1. STATUTORY PROVISIONS GOVERNING BAIL:

Constitutional Bail Provisions: Article I, §12; Article I, §28\*

§12 everyone, even capital offenders, can be released at court’s discretion; detention available only in very narrow set of cases

§28 allows denying bail in any case, and states primary concern is public safety and safety of victim. Public safety is not defined.

\*In People v Standish, the California Supreme Court stated that Article I, §28 did not go into effect. Although Prop 9 “amended” Article I,§28, the argument is that you cannot amend provisions that were never in effect. Standish states that the bail provisions of Article I, §12 and Article I, §28 could not be harmonized, as they were in direct conflict; §12 got more votes than §28, so §28 never became operative.

Penal Code §§ 1268-1319.5

NOTE particularly:

Penal Code §1270.2 – every defendant has an automatic, statutory right to review of the bail decision made at arraignment within 5 calendar days if he is still in custody. This right is mandatory unless waived by the defendant. (See page 144 *In re Humphrey* (2021) 11 Cal.5th 135, 144).

Penal Code §1271: If charge is for any other offense [other than crime punishable by death Penal Code §1270.5] a defendant may be admitted to bail before conviction as a matter of right.

Penal Code §1270: Any person charged with a crime, other than a capital offense, may be released on his own recognizance. Misdemeanants are entitled to OR release unless court makes findings in accordance with 1275 on the record; in such cases the court must set bail or release conditions.

1. PERTINENT CASE LAW:

In re Humphrey (2021) 11 Cal.5th 135

Bail amount must be an individual decision and take into account a defendant’s ability to pay.

In re White (2020) 9 Cal.5th 455

Humphrey cites this case as showing “clear and convincing evidence” to detain. Note that the detention decision in White was AFTER an evidentiary hearing (prelim).

In re York (1995) 9 Cal.4th 1133

Case that first allowed imposition of 4th amendment waivers for pretrial release condition. NOTE that the 9th Circuit addresses York and states that it is doubtful that it would pass constitutional muster after the US Sup. Court decision in US v Knight.

People v. Standish (2006) 38 Cal.4th 858

Case in which Cal. Sups state that Article I, §28 never went into effect and could not be harmonized with Article I, §12

U.S. v. Scott (9th Cir. 2006) 450 F.3d 868

This is the decision that we should be pushing in our motions. Very good analysis re: appropriate bail conditions.

Dant v. Superior Court (1998) 61 Cal.App.4th 380

Addresses timing; every defendant is entitled to a bail decision at arraignment.

I. ISSUES NOT RESOLVED BY *HUMPHREY*

* The interplay between California Constitution, article I, sections 12 and 28(f)(3). But see argument above.
* Whether there is a different standard for the detention of a defendant based solely on flight risk – Humphrey was based on consideration of public safety and flight risk together. (p. 20)
* How “public safety” is defined.
* The level of risk of future nonappearance that justifies detention.
* The elements of procedural due process for determining detention.
* What conditions of release are considered “reasonable.”
* Whether there is an allocated burden of proof in the determination of detention and ability to pay.
* Who is responsible for the cost of conditions imposed by the court.
* Whether the ability to pay includes consideration of the ability to pay a bond premium.
* Whether the court is required to conduct a review of all persons currently in custody to assure bail is set in compliance with Humphrey.
* Whether defendants are entitled to an evidentiary hearing