

CREATING AN EFFECTIVE
PRETRIAL
PROGRAM

A TOOLKIT FOR PRACTITIONERS

by

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TABLE OF CONTENTS

Introduction.....	1
Pretrial: An Overview	3
Pretrial Programs: Risk Assessment	5
Pretrial Programs: Diversion.....	8
Pretrial Programs: Supervision	10
Assessing Pretrial Effectiveness.....	15
Ongoing Measurement and Enhancement.....	16
Conclusion	21
About the Crime and Justice Institute at CRJ	22
About Californians for Safety and Justice’s <i>Local Safety Solutions Project</i>	22
Other Resources.....	23
Appendix.....	25
Endnotes.....	28

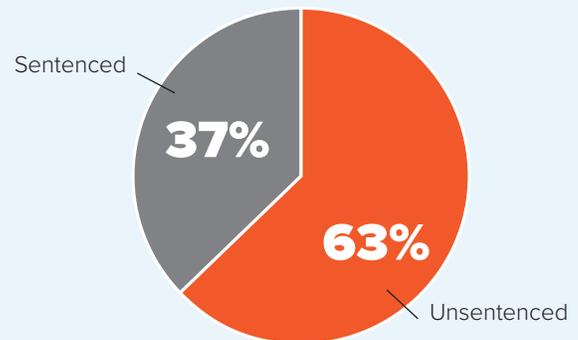
INTRODUCTION

These are times of significant change for county jails and justice systems. Public Safety Realignment, the 2011 law that shifted management of people convicted of certain nonviolent, non-serious, non-sex offenses from state prisons and parole to county jails and probation, has had a major impact. More individuals are being sentenced to county jail instead of state prison, including people who violate conditions of their parole. Some county jails face limited capacity or strained resources. Combined with ongoing county budget challenges, more than ever, local leaders need effective strategies to safely manage their justice populations and reduce costs at the same time.

On average, more than 60 percent of those in local jails in California are awaiting trial.¹ They are being detained “pretrial” while their case goes through criminal proceedings. There are models of pretrial diversion and supervision programs that can effectively manage these individuals in a community setting. Reducing the number of pretrial detainees in jails or the length of their stay can conserve considerable resources and allow the jail to meet other public safety needs. In a post-Realignment California, assessing pretrial program options is both an opportunity and a necessity.

Fortunately, pretrial program models have evolved considerably in recent decades, and there is evidence to show that they can be more successful than the money bail system at ensuring public safety and court appearance. There are many evidence-based options available to communities seeking to implement or strengthen pretrial programs. There is not one “correct” model for pretrial programs, and they can be successfully administered through the courts, probation departments, sheriff departments, county administration, independent agencies or any combination of these.

FIGURE A. CALIFORNIA COUNTY JAIL POPULATIONS



Source: Board of State and Community Corrections, 2012.¹

Many counties are now exploring such programs, asking critical questions about whom among those awaiting trial needs to be in jail and who can be managed successfully in the community.

This toolkit offers guidance to county officials on how to develop and operate these programs at the local level, building upon available literature on effective pretrial policies and practices. Specifically, officials will find:

- Key information about the legal framework and national standards for pretrial programs;
- How to implement a pretrial risk assessment;
- Pretrial diversion and supervision advice;
- How to assess your current system; and
- Recommendations on using data to measure and enhance pretrial programs.

For more information, please refer to the Other Resources section at the end of this document.

Definition of Key Terms

Pretrial Population: People awaiting the outcome of criminal charges against them.

Pretrial Diversion: A program that postpones the prosecution of an offense at any point in the judicial process from charging until adjudication. If the defendant successfully completes a diversion program, criminal charges may be dismissed at the end of the diversion period.

Release on One's Own Recognizance (OR): A judge or sheriff releases a defendant from custody without posting money bail.

Supervised Release: A program that supervises defendants in the community while they await the outcome of their charge.

PRETRIAL: AN OVERVIEW

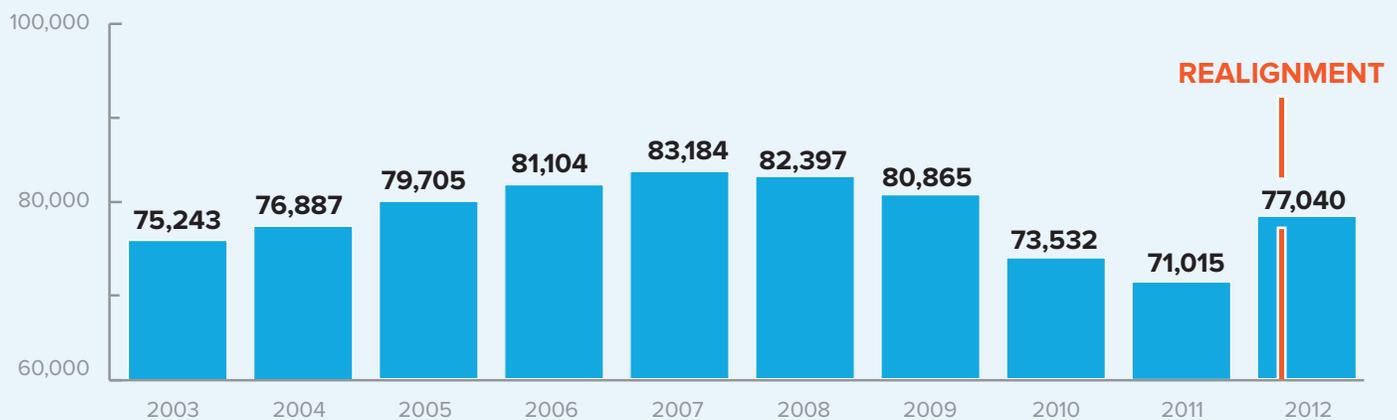
Jail Population Trends

Despite declining national crime rates between 1980 and 2008, jail populations in the U.S. grew significantly during that same period, peaking at 785,533.² The number of people in jails across the country began to decline in 2008. Until recently, California was also experiencing a decline. After record-low jail populations in 2010 and 2011, the number of California jail inmates increased during 2012 by an estimated 7,600.³ Public Safety Realignment, which shifted the management of specified

nonviolent, non-sex, non-serious felonies to local counties, is the major contributor to this growth.

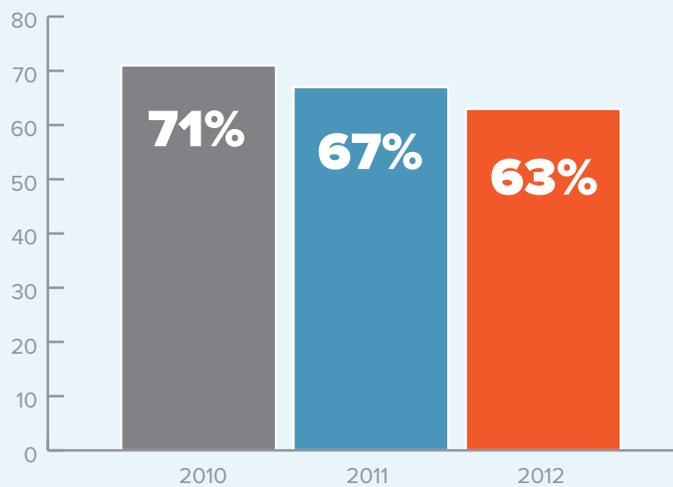
While much of the focus post-Realignment is on individuals serving local sentences after being convicted of a crime, **the majority of people in California jails continue to be individuals awaiting trial.** Enhanced pretrial programs offer an option for counties to preserve jail space and reduce their jail populations safely.

FIGURE B. CALIFORNIA JAIL POPULATIONS, 2003–2012



Source: Board and State Community Corrections, 2012¹

FIGURE C. UNSENTENCED IN STATEWIDE JAIL POPULATION, 2010–2012



Source: Board and State Community Corrections, 2012¹

From a legal perspective, pretrial programs consider both the rights of the defendant and the integrity of the judicial process. The presumption of innocence, the right to reasonable bail and other legal and constitutional rights of people facing charges are balanced with the need to protect the community, maintain the integrity of the judicial process and assure appearance in court.⁴ Effective pretrial practice is based on the principles of Evidence-Based Practices (EBP), which is the application of science into operational practice for services and programs for people in the justice system. Research has shown EBP interventions, including pretrial supervision, reduce costly jail stays, increasing the likelihood that the defendant does not commit a new crime while awaiting trial and returns to court.⁵ Pretrial interventions should be geared toward achieving those desired outcomes in a cost-effective manner.

Legal Framework for Pretrial Justice in California

California's pretrial system can be divided into two types of release systems:

1. Financially-secured release (traditional money bail); and
2. Government-supervised or non-financial release (release on the defendant's own recognizance, pretrial diversion, conditional or supervised release, and electronic monitoring).

In California, counties use these two options at different rates. San Mateo, for example, has an 82-percent financial and 18-percent non-financial release rate, compared to a 42-percent financial and 58-percent non-financial release rate in San Bernardino County.⁶ Pretrial reform can expand non-financial releases.

Both the California Constitution and the California Penal Code contain provisions that define, at least in broad strokes, the legal framework for bail and other pretrial practices. Information about these provisions (which provide the statutory framework for pre- and post-conviction bail, release on defendant's own recognizance and pretrial diversion) is laid out in detail in the Other Resources section at the end of this toolkit.

National Standards

In addition to the state legal framework for pretrial justice, practice standards have been developed at the national level. The American Bar Association (ABA) and National Association of Pretrial Services Agencies (NAPSA) have developed national standards for pretrial release practices, and NAPSA has also developed an accreditation process for pretrial agencies.

In California, the California Association of Pretrial Services has adopted standards for local practice.⁷ Additionally, several other national organizations have released policy documents supportive of pretrial justice practices⁸ (e.g., the Conference of State Court Administrators, National Association of Counties, Association of Prosecuting Attorneys, International Association of Police Chiefs, and the National Legal Aid and Defenders Association, American Council of Chief Defenders).

The ABA and NAPSA **standards advocate for the use of risk-based pretrial decision-making rather than a system based on financial bond** or commercial surety. Extensive research has demonstrated that actuarial assessment is a safer, more accurate way of making release decisions than solely using professional judgment.⁹ Pretrial risk-assessment tools have been validated and successfully implemented in states and counties across the country, including several in California.

PRETRIAL PROGRAMS: RISK ASSESSMENT

Who is likely to appear in court and unlikely to pose a threat to public safety if released pending trial?

A key function of a pretrial program is to provide information to aid the court in answering this question. Scientific data is available to help decision-makers identify those with the highest likelihood of success through the use of pretrial risk-assessment tools.

Pretrial risk assessment places defendants into categories of risk in a manner that predicts the likelihood of either an arrest on a new charge or failure to appear in court. The results of the pretrial risk assessment provide uniform criteria that can assist in the decision to release or detain pending trial. When used effectively, risk assessment serves to increase public safety, as well as reduce costs and conserve jail bed space for high-risk defendants and high-risk sentenced individuals.

A sample pretrial risk-assessment instrument can be found in this section.

Things to Consider When Implementing a Pretrial Risk Assessment

1. Define the Purpose(s) for Using the Instrument

What do you want the instrument to do, and how will the information it provides be used? For example, the instrument can be used to:

- Predict the risk of court appearance and/or new arrest;
- Support conditions for release pending trial; and/or
- Guide decision-making by judges, jail authorities and/or other staff.

2. Identify Available Instruments

Survey the market to see what options are available. A sample non-proprietary instrument is included in this section, and many more tools are available that can best fit your needs. Creating an instrument specifically for a jurisdiction (or a set of jurisdictions within the region or state) is also an option. Peers, professional associations and technical assistance providers can supply useful guidance, information and support.

3. Conduct a Review of Available Research

Gather published and unpublished studies about the instrument(s) identified. Review these studies to assess the instrument's predictive validity, taking into account the level of rigor and independence of the research. Determine whether the survey instrument assesses risk accurately for different jail demographics (e.g., predicts risk for males better than for females.)

4. Consider Other Important Factors Unique to the Jurisdiction

Each jurisdiction has unique factors to consider in making the final decision, including:

- Cost and workload;
- Administrative, court, population capacity and/or statutory requirements;
- Degree of external support needed to integrate the instrument into daily business practices; and
- The various risk-assessment instruments already in use throughout the jurisdiction(s).

Prepare for Challenges to Implementation

Challenges to implementation are inevitable. The following issues may arise:

- **Workload and time constraints:** Address through various restructuring or prioritization methods. For example, limit the workload associated with monitoring low-risk individuals. This type of restructuring can provide time to conduct and apply the pretrial risk-assessment instrument. In addition, if particular defendants are statutorily excluded from pretrial release, do not take the time to administer a pretrial risk assessment.
- **Buy-in:** Address by increasing levels of knowledge and comfort with the instrument with key stakeholders (e.g., courts, District Attorneys, Public Defenders, Sheriffs, county executives, staff, etc.). This can include ongoing educational efforts and data-driven feedback on the effectiveness of pretrial release and/or detention decisions and practices.

- **Accuracy:** Address through ongoing training and quality assurance to ensure the instrument is administered in a consistent manner. It should also be periodically validated (assessed to determine if the instrument correctly predicts the probability of its new arrest and/or failure to appear).
- **Competing practices** (e.g., financial bail schedules, booking matrices and other forms of subjective risk

assessment): Address by identifying when and how these methods are used and if they are operating at cross purposes to risk-based decision-making. Thereafter, determinations can be made to reduce conflicting practices, duplication of efforts and/or eliminate potentially dangerous practices.

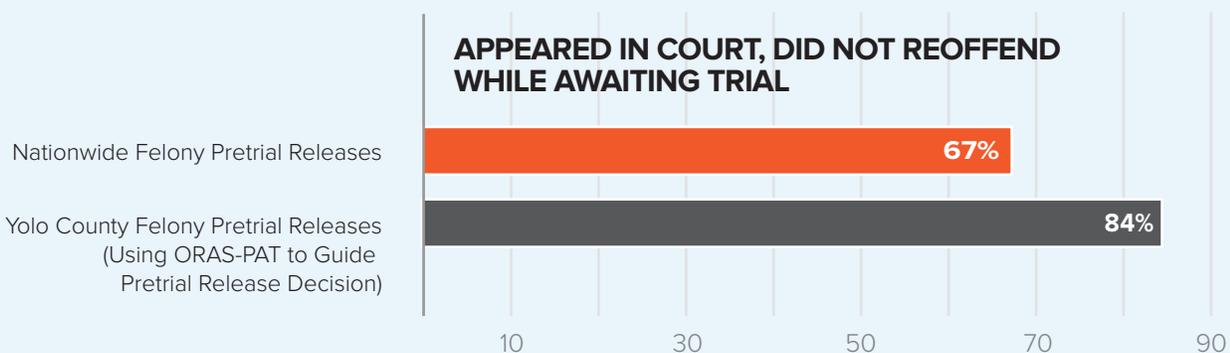
Increasing Public Safety with Pretrial Risk Assessment in Yolo County

The Yolo County Probation Department’s pretrial program, established in 2010, has achieved remarkable results in a short time, safely and effectively reducing the jail’s pretrial population. Probation’s Pretrial Unit worked in conjunction with the District Attorney, Public Defender, Sheriff and the court to establish the program’s initial criteria. They selected the Ohio Risk Assessment System — Pretrial Assessment Tool (ORAS-PAT), a non-proprietary, streamlined tool that asks individuals about their criminal history, age of first arrest, prior failures to appear in court, drug use, residential stability and employment history (see Figure E).

The Probation Department then double-checks the defendant’s criminal history, contacts any victims, confirms release addresses and reviews community ties. The Pretrial Unit provides community supervision for each individual released on Supervised OR and sees higher-risk individuals weekly in face-to-face meetings or home visits.

Results: From 2010 to 2012, felony defendants on supervised release in Yolo County had an 84-percent success rate. On average, 67 percent of released felony defendants nationally (most of whom are released on bail) stay out of trouble and appear in court.¹⁰

FIGURE D. SUPERVISED RELEASE SUCCESS RATES



Source: Bureau of Justice Statistics 2007.¹⁰

FIGURE E. OHIO RISK ASSESSMENT SYSTEM— PRETRIAL ASSESSMENT TOOL (ORAS-PAT)

OHIO RISK ASSESSMENT SYSTEM: PRETRIAL ASSESSMENT TOOL (ORAS-PAT)

Name: _____ Date of Assessment: _____
 Case#: _____ Name of Assessor: _____

Pretrial Items		Verified
1. Age at First Arrest 0=33 or older 1=Under 33	<input type="text"/>	<input type="checkbox"/>
2. Number of Failure-to-Appear Warrants Past 24 Months 0=None 1=One Warrant for FTA 2=Two or More FTA Warrants	<input type="text"/>	<input type="checkbox"/>
3. Three or more Prior Jail Incarcerations 0=No 1=Yes	<input type="text"/>	<input type="checkbox"/>
4. Employed at the Time of Arrest 0= Yes, Full-time 1= Yes, Part-time 2= Not Employed	<input type="text"/>	<input type="checkbox"/>
5. Residential Stability 0=Lived at Current Residence Past Six Months 1=Not Lived at Same Residence	<input type="text"/>	<input type="checkbox"/>
6. Illegal Drug Use During Past Six Months 0=No 1=Yes	<input type="text"/>	<input type="checkbox"/>
7. Severe Drug Use Problem 0=No 1=Yes	<input type="text"/>	<input type="checkbox"/>
Total Score:	<input type="text"/>	

Scores	Rating	% of Failures	% of Failure to Appear	% of New Arrest
0-2	Low	5%	5%	0%
3-5	Moderate	18%	12%	7%
6+	High	29%	15%	17%

Please State Reason if Professional Override:

Reason for Override (note: overrides should not be based solely on offense):

Other Areas of Concern. Check all that Apply:

<input type="checkbox"/> Low Intelligence*	<input type="checkbox"/> Child Care
<input type="checkbox"/> Physical Handicap	<input type="checkbox"/> Language
<input type="checkbox"/> Reading and Writing Limitations*	<input type="checkbox"/> Ethnicity
<input type="checkbox"/> Mental Health Issues*	<input type="checkbox"/> Cultural Barriers
<input type="checkbox"/> No Desire to Change/Participate in Programs*	<input type="checkbox"/> History of Abuse/Neglect
<input type="checkbox"/> Transportation	<input type="checkbox"/> Interpersonal Anxiety
<input type="checkbox"/> Other _____	

*If these items are checked it is strongly recommended that further assessment be conducted to determine level or severity.

Source: Center for Criminal Justice Research, University of Cincinnati School of Criminal Justice, 2010.

PRETRIAL PROGRAMS: DIVERSION

In fiscal year 2010-2011, the California Superior Court processed more than 1.5 million criminal cases, but only 16 percent were felonies.¹¹ The amount of resources consumed to file and process 1.5 million cases is extraordinary, not to mention the additional traffic through the courts due to violations and other infractions.

While pretrial programs can decrease the burden on jails, the burden on courts remains the same — unless more efficient alternatives are pursued to hold individuals accountable. Pretrial diversion offers an alternative for individuals charged with certain traffic, misdemeanor or felony offenses.

Pretrial diversion affords the justice system opportunities to triage resources to serious crimes and higher-risk defendants, helping with docket management and reducing jail costs. It also provides opportunities for victims and offenders to remedy alleged criminal activity outside of the traditional and costly adjudication process.

What is Pretrial Diversion?

Pretrial diversion is defined as any voluntary option in which defendants undergo alternative criminal case processing that results in dismissal of the charge(s) if certain conditions are satisfied.¹² According to national standards,¹³ the purpose of pretrial diversion is to:

- Enhance public safety by addressing the root cause of behaviors that lead to arrest;
- Reduce the stigma associated with a record of conviction;
- Restore victims; and
- Conserve justice system resources.

Pretrial diversion's key components are:

1. Uniform eligibility criteria;
2. Structured services and supervision; and
3. Charge dismissal upon successful completion of the required conditions.¹⁴

Pretrial diversion programs conduct an assessment of risk and needs, and provide targeted supervision and programming based on that assessment. While most pretrial diversion programs require defendants to accept responsibility for their actions, defendants are not required to admit guilt. Another key aspect is that each case considered for pretrial diversion has prosecutorial merit. Therefore, the process for initiating pretrial diversion occurs after the decision has been made to proceed with filing criminal charges. And similar to pretrial programs, pretrial diversion can be located in a variety of agencies: a stand-alone agency, District Attorney's office, pretrial agency, probation, courts, private nonprofits, Sheriff's office, etc.

While research on pretrial diversion is still emerging, certain promising and emerging practices in the field have been identified. Table 1 outlines current knowledge of promising practices in pretrial diversion as outlined in a recent publication by the National Association of Pretrial Service Agencies.¹⁵

Diversion is not a “cure-all” for resource management. However, more and more jurisdictions are turning to diversion to manage individuals charged with low-level offenses while still addressing underlying issues such as substance abuse and mental health. For more information and program examples, visit the diversion webpage of the National Association of Pretrial Service Agencies: <http://napsa.org/diversionmain.html>.

TABLE 1. PROMISING PRACTICES IN PRETRIAL DIVERSION

PROMISING PRACTICE	INTENT
Formalized cooperative agreements between the pretrial diversion agency and key stakeholders to assure program continuity and consistency	Allows for transparency and continuity of program rules and consistency of treatment of all defendants
Defendant access to counsel before the decision to participate in pretrial diversion	Allows defendants to fully understand the merits of their individual cases, program requirements and potential outcomes of participation; enables defendants to make an informed decision to enter the program
Specific due process protections incorporated into programming	Affords defendants rights and protections under pretrial status; includes the right to review a prosecutor’s decision to deny access to pretrial diversion, written reasons for termination from pretrial diversion, and the right to challenge termination decisions
Broad, equitable and objective diversion eligibility criteria, applied consistently at multiple points of case processing	Allows for similarly situated defendants (i.e., similar charges and criminal histories) to be given equal consideration for access into pretrial diversion; encourages broad application of the criteria to provide the opportunity to all potential candidates
Uniform and validated risk and needs assessment to determine the most appropriate and least restrictive levels of supervision and services needed	Allows for the identification of risk and needs to address in the program for each defendant at or shortly after enrollment
Intervention plans tailored to individual participant risks and needs — and developed with the participant’s input	Provides the realistic goals and objectives to address each defendant’s assessed risk while being responsive to individual characteristics, encouraging motivation and responsibility for change, and utilizing the least restrictive means necessary
Graduated sanctions short of termination as responses to participant behavior	Provides for swift, certain and proportionate responses to noncompliance that, when consistently applied, mitigate risks and serve to increase compliance
Maximum possible privacy protections for participants and program records	Affords confidentiality for the program and each defendant; ensures consistency with the unique legal protections of pretrial status and the opportunity for record expungement upon successful completion
Independent program evaluations	Provides an unbiased study of program effectiveness and the identification of areas for continued improvement

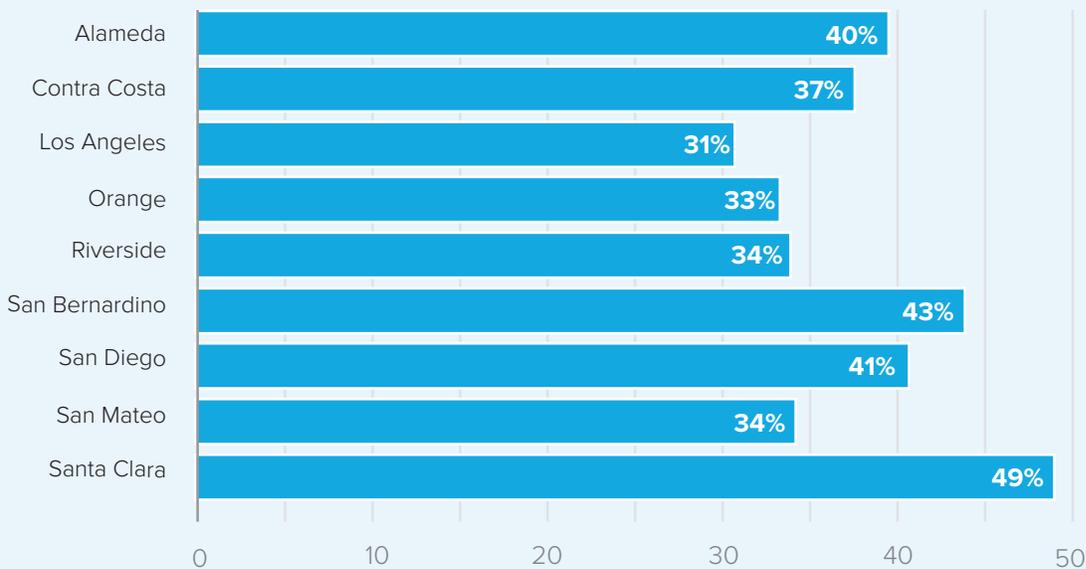
Source: National Association of Pretrial Service Agencies, 2010.¹⁵

PRETRIAL PROGRAMS: SUPERVISION

Pretrial supervision offers county justice systems intermediate options between release on one's own recognizance and remand to jail for those defendants facing formal prosecution. Risk-based assignment to pretrial supervision can help assure a return to court, maintain public safety and conserve resources for supervision of high-risk caseloads. A continuum of pretrial supervision options can be housed anywhere in the justice system and should include responses appropriate for high-, medium- and low-risk defendants.

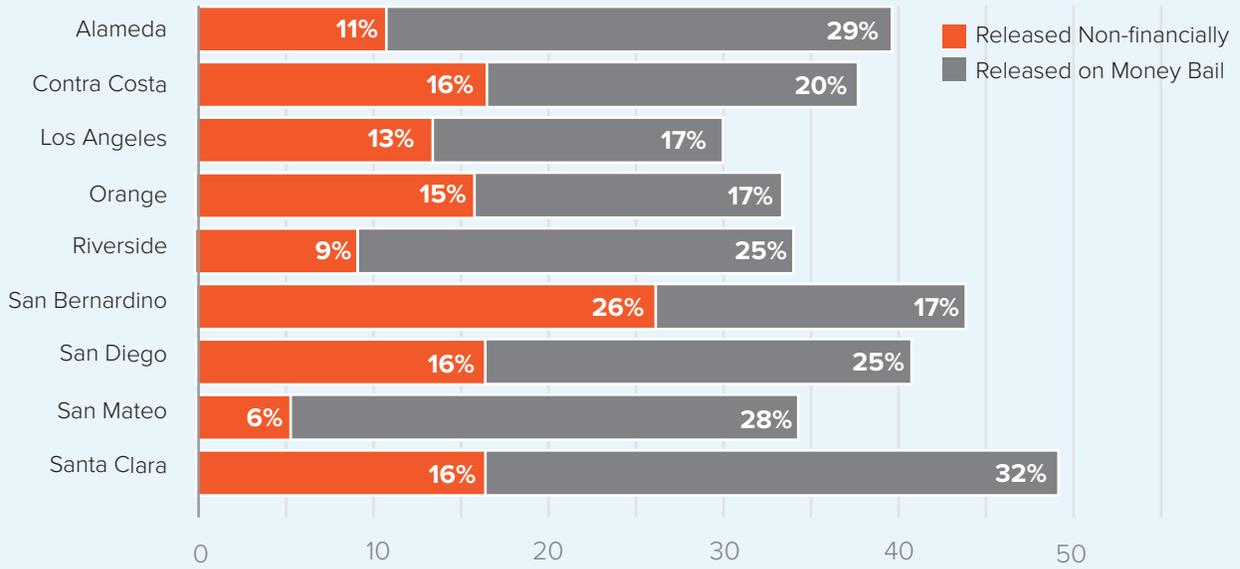
In contrast to pretrial diversion, pretrial supervision is not voluntary and does not require that a defendant admit guilt or take responsibility for the alleged crime. Successful completion of pretrial supervision does not result in charges being dropped or make any other guarantees in terms of disposition. It can, however, reduce recidivism by allowing defendants to maintain employment and ties to family and community — and save counties money by placing individuals in the least restrictive setting necessary to ensure public safety and return to court.

FIGURE F. OVERALL PRETRIAL RELEASE RATE (% OF ELIGIBLE DEFENDANTS) BY COUNTY



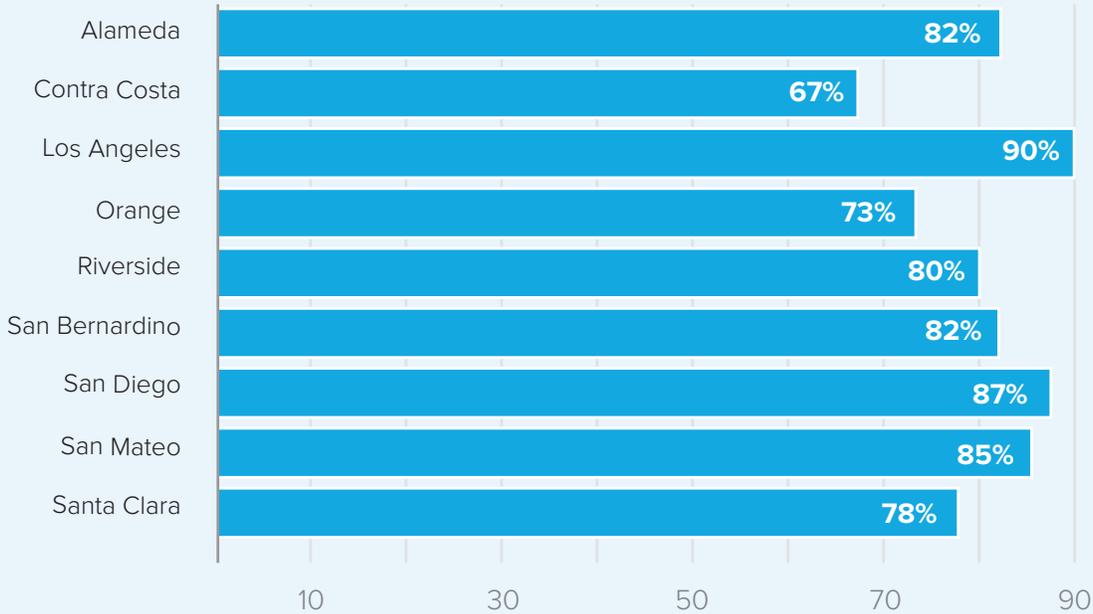
Source: Pretrial Justice Institute, 2009.⁶

FIGURE G. TYPES OF PRETRIAL RELEASE BY COUNTY



Source: Pretrial Justice Institute, 2009.⁶

FIGURE H. PRETRIAL SUCCESS RATES BY COUNTY, 2004 (% WITH NO NEW ARREST)



Source: Crime and Justice Institute, 2010.²³

Effective pretrial supervision strategies vary from straightforward interventions (court date reminder systems) to more intensive supervision and monitoring. The table on page 14 summarizes interventions cited in *State of Science of Pretrial Release Recommendations and Supervision*.¹⁶

Some interventions, like court date reminders, have been proven successful in reducing failures to appear. Others, like electronic monitoring, have not been proven to reduce risk, but they are a successful population management strategy (allowing defendants to be maintained in the community).

Questions for Developing a Pretrial Program Continuum

- What are the risk reduction and/or population management goals that the program is trying to achieve?
- What existing data supports the program's effectiveness?
- Who is the target population?
- What resources are needed to implement the program effectively, and to ensure that it is utilized?
- To what terms of supervision will defendants be subjected, and how will they be held accountable?
- How will referrals be managed, and how will the program communicate with the court?
- How will success be measured?

Areas of Caution

Drug testing is not proven effective as a risk reduction strategy, and over-testing can result in program failure because defendants miss appointments.¹⁷ However, if the jail is housing many low-risk defendants awaiting trial on drug charges, and release with a condition of drug testing is agreeable to local stakeholders, drug testing can provide a viable option for population management. However, data on violations should be closely tracked to determine if the structure of the program contributes to failure on supervision.

Avoid pretrial programming that leads to a “*net-widening*” of supervision. Low-risk individuals charged with low-level

offenses should be released on their own recognizance, and pretrial supervision programming should be reserved for individuals who otherwise would go to jail. Supervision for individuals charged with low-level offenses can be detrimental because it disrupts their pro-social activities and can bring them into contact with individuals with more serious criminal histories. Scarce resources should be dedicated to the higher-risk individuals who will derive the most benefit.

Reducing Costs Through the Affordable Care Act for Treatment of Pretrial Populations

As part of health care reform, California is expanding Medi-Cal eligibility to all citizens and certain qualified non-citizens 18-64 years old with incomes under 138 percent of the Federal Poverty Line, effective January 1, 2014. This means that, for the first time, the large majority of individuals in jail will become eligible for health coverage, including mental health care and substance abuse treatment. However, only treatment in non-correctional hospitals and other community settings, and not in the jail, will be covered.

With expanded Medi-Cal reimbursements and enhanced treatment benefits:

- Treatment in community settings, including as part of a pretrial diversion or supervision program, may be able to be reimbursed at 100 percent of the costs; and/or
- A stay in a treatment program may be less expensive and more effective at reducing recidivism than jail stays for low-level, chronically ill pretrial populations.

For more information about how county justice systems can take advantage of health care reform to reduce costs and increase public safety, see *Enrolling County Jail & Probation Populations in Health Coverage*, another toolkit in this series, available at safeandjust.org.

Administrating Agency Checklist of Program Functions

Once the decision has been made to implement a supervision program, the process proceeds in the same way that it would for most programming: An agency must take responsibility for administration. Budgets, staffing, policies and procedures must be put in place, and performance measures should be documented. Specifically, ensure that:

- Stakeholders are involved in program development and supportive of implementation;
- The program fits within the legal framework for pretrial;
- The role of the program in the system and eligibility are clear to all stakeholders;
- Processes are in place to integrate the program into pretrial decision-making; and
- Data is collected and shared.

Ongoing data collection will ensure that the program is being used as intended and does not have unintended consequences. (For example, if assessment is delegated to a new pretrial agency, monitor any changes in inmates' length of stay to make sure the change does not cause administrative delays.)

Data-Driven Pretrial Supervision Practices Conserve Needed Jail Space in Santa Cruz

Santa Cruz County has been honing its pretrial supervision strategies for almost a decade, helping keep its unsentenced jail population at or below the state average.

The expanded pretrial program, led by the Probation Department, was initiated in 2005 in response to overcrowding and unsafe conditions in the county jail. In Santa Cruz, comparatively few people are held in jail pretrial: 71 percent of 2011 arrestees were released prior to the disposition of their charges, including 45 percent released on their own recognizance, 18 percent making bail, and about 5 percent being placed on a supervised release program. With the help of four pretrial probation deputies stationed in the jail, pretrial release is secured quickly in Santa Cruz, with the vast majority of those released spending less than a day in jail.

Santa Cruz's pretrial supervision program makes it possible for certain higher-risk individuals to be managed in the community as they await the outcome of charges. Like many other jurisdictions, a substantial proportion of individuals are arrested on drug charges in Santa Cruz. Those who are not released with a citation or on their own recognizance are released to pretrial supervision, where they are connected with treatment programs appropriate to their risk and needs.

Results: Analysis of Santa Cruz pretrial programs reveal that 92 percent of participants did not acquire new charges upon release, and 89 percent successfully appeared on their court date.

TABLE 2. PRETRIAL INTERVENTION STRATEGIES

TYPE	PURPOSE	RESEARCH SUMMARY	EXAMPLES	OTHER CONSIDERATIONS
Court Date Notification	To reduce failure to appear and other related costs	Studies spanning 30 years and six states demonstrated court date notification systems effectively reduced failure to appear rates.	<ul style="list-style-type: none"> • Nebraska • Multnomah County, OR • Flagstaff, AZ • Jefferson County, CO • King County, WA • New York, NY 	<ul style="list-style-type: none"> • Notification options included volunteer callers, automated systems and a combination of calls and mailings. • Studies varied in target population and method of notification.
Drug Testing	To monitor drug use and reduce or deter pretrial failure	Studies do not demonstrate drug testing as a condition of pretrial release is effective in reducing pretrial failure, even when a system of sanctions is included.	<ul style="list-style-type: none"> • Washington, D.C. • Multnomah County, OR • Pima and Maricopa Counties, AZ • Prince George's County, MD and Milwaukee, WI 	<ul style="list-style-type: none"> • Studies demonstrated drug testing had high rates of noncompliance due to missed appointments.
Electronic Monitoring	To provide surveillance and monitor compliance pending trial; serves as an alternative to detention	Studies do not demonstrate electronic monitoring reduces pretrial failure.	<ul style="list-style-type: none"> • Mesa County, AZ • Lake County, IL • Federal Pretrial • Marion County, IN 	<ul style="list-style-type: none"> • Studies demonstrated that the use of electronic monitoring can result in higher technical violation rates. • Electronic monitoring can reduce unnecessary detention of defendants who would have otherwise been detained. • Studies did not address the risk level of the defendants; more research is needed.
Supervision	To facilitate, support and monitor compliance with pretrial release conditions	Data points to a general benefit of supervision, but little research is available on type and intensity of supervision.	<ul style="list-style-type: none"> • Dade County, FL; Milwaukee County, WI; and Multnomah County, OR • Philadelphia, PA 	<ul style="list-style-type: none"> • Conditions of supervision are meant to address risk of flight and danger to community safety, pending trial. • Historically, there is significant variation in what supervision entails (e.g., monthly phone calls, daily face-to-face contacts, additional services). • More research is needed to tell what type(s) of supervision work best with which defendants (see Supervision with Alternatives to Detention)
Supervision with Alternatives to Detention	To reduce unnecessary detention while assuring court appearance and community safety	When the risk level of the defendant is considered, non-custodial supervision options can reduce unnecessary jail stays while assuring court appearance and public safety.	<ul style="list-style-type: none"> • Federal Pretrial 	<ul style="list-style-type: none"> • Alternatives for low-risk defendants should rarely be used, if at all, as it can increase risk of failure (mental health treatment may be an exception). • Moderate- and higher-risk defendants benefit from alternatives when a specific risk is matched to a specific alternative. • When applied appropriately to moderate- and high-risk defendants, alternatives provide programmatic and economical benefits. • Some examples of alternatives include: third-party custody, drug/mental health/sex offender treatment, location monitoring, housing in a halfway house or shelter.

Source: Pretrial Justice Institute, 2011.¹⁸

ASSESSING PRETRIAL EFFECTIVENESS

A pretrial program, with its risk-assessment, diversion and supervision components, should be continually assessed to ensure it is meeting its goals of protecting public safety and targeting justice system resources efficiently. Whether you have a pretrial program in place or are starting from scratch, a system assessment provides an opportunity to determine where you are and how to develop a plan for moving forward. The assessment should include a review of qualitative and quantitative data, as well as discussion of the goals for pretrial services.

The assessment process should incorporate diverse viewpoints from across agencies (courts, sheriff departments, etc.) and within agencies (from executives to frontline staff) through surveys, focus groups or open meetings.

System assessment results are intended to be constructive, not overwhelming. When presenting results, identify areas of strength as well as need, and focus on actionable items that will achieve the goal of pretrial services in your county. A variety of survey-style assessment tools are available at: www.crj.org/cji.

Assessment Questions to Ask

- What are the goals of our pretrial system?
- What are the demographics of the pretrial population?
- How are pretrial defendants currently managed?
- What are the policies and procedures of individuals and agencies that are part of pretrial decision-making?
- What statutes govern local pretrial decision-making?
- How does local practice compare to national standards?

ONGOING MEASUREMENT AND ENHANCEMENTS

Pretrial programs are the most effective when measurement is ongoing. Understanding how many adults are arrested each year, which agencies make the most arrests, booking trends, trends by offense type, length-of-stay trends and release patterns will provide a high-level view of what is happening in the system.

A companion toolkit, *How to Assess Jail Populations: A Toolkit for Practitioners*,¹⁹ provides guidelines for calculating and analyzing factors that will aid in risk management and the expansion of effective community supervision programs. That toolkit also provides an entrée into key pretrial services measures on a systemic level.

Jail Assessment Questions to Ask

- What proportion of people in the county jail are able to secure pretrial release, and how does this number compare to the state average?
- How do money bail amounts in your county compare with those for the same crimes in other California counties?
- How many people assessed as low-risk are being released on personal recognizance and/or transferred to pretrial, non-custodial supervision programs?
- How long do people who are unable to secure pretrial release typically spend in jail before their court disposition?
- What are the charges facing this group? Is there a subsection that would be likely to succeed in pretrial release?

Assessing the Impact of Functions Within Pretrial Programs

How well is your county doing with each of the following?

- Conducting pretrial risk assessment
- Completing pretrial reports
- Providing recommendations to release or detain defendants to the court
- Providing pretrial supervision
- Responding to noncompliance
- Cost-effectiveness of the above components

What Data is Needed?

A recent publication by the National Institute of Corrections and the Pretrial Executive Network entitled *Measuring What Matters: Outcome and Performance Measures for the Pretrial Services Field*²⁰ describes essential outcomes, performance goals and other measures to utilize (see Table 3). The measures highlighted in the publication mirror the national standards for pretrial justice practices by the American Bar Association²¹ and the National Association of Pretrial Services Agencies.²²

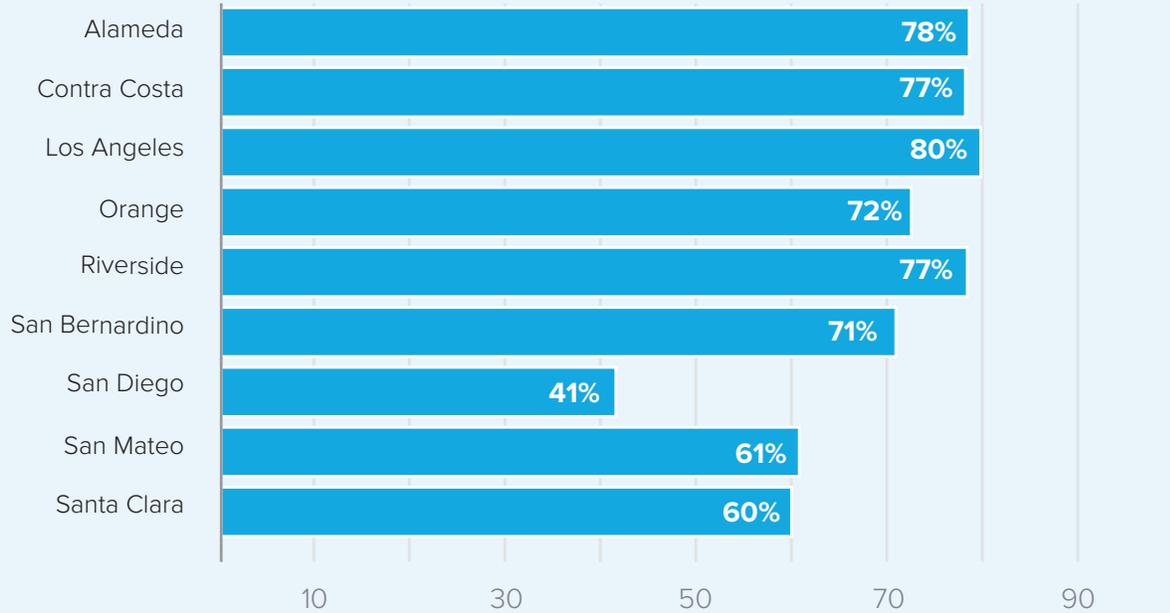
Because the national standards recommend only non-financial terms of release, no data elements pertaining to bail are included here. However, since financial terms and commercial surety are legal in California, local counties should also collect data on the relationship between bond amounts, charges, defendant outcomes and jail utilization to determine whether bail practices are having the desired outcome.

TABLE 3. SUMMARY OF KEY DATA MEASURES FOR THE PRETRIAL SERVICES FIELD

DATA MEASURES	DATA DESCRIPTIONS
OUTCOME MEASURES — INDICATORS OF EFFECTIVENESS IN ACHIEVING A STATED MISSION OR INTENDED PURPOSE	
Appearance Rate	The percentage of supervised defendants who make all scheduled court appearances
Safety Rate	The percentage of supervised defendants who are not charged with a new offense during the pretrial stage
Concurrence Rate	The ratio of defendants whose supervision level or detention status corresponds with their assessed risk of pretrial misconduct
Success Rate	The percentage of released defendants who (1) are not revoked for technical violations of the conditions of their release, (2) appear for all scheduled court appearances, and (3) are not charged with a new offense during pretrial supervision
Pretrial Detainee Length of Stay	The average length of stay in jail for pretrial detainees who are not statutorily ineligible for pretrial release
PERFORMANCE MEASURES — QUANTITATIVE OR QUALITATIVE CHARACTERIZATIONS OF PERFORMANCE	
Universal Screening	The percentage of defendants eligible for release by statute or local court rule that the program assesses for release eligibility
Recommendation Rate	The percentage of time the program follows its risk-assessment criteria when recommending release or detention
Response to Defendant Conduct	The frequency of policy-approved responses to compliance and non-compliance with court-ordered release conditions
Pretrial Intervention Rate	The pretrial agency’s effectiveness at resolving outstanding bench warrants, arrest warrants, and capiases
MISSION-CRITICAL DATA — STRATEGICALLY LINKED TO OUTCOMES AND PERFORMANCE; TRACKS PROGRESS IN AREAS AND ON ISSUES THAT SUPPLEMENT SPECIFIC MEASURES	
Defendants Released by Release Type and Condition	The number of release types ordered during a specified time frame
Caseload Ratio	The number of supervised defendants divided by the number of pretrial officers/case managers
Time From Non-financial Release Order to Start of Pretrial Supervision	Time between a court’s order of release and the pretrial agency’s assumption of supervision
Time on Pretrial Supervision	Time between the pretrial agency’s assumption of supervision and the end of program supervision
Pretrial Detention Rate	Proportion of pretrial defendants who are detained throughout pretrial case processing

Source: National Institute of Corrections and the Pretrial Executive Network, 2011. ²⁰

FIGURE I. PERCENTAGE OF CASES WITH MONEY BAIL BY COUNTY, 2004



Source: Clark, John. The Impact on Money Bail on Jail Bed Usage, American Jails, July/August 2010.

Getting Started

These data provide a snapshot of how well the pretrial program is functioning and the impact it is having on the local criminal justice system. The challenge lies in determining when and how data is collected to maximize utility while managing workload. Table 4, adapted from an earlier CJI publication,²³ outlines a strategy for working through common challenges while developing and implementing pretrial data collection and analysis — and how to use the analysis for ongoing improvements.

TABLE 4. PRETRIAL DATA COLLECTION AND ANALYSIS ROADMAP

STEP 1: DEFINE THE OUTCOME(S)

- Consider agency mission, vision statements, national standards and the purpose of the pretrial program.
- Clearly define the intended outcome(s) in terms that are Specific, Measurable, Attainable, Realistic and Time-bound (SMART). This will provide specified targets to focus efforts upon.
- Discuss goals with key stakeholders to ensure commitment to agreed-upon outcomes.

STEP 2: DEVELOP A PRETRIAL PROGRAM LEVEL LOGIC MODEL TO ACHIEVE THE DESIRED OUTCOME(S)

- Logic models provide a graphic means of describing what is intended to happen, including resources to utilize, activities to perform, and the outputs and outcomes that will be achieved.
- The logic model development process aids in the clarification of pretrial service components and the theories behind their effectiveness. It also serves as a guide to evaluation.
- If, after developing the logic model, it is determined there are gaps that will make achieving the desired outcome(s) problematic, brainstorm ways to revise the resources or activities in a way that will logically enable the desired outcome(s) to be achieved, or perhaps revise the desired outcome(s) accordingly. Revise the logic model accordingly.
- Note: In addition program level logic models, more detailed logic models can be utilized on a narrower scale, such as for a particular component of the pretrial program.

STEP 3: DETERMINE WHAT INDICATORS WILL NEED TO BE MEASURED

- Use the logic model as the frame from which to select indicators to measure. Then, dissect the various elements to pinpoint exactly what needs to be known in order to pinpoint what is working or not working.
- Prioritize these indicators based on what you need to know first and what you have the resources to collect. During the prioritization process it is helpful to consider factors such as the consistency with the research literature, timeliness of data availability, ease of reporting and the level of interest among stakeholders.
- Consider the utility of the indicator(s) and the message that emphasis on particular indicator(s) will send, keeping in mind the items that get measured will be what gets done.
- Over time, phase in indicators that gradually build proficiency and capacity.

STEP 4: DECIDE HOW TO MEASURE THE INDICATORS

- Brainstorm mechanisms that can capture the indicators selected and develop a strategy for how the data will be collected, by whom and how often. Some common mechanisms include management information systems and databases, spreadsheets, supervisory reviews, policy audits, peer reviews, surveys, and/or formal evaluation.
- Study mechanisms to ensure that they are reliable and valid (i.e., they measure the right things).
- If there are too many indicators on which to realistically collect data, another round of prioritization may be needed. This may also be an opportunity to identify where deeper levels of quality assurance may be needed.

STEP 5: DOCUMENT A PLAN THAT PULLS IT ALL TOGETHER

- The plan should describe how these indicators will be brought together, articulate why, how and when they will be collected and reported, as well as who they will be reported to.
- The plan can be shared with stakeholders and agency employees and may need to be updated on an annual (or more frequent) basis as the agency progresses.

STEP 6: COMMUNICATE THE PLAN (REPEATEDLY)

- Communicate early and often about the purpose of the plan and how the data will be used for feedback, improvement and to celebrate successes.
- Multiple forms of communication are often helpful, including letters or emails to stakeholders and employees, blogs, meetings, annual reports and press releases.

STEP 7: COLLECT THE DATA

- Everyone involved in the data collection process should have a clear understanding of the tasks each needs to complete.
- Training may need to be provided upfront and regular checks should be done to ensure data is being collected consistently and accurately.
- Be mindful of accuracy; data that is trustworthy is much more likely to be acted upon.

STEP 8: ANALYZE AND REPORT THE DATA

- Put the data into a format that can be easily understood and used (e.g., one page of of bullets to summarize the information, simple graphs and bar charts, and/or complex statistical analysis depending on the data and capacity for analysis).
- It helps to compare present data to baseline measures or other benchmarks. The benchmarks should be initially set at realistic levels to ensure they are attainable, then gradually raise the benchmarks as proficiency is established.
- Test the reporting format to ensure the data is accurate and easily understood. Revise if necessary.
- Be sure to disseminate the data quickly so it can be put to use.

STEP 9: PUT THE DATA TO USE

- Ask key questions: What is and is not working? What are the lessons learned? How can data be used for improvement?
- Celebrate success and create improvement plans where necessary.
- Data is most useful when it is applied to improve practices; create opportunities to discuss data and how to use it.

STEP 10: REPEAT

- Determine at regular intervals until the outcome(s) have been mastered.
- Once mastery of the outcome(s) is achieved, move on to the next desired outcome(s) and repeat the steps.

Source: Crime and Justice Institute, 2010. ²³

The data measures and steps outlined above provide the type of knowledge base that will help local counties know if pretrial programs are producing their intended outcomes. Having a clear plan in place to identify and use data to drive decisions can foster data-driven decision-making and, ultimately, provide for greater accountability, efficiency and effectiveness within the justice system. For more information, see the Other Resources section.

CONCLUSION

Rising jail populations are forcing California counties to prioritize their institutional resources in ways that maximize, not jeopardize, public safety. Previous uses of jails to house large numbers of people awaiting trial is no longer feasible, and counties throughout California are seeing the benefit of applying risk-based pretrial practices to make more beds available for sentenced individuals and high-risk pretrial defendants, while maintaining low-risk defendants in the community.

For counties that pursue pretrial risk-assessment and supervision practices, there is no “right” approach; a variety of tools are available, and pretrial supervision can be structured in numerous ways through the courts, sheriff departments, probation or an independent agency. Community Corrections Partnerships²⁴ or other local collaboratives can build a system that meets local needs, saves money and helps to keep prison crowding from simply shifting to jail crowding.

ABOUT THE CRIME AND JUSTICE INSTITUTE AT CRJ



crj.org/cji

The primary goal of the Crime and Justice Institute (CJI) at Community Resources for Justice is to make criminal and juvenile justice systems more efficient and cost effective to promote accountability for achieving better outcomes. CJI provides nonpartisan policy analysis, consulting and research services to improve public safety throughout the country. With a reputation built over many decades for innovative thinking, unbiased issue analysis and effective policy advocacy, CJI's strength lies in its ability to bridge the gap between research, policy and practice in public institutions and communities, and provide evidence-based, results-driven recommendations.

Services include:

- Trainings
- Assessments
- Policy Development and Analysis
- Research and Evaluation
- Implementation Assistance

CJI has worked at the county and state level in California to build systemic capacity for data-driven public safety policy and practice, including supporting the implementation of Public Safety Realignment, expanding the application of evidence-based principles, and enhancing the administration of pretrial justice.

ABOUT CALIFORNIANS FOR SAFETY AND JUSTICE'S LOCAL SAFETY SOLUTIONS PROJECT



safeandjust.org

Californians for Safety and Justice is a nonprofit working to replace prison and justice system waste with common sense solutions that create safe neighborhoods and save public dollars. Partnering with experts from around the country, our *Local Safety Solutions Project* provides direct support to counties interested in using innovative approaches to increase safety and reduce justice system costs.

OTHER RESOURCES

Websites

Pretrial Assistance to California Counties, Crime and Justice Institute at Community Resources for Justice
crj.org/eji/entry/project_pacc

Pretrial Justice Institute
pretrial.org

National Association of Pretrial Services Agencies
napsa.org

National Institute of Corrections
nicic.gov

Tools

Ohio Risk Assessment System: Pretrial Assessment Tool

Crime and Justice Institute Pretrial System Assessment

Virginia Pretrial Assessment
safeandjust.org/resources/pretrialtoolkit

Publications

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APPENDIX

What does California state law say about pretrial release?

California's statutory requirements on pretrial release — including with respect to money bail, OR release, and diversion — are important to keep in mind when designing a pretrial program.

Article 1, § 28 (b) of the California Constitution grants victims the right to have their and their family's safety to be considered at bail. Section 28 (f) (3) reiterates Article 1 § 12's provisions concerning the right to non-excessive bail, but also adds the following: "In setting, reducing or denying bail, the judge or magistrate shall take into consideration the protection of the public, the safety of the victim, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case. Public safety and the safety of the victim shall be the primary considerations." That Section also requires courts to apply the same considerations to release on recognizance.

Bail:

Article I, § 12 of the California Constitution affords the right to be released on bail by sufficient sureties except in three circumstances: (1) capital crimes when the facts are evident or the presumption great; (2) felony offenses involving acts of violence or sexual assault, when the facts are evident or the presumption great and there is clear and convincing evidence of a substantial likelihood that the defendant's release would result in great bodily harm to others; and (3) felony offenses when the facts are evident or the presumption great and there is clear and convincing evidence of a substantial likelihood that the defendant, if released, would carry out a threat of great bodily injury to another. This section of the Constitution also requires that, in fixing the amount of money bail, the court perform some level of individualization, taking into account the seriousness of the offense charged, the defendant's previous criminal record, and the probability of the defendant's appearing at the trial or hearing. In the alternative, in the court's discretion, a defendant may be released on his own recognizance.

Several provisions of the California Penal Code prescribe specifications for pretrial practices in California. The relevant bail provisions touch upon — among other matters — the amount of bail to be set, the availability of release on the defendant's own recognizance, and the availability of post-conviction bail. The Penal Code also contains authority for a variety of pretrial diversion programs.

Amount of bail. Bail must be fixed by the judge at the time of appearance. If there was no appearance, bail must be in the amount fixed in the arrest warrant. If there was no warrant, the amount of bail must follow a uniform countywide schedule of bail for the county in which the defendant is required to appear. § 1269b(b). The countywide schedule must account for the seriousness of the offense charged, including aggravating factors chargeable in the complaint. § 1269b(e). If the defendant is arrested for a felony offense or a misdemeanor violation of a domestic violence restraining order and there is reasonable cause to believe that the standard bail amount is insufficient to ensure the defendant's appearance or to protect a victim of domestic violence, a peace officer must request that the court order a higher bail amount. § 1269c. A defendant charged with certain offenses, conversely, may apply to the court for release on a bail lower than the standard amount or for release on his own recognizance. § 1269c. In setting, reducing, or denying bail, the court must consider the protection of the public, the seriousness of the offense charged, the defendant's previous criminal record, and the probability of the defendant's appearing at trial or hearing. § 1275(a). Analysis of the seriousness of the offense must include consideration of, where applicable, the victim's injuries, threats to the victim or witnesses, the use of a firearm, and the use of controlled substances. § 1275(a).

Release on the defendant's own recognizance. Any defendant charged with a non-capital offense may be released on his own recognizance. § 1270(a). A defendant charged with a misdemeanor is entitled to release on his own recognizance unless the court finds on the record that such release will compromise public safety or will not reasonably ensure the defendant's appearance. § 1270(a). For certain crimes—

including serious felonies, violent felonies, intimidation of witnesses, certain domestic batteries, and certain violations of protective orders—a hearing must be held in open court before the defendant may be released on an increased or decreased bail amount or may be released on his own recognizance. § 1270.1(a). At the hearing, the court must consider evidence of the defendant’s potential danger to others and the defendant’s ties to the community. § 1270.1(c). The court may also request the preparation of an investigative report recommending whether the defendant should be released on his own recognizance. § 1318.1. A defendant released on his own recognizance must agree to appear at all times ordered by the court, comply with all reasonable conditions imposed by the court, not depart the state without leave, and waive extradition if he is apprehended outside of California. § 1318(a).

Post-conviction bail. After conviction for a non-capital offense, a defendant who has applied for probation or who has appealed may be admitted to bail as a matter of right pending application for probation in cases of misdemeanors, or appeals from judgments imposing a fine or imposing imprisonment for misdemeanors. § 1272(1)-(2). The defendant may be admitted to bail as a matter of discretion in all other cases. § 1272(3). In such cases, release on bail pending appeal must be ordered if the defendant demonstrates, by clear and convincing evidence, that he is not likely to flee and that he does not pose a danger to another person or to the community; if so, the defendant must also demonstrate that the appeal raises a substantial legal question not designed merely to delay. § 1272.1.

Pretrial diversion programs. Pretrial diversion refers to postponing the prosecution of an offense—either temporarily or permanently—at any point in the judicial process from charging until adjudication. § 1001.1. If the defendant performs satisfactorily in a diversion program, criminal charges may be dismissed at the end of the diversion period. § 1001.7. Currently, diversion programs exist for drug abusers (§ 1000), persons charged with drug offenses (§ 1000.8), persons charged with child abuse and neglect (§ 1000.12; § 1001.70), persons with cognitive developmental disabilities (§ 1001.21), persons charged with traffic violations (§ 1001.40), persons

charged with certain misdemeanors (§ 1001.51), and persons who write bad checks (§ 1001.60). None of these provisions or any other provisions in the Penal Code should “be construed to preempt other current or future pretrial or precomplaint diversion programs.” § 1001.

California statutory provisions delineate the scope of pretrial release and specific exceptions:

- *California Constitution Article I, § 12* singles out only three groups for differential bail treatment (in this case, excepting them from the right to be released on bail by sufficient sureties): individuals charged with capital offenses, individuals charged with violent felonies who pose a danger to others, and individuals charged with felonies who have threatened to harm others.
- *Penal Code § 1319.5(b)* limits which individuals can be released on their own recognizance without a hearing, specifically excluding: persons on felony probation or felony parole and persons who have failed to appear in court three or more times over the preceding three years and who are arrested for any felony offense, violation of the California Street Terrorism Enforcement and Prevention Act, assault and battery, theft, burglary, or any offense in which the defendant was armed or personally used a firearm.
- *Penal Code § 1270.1(a)* limits which individuals can be released on bail in an amount more or less than the standard bail schedule amount without a hearing, specifically excluding: individuals charged with serious felonies, individuals charged with violent felonies (with an exemption for residential burglary), persons charged with preventing or dissuading a witness from testimony where the offense is punished as a felony, persons charged with domestic battery, and persons charged with violation of a protective order under certain circumstances. Serious felonies, as defined in Penal Code § 1192.7(c), and violent felonies, as defined in Penal Code § 667.5(c), include: murder, attempted murder, manslaughter, mayhem, rape, rape in concert, sodomy, lewd or lascivious act with a child, felony punishable by death or life imprisonment, felony involving great bodily injury

to another, felony involving use of a firearm, grand theft involving a firearm, robbery, arson, sexual penetration by force or fear of injury, kidnapping, explosion of destructive device, assault with intent to commit a felony, assault with a deadly weapon on a peace officer or fireman, continuous sexual abuse of a child, carjacking, extortion, felony threats to victims or witnesses, first-degree burglary, assault by a prisoner, holding a hostage by a prisoner, use of a weapon of mass destruction, sale of specified drugs (heroin, cocaine, PCP, methamphetamine) to a minor, throwing acid or flammable substances, discharge of a firearm at an occupied dwelling or vehicle, and shooting from a vehicle.

Pretrial justice is also a target for recent and pending legislation, including an expansion of the use of electronic monitoring and support for the implementation of evidence-based practices. The field is likely to receive additional legislative attention as a result of rising jail populations.

ENDNOTES

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- ¹¹ <http://courts.ca.gov/documents/2012-Court-Statistics-Report.pdf>
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- ¹⁴ Ibid.
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- ¹⁹ Austin, James; JFA Institute. “Assessing and managing your jail population: A toolkit for practitioners,” Californians for Safety and Justice and the Tides Center, 2012.
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- ²¹ Criminal justice standards on pretrial release: Third edition, American Bar Association, 2002.
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- ²³ Pierce-Danford, Kristy; Guevara, Meghan. “Commonwealth of Virginia: Roadmap for evidence-based practices in community corrections,” Crime and Justice Institute at Community Resources for Justice, 2010.
- ²⁴ Community Corrections Partnerships (CCP) are county entities that advise the county on evidence based sentencing and supervision practices. The executive committee of the CCP is comprised of local public safety and health officials and is charged with developing implementation plans for Public Safety Realignment.
- ²⁵ This statutory provision echoes Article I, § 12 of the California Constitution.

