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July 7, 2021

To: Supervisor Hilda L. Solis, Chair
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From: Ricardo D. Garcia
Public Defender

RE: REPORT BACK – IMPLEMENTING THE CALIFORNIA SUPREME COURT'S HUMPHREY DECISION (ITEM #32 April 20, 2021)

On behalf of the Alternate Public Defender, District Attorney, and Public Defender, enclosed please find the Report Back - Implementing The California Supreme Court's *Humphrey* Decision (April 20, 2021, Item # 32)

Should you need additional information or have any questions, please contact us.

RDG:js

c: Fesia Davenport, CEO
Executive Office, BOSReportTracking@bos.lacounty.gov
Justice Deputies
George Gascón, District Attorney
Erika Anzoategui, Alternate Public Defender

REPORT BACK - IMPLEMENTING THE CALIFORNIA SUPREME COURT'S *HUMPHREY* DECISION

On April 20, 2021, the Board of Supervisors (Board) unanimously approved Supervisors Kuehl and Solis's motion responding to the California Supreme Court's recent holding in *In re Kenneth Humphrey*. The purpose of the motion was to create a "collaborative, inclusive, and effective plan to present to the Courts that complies with the *Humphrey* decision in protecting the constitutional rights of accused people, promoting public safety, and reflecting the 'care first, jail last' philosophy adopted by the Board."

The motion instructed the Public Defender, Alternate Public Defender, and District Attorney to:

1. Consult with the Chief Executive Office, County Counsel, Los Angeles City Attorney, Los Angeles City Attorney's Association, Probation Department, Sheriff's Department, Los Angeles Superior Court, California Attorney General, and other pretrial experts;

2. Report back to the Board in 60 days with recommendations for how Los Angeles County justice partners can implement the holding of *Humphrey,* protect the constitutional rights of accused people, and promote public safety; and

3. Present this report to the Los Angeles Superior Court as the County's response to *Humphrey.*

Background

As is true across the United States, a Californian who has been accused but not convicted of a crime can either be released or detained in jail pending trial, subject to applicable rules, statutes, and the Eighth Amendment of the United States Constitution.

The negative effects of pre-trial detention on the outcome of an accused person's case, as well as their mental health, employment, housing, and future risk of recidivism, have been well documented and are beyond dispute.1 Because of these severe

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1 Justice Denied: The Harmful and Lasting Effects of Pretrial Detention By Leon Digard, Senior Research Editor, and Elizabeth Swavola, Program Manager, Vera Institute of Justice (April 2019),

consequences, pre-trial detention, which by definition applies only to presumptively innocent people who have not been convicted of any crime, is unacceptable, and should be avoided whenever safely possible.

California incarcerates a larger percentage of its pre-trial population than most states. [2] While the issue is complex, two factors are readily identifiable as contributing to California's high rate of pre-trial detention: (i) near-exclusive reliance on cash bail rather than non-monetary conditions of release[3]; and (ii) mechanical use of a "bail schedule" setting default bail at an amount five times higher than the national mean.[4][5]

California's money-focused pre-trial detention system has created a pre-trial review system where high bail is routinely set based solely on the charge, rather than an individualized determination of risk and need. Under this process, poverty serves as a proxy for safety and flight risk, with wealthy defendants routinely released while less affluent defendants are routinely detained without meaningful consideration of less-restrictive alternatives. Just as troublingly, reliance on the charge alone effectively turns the presumption of innocence on its head, with defendants who have not been convicted of any crime being held in jail for weeks, months, or years solely because they are: a) poor; and b) accused of committing a crime.

On March 25, 2021, the California Supreme Court made a substantial step towards addressing these flaws when it decided *In re Humphrey* (2021) 11 Ca1.5th 135. Notably, as described below, *Humphrey* largely prohibits the use of cash bail and bail schedules as the primary means of determining who is released and who is imprisoned before trial.

The Humphrey Holding

Humphrey sharply curtails the use of cash bail and limits the use of bail schedules, instead mandating the use of a graduated review process by the courts, with a focus on non-monetary conditions of release. *Humphrey* requires trial courts to do all of the following before ordering pre-trial detention:

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https://www.ver_a.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf [as of May 27, 2021], p. 4.

2 Tafoya, Pretrial Detention and Jail Capacity in California (July 2015), https://www.ppic.org/publication/pretrial-detention-and-jail-capacity-in-california/ [as of Mar. 25, 2021].

3 Cash bail refers to a statutory provision whereby a court agrees to order the defendant's release in exchange for payment of a specified amount of money to the court. Although defendants are theoretically entitled to return of the money if the defendant does not subsequently fail to appear in court, as a practical matter, this is irrelevant. Because bond amounts are typically set far higher than the average defendant can afford, most defendants are forced to pay a bondsman to post the bond for them—and the money paid to the bondsman by the defendant is not returned, even when the defendant is not ultimately charged, makes every court date or is exonerated. Pen. Code § 1269b; CCR § 2081.

4 A bail schedule is a judicially created document laying out the default bail amount for each type of offense. A bail schedule determines the amount of bail set by an arresting agency before a defendant appears in court, and provides a baseline from which a reviewing court will make future bail decisions. Pen. Code § 1269b

5 Tafoya, *ibid.*

(1) Release the accused person *without* conditions unless evidence establishes that he/she is reasonably likely to flee or reasonably likely to pose a risk to public safety if released;

(2) If such a risk is reasonably likely, determine which non-monetary conditions of release are necessary to mitigate that risk, and to then release the accused person on those conditions;

(3) If clear and convincing evidence establishes that non-monetary conditions of release are not sufficient by themselves to address flight/safety risks, to set money bail in an amount no higher than the defendant can afford;

(4) If clear and convincing evidence establishes that setting bail in a higher amount is the *only* means of addressing safety/flight risks, the court may set bail higher than the defendant can afford but must still comply with other statutory and constitutional requirements;

(5) Set forth reasons for the decision on the record.[6]

The implementation of *Humphrey* in Los Angeles County will require significant changes in the way that bail and release decisions are managed, since *Humphrey:*

- *Prevents* the previously common practice of setting bail based on the countywide bail schedule
- *Prohibits* pre-trial detention absent "clear and convincing" evidence that appropriate conditions of release will not mitigate safety/flight risk, and
- *Forbids* the setting of cash bail in an amount the accused person cannot pay, absent clear and convincing evidence that no lesser amount will mitigate safety/flight risk.

Taken together, these changes require courts, attorneys, and the Los Angeles community to abandon wealth-based release policies, to identify means by which justice partners can rapidly assess the needs, risks, and strengths of each individual defendant, and to locate or create a readily accessible resource/services pool from which to create appropriate release plans, whenever possible.

Stakeholder's Obligations

The mandates of *Humphrey,* with its focus on non-cash conditions of release, extend to all justice stakeholders and create changed responsibilities with respect to implementation. The next logical step for justice stakeholders will be to:

- Ensure that all staff and members are aware of *Humphrey's* requirements
- Rapidly assess the strengths, needs, for each accused person.
- Identify or build supportive services to provide "least restrictive" conditions of release in lieu of cash bail.
- Ensure rapid access to supportive services, including mental health treatment and beds, for accused people.
- Calibrate conditions of release in order to avoid over-conditioning released people and thereby defaulting back to mass pre-trial incarceration.

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6 *Humphrey, supra,* 11 Ca1.5th at 246-248.

- Create mechanisms that ensure prompt review of erroneous detention decisions.
- Reconsider the existing countywide bail schedule in light of national norms and utility.
- Reconsider common practices, such as the issuance of "no bail" warrants on minor or technical violations of probation.
- Inform victims of violent crimes of the status of release and connect then to victim services and safety planning.

As directed by the Board and in order to identify the services in those areas where we believe that *Humphrey* implementation is most likely to be required, the lead agencies for this report have convened meetings and spoken with other justice stakeholders, including LA County CEO, Alternatives to Incarceration, Los Angeles Superior Court, Los Angeles City Attorney, Los Angeles City Attorney Association, Probation, Sheriffs Department, California Attorney General, County Counsel, San Francisco District Attorney, San Francisco Pretrial, Santa Clara Pretrial, Santa Clara Public Defender, Center for Court Innovation, Civil Rights Corp., Silicon Valley Debug, The Bail Project, Vera Institute, Justice LA, Human Rights Watch, andiKBi) Dignity and Power Now.

Recommendations

The reporting agencies have identified the following priorities for successful *Humphrey* implementation broken down into two parts. First, the parties address what needs to be done immediately to create a best practices approach to pre-trial and then, this letter tackles immediate implementation of the Humphrey decision.

Best Practices

I. Fund an Independent Pre-Trial Services Division

The authors recommend that this work be housed in a County organizational unit or division focused on pretrial services. Responsibilities of this unit or division shall include contracting with community based organizations to provide services, monitoring the quality of those services, and administrating the budget for such services. In order to support the Board's Care First, Jails Last vision, the authors recommended a move away from the tradition of vesting supervision of services in a law enforcement department, division or office.

We believe that in the implementation of the *Humphrey* decision it is essential that we maintain the presumption of innocence and address the needs of those who are accused of criminal acts. Addressing needs will ensure their appearance for future court proceedings and promote public safety. It is important to do so in an environment which centers building trust and access to services rather than strengthening systems of control in order to monitor behavior.

The division's mission should be to improve outcomes and safely decrease the population of those incarcerated pre-trial by:

(i) coordinating with other departments and agencies in order to access a centralized hub of pre-trial services;
(ii) providing pre-trial case management services that are trauma-informed and use the approach of support over supervision to justice-involved individuals;
(iii) assessing justice involved individuals, using a strengths and needs based assessment to provide pre-trial services as appropriate;
(iv) setting limits on the use of those services (e.g., electronic monitoring) to avoid over-conditioning releases; and
(v) supervising and vetting community-based programming to ensure consistency, accessibility, and quality of treatment.

II. Identify Currently Available Pre-Trial Resources

Humphrey prioritizes the use of non-monetary conditions of release, thereby conditioning release in many instances on the availability of relevant services. Providing rapid assessments and service linkage should be done in an organized, methodical basis countywide, with the purpose of avoiding "zip code" justice, wherein one courthouse has fewer resources at its disposal than another.

Each LA County agency, department, or group who may be able to provide relevant services or resources to some or all justice involved individuals should be directed to provide a list of those services or resources, and to then to report all updates to that list on a quarterly basis to the Director of the Pre-Trial Division.

Relevant services or resources include, but are not limited to:

- two-way text messaging reminders
- transportation
- child/elder care
- food
- shelter
- mental health services
- drug and alcohol services
- medical services
- family services
- benefits sign up assistance
- employment opportunities
- job training
- educational services
- pre-trial monitoring (check-ins, electronic monitoring)
- regional center services
- peer mentors
- case management.

Each list should include: (i) a detailed description of each service; (ii) eligibility criteria; (iii) a description of the procedure needed to implement those services; (iv) the average length of time currently required to connect a person to those services; and (v) and a contact person who can answer questions about those services from justice partner agencies.

All County Departments and agencies should be directed by the Board of Supervisors to submit a resource list and to update it quarterly. This includes but is not limited to: ATI, Department of Mental Health, Office of Diversion and Reentry, Probation Department, Department of Public Social Services, LASD, Los Angeles Homeless Services Authority, Public Defender, Alternate Public Defender, ICDA, Regional Center, Department of Health Services, Military and Veteran's Affairs, Department of Public Health, and Public Guardian.

III. Create a Centralized Resource Database

Los Angeles County should provide the Pre-trial Service Division with staff whose mission is to keep, disseminate, and continuously update a fluid list of resources and services that are available to pre-trial defendants, with daily updates as to availability of services.

Staffs mission should additionally include: (i) a mandate to work with other agencies to shorten wait times for services for justice involved people: (ii) to create an accessible online portal for exclusive use by justice partners seeking pre-trial resources; and (iii) ensure that the portal allows the creation of a "release plan" of services by including a searchable data-base of resources (with online applications and staffed help-desks).

IV. Direct County Agencies to Expedite Pre-Trial Services

To avoid instances in which an otherwise eligible person is detained in jail simply because relevant services take too long to implement, each County Department, Agency, or group should be directed to review their current procedures and timelines for provision of services to justice involved individuals, to report those timelines to the Pre-Trial Director and to work with them to shorten wait times for those services.

V. Provide funding to Contract with CBOs for Specified Pre-Trial Services

Pending the creation of a centralized agency, the County should contract with Community Based Organizations (CBOs) to embed cross-trained service linkage staff in all county courts. Staffs mission should be to assist indigent defense counsel to identify relevant services and create a pre-trial release plan that a bench officer may consider under *Humphrey's* alternative conditions of release requirement. Conditions should not be akin to punishment. They should not restrict an individual's ability to work, maintain support networks, and tend to emergencies as they may arise. CBO's should include groups able to provide or directly and effectively link individuals to the following:

(i) Dedicated treatment beds and services for mentally ill, justice involved individuals, including "high needs" individuals and "hard to place" individuals

(ii) Family Support Services

(iii) Drug and Alcohol Counseling

(iv) Domestic Violence Counseling

(v) Court-embedded mental health clinical and linkage staff

(vi) Law enforcement-dedicated hospital/clinic drop offs for defendants who meet 5150 criteria

(vii) Two-way text reminders sent seven, three, and one day(s) before a scheduled court date.

(viii) Transitional/Permanent Housing

(ix) Identification Cards

(x) Peer Support programs

(xi) If an individual does not have a phone, the Pre-Trial Division will

(xii) determine if there is a safe loved-one they can contact instead or an

(xiii) alternative means to send reminders such as email or postal mail.

(xiv) Child/Elder care

(xv) Assistance with Job Searches and Career Placement

(xvi) Assistance in accessing or reinstating public benefits

Referrals to immigrations attorneys

Transportation: Bus fare, gas, parking fees, bus/train passes, rideshare fees

VI. Fund Staff to Prepare, File Appropriate Release Plans

Early Representation

A substantial problem with current detention practices is that indigent arrestees are never assigned an advocate upon arrest. Instead, they must wait in jail, often for days, before they arrive in court and are given access to counsel, who can then begin the laborious process of creating a release plan for that person.

In contrast, indigent arrestees who are provided with pre-arraignment counsel and given access to supportive services are more likely to be released and have substantially better mental health, employment, recidivism, and case outcomes than those not given such access. Even where early representation does not result in immediate release, pre-arraignment representation gives defense counsel more time to create and present a release plan to the arraignment judge, as well as the

opportunity to capture crucial, time-sensitive evidence that might otherwise be lost.

Early representation models (ERM) have been adopted in Sacramento, San Francisco, Santa Clara, Miami-Dade County, Florida, and Cook County, Illinois. The Los Angeles Public Defender currently operates a limited, unfunded variant of ERM in their Adult and Juvenile Miranda work. These models provide immediate access to counsel upon request of a person detained by law enforcement. The California Policy Lab found that in San Francisco, early representation at the pre-arraignment stage doubled the likelihood of release at arraignment.7

To avoid unnecessary pre-trial detention and the negative effects on individuals and the community that flow from detention, it is therefore recommended that a Pretrial Release Unit be established with the PD, APD and ICDA to provide access pre-arraignment to release services for indigent arrestees. This will require additional funding as lawyers would be required to work variable hours providing services that differ from regular trial function.

Arraignment

Humphrey requires a court to consider alternative conditions of release in lieu of money bail. The court recognized that release decisions have substantial impact on a client's mental and physical well-being, employment, and the resolution of the case. It frequently falls to defense counsel and their staff to assess the detainee, identify appropriate alternative conditions of release, link the detainee to those services, and present a release plan to the court.

The responsibility to plan for release should be shared with the pre-trial agency, and the defense. Investigations take time and a staff of attorneys to direct the investigation, investigators to carry it out, verify and social workers to assist with identifying other needs. The County should therefore fund additional staffing for stakeholders in order to perform service identification and linkage at the arraignment stage. The primary responsibility is shouldered by the defense and the pre-trial agency while the prosecutor is responsible to ensure that the needs of the victim of violent crime are identified and public safety is accomplished. Additional staff for the Bureau of Victim's Services within the DA office would be required to provide a trauma informed Victim Services Representative who would be embedded in the court to reach out to the victim at every intercept point to notify them of the release status of the accused, connect them to trauma informed services and safety planning.

VII. Reform Bail Related Court Procedures

The authors recommend that LA Superior Court consider adopting policies and/or local rules designed to address the requirements of *Humphrey* and expedite review of pre-trial detention decisions.

Relevant policies/rules should potentially include:

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7 See https://www.capoliQylab.org/wp-content/qploads/2018/06/Poliev-Brief-Early-Representation-Alena-Yarmoskv.pclf

(i) setting a local rule/policy mandating a two-day bail review date upon request, instead of the maximum of five days authorized by Penal Code section 1270.2;

(ii) setting a local rule/policy consistent with Penal Code section 859c, clarifying that a bail review hearing must be conducted by a bench officer other than the officer who previously denied release;

(iii) setting a local rule/policy creating a single, dedicated habeas court to review *Humphrey* writs, with an automatically expedited timeline;

(iv) setting a local rule/policy requiring, upon request, the creation of a transcript within two court days of any hearing that results in detention, in order to expedite judicial review.

VIII. Reform Existing Emergency and Non-Emergency Bail Schedules

In broadly prohibiting the use of bail schedules in *Humphrey,* the Supreme Court specifically noted that the median bail amount in California is five times higher than the national mean.[8]

To address the vast discrepancy between national bail amounts and those called for in the current Los Angeles bail schedule, it is recommended that the LA Superior Court:

(i) Maintain the existing **emergency** bail schedule, but address discrepancies relating to the issuance of arrest warrants for defendants who were not previously notified to be in court, and the presence of non-violent "excluded" offenses (e.g., vandalism);

(ii) Consider and adopt a new "general" bail schedule setting bail in an amount no higher than national norms, taking into account socioeconomic data regarding bail affordability for detained individuals, with the input of relevant agencies, including the Los Angeles Public Defender, Alternate Public Defender, and District Attorney.

IX. Reform Bail on Probation/AB 109 Violations

Humphrey does not specifically address the setting of bail for probation violations and/or parole violations. However, the common practice of setting "no bail" for minor or technical violations of probation or AB 109 appears contrary to the spirit of *Humphrey* and threatens to severely undercut it's decarceration effect by causing the pre-adjudication imprisonment of men and women who might otherwise be safely

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8 *Humphrey, supra,* 11 Ca1.5th at 242 ("[E]ven when bail is technically allowed, the amount that must be posted is considerably higher in California, on average, than elsewhere. And not in a way that can plausibly be justified by the state's higher cost of living: 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)".) Citations omitted, emphasis in original.

released into the community.[9]

It is therefore recommended that the LA Superior Court, and County Agencies, including Probation, District Attorney, Public Defender, and Alternate Public Defender, convene a committee to study and make recommendations on local rules and procedures designed to avoid the unnecessary incarceration of defendants accused of minor or technical violations of probation or parole. (If a committee already exists, it is recommended that the aforementioned justice stakeholders be included in those pre-existing committees.)

X. Working Group

It is recommended that a pretrial working group be created that includes the following Departments: CEO, County Counsel, District Attorney, Public Defender, Alternate Public Defender, ICDA, and Los Angeles Superior Court continue to meet to implement the recommendations contained herein. The authors recommend that this core group consult with community-based organizations and other organizations with pretrial expertise and report back to the Board within 60 days. (If this committee already exists it is recommended that the aforementioned justice stakeholders be included in those discussions.)

It is further recommended that the working group study and develop a recommendation for the following oft used pre-trial conditions:

a. GPS/Electronic Monitoring
b. Drug Testing: Mandatory and Non-Mandatory
c. Required In-Person Check Ins
d. Administrative vs. Punitive Responses to Condition Violation

However, to be clear, the working group will study these conditions of release with the goal of true justice reform in mind, which translates to limited use of these conditions moving forward.

XI Data Collection

Data collection is a critical component to successful implementation of the *Humphrey* decision. Other avenues should also be explored. Recently, the CEO/CIO began work collecting data to support pretrial reform. The information will be updated quarterly. It is recommended that the working group be expanded to include the community organizations recommended in this report and that, as part of any agreement, anonymized data collection be required. The data is important to determine if the conditions imposed result in racially disparate outcomes or disparate impacts. The data will include, but are not limited to:

- Results of the Pre-trial pilot known as the Pre-arraignment Pretrial Pilot (PREP)

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9 The Supreme Court's concerns regarding the undesirable impact of unnecessary pre-trial detention and conclusion that most defendants can be safely released pre-adjudication, does not become untrue, for example, simply because the person in question is on probation.

- Number of motions filed by prosecutors for pre-trial detention. (race and gender of those accused that are the subject of the motion)
- Number of pre-trial detention hearings and percentage of overall cases that result in pre-trial detention hearings
- Types of charges filed
- Results of pre-trial detention hearing
- Overall case disposition
- Demographic data including race, age, zip code, gender, language, income, household, number of dependents
- Rates of re-arrest, charges filed and re-conviction.
- Failure to appear
- Outcomes after resolution of cases, including housing stability, employment, educational achievement, etc.

XII Train Relevant Personnel

Each justice stakeholder agency who is likely to be part of the *Humphrey* release process, including, at a minimum, the LA Superior Court, District Attorney, City Attorneys, Public Defender, Alternative Public Defender, and ICDA should provide mandatory training to staff on the requirements of *Humphrey,* its graduated review process, its focus on non-monetary conditions of release, statistical efficacy of the most oft-used conditions (0.R., electronic monitoring, drug/alcohol testing, treatment, text reminders, transportation, child care) with an initial focus on staff who are likely to handle arraignments, bail reviews, or other pre-trial detention decisions.

As subject matter experts on the issue of the constitutional rights of criminally charged persons and as the entities responsible for the zealous advocacy of indigent persons who are ultimately charged in the criminal legal system, the Public Defender, Alternate Public Defender and ICDA are uniquely suited to counsel and train any pretrial services agency which seeks to interview potential clients. As such, this workgroup recommends that the Board direct the pretrial services division and its contractors to work closely with the indigent defense agencies to develop a comprehensive training program for all persons who will interview people arrested for crimes before actual implementation of any business model. Further, it is recommended that the indigent defense agencies receive funding to resource their Training staff to provide this training.

XIII Ability to Pay

We recommend that the pre-trial division conduct an assessment of the ability for the accused to pay a monetary sum if the court finds that a monetary sum is reasonably necessary to protect the public and the victim or to ensure the accused's presence at trial. We further recommend that a work group be convened with the District Attorney, Public Defender, Alternate Public Defender, LA Superior Court and relevant Community Based Organization to determine the appropriate method of determining the accused ability to pay.

1. Ability to pay means present ability to pay, without borrowing money, selling property, obtaining money or taking money from family or securing a bond.

XIV Cost Analysis of Each Project

It is recommended that the DA, Public Defender, Alternate Public Defender, ICDA and ATI work together to conduct a cost analysis of implementation of the recommendations in this report.

Conclusion

The authors are grateful for the opportunity to address this important issue. We appreciate the Board's commitment to ensuring fairness within the system. We hope you find our recommendations useful and look forward to the spirit of *Humphre* being realized for all Angelenos.

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