**MEMORANDUM**

Re: *In re Humphrey*; Clear and Convincing Evidence Standard

The California Supreme Court in *In re Humphrey* held that pretrial detention is constrained by state and federal constitutional equal protection and due process considerations[[1]](#footnote-1) and, as such, “courts must consider an arrestee’s ability to pay alongside the efficacy of less restrictive alternatives when setting bail . . .”[[2]](#footnote-2) The Court held that:

1. the practice of conditioning an arrestee’s liberty on whether they can afford bail is unconstitutional;[[3]](#footnote-3)
2. courts must consider an arrestee’s ability to pay when setting bail;[[4]](#footnote-4) and
3. when making bail determinations, courts must undertake an individualized consideration of relevant factors (seriousness of charged offense, history of compliance with court orders, criminal record, etc.).[[5]](#footnote-5)

The Court also addressed the standard for determining when an arrestee may be held in pretrial custody: when the court has made an individualized determination that “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.”[[6]](#footnote-6) However, the Court does not provide further clarity on what “clear and convincing evidence” means in the context of bail determinations. This memo will explore how the meaning of the clear and convincing evidence standard, how it has been applied, and consider how it should be applied in bail determination hearings when considering police reports.

1. Clear and Convincing Evidence Standard

California Welfare and Institutions Code section 361(c) provides that “A dependent child shall not be taken from the physical custody of his or her parents . . . unless the juvenile court finds clear and convincing evidence . . .”[[7]](#footnote-7) of certain delineated circumstances, such as a “substantial danger to the physical health, safety, protection, or physical well-being of the minor if the minor were returned home . . .”[[8]](#footnote-8) A number of cases have interpreted the meaning of “clear and convincing evidence” in this context. It is a standard that requires “a high probability, such that the evidence is so clear as to leave no substantial doubt.”[[9]](#footnote-9) Clear and convincing evidence must be “sufficiently strong to command the unhesitating assent of every reasonable mind.”[[10]](#footnote-10)

The standard is generally applied to circumstances “‘where particularly important individual interests or rights are at stake,’ such as the termination of parental rights, involuntary commitment, and deportation.”[[11]](#footnote-11) In a conservatorship case exploring the import of the clear and convincing evidence standard of proof, the California Supreme Court characterized it as “demand[ing] a degree of certainty greater than that involved with the preponderance standard, but less than what is required by the standard of proof beyond a reasonable doubt. This intermediate standard ‘requires a finding of high probability.”[[12]](#footnote-12) With these interpretation in tow, it is clear that the use of police reports in bail determination hearings do not rise to the level of “high probability” that the clear and convincing standard of proof requires.

1. Reliance on Police Reports in Bail Determination Hearings Does Not Satisfy the Clear and Convincing Evidence Standard

A police report relied on by counsel as evidence during a bail determination hearing, without more, does not meet the high probability threshold required by the clear and convincing evidence standard. In order to meet the clear and convincing evidence standard, bail determinations should be made pursuant to formal evidentiary hearings.

1. *Admissibility of Police Reports*

As a general rule, police reports are inadmissible under the business records exception: the U.S. Supreme Court has held that regularly conducted business activity for the purpose of producing evidence for use at trial does not fall under the business records exception to the hearsay rule.[[13]](#footnote-13)

The public records exception to the hearsay rule is less straightforward. In addition to being made within the scope of duty and close in time to an act, condition, or event, the California Evidence Code’s official records exception to the hearsay rule requires that the “sources of information and method and time of preparation [of a written record] were such as to indicate its trustworthiness.”[[14]](#footnote-14) In *Imachi v. Department of Motor Vehicles*, the Court held that an officer’s statement falls within the public records exception “to the extent that it reports the officer’s firsthand observations.”[[15]](#footnote-15) In *Gananian v. Zolin*, the Court declined to follow *Imachi*’s narrow conception of the public records exception, finding that an officer’s sworn report that included the personal observations of another officer was admissible as a public employee record.[[16]](#footnote-16) The Court in *Gananian*, relying on *People v. Baeske*, described the trustworthiness requirement as being fulfilled upon “a showing that the written **report** is based upon the observations of public employees who have a *duty* to observe the facts and **report** and record them correctly.”[[17]](#footnote-17) A public employee’s written record that is informed by information obtained from persons who are not public employees generally does not meet the trustworthiness requirement and is inadmissible.[[18]](#footnote-18)

Further, the California Public Records Act exempts from disclosure a large portion of law enforcement records: “Records of complaints to, or investigations conducted by, or records of intelligence information or security procedures of . . . any state or local police agency . . . [and] that portion of those investigative files that reflect the analysis or conclusions of the investigating officer . . .” are not obtainable.[[19]](#footnote-19)

There is also evidence to suggest that police officers not only fabricate reports and in-court testimony but, when they are found to credibly have done so by a judge, they are not subsequently penalized for their behavior by their superiors within law enforcement.[[20]](#footnote-20) In one recent example of misconduct, U.S. District Judge Charles Breyer described the testimony of SFPD officer Nicholas Buckley—which was later contradicted by video footage—as “criminal contempt,” “an epic fantasy,” and a “prolonged, false, and ultimately non-responsive testimony [that] thwarted an effective hearing and wasted the Court’s time.”[[21]](#footnote-21) The Court declined to hold Buckley in criminal contempt, instead transferring transcripts of Buckley’s testimony to the San Francisco Police Department for administrative review and deferring to a government perjury investigation.[[22]](#footnote-22) Federal authorities ultimately closed the perjury investigation without bringing charges and Buckley was returned to patrol duty by the SFPD without punishment for his falsifications.[[23]](#footnote-23) Indeed, a nationwide study of abuse of police authority conducted by the Police Foundation with support from the U.S. Department of Justice, found that a majority of officers (52.4 percent) agree or strongly agree that “it is not unusual for officers to ‘turn a blind eye’ to other officers’ improper conduct” and, further, that “6 in 10 (61 percent) indicated that police officers do not always report even serious criminal violations that involve abuse of authority by fellow officers.”[[24]](#footnote-24) This lack of strong oversight calls into question the incentive for rigorous and accurate reporting practices in law enforcement, particularly when flagrant misrepresentation goes unchecked.

1. *Statements by Counsel*

Unsworn statements made by counsel do not constitute evidence.[[25]](#footnote-25) Evidence is defined as “testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact.”[[26]](#footnote-26) The Evidence Code requires that “[e]very witness before testifying shall take an oath or make an affirmation or declaration . . .”[[27]](#footnote-27) As “testimony” means statements given under oath, statements made by counsel are not evidence.[[28]](#footnote-28) Thus, taken together with the discussion on police reports above, a district attorney’s unsworn statements during a bail determination hearing that are recitations of police reports and not informed by personal knowledge cannot suffice to meet the threshold for clear and convincing evidence. A formal evidentiary hearing is required during bail determinations to thoroughly examine the veracity of the content within police reports and to bring the use of them up to the high standard of clear and convincing evidence of proof.

1. Assuming the Truth of Criminal Charges and the Presumption of Innocence

The Court in *In re Humphrey*, notes that, “[a]long with those primary conditions of victim and public safety, the court must assume the truth of the criminal charges.”[[29]](#footnote-29) The decisions the Court relies in proceeding as such—decisions written in the late nineteenth and early twentieth centuries—merit reconsideration. The first case the Court cites, *Ex Parte Duncan*, simply takes as “the settled rule” the reasoning in a prior decision, *Ex Parte Ryan*, which found that “the presumption of guilt arises against [a] prisoner upon the finding of an indictment against him . . .”[[30]](#footnote-30) The brief opinion in *Ex Parte Duncan* does not explore the issue further. The Court in *Ex Parte Ryan*, an excessive bail case and similarly brief in its elaboration on the topic of presuming the truth of the criminal charges, dealt with circumstances in which little to no evidence had been proffered on behalf of the detained individual before the San Francisco Police Court and which the California Supreme Court, regardless, refused to consider.[[31]](#footnote-31) The extent of the Court’s discussion concerning the presumption of guilt is the following:

Under the circumstances, even in view of the action of the Police Court, I am bound to assume his guilt for the purpose of this proceeding-for certainly I have here no means of determining his innocence-to say nothing of the principle of law that, except for the purpose of a fair and impartial trial before a petit jury, the presumption of guilt arises against the prisoner upon the finding of an indictment against him.[[32]](#footnote-32)

The paucity in discussion as to why presumption of guilt is the settled rule in bail proceedings is alarming. Indeed, the language in *Ex parte Ryan* seems to indicate a situation- and case-specific decision in assuming the guilt of the detained individual (“*Under the circumstances* . . . I am bound to assume his guilt for the purpose of this proceeding . . .”), though the Court goes on to cursorily mention, without citing a prior decision, a “principle of law” that gives rise to the “presumption of guilt” in certain circumstances.[[33]](#footnote-33) *Ex parte Ruef*, the other case *In re Humphrey* cites, similarly relies on *Ex parte Ryan*, as well as *Ex parte Duncan*, in assuming the guilt of the arrestee without further elaboration.[[34]](#footnote-34) The sparseness of judicial reasoning on the issue alone should trigger a reexamination of this unquestioned rule, particularly as it implicates the accused’s “fundamental constitutional right to liberty,”[[35]](#footnote-35) which the Court in *In re Humphrey* aims to protect.

To that end, another long-held principle enshrined within our legal system is the presumption of innocence. The presumption of innocence, while “not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice.[[36]](#footnote-36) In *People v. Troche*, the California Supreme Court characterized it as “the strongest presumption known to law . . . as much a part of our Constitution, both state and national, as if it were written therein in letters burnished in gold.”[[37]](#footnote-37) In a late nineteenth century case, *In re Wong Hane*, the California Supreme Court struck down a Los Angeles ordinance that made “the mere possession of a lottery ticket a misdemeanor” and made it incumbent upon the arrestee to show that their possession was “lawful or innocent.”[[38]](#footnote-38) In declaring the law unconstitutional, the Court held: “If there are any circumstances under which the possession of a lottery ticket may be lawful or innocent, a defendant who is charged with the offense of having such a ticket in his possession is entitled to the presumption of innocence, and cannot be compelled to establish his innocence by affirmative proof. To the extent that the defendant is required to establish his innocence, the provisions of the ordinance violate his constitutional rights.”[[39]](#footnote-39) In this light, the presumption of guilt discussed above is at odds with the presumption of innocence. The practice of presuming an arrestee’s guilt to determine if they should maintain their liberty is violative of detained individuals’ fundamental rights and completely inapposite to our constitutional presumption of innocence.

1. *In re Humphrey* (2021) 11 Cal.5th 135, 276 Cal.Rptr.3d 232, 238, 244. [↑](#footnote-ref-1)
2. *Id.* at 245. [↑](#footnote-ref-2)
3. *Id.* at 237. [↑](#footnote-ref-3)
4. *Id.* at 246. [↑](#footnote-ref-4)
5. *Id.* at 245. [↑](#footnote-ref-5)
6. *Id.* at 248 (emphasis added). [↑](#footnote-ref-6)
7. Welf. & Inst. Code, § 361(c). [↑](#footnote-ref-7)
8. Welf. & Inst. Code, § 361(c)(1). [↑](#footnote-ref-8)
9. *In re Luke M.* (2003) 107 Cal.App.4th 1412, 1426 (citing *In re Jerome D.* (2000) 84 Cal.App.4th 1200, 1205). [↑](#footnote-ref-9)
10. *In re Jerome D.* (2000) 84 Cal.App.4th 1200, 1205.  *See also* *In re Angelia P.* (1981) 28 Cal.3d 908, 919 (“’Clear and convincing’ evidence requires a finding of high probability. This standard is not new. We described such a test, 80 years ago . . . It retains validity today.”). [↑](#footnote-ref-10)
11. *Weiner v. Fleischman* (1991) 54 Cal.3d 476, 487 (quoting *Herman & MacLean v. Huddleston* (1983) 459 U.S. 375, 389-390). *See also* *Santosky v. Kramer* (1982) 455 U.S. 745, 756 (“This Court has mandated an intermediate standard of proof—‘clear and convincing evidence’—when the individual interests at stake in a state proceeding are both ‘particularly important’ and ‘more substantial than mere loss of money . . . the Court has deemed this level of certainty necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with ‘a significant deprivation of liberty’ or ‘stigma.’”) (quoting *Addington v. Texas* (1979) 441 U.S. 418, 424-426). [↑](#footnote-ref-11)
12. *Conservatorship of O.B.*(2020) 9 Cal.5th 989, 989 (quoting *In re Angelia P.* (1981) 28 Cal.3d 908, 919). [↑](#footnote-ref-12)
13. *People v. McVey* (2018) 24 Cal.App.5th 405, 415*; Melendez-Diaz v. Massachusetts* (2009) 537 U.S. 305, 321. [↑](#footnote-ref-13)
14. Cal. Evid. Code, § 1280 (West 2021). [↑](#footnote-ref-14)
15. *Imachi v. Department of Motor Vehicles* (1992) 2 Cal.App.4th 809, 817. [↑](#footnote-ref-15)
16. *Gananian v. Zolin* (1995) 33 Cal.App.4th 634, 639. [↑](#footnote-ref-16)
17. *Gananian*, *supra* note 15 at 650 (bold and italics in original) (quoting *People v. Baeske* (1976) 58 Cal.App.3d 775, 780). [↑](#footnote-ref-17)
18. *People v. Baeske* (1976) 58 Cal.App.3d 775, 780 [↑](#footnote-ref-18)
19. Cal. Gov’t. Code, § 6254(f) (West 2021).  *See also* 65 Ops.Cal.Atty.Gen. 563, (1982) (“We conclude that records of arrest as well as records of complaints are exempt from disclosure under section 6254(f).”). [↑](#footnote-ref-19)
20. Michael Barbra, *Federal judge: SF police officer’s testimony was ‘pure fiction,’* S.F. Examiner (May 18, 2021), https://www.sfexaminer.com/news/federal-judge-sf-police-officers-testimony-was-pure-fiction/; *USA v. Simpson*, Order re Buckley Test. (May 18, 2021), https://assets.documentcloud.org/documents/20744995/judge-breyer-ruling-on-officer-buckley-51821.pdf; Matthew Ormseth & Ben Poston, *Judge dismisses 15 cases involving LAPD officers implicated in gang-framing scandal*, L.A. Times (Dec. 4, 2020), https://www.latimes.com/california/story/2020-12-04/lapd-gang-framing-charges. [↑](#footnote-ref-20)
21. Michael Barbra, *Federal judge: SF police officer’s testimony was ‘pure fiction,’* S.F. Examiner (May 18, 2021), https://www.sfexaminer.com/news/federal-judge-sf-police-officers-testimony-was-pure-fiction/; *USA v. Simpson*, Order re Buckley Test. 8 (May 18, 2021), https://assets.documentcloud.org/documents/20744995/judge-breyer-ruling-on-officer-buckley-51821.pdf [↑](#footnote-ref-21)
22. Michael Barbra, *Federal judge: SF police officer’s testimony was ‘pure fiction,’* S.F. Examiner (May 18, 2021), https://www.sfexaminer.com/news/federal-judge-sf-police-officers-testimony-was-pure-fiction/; *USA v. Simpson*, Order re Buckley Test. 1 (May 18, 2021), https://assets.documentcloud.org/documents/20744995/judge-breyer-ruling-on-officer-buckley-51821.pdf. [↑](#footnote-ref-22)
23. Michael Barbra, *Federal judge: SF police officer’s testimony was ‘pure fiction,’* S.F. Examiner (May 18, 2021), https://www.sfexaminer.com/news/federal-judge-sf-police-officers-testimony-was-pure-fiction/. [↑](#footnote-ref-23)
24. David Weisburd et al., *Police Attitudes Toward Abuse of Authority: Findings From a National Study*, National Institute of Justice, 3-5 (May 2000), https://www.ojp.gov/pdffiles1/nij/181312.pdf [↑](#footnote-ref-24)
25. *People v. Kiney* (2007) 151 Cal.App.4th 807, 815. [↑](#footnote-ref-25)
26. Cal. Evid. Code, § 140. [↑](#footnote-ref-26)
27. Cal. Evid. Code, § 710. [↑](#footnote-ref-27)
28. *County of* *Alameda v. Moore* (1995) 33 Cal.App.4th 1422, 1426. [↑](#footnote-ref-28)
29. *Humphrey*, *supra* note 1 at 245. [↑](#footnote-ref-29)
30. *Ex parte Duncan* (1879) 53 Cal. 410, 411 (quoting *Ex Parte Ryan* (1872) 44 Cal. 555, 558). [↑](#footnote-ref-30)
31. *Ex parte Ryan* (1872) 44 Cal. 555, 558. [↑](#footnote-ref-31)
32. *Id.* [↑](#footnote-ref-32)
33. *Id*. (emphasis added). [↑](#footnote-ref-33)
34. *Ex parte Ruef* (1908) 7 Cal.App 750, 752. In its opinion, the Court discusses the issue of presuming guilt in two sentences and, even then, only to recite the rules from *Ryan* and *Duncan*. [↑](#footnote-ref-34)
35. *Humphrey*, *supra* note 1 at 243. [↑](#footnote-ref-35)
36. *People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1405 (quoting *Estelle v. Williams* (1976) 425 U.S. 501, 503). [↑](#footnote-ref-36)
37. *People v. Troche* (1928) 206 Cal. 35, 62. [↑](#footnote-ref-37)
38. *In re Wong Hane* (1895) 108 Cal. 680, 681. [↑](#footnote-ref-38)
39. *Id*. at 682. [↑](#footnote-ref-39)