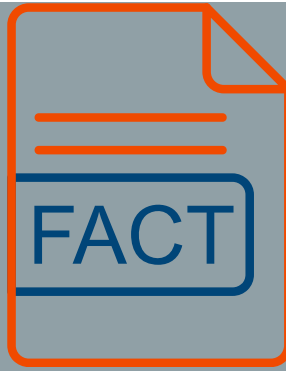


SF BAIL



SHEET

This Fact Sheet is intended to increase the public's understanding of the factors state law requires Superior Court judges to consider when deciding whether to release or to detain a defendant or to set bail prior to trial.

What is Bail?

Bail is money or property that a defendant puts up to guarantee their promise to return for future court dates. If the defendant fails to return to court, the money or property is forfeited.

How Does Bail Work in San Francisco?

Every defendant who enters a not guilty plea is presumed innocent until convicted, either by entering a plea or being found guilty after trial.

This presumption of innocence means that all defendants have a right to release or the setting of affordable bail before trial, subject to limited exceptions. (California Constitution, Article 1, Sections 12, 28.)

Judges must follow the law when setting bail. What are they required to consider and follow when making bail decisions?

The **California Constitution** (California Constitution, Article 1, Sections 12, 28.) requires judges, when setting bail, to consider these factors:

- The seriousness of the charged crime;
- The defendant's previous criminal record;
- Whether the defendant is a risk to the community;
- The safety of the victim; and
- Whether they are likely to appear at the next court date (a "flight risk.")

What About Case Law?

Judges must also follow case law that comes from higher courts. The California Supreme Court issued a decision in 2021 that significantly changed the law concerning a defendant's potential release from jail before the trial. *In re Humphrey* (2021) 11 Cal. 5th 135.

Under the *Humphrey* decision:

- A court is prohibited from keeping a defendant in jail pretrial solely because a defendant cannot afford bail, as such a detention violates the federal and California Constitutions.

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- If the court determines that releasing a defendant prior to trial poses a risk to public or victim safety or flight risk, the court should consider whether nonfinancial conditions of release (also called "less restrictive alternatives") may reasonably protect the public and the victim or reasonably assure the defendant's presence at future court dates. These less restrictive alternatives include electronic monitoring, regular check-ins with a pre-trial case manager, community housing or shelter and drug and/or alcohol treatment.
- If the court determines that setting bail as a condition of release is necessary, it must consider the defendant's ability to post the stated amount of bail, along with the seriousness of the charged offense and the defendant's criminal record.
- Only if less restrictive alternatives would not protect public safety or prevent flight is the court permitted to order the defendant detained before trial or to set bail in an amount the defendant cannot afford. The court must find that *clear and convincing evidence* demonstrates that the defendant's detention is necessary to protect public or victim safety or ensure the defendant's return to court.

In addition, subject to limited exceptions, judges are required by law to release defendants from custody after arraignment where, within 10 court days after arraignment, the prosecution is not ready to produce evidence that the case is supported by probable cause. (California Penal Code Section 859b).

The Role of the Prosecutor and Defense Counsel

In our advocacy system, the defendant is represented by an attorney and, if they cannot afford an attorney, the court appoints either the Office of the Public Defender or an attorney from the court's conflict panel. The defense lawyer advocates for the client's release from custody.

Where the District Attorney seeks to have the court detain the defendant, the assistant district attorney must provide **clear and convincing evidence that no less restrictive alternatives to incarceration exist to protect the public or to ensure defendant's future appearance in court**, as required by the *Humphrey* decision.

CONCLUSION

Setting bail in California requires judges to release defendants before trial on affordable bail or with nonfinancial conditions of release unless the judge concludes, based on clear and convincing evidence, that these alternatives will not reasonably protect the public and the victim, or reasonably assure the defendant's presence at future court dates.

