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PRE-TRIAL RELEASE AND DETENTION

Ensuring Victim and Public Safety Are Paramount in All Pre-Trial Release Decisions

The California Constitution demands that victim and public safety remain at the forefront of all pre-trial release decisions. Consistent with this constitutional obligation, the San Francisco District Attorney's Office will evaluate every pre-trial release decision on an individualized basis considering victim safety, the protection of the public, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of the defendant's appearance in court. Public safety and the safety of the victim shall be the primary considerations.¹

The law also directs that less restrictive alternatives to pre-trial detention be considered first. Examples of these, in increasing levels of supervision, include own recognizance release, protective orders, electronic monitoring, and home detention. But when clear and convincing evidence shows that those less restrictive alternatives alone or in combination are insufficient to meaningfully protect victim and public safety or to ensure that the defendant appears in court, pre-trial detention may be necessary to protect those compelling government interests.

Pre-trial detention is a carefully limited exception. An order for pre-trial detention can only issue if: (1) the underlying facts of the case are sufficient to support a hypothetical verdict of guilt; (2) clear and convincing evidence shows a substantial likelihood that the defendant, if released, would endanger the victim or public safety or fail to appear as required; and (3) clear and convincing evidence shows that no less restrictive alternative will ensure the compelling government interest(s) at stake.

Where applicable, pre-trial detention may be sought for felony offenses involving:

1. Violence on another person;
2. Sexual assault on another person;
3. A threat of great bodily harm to another person;
4. An unreasonable risk to victim or public safety;
5. Repeated criminal conduct that poses a risk to public safety;
6. Repeated failures to abide by less restrictive alternatives; and
7. Repeated failures to appear in court as required.

(See Cal. Const., art. I, §§ 12, 28.)

No Cash Bail

In misdemeanor cases, a defendant is presumptively eligible for pre-trial release, unless the court finds that release will compromise public safety and will not reasonably assure the

¹ This pre-trial release and detention policy supersedes the pre-trial release and detention policy that was updated on January 1, 2022, both policies are 'no-cash bail' policies with exceptions for misdemeanor cases as set by law.

appearance of the defendant as required. (Pen. Code, §§ 1270, 1275.) Where a misdemeanor defendant's release unreasonably compromises public safety or poses a flight risk, a court *must* set cash bail. (Pen. Code, § 1270.)

It is the policy of the San Francisco District Attorney's Office not to seek cash bail in criminal cases, except in certain misdemeanor cases where the law provides a court with no other choice to protect public safety.

Procedure

Any review for any pre-trial release decision, requires that Assistant District Attorneys (ADAs) first determine whether less restrictive alternatives (from the least to the most restrictive levels) sufficiently protect victim and public safety or ensure that the defendant appears in court under the particular facts and circumstances of the case. If the ADA concludes that those alternatives are inadequate, the ADA must make a further individualized assessment to determine whether detention without bail is the only available option to protect victim and public safety or to ensure that the defendant appears in court.

In those cases, the ADA must then prepare a written motion to detain and provide the court with the underlying reasons, which may be in documentary form or be made by way of a proffer.

The initial post-filing determination of detention shall be made by the ADA handling/reviewing the matter for filing. This ADA may consult with their managing attorney, or higher, if there are questions about the level of supervision that best protects public safety.

Any change in circumstance warranting re-evaluation of the defendant's level of supervision should be discussed with a managing attorney, or higher, before filing a motion to increase or decrease the defendant's supervision level.

When the ADA handling the matter becomes aware of a change in the defendant's circumstances, and exigency does not allow time to confer with a manager, that ADA should make the decision with a focus on public safety (as outlined above) using their best judgement, and then advise their managing attorney of the action taken.

To abide by the constitutional mandate under Marsy's Law, ADAs must, upon request, ask the court to allow any victim to speak at any hearing where a court makes a pre-trial release decision.

Findings Necessary for a Pre-Trial Detention Order

The court must make the following findings in issuing a pre-trial detention order:

1. The facts are evident and presumption great for the qualifying offense;
2. Clear and convincing evidence shows the following:
 - A substantial likelihood of an unmanageable risk to victim or public safety or an unreasonable flight risk;
 - Less restrictive alternatives or any combination are insufficient to protect these compelling interests; and
3. The reasons for denying pretrial release are entered in the court's minutes and set forth on the record.

Pre-Trial Release and Detention Policy - Effective August 24, 2022