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# SENATE COMMITTEE ON PUBLIC SAFETY

Senator Aisha Wahab, Chair

2023 - 2024 Regular

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**Bill No:** SB 1133                      **Hearing Date:** April 16, 2024  
**Author:** Becker  
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**Urgency:** No                                      **Fiscal:** No  
**Consultant:** SC

**Subject:** *Bail*

## HISTORY

**Source:** Vera Institute

**Prior Legislation:** SB 262 (Hertzberg), failed passage Assem. Floor, 2022  
AB 1347 (Jones-Sawyer), Ch. 444, Stats. 2021  
SB 10 (Hertzberg), Chapter 644, Statutes of 2018, repealed by referendum  
AB 805 (Jones-Sawyer), Ch. 17, Stats. 2013  
SB 210 (Hancock), Assem. inactive file, 2013

**Support:** ACLU California Action; California Public Defenders Association; Californians for Safety and Justice; Californians United for a Responsible Budget; Care First California; Children’s Defense Fund – CA; Ella Baker Center for Human Rights; Essie Justice Group; Felony Murder Elimination Project; Initiate Justice; Initiate Justice Action; Justice2Jobs Coalition; La Defensa; Legal Services for Prisoners with Children; Los Angeles Regional Reentry Partnership; Rubicon Programs; San Francisco Public Defender; Silicon Valley De-Bug; Smart Justice California

**Opposition:** American Bail Coalition; California District Attorneys Association (unless amended)

## PURPOSE

*The purpose of this bill is to 1) require the court to review whether there remains clear and convincing evidence of a risk to public safety or the victim, or a risk of flight, and that no less restrictive alternative can address that risk at the automatic review of the order fixing the amount of bail by the judge or magistrate; 2) require the court to, upon request, conduct a hearing to consider a change in the amount of bail in specified circumstances; and 3) entitles a defendant who has a nonmonetary condition of release, other those specified, to an automatic review of those conditions after 60 days.*

*Existing law* prohibits excessive bail. (Cal. Const., art. I, sections 12 and 28(f)(3).)

*Existing law* declares that a person shall be released on bail by sufficient sureties, except for:

- Capital crimes when the facts are evident or the presumption great;

- Felony offenses involving acts of violence on another person, or felony sexual assault offenses on another person, when the facts are evident or the presumption great and the court finds based upon clear and convincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others; or
- Felony offenses when the facts are evident or the presumption great and the court finds based on clear and convincing evidence that the person has threatened another with great bodily harm and that there is a substantial likelihood that the person would carry out the threat if released.

(Cal. Const., art. I, section 12.)

*Existing law* provides that 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. A person may be released on his or her own recognizance (OR) in the court's discretion, subject to the same factors considered in setting bail. (Cal. Const., art. I, section 28(f)(3).)

*Existing law* states that the admission to bail is the order of a competent court or magistrate that the defendant be discharged from actual custody upon bail. (Pen. Code, § 1268.)

*Existing law* authorizes the officer in charge of a jail or the clerk of the superior court to approve and accept bail in the amount fixed by the arrest warrant, schedule of bail, or an order admitting to bail in cash or surety bond and to issue and sign an order for the release of the arrested person and to set a time and place for the appearance of the arrested person in court. (Pen. Code § 1269b, subd. (a).)

*Existing law* states that it is the duty of the superior court judges in each county to prepare, adopt, and annually revise a uniform countywide schedule of bail for all bailable felony offenses and for all misdemeanor and infraction offenses except Vehicle Code infractions. The penalty schedule for infraction violations of the Vehicle Code shall be established by the Judicial Council. (Pen. Code § 1269b, subd. (c).)

*Existing law* requires the countywide bail schedule to contain a list of the offenses and the amounts of bail applicable for each as the judges determine to be appropriate. If the schedule does not list all offenses specifically, it shall contain a general clause for designated amounts of bail as the judges of the county determine to be appropriate for all the offenses not specifically listed in the schedule. A copy of the countywide bail schedule shall be sent to the officer in charge of the county jail, to the officer in charge of each city jail within the county, to each superior court judge and commissioner in the county, and to the Judicial Council. (Pen. Code § 1269b, subd. (f).)

*Existing law* authorizes a court to release a person who has been arrested for, or charged with any offense other than a capital offense, on his or her own recognizance. (Pen. Code § 1270.)

*Existing law* requires a person arrested for a misdemeanor to be released on OR release unless the court makes a finding on the record that there is no condition or combination of conditions that would reasonably ensure public safety and the appearance of the defendant as required, an

OR release will compromise public safety or will not reasonably ensure the appearance of the defendant. Public safety shall be the primary consideration. If the court makes one of those findings, the court shall then set monetary bail and specify the conditions, if any, under which the defendant shall be released. (*Id.*)

*Existing law* authorizes a court to release a person on bail in an amount that is more or less than the amount contained in the bail schedule, or release the person on OR release after conducting a hearing in open court. If bail is set in an amount that is different from that contained in the bail schedule, the judge or magistrate shall state the reasons for that decision on the record. (Pen. Code § 1270.1.)

*Existing law* states that in setting, reducing, or denying bail, a judge or magistrate shall take into consideration the protection of the public, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of their appearance at trial or at a hearing of the case. The public safety shall be the primary consideration. In setting bail, a judge or magistrate may consider factors such as information in the pretrial release report. (Pen. Code, § 1275, subd. (a)(1).)

*Existing law* states that in considering the seriousness of the offense charged, a judge or magistrate shall include consideration of the alleged injury to the victim, and alleged threats to the victim or a witness to the crime charged, the alleged use of a firearm or other deadly weapon in the commission of the crime charged, and the alleged use or possession of controlled substances by the defendant. (Pen. Code, § 1275, subd. (a)(2).)

*Existing law* provides that before a court reduces bail to below the amount established by the bail schedule approved for the county for a person charged with a serious felony or a violent felony, the court shall make a finding of unusual circumstances and shall set forth those facts on the record. For purposes of this subdivision, “unusual circumstances” does not include the fact that the defendant has made all prior court appearances or has not committed any new offenses. (Pen. Code, § 1275, subd. (c).)

*Existing law* states that when a person is detained in custody on a criminal charge prior to conviction for want of bail, that person is entitled to an automatic review of the order fixing the amount of bail by the judge or magistrate. That review shall be held no later than 5 days from the time of the original order fixing the amount of bail on the accusatory pleading. The defendant may waive this review. (Pen. Code, §1270.2.)

*This bill* reduces the timeframe to hold the automatic review hearing from 5 days to 3 days.

*This bill* requires at the automatic review hearing, the court to review the considerations required in Penal Code section 1275 and determine whether there remains clear and convincing evidence of a risk to public safety or the victim, or a risk of flight, and that no less restrictive alternative can reasonably protect against that risk.

*Existing law* states that after a defendant has been admitted to bail upon an indictment, information, or complaint, the court in which the charge is pending may, upon good cause shown, either increase or reduce the amount of bail. If the amount be increased, the court may order a defendant to be committed to actual custody, unless he give bail in such increased amount. If application be made by the defendant for a reduction of the amount, notice of the application must be served upon the District Attorney. (Pen. Code, §1289.)

*This bill* removes the authority for the court to commit the defendant into actual custody for failure to give bail in the increased amount.

*This bill* requires the court, upon request, conduct a hearing to consider a change in the amount of bail in any of the following circumstances, and in any other appropriate circumstance as determined by the court:

- A plea offer is made by the prosecutor;
- The defendant has been incarcerated for the maximum amount of time, including credits, that they could serve if convicted;
- There is new information available to mitigate the risk to public safety or flight; or,
- There is new information available that is relevant to a defendant's release plan.

*This bill* states that if application be made for an increase or reduction of the amount, notice of the application must be served upon the opposing party.

*This bill* provides that when a court has imposed upon a defendant a nonmonetary condition or conditions of release, other than a protective order or statutorily mandated conditions, that person is entitled to an automatic review of those conditions every 60 days, or as soon as practicable but not to exceed 75 days.

*This bill* states that at that hearing there shall be a rebuttable presumption that the conditions are no longer necessary and shall be removed if the person has remained in compliance with the condition or conditions for 60 days.

*This bill* provides that the District Attorney may rebut this presumption by establishing clear and convincing evidence that the conditions remain necessary to mitigate risk to public safety or the victim, or to mitigate risk of flight, and that no less restrictive alternatives can address that risk.

*This bill* clarifies this the bill's provision requiring an automatic review of nonmonetary conditions of release do not replace any other existing opportunity for review of nonmonetary conditions of release.

*This bill* states that the Legislature finds and declares all of the following:

- According to the Committee on the Revision of the Penal Code, pretrial detention is often the single best predictor of case outcomes. It increases the likelihood of a conviction and the severity of a conviction and sentence while reducing future employment and access to social safety nets. Rates of pretrial detention are higher on average for people of color and bail amounts are also consistently higher for Black and Latino defendants. The severity of pretrial detention and cascading negative consequences from being incarcerated can often exert undue pressure on people held in custody to plead guilty.
- According to the Prison Policy Initiative, pretrial detention has negative consequences for public safety. Any time spent in pretrial detention beyond 23 hours is associated with a consistent and significant increase in the likelihood of future rearrest.

- According to Advancing Pretrial Policy and Research, excessive conditions of pretrial release do not appear to reduce rearrest rates, but instead unnecessarily subject people to technical violations and revocation of bail.

## COMMENTS

### 1. Need for This Bill

According to the author of this bill:

Under the current system, judges typically set financial bail or impose conditions of pretrial release in a matter of minutes or seconds—and without much information to inform that decision. Many circumstances can arise after that initial hearing to justify modifying someone’s bail amount or release conditions: the defense might receive more information for a proper bail argument, the prosecution might offer a plea to a lesser charge, or new information might surface indicating less risk to public safety. But current law does not provide clear, consistent procedures around when and how to revisit pretrial release decisions.

SB 1133 strengthens and clarifies the existing mechanisms for revisiting pretrial release decisions in four ways. First, it aligns the evidentiary standard for initial bail review with the California Supreme Court’s standard as articulated in *In re Humphrey*, ensuring that courts across the state follow the same decision-making framework. Second, it changes the timeframe for automatic bail review from five days to three days, reducing the risk that people will needlessly suffer from loss of housing, employment, or custody of children while in jail. Third, it clearly defines “good cause” for reviewing bail at any other point in the pretrial period, clarifying certain circumstances that should give rise to reviewing a pretrial release decision. Finally, it ensures other non-monetary pretrial conditions, such as electronic monitoring and mandatory drug testing, are reconsidered on a regular basis to verify that release requirements that are not more onerous than necessary.

By doing so, California will implement a reasonable pretrial release program that improves public safety.

### 2. Background: Bail

Existing law provides a process whereby the court may set a bail amount for a criminal defendant. (Penal Code Section 1269b.) Additionally, Section 12 of Article 1 of the California Constitution provides, with limited exceptions, that a criminal defendant has a right to bail and what conditions shall be taken into consideration in setting bail. A defendant may post bail by depositing cash or an equivalent form of currency, provide a security in real property, or undertake bail using a bail bond.

The bail bond is the most likely means by which a person posts bail and is essentially a private-party contract that provides the court with a guarantee that the defendant will appear for a hearing or trial. A defendant pays a licensed bail agent a percentage of the total amount of bail ordered as a non-refundable fee – often an amount in the range of 10%. The bail agent will

contract with a surety company to issue a bail bond – essentially, an insurance policy. The bond is issued providing that if the defendant fails to appear, the county will receive the full amount of bail set by the court. The bond is provided to the court and, if accepted, the defendant is released. As designed, the bail system often allows the court to rely on the private sector to ensure appearances and provide a means for the county to be made whole in the event that a person fails to appear.

While the main purpose of a bail bond is to provide some assurance that a defendant will return to court to resolve the pending charges, courts also consider the danger a released defendant will pose to the public or specific persons. Bail is set through a bail schedule that lists preset amounts of bail for various crimes. A committee of judges in each county promulgates the bail schedule for that county. (Pen. Code § 1269b, subd. (c).) A defendant or the prosecution can move the judge presiding over a particular case to raise or lower the amount of bail, or the defendant can request OR release. (Pen. Code § 1275.) When a defendant remains detained in custody for want of bail, the law entitles the defendant to an automatic review within 5 days of setting bail. (Pen. Code, § 1270.2.) Additional statutory rules apply if the defendant is charged with a serious felony or domestic violence. (Pen. Code § 1270.1.) A court may also, upon good cause shown, either increase or reduce the amount of bail after a defendant has been admitted to bail. (Pen. Code, § 1289.)

The money bail system has come under scrutiny because of claims that it does not promote public safety and it unfairly penalizes defendants who are poor while allowing defendants who have means to buy their way out of jail. The Chief Justice of the California Supreme Court set up a working group to study pretrial detention practices and provide recommendations for reform. The study found that California’s “pretrial and release detention system unnecessarily compromises victim and public safety because it bases a person’s liberty on financial resources rather than the likelihood of future criminal behavior and exacerbates socioeconomic disparities and racial bias.” (Judicial Council of Cal., Pretrial Detention Reform: Recommendations to the Chief Justice (2017), p. 1.) The working group recommended several reforms including implementing a robust risk-based pretrial assessment and supervision to replace the monetary bail system. (*Id.* at p. 2.)

The Legislature passed legislation that would have implemented major changes to the bail system by replacing cash bail with pretrial risk assessments and non-monetary conditions of release (SB 10, Chapter 244, Statutes of 2018), however a veto referendum on the law was placed on the November 2020 ballot and the law was repealed. (Proposition 25, failed passage by California voters, Gen. Elec. (Nov. 3, 2020).) When a referendum fails, the Legislature is limited in enacting the same or “essentially similar” legislation. (*Assembly v. Deukmejian* (1982) 30 Cal.3d 638.)

In 2021, the California Supreme Court held that the court must consider a person’s ability to pay when setting bail amounts and that pretrial detention can only be used when no other less restrictive option will ensure follow-up appearance at court and guarantee the public’s safety, which will be discussed in further detail below. (*In re Humphrey* (2021) 11 Cal. 5<sup>th</sup> 135.)

### **3. Pretrial Services and Nonmonetary Conditions of Release**

When a person has been arrested for a crime and booked into jail custody, the person may be released from custody prior to trial proceedings either on bail, own recognizance, or supervised release with conditions. Persons who are not released pursuant to one of these avenues will

remain in custody until the resolution of their case. Pretrial services is responsible for conducting pretrial risk assessments, making recommendations for pretrial release or detention, supervising and providing services to released individuals, and locating those who do not show up for court appearances. Existing law requires pretrial service agencies to validate their pretrial risk assessment tools no less than every three years and to specified information regarding the tool, including validation studies, publicly available. (Pen. Code, §1320.35.)

Although pretrial services have been around since the 1960s, bail has been the primary avenue for pretrial release. (*Pretrial Risk Assessment in California*, Public Policy Institute of California (Dec. 2019), p. 4.) Critics of the bail system argue that bail system fails to protect public safety and gives wealthy people an advantage over people who cannot afford bail. In 2018, the First District Court of Appeals in San Francisco ruled that pretrial detention of a defendant solely due to inability to post bail is unconstitutional. (*In re Humphrey* (2018) 19 Cal.App.5th 1006.) The California Supreme Court upheld this ruling: “The common practice of conditioning freedom solely on whether an arrestee can afford bail is unconstitutional. Other conditions of release — such as electronic monitoring, regular check-ins with a pretrial case manager, community housing or shelter, and drug and alcohol treatment — can in many cases protect public and victim safety as well as assure the arrestee’s appearance at trial. What we hold is that where a financial condition is nonetheless necessary, the court must consider the arrestee’s ability to pay the stated amount of bail — and may not effectively detain the arrestee ‘solely because’ the arrestee ‘lacked the resources’ to post bail.” (*In re Humphrey*, supra, 11 Cal. 5th at p. 143.)

The Budget Act of 2019 (AB 74 (Ting), Ch. 23, Stats. 2019) earmarked \$75 million to the Judicial Council to launch and evaluate two-year pretrial projects in local trial courts. The projects aimed to increase the safe and efficient release of arrestees before trial, use the least restrictive monitoring practices possible while protecting public safety and ensuring court appearances, validate and expand the use of risk assessment tools, and assess any bias. In August 2019, the Judicial Council approved and distributed funding to the 16 pilot projects selected for participation in the Pretrial Pilot Program. By the conclusion of the pilot program, 14 of 16 pilot projects had implemented a court date reminder system which provides text message and phone call notifications to all individuals as pretrial release. Initial data showed that court appearances after the implementation of a court date reminder system increased significantly. The final report on the Pretrial Pilot Program suggested an overall positive impact of the program including increased pretrial release and decreased booking/rearrest for misdemeanors and felonies. See [https://www.courts.ca.gov/documents/Pretrial-Pilot-Program\\_Final-Report.pdf](https://www.courts.ca.gov/documents/Pretrial-Pilot-Program_Final-Report.pdf) [as of Apr. 5, 2024].)

Following the pilot program, the Budget Act of 2021 (SB 129 (Skinner), Ch. 69, Stats. 2021) allocated ongoing funding to the Judicial Council for the implementation or expansion of pretrial programs in all California courts.

#### **4. Impact of This Legislation**

As discussed above, a defendant may be released from custody either through bail, OR release or pretrial release with non-monetary conditions. If bail is set by the magistrate or judge and the defendant remains in custody due to want of bail, existing law provides the defendant with an automatic review of the bail amount within 5 days. (Pen. Code, § 1270.2) This bill reduces the time frame for when the hearing must be held from 5 days to 3 days. This bill also requires the court to review the considerations in Penal Code 1275, specifically protection of the public, the seriousness of the offense charged, the previous criminal record of the defendant, and the

probability of their appearance at trial or at a hearing of the case. This bill also requires the court to determine whether there remains clear and convincing evidence of a risk to public safety or the victim, or a risk of flight and that no less restrictive alternative can reasonably protect against that risk. This standard comes from the *Humphrey, supra*, ruling for making bail determinations.

Existing law authorizes a court at any time, if good cause is shown, to increase or reduce bail. If bail is increased, the court has the authority to commit the defendant into custody for failure to give bail in the increased amount. (Pen. Code, §1289.) The Committee on the Revision of the Penal Code (established by SB 94, chapter 25, statutes of 2019) noted its most recent report that:

[A]most any period of pretrial detention is harmful to the incarcerated person and community. Pretrial detention is often the single best predictor of case outcomes: it increases the likelihood of a conviction, the severity of conviction, and the length of a sentence. At the same time, pretrial detention reduces future employment and access to social safety nets.

(Committee on the Revision of the Penal Code, 2023 Annual Report, p. 55, [http://www.clrc.ca.gov/CRPC/Pub/Reports/CRPC\\_AR2023.pdf](http://www.clrc.ca.gov/CRPC/Pub/Reports/CRPC_AR2023.pdf) (December 2023) [as of Apr. 8, 2024].

The report recommended that the existing law that allows bail to be revisited for good cause should be amended to specify that a presumption of good cause exists when public safety concerns have diminished or further pretrial incarceration is unfair. Specifically, “good cause” should be defined to include: (1) whenever a plea offer is made by a prosecutor, particularly if the offer is to time served or its equivalent or (2) the defendant has been incarcerated for the maximum amount of time, including credits, that they could serve if convicted. (*Ibid.*)

This bill requires the court to conduct a hearing to consider a change in the amount of bail in specified circumstances, including those recommended by the Committee on the Revision of the Penal Code and in any appropriate circumstance as determined by the court.

This bill also creates an automatic review process for defendants released on non-monetary conditions. Specifically, this bill states that an automatic review hearing must be held by the court every 60 days for a defendant who is released on nonmonetary conditions of release, other than a protective order or statutorily mandated conditions. The bill establishes a rebuttable presumption that the conditions are no longer necessary and shall be removed if the person has remained in compliance with the conditions for 60 days. This presumption may be rebutted if the district attorney establishes by clear and convincing evidence that the conditions remain necessary to mitigate risk to public safety or the victim or to mitigate flight risk and that no less restrictive alternatives can address that risk.

## 5. Amendments to be Adopted in Committee

The author of the bill intends to adopt amendments in committee to add back in the authority of the court to commit the defendant into custody if the defendant fails to pay the increased amount following a hearing to consider a change in the amount of bail previously set and other clarifying amendments.



## 6. Argument in Support

According to Vera Institute, the sponsor of this bill:

SB 1133 strengthens and clarifies the existing mechanisms for revisiting pretrial release decisions in four ways. First, it aligns the evidentiary standard for initial bail review with the California Supreme Court’s standard as articulated in *In re Humphrey*, ensuring that courts across the state follow the same decision making framework. Second, it changes the timeframe for automatic bail review from five days to three days, reducing the risk that people will needlessly suffer from loss of housing, employment, or custody of children while in jail. Third, it clearly defines “good cause” for reviewing bail at any other point in the pretrial period, clarifying certain circumstances that should always give rise to reviewing a pretrial release decision. Finally, it creates an automatic review hearing for other nonmonetary pretrial conditions, such as electronic monitoring and mandatory drug testing, ensuring that people who are compliant with conditions do not have to navigate release requirements that are more onerous than necessary. Given that the use of electronic monitoring has drastically increased in many counties across California in recent years, this bill will provide an important backstop to ensure that onerous and costly conditions are only imposed when needed. This would align California with peer states: Illinois passed a 60-day conditions review for electronic monitoring in 2021, and Michigan has introduced comparable policy this session.

Ensuring adequate opportunities for reviewing pretrial decisions is good for safety, justice, and county budgets. Although these decisions are intended to address any risk to public safety or missed court appearance, research shows that unnecessary pretrial detention results in heightened pressure to plead guilty, increased rates of rearrest, and a high price tag for counties. SB 1133 seeks to address these issues by improving access to bail and pretrial conditions review across California.

## 7. Argument in Opposition

According to the American Bail Coalition:

This section requires mandatory bail review hearings in four new circumstances, the most important being at the time the prosecutor offers a plea deal (which is a great percentage of the total cases). This hearing is mandatory and occurs regardless of whether requested by the prosecution or defense. The expansion of categories requiring a hearing do not expand the existing standard for the setting of the underlying bail, and thus unnecessary hearings will occur because defendants are going to be entitled to hearings on bail in many matters when the court is not going to grant it because there is no good cause shown (i.e., a plea deal is offered in every case, which is grounds for a hearing, and the other three new categories that trigger mandatory hearings, but they are not grounds for relief). This is going to further burden pretrial due process in California, stalling many defendants unnecessarily in jail.

...

While the Committee to Revise the Penal Code did suggest allowing custodial decisions to be “revisited” upon the issuance of a plea deal, the Committee unfortunately did not recommend any changes to the underlying penal code sections governing the changes in bail, thus rendering this section truly the creation of procedural false hope without a substantive remedy. While a plea offer triggers an automatic hearing to revisit bail, it does not change the reasons for which bail is set or create a presumption in favor of release. Instead, this is going to create a disincentive for timely plea deals, because it will trigger a mandatory bail hearing when offered. Instead, the incentive will be to simply calendar a plea hearing and offer the deal the morning of or night before. All that said, if courts are going to have to have an additional bail hearing when a plea offer is made, but before it is accepted, in all cases whatsoever (including multiple offers within a criminal case), we forecast a complete gridlock of the criminal process absent significant funding. Importantly, today, when a plea offer is accepted in open court, the court may revisit bail at that time. As to the other factors, a court may change a bail when “good cause” is shown, and courts thus already have discretion to grant all of the relief requested, the underlying standard for granting relief remaining the same under this legislation as current law.

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