

GENERAL OFFICE MEMORANDUM 18-028

TO: ALL DISTRICT ATTORNEY PERSONNEL

FROM: JOHN K. SPILLANE 
Chief Deputy District Attorney

SUBJECT: *In re Kenneth Humphrey* (January 25, 2018) ___ Cal.App. 5th ___
[2018 Cal.App. LEXIS 64]

DATE: FEBRUARY 16, 2018

In re Kenneth Humphrey (January 25, 2018) ___ Cal.App.5th ___ [2018 Cal.App.LEXIS 64] (*Humphrey*) held that due process and equal protection clauses of the Fourteenth Amendment require the trial court to make two inquiries when setting bail: (1) whether the defendant has the financial ability to pay the amount of bail ordered, and if not, (2) whether less restrictive conditions of bail are adequate to serve the government's interest.

The *Humphrey* court quoted extensively from *United States v. Salerno* (1987) 481 U.S. 739 for the principle that liberty is a fundamental interest and an arrestee's right to bail "cannot be abridged except through a judicial process that safeguards the due process rights of the defendant and results in a finding that no less restrictive condition or combination of conditions can adequately assure the arrestee's appearance in court and/or protect public safety...." (*Humphrey*, p. 16.)

Defendants are presumptively denied bail for capital crimes. (*Humphrey*, p. 13 fn.9.) The California Constitution also sets forth when bail can be denied for non-capital felonies under certain conditions, including:

- (a) Felony offenses involving acts of violence on another or felony sexual assault offenses when the facts are evident and 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
- (b) 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 person would carry out threat if released. (*Humphrey*, pp. 15-16, Cal. Const. art 1 § 12.)

At a bail hearing for violent felony offenses, felony sexual assaults, or where a person threatens another with great bodily injury, the court may deny bail when the prosecutor proves by clear and convincing evidence that there is a substantial likelihood that the person's release will result in great bodily injury or that the person will carry out the threat. If bail is denied, deputies

should make certain that *the court articulate specific individualized facts and circumstances to support its findings that no bail is warranted.*

If this burden cannot be met, the court must order release on bail. In doing so, the important financial inquiry is not the amount prescribed by the bail schedule, but the amount necessary to secure the defendant's appearance at trial or a court-ordered hearing. (*Humphrey*, p. 40.) The bail schedule is statutorily required (§ 1269b) and is the default position. (*Ibid.*)

The factors to be considered in setting bail are listed in Penal Code¹ §§ 1270.1 and 1275;² these factors have not been changed by *Humphrey*.³ These factors must be weighed against the others. (*Humphrey*, p. 33.) The prosecutor should make offers of proof, present documentary evidence, other reports and relevant information in support of the bail amount requested. When the court considers whether the defendant has ability to post the bond (§ 1270.1 (c)), the *Humphrey* court held that an additional factor, though not in the statutes, is constitutionally required to be considered in the analysis: whether there are less restrictive alternatives.

If the court determines the defendant cannot pay the amount the court concludes is required to ensure his or her future court appearances, and that there is no less restrictive alternative, "it may impose that amount only upon a determination by clear and convincing evidence that no less restrictive alternative will satisfy that purpose." (*Humphrey*, pp. 17, 31.) The court record must reflect specific facts and reasons for that determination. (*Humphrey*, p. 45.)

In sum, defendants who seek to have their bail reduced must follow procedures set forth in sections 1270.1 and 1270.2.⁴ If the judge sets bail that is more or less than the amount in the bail schedule, the specific individualized facts and reasons for that decision must be stated on the record; the court must also address the issue of threats made against the victim or witness on the record. (§§ 1270.1 (d), 1275.)

Response templates are forthcoming and will be available in LADAnet.

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¹ All further statutory references are to the Penal Code unless otherwise stated.

² The factors include: evidence of past court appearances, maximum potential sentence, danger to other persons if detained person is released, threats made by the detained person, any past acts of violence, community ties of the detained person and the ability to post bond. (§ 1270.1 (c).) The court must also consider protection of the public, seriousness of the offense, previous criminal record, and probability of appearing at trial or at a hearing in the case, and information from relevant reports. Public safety shall be the primary consideration. The judge must also consider injury to the victim, alleged threats to the victim and witnesses, use of a firearm or deadly weapon in the commission of the crime, alleged use or possession of controlled substance, (§ 1275 (a).)

³ The court did not define "ability to pay" nor did it require that bail must be set in an amount that defendant *can* pay.

⁴ Defendants charged with offenses in violation of §§ 1192.7, 667.5(c) except for residential burglary, 136.1 (c), 262, 273.5, 422 as a felony, 646.9, 243(e)(1), and 273.6 may have a court hearing upon two-days written notice to the prosecutor. (§ 1270.1 (a), (b).) Persons detained otherwise are entitled to a bail review not later than five days from the date of the original order fixing bail. (§ 1270.2.)