

Legal Frameworks Governing Pretrial Release and Detention: Tracking Developments in California

Brief

Introduction

In 2020, the National Center for State Courts published a White Paper on Pretrial Preventive Detention.¹ The White Paper was prepared under the guidance of a Work Group established by the Conference of Chief Justices and Conference of State Court Administrators and reviewed the use of pretrial preventive detention in five jurisdictions: District of Columbia, New Jersey, New Mexico, Arizona, and California. The paper summarized the pretrial detention provisions in the five jurisdictions and reviewed the implementation challenges that the jurisdictions had faced, and the lessons learned.

The White Paper's discussion of pretrial detention in California focused on the provisions of SB 10, legislation enacted in August 2018 that was to go into effect in October 2019 and would have eliminated cash bail and instituted an explicit preventive detention system. However, the qualification of a voter referendum in January 2019 stayed its implementation, and the defeat of Proposition 25 at the voter referendum in November 2020 repealed SB 10.²

Concurrently, in January 2018, California's First District Court of Appeal ruled in favor of Kenneth Humphrey, who had been held in jail because he was unable to pay the \$350,000 bail set after his arrest for allegedly robbing and threatening his neighbor. Holding that California's money bail system violated due process and equal protection, the ruling of the intermediate court of appeal required trial court judges to consider a defendant's ability to pay as well as non-monetary options for release when determining a bail amount.³ Upon remand, the trial court held a bail review hearing and ordered that Humphrey be released on nonfinancial conditions. In May 2018, the California Supreme Court, upon request by several entities who were not parties in the case and despite Mr. Humphrey's release from custody, granted review on its own motion to address the constitutionality of money bail as currently used in California. Almost three years later, following the repeal of SB 10, the California Supreme Court issued its March 2021 ruling in *In Re Humphrey* declaring that "the common practice of conditioning freedom solely on whether an arrestee can afford bail is unconstitutional."⁴

This paper summarizes the status of pretrial detention in California in the wake of the California Supreme Court's March 2021 ruling in *In Re Humphrey*.

Persons Subject to Detention

In California, there is no statute defining those persons subject to pretrial detention. There are, however, two relevant, and apparently conflicting, constitutional provisions that address the issue. In 1982, California voters enacted Proposition 4 which amended article 1, section 12 of the California Constitution to provide, in part:

A person shall be released on bail by sufficient sureties, except for:

- a) Capital crimes when the facts are evident or the presumption great;
- b) Felony offenses involving acts of violence on another person, or felony sexual assault offenses on another person, when the facts are evident 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
- c) 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 the person would carry out the threat if released.⁵

In 2008, California voters passed Proposition 9, Marsy's Law, which amended article 1, section 28 (f)(3) of the California Constitution to provide, in part:

Public Safety Bail. A person may be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great. Excessive bail may not be required. In setting, reducing or denying bail, the judge or magistrate shall take into consideration the protection of the public, the safety of the victim, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case. Public safety and the safety of the victim shall be the primary considerations.⁶

The two Constitutional provisions appear to be inconsistent. In 2021, in its *In Re Humphrey* decision, the California Supreme Court acknowledged that in making a bail determination the court "must still consider whether the deprivation of liberty caused by an order of pretrial detention is consistent with state statutory and constitutional law specifically addressing bail ... and with due process." Noting that the question was not involved in the current case, the court added "we leave for another day the question of how two constitutional provisions addressing the denial of bail-article 1, sections 12 and 28, subdivision (f)(3)-can or should be reconciled..."⁷

The Court immediately went on to twice note, however, that in *United States v. Salerno*, the U.S. Supreme Court had said that it remains true that "[I]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception," and had also expressly noted that the statute involved there authorized pretrial detention only of "individuals who have been arrested for a specific category of extremely serious offenses."⁸ The Court also quoted approvingly from a Massachusetts Supreme Court decision pointing out that "the practice of pretrial detention on the basis of dangerousness has been upheld as constitutional in part because "the Legislature 'carefully limit[ed] the circumstances under which detention may be sought to the most serious of crimes'".⁹ It has been suggested, therefore, that the California Supreme Court will ultimately conclude that the more restrictive provisions of article 1, section 12 govern the use of pretrial detention in California.¹⁰

The Use of Money Bail

Noting that the median bail amount in California is more than five times the median amount in the rest of the nation, the California Supreme Court declared in *In Re Humphrey* that “the common practice of conditioning freedom solely on whether an arrestee can afford bail is unconstitutional.” The court noted that “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.”¹¹ “Where the court determines a financial condition, such as cash bail or bail bond, is necessary to secure the state’s interests,” the Court said, it “must consider the defendant’s ability to pay the amount set.”¹² “The bail must be set at a level the defendant can reasonably afford,” the Court added.¹³

The Court held that “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 of bail the court finds reasonably necessary to protect compelling government interests; or (2) detention is necessary to protect victim or public safety, or ensure the defendant’s appearance, and there is clear and convincing evidence that no less restrictive alternative will reasonably vindicate those interests.”¹⁴

Although the Court’s language appears to authorize pretrial detention to secure the defendant’s appearance, the Court later added in a footnote: “We have not been asked to decide and do not determine here whether the California Constitution permits pretrial detention based on risk of nonappearance or flight alone, divorced from public and victim safety concerns.”¹⁵

The court based its decision on “both 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.”¹⁶

The Pretrial Detention Process

CA Const. Art. 1, Section 28 (f)(3) provides: “Before any person arrested for a serious felony may be released on bail, a hearing may be held before the magistrate or judge, and the prosecuting attorney and the victim shall be given notice and reasonable opportunity to be heard on the matter.” When making any bail determination, the Court said in *In Re Humphrey*, the trial court’s procedure “must also comport with other traditional notions of due process” including “the court’s obligation to set forth the reasons for its decision on the record and to include them in the court’s minutes.” The court “must undertake an individualized consideration of the relevant factors” including “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” the Supreme Court added.¹⁷ The Court also declared that a pretrial detention order must be based on a finding “by clear and convincing evidence, that no nonfinancial condition of release can reasonably protect” the safety of the public, or the victim, or “reasonably assure the arrestee’s appearance in court.”¹⁸

The Use of Risk Assessment

In *In Re Humphrey*, the California Supreme Court repeatedly refers to “*risk of flight*” and “*risk to public or victim safety*” and explicitly notes that “in choosing between pretrial release and detention, we recognize that absolute certainty-particularly at the pretrial stage, when the trial meant to adjudicate guilt or innocence is yet to occur-will prove all but impossible. A court making these determinations,” the Court said, “should focus instead on *risks* to public safety or victim safety or to the integrity of the judicial process that are reasonably likely to occur.”¹⁹

In the past two years, California has invested heavily in efforts to evaluate judicial use of pretrial risk assessment tools to improve judicial pretrial release decision-making.²⁰ The Budget Act of 2019 allocated \$75 million to the California Judicial Council to fund a Pretrial Pilot Program. The goals of the Pilot Program include: (1) to increase pretrial release of individuals booked into jail, (2) expand the judicial use and validation of pretrial risk assessment tools, and (3) assess any disparate impact or bias that may result from implementation of the programs. The funds were awarded by the Judicial Council to seventeen counties across the state selected through a competitive application process to support implementation and evaluation of promising pretrial reforms informed by pretrial risk assessment information over a two-year period.²¹ In addition, Senate Bill 36, also adopted in 2019, established mandatory pretrial risk assessment validation and reporting requirements for all pilot projects.²²

The onset of the Covid-19 pandemic in 2020 disrupted operation of the Pilot Program. In response to the pandemic, the California Judicial Council approved emergency rules in April 2020, including the adoption of an emergency statewide bail schedule that set presumptive bail at \$0 for most misdemeanor and lower-level felony cases. The statewide bail schedule was repealed in June 2020, but approximately half the counties participating in the pilot program then adopted local emergency bail schedules, several of which included \$0 bail provisions. As a result of these measures, many individuals who would have been eligible for the pilot program were cited and released in the field or released on zero bail at booking without participating in a pretrial risk assessment.²³ Senate Bill 115, enacted in September 2020, provided the pilot courts with an additional year, until June 30, 2022, to expend funds allocated to the program.²⁴

The Covid-19 pandemic also disrupted the evaluation and reporting timelines for the risk assessment pilot programs. The Judicial Council is now required to provide an interim report to the Legislature on July 1, 2022, and a final report on the program’s outcomes no later than July 1, 2023. The legislature also approved a delay in implementation of the validation and reporting requirements of Senate Bill 36. Under the extension in AB 3364, pretrial services agencies had until July 1, 2021, to validate their pretrial risk assessment tools, the Judicial Council was required to publish outcome-based data on its website commencing June 30, 2021, and, commencing January 1, 2023, is required to provide reports to the courts and the Legislature including recommendations to mitigate bias in pretrial decision-making.²⁵

In June 2021, the Judicial Council issued a report on its validation studies of the four pre-trial risk assessment tools used in the 17 counties participating in the pilot project: the Ohio Risk Assessment System-Pretrial Assessment Tool (ORAS-PAT), Public Safety Assessment (PSA), Virginia Pretrial Risk Assessment Instrument (VPRAI), and Virginia Pretrial Risk Assessment Instrument-R (VPRAI-R)/ Virginia Pretrial Risk Assessment Instrument-O (VPRAI-O). The Judicial Council reported that predictive accuracy and reliability metrics for the pretrial assessment tools used in the pilot programs were generally in the good to excellent ranges for nearly all measured outcomes, both overall and for the race, ethnicity, and gender sub-groups analyzed.²⁶

An Aggregated Data Report published in July 2021 included: pre-arraignment and pre-trial release rates aggregated by race, ethnicity, gender, and offense type; the percent of released individuals making required court appearances and not charged with a new offense by risk level; and the percent of assessed individuals receiving pretrial supervision by level of supervision. Data collection continues through December 2022 and the final data report to the legislature is due July 1, 2023. No conclusions have yet been drawn from the data reported.²⁷

About this Brief

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Endnotes

- ¹ R. Warren, S. Keilitz, White Paper on Pretrial Preventive Detention, February, 2020, available at https://www.ncsc.org/data/assets/pdf_file/0026/63665/Pretrial-Preventive-Detention-White-Paper-4.24.2020.pdf.
- ² *Id.* at 1; see, [https://ballotpedia.org/California_Proposition_25,_Replace_Cash_Bail_with_Risk_Assessments_Referendum_\(2020\)](https://ballotpedia.org/California_Proposition_25,_Replace_Cash_Bail_with_Risk_Assessments_Referendum_(2020)).
- ³ *In re Humphrey*, 19 Cal.App.5th 1006 (2018).
- ⁴ *In re Humphrey*, No. S247278, 2021 WL 1134487, at *2 (Cal. Mar. 25, 2021).
- ⁵ CA Const. Art. 1 Section 12.
- ⁶ CA Const. Art. 1, Section 28 (f)(3).
- ⁷ *Op. cit.*, n. 3 at 22.
- ⁸ *Id.* at 22-24, citing *United States v. Salerno*, 481 U.S. 739 (1987).
- ⁹ *Op. cit.* n. 3, at 23.
- ¹⁰ See, Nicholas Cotter and David A. Kaiser, SCOCABlog, “Opinion Analysis: In Re Humphrey (S247278),” (June 7, 2021) available at <HTTP://SCOCABLOG.COM/OPINION-ANALYSIS-IN-RE-HUMPHREY-S247278/> (“Taken together, the analysis and framing in *Humphrey* suggest that section 12 alone controls bail denials.”)
- ¹¹ *Op. cit.*, n. 3, at 1.
- ¹² *Id.* at 2.
- ¹³ *Id.* at 20.
- ¹⁴ *Id.* at 24.
- ¹⁵ *Id.* at 6.
- ¹⁶ *Id.* at 16.
- ¹⁷ *Id.* at 18.
- ¹⁸ *Id.* at 19-21.
- ¹⁹ *Id.* at 21 (italics added).
- ²⁰ Generally, there is no statutory authority in California for a system of pre-trial release by nonjudicial officers outside of the application of judicial bail schedules. See, “Pretrial Reform: Pretrial Pilot Program Recommended Awards,” Report to the Judicial Council, August 5, 2019, available at <https://www.courts.ca.gov/documents/eandp-20190729-mm.pdf>.
- ²¹ *Id.*
- ²² Judicial Council of California, Pretrial Risk Assessment Tool Validation (June 2021), available at https://www.courts.ca.gov/documents/Pretrial_Risk_Assessment_Tool_Validation_June_2021.pdf.
- ²³ Judicial Council of California, Pretrial Pilot Program: Report to the Legislature (January 2021) available at https://www.courts.ca.gov/documents/Pretrial_Pilot_Program_Leg_Report_January_2021.pdf.
- ²⁴ *Id.*
- ²⁵ *Id.*
- ²⁶ *Op. cit.*, n. 21.
- ²⁷ Judicial Council of California, SB 36: Pretrial Pilot Program Aggregated Data Report, July 1, 2021, p. 3 available at https://www.courts.ca.gov/documents/SB_36_Pretial_Pilot_Program_Aggregated_Data_Report.pdf.