

# POINTS AND AUTHORITIES

The District Attorney of Alameda County Presents a Weekly Video Survey of  
Criminal Law Approved for Credit Toward California Criminal Law Specialization: #172--  
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Week Of	Topic	Guest	30 min
April 19, 2021	<i>In re Humphrey on Habeas Corpus</i> Part I		General

## *In re Humphrey* (2021) 11 Cal.5th 135

On March 25, 2021, the Supreme Court issued its unanimous opinion in *In re Humphrey* that addresses the use of bail resulting in pretrial detention. The Supreme Court concludes that “[t]he common practice of conditioning freedom solely on whether an arrestee can afford bail is unconstitutional.” (*Id.* at p.\*1.)

This week’s P&A will discuss the Supreme Court’s opinion. Next week’s P&A will discuss the practical questions the *Humphrey* decision is already raising in our courts in Alameda County. The opinion decision provides little guidance as to how the bail system should be implemented, “leav[ing] such details to future cases.” (p.\*10.)

### I. Background

The defendant Humphrey, who was 66 years old, and the victim, who was 70 years old, lived in the same senior apartment building. Humphrey followed the victim into his apartment, where he robbed the victim of seven dollars and a bottle of cologne. Humphrey was charged with residential robbery and burglary against an elderly victim, inflicting injury on an elder adult, and misdemeanor theft from an elderly adult. The complaint also alleged that Humphrey had suffered four prior strike convictions and four prior felony convictions, all for robbery or attempted robbery. The most recent strike conviction had occurred 25 years earlier. (p.\*2.)

At arraignment, Humphrey sought an OR release without any condition of money bail. He cited his age, his community ties, and his unemployment and financial condition. He noted the value of the property taken, the remoteness of his prior strike convictions, the lack of any arrests for the prior 14 years, and his history of complying with court-ordered appearances. The prosecutor requested bail in the amount of \$600,000, as recommended by the bail schedule. The trial court denied Humphrey’s request for OR

and set the bail at \$600,000, with a stay-away order. Although acknowledging Humphrey's community ties and the age of his prior convictions, the court cited "the seriousness of the crime, the vulnerability of the victim, as well as the recommendation from pretrial services." (p.\*2.)

Humphrey then filed a motion for a formal hearing pursuant to Penal Code section 1270.2, with an accompanying request for OR release. Humphrey, who is African American, attached an exhibit to his motion which found that "'Black adults in San Francisco are 11 times more likely as White adults to be booked into County Jail'" prior to trial. The motion provided additional information about Humphrey's background, including efforts to address substance abuse issues. Humphrey advised that he had been accepted into another residential substance abuse and mental health treatment program, which was scheduled to begin the day after his bail hearing. (p.\*2).

At the bail hearing, the prosecutor pointed out that the trial court would need to find unusual circumstances to justify the bail schedule because Humphrey was charged with robbery, a serious and violent felony (Pen. Code § 1275, subd. (c)). The prosecutor asserted there were no such circumstances here and also argued that Humphrey was a "'great public safety risk'" and a flight risk because he faced a lengthy prison sentence. (p.\*3.)

The trial court again denied OR and supervised release, but reduced the bail to \$350,000. The court chose to deviate from the bail schedule because of Humphrey's willingness to participate in treatment, but only to a limited extent citing public health and safety concerns, and the court further required that Humphrey participate in a residential treatment program. However, the public defender responded that Humphrey was too poor to post \$350,000 bail, and thus would be unable to do the required residential treatment program. The Supreme Court notes that the trial court "did not consider whether any nonfinancial conditions of release could address the public safety concerns or flight risk." (p.\*3.)

Humphrey then filed a petition for writ of habeas corpus in the Court of Appeal, arguing that requiring money bail as a condition of release in an amount the accused cannot pay is the functional equivalent of a pretrial detention order, which can be justified only if the state establishes a compelling interest in detaining the accused and the state demonstrates that detention is *necessary* to that purpose. Humphrey requested OR release or a remand to the superior court for a new hearing, in which the court could either (1) set the least restrictive, nonmonetary conditions of release necessary to protect the public, or (2) impose a financial condition of release upon making findings upon Humphrey's ability to pay. After initially opposing the petition, the Attorney General agreed that Humphrey was entitled to a new bail hearing, and added that it would no longer defend an application of bail law that does not take into consideration a person's ability to pay. (p.\*3.)

The Court of Appeal granted habeas corpus relief and directed the trial court to conduct a new bail hearing. At this hearing Humphrey was ordered released on various nonfinancial conditions, including electronic monitoring, a stay-away order, and participation in a residential abuse treatment program

for seniors. Although no party petitioned for review, the Supreme Court granted review on its own motion to address the constitutionality of money bail as it was used at that time, and the proper role of public and victim safety. (p.\*4.)

## **II. The Supreme Court's Analysis**

The Supreme Court states “[i]t is one thing to decide a person should be charged with a crime, but quite another to determine, under our constitutional system, that the person merits detention pending trial on that charge. Even when charged with a felony, noncapital defendants are eligible for pretrial release – on their own recognizance, or OR supervised release, or by posting money bail.” The Supreme Court states that the disadvantages to remaining incarcerated pending resolution of criminal charges are immense and profound.” It points out that, among those disadvantages, studies suggest that pretrial detention heightens the risk of losing a job, a home, and custody of a child. Moreover, pretrial detention forces the state to bear the cost of housing and feeding those arrestees who properly could be released. (p.\*4.)

The Court relies on a study that shows arrestees in large urban counties in California reportedly end up in pretrial detention at much higher rates than arrestees in large counties elsewhere. Part of that disparity may be based on the fact even when bail is technically allowed, the amount that must be posted is considerably higher in California, on average, than elsewhere. The study states: “The median bail amount in California (\$50,000) is *more than five times* the median amount in the rest of the nation (less than 10,000.)” (p.\*5, italics added by Court.)

The Supreme Court state that “[t]he indiscriminate imposition of money bail has consequences.” It quotes another study: “ ‘[S]ome people currently in California jails who are safe to be released are held in custody solely because they lack the financial resources for a commercial bail bond, and other people who may pose a threat to public safety have been able to secure their release from jail simply because they could afford to post a commercial bond.’ ” (p.\*5 ) Focusing on the significance of this circumstance, the Supreme Court states: “*That disparity lies at the heart of this case.*” (p.\*5, emphasis added.)

## **III. Equal Protection and Due Process**

The Supreme Court states that equal protection and substantive due process converge in the money bail context. “The accused retains a constitutional right to liberty,” and “the state’s interest is not to punish,” but to assure that the defendant appears at court proceedings and to protect the victim, as well as the public from further harm. (p.\*6.)

“Yet if a court does not consider an arrestee's ability to pay, it cannot know whether requiring money bail in a particular amount is likely to operate as the functional equivalent of a pretrial detention order.

Detaining an arrestee in such circumstances accords insufficient respect to the arrestee's crucial state and federal equal protection rights against wealth-based detention as well as the arrestee's state and federal substantive due process rights to pretrial liberty.” (p.\*7.)

“What we must therefore conclude is that pretrial detention is subject to state and federal constitutional constraints. Consistent with the aforementioned principles, we hold that such detention is permissible unless no less restrictive conditions of release can adequately vindicate the state’s compelling interest.” (p.\*7.)

#### **IV. The Supreme Court’s “Framework Governing Bail Determinations”**

The Court, having concluded that trial courts must consider an arrestee’s ability to pay alongside of the efficacy of less restrictive measures, next provides a “general framework for governing bail determinations.” (p.\*8.)

The Court says first, “When making any bail determination, a superior court must undertake an individualized consideration of the relevant factors. These factors include the protection of the public as well as the victim, the seriousness of the charged offense, the arrestee's previous criminal record and history of compliance with court orders, and the likelihood that the arrestee will appear at future court proceedings. (Cal. Const., art. I, §§ 12, 28, subds. (b)(3), (f)(3); Pen. Code, § 1275, subd. (a)(1).)”

The Court observes that with the passage of Prop 9, the voters amended the Constitution to grant the people of the state of California to have the safety of the victim and the victim’s family considered in the bail determination process. The voters added “the safety of the victim” to the list of factors that a court shall consider in “setting, reducing or denying bail ensuring that it, along with public safety, will be the “primary considerations” in those determinations. (Cal. Const., art. I, § (f)(3), see Pen. Code, §1275, subd. (a)(1).) The Court says along with those primary considerations of victim and public safety, the court must assume the truth of the criminal charges.

To determine the kind of threat to victim of public safety that is required, the Court says a trial court cannot have an arrestee detained pretrial based on concerns regarding the safety of the public or the victim, *unless* the court has found clear and convincing evidence that no other conditions of release could reasonably protect those interests. (p.\*8.)

The Court looks at arrestees who are flight risks. While the Court notes that the Constitution does not address the issue, the Court concludes that the standard of proof should likewise be clear and convincing evidence that no conditions of release can reasonably assure the arrestee’s appearance in court. (p.\*8.)

The Court then looks at those cases where the arrestee poses little or no risk of flight or harm to others, and state the trial court may offer OR release with appropriate conditions. “Where the record reflects the risk of flight or a risk to public or victim safety, the court should consider whether nonfinancial conditions of release may reasonably protect the public and the victim or reasonably assure the arrestee's presence at trial. If the court concludes that money bail is reasonably necessary, then the court must consider the individual arrestee's ability to pay, along with the seriousness of the charged offense and the arrestee's criminal record, and — unless there is a valid basis for detention — set bail at a level the arrestee can reasonably afford. *And if a court concludes that public or victim safety, or the arrestee's appearance in court, cannot be reasonably assured if the arrestee is released, it may detain the arrestee only if it first finds, by clear and convincing evidence, that no nonfinancial condition of release can reasonably protect those interests.*” (p.\*9, emphasis added.)

The Supreme Court acknowledges the uncertainty of conditions of release: “The experiences of those jurisdictions that have reduced or eliminated financial conditions of release suggest that releasing arrestees under appropriate nonfinancial conditions — such as electronic monitoring, supervision by pretrial services, community housing or shelter, stay-away orders, and drug and alcohol testing and treatment (citations omitted) may often prove sufficient to protect the community. (Citations omitted) Yet just as neither money bail (nor any other condition of release) can guarantee that an arrestee will show up in court, no condition of release can entirely eliminate the risk that an arrestee may harm some member of the public.” Thus, “a court making these determinations should focus instead on risks to public or victim safety or to the integrity of the judicial process that are reasonably likely to occur.” (p. \*9.)

As to pretrial detention, the Court says that while due process does not categorically prohibit the ordering of pretrial detention, “it remains true that ‘[i]n our society liberty is the norm, and detention prior to trial with or without trial is the carefully limited exception.’” (p.\*9, quoting *United State v. Salerno* (1987) 481 U.S. 739, 755.) Thus an order of detention “requires an interest that is ‘sufficiently weighty’ in the given case. (p.\*10.) Finally, if a court makes an order that results in pretrial detention, it must set forth the reasons for its decision on the record and include them in the minutes.

## **V. When An Arrestee Should Remain in Custody**

The Court stated when an arrestee should remain in custody: “An arrestee may not be held in custody pending trial unless the court has made an individualized determination that (1) the arrestee has the financial ability to pay, but nonetheless failed to pay the amount the court finds reasonably necessary to protect compelling government interests; or (2) detention is necessary to protect victim or public safety, or to ensure the defendant’s appearance, and there is clear and convincing evidence that no less restrictive alternative will vindicate those interests.” (p.\*10.)

## **VI. Issues Not Addressed By the Supreme Court**

- The Supreme Court's *Humphrey* decision provides little guidance as to how to conduct a bail hearing, the content of the hearing, and how the ability to pay is determined. The P&A next week will address this issue in more detail, with input from the prosecutors who are involved in these bail hearings and are familiar with the arguments being made by defendants.
- California has two competing constitutional provisions governing bail, which are Article 1, section 12, and article 1, section 28(f)(3). The Court declined to address which of those provisions applies for a detention order. The Court in a footnote states: "Because this case does not involve an order denying bail, we leave for another day the question of how [these] two constitutional provisions . . . can and should be reconciled, including whether these provisions authorize or prohibit pretrial detention of noncapital arrestees outside the circumstances specified in section 12, subdivisions (b) and (c)." (*Id.* at p. 9, n. 7.)

## **Next Week: Humphrey and Bail, Part II**

Suggestions for future shows, ideas on how to improve P&A, and other comments or criticisms should be directed to P&A author Mary Pat Dooley at (510) 272-6249, [marypat.dooley@acgov.org](mailto:marypat.dooley@acgov.org). Technical questions should be addressed to Gilbert Leung at (510) 272-6327. Participatory students: MCLE Evaluation sheets are available on location and certificates of attendance are constructively maintained in your possession in the Ala. Co. Dist.Atty computer banks.

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