



1 Defendant has requested a pretrial bail hearing pursuant to the holding of *In re*  
2 *Kenneth Humphrey* (January 25, 2018) \_\_\_ Cal.App.5th \_\_\_ [2018 Cal.App.LEXIS 64] (*Humphrey*).

3 The People oppose any OR release, OR release with nonfinancial conditions, or any bail reduction  
4 as to this defendant.

5 Penal Code sections 1270.1 and 1275<sup>1</sup> enumerate the factors that a court must  
6 consider when setting, denying, or reducing bail. In making that determination, the factors must be  
7 individualized and be weighed against each other. Public safety and the safety of the victim shall be  
8 the primary considerations. (Cal. Cons. Art 1, §28 (f)(3).) A defendant's ability to post bond (§  
9 1270.1 (c)) is only *one* factor a judge must consider, not the sole factor.

11 The People oppose setting bail because:

12 [Select this section if any of the following applies. Indicate which section(s) apply by checking the  
13 appropriate box. If the charged offense(s) do not fall within this section proceed to next section.]

14  The defendant should be preventively detained because the crime(s) charged fall(s) within  
15 article I section 12 of the California Constitution:

16  Capital crime;

17  Felony offense involving an act of violence or felony sexual assault and the facts are  
18 evident or the presumption great and the court will find upon clear and convincing  
19 evidence that there is a substantial likelihood that the defendant's release would  
20 result in great bodily harm to others;

21  Felony offense when the facts are evident or the presumption great and the court will  
22 find upon clear and convincing evidence that there is a substantial likelihood that the  
23 person would carry out the threat if released.  
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27 <sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

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The People oppose deviating from the scheduled bail amount.

1. In determining or denying bail, the court shall consider §1275 (a)(1):

- Protection of the public;
- Seriousness of the offense charged;
- Previous criminal record of the defendant;
- Probability of defendant’s appearance at trial or hearing of the case.

2. In considering the seriousness of the offense charged, the court shall consider § 1275 (a)(2):

- Alleged injury to the victim;
- Alleged threats to the victim or witness;
- Alleged use of firearm or other deadly weapon;
- Alleged use of controlled substance by the defendant.

3. In considering offenses wherein a violation of chapter 6 commencing with section 11350 of division 10 of Health and Safety Code is charged, the court shall consider § 1275 (b):

- The alleged amount of controlled substance involved;
- Whether the defendant is currently released on bail for an alleged violation of the same chapter.

4. At this hearing, the court shall consider § 1270.1 (c) as applied to the listed offenses:

- Past court appearances of the detained person;
- The maximum potential sentence that could be imposed;
- The danger that may be posed to other persons if the detained person is released;
- The potential danger to other persons, including threats that have been made by the detained person;
- Any past acts of violence;

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- Ties to the community;
- Ability to post bond.

5. There is no infrastructure which exists to support pretrial release supervision.

- There is no less restrictive non-financial condition that this defendant requires which will protect the community and ensure defendant’s appearance at all future proceedings.

**I**

**STATEMENT OF FACTS AND FACTORS RELATED TO BAIL**

[Add statement of facts of this case. Emphasize factors relating to bail.]

**II**

**POINTS AND AUTHORITIES**

**A**

**CALIFORNIA’S PRETRIAL RELEASE SYSTEM  
HAS NOT BEEN ABROGATED BY *HUMPHREY***

California’s pretrial release system is governed by the State constitution and sections 1268-1276.5.

**1. The *Humphrey* Decision**

*Humphrey* arises from a petition for writ of habeas corpus alleging the trial court failed to consider the petitioner’s ability to pay and other circumstances when setting his bail.

1 Humphrey was 63 years old when he was charged with first degree robbery (§211), first degree  
2 residential burglary (§ 459), inflicting injury (but not great bodily injury) on an elder and dependent  
3 adult (§ 368 subd. (c)), and theft from an elder or dependent adult, charged as a misdemeanor, (§  
4 368, subd. (d)). It was additionally alleged that Humphrey has suffered at least two prior strike  
5 offenses, the most recent prior offense was committed in 1992.

6           At his arraignment, bail was set at \$600,000 in accordance with the bail schedule.  
7 Humphrey sought a review of the bail, arguing that the bail amount was unreasonable and beyond  
8 his means and violated the Eight Amendment’s proscription against excessive bail. After hearing  
9 arguments from both counsel, petitioner’s bail was reduced to \$350,000. The *Humphrey* court  
10 found that the trial judge failed to consider the financial circumstances of the petitioner or less  
11 restrictive alternative conditions of release when setting the bail amount. (*Humphrey*, p. 22.) The  
12 court stated that without that inquiry, there was no “connection between the amount of bail fixed  
13 and the dual purposes of bail, assuring petitioner’s appearance and protecting public safety.  
14 (Citations omitted.)” (*Id.*, p. 23.)

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16           While ruling on the writ and granting a new bail hearing, *Humphrey* affirmed the use  
17 of the bail schedule, the use of preventive detention upon necessary findings, and the factors to be  
18 considered at the bail hearing as enumerated in sections 1270.1 and 1275. The court held that due  
19 process and equal protection clauses of the Fourteenth Amendment require the trial court to make  
20 two inquiries when setting bail: (1) whether the defendant has the financial ability to pay the  
21 amount of bail ordered, and if not, (2) whether less restrictive conditions of bail are adequate to  
22 serve the government’s interest. Further, if the court determines that the defendant is unable to  
23 afford the amount of bail that is necessary to ensure public safety, the court must make findings, by  
24 clear and convincing evidence, to preventively detain defendant.  
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1                   **2. Applicable Statutes**

2                   Article I, section 12 of California’s Constitution guarantees a criminal defendant the  
3 right to pretrial release on bail unless charged with certain categories of crimes. Thus, bail is  
4 presumptively denied for persons charged with a capital offense, felony offense involving acts of  
5 violence on another, felony sexual assault offense when the facts are evident or the presumption  
6 great and the court finds based upon clear and convincing evidence that there is a substantial  
7 likelihood the person’s release would result in great bodily harm to others or that the person has  
8 threatened another with great bodily harm and that there is a substantial likelihood that person  
9 would carry out the threat if released.  
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11                   Additionally, section 12 of article I prohibits excessive bail. When setting bail, it  
12 requires the court to consider the seriousness of the offense charged, the previous criminal record of  
13 the defendant, and the probability of his or her appearing at the trial or hearing of the case. (Cal.  
14 Cons. Art. I, §12.) Section 28 of article I establishes 17 rights for victims of crime, one of which is  
15 to “have the safety of the victim and the victim’s family considered in fixing the amount of bail and  
16 release conditions for the defendant.” (Cal. Cons. Art. I, § 28, subd. (b)(3).) California’s  
17 constitutional provisions regarding bail have not been abrogated by *Humphrey*.  
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19                   Sections 1268-1276.5 implement the constitutional right to bail, providing: the right  
20 to release on bail unless charged with certain crimes, the right to a bail hearing when the prosecutor  
21 or the arrestee is seeking an increase or reduction from the bail schedule if charged with certain  
22 specified offenses, factors the court must consider when determining own recognizance release,  
23 and, in the case of a deviation from the bail schedule, the requirement that a judge state on the  
24 record the reason for deviation.  
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1 The factors that a court must consider when setting, denying or reducing bail are set  
2 forth in sections 1270.1 and 1275. Public safety shall be the primary consideration. The factors  
3 include: evidence of past court appearances, maximum potential sentence, danger to other persons if  
4 the detained person is released, threats made by the detained person, any past acts of violence,  
5 community ties of the detained person and the ability to post bond. (§ 1270.1 (c).) The court must  
6 also consider protection of the public, seriousness of the offense, previous criminal record,  
7 probability of appearing at trial or at a hearing in the case, and information from relevant reports.  
8 The judge must also consider injury to the victim, alleged threats to the victim and witnesses, use of  
9 a firearm or deadly weapon in the commission of the crime, and alleged use or possession of  
10 controlled substance. (§ 1275 (a).) *Humphrey* requires the court to consider individualized factors  
11 of the defendant, such as his/her ability to pay, dangerousness and/or risk of flight. These factors  
12 must be weighed against the others. (*Humphrey*, p. 33.) None of the California statutes  
13 implementing bail have been abrogated by *Humphrey*.

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16 When setting bail, a court must inquire into the defendant's ability to pay the amount  
17 of bail ordered because that finding "is critical...to guard against improper detention based only on  
18 financial resources." (*Humphrey*, p. 30.) Section 1270.1 requires a court to consider a defendant's  
19 ability to post bond as a factor when determining bail. Moreover, it is defendant's burden to show  
20 his/her inability to afford the bond. (§ 1270.1 (c) [the court shall also consider any evidence offered  
21 by the detained person regarding...his or her ability to post bond].) *Humphrey* did not define  
22 "ability to pay" nor did it require that bail must be set in an amount that defendant can pay. "If the  
23 court concludes that an amount of bail the defendant is unable to pay is required to ensure his or her  
24 future court appearances, it may impose that amount only upon a determination by clear and  
25 convincing evidence that no less restrictive alternative will satisfy that purpose." (*Humphrey*, p. 31.)  
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1                   When ruling on the motion to reduce bail, express findings and statements of  
2 decisions are required in section 28 (f)(3) of article I of the Constitution. When setting bail in an  
3 amount that deviates from the bail schedule, the court must state the reason for the decision and  
4 address threats made against the victim or witnesses on the record. (§ 1270.1 (d).) If the court  
5 reduces bail below the amount established in the bail schedule in the case of a serious felony (§  
6 1192.7 (c)) or a violent felony (§ 667.5 (c)), the court must make a finding of unusual circumstances  
7 and state the findings on the record. (§ 1275 (c).) In the same vein, *Humphrey* cautioned against  
8 generalized statements such as “substantial flight risk,” “danger to society,” “some risk to society,”  
9 or generalizations of future criminality, as they would be insufficient. (*Humphrey*, pp. 32-33,  
10 quoting *In re Pipinos* (1982) 33 Cal.3d 189.) Thus, when setting, reducing, or denying bail, the  
11 court must state specific individualized facts and circumstances to support its order.  
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### 13                   **3. Preventive Detention**

14                   Judges have discretion under article 1 sections 12 and 28(f)(3) of the California  
15 Constitution to order preventive detention in certain circumstances when the court makes the  
16 requisite findings. (*Humphrey*, p. 3; Pretrial Detention Reform Workgroup, Recommendations to  
17 the Chief Justice, Oct. 2017, p. 52 [“In the limited number of cases where no condition or  
18 combination of conditions can assure public safety, judges must have the authority to detain  
19 individuals in custody to protect the public, victims, and witnesses].)  
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21                   *Humphrey* elaborated on a trial court’s authority to preventively detain an individual  
22 after inquiring of the defendant’s ability to pay a bond amount and making findings on the record  
23 that either (1) the defendant has the financial ability to pay but failed to pay the amount of bail the  
24 court finds reasonably necessary to ensure his or her appearance at further court proceedings; or (2)  
25 the defendant is unable to pay that amount and no less restrictive conditions of release would be  
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1 sufficient to reasonably assure such appearance; or (3) no less restrictive nonfinancial conditions of  
2 release would be sufficient to protect the victim and the community. (*Humphrey*, p. 17.) The court  
3 may set a bail amount that the defendant is unable to pay and results in the defendant's pre-trial  
4 detention if the court makes the determination, upon clear and convincing evidence that no less  
5 restrictive alternative will ensure the defendant's future court appearances. (*Humphrey*, p. 40.)

## 6 **B**

### 7 **DEFENDANT'S BAIL SHOULD NOT BE REDUCED**

#### 8 **1. Defendant Has Not Shown Individualized Factors Warranting Reduction of Bail or** 9 **Release**

10 When a court is considering defendant's request to reduce bail or release from  
11 custody on OR, the showing required is undeniably on the defense.

12 Evidence Code section 550 provides:

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- 14 (a) The burden of producing evidence as to a particular fact is on the party against whom a  
15 finding on that fact would be required in the absence of further evidence;
  - 16 (b) The burden of producing evidence as to a particular fact is initially on the party with the  
17 burden of proof as to that fact.

18 The statute is essentially a codification of established case law. The rule of convenience and  
19 necessity declares that, unless it is "unduly harsh or unfair," the "burden of proving an exonerating  
20 fact may be imposed on a defendant if its existence is 'peculiarly' within his personal knowledge  
21 and proof of its nonexistence by the prosecution would be relatively difficult or inconvenient."

22 (*People v. Mower* (2002) 28 Cal.4<sup>th</sup> 457, 477, citing *In re Andre R.* (1984) 158 Cal.App.3d 336,  
23 342.)

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25 A defendant's ability to pay appropriate bail, as well as other potentially relevant  
26 factors in this analysis, are uniquely within his or her knowledge. The People have no means of  
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1 establishing a defendant's financial resources. Similarly, the People are significantly impaired in  
2 our ability to produce evidence relating to potential risk factors such as: marital status, stability,  
3 residence, education, employment, ties to the community, prior substance abuse treatment efforts,  
4 current substance abuse, mental health issues, etc. To the extent that the defendant seeks to have  
5 those factors evaluated by this Court, it must be his/her burden to produce evidence to that effect.

6 **2. The Court Has Already Weighed Factors to Set Bail**

7 Defendant has not shown that his/her bail should be reduced or that he should be  
8 released OR. Applying the factors in sections 1270.1 and 1275, defendant's current bail of \_\_\_ is  
9 necessary.  
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11 [Select the applicable statements and state your reasons why bail should not be reduced.]

- 12 1. Defendant is charged with an offense that is presumptively "no bail." [Add your facts here]
- 13 2. The trial court has already conducted a legally sufficient bail hearing by considering: [Add  
14 your §§1270.1 and 1275 facts and findings here]
- 15 3. The court has already made a financial inquiry and has determined that the bail amount is  
16 necessary to ensure defendant's future appearance in court. [Add your facts here.]
- 17 4. The court has considered less restrictive alternatives in this case and there is no less  
18 restrictive alternative that can be imposed to protect public and victim safety. [Add your  
19 facts here.]
- 20 5. The court's record shows specific individualized facts and circumstances to support the bail  
21 amount ordered. [Add your facts here.]  
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1 **[The section below only applies to art. 1 section 12 offenses:]**

2 **[3. Defendant Must Be Preventively Detained]**

3           Nothing in *Humphrey* diminishes a judge’s discretion to order the detention of a  
4 defendant when risks to public safety or of flight cannot be adequately addressed through non-  
5 monetary conditions of release. Maintaining that discretion is more faithful to the underlying intent  
6 of the California Constitution than mandating release of dangerous indigent defendants simply  
7 because they are indigent.

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9           Bail may be denied in a capital offense when the facts are evident or the presumption  
10 great; or in a violent felony offense or felony sexual assault offense when the facts are evident or  
11 the presumption great and the court finds based upon clear and convincing evidence that there is a  
12 substantial likelihood the person’s release would result in great bodily harm to others; or in a felony  
13 offense when the facts are evident or the presumption great and the court finds based on clear and  
14 convincing evidence that the person has threatened another with great bodily harm and that there is  
15 a substantial likelihood that the person would carry out the threat if released. (Cal. Const. art. 1,  
16 section 12, see, *In re Christopher Lee White* (March 6, 2018) \_\_Cal.App.5th \_\_ [2018 Cal.App.  
17 LEXIS 185].)

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19           Here, defendant must remain in custody because there is no non-financial condition  
20 or combination of non-financial conditions which will protect the community from defendant.

21 [Add your facts and reasons here.]  
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**III**  
**CONCLUSION**

There is a substantial likelihood that if released/bail is reduced, this defendant would  
[add your facts here]

In evaluating bail, the People urge the Court to make a finding that there are no enforceable conditions which can protect the public or ensure defendant’s appearance at court proceedings. If the court determines a setting of bail is appropriate, the People further urge the Court to engage in a multi-faceted analysis of his ability to pay, weighing ability to pay with the other factors in required by §§1270.1 and 1275.

Dated: XXXX, 2018

Respectfully submitted,

JACKIE LACEY  
DISTRICT ATTORNEY

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Deputy District Attorney