JUDICIAL COUNCIL OF CALIFORNIA

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INVITATION TO COMMENT

LEG16-05

Title
Criminal Procedure: Pre-Arraignment Own Recognizance Release Under Court-Operated or Approved Pretrial Programs

Proposed Rules, Forms, Standards, or Statutes
Amend Penal Code section 1319.5

Proposed by
Criminal Law Advisory Committee
Hon. Tricia Ann Bigelow, Chair

Action Requested
Review and submit comments by June 14, 2016

Proposed Effective Date
January 1, 2018

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Executive Summary and Origin

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, own recognizance (OR) releases under a court-operated or court-approved pretrial release program for arrestees with three or more prior failures to appear (FTAs). This proposal was developed at the request of courts that are actively engaged in developing and expanding pretrial programs in an effort to improve pretrial processes, address the effects of jail overcrowding and court calendar impacts, provide judges with options in ordering pretrial release, and increase access to justice in the earliest stages of a criminal proceeding.

Background

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.[1] 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

[1] 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 detention actually increases recidivism. And in other types of offenders we found that supervised release is actually as effective as money bail."

overcrowding of California's jails, a problem that became more significant with criminal justice realignment.

Courts in many counties have been working with justice system partners to develop effective pretrial programs. These programs provide for judicial determination of each offender's suitability for some form of OR release, including offenders who may have multiple FTAs, a factor that is often related to jail overcrowding. For many courts, the motivation in creating an evidence-based pretrial program has been to increase judicial discretion to order release for appropriate defendants, and to ensure that: (1) the court's release decision is informed by a risk assessment conducted by the probation department and/or jail officials, with a recommendation based on county-specific guidelines that establish which defendants are eligible for release; and (2) the majority of individuals granted OR release are supervised by probation officers, court marshals and/or local law enforcement, rather than released without any form of supervision. Neither of these conditions are commonly in place when consent decrees or court orders require jail officials to release arrestees in order to meet jail caps.[2]

For defendants who receive court-approved OR release, however, Penal Code section 1318 requires that the defendant sign an agreement that includes the defendant's promise: (1) to appear at all times and places, as ordered by the court; (2) to obey all reasonable conditions imposed by the court; (3) not to depart the state without leave of the court; and (4) to waive extradition if the defendant fails to appear as required and is apprehended outside of the State of California.[3] Courts have broad authority to impose additional appropriate conditions when granting OR release, including drug testing and electronic monitoring.

Some pretrial programs include a pre-arraignment OR release component, providing judges with discretion to approve releases that allow arrestees to return to their jobs and families, while imposing statutory conditions and appropriate levels of supervision. These programs use a non-adversarial review process that operates during regular court hours, and on weekends and holidays with independent judicial review and release determinations by the on-call magistrate. The efforts of courts to implement these innovative programs have been hindered by the inflexible requirements of section 1319.5, which requires a hearing in open court before some arrestees can be granted OR release. Since courts cannot schedule a hearing in open court on weekends and holidays, jail officials may have no option but to release offenders to meet the jail cap. Without supervision or court date reminders, many will fail to appear for subsequent court dates, and so the dysfunctional cycle of arrest and unsupervised jail release will continue.

[2] Currently, jails in 18 counties in California are operating under a state or federal court order that places a mandatory limit on the number of inmates who may be housed in those jails (a jail cap). When a jail reaches capacity, officials are required to release a sufficient number of inmates to meet the limit imposed by the jail cap. In 2010, jails released approximately 6800 unsentenced inmates each month due to lack of capacity. Magnus Lofstrom and Katherine Kramer, "Capacity Challenges in California's Jails" Public Policy Institute of California, 2012.
[3] All further statutory references are to the Penal Code unless otherwise specified.

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, the restriction in section 1319.5 limits the number of arrestees the court may consider for OR release without a hearing in open court, constraining judicial discretion and limiting the courts' ability to efficiently process pre-arraignment releases for appropriate defendants.

The Proposal

The Criminal Law Advisory Committee proposes amending section 1319.5 to allow judges to grant pre-arraignment OR release under court-operated or court-approved pretrial release programs to individuals arrested for a felony offense who have three or more FTAs in the previous three years, and to allow judicial discretion to grant such release without a hearing in open court. The proposal would provide judges with greater flexibility in ordering supervised pre-arraignment OR release, encourage greater efficiency in case processing, assist courts in addressing the impact of jail overcrowding on court calendars and justice system partners, increase access to justice in the earliest stages of a criminal proceeding, and potentially improve outcomes for defendants who benefit from earlier release. The proposal is intended to provide operational efficiencies for courts committed to the use of evidence-based pretrial programs that are struggling to process large populations of arrestees who, in response to many years of jail overcrowding and other factors, have amassed numerous FTAs making them ineligible for pre-arraignment OR release under the restrictions in section 1319.5.

The proposal would add an exception to section 1319.5(b)(2) addressing release under a court-operated or court-approved pretrial release program. The requirement to have a hearing in open court on OR release would apply to any person who has failed to appear in court as ordered three or more times over the three years preceding the current arrest, "unless the person is released under a court-operated or court-approved pretrial release program."

Alternatives Considered

The committee alternatively considered more expansive amendments to section 1319.5 but determined that the current, limited proposal would appropriately enhance the discretion of judges, encourage court efficiencies, and assist justice system partners.

Implementation Requirements, Costs, and Operational Impacts

Under the proposal, judges would have discretion to grant pre-arraignment OR release under a court-operated or court-approved pretrial program, which would likely result in fewer FTAs, fewer court hearings, and greater efficiency in processing cases. For courts with a court-operated or approved pretrial program, potential implementation costs and operational impacts may include additional court time to review pretrial reports and, as appropriate, impose various modes of supervision for arrestees released OR prior to arraignment. Because implementation would be voluntary, however, each court could determine whether potential efficiencies would outweigh implementation costs and operational impacts.

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?
- Are the proposed revisions an effective way to address the restrictions imposed by Penal Code section 1319.5?

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.
- 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 systems, or modifying case management systems.
- Would two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Penal Code section 1319.5, at page 5

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

Penal Code section 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.