

Article I, Section 12 – Not Section 28 – Governs Bail in California.

Overview

The California Supreme Court is currently considering how to reconcile the apparent conflict between the California constitution's two bail provisions: Article I, section 12 and Article I, section 28. Under section 12, bail is an "absolute right" granted to criminal defendants with three narrow exceptions; under section 28, bail is discretionary and public safety is the primary consideration. Because constitutional provisions must be reconciled, the apparent conflict is a false choice: rather than choosing between them, the court is likely to harmonize these sections. When a defendant falls within one of section 12's narrow exceptions (and so would be denied bail under that section) judges should apply the factors listed in section 28 to decide if the defendant may nonetheless be granted bail. This interpretation is consistent with case law and the principle that ambiguous constitutional provisions should be harmonized, not invalidated.

Sections

12 and 28 Have Conflicted Since 1982

Article

I's contradictory bail provisions stem from competing ballot propositions. In June 1982, California voters were presented with two separate propositions on bail: Proposition 4 sought to expand the circumstances under which courts could

deny bail by amending section 12, while Proposition 8 (also known as the Victims' Bill of Rights) sought to eliminate section 12 entirely and make bail discretionary. Although the electorate approved both propositions, Proposition 4 received over 2 million more votes than Proposition 8. Accordingly, Proposition 4's bail provisions prevailed.[1]

This left California with contradictory bail provisions: Proposition 4 carved out more exceptions to the absolute right of bail, but it did not eliminate the right entirely — yet the discretionary language of section 28 was adopted without eliminating section 12. In 2008, Proposition 9 amended section 28 to make the “safety of the victim,” and public safety, the “primary considerations” when setting bail. No court has considered the Proposition 9's effect on section 12.

Humphrey **and *White* Compounded the Bail Problem**

The lack of clear guidelines on bail is a problem for California judges, who must make thousands of bail determinations each year. The lack of clear standards for setting bail creates a risk that courts are applying bail standards inconsistently. And the law is unclear on whether there is an absolute constitutional right to bail. Two recent appellate decisions, *In re Humphrey* and *In re White*, illustrate the problem created by the separate constitutional bail provisions.

In re Humphrey transformed bail in California by effectively eliminating the money bail schedule.[2]
Instead of setting bail based on the offense charged, the *Humphrey* court concluded

that due process requires judges to make individual inquiries into each defendant's ability to pay. It further held that judges must impose the least restrictive bail conditions possible.

But

the *Humphrey* court did not confront the core problem: reconciling sections 12 and 28. Instead, the decision noted only that section 12 grants "an absolute right to bail except in a narrow class of cases," and that section 28 made "public safety and the safety of the victim" the "primary consideration" for judges setting bail. It did not address whether section 28 authorizes judges to impose higher bail on defendants that threaten public safety. Nor did it consider whether a defendant entitled to bail under section 12 can be detained under section 28 to protect victims. Because *Humphrey* did not resolve the inconsistencies between section 12 and section 28, the law remains unclear.

In *In re White*, the court attempted to reconcile the tension between section 12 and Penal Code sections 1268-1276.5, which blend the language of sections 12 and 28.[3] The *White* court held that, even if a defendant falls under one of section 12's exceptions, the defendant can only be denied bail upon a finding of "clear and convincing evidence" that there is a substantial likelihood the defendant's release would result in "great bodily harm" to others.

Yet

the decision mentioned section 28 only in passing. While *White* strongly suggests that section 12's goals are unimpeded by the seemingly more flexible public safety bail provisions of section 28, it did not attempt to resolve the central issue. At a minimum, *White* makes clear that courts should not apply section 28 or Penal Code sections 1268-1276.5 in a manner

that undermines the near-absolute right to bail guaranteed by section 12.

The California Supreme Court granted review in both *Humphrey* and *White*, and directed the parties in both cases to brief the question of whether section 12 or section 28 governs bail denial in noncapital cases — or whether those provisions may be reconciled. As we explain, the Supreme Court can reconcile the bail provisions by holding section 12 governs bail in almost all cases, and section 28 only applies when a defendant falls into one of section 12’s narrow exceptions.

Section 28 Only Applies When a Defendant Fits One of Section 12’s Exceptions

The California Supreme Court can reconcile the two provisions by holding section 28 elaborates on and clarifies section 12, but does not replace it. Article I, section 12 announces the general rule of a criminal defendant’s right to bail. It creates a constitutionally-guaranteed right to be released on bail, except in three circumstances: capital offenses with a preliminary judicial finding of the essential facts, some violent or sexual felonies, and felonies where there is clear and convincing evidence that pretrial release would result in the defendant carrying out a threat of great bodily harm. Nothing about section 12’s text or structure require a judge to deny bail even in one of these circumstances. On the contrary, it allows judges to grant bail “by sufficient sureties.”

Section 28 lists five factors that courts must consider when conducting a bail inquiry:

public protection; victim safety; the seriousness of the offense charged; the defendant's criminal history; and the likelihood of defendant appearing at trial. Section 28 makes clear that courts can consider these factors in setting, reducing, or denying bail. Section 28 can only come into conflict with section 12 when a judge is deciding whether to deny bail.

The structure of section 12 makes clear that it does not conflict with section 28. Section 12 does not require judges to deny bail when a defendant is charged with an offense that falls within an exception. Rather, it gives judges discretion to grant bail. Because section 12 gives courts discretion to impose bail, the California Supreme Court can hold that section 28's five-factor analysis is intended to help courts decide whether to deny bail in one of section 12's three enumerated exceptions.

Reconciling sections 12 and 28 this way is consistent with the well-accepted judicial method for adjusting apparently conflicting constitutional provisions. When two constitutional provisions are in conflict, courts should avoid interpreting the newer provision to repeal the older one.[4]

Accordingly, the California Supreme Court should not interpret section 28 to repeal section 12 merely because it was amended more recently. Our proposed solution is consistent with the presumption against repeal because it gives effect to both section 12 and section 28. When construing rival initiatives courts generally presume electors are aware of existing law,[5] and there is a strong presumption against implied repeal.[6] The maxims of jurisprudence are in accord: interpretations must be reasonable, and interpretations giving effect are preferred.[7] So are the relevant canons of construction: the presumption against implied repeal and the requirement of harmonization,

which apply where (as here) two constitutional provisions overlap and one does not explicitly repeal the other.[8] Under the presumption against implied repeal, implied repeals may only be found where “there is no rational basis for harmonizing” the two potentially conflicting and the provisions “are so inconsistent that the two cannot have concurrent operation.”[9]

Our proposed solution allows for concurrent operation: section 12 operates broadly, while section 28 provides additional guidance when an exception to section 12 applies. And the solution is rational because it is consistent with bail being a long-standing absolute right;[10] interpreting section 28 in this manner would allow more people to enjoy the right to bail. The proposed solution similarly satisfies the requirement of harmonization, which allows courts to examine “the context in which language appears” and adopt a construction that “best serves to harmonize a statute internally and with related statutes.”[11] Because sections 12 and 28 cannot operate simultaneously, harmonization requires an interpretation that limits the applicability of one of the sections. Section 12 only makes bail discretionary in three limited circumstances, while section 28 lists factors that judges should consider when setting bail. The only internally consistent interpretation is that section 28 applies to section 12’s exceptions. In light of these interpretive rules, courts should allow sections 12 and 28 to coexist, rather than favor one to the exclusion of the other.[12] This interpretation is reasonable and preserves both constitutional sections.

A Practical Guide to Bail Inquiries

While our interpretation would resolve the core tension between sections 12 and 28, this does not solve the problem entirely. When imposing bail, courts cannot view these two constitutional provisions in a vacuum. They must also consider

other authorities including federal due process requirements and relevant state statutes. We propose a three-step process that judges should adopt when assessing bail. This solution ensures that the goals and rationales of sections 12 and 28 are met, that the due process rights of individual defendants are respected, and that new developments in the law are accounted for. These steps should be followed in order.

First,

the court must consider whether the criminal defendant has a constitutional right to bail under Article I, section 12 of the California constitution. As discussed above, section 12 presumes that all defendants are entitled to bail unless any of three enumerated exceptions apply. In any of these three situations, a court may deny bail at its discretion. In all other cases, the defendant is entitled to bail.

Second,

if the defendant is entitled to bail under section 12 or the court decides to grant bail, the court must conduct an individualized inquiry into the defendant's situation to determine appropriate conditions. The court then must consider the factors set out in section 28. When a court sets bail, the local bail schedule is the statutory presumption. Courts must justify deviations from the schedule with specifically detailed facts.

Third,

the court must then review the final bail imposed to ensure that it complies with due process and equal protection requirements set forth by other authorities like federal law and SB 10 (discussed below). During this review, the judge must conduct inquiries regarding the individual defendant's financial ability to post bail and whether less restrictive conditions of release exist.[13] Further, the judge must not set a bail amount based solely on a bail schedule. The court must set the

amount based on an individualized inquiry with specific findings.[14] Finally, pending the Supreme Court of California's decision on *Humphrey, White*, and SB 10, imposing bail on a defendant must not involve money payment, subject to the preceding factors in section 28.

This summarizes our three-part bail inquiry:

STEP

1: Does the criminal defendant have a constitutional right to bail under Article I, section 12 of the California Constitution? Yes, unless:

1. The defendant is charged with a capital offense, and the judge makes a clear finding of the facts of the offense or the presumption of guilt on the basis of those facts; OR
2. The defendant is charged with (a) an act of violence or sexual assault, and (b) the judge makes a clear finding of the facts of the offense or the presumption of guilt on the basis of those facts, and (c) the judge finds by the clear and convincing evidence standard that the release of that criminal defendant will be likely to result in physical harm to others; OR
3. The defendant is charged with (a) a felony offense, and (b) the judge makes a clear finding of the facts of the offense or the presumption of guilt on the basis of those facts, and (c) the judge finds by the clear and convincing evidence standard that the defendant has made a specific threat to another person that would likely be carried out if the defendant were to be released.

If
an exception applies, the court *may* deny
bail at its discretion.

STEP

2: If an exception to section 12 applies, the court must conduct an individualized inquiry into that defendant's situation in order to determine an appropriate bail imposition under section 28. The court must consider the following factors:

1. the protection
of the public;
2. the
safety of the victim;
3. the
seriousness of the offense charged;
4. the
previous criminal record of the defendant; and
5. the
probability of his or her appearing at the trial or hearing of the case.

In
such cases, the local bail schedule is the statutory presumption; deviations must be justified with specifically detailed facts by the court.

STEP

3: Does the judge's bail comport with the due process and equal protection requirements set forth by other authorities (federal law, *Humphrey*, SB 10)?

- The judge must conduct findings and inquiries regarding the individual defendant’s financial ability to post bail and whether less restrictive conditions of release exist; [15]
- The judge must not set bail amount based solely on a bail schedule, rather than individualized inquiry with specific findings detailed by the court; [16]
- The imposition of bail must not involve money payment, subject to the preceding factors in section 28.

Eliminating Money Bail is Constitutional; SB 10 is Not

A related issue is whether eliminating money bail is constitutional. It is, but SB 10—a bill that attempts to replace money bail with a risk assessment system—is not.[17] SB 10, which Governor Brown signed into law in August 2018, eliminates money bail in favor of individualized risk assessments.[18] Under SB 10, pretrial services must classify each defendant as low, medium, or high risk. Low and medium risk defendants are presumptively entitled to own recognizance release; high risk defendants are not entitled to pretrial release.[19] SB 10 further creates new criteria for which defendants can be detained before trial regardless of their risk assessment. Although eliminating money bail is constitutional, SB 10’s bar on releasing high risk defendants may violate the state constitutional “absolute right to bail.” And the new “no bail” exceptions that SB 10 creates violate sections 12 and 28. Accordingly, SB 10 is unconstitutional.

Eliminating money bail, however, is constitutional. Neither section 12 nor section 28

explicitly require cash bail. The constitution only requires “sufficient sureties,” which it does not define, and the possibility of own recognizance release. Under the plain

meaning of surety (“a basis of confidence or security”) money is not the only kind of surety. California courts have recognized alternative, non-cash methods of posting bail, observing that “[i]rrespective of the particular type of security given for the defendant’s release, the obligation of the parties is contractual.”[20]

Eliminating money bail is also consistent with *Humphrey* and federal due process requirements. Removing money entirely puts similarly situated criminal defendants on level ground, regardless of their finances. Such leveling protects against the very situation that *Humphrey* sought to prevent: two defendants charged with the same crime being treated differently based on their relative ability to pay.

SB

10’s pretrial risk assessment poses a closer constitutional question because “high risk”[21]

defendants are not entitled to pretrial release under the bill.[22] The risk assessment

framework gives pretrial services enormous discretion, as their classification effectively determines an individual’s pretrial fate.[23] This conflicts with *Humphrey*’s recognition that section 12 grants “an absolute right to bail.” *Humphrey* arguably eliminated a judge’s

power to deny bail in cases where the defendant does not threaten public safety, while SB 10 appears to shift the discretion to pretrial services.

Although

SB 10’s risk assessment is a constitutional twilight zone, its creation of new no-bail exceptions is certainly unconstitutional. SB 10 allows judges to deny bail in thirteen situations, regardless of the defendant’s risk assessment. For

example, a judge could deny bail to “a defendant arrested for a violation of any type of restraining order within the past five years.”[24] Judges could also deny bail to defendants arrested for certain misdemeanors.[25] These no-bail exceptions are

wholly inconsistent with the constitution. The constitution is clear that bail is an absolute right (“A person shall be released on bail by sufficient sureties”) subject to section 12’s three exceptions. All three exceptions relate to capital and felony offenses. This makes SB 10, which allows judges to deny bail to defendants charged with misdemeanors, particularly vulnerable to a constitutional challenge. Many of SB 10’s situations where bail is not allowed are also inconsistent with the policy goal of imposing bail, which is to ensure the defendant’s presence at subsequent hearings. For example, denying someone bail if they have violated a restraining order within the past five years is seemingly concerned with public safety, not ensuring a defendant’s appearance. Because of these flaws, SB 10 contains several provisions that make it unconstitutional.

Conclusion

Article

I, section 12 sets forth the constitutional framework for the right to bail in California. Article I, section 28 helps guide the calculus courts undertake when assessing bail. It does so by providing courts with a five-factor analysis when conducting individualized inquiries for each criminal defendant. Section 12 provides the foundation for the constitutionally guaranteed presumption of bail, along with its narrow exceptions. Section 28 provides guidance to courts when determining how to set bail. Neither provision invalidates the other, nor should they be so interpreted. The provisions’ plain text, legislative history, practical application, and judicial interpretive tools make clear that section 28 is advisory.

If the California Supreme Court affirms *Humphrey*, the inquiry will shift only in form, but not in function. When setting bail for an indigent defendant, courts should still conduct the same analysis by analyzing whether any of the exceptions in section 12 apply, and then apply section 28's five-factor analysis. But the conditions of release simply change from money to other appropriate safeguards to ensure the defendant's subsequent appearance in court. Similarly, if the California Supreme Court upholds SB 10's ban on monetary bail, the inquiry will remain the same, but removes monetary collateral from the equation entirely. As of publication, SB 10 has been put on hold, due to a successful petition campaign spearheaded by Californians Against the Reckless Bail Scheme.[26] Currently, SB 10 will appear as a referendum on the November 2020 ballot.[27] If the ballot proposition passes, the California Supreme Court will likely invalidate portions of SB 10 as unconstitutional.

-o0o-

Nicholas Cotter is a third-year law student at Berkeley Law and a research fellow at the California Constitution Center. Senior research fellows David and Michael Belcher contributed to this article.

[1] Cal. Const., art. XVIII, § 4.

[2] *In re Humphrey* (2018), depublished pending review, case number S247278.

[3] *In re White* (2018), depublished pending review, case number S248125.

[4] *In re Lance W.* (1985) at 886.

[5] *Cal. Cannabis Coalition v. City of Upland* (2017) at 934.

[6] *Id.* at 945; *Bd. of Supervisors v. Lonergan* (1980) at 868 (“So strong is the presumption against implied repeals that when a new enactment conflicts with an existing provision, in order for the second law to repeal or supersede the first, the former must constitute a revision of the entire subject, so that the court may say that it was intended to be a substitute for the first.”) (citations and quotations omitted).

[7] Civil Code §§ 3541, 3542.

[8] *Garcia v. McCutchen* (1997) at 477.

[9] *Id.*

[10] *In re Humphrey, supra*, note 1.

[11] *Pacific Gas & Electric Co. v. County of Stanislaus* (1997) at 1152.

[12] *Id.*

[13] *In re Humphrey, supra*, note 1 at 1025-28.

[14] *Id.* at 1038, fn. 17.

[15] *In re Humphrey, supra*, note 1 at 1025-28.

[16] *Id.* at 1038, fn. 17.

[17] Sen. Bill No 10 (2017-2018 Reg. Sess.)

[18] As of publication, SB 10 has been put on hold, due to a successful petition campaign spearheaded by Californians Against the Reckless Bail Scheme. Currently, SB 10 will appear as a referendum on the November 2020 ballot.

[19] Pen. Code § 1320.13(b).

[20] *Overland v. Super. Ct. (2005)* at 684 (“The statutory scheme provides various

alternatives for posting bail. A defendant may be released from custody upon (1) execution of a bail bond or undertaking of bail by an admitted surety insurer (Pen. Code, § 1276); (2) deposit by the defendant or any other person of cash in the amount of the bail (§§ 1295, 1296); (3) deposit by the defendant or any other person of bonds of the United States or State of California “of the face value of the cash deposit required” (§ 1298); or (4) provision by the defendant or any other person of equity in real property equal to twice the amount of the cash deposit required (§ 1298).”).

[21] High risk is “categorized as having a significant level of risk of failure to appear in court as required or risk to public safety due to the commission of a new criminal offense while released on the current criminal offense.”

[22] Pen. Code § 1320.10, subd. (e)(1).

[23] See Pen. Code § 1320.7, subds. (b)–(d).

[24] Pen. Code § 1320.10, subd. (e)(6).

[25] Pen. Code § 1320.10, subd. (e)(3).

[26] Michael McGough, *The Fate of California’s Cash Bail Industry Will be Decided on the 2020 Ballot*, The Sacramento Bee (Jan. 17, 2019).

[27] *Id.*