AMERICAN BAIL COALITION

December 14, 2018

Criminal Law Advisory Committee
Hon. Tricia A. Bigelow, Chair

RE: Comment on Proposed Rule Changes, Addition of Rules 4.10 and 4.40 of the California Rules of Court

Dear Judge Bigelow,

I. The Rules Process to Implement Senate Bill 10 Should be Immediately Suspended Until the Voters Have Had a Chance to Vote on Senate Bill 10

Senate Bill 10 has been stayed by the Secretary of State due to a referendum effort, and it will not become law until after the November, 2020 election. To expend any additional governmental resources attempting to implement such a law risks an extreme waste of taxpayer resources when the voters fail to vote for Senate Bill 10.

II. The Proposed Rules Completely Fail to Define Validation

Senate Bill 10 requires in relevant part:

> 1320.24. (a) The Judicial Council shall adopt California Rules of Court and forms, as needed, to do all of the following:
>
> …
>
> (2) Describe the elements of "validation," address the necessity and frequency of validation of risk assessment tools on local populations, and address the identification and mitigation of any implicit bias in assessment instruments.

The proposed rules do nothing to describe the elements of validation. In fact, the rules command that all risk assessments be valid, but then fail to define what validation is, including addressing the necessity and frequency of such tools on local populations.

American Bail Coalition
P.O. Box 352
Franklinville, NJ 08322
info@AmBailCoalition.org
www.AmericanBailCoalition.org

III. There is No Due Process Provisions for the Panel Required to be Created to Set the Risk Tolerances and Other Due Process Issues

The panel required to be created, the results of which will heavily drive policies of release, what conditions of release, or preventative detention relies on four persons, not required to officials of the judicial branch of the state of California, a resident of the State of California, or a public official working within the State of California. These four persons will accompany three judicial officers to round out the panel of seven.

First, this delegates substantive law-making power to unelected officials, no of whom have taken an oath of office and whom would be bound by the appropriate ethical cannons governing their office. Sadly, the four could over-rule the duly appointed or elected judges who would comprise a majority. Setting the risk tolerances is clearly an administrative and executive function, and those branches of government are not involved in that process, at least as Senate Bill 10 has been passed. In addition, there is no representation allowed from prosecutors, law enforcement, victims' rights groups, civil rights groups, or the public in general. We think this is a fatal due process problem of the enormity of the decisions to be made concerning every aspect of custody and the nature of the trammeling of other liberties in the name of supervision and denying of privacy and other constitutional rights. We absolutely question the wisdom of whether this power should have been delegated to the judicial branch in the first place, since the judicial branch will ultimately be called on to decide in court the constitutionality of various provisions of Senate Bill 10.

Second, there are no procures proscribed by the rules, which leaves this seven person secret board to simply go into a room and draw up the scores. We think this process must require due process, and without it, the regime of setting the risk scores is fatally unconstitutional. There are no required hearings, no standard of considering any particular information, or any guidance in terms of how to set the various risk scores. For example, in the attached article recently published in the UCLA Criminal Law Journal, it was noted that the Arnold Foundation risk categories had been calibrated to a percentage of failure to appear or commit a new crime in one jurisdiction as follows: 1 (12%), 2 (16%), 3 (18%), 4 (23%), 5 (27%), 6 (30%). These categories themselves are substantive—how we will decide the cut-points in segregate persons into such categories, and will the distinction that puts the person at very high medium risk and very low high risk survive equal protection scrutiny. Do these cut points have a rational basis, or will they? And what will be the basis? This policy-making board of the judicial branch, not controlled by the judicial branch, will then be tasked with taking the six categories, and turning them into three. As we know, the three categories will then determine who walks, who gets their other liberties trammeled, and who gets preventative detention.

American Bail Coalition
P.O. Box 352
Franklinville, NJ 08322
info@AmBailCoalition.org
www.AmericanBailCoalition.org

That is hardly the process the founders would have thought appropriate under such circumstances, and while we hope the judicial branch will draft appropriate due process procedures, we think Senate Bill 10's statutory regime is conceptually fatally flawed, and we doubt the judicial branch could remedy the same.

IV. The Proposed Rules Do Not Address the Identification and Mitigation of Any Implicit Bias in Assessment Instruments

Section 1320.24(a)(2) of Senate Bill 10 requires that rules be adopted that "address the identification and mitigation of any implicit bias in assessment instruments."

Unfortunately, the proposed rules completely lack any specificity on that point. In fact, among those researchers who have tested such risk assessment instruments for bias, there is no generally accepted definition of bias or a particular generally accepted methodology to employ in order to identify bias. For example, some researchers use the error rate balance approach (for example, the analysis by ProPublica which demonstrated that the COMPAS tool is racially biased), while others, including the Laura and John Arnold Foundation (who hire their own contractors to test their tool), have rejected the error rate balance approach and argue that the moderator regression approach is the preferred approach. In order to comply with the law, the Judicial Council will have settle this question or provide for some great clarity. Further, there is nothing in the rules that addresses how implicit bias will be mitigated when it has been discovered. Finally, if a tool is so inherently biased that bias cannot be mitigated, there is nothing in the rules that prohibit the continued use of a biased tool.

This issue is important—110 national civil rights groups including the NAACP and ACLU have called for an end to the use of pretrial risk assessments largely due to concerns of bias and validity, which is enclosed. Recently it was discovered that Los Angeles County was using a risk tool designed for sentencing in the State of Wisconsin that was dramatically over-predicting riskiness, thus causing greater than necessary detention and restrictions on individual liberty. This rule as drafted gives short shrift to these concerns and does little if anything to provide specific procedures, processes, or standards to identify bias and remedy such bias.

V. Proper Uses of Risk Assessment Do Not Include, Under the Proposed Rules, Assessing Risk of Failing to Appear

The proposed rule does not define appearance in court as a relevant factor for the risk assessment to assess. 4.10(b) does not contain any reference to appearance in court, although

American Bail Coalition
P.O. Box 352
Franklinville, NJ 08322
info@AmBailCoalition.org
www.AmericanBailCoalition.org

it appears in other sections of the rule as a factor for pretrial assessment services to consider. We think this is probably an omission, but needs to be corrected.

VI. The Rule Does Not Require Pretrial Assessment Services to Verify the Accuracy of the Information Used in a Report to the Court or For Purposes of Running a Risk Assessment Score

4.10(b)(4) purports to require that Pretrial Assessment Services verifies the accuracy of the information contained in the report to the court. This includes, at a minimum, providing the results of the risk assessment, the complete criminal history of the defendant, and any failures to appear in court within the last three years. 4.10(b)(4) only requires that the information be confirmed as accurate "to the extent possible." This is an unclear standard. Further, courts are then not allowed to use a risk score or other information that is not accurate. Also, there is no reason or explanation as to why only three years of history of failing to appear in court is the appropriate standard.

VII. Greater Clarity on the Issue of the Use of Proprietary and/or For-Profit Risk Assessment Tools is Needed

First, the rule provides that a court should consider whether "the instrument's proprietary nature has been invoked." Invoked is not defined. The Laura and John Arnold Foundation does not "invoke" the proprietary nature of their tool in a criminal proceeding, although they certainly could at some point when defendants wake up and realize their rights and liberties are being trammeled by a computer program and begin to challenge the same. Instead, the Arnold Foundation signs a contract with the entity using the tool that prevents disclosure of any of the underlying information used to create the tool, and then allows the Foundation unprecedented access to data about persons living in the State of California. This rule needs to clarify "invoked."

Our suggestion would be that all agreements, contracts or memorandums of understanding shall be provided to the court at the time the report is given to the court so that courts understand what rights the entity using the tool has waived. Further to that point, this rule only requires that the proprietors of such tools disclose the factors (age at first arrest, prior felonies, etc.) that are considered and the weights assigned to such factors (including the scoring of the instrument and then the translation of the points score to the risk categories), but does not permit the public, the prosecutor, or a criminal defendant to audit, inspect or test the underlying data and statistical analysis thereon that lead to the conclusion that the factors to be weighted were themselves based on some sound statistical analysis. Finally, all risk

American Bail Coalition
P.O. Box 352
Franklinville, NJ 08322
info@AmBailCoalition.org
www.AmericanBailCoalition.org

assessment validation reports should be made public records and placed on a website so that the public can view them.

VIII. Greater Clarity is Needed in Section (b)(5)(D)

This section requires presenting to the judge any scientific evidence that the risk assessment "unfairly classifies" a person based on race, ethnicity, gender, or income level. First, this section does not define "scientific research." Two, this presumes the bias is explicit by suggesting that the tool unfairly classifies *based on* race, ethnicity, gender or income level. No tools do that directly. The concern is that other factors, including the use of demographic factors, may correlate with race and then have a disparate impact upon certain protected classes. Again, the problem is that the rules do not define how bias is to be measured in the first place, by whom, and how often. Ostensibly, this should be incorporated into the definition of what validation means, which should include an affirmative command that the assessments be tested for bias using a particular methodology and pass scrutiny under whatever uniform test or standard is required. This proposed rule falls extremely short in these respects.

IX. The Rule Requires Informing Judges of Validation But Then Fails to Define It

The rule requires that judges be informed as to "Whether the particular instrument has been validated on a relevant population." One, there is no definition of what validation means. Two, because there is no such definition, there is further no definition of what a relevant population may be. Three, there is no requirement that an instrument ever be re-validated. Only that it be valid. It cannot be validated once, and then valid forever.

X. Pretrial Risk Assessments Are A Public Record and Should Not be Concealed From Public View

The public has a strong interest in knowing whether or not the risk assessments work and the extent to which they are implicitly biased. National best practices, including from the AI Now Institute, demand transparency of such assessment tools so that the public and independent researchers can conduct their own analysis, auditing, and testing of such tools for efficacy and bias. Because lawyers are behind in terms of challenging risk assessment tools in court under state and federal law, it is even more important that the tools be even more transparent than less, otherwise, there will be no way to determine whether they work and the extent to which they may be biased, except by the government. Further, the rule does not specifically permit a victim of the crime to view the report—instead, the rule allows the parties to the case to see the report. This should be corrected.

American Bail Coalition
P.O. Box 352
Franklinville, NJ 08322
info@AmBailCoalition.org
www.AmericanBailCoalition.org

XI. The Rule Does Not Define How the List of Validated Tools Will Be Created and By Whom

Validated Risk Assessment Tool, as defined by Senate Bill 10, means a tool selected by a court "from the list of approved pretrial risk assessment tools maintained by the Judicial Council." Yet, how is the Judicial Council going to approve such tools, what standards will be used, and how will defendants be able to challenge a decision to adopt a particular tool? The rule is silent on this point.

Senate Bill 10 also requires that the tool be demonstrated to be accurate and reliable, but the rules do not set any particular standard or definition as to how accurate and how reliable the tools need to be.

To further complicate matters, an advisory board under the penal code as enacted in Senate Bill 10 is to be created to designate "low," "medium," and "high" risk levels based upon the scores or levels provided by the instrument but does not empower the same board to then approve the validity of the tools pursuant to what the rule change should have defined as the standards for validation. The advisory board is also a state-level advisory board. The law under Senate Bill 10 theoretically permits a limitless number of tools to be defined as validated tools, and yet a statewide advisory board will be tasked with taking each individual tool that passes muster as having been validated (presuming there was a definition of the same, and setting the risk tolerances. Aside from a horrifying *ex parte* decision, this is also one of getting into the business of legislating without any required due process. To further complicate matters the penal code under Senate Bill 10 conflicts with itself—it requires a validated risk assessment tool to consider risk of flight, and yet it does not permit the judicial counsel to take risk of flight into consideration in Section 1320.24(1).

IX. Use of Un-Convicted Conduct is a Major but Unresolved Issue

The number one factor in nearly every risk assessment used in the United States in the bail setting context is age at first arrest regardless of whether the arrest lead to charges being filed, or, more importantly, whether the conduct resulted in a conviction. This is a factor contained in what many consider the gold standard—the Public Safety Assessment developed by the Laura and John Arnold Foundation. In addition, the Arnold Foundation tool scores highly the fact that there are other pending charges into its formula.[1] To exclude this information

[1] https://www.arnoldfoundation.org/wp-content/uploads/PSA-Risk-Factors-and-Formula.pdf

American Bail Coalition
P.O. Box 352
Franklinville, NJ 08322
info@AmBailCoalition.org
www.AmericanBailCoalition.org

from consideration by a pretrial assessment services program would be to ban the Arnold Foundation PSA in California.

This brings up a second key point—because validation is not defined, there is no way to know whether a validated tool may be permitted to include un-convicted conduct. The rules should instead be defined with particularity whether un-convicted conduct may be used, and under what circumstances. The heart of the reason for the reform was the protection of the presumption of innocence. The State of California will instead allow algorithms to use and score the age of first arrest and other unconvicted conduct (from which no trial may ever exonerate them), which will for all time furnish a key link in the chain of preventative detention or other liberty trammeling measures the State wants to impose. While the rules pay lip service to individualization, those performing the work will believe in the science of the risk assessment and will instead to look to group data for guidance. Instead, rules already concede, "That the instrument's risk scores are based on group data, and that the instrument is designed to identify the likelihood of risk for groups of individuals with certain characteristics, but cannot predict the future behavior of a particular individual."

Sincerely,

DocuSigned by:
553C35E22F4848B...

Jeff Clayton
Executive Director
American Bail Coalition
(877) 958-6628
JClayton@AmericanBail.org

American Bail Coalition
P.O. Box 352
Franklinville, NJ 08322
info@AmBailCoalition.org
www.AmericanBailCoalition.org