Opinion Analysis: In re Humphrey (S247278)

Overview

On March 25, 2021, the California Supreme Court handed down its long-awaited decision in *In re Humphrey* (S247278). The case presented two key questions concerning bail: whether cash bail is unconstitutional, and how to resolve two apparently conflicting California constitutional provisions concerning bail. The decision answered the first question, and demurred on the second:

- The court held that pretrial detention based solely on a person's inability to pay is unconstitutional. Because liberty is the norm in the criminal justice system, there is a fundamental right to bail, and bail may be denied only in narrow and unusual circumstances. Yet *Humphrey* does not categorically hold money bail to be unconstitutional — so money bail *may* be set, but it must be set at an amount within the defendant's means. This precludes the traditional court practice of relying solely on a county bail schedule to set a fixed bail amount.
- The grant of review included the apparent conflict between the California constitution's two bail provisions: article I, section 12 and article I, section 28. But *Humphrey* declined to expressly address the standards for an order denying bail, leaving open questions about how courts should reconcile those provisions. The court's reasoning does, however, suggest that section 12 alone controls bail denials.

It is now clear that when setting bail, courts must consider the defendant's individual circumstances and financial situation, and that non-financial conditions of release should be favored over financial conditions. To assist judges in setting bail, we propose a three-step process that accounts for how *Humphrey* affects the analysis.

Analysis

There is now a due process right to affordable bail

Humphrey follows a tumultuous period for bail reform in California. In January 2018, the Court of Appeal decided *In re Humphrey* (2018) 19 Cal.App.5th 1006 and held that, before setting the amount of money bail, a court is constitutionally required to consider a defendant's ability to pay. Later in 2018, the California Money Bail Reform Act was enacted, which would have abolished money bail in California — but it was quashed by a referendum in November 2020. The United States Supreme Court has never recognized a right to affordable money bail, and *Humphrey* is the first time the California Supreme Court has done so.

Humphrey primarily relies on *Bearden v. Georgia* (1983) 461 U.S 660, which held that the Fourteenth Amendment barred a state from imprisoning a felony probationer on a probation revocation solely because he was unable to pay his fine and restitution (Bearden had lost his job). The high court held:

> *[I]n revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. . . . If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measures of punishment other than imprisonment. Only if alternate measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay.*[1]

Bearden held that imprisoning an indigent probationer solely for failure to pay a fine violated due process. *Humphrey* extends this principle to money bail, and relies on two important differences between criminal fines and money bail. For money bail, "the accused retains a fundamental constitutional right to liberty" because the arrestee stands innocent, while a probationer like Bearden has already been convicted.[2] That gives the arrestee a strong argument for a fundamental constitutional liberty interest. And "the state's interest in the bail context is not to punish — it is to ensure the defendant appears at court proceedings and to protect the victim, as well as the public, from further harm."[3] That removes a powerful governmental interest weighed in *Bearden* (punishment) from the money bail

context. The result is that if due process bars imprisonment for nonpayment in the probation revocation context, that conclusion is even more compelling in the bail context.

Due process in pretrial detention bars unaffordable bail set by schedule

Several significant consequences follow from *Humphrey*'s recognition of a constitutional right to affordable bail.

The major consequence is that imposing unaffordable bail is now treated as an unconstitutional detention. Previously, when a court imposed a bail schedule amount that a defendant could not afford, the fact that the defendant stayed in custody had no constitutional significance. After *Humphrey*, setting bail beyond a defendant's ability to pay is effectively "the functional equivalent of a pretrial detention order."[4] Consequently, the same evidentiary standard required to justify a pretrial detention order is now required for detention due to unaffordable bail: "clear and convincing evidence that no condition short of detention could suffice."[5] Absent that finding, pretrial detention is a due process violation.

Thus, after *Humphrey*, defendants can be deprived of their constitutional right to bail in two ways:

- An "express detention" occurs when the court denies bail and orders a preventative detention.
- An "effective detention" occurs when the court grants bail, but sets the amount beyond the defendant's ability to pay.

Under *Humphrey*, both are considered pretrial detentions for constitutional purposes. And the clear and convincing standard now applies to both express and effective detentions.

A court now may set bail beyond a defendant's means only on a finding by clear and convincing evidence that the case falls within an article I, section 12 exception, and that detention is the only option to ensure the victim's protection and the defendant's subsequent appearance in court. *Humphrey* also held that pretrial detention "is impermissible unless no less restrictive conditions of release can

adequately vindicate the state's compelling interests."[6] And because pretrial detention now includes effective detention, the same constitutional restrictions that a trial court had to consider under prior law in issuing a pretrial detention order now must be considered to avoid unconstitutionally detaining a defendant by imposing unaffordable bail. This means that a detention order cannot result merely from a defendant's inability to pay — it must be based on the "insufficiency of less restrictive conditions to vindicate compelling government interests: the safety of the victim and the public more generally or the integrity of the criminal proceedings."[7]

The bottom line is that, to avoid an unconstitutional effective detention resulting from imposing unaffordable bail, courts must either release arrestees under appropriate nonfinancial conditions or set bail at an amount the defendant can afford. That creates an apparent paradox for trial judges: if the court had the evidence to make such findings, it could issue an express no-bail detention order in the first place. But even though *Humphrey* does not directly preclude a court from setting bail at more than the defendant can afford, realistically no court would now go through the trouble of determining what bail is affordable for a defendant — and then set bail at an unaffordable amount.

That reality will bar rote reliance on county bail schedules. *Humphrey* specifically criticized uniform bail schedules, preferring instead "a careful, individualized determination of the need to protect public safety."[8] A uniform bail schedule is antithetical to the notion of conducting an individualized assessment, because bail schedules assign amounts based solely on charged offenses, not the defendant's individual circumstances.

***Humphrey* is consistent with other recent expansions of poverty-based constitutional protections to criminal defendants**

Financial status has never been recognized by the U.S. Supreme Court as a suspect classification for equal protection purposes.[9] Nor does current California Supreme Court doctrine clearly recognize wealth as a suspect class.[10] But recently courts have increasingly recognized constitutional protections for impoverished defendants

in the areas of criminal fines and money bail. *Humphrey* reflects the most high-profile development in this recent trend.

Criminal fines recently came under a wealth-based constitutional analysis in *People v. Duenas*, which held that due process under the state and federal constitutions requires the trial court to hold a hearing to determine a defendant's present ability to pay before it imposes restitution fines.[11] The court reasoned that "a state may not inflict punishment on indigent convicted criminal defendants solely on the basis of their poverty," and that the "potentially devastating consequences" of failing to pay criminal assessments on indigent persons "transforms a funding mechanism for the courts into additional punishment for a criminal conviction for those unable to pay."[12] The court reached that conclusion even though the statutes in question do not contain an express ability to pay requirement — and one statute expressly directs courts *not* to consider the defendant's ability to pay.[13]

Humphrey similarly relied on indigency or relative wealth for its constitutional analysis in the money bail context. And the decision noted that other jurisdictions "have similarly concluded that detaining arrestees solely because of their indigency is fundamentally unfair and irreconcilable with constitutional imperatives," citing cases from the federal Fifth and Ninth Circuits, and from Nevada and Washington state.[14] It has long been unclear under California law whether wealth is a suspect classification.[15] These decisions in the criminal procedural rights context may support arguments for wealth as a suspect category in other contexts, and at least suggest that wealth may be a suspect classification under the California constitution when a fundamental right is implicated.

Special procedural problems in applying a right to affordable bail

Bail is different from other benefits conferred on indigent criminal defendants, because it can include an amount decision. Other rights, such as the right to a free transcript of a preliminary hearing, are binary: you either qualify or you don't, and defendants who cannot afford the transcript fee get it for free.[16] There is no process for setting a discounted price that an indigent defendant *could* afford and then

charging that. One is either indigent or not, and if so, the defendant receives the court service for free. That binary view also applies to the fines and fees considered in *Duenas* — those fines cannot be discounted, and if the defendant is unable to pay, the fine is waived.

Bail is much more complicated. To completely waive the payment of money bail based on a defendant's financial situation, when money bail could and should be required, would undercut the purpose of money bail. Thus, under *Humphrey*, the court must determine an amount lower than the standard bail schedule amount that is both large enough to serve as a guarantee for defendant's appearance at trial and yet is financially affordable to the defendant. This is a much more complicated procedure than determining whether a defendant is indigent or not for the purposes of free representation by the public defender, for example.

The practical effect of the new right to affordable bail is that bail-setting goes from being one of the least litigious hearings in the criminal justice process to one that could resemble a mini-trial on the issue of a defendant's financial resources and ability to pay. Given the vast numbers of bail-setting hearings conducted, the added drain on judicial time and resources in implementing the new requirements could significantly impact California's trial courts. The Court of Appeal decision in *Humphrey* frankly acknowledged the likely impact on judicial resources from these new bail hearing requirements, noting that it will be "hard, perhaps impossible, for judicial officers to fully rectify the bail process without greater resources than our trial courts now possess" and that judges may "be compelled to reduce the services courts provide."[17]

After *Humphrey*, article I, section 12 alone should control bail denials

Humphrey did not address the relationship between the California constitution's bail clauses. (For an analysis of this issue, see Article I, Section 12 — Not Section 28 — Governs Bail in California.) But it did suggest where the court stands on the issue:

> *"[A]n 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."*[18]

In the next sentence the court clarifies that any pretrial detention order must comport with "specific and reliable constitutional constraints." This refers to the California constitution's bail clauses (article I, sections 12 and 28(f)(3)). But the court recognizes that "detention prior to trial . . . is the carefully limited exception" that applies only in "narrow" and "unusual circumstances." That description invokes section 12, which permits denying bail in just three enumerated circumstances. The Court of Appeal decision in *Humphrey* also used "narrow" to describe the types of cases in which bail can be denied under section 12.[19] By contrast, section 28 can hardly be described as "narrow," because it "would have rendered bail discretionary in all cases."[20] The identity of language between the two decisions, and the specific use of "narrow" to describe exceptions to bail, is at least consistent with the argument that article I, section 12 governs bail, not section 28. And *Humphrey*'s general framework that "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception" is also more consistent with section 12 than section 28.[21] Taken together, the analysis and framing in *Humphrey* suggest that section 12 alone controls bail denials.

A practical guide to bail inquiries, post-*Humphrey* edition

Following *Humphrey*, in setting bail judges must consider an array of requirements from the California constitution, federal due process, and state statutes. We propose a three-step process (followed in order) that judges should adopt when assessing bail.[22]

1. The court must consider whether the criminal defendant has a constitutional right to bail under article I, section 12 of the California constitution. The text of 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.

2. If the court orders pretrial detention — either by issuing a no-bail order or by setting bail at an amount that the defendant cannot afford — it must conduct a separate inquiry before doing so. It must find by clear and convincing evidence that the case falls within one of article I, section 12's exceptions, and that no other conditions of release would suffice to ensure the victim's protection and the defendant's subsequent appearance in court. To satisfy procedural due process, the decision to detain a defendant must be accompanied by a statement of the reasons for its decision on the record and the court's minutes.
3. If the defendant is entitled to bail under article I, section 12 or the court otherwise decides to grant bail, the court must conduct an individualized assessment of the defendant's circumstances and financial situation to determine appropriate conditions of release. In doing so, the court must consider the factors set out in *Humphrey* (tracking the language of section 28). Release on non-financial conditions is preferred, and the court should impose the least restrictive conditions possible. If financial conditions are imposed, they must be set at an amount that is within the defendant's means as determined at the court hearing. In setting, reducing, or denying bail, the court must focus on the defendant's ability to pay – not the bail schedule. Blind adherence to the county bail schedule is likely unconstitutional. Finally, the court must then review the final bail order to ensure that it complies with due process and equal protection requirements set forth by other authorities including federal law.

The table below summarizes this three-part bail inquiry:

STEP 1: Does the criminal defendant have a constitutional right to bail under article I, section 12? 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: Does the court seek to order an express or effective pretrial detention? Yes, if the court intends to set bail at:

1. no bail; OR

2. an amount beyond the defendant's means.

If so, then the order may only withstand constitutional scrutiny if the court finds by "clear and convincing evidence" that:

• The detention complies with statutory and constitutional requirements (e.g. article I, section 12); and

• "No condition short of detention could suffice."

STEP 3: If bail is granted under section 12, the court must conduct an individualized inquiry to determine an appropriate conditions of release. The court may consider the following factors:

1. the protection of the public;

2. the protection of the victim;

3. the seriousness of the charged offense;

4. the defendant's previous criminal record;

5. the defendant's history of compliance with court orders; and

6. the likelihood that the defendant will appear at future court proceedings.

After assessing the defendant's circumstances, the court must determine appropriate conditions of release in the following order:

• Non-financial conditions of release are preferred. This may include electronic monitoring, regular check-ins with a pretrial case manager, community housing or shelter, and drug and alcohol treatment.

• Financial conditions of release are the last resort. If ordered, they must be set at an amount that is within the defendant's means. The bail amount cannot be based solely on a bail schedule.[23]

Finally, the court must then review the bail order to ensure that it comports with the due process and equal protection requirements set forth by other authorities (state statutes, state constitution, federal constitution). The court's order must be the least restrictive conditions possible to ensure the protection of the victim and the defendant's future appearance in court.[24]

Conclusion

Humphrey unanimously held that it is unconstitutional to detain an arrestee pending

trial unless the government has proven by clear and convincing evidence that pretrial detention is necessary to ensure the victim's safety or the arrestee's appearance in court. The California constitution guarantees a fundamental right to bail, which may be denied only in narrow circumstances. When setting, modifying, or denying bail, judges must conduct an individualized assessment into the defendant's situation to determine appropriate non-financial conditions of release or affordable money bail.

This decision is groundbreaking in that it redefines "pretrial detention" for constitutional purposes as either a no-bail order or setting unaffordable money bail. By doing so, the court follows a recent trend of recognizing the indigent as a class deserving of greater constitutional protections. And while it did not rule on the relationship between the California constitution's bail provisions, *Humphrey* is forceful in its core message: liberty is the norm, and pretrial detention should be limited to the few narrow and unusual circumstances that are permitted by the state constitution.

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1. *Bearden v. Georgia* (1983) at 673. ↑

2. *In re Humphrey* (2021) Cal.5th [S247278] at 14 (citing *United States v. Salerno* (1987) at 750). Page references for *Humphrey* S247278 are to the slip opinion. ↑

3. *Humphrey* at 14, citing Cal. Const., art. I, §§ 12, 28(f)(3); Pen. Code § 1275(a)(1). ↑

4. *Humphrey* at 16. ↑

5. *Humphrey* at 3. ↑
6. *Humphrey* at 17. Those less restrictive conditions include "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." *Humphrey* at 21. ↑
7. *Humphrey* at 3. ↑
8. *Humphrey* at 1–2. ↑
9. *See, e.g., Douglas v. California* (1963) at 361–62 (dis. opn. of Harlan, J.). ↑
10. Carrillo & Chou, California Constitutional Law (West Academic Publishing 2021) at 635–39. ↑
11. *People v. Duenas* (2019). ↑
12. *Id* at 1166–68 ↑
13. *Id*. at 1170. ↑
14. *Humphrey* at 16. ↑
15. Carrillo & Chou at 638–39. ↑
16. *Roberts v. LaVallee* (1967). ↑
17. *In re Humphrey* (2018) at 1049. ↑
18. *Humphrey* at 24. ↑
19. *In re Humphrey* (2018) at 1022. ↑
20. *People v. Standish* (2006) at 798. ↑
21. *Humphrey* at 22. ↑
22. This process has been amended from our original proposal. *See* Cotter,

supra note 18. ↑

23. *Humphrey* at 2. ↑

24. *Humphrey* at 7. ↑