued an order providing superior courts with authority to that effect on March 30, 2020. As with emergency rule 4, this action to extend the time for arraignment was taken to address the immediate health and safety concerns for court and jail staff, judicial officers, defendants, and the public.

Given the focus on both public health and public safety, the Judicial Council has continuously monitored conditions in the superior courts and across the state, noting the statewide decrease in crime during the period of the state of emergency, a decrease that continued after emergency rule 4 went into effect. It also became known that many county sheriffs—either by implementing their own policies prior to the EBS or as a result of the EBS—significantly reduced the inmate population in the jails.

The council continues to analyze information about health and safety conditions throughout the state during this pandemic, and the state and local responses. Accordingly, the council will continue to modify and adjust its actions to balance health and safety and provide assistance and relief when appropriate to California’s courts and the communities they serve.

The proposal

The Judicial Council recognizes that, although the state of emergency has not yet been lifted, a variety of actions and changes now provide the public health assurances needed to justify the repeal of emergency rule 4:

- The shelter-in-place order is being lifted by the Governor in phases based on public health considerations in individual counties and the success to date of combined state and local efforts to reduce the rate of infection, particularly among vulnerable populations.
- Counties are in varying stages of reopening, with many counties already moving to phase 3 while others are reopening more gradually.
- On May 25, 2020, CDCR opened intake for convicted individuals from county jails in Los Angeles, San Bernardino, San Diego, and Fresno counties. CDCR will open intake for convicted individuals from county jails in all 58 California counties on June 19, 2020. This provides for continued reduction of jail populations as convicted individuals are transferred from county jails to state institutions.
- Due to the swift and decisive actions of the Chief Justice, the Judicial Council, the sheriffs, and the superior courts, the population in county jails across the state has declined by more than 20,000 individuals statewide since the start of the pandemic.¹²
- All counties with a local jail reported a reduction in their jail populations of between 10 and 60 percent to the BSCC.¹³
- As noted above, crime rates have continued to remain at historic lows during the period of the state of emergency.
- Based on the significant actions taken by the Chief Justice, the Judicial Council, and the superior courts to protect public health and safety, the courts are well-positioned to continue operations and move toward phased safe reopening with the return of court staff, enhanced sanitation and other protections, and the careful use of courtrooms, despite the existence of COVID-19.

¹² Sacramento Bee, May 24, 2020, <https://www.sacbee.com/news/coronavirus/article242900061.html>.

¹³ <http://www.bscc.ca.gov/wp-content/uploads/JPS-ADP-Data-Snapshot-5.29.2020.pdf>

- Pursuant to emergency rule 3, the superior courts have undertaken the effective use of videoconferencing and other technology for some arraignments and other criminal proceedings, allowing for these proceedings to take place in a timely manner while observing safe social distancing.

In recognition of these factors, including the reduction in local jail populations, the decision by CDCR to allow intake of convicted individuals currently housed in county jails, and the variations among California local health department orders, the chairs of the Judicial Council's six internal committees recommend that the Judicial Council (1) repeal emergency rule 4, the statewide COVID-19 Emergency Bail Schedule; (2) provide direction to the superior courts about implementation issues related to the repeal of the COVID-19 Emergency Bail Schedule; and (3) support the action of the Chief Justice to rescind the statewide authorization to extend the time for arraignments in her March 30, 2020 order.

When the EBS is repealed effective June 20, 2020, each superior court has the option of returning to the countywide bail schedule in effect on April 5, 2020, or using a revised bail schedule the court has adopted or subsequently adopts. Each court may determine—taking into consideration the conditions within its county, guidance from local health and other government officials, current jail population, and input from justice partners—to further revise its countywide bail schedule to more effectively meet local public health and safety considerations. Although the EBS will no longer be in effect, courts are not required to reset bail for any person for whom bail was set in accordance with the EBS. Similarly, a court retains discretion to adjust the amount of a person's bail due to changed circumstances in accordance with existing statutory and case law.

Courts are encouraged to retain or adopt schedules with \$0 bail or significantly reduced bail levels for most misdemeanors and low-level felonies, where appropriate. In addition, courts are encouraged to maximize the safe release of individuals prearrest, or at arraignment by own recognizance or supervised release informed by a pretrial risk assessment when available.

In the regrettable instance that COVID-19 public health conditions reoccur or worsen severely in the state of California, the Judicial Council will consider reinstating a statewide Emergency Bail Schedule.

The repeal of the COVID-19 Emergency Bail Schedule is intended to work in coordination with the action of the Chief Justice to rescind the statewide extension of time for arraignment provided for in her March 30, 2020 order, and is based on courts' increasing ability to manage arraignment workloads and protect the due process rights of individuals to a speedy review of their custody status. The Chief Justice has indicated that this action will also go into effect on June 20, 2020.

Policy implications

The COVID-19 pandemic has presented an unprecedented crisis that threatens the lives, health, and safety of all Californians. California courts, however, provide critical services that also affect

the lives of many Californians, including some of the most vulnerable. Given the statewide reduction in jail populations, the vast differences among California's 58 counties, the varying levels of the health crisis across California, and the reopening of the counties, it is appropriate for the Judicial Council to repeal emergency rule 4 and the statewide COVID-19 Emergency Bail Schedule, and direct each superior court to use a countywide bail schedule that reflects the county's needs while providing timely arraignments.

Comments

This proposal has not been circulated for comment due to the urgent need to address the rapidly changing public health and safety conditions that vary from county to county across the state. As courts continue expansion of court services and counties undertake phased reopening, the council must act swiftly to return discretion to the courts for their criminal procedures.

Alternatives considered

The council could take no action at this time. Over the past few weeks, however, it has become clear that the superior courts and their justice system partners are now returning to some elements of more typical functioning in criminal proceedings. The chairs of the Judicial Council's six internal committees concluded that these recommendations would be useful to the courts in addressing the operations of the courts and jails, and the rights of defendants going forward.

Fiscal and Operational Impacts

It is anticipated that the proposal will provide courts with discretion to address a critical element of criminal procedure based on court and county conditions while protecting health and safety. It is uncertain what fiscal impact these recommendations may have on the courts.

Attachments and Links

1. Cal. Rules of Court, emergency rule 4, at pages 9–11
2. Voting instructions, at page 12
3. Vote and signature pages, at pages 13–14

Emergency rule 4 of the California Rules of Court is repealed, effective June 20, 2020, to read:

Emergency rule 4. Emergency Bail Schedule

(a) Purpose

Notwithstanding any other law, this rule establishes a statewide Emergency Bail Schedule, which is intended to promulgate uniformity in the handling of certain offenses during the state of emergency related to the COVID-19 pandemic.

(b) Mandatory application

No later than 5 p.m. on April 13, 2020, each superior court must apply the statewide Emergency Bail Schedule:

(1) To every accused person arrested and in pretrial custody.

(2) To every accused person held in pretrial custody.

(c) Setting of bail and exceptions

Under the statewide Emergency Bail Schedule, bail for all misdemeanor and felony offenses must be set at \$0, with the exception of only the offenses listed below:

(1) A serious felony, as defined in Penal Code section 1192.7(c), or a violent felony, as defined in Penal Code section 667.5(c);

(2) A felony violation of Penal Code section 69;

(3) A violation of Penal Code section 166(c)(1);

(4) A violation of Penal Code section 136.1 when punishment is imposed under section 136.1(c);

(5) A violation of Penal Code section 262;

(6) A violation of Penal Code sections 243(e)(1) or 273.5;

(7) — A violation of Penal Code section 273.6 if the detained person made threats to kill or harm, has engaged in violence against, or has gone to the residence or workplace of, the protected party;

(8) — A violation of Penal Code section 422 where the offense is punished as a felony;

(9) — A violation of Penal Code section 646.9;

(10) — A violation of an offense listed in Penal Code section 290(c);

(11) — A violation of Vehicle Code sections 23152 or 23153;

(12) — A felony violation of Penal Code section 463; and

(13) — A violation of Penal Code section 29800.

(d) — Ability to deny bail

Nothing in the Emergency Bail Schedule restricts the ability of the court to deny bail as authorized by article I, section 12, or 28(f)(3) of the California Constitution.

(e) — Application of countywide bail schedule

(1) — The current countywide bail schedule of each superior court must remain in effect for all offenses listed in exceptions (1) through (13) of the Emergency Bail Schedule, including any count-specific conduct enhancements and any status enhancements.

(2) — Each superior court retains the authority to reduce the amount of bail listed in the court's current countywide bail schedule for offenses in exceptions (1) through (13), or for any offenses not in conflict with the Emergency Bail Schedule.

(f) — Bail for violations of post-conviction supervision

(1) — Under the statewide Emergency Bail Schedule, bail for all violations of misdemeanor probation, whether the arrest is with or without a bench warrant, must be set at \$0.

(2) — Bail for all violations of felony probation, parole, post-release community supervision, or mandatory supervision, must be set in accord with the statewide Emergency Bail Schedule, or for the bail amount in the court's countywide schedule of bail for charges of conviction listed in exceptions (1) through (13), including any enhancements.

~~(g) — Sunset of rule~~

~~This rule will remain in effect until 90 days after the Governor declares that the state of emergency related to the COVID-19 pandemic is lifted, or until amended or repealed by the Judicial Council.~~

Instructions for Review and Action by Circulating Order

Voting members

- Please reply to the email message with “I approve,” “I disapprove,” or “I abstain,” by **4:00 p.m., Wednesday, June 10, 2020.**
- If you are unable to reply by Wednesday, June 10, 2020, please do so as soon as possible thereafter.

Advisory members

The circulating order is being emailed to you for your information only. There is no need to sign or return any documents.

CIRCULATING ORDER
Judicial Council of California
Voting and Signature Pages

Effective immediately, the Judicial Council approves the following:

- Repeal emergency rule 4 of the California Rules of Court, the statewide COVID-19 Emergency Bail Schedule, effective June 20, 2020.
- Direct the superior courts that upon repeal of the statewide COVID-19 Emergency Bail Schedule:
 - The countywide bail schedule that was in effect on April 5, 2020, becomes effective, unless the court adopts a revised bail schedule; and
 - Bail is not required to be reset for any person for whom bail was set in accordance with the COVID-19 Emergency Bail Schedule.
- Support the action of the Chief Justice to rescind the provision in her March 30, 2020 order, in which she authorized courts to issue implementation orders to extend the time period provided in section 825 of the Penal Code within which a defendant charged with a felony offense must be taken before a magistrate from 48 hours to not more than seven days.

My vote is as follows:

Approve

Disapprove

Abstain

Tani G. Cantil-Sakauye, Chair

Marla O. Anderson

Richard Bloom

C. Todd Bottke

Stacy Boulware Eurie

Kyle S. Brodie

Ming W. Chin

Jonathan B. Conklin

My vote is as follows:

Approve

Disapprove

Abstain

Samuel K. Feng

Brad R. Hill

Rachel W. Hill

Harold W. Hopp

Harry E. Hull, Jr.

Hannah-Beth Jackson

Patrick M. Kelly

Dalila Corral Lyons

Gretchen Nelson

Maxwell V. Pritt

David M. Rubin

Marsha G. Slough

Eric C. Taylor

Date: _____

Attest:

Administrative Director and
Secretary of the Judicial Council