

**AFFIDAVIT OF GARRY HERCEG**

Garry Herceg, having been duly sworn according to law, deposes and states as follows:

**Background**

1. I have been Director of the Office of Pretrial Services for Santa Clara County since December 2010. I also currently work as a consultant for Justice System Partners.
2. Prior to my appointment as Director of the Office of Pretrial Services, I spent over 16 years in adult and juvenile probation services with Santa Cruz and Monterey Counties.
3. I served as Assistant Division Director of Santa Cruz County Juvenile Hall from 2007 to 2010. During this time I was responsible for implementing evidence-based programs that improved the conditions of confinement for juvenile detainees. In addition, I oversaw the daily operations of the home supervision and electronic monitoring programs.
4. I have a bachelor's degree from San Jose State University in Administration of Justice. My professional training includes Stanford University's Leadership and Transformation Program, National Institute of Corrections Pretrial Executive Program, California Institute of Mental Health Aggression Replacement Instructor Training, Burns Institute Disproportionate Minority Contact Training, and the Annie E. Casey Foundation's Juvenile Detention Alternatives Initiative.
5. I am a member of the California Association of Pretrial Services as well as the National Association of Pretrial Services Agencies.
6. I was honored in 2006 as Santa Cruz County's Probation Officer of the Year.

**Overview**

7. In this affidavit, I will describe Santa Clara County's Office of Pretrial Services. I will also express opinions on the efficacy of pretrial service programs, explain why private bail bond companies are unnecessary, and describe what I view as problems with a wealth-based system for pretrial detention.
8. The facts and opinions expressed in this affidavit are based on my education, training, and experience as Director of the Office of Pretrial Services as well as the knowledge I have acquired through years of experience in the criminal justice system.
9. I am receiving no compensation for the preparation of this affidavit.

**Analysis**

**A. Pretrial Services in Santa Clara County**

10. The Office of Pretrial Services in Santa Clara County facilitates release for defendants held in jail pending trial. Most felony arrestees are interviewed at the time of booking, and investigative reports are prepared and presented to judges who determine suitability for Own Recognizance (“OR”) release, Supervised Own Recognizance (“SOR”) release, or probable cause to detain.

11. Individuals may be granted an OR release by the judge and be required to make all scheduled court appearances and not violate any laws while their case is pending. The judge also has the option of imposing conditions of release and may grant an SOR release from jail. Conditions of release vary according to the particular risks involved in the case and may include drug testing, alcohol monitoring, substance abuse or mental health treatment, domestic violence counseling, restraining/stay-away orders, curfews, home detention, and electronic monitoring.

12. The Jail Unit of Pretrial Services operates 24 hours a day, 7 days a week and interviews all defendants booked on new felony charges for the purpose of recommending those arrestees who can be released from custody on OR, who are most likely to appear in court and who will not compromise public safety. For those not released, officers assist the judge or night commissioner in the determination of probable cause to detain the arrestee and the setting of money bail. The Jail Unit has a station in the jail booking area with a phone and computer access to records, so there is no need to wait until court is in session to make release recommendations. Judges are available 24 hours a day, 7 days a week to review cases and permit pre-arraignment release.

13. The empirically researched Santa Clara County Pretrial Risk Assessment Instrument (locally validated in 2013) is used for initial screening. The instrument measures the likelihood of appearance in court and likelihood of new offenses. The risk assessment examines a defendant’s status at the time of the arrest as it relates to the current charges, other pending charges, past criminal history, residence, employment, primary caregiver, domestic violence and history of drug abuse.

14. Officers assigned to the Supervision Unit monitor defendants who are released on supervised own recognizance with conditions. Officers provide supervision during the adjudication process of all individuals who have been granted SOR release to ensure that they comply with the conditions of their release. Supervision officers refer clients to appropriate services within the community, such as substance abuse treatment or domestic violence counseling, for the purpose of intervention that will assist the defendant in successfully completing the period of pretrial supervision. Performance reports are provided for defendants at the time of sentencing as requested by the judge. Those individuals who fail to comply with release conditions are returned to court for appropriate sanctions.

15. The Drug Testing Unit provides urine drug testing as a part of the supervision of defendants released on SOR. Drug testing results are used as a means to monitor the pretrial conduct of released defendants in order to deter drug use and determine if individuals are in compliance with court-ordered release conditions. Drug testing is arranged by the assigned supervision officer and strict chain-of-custody procedures are followed by the community workers conducting the test.

16. The Court Unit officers provide investigative reports to the Court at the time of a defendant’s arraignment. Officers recommend OR or SOR and include information regarding the

scheduled bail amount in order to assist the judge in making an informed decision to release a defendant from jail or set an individualized bail amount. At arraignment, court officers appear as needed to present the reports, conduct follow-up investigation and answer any questions the judge or attorneys may have about the release recommendation. Court officers prepare reports at any court hearings at the judge's request for further consideration of release on OR or SOR.

17. Data from the first 9 months of 2015 show an average appearance rate of 95.4% in Santa Clara County for defendant released OR or SOR. The percentage of OR and SOR defendants who are not arrested for a new offense during the pretrial stage was 99.3%. The rate of defendants who (1) are not arrested for a new offense during pretrial supervision, (2) appear for all scheduled court appearances, and (3) are not revoked for technical violations of conditions was 93%.

18. According to an audit report by Harvey Rose Associates, over a six-month period in 2011, the Office of Pretrial Services saved the County nearly \$32 million in jail bed costs.

19. In cases where defendants are not released OR or SOR, detention is ordered by setting a money bail. This is troubling. When a judge does not believe that someone should be released, she sets a money bail amount and crosses her fingers in hopes that the defendant will not be able to afford that amount. Sometimes the defendant is able to afford the amount and is released even though he presents a flight risk or danger to the community. Money bail is used as a coarse order of detention.

20. A defendant ordered detained on money bail has essentially three options. Those wealthy enough to afford the full amount can pay it to the county and have it returned upon the resolution of their proceedings. Those who cannot afford the full amount but who are wealthy enough to pay 10% of their bail amount can pay a private bail bond company to secure their release. The poorest defendants must stay in jail pending the resolution of their case.

21. Sometimes arrestees post bail through a private bail bond company prior to arraignment and then at arraignment the judge increases their bail to an amount that they are unable to pay. In such situations, the defendants remain in jail until the resolution of their cases but must also pay the fee to the private bail bond company. The private bail bond company is then able to collect large fees from the arrestees while doing no work to supervise them.

22. Similarly, sometimes defendants post bail through a bail bond company and then charges are dismissed or the judge eliminates any money bail requirement. Again, in such situations, the private bail bond company still gets the fee from the defendants despite doing no work to supervise them pretrial.

## **B. Best Practices in Pretrial Services**

23. In California, an average of 64% of the jail population is made up of pretrial detainees.

24. Many jurisdictions use a money bail schedule that links each alleged offense to a dollar amount, but there is no research to indicate whether or not this accurately predicts or mitigates

risk. Conversely, research does show that certain elements of a defendant's past and current behavior and circumstances are predictive of risk.

25. Across California, individualized assessments of defendants' public safety and flight risk are routinely forgone, making pretrial release less a question of public safety and more a question of defendants' financial ability. The lack of individualized risk assessment at the time of arraignment has contributed to the high rates of pretrial detention. Individuals with financial means, such as a home to use as collateral, can secure release and return to their jobs, families, and communities. Others who cannot raise the necessary collateral must stay in jail, for several months in some cases, and may more readily accept a plea bargain as a result.

26. Many California counties have significantly reduced their need for expensive jail beds by implementing pretrial programs that use assessments to determine risk and then release detainees who are low risk for flight and committing new crimes, with or without some form of supervision depending on the defendants' needs.

27. In addition to risk-avoidance concerns regarding defendant behavior, pretrial risk assessment instruments can consider offender needs for treatment or other assistance.

28. A sound pretrial detention/release strategy can benefit justice system operations, reducing or forestalling court congestion and jail overcrowding.

**Conclusions**

29. Santa Clara County's Office of Pretrial Services operates a safe and effective pretrial system that maintains high appearance and safety rates while allowing quick release for many defendants.

30. Whether or not detainees are released often is based on their ability to pay rather than the risk that they present. The result is inappropriate detention: many defendants who are considered low risk for flight or to commit a new crime are detained in jails solely because they cannot afford bail.

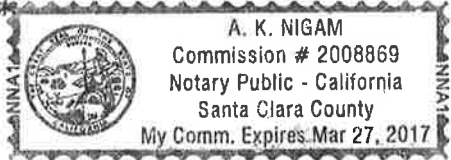
31. Pretrial Services does just as well, if not better, than bail agents in terms of getting defendants to their court dates. The difference is that Pretrial performs this service without requiring money from the defendants.

*[Handwritten Signature]*  
Garry Herceg 3-9-16

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

STATE OF California  
COUNTY OF Santa Clara

SWORN AND SUBSCRIBED BEFORE ME  
This 9<sup>th</sup> day of March, 2016  
San Jose, CA.



*[Handwritten Signature]*  
(Notary Public)

Affidavit of Garry Herceg4  
\* by Garry Herceg proved to me on the basis of satisfactory evidence to be the person who appeared before me.