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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 in any form is a carefully limited exception to release. 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. An unreasonable flight risk;
6. Repeated criminal conduct that poses a risk to public safety;
7. Repeated failures to abide by less restrictive alternatives; and
8. Repeated failures to appear in court as required.

(See Cal. Const., art. I, §§ 12, 28; *In re Humphrey* (2021) 11 Cal.5th 135; *In re Kowalczyk* (2022) 85 Cal.App.5th 667.)

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 appearance of the defendant as required. (Pen. Code, §§ 1270, 1275.) Where a misdemeanor

¹ This pre-trial release and detention policy supersedes the August 24, 2022 pre-trial release and detention policy (which had been previously updated on January 1, 2022). All policies are 'no-cash bail' policies with necessary exceptions as set by law.

defendant's release unreasonably compromises public safety or poses a flight risk, a court *must* set cash bail. (Pen. Code, § 1270.) For felony offenses that do not involve violence, sexual assault, or threats, but where detention is still necessary to protect victim or public safety or to ensure a defendant's appearance in court and no less restrictive alternatives can reasonably protect those compelling interests, a court must similarly set cash bail. (See *In re Humphrey* (2021) 11 Cal.5th 135; *In re Kowalczyk*, 2022 Cal.App. LEXIS 967.)

It is the policy of the San Francisco District Attorney's Office not to seek cash bail in criminal cases, except in those exceptional circumstances where the law provides a court with no other choice to protect victim or public safety or ensure a defendant's appearance in court. These exceptional circumstances are limited to those cases where the defendant: (1) poses an unreasonable risk to victim or public safety; (2) poses an unreasonable flight risk; (3) has repeatedly engaged in criminal conduct that poses a unreasonable risk to public safety; (4) has repeatedly failed to abide by less restrictive alternatives; or (5) has repeatedly failed to appear in court as required.

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 or public safety or ensure that the defendant appears in court under the particular facts and circumstances of the case.

The initial determination shall be made by the ADA handling/reviewing the matter for filing. If the ADA concludes that less restrictive alternatives are inadequate, the ADA must make a further individualized assessment to determine whether detention is the only available option to protect victim or public safety or to ensure that the defendant appears in court. In those cases where a court may deny bail, 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. In exceptional circumstances and where the law does not allow a court to deny bail to protect victim or public safety or to ensure a defendant's appearance in court, the ADA may seek detention with the approval of their managing attorney, or higher, and must file a written motion.

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 victim and 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 that the person's release would result in great bodily injury to others or that detention is necessary to protect victim or public safety or to ensure a defendant's appearance in court; and

- No less restrictive conditions of release can reasonably 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.

REVISED Pre-Trial Release and Detention Policy - Effective January 18, 2023