

BAIL: LEGAL CHECKLIST

Court can either release, or detain if authorized by art. I, § 12. No unaffordable cash bail.

To order detention (CA Cons. art. I, § 12), court must:

- o Find that client is charge-eligible
 - o Felony offense involving acts of violence on another person
 - o Felony sexual assault offense on another person
- o Find that “the facts are evident or the presumption great”
 - o In light of all the evidence, can any reasonable trier of fact find D guilty BARD?
—*In re White*, where the finding was made based on live testimony at a prelim
- o Find a substantial likelihood that release will result in GBH to others based upon clear and convincing evidence
- o OR: charged w/ a felony, facts are evident, has threatened another w/ GBH, and C&C evidence there is a substantial likelihood the person will carry it out if released

IN ADDITION, under *Humphrey* and *Yedinak*,¹ must:

- o Consider whether release conditions will reasonably ensure appearance and safety
- o Can only detain upon a finding by clear and convincing evidence that they do not

If the above conditions are not met, must set attainable release conditions (*Kowalczyk*).

- o If little or no risk of flight or danger, OR. Otherwise, can set reasonable conditions.
 - o In misdemeanor cases: must make a “finding on the record” that OR will compromise public safety or not reasonably assure appearance (PC § 1270)
- o Can only set money bail if find it reasonably necessary by C&C evidence (*Kowalczyk*)
 - o *Could only be to prevent flight, not danger; only forfeited for flight, PC § 1305.*
- o Money bail must be “reasonable.” Cannot be unattainable to defendant or designed to effectuate detention. Arrestee must be able to reasonably afford – but it not need be convenient or easily affordable. (*Kowalczyk*.) **D bears burden of support claim of inability to pay with “reliable evidence,” which may include affirmation under penalty of perjury.** (fn. 25)
- o Statutory factors for courts deciding pretrial release, subject to the above constitutional constraints: protection of public + victim (primary factor), seriousness of offense charged, previous criminal record, probability D will appear in court²

¹ *Yedinak v. Superior Ct.*, 92 Cal. App. 5th 876 (2023)

² Cal. Cons. art. I, § 28(f)(3); PC § 1275

Prosecutor can proffer facts supporting pretrial detention rather than provide actual evidence or testimony, but only if proffer is sufficiently reliable. Reliability factors:

- (1) the specificity and comprehensiveness with which the proffer describes the evidence;
- (2) the extent to which the proffer is supported by other evidence, such as photographs, videos, documents, or testimony;
- (3) whether the proffer attributes its information to identified witnesses with firsthand knowledge;
- (4) whether the government has failed to provide more precise evidence that it could readily have submitted, such as transcripts, recordings, or photographs that the proffer describes;
- (5) whether the defense has, by proffer or otherwise, provided a specific basis for doubting the proffer’s reliability;
- (6) whether the government has failed to produce readily available witnesses;
- (7) whether information was sworn or made under oath

This is a nonexclusive list provided by the CSC in In re Harris (2024) 550 P.3d 116.

For bail pending probation violation hearing (Penal Code § 1203.25):

- o Similar framework:
 - Court “shall” release the person OR unless it finds by C&C evidence that “the particular circumstances of the case require the imposition of an order to provide reasonable protection to the public and reasonable assurance of” appearance (§ 1203.25(a))
 - All release conditions must be the least restrictive necessary (§ 1203.25(a)(3))
 - No unaffordable money bail ((c)(2))
 - No money bail or detention absent C&C evidence of necessity ((c)(1) + (e))
- o Special goodies:
 - **Court cannot deny release in a misdemeanor probation case for a first alleged violation (§ 1203.25(d))**
 - **Bail must always be set at an amount the person can reasonably afford entirely—not a bail bond or a property bond (§ 1203.25(c)(2))**
 - “The court shall not require the use of any algorithm-based risk assessment tool in setting conditions of release.” (§ 1203.25(a)(2))