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Policy Directive
San Francisco District Attorney's Office
1.1 Pretrial Release Conditions and Detention Policy

I. INTRODUCTION

Requiring money bail to secure pretrial release discriminates against indigent persons, violates due process, and undermines public safety. It is the policy of the District Attorney's Office not to seek money bail.¹ Given the significant deprivation of liberty and requirements of due process for the accused, it is the District Attorney's policy to only seek pretrial detention, consistent with the California Constitution, when necessary to protect public safety and to reasonably ensure the defendant's return to court. Requesting that the court detain a person before a conviction and while the presumption of innocence applies must only be done after all release conditions have been considered and found to be inadequate to protect public safety or to reasonably ensure the defendant's return to court.

II. PRETRIAL RELEASE CONDITIONS

- A. The Assistant District Attorney (ADA) charging the case must decide whether the ADA believes that pretrial release conditions will adequately protect public safety and will reasonably ensure the defendant's return to court.
- B. The charging ADA must seek and consider all available information including, but not limited to: incident reports and investigation chronologies, the Public Safety Assessment administered by the San Francisco Pre-trial Diversion Project, and all available information about a defendant. All sources of information will be considered to make the most informed decision possible within the timeframe allotted by law, including when known, the wishes of the victim consistent with the Victim's Bill of Rights under Marsy's Law as outlined by the California Constitution.

¹ Nominal bail may be set in very limited circumstances (see Section 3, subsection G) and, notwithstanding concerns regarding the constitutionality of bail itself, bail may currently be required by statute in the rare and exceptional circumstances that detention is appropriate in a misdemeanor case. (see Section 4, subsection C).

- C. Pretrial release conditions, if any, will be considered in order from least restrictive (No Conditions) to most restrictive (Electronic Monitoring / Home Detention). Asking the court for release with no conditions will be the initial position considered by the charging ADA. The least restrictive condition or combination of conditions for release must be found to be inadequate to protect public safety and to reasonably ensure the defendant's return to court before considering asking the court for the next least restrictive condition.
- D. Examples of pretrial release conditions in tiers of ascending order from least to most restrictive is appended to this policy. (See Table 1.)
- E. When considering what condition or set of conditions to ask the court to impose, the ADA must assess whether the pretrial release conditions requested are reasonably related to the charges, necessary to protect the public, and can reasonably ensure the defendant's return to court.

III. PRETRIAL DETENTION PROCEDURES

- A. The Assistant District Attorney (ADA) charging the case must obtain the approval of a Managing Attorney before asking the court for pretrial detention.
- B. The request to seek pretrial detention shall be considered only when the facts are evident and clear and convincing evidence shows a substantial likelihood that the defendant's release would lead to the defendant's flight or risk to the victim's or public safety.²
- C. Only after all pretrial release conditions have been thoroughly evaluated and found to be inadequate to protect public safety and to reasonably ensure the defendant's return to court must the ADA consider asking the court to order that the defendant be held in custody before trial.
- D. Without other open cases, warrants, en routes, Parole, Probation, Post Release Community Supervision (PRCS), Mandatory Supervision (MS), or other legal encumbrances, the ADA will consider asking the court to impose pretrial detention at arraignment in:
 - 1. Felony offenses involving acts of violence on another person; or

² The purpose of bail “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. (See Cal. Const., art. I, §§ 12, 28, subd. (f)(3); Pen. Code, § 1275, subd. (a)(1).)” (*In re Humphrey* (2021) 11 Cal.5th 135, 150-151, italics added.) “[F]actors include the *protection of the public as well as the victim*, the seriousness of the charged offense, the arrestee’s previous criminal record and history of compliance with court orders, and the likelihood that the arrestee will appear at future court proceedings.” (*Id.* at 152, italics added; see also *In re Harris* (2021) 71 Cal.App.5th 1085, 1096 [the holding in *Humphrey* applies to all orders of pretrial detention].)

2. Felony offenses when the defendant has threatened another with great bodily harm;
 3. Felony sexual assault offenses on another person; or
 4. Felony cases when public safety requires it based on the facts of the case or when the accused presents a flight risk that cannot be addressed through less restrictive means.
- E. The presumption is against detention at arraignment, but, **after consideration and exclusion of all available lesser restrictive alternatives**, an ADA may consider requesting that the court order that the defendant be detained pretrial in these cases:
1. Felony offenses not involving violent³ conduct but that involve threats of future violence or repeated conduct that poses a risk to public safety (factors: same crime, victim, area).
 - i. The ADA should take into consideration whether the defendant has failed to comply with less restrictive alternatives in *any* open cases, including post-conviction cases in which defendant is being supervised (i.e., probation, mandatory supervision, PRCS, parole).
 2. Likelihood of actual flight from prosecution for the felony offense that cannot be addressed by alternative release conditions.
 - i. The substantial likelihood of the defendant’s flight may include felony holds from other jurisdictions. Release conditions or detention may be considered for the limited purpose of ensuring the defendant is not removed to another jurisdiction.
 - a. Considerations must include, but are not limited to, a comparison of the seriousness of the local charges to the outside jurisdiction charges, uncertainty about when the defendant will be returned, and maintaining joinder of co-defendants.
- F. If approved to ask the court to order that the defendant be detained pretrial, the charging ADA must prepare and file a Motion to Detain and supply supporting evidence⁴ and legal authority to the court.
- G. Temporary detention may be sought when the matter is continued with the defendant in

³ “Violence” here applies as commonly understood and is not limited to legally “violent” offenses as defined in section 667.5, subdivision (c) of the Penal Code.

⁴ Such evidence need not be evidence that would be admissible at trial but may be in the form of a proffer by the ADA. (*In re Harris* (2021) 71 Cal.App.5th 1085, 1097.)

custody, in these circumstances:

1. To determine whether a specific release plan that is not in place or available at the time of arraignment or bench warrant recall will address the public safety and flight concerns. An In-Custody Referral (ICR) may provide an alternative release plan, but an ADA in court may still oppose release if the proposed plan is inadequate;
2. Pending resolution of other open cases, warrants, en routes, holds for Parole or petition, Probation or Motion to Revoke probation, Post Release Community Supervision (PRCS) or Mandatory Supervision (MS), or other legal encumbrances.⁵

IV. COURT

- A. The ADA at arraignment or bench warrant recall must recommend release conditions as appropriate based on the recommendations from the charging ADA, any other available information, and the wishes of the Victim, when known, consistent with the Victim's Bill of Rights under Marsy's Law as outlined by the California Constitution.
- B. If the ADA believes new information not considered by the charging ADA supports a detention, the ADA in court must consult a Managing Attorney or Division Chief to obtain approval for this change in position.
- C. In the truly rare and exceptional circumstance that all less restrictive alternatives to bail or custody have been investigated or exhausted in a misdemeanor case, the Managing Attorney, or Division Chief may approve an ADA's request, under *Humphrey*, to seek an order that the person remain in custody subject to the formulation of an alternative, appropriate release plan.⁶
- D. The initial pretrial detention request made by the ADA at arraignment shall only be reconsidered at subsequent court hearings upon new information or changed circumstances not known when the initial request was made.

1. If alternative release conditions have been exhausted, and the new information or

⁵ Alternatively, if there is a no-bail probation or parole hold and there is a trailing criminal case that does not meet criteria for detention, the District Attorney's Office may also seek nominal bail and appropriate release conditions, without prejudice, for the defendant to obtain custody credits pending resolution of the no-bail hold.

⁶ While the People are concerned about the constitutionality of money bail itself, section 1270 currently requires the setting of money bail for misdemeanors when a court makes findings under section 1275, even under circumstances which may result in a *de facto* detention. (*Humphrey, supra*, 11 Cal.5th at p. 154, fn. 7 [finding that setting unattainable bail is not the same as denial of bail].)

changed circumstances supports seeking detention that was not previously sought, the ADA must consult a Managing Attorney or a Division Chief before making the detention request of the court.

These changed circumstances or new information include:

- i. Repeated unexcused failures to appear in the present case (bench warrants) if these failures show, by clear and convincing evidence, a likelihood of flight from prosecution;
 - ii. Failures to abide by the court's release conditions, if these failures show, by clear and convincing evidence, a likelihood of flight from prosecution;
 - iii. The commission of new offenses that raises public safety concerns, especially if the offenses involve the same or similar crimes, victims, or in the same area where the original crime occurred.
2. New information or changed circumstances may also support not opposing a defendant's request for release or a request to change the level of recommended pretrial condition(s).
- i. After an initial determination to seek detention, the decision to agree to release will be made with the approval of a Managing Attorney.
 - ii. If a case is calendared for the return of an In-Custody Referral (ICR) or release plan, the ADA must decide whether the proposed release plan has adequately addressed any public safety or flight concerns before changing the office's position that the court should order temporary detention to release with conditions.
 - iii. The decision to seek a change in the level of pretrial condition(s) or to not oppose a defendant's request to change the level of pretrial conditions will be made at the discretion of the ADA.
- E. If requested by the victim, the ADA will ask the court to allow the victim(s) the opportunity to be heard on the post-arrest release decision.
- F. The ADA in court will state the District Attorney's position documented in the case file along with a summary of the reasons on the record at the time the court is considering detention or release. The ADA in court must document in the case file the outcome of any detention or release hearing and the court's decision and reasoning regarding detention or release.

V. EXCEPTIONS

If extraordinary circumstances present unusual risks of harm to public safety or victims, an ADA at any stage of the proceedings may deviate from the policies enumerated herein with the approval of the Division Chief.

Table 1. PRETRIAL RELEASE CONDITIONS	
LEAST Restrictive Conditions	<ul style="list-style-type: none"> • Own Recognizance Release – No Active Supervision (OR-NAS) <ul style="list-style-type: none"> ○ Court date reminders • Travel restrictions – order to not leave the state, surrender passport • Driving prohibitions or restrictions • Order to abstain from alcohol or other substances • Stay away order • Other
MEDIUM Restrictive Conditions	<ul style="list-style-type: none"> • Own Recognizance Release – Minimum Supervision (OR-MIN/S) <ul style="list-style-type: none"> ○ Court date reminders ○ Phone reporting • Maintain employment, maintain or commence educational program • No weapons condition • Order to surrender weapon(s) to law enforcement • Search condition • Other
MOST Restrictive Conditions	<ul style="list-style-type: none"> • Own Recognizance Release – Assertive Case Management (OR-ACM) <ul style="list-style-type: none"> ○ Court date reminders ○ Phone and in person reporting ○ Out of custody assessments • Electronic monitoring (EM-GPS) • Secure Continuous Remote Alcohol Monitoring (SCRAM) • Home detention (HD) • Home relocation • Mental health treatment • Alcohol abuse treatment • Substance abuse treatment • Drug and alcohol testing • Residential treatment program • Other