

# *In re Humphrey*: California high court's invocation of the fourteenth amendment may influence money bail systems across the nation

By Jennifer S. Freel, Esq., Brian L. Howard II, Esq., and Laura K. Muse, Esq., *Vinson & Elkins\**

APRIL 16, 2021

Last week, the Supreme Court of California issued a landmark decision<sup>1</sup> finding that both state and federal constitutional law principles require judges to consider whether an arrestee can actually pay an amount fixed for money bail.

The Court held that California's current bail system is unconstitutional because it does not focus on public safety, a defendant's prior criminal history, or a defendant's ability to pay, but instead focuses on an arbitrary county schedule of appropriate bail for particular crimes.

If the reasoning is adopted by other states, it could fundamentally change how bail is set, which has been criticized for resulting in the unwarranted jailing of criminal defendants based solely on economic status.

## BACKGROUND AND PROCEDURAL HISTORY

Kenneth Humphrey was arrested in 2017 for first degree residential robbery and burglary against an elderly victim, inflicting injury on an elder adult, and misdemeanor theft from an elder adult.<sup>2</sup> Humphrey had a prior criminal history.<sup>3</sup>

Throughout his trial court proceedings, Humphrey sought release on his own recognizance without money bail conditions, citing such facts as his community ties, the remoteness of his prior convictions, the lack of any arrests over the preceding 14 years, his history of complying with court-ordered appearances, and his history of and willingness to undergo substance abuse and mental health treatment.<sup>4</sup>

While the trial court reduced his initial \$600,000 bail to \$350,000, it did not address the public defender's claim that Humphrey was too poor to cover even the reduced amount.<sup>5</sup>

The Court of Appeal granted Humphrey's habeas petition, and, on remand, the trial court did not impose a money bail order, electing instead to impose nonfinancial conditions.<sup>6</sup>

Taking the case up on its own motion,<sup>7</sup> the Supreme Court of California agreed with the Court of Appeal's determination that Humphrey had been entitled to a new bail hearing because the trial court failed to consider his ability to afford bail and, if he could

not, whether less restrictive alternatives could have protected the State's safety and flight risk interests.<sup>8</sup>

This case, the Court itself noted, is a matter of first impression — neither the Supreme Court of California nor the U.S. Supreme Court has before held that a judge "must consider what an arrestee can pay when fixing the amount of money bail."<sup>9</sup>

Failure to consider whether an arrestee can make bail means a court "cannot know" whether it has issued a "functional equivalent of" or *de facto* pretrial detention order.<sup>10</sup>

---

The Court held that California's current bail system is unconstitutional because it does not focus on public safety, a defendant's prior criminal history, or a defendant's ability to pay, but instead focuses on an arbitrary county schedule of appropriate bail for particular crimes.

---

Importantly, the opinion dodges the question of whether the Eighth Amendment, which prohibits excessive bail, should be part of the analysis, insisting that the opinion is about *how* bail is calculated as opposed to *whether* bail is excessive.<sup>11</sup>

## IN RE HUMPHREY TEST

The Court laid out a three-part general framework to assist courts with implementing the new rule:

- (1) **Non-Financial Conditions.** As a threshold matter, if "the record reflects the risk of flight or a risk to public or victim safety, the court should consider whether nonfinancial conditions of release may reasonably protect the public and the victim or reasonably assure the arrestee's presence at trial."<sup>12</sup> Nonfinancial conditions might include electronic monitoring, regular check-ins with a pretrial case manager,



community housing or shelter, stay-away orders, or drug and alcohol testing and treatment.<sup>13</sup>

- (2) **Money Bail The Defendant Can Reasonably Afford to Pay.** “If the court concludes that money bail is reasonably necessary, then the court must consider the individual arrestee’s ability to pay, along with the seriousness of the charged offense and the arrestee’s criminal record, and — unless there is a valid basis for detention — set bail at a level that the arrestee can reasonably afford.”<sup>14</sup>
- (3) **Pretrial Detention Order.** “[I]f the court concludes that public or victim safety, or the arrestee’s appearance in court, cannot be reasonably assured if the arrestee is released, it may detain the arrestee only if it first finds, by *clear and convincing evidence*, that no nonfinancial condition of release can reasonably protect those interests.”<sup>15</sup>

### POTENTIAL IMPACT OF *IN RE HUMPHREY* OUTSIDE OF CALIFORNIA

As of March of last year, three out of five people were sitting in a U.S. jail without having been convicted of a crime.<sup>16</sup>

The money bail system is widely criticized for criminalizing poverty and perpetuating inequities disproportionately impacting communities of color.<sup>17</sup>

As the California Supreme Court noted, pretrial detention can have profound harmful effects, such as an impaired defense or the loss of a job or home.<sup>18</sup>

*In re Humphrey* is based in both state and federal equal protection and substantive due process law. Whether this ruling is appealed to the U.S. Supreme Court or possibly influences other state court decisions remains to be seen.

Either outcome may result in widespread changes affecting how judges determine the amount of, or even whether to set, money bail.

In the interim, the legislative process presents an alternative avenue for reform. Just last month, Illinois became the first state to completely eliminate cash bail payments.<sup>19</sup>

### Notes

<sup>1</sup> <https://bit.ly/3e6nPCe>

<sup>2</sup> *In re Humphrey*, No. S247278, 2021 WL 1134487, at \*2 (Cal. Mar. 25, 2021).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at \*2-3.

<sup>5</sup> *Id.* at \*3.

<sup>6</sup> *Id.* at \*3-4.

<sup>7</sup> *Id.* at \*3 n.2 (“Although Humphrey himself was no longer detained or subject to money bail, we granted review to address important issues that are capable of repetition yet may evade review and to provide guidance for future cases.”) (internal quotations omitted).

<sup>8</sup> *Id.* at \*2.

<sup>9</sup> *Id.* at \*5.

<sup>10</sup> *Id.* at \*7.

<sup>11</sup> *Id.* at \*6, n.4.

<sup>12</sup> *Id.* at \*9.

<sup>13</sup> *Id.* at \*1, \*9.

<sup>14</sup> *Id.* at \*9.

<sup>15</sup> *Id.* (emphasis added).

<sup>16</sup> See Lea Hunter, *What You Need to Know About Ending Cash Bail*, Ctr. for Am. Progress (Mar. 16, 2020), <https://ampr.gs/3dhPOjn>.

<sup>17</sup> See e.g., *id.*

<sup>18</sup> *In re Humphrey*, 2021 WL 1134487, at \*4.

<sup>19</sup> Cheryl Corley, *Illinois Becomes 1st State to Eliminate Cash Bail*, Nat’l Pub. Radio (Feb. 22, 2021), <https://n.pr/3gidqGe>.

*This article was published on Westlaw Today on April 16, 2021.*

\* © 2021 Jennifer S. Freel, Esq., Brian L. Howard II, Esq., and Laura K. Muse, Esq., Vinson & Elkins

## ABOUT THE AUTHORS



**Jennifer S. Freel** (L) is an attorney in the Government Investigations and White-Collar Criminal Defense Practice of **Vinson & Elkins'** Austin, Texas, office. She handles pretrial, trial and appellate matters. A former assistant U.S. attorney in the Austin Division of the Western District of Texas, Freel has trial experience involving narcotics conspiracies, gun smuggling and white-collar crime. She has also defended convictions from across the district as an appellate AUSA. She

can be reached at [jfreel@velaw.com](mailto:jfreel@velaw.com). **Brian L. Howard II** (C) is a senior associate in the Government Investigations and White-Collar Criminal Defense Practice of Vinson & Elkins' Washington, D.C., office. He routinely conducts complex investigations and defends corporate and individual clients in matters related to compliance with the U.S. Foreign Corrupt Practices Act, securities and antitrust laws, procurement fraud, and other criminal laws and regulations. Howard's practice also involves risk mitigation and compliance counseling, including conducting risk assessments, developing and implementing risk management and compliance programs, training relevant stakeholders, and testing preexisting programs for effectiveness. He can be reached at [bhoward@velaw.com](mailto:bhoward@velaw.com). **Laura K. Muse** (R) is an attorney in the firm's Washington, D.C., office. Her principal area of practice is commercial and business litigation. She can be reached at [lmuse@velaw.com](mailto:lmuse@velaw.com). This article was originally published April 05, 2021 on the firm's website. Republished with permission.

**Thomson Reuters** develops and delivers intelligent information and solutions for professionals, connecting and empowering global markets. We enable professionals to make the decisions that matter most, all powered by the world's most trusted news organization.

This publication was created to provide you with accurate and authoritative information concerning the subject matter covered, however it may not necessarily have been prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional. For subscription information, please visit [legalsolutions.thomsonreuters.com](https://legalsolutions.thomsonreuters.com).