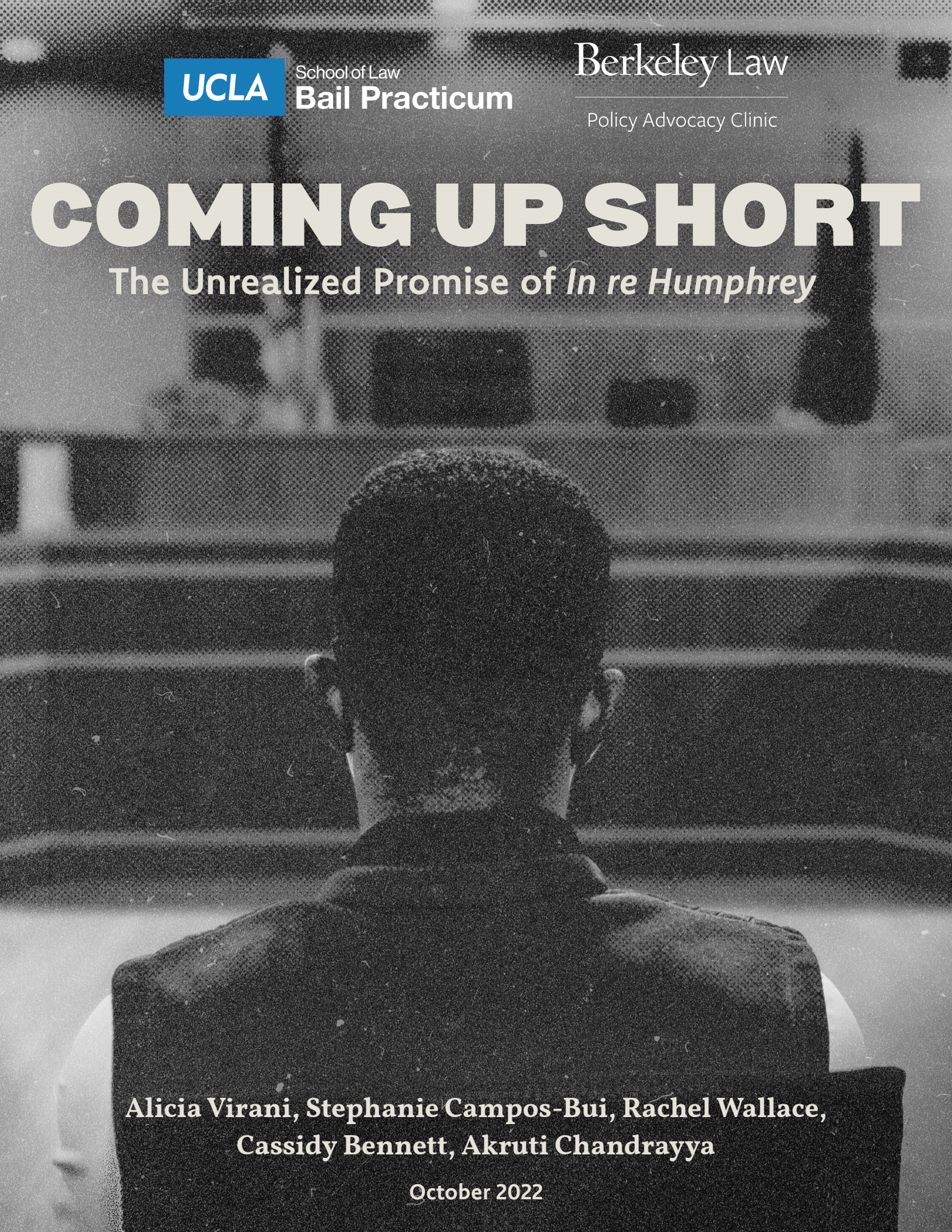
UCLA School of Law Bail Practicum

Berkeley Law
Policy Advocacy Clinic

COMING UP SHORT

The Unrealized Promise of *In re Humphrey*



Alicia Virani, Stephanie Campos-Bui, Rachel Wallace, Cassidy Bennett, Akruti Chandrayya

October 2022

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Finally, we would like to thank Mr. Kenneth Humphrey whose perseverance and advocacy in his case led to this monumental decision that is changing the conversation around pretrial justice.

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Terminology

Arraignment
An arraignment is when a person who has been accused of a crime first appears before a judge. During this appearance, the judge informs the person accused of the charges against them along with their rights. The person may be required to enter their plea (either guilty or not guilty) during this time. This is also the time during which a judge sets the requisite bail amount, or releases the person accused with or without conditions. If the accused individual cannot afford an attorney, the arraignment is where they will be assigned appointed counsel.

California Public Records Act (CPRA)
Under the California Public Records Act, any person can submit a written or verbal request to a State or Local Government agency to seek information or records that are publicly available from the entity.

Electronic/GPS Monitoring (EM)
When bail is being determined, a judge may order the release of a person who has been accused with some conditions in place to ensure they return for their next court hearings. Sometimes these conditions include electronic or GPS monitoring. Typically, EM is in the form of an ankle bracelet placed on the person being released to track their whereabouts.

Failure to Appear (FTA)
A failure to appear results when a person who has been accused fails to appear for a scheduled court hearing.

No Bail Holds
A no bail hold is an order by a judge when considering pretrial release. It effectively means that the person who has been accused will no longer be eligible for any form of release–either via money bail or release with conditions.

Own Recognizance (OR)
A person is granted release on their own recognizance when the judge releases them with no money bail or conditions. The person is simply released and can fight their case outside of custody.

Risk Assessment Tools (RAT)
These tools are often used by pretrial government agencies that submit reports to the judge to determine bail. The judge uses these reports to make a determination of whether a person must be released on money bail, on their own recognizance with or without conditions, or remain detained. These tools used by pretrial agencies purport to use "objective factors" such as a person's past criminal history, FTAs in previous cases, employment history, etc. to determine their risk score.

Writs
When a lower court errs in applying the law at a bail wearing, the attorney for the incarcerated individual may seek review of the bail decision via a writ.

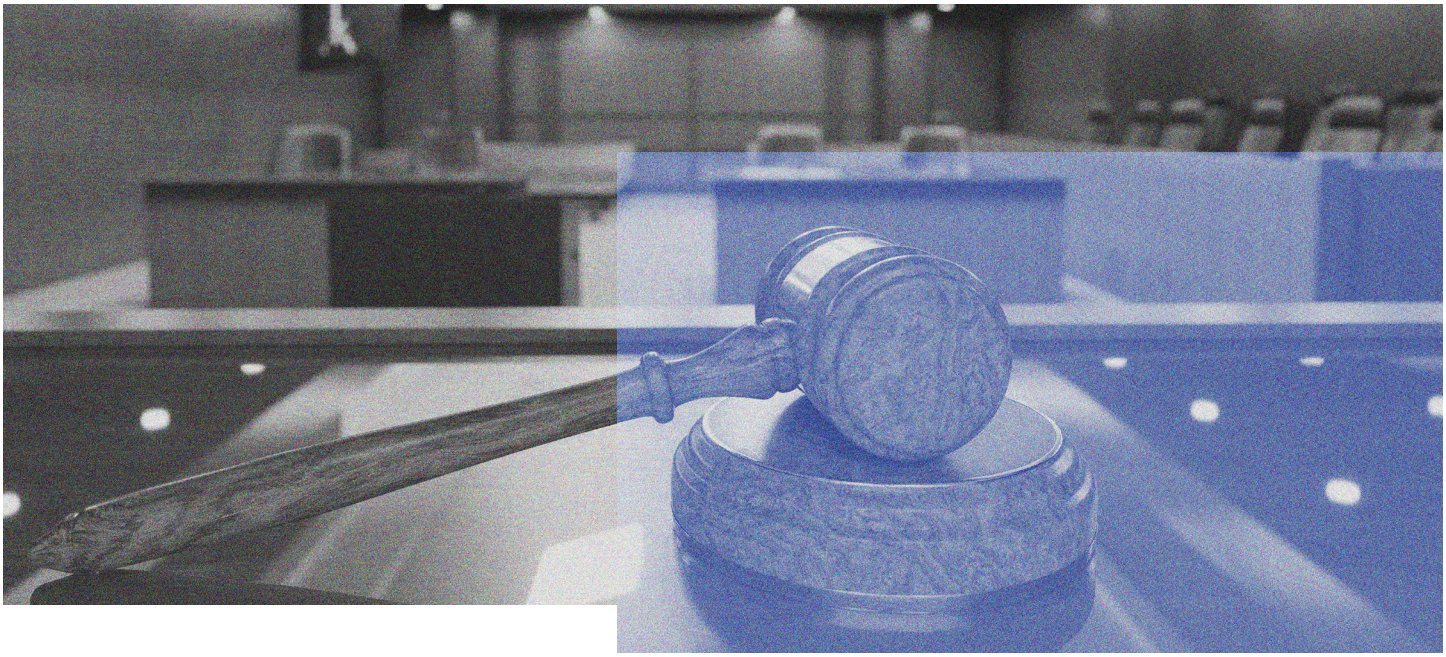
Zero Bail
When a judge sets zero bail, the person who has been accused of a crime can be released without the payment of a bond or money bail. This generally only applies to certain misdemeanors and other lower-level offenses.

Language Note

- **"Criminal legal system"** replaces "criminal justice system" to avoid ascribing outcomes of justice to the current system. We do not use the term "carceral system," as our scope does not include police, surveillance, or other forms of carceral control.

- **"Crime survivor"** replaces "victim" to be consistent with the terminology used by system-impacted organizations such as the Alliance for Safety and Justice and its California affiliate, Crime Survivors for Safety and Justice.

- We make every effort to use **people-first language** throughout this report, e.g., "person who is detained pretrial" versus "detainee" or "accused individual/person who is accused" versus "defendant."



Executive Summary

On March 25, 2021, the California Supreme Court ruled in *In re Humphrey* that setting bail at an amount that a person cannot afford to pay is unconstitutional. Heralded as a landmark and historic decision, attorneys, community members, and other stakeholders predicted that the *Humphrey* decision would lead to more people being released pretrial. The decision was also seen as a racial justice victory, given the vast racial disparities in who is booked into custody and held pretrial without being able to afford their release — primarily Black, brown, and indigenous people.

After a review of numerous qualitative and quantitative datasets, our research team has found that **the promise of *Humphrey*, 18 months after it was decided, remains unmet.** What has emerged through a review of copious data, correspondence, policies, news articles, and a statewide survey of defense attorneys is the following:

1. There is no evidence that *Humphrey* has resulted in a net decrease of the pretrial jail population in California;
2. There is no evidence that *Humphrey* has resulted in a decrease in bail amounts across California; and
3. There is no evidence that *Humphrey* has resulted in a decrease in the average length of pretrial detention in California.

Additionally, the *Humphrey* decision has impacted system actors in the following ways:

4. Many judges interpret *Humphrey* as having increased their authority to order no bail holds;
5. Multiple probation departments are creating or expanding their pretrial services programs as a result of *Humphrey*;
6. Defense attorneys are experiencing many changes and challenges to their practice post-*Humphrey* that may inhibit their ability to effectively advocate for the pretrial release of their clients; and
7. Prosecutors have not significantly changed their policies or practices in ways that conform with the *Humphrey* decision's mandates.

We propose the following recommendations so that California can make significant strides towards ending wealth-based detention and reducing its pretrial population:

Judicial Council

1. The Judicial Council Should Require Judges to Undergo Training and Continuing Education on Pretrial Detention Procedures and Research
2. The Judicial Council Should Develop and Enforce a Statewide Uniform Zero Dollar Bail Schedule
3. The Judicial Council Should Create and Oversee Diverse Local Commissions Charged with Monitoring Pretrial Detention and the Use of Money Bail

The Legislature

1. The Legislature Should Codify a Presumption of Pretrial Release for All Cases
2. The Legislature Should Increase Support for Indigent Defense at the Earliest Stage Possible
3. The Legislature Should Designate Funding for Jurisdictions to Establish Pretrial Services Agencies Outside of Law Enforcement Departments
4. The Legislature Should Require the Judicial Council and Superior Courts to Track and Publish Data on Pretrial Detention and Releases

While Humphrey has certainly had an impact on the way all stakeholders in the criminal legal system engage in bail and pretrial detention procedures, it has had less of an impact on the pretrial detained population writ large. The people most at risk—those detained pretrial—have seen little meaningful change as to how their detention status is considered in court and whether they are released pretrial.

Introduction

Across the country, organizers, impacted people, advocates, and researchers have sounded the alarm about pretrial detention as the largest driver of mass incarceration over the past decade. The issue has taken hold as more evidence emerges around the impact of incarcerating legally innocent people while they await trial. The harms of even short stays in pretrial detention are well documented. People held in pretrial detention have a higher chance of being convicted, and are more likely to plead guilty as compared to those who are able to afford their freedom prior to trial.[1] In California, roughly 80% of jail deaths occur during pretrial detention and deaths by suicide account for one quarter of those deaths.[2] Requiring people to await trial in jail impedes people's ability to maintain employment and avail themselves of economic opportunities, trapping people in a cycle of poverty and repeated criminal system involvement.[3] In the short term, pretrial detention takes an immediate and severe financial toll on people and their families. Many people lose their jobs,[4] housing,[5] parental rights, and/or personal property[6] because of their pretrial detention. Families face both decreased household incomes and increased childcare costs while their loved ones are incarcerated.[7] These burdens fall more heavily on Black, brown, and indigenous people who are more frequently detained pretrial than their white counterparts.[8]

In California, 74% of people incarcerated in jails are unsentenced.[9] As of 2015, the average bail amount was $50,000, five times the national average.[10, 11] Nearly 80% of people arrested in California cannot afford to pay bail.[12] Our current system of money bail not only criminalizes poverty but exacerbates racial bias in the system, draining wealth and resources from Black, brown, and indigenous communities across the state. Across the country, bail amounts for Black and brown people are set twice as high as bail amounts for white people.[13] Further, pretrial detention disproportionately harms Black women, both those who are incarcerated and those who are left to bear the cost while a loved one is incarcerated.[14]

In 2018, the California Legislature attempted to rectify the issues of wealth-based detention by passing into law Senate Bill 10 (SB 10). SB 10 eliminated cash bail and put in its place a mandate for counties to use risk assessment tools (RATs) to assist judicial decisionmakers in making pretrial release decisions. It also required that almost every county in the state rely on its probation department to oversee a pretrial services program.[15] After the governor signed SB 10 into law, it was stayed, and Proposition 25 was placed on the November 2020 ballot as a referendum on SB 10. The voters subsequently struck down SB 10 and thus cash bail remains in California.

On March 25, 2021, the California Supreme Court handed down the *In re Humphrey* decision.[16] In short, the Court ruled that setting bail at an amount that a person cannot afford to pay is unconstitutional. This decision is amongst many other cases, legislative and policy changes, and organizing victories across the country to eliminate the use of cash bail as a tool to incarcerate people pretrial on the basis of wealth.

In Harris County, Texas, pursuant to litigation efforts and a consent decree, secured money bond was eliminated as a requirement for most misdemeanors in 2020. The County adopted a rule that requires most people charged with misdemeanors to be released with an unsecured bond amount of $100.[17] The monitors of the consent decree found that this change has decreased the rate of pretrial detention in Harris County from 61% in 2016 to 43% in 2021 and saved the county $3.6 million in jail costs.[18] Prior to 2019, in almost all misdemeanor cases, the bond amount was $500 or more, but in 2021, bond amounts of $100 or less were observed in nearly 70% of cases.[19] The County also saw an 11% decline in the Black-white gap in pretrial release rates. Most recently, researchers have found that the reforms taken up in Harris County have led to a decline in recidivism, with a 6% reduction in new cases over three years following arrest.[20]

In New York State, the Legislature eliminated money bail and pretrial detention in nearly all misdemeanor and nonviolent felony cases in 2019. In the first few months after implementation, there was a 45% decline in pretrial detention across the state.[21] However, the Legislature passed a series of revisions which effectively increased the number of cases that were once again eligible for money bail. Researchers found that these amendments were responsible for a 7-11% increase "over what the pretrial jail population would otherwise have been…"[22] Even though New York's bail laws required an ability to pay analysis, researchers "did not detect a consistent change in judges' median bail amounts from 2019 to 2020."[23]

Research evaluating the implementation of pretrial reform, including from states such as Texas,[24] New Jersey,[25] New York,[26] and Kentucky,[27] shows that as release rates increase, people are less likely to be convicted or get jail sentences, and there is no subsequent correlation to an increase in crime rates.[28] In fact, some research suggests such pretrial reforms can cause crime to decrease.[29]

In light of the remarkable success of pretrial reforms in these other jurisdictions, this report explores the impact of *Humphrey* across California. In beginning our research, we sought to understand how *Humphrey* was being used in the courts and the impacts it was having on pretrial release decisionmaking. We hypothesized that the *Humphrey* decision would result in a dramatic decrease in people detained pretrial. What our report finds, however, is a much different story. While *Humphrey* has certainly had an impact on the way all stakeholders in the criminal legal system engage in bail and pretrial detention procedures, it has had less of an impact on the pretrial detained population writ large. The people most at risk—those detained pretrial—have seen little meaningful change as to how their detention status is considered in court and whether they are released pretrial.

History of *In re Humphrey*

On May 23, 2017, Kenneth Humphrey, a Black 63-year-old retired shipyard laborer and lifelong San Francisco resident, allegedly followed 79-year-old Elmer J. into his apartment, told him to get on the bed, and threatened to put a pillowcase over his head. Mr. Humphrey allegedly threw Elmer J.'s phone on the floor, took five dollars and a bottle of cologne, and left. Mr. Humphrey was arrested and charged with first degree robbery, first degree residential burglary, inflicting injury on an elder and dependent adult, and theft from an elder or dependent adult.[30] At Mr. Humphrey's arraignment, he asked to be released on his own recognizance with no financial conditions and a stay-away order from Elmer J. The prosecutor requested bail in the amount of $600,000, as prescribed by the bail schedule, and the trial court ordered bail set in that amount. Mr. Humphrey then filed a motion for a formal bail hearing, "claiming that 'bail, as presently set, is unreasonable and beyond the defendant's means' and 'violates the Eighth Amendment's proscription against excessive bail.'"[31]

At Mr. Humphrey's bail hearing, the court lowered the bail to $350,000 and set the condition that Mr. Humphrey participate in the Golden Gate for Seniors Program on his release—ignoring the fact that Mr. Humphrey still could not pay $350,000, would not get out by the next day, and therefore would be unable to enroll in the program until another empty spot became available. Mr. Humphrey filed a writ of habeas corpus, challenging the court's bail decision.

On January 25, 2018, the California Court of Appeal ruled on the writ, reversed the trial court's decision, and remanded the case so that Mr. Humphrey could have a new bail hearing.[32] The court held that:

1. The failure to make findings and inquiries regarding a person's financial ability to post bail and less restrictive conditions of release violated due process and equal protection; and
2. The decision to set bail based solely on the bail schedule, rather than an individualized inquiry, violated Mr. Humphrey's due process rights.[33]

On remand, Mr. Humphrey was released on non-monetary conditions, including a stay-away order, electronic monitoring, and participation in a residential substance abuse program.[34]

The California Supreme Court decided to review the Court of Appeal decision on its own motion "to address the constitutionality of money bail as currently used in California as well as the proper role of public and victim safety in making bail determinations."[35] One of the Court's requests for briefing was: "Under what circumstances does the California Constitution permit bail to be denied in noncapital cases? Included is the question of what constitutional provision governs the denial of bail in noncapital cases—article I, section 12, Subdivisions (b) and (c), or article I, section 28, Subdivision (f)(3) of the California Constitution-or, in the alternative, whether these provisions may be reconciled."[36]

The California Supreme Court released their decision affirming the Court of Appeal's ruling on March 25, 2021. Based on equal protection and substantive due process arguments, the court held that:

1. The practice of conditioning pretrial release solely on whether an accused individual can afford bail is unconstitutional;
2. Unless there is a valid basis for detention, a court must set bail at a level that an accused individual can reasonably afford; and
3. An accused individual may not be held in custody pending trial unless the court has made the requisite individualized determination.[37]

However, there was much the California Supreme Court left unsettled. Primarily, even though the Court asked for this issue to be briefed, the Court declined to address the interaction of Article 1 Sections 12 and 28 of the California Constitution[38] and which provision, if any, governs decisions to deny bail in noncapital cases. As will be discussed later in this report, without this clarity, judges have been ordering pretrial detention without bail in cases where bail is a constitutional right. Further, the Supreme Court did not provide any instructions on how the individualized determination should take place–stating that "this is not a case that requires us to lay out comprehensive descriptions of every procedure by which bail determinations must be made. We leave such details to future cases."[39]

Cases have arisen since the *Humphrey* decision that will provide additional guidance for courts engaging in bail hearings. In *In re Harris,* the California Supreme Court will review what evidence a trial court can consider at a

bail hearing when evaluating whether an individual meets the standard for preventive detention without bail.[40] In *In re Kowalczyk,* the California Supreme Court issued a grant and transfer to the Court of Appeal instructing them to issue a decision on which constitutional provision—Article 1 Section 12 or Section 28—governs the denial of bail and whether the two provisions can be reconciled. The Court specifically asked for additional briefing from the parties, inviting the Attorney General to weigh in as amicus curiae, on this question.

When *Humphrey* was decided, it was heralded as a landmark and historic decision,[41] and a victory for those fighting to ensure that people are not treated differently in the criminal legal system based on wealth. The Los Angeles Times stated, "Thursday's ruling is likely to lead to many more people being released without bail before they go to trial."[42] Unfortunately, as this report will illuminate, this has not been the case, and the *Humphrey* ruling has led to some unintended consequences.

Methodology

To understand the effects of *In re Humphrey* on accused people across the state, we analyzed publicly available data and information submitted directly to the research team.

The sources for this research include:

- **Publicly Available Data from the Board of State and Community Corrections (BSCC)**[43]
- **California Public Records Act (CPRA) Requests** – We submitted requests pursuant to the California Public Records Act to Probation departments, Sheriff departments, District Attorney offices, and Superior Courts in all 58 counties, as well as to the California Judicial Council, requesting data on pretrial release outcomes, internal policies, and correspondence related to the *Humphrey* decision.[44]
- **Defense Attorney Survey** – We sent a survey to defense attorneys statewide through the California Public Defender Association and outreach to individual public defender offices. The survey yielded 251 defense attorney responses across 50 counties.[45] The survey was sent in two waves, the first from September-November 2021 and the second from March-April 2022.[46]
- **District Attorney Survey** – We asked for permission to send a survey to district attorneys statewide through the California District Attorney Association and conducted outreach to individual district attorney offices.[47] The survey yielded one response from a district attorney in one county.
- **Public Defender Roundtables** – We hosted two conversations with public defender's offices, with a total of 14 participants from 11 counties.
- **News Articles** – We scanned news media for any articles about the *Humphrey* decision and its implementation.
- **Writs** – We reviewed writs available through legal search engines such as Westlaw and LexisNexis, as well as received writs from defense attorneys across the state for analysis.

Still, we can assume that the *Humphrey* decision and its unintended consequences has the greatest implications for California's Black, brown, and indigenous communities.

Limitations

Our ability to understand the direct impact of *Humphrey* was limited by various factors. First, most system actors across the state do not consistently track data on pretrial releases and decision-making. Second, over the last few years, the Legislature has advanced various reforms, including the development of pretrial pilot programs in select counties. Third, the California Supreme Court released the *Humphrey* decision in March 2021, during the COVID-19 pandemic and when many courts had already instituted emergency zero-dollar bail policies. Such limitations pose challenges to fully understanding the impact of *Humphrey* and are discussed in turn.

Data Limitations

Data in California about the pretrial custodial population is difficult to come by. Even after our extensive CPRA requests to all stakeholders, it became clear to our research team that there is no singular entity in each county tasked with leading the charge on comprehensive data collection. In particular, information about the outcomes after someone is booked into custody (i.e., whether they remain in pretrial detention, are released, or post bail) is widely unavailable.

We used different timeframes to analyze *Humphrey*'s effects in different sections based on the data available. For example, the BSCC data was more compatible to a comparison across quarters, whereas local data often made sense to analyze according to the *Humphrey* decision points in 2018 and 2021. Because this report is not meant to draw causal conclusions, we did not standardize these timeframes. Should more comprehensive data be provided in the future, researchers may be able to do more advanced statistical analysis to draw causal conclusions.

Finally, while bail practices disproportionately impact Black, brown, and indigenous communities—who are overrepresented at every stage of the criminal legal system, including pretrial incarceration—we did not receive the demographic data needed to conduct a racial and ethnic analysis for this project, despite asking for such data in our records requests. Still, we can assume that the *Humphrey* decision and its unintended consequences has the greatest implications for California's Black, brown, and indigenous communities.

A. Local

Of the stakeholders to whom we sent CPRA requests, courts across the state provided our team with the least comprehensive data. This is curious since they are the only system actor that would have the ability to track every single person who has a criminal case filed against them. When courts did send data, often the data fields appeared as though they had been manually entered as opposed to being given a standardized drop-down menu of outcomes to choose from, making them difficult to analyze and interpret. Data fields were often missing information—sometimes entire months of information was left out—or the entries were vague. For example, one court had an option of indicating whether no bail was ordered, but upon further analysis, the classification was sometimes used to indicate a no bail hold and other times to indicate that $0 bail was ordered, and the person was released. Some courts provided data on the number of arraignments, but without release outcomes or any demographic information.

Some probation departments maintained relatively good data on pretrial release outcomes, but generally their data did not include everyone booked into pretrial custody. They instead only had data on the subset of people they assessed for pretrial services, or only had data on those who were released to probation pretrial.

Most district attorney offices reported having no responsive records. Some responded with the number of arraignments the office appeared on but did not have data on the outcomes of such hearings. Several offices provided records which included officewide policies and trainings on *Humphrey*.

Sheriff's departments provided the most comprehensive data. However, there were similar issues with the court data in that data entries were often not standardized, and data fields were frequently missing data. Additionally, some sheriff's department data were unclear about whether it reflected pre-arraignment release decisions, or if the dataset was later updated after an individual's arraignment.

B. State

The Judicial Council produces regular reports using statewide data,[48] but these reports do not provide data on releases. The Judicial Council has also requested numerous data fields from counties with pretrial pilots (these pilots are described below); however, the data do not include a request for countywide data on release and detention decisions. They do request release information from probation and jail systems in each pilot county.[49] However, given the issues with data listed above, this may not account for all individuals in each county and their release decisions.

The BSCC maintains data and produces reports on the pretrial custodial population at the state and county levels.[50] This information is useful to researchers but does not include information about release decisions and other factors of interest. Further, the way that the BSCC reports on the pretrial population is to identify who is unsentenced, or non-sentenced. The unsentenced population can include people who have been sentenced on multiple cases already, but still have one case that is pretrial. While these people are part of the pretrial population, they are also serving a sentence on other cases, which makes them a slightly distinct population from those who are solely in custody pretrial. The BSCC data does not allow researchers to separate out these groups.

Policy Interventions

In addition to the sparse landscape of data that makes it difficult to analyze the impact of the *Humphrey* decision, several policy decisions in 2020 changed the state's approach to pretrial detention. For example, in 2020, the California Judicial Council funded pretrial pilot programs in sixteen counties across the state.[51] These pilot programs were a result of a budget allocation of $75 million to the California Judicial Council to "fund

the implementation, operation, and evaluation of programs or efforts in at least 10 courts related to pretrial decision-making."[52] The state Budget Act of 2019 requires the funding be used to expand own recognizance and monitored release, implementing the "least restrictive interventions and practices necessary to enhance public safety and return to court."[53] These pretrial pilot programs, in theory, were meant to increase supervised pretrial releases in the counties in which they were implemented.

COVID-19

Due to the COVID-19 pandemic, the California Judicial Council issued an emergency zero-dollar bail policy in April 2020.[54] This policy altered the bail schedule across the state by setting bail at zero dollars for most misdemeanors and low-level felonies. The policy was in effect statewide from April through June 2020. Some superior courts then adopted their own zero-dollar bail policies that extended beyond June 2020. In theory, these newly revised bail schedules should have resulted in the release of more people pre-arraignment, as sheriff's departments across the state rely on the bail schedule at the booking stage to determine whether to detain someone or release them with a citation or promise to appear. As a result, it is difficult to ascertain whether any changes in bail amounts occurred in response to *Humphrey* or as a result of revised bail schedules prompted by the COVID-19 crisis.

The issues presented by the data as well as intervening policy decisions and COVID-19 make it difficult to draw a causal link between *Humphrey* and changes that have occurred in pretrial decision-making over the past few years. However, the robust response to the defense attorney survey and the internal correspondence on changes in practice do tell an illuminating story about some key aspects of *Humphrey* implementation.

Findings

In order to assess the implementation of *Humphrey*, we organized our analysis along the three primary components of the California Supreme Court's holding. We sought to evaluate whether there were changes in the number of people being held in pretrial detention, the dollar amounts at which bail is being set, and the length of time people are being held in custody pending trial.

In our review of records and interviews with defense attorneys, we find that:

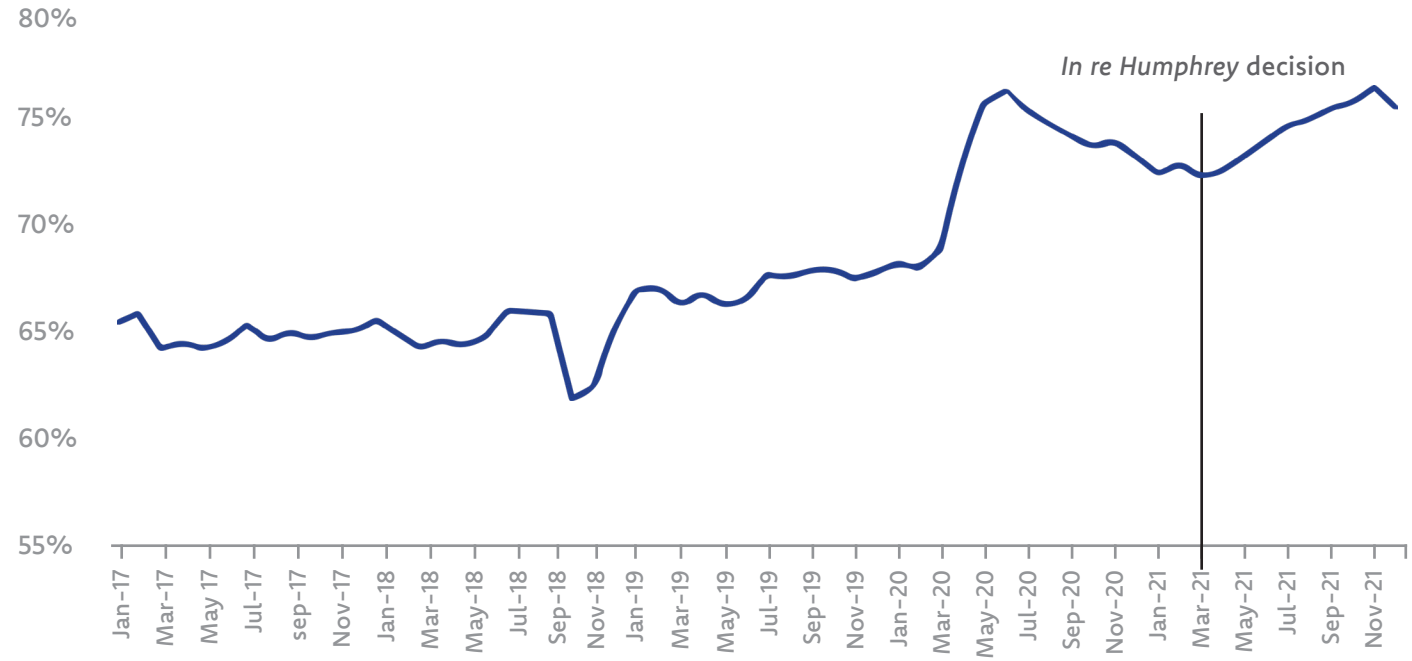
- There is no evidence that *Humphrey* has resulted in a net decrease of the pretrial jail population in California;
- There is no evidence that *Humphrey* has resulted in a decrease in median bail amounts in California; and
- There is no evidence that *Humphrey* has resulted in a decrease in the average length of pretrial detention in California.

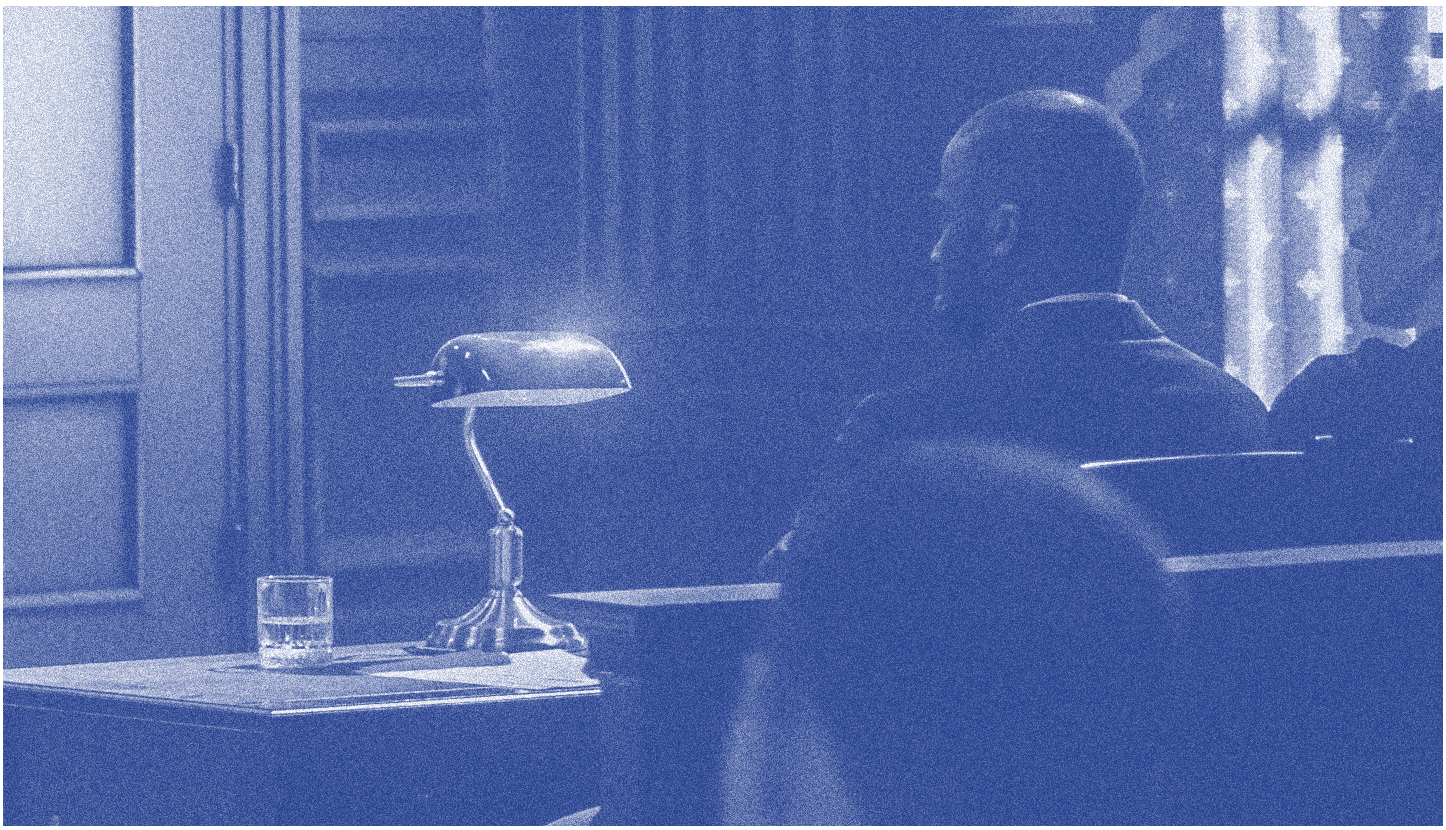
There is no evidence that *Humphrey* has resulted in a net decrease of the pretrial jail population in California

In *Humphrey,* the California Supreme Court held that, "The practice of conditioning pretrial release solely on whether an accused individual can afford bail is unconstitutional."[55] A 2017 report by Human Rights Watch found that nearly 80% of people arrested in California could not afford to pay bail.[56] In theory, by forbidding the conditioning of one's release solely on one's ability to pay, the *Humphrey* decision should have resulted in a decrease in the pretrial jail population.

However, available data suggest that there has been no such impact on the pretrial jail population. As noted in the section on limitations, there are no statewide data on the number of people in pretrial detention in California. The best publicly available data are from the BSCC on the number of sentenced and unsentenced people in jails across the state. Albeit imperfect, the data, as shown in Figure 1 below, depict an overall increase in the percentage of the jail population that is unsentenced after the *Humphrey* decision in March 2021.

Figure 1. Statewide Unsentenced Percentage of Average Daily Jail Population 2017-2021[57]

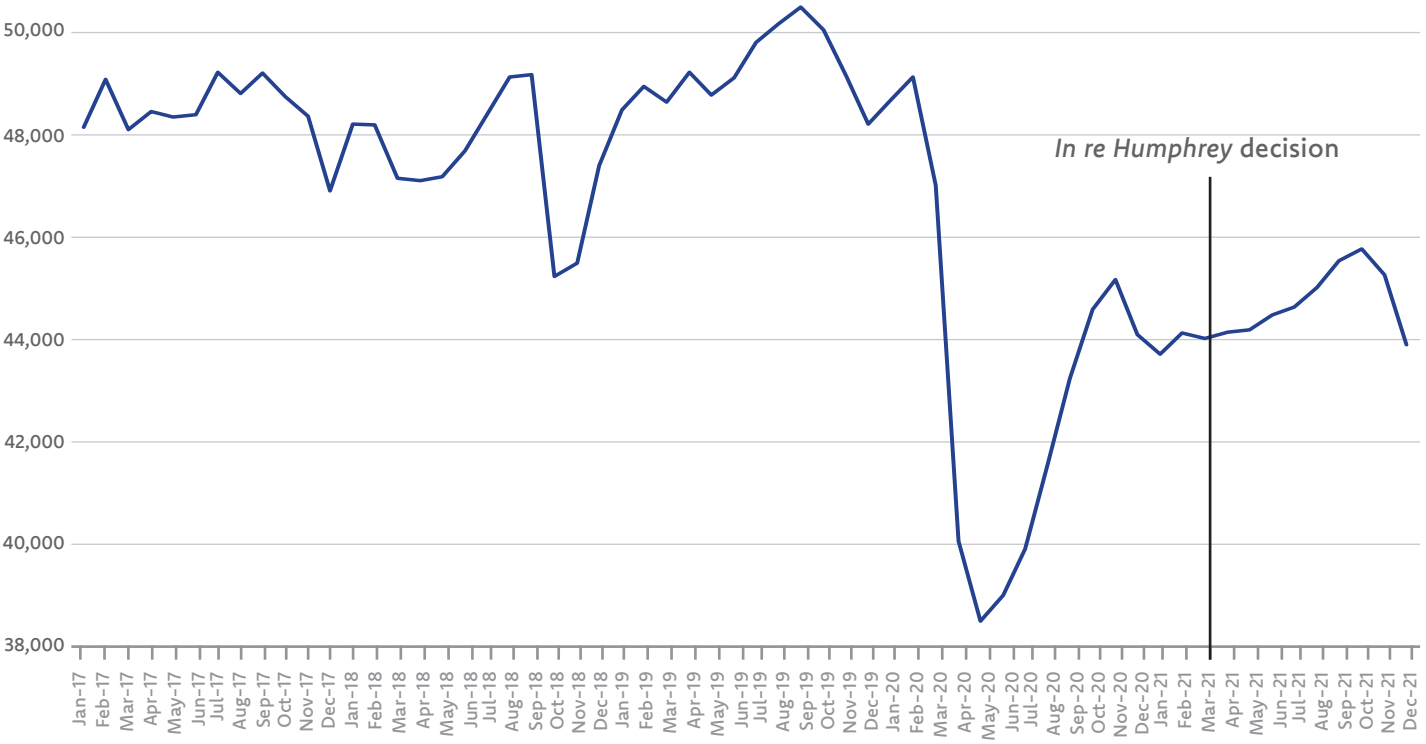




The high percentage of unsentenced people reflected in the BSCC data could be attributed to case backlog as more people may be spending longer terms awaiting trial, particularly during the pandemic which delayed many people's trials. Additionally, in previous years there tends to be an increase in the percentage of the jail population that is unsentenced in the late spring and summer months. Therefore, we are unable to directly attribute such an increase to the *Humphrey* decision.

Still, if *Humphrey* was being implemented as intended, we would expect to see a smaller increase (net effects of *Humphrey* and typical seasonal increases) or even an overall decrease in pretrial population after March 2021. Instead, as shown in Figure 2, we see a marked increase in the number of unsentenced people in the average daily jail population after the *Humphrey* decision.

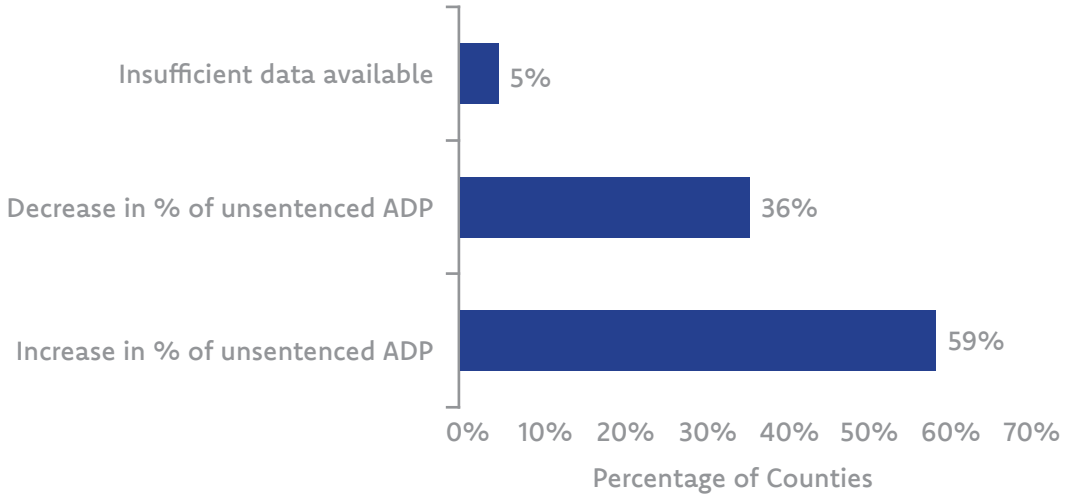
Figure 2. Statewide Unsentenced Average Daily Jail Population 2017–2021[58]



An analysis of bail reform—pre- and post-the 2018 *Humphrey* ruling—in San Francisco County found no major changes in the overall jail population.[59] While the percentage of people detained for the full pretrial period declined, the pretrial jail population remained fairly stable.[60]

We also analyzed the BSCC data to identify potential trends at the individual county level. As seen in Figure 3, 59% (34 counties)[61] of counties saw an increase in the percentage[62] of the jail population that was unsentenced from January through March 2021 (Quarter 1) to April through December 2021 (Quarter 2-Quarter 4).[63] The remaining 36% (21 counties)[64] saw a decrease and 5% (3 counties) did not have sufficient data available.[65] Similar to pretrial detention rates, we also see an increase in the total number of people who are unsentenced from Quarter 1 of 2021 to Quarter 2 through Quarter 4 2021.[66]

Figure 3. Changes in Unsentenced ADP by Percentage of Counties (Q1 2021 vs. Q2–Q4 2021)



Contrary to the BSCC data, survey responses to the defense attorney survey indicated possible decreases in the pretrial jail population. In response to the survey, 43% of defense attorneys stated that judges are releasing people pretrial more frequently than before March 2021, while only 38% said judges are releasing people pretrial at the same rate and 19% said judges are releasing people less frequently than before March 2021. Because the survey results are concentrated in certain counties, however, this is likely a bigger indication of county discrepancies in pretrial release practices post-*Humphrey* than it is a statewide trend.

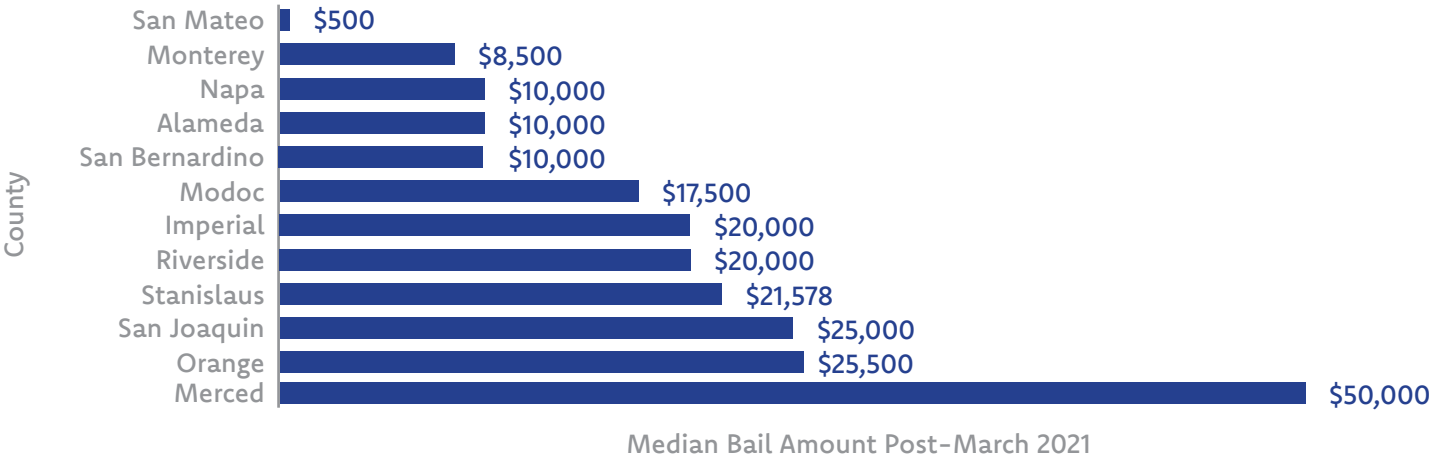
There is no evidence that *Humphrey* has resulted in a decrease in median bail amounts across California

In *Humphrey*, the California Supreme Court held that, "Unless there is a valid basis for detention, a court must set bail at a level that an accused individual can reasonably afford."[67] Knowing that nearly 80% of all Californians arrested cannot afford to post bail,[68] we would therefore expect an overall decrease in bail amounts across the state post-*Humphrey*.

To understand the impact that *Humphrey* has had on bail amounts, we requested data regarding bail amounts set and ordered.[69] We reviewed median bail amounts (misdemeanor and felony) across 12 counties post-*Humphrey* (March 2021). As seen in Figure 4, amounts ranged from a low of $500 in San Mateo County to a high of $50,000 in Merced County.

Varying trends in bail amounts by county are confirmed by defense attorneys, who also expressed concern with the fact that bail continues to be set at amounts that many people cannot afford to pay.

Figure 4. Median Bail Amount (Misdemeanor and Felony) Post-March 2021 by County



We also reviewed data on bail amounts by month from 2017 to August 2021 in three counties (Merced, San Joaquin, and San Mateo)[70] to better understand the potential impact that the *Humphrey* decision has had on bail amounts over time.

A. Merced County

In Merced County, judges have set bail in cases in fewer cases post-*Humphrey*, slightly dropping from in 67.4% of all felony cases prior to the 2018 Court of Appeal decision to in 63.0% of all felony cases after the 2021 California Supreme Court decision. Judges are releasing people on their own recognizance more frequently after *Humphrey*. Prior to 2018, judges ordered that people be released on their own recognizance in 9.8% of felony cases and in 19.5% of felony cases after *Humphrey*.

By comparison, judges are also setting bail in a fewer number of misdemeanor cases after *Humphrey*, decreasing from 31.1% of all cases to 14.1%. However, release on recognizance rates have increased significantly from 61.0% of cases prior to *Humphrey* to 79.7% cases after.

Median bail amounts for felony charges have roughly remained the same over time, starting at a median of $72,500 prior to 2018, jumping to $100,000 between 2018 and 2021, and then dropping back down to $75,000 post-March 2021. Median amounts for misdemeanor charges were $10,000 prior to 2018 and $5,000 after 2018 and through 2021.

Overall, the percentage of people charged with felonies who were able to bail out in Merced County has decreased. Prior to 2018, 5.3% of people were able to post bail. From 2018 to 2021 (including after *Humphrey)*, only 2.8% of people posted bail, which suggests that bail continues to be set at unaffordable amounts.

B. San Joaquin County

In San Joaquin County, judges have set bail in fewer cases post-*Humphrey*, decreasing from a little over 30% prior to 2018 to 18.7% after the 2021 California Supreme Court decision. Some of this may be attributable to a larger number of people being released on their own recognizance, but there was also a notable increase in the number of no bail holds.

Median bail amounts (misdemeanor and felony[71]) have decreased since *Humphrey*, from a median of $50,000 prior to March 2021 to $25,000 after. The percentage of people able to bail out has increased over time. Prior to 2018, 1.2% of all people who had bail set were no longer in custody. After March 2021, 17% of those who had bail set were no longer in custody.

C. San Mateo County

In San Mateo County, since 2017, the median bail amount stayed constant at $7,500. In 2021, it dropped to $250 after the court adopted an emergency bail order that reduced bail to $250 for misdemeanors and felonies (with certain exceptions).[72] In the first two months of 2022, however, the median bail amount went back up to $7,500. Despite the fluctuations in bail amounts, the percentage of people who were able to bail out stayed consistent over time, at 26% prior to 2018 and 27% after March 2021.

Reports from court watching in February 2022 in San Mateo County show that 48.5% of people were ordered to pay bail over $1,000[73] and people's ability to pay were taken into consideration in only 0.9% of all cases observed.[74] One observer noted that a judge expressed concern about his constrained powers for setting no bail and instead set $10 million bail.[75] The use of unaffordable bail to detain people seen as alleged threats to public safety is confirmed by writs filed over the last year. For example, in *In re Shir Eitan,* a judge set bail at $1,000 for an unhoused person with no prior felony convictions, effectively detaining her knowing she could not afford to pay.[76]

Varying trends in bail amounts by county are confirmed by defense attorneys, who also expressed concern with the fact that bail continues to be set at amounts that many people cannot afford to pay.

Most defense attorneys stated that prosecutors' behaviors around requesting increases in bail amounts had not been affected by the *Humphrey* decision. In other words, prosecutors are still requesting an increase in bail at the same rate as prior to *Humphrey*. The majority of respondents (80%) also indicated that judges maintain bail at the same amount when requests for pretrial release are denied rather than decrease the bail amount. In a smaller number of cases, judges are increasing bail or placing a no bail hold. However, in at least half those cases where bail amounts *are* changed, over half (52%) of respondents said that judges reduce bail to an amount that is still unaffordable.

Although *Humphrey* was clear that setting bail beyond a person's ability to pay is not an option, only 17% of all defense attorneys surveyed said that bail–even when reduced–was set at an amount that was affordable for their clients.

- *"Judges are releasing more clients than they did prior to the COVID pandemic, and reducing bail below schedule in far more cases. However, in most cases bail is still being set at an amount clients cannot afford."*—Defense Attorney, Yolo County
- *"Ability to pay is hardly discussed, even with respect to houseless individuals."*—Defense Attorney, Merced County
- Five of the San Joaquin County defense attorneys stated that judges never reduce bail to an affordable amount after a *Humphrey* argument, and the other eight stated that judges reduce bail to an affordable amount only 25% of the time.

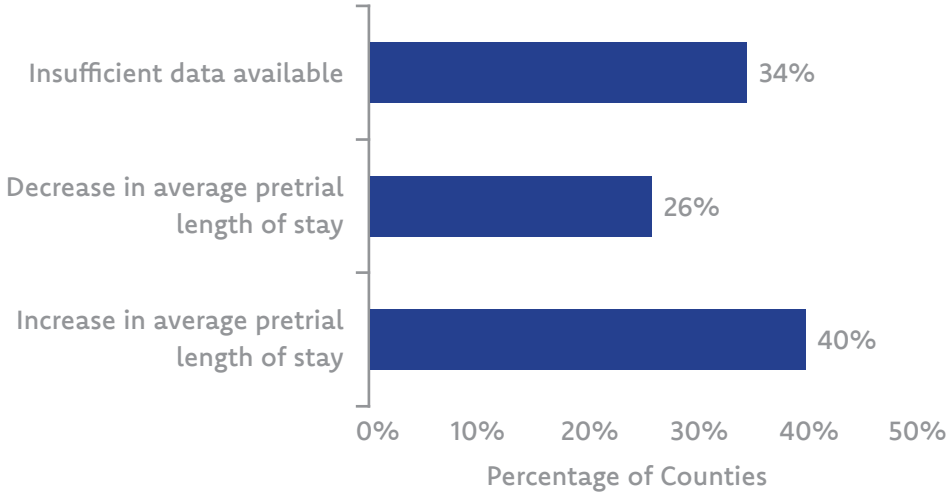
There is no evidence that *Humphrey* has resulted in a decrease in the average length of pretrial detention in California

In *Humphrey*, the California Supreme Court held that, "An accused individual may not be held in custody pending trial unless the court has made the requisite individualized determination."[77] While the explicit goal of *Humphrey* was not to change the average length of pretrial detention statewide, we might expect such a reduction if

judges were making individualized release decisions at arraignment pursuant to the new standards outlined in *Humphrey*. For example, in San Francisco County, the median length of stay following the 2018 *Humphrey* ruling decreased by approximately one week.[78]

The BSCC collects average length of stay information by quarter in each jurisdiction. As illustrated in Figure 5, January through March 2021 (Q1) and April through December 2021 (Q2-Q4), 40% of counties (23 counties) saw an increase in average pretrial length of stay.[79,80] Only 26% of counties (15 counties) saw a decrease in average pretrial length of stay for Q2 through Q4 of 2021 compared to Q1 of 2021.[81] The remaining 34% of counties (20 counties) did not have sufficient data available to conduct this analysis.[82]

Figure 5. Changes in Average Pretrial Length of Stay by Percentage of Counties (Q1 2021 vs. Q2–Q4 2021)



It is noteworthy that we see an overall increase in length of stay in many counties. One possible explanation is that *Humphrey* has led to the jail population consisting of people with more serious charges, cases which often require more preparation and investigation and thus take longer to come to a resolution.

On the other hand, as defense attorneys have reported, the increase may be because it is taking longer to have a robust bail hearing and people are not necessarily being seriously considered for release at arraignment. Responses to the defense attorney survey and discussions from the public defender roundtables indicate that judges are often delaying hearings, thus prolonging pretrial incarceration. One defense attorney from Alameda County said that judges sometimes delay cases by refraining from deciding the bail motion until after the preliminary hearing takes place.

Additionally, an increase in no bail holds means more people cannot bail out and thus may remain incarcerated for longer periods of time while awaiting the resolution of their case.

Increased lengths of stay can often exacerbate the already coercive nature of pretrial detention by encouraging people incarcerated pretrial to plead guilty in order to be released from custody. This is one potential negative outcome of an increase in average length of stay, in addition to the compounded impacts that pretrial detention has on the mental, physical, and economic wellbeing of incarcerated people and their families.

Impact on System Actors' Behaviors and Practices

While we initially set out to evaluate compliance with the holding in *Humphrey*, data gathered through research revealed substantive changes in practices by system actors—including judges, defense attorneys, prosecutors, and probation departments—that are worth noting in more detail.

Judges

Through reviewing writs, internal correspondence amongst court stakeholders, and responses to the defense attorney survey, it became clear that many judges across the state are misapplying the holdings in *Humphrey*. Some judges are imposing no bail holds in cases where a person is entitled to bail, while others are refusing to consider less restrictive alternatives.

A. Judges Are Interpreting Humphrey as Increasing Their Authority to Order No Bail Holds

On April 2, 2021, the Judicial Council sent an email to the presiding judges and court executives of all superior courts throughout the state including what they called an "outline of procedures for bail setting after the California Supreme Court's *In re Humphrey* decision…"[83] This outline of procedures is a twelve-page memorandum written by Judge Richard Couzens, a retired judge from Placer County. (See Appendix D, hereinafter referred to as "the Couzens' memo.") Judge Couzens also presented the information in the memorandum via a webinar to judges across the state.

The Couzens' memo quotes extensively from *Humphrey* and provides guidance and sample language to judges on conditions of release, ability to pay, determining risk, preventive detention, burden of proof, and other procedural issues. The majority of the Couzens' memo is a concise summary of *Humphrey* that adheres to its dicta and holdings. However, there is one part of the memo that stands out as providing judges with advice on how to consider release or detention that seems to step out of the bounds of the *Humphrey* decision. The Couzens' memo outlines in a tiered fashion four options available to judges pursuant to *Humphrey*:

1. Release an individual on their own recognizance (OR) without restriction "where there is little or no risk of flight or to public safety";
2. Release an individual OR with nonfinancial conditions reasonably necessary for the protection of the public "where there is some risk to the public or the victim, or of nonappearance";
3. Set monetary bail "if reasonably necessary to protect the interests of the state, but at a level the defendant can reasonably afford"; or
4. Detain the individual and set no bail "if the court concludes that protection of the public or the victim, or future appearance in court cannot be reasonably assured if the defendant is released, if the court finds by clear and convincing evidence that no less restrictive condition of release can reasonably protect the state's interest and that such detention is consistent with the constitution and related statutes."[84]

In enumerating the *Humphrey* options in this way, Judge Couzens is essentially telling judges that they can detain individuals with no bail when their risk level is any higher than "some risk." The *Humphrey* court, however, did not delineate the options in this way. In fact, the court stated, "Where the record reflects the risk of flight or a risk

to public or victim safety, the court should consider whether nonfinancial conditions of release may reasonably protect the public and the victim or reasonably assure the arrestee's presence at trial."[85] In other words, judges should consider nonfinancial conditions of release no matter what level of risk is presented by the accused person. The court goes on to state that the elimination of all risk is not possible, nor is it the goal; and quotes *Salerno* in reminding courts that "'[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.'"[86]

Judge Couzens' memo does not reflect these parameters on pretrial detention. Instead, the memo contains an entire section on preventive detention. Notably, he states that the California "Constitution, article I, § 28, provides a potential alternative means of preventive detention from that of article I, § 12."[87] Judge Couzens' guidance to judges across the state opens up a new avenue of preventive detention that is arguably not provided by Article I Section 28, and which the California Supreme Court declined to address in the *Humphrey* decision.

- Article I Section 28 of the California Constitution states that "a person may be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great."
- Article I Section 12 of the California Constitution states that a person shall be released on bail except in three distinct scenarios.[88]

Reading the language of these two provisions together, one interpretation is that only in the three scenarios outlined by Article I Section 12 (in which the capital crimes scenario overlaps with the Article I Section 28 provision) can a court deny bail. However, the Couzens' memo provides the following sample language that seems to allow for preventive detention in cases that fall outside of Article I, Section 12:

This portion of the Couzens' memo could be interpreted as encouraging more preventive detention as a result of *Humphrey* in cases where cash bail may have been set previously or where people would have been released

THE COURT'S ORDER FOR DETENTION UNDER ART. I, § 28(F)(3): The court should set forth findings on the record, including the weighing of any relevant factors, and in the minutes:

(1) The facts are evident or the presumption great the defendant committed the charged offense.
(2) If the court so finds, it can state, "the court finds by clear and convincing evidence that no condition or combination of conditions will reasonably assure the protection of the public or safety of the victim."
(3) If the required findings are made for detention, the court should set the custody status: "Although the defendant is eligible for bail, after consideration of the foregoing factors, and the provisions of article I, § 28(f)(3) and Penal Code § 1275, the court finds defendant's [risk to the public/victim] [risk of nonappearance] outweighs such eligibility and sets custody at 'NO BAIL.' "

NOTE: The best practice is to set a "no bail" order rather than intentionally setting bail beyond the defendant's ability to pay. The act of setting bail is premised on the suitability of the defendant's release at the amount set and is inconsistent with the intent to detain. If bail is set, it must be in an amount within the defendant's ability to pay.

from custody on their own recognizance. Remarks from defense attorneys and district attorneys across the state indicate that Judge Couzens' memo is in fact being relied upon in this way:

> *"The judges claim that Judge Couzens is teaching them that Humphrey makes it easier to detain without bail."*—Defense Attorney, San Mateo County

An email from Berkley Brannon, Chief Assistant District Attorney in Monterey County, states, "According to Couzens, there are two legal avenues to deny bail…The other avenue to deny bail I was not aware of. It is Art. 1 sec. 28(f)."[89] The email goes on to say,

> "Because Humphrey limits preventative detention to the most serious crimes, it may be that under Art. 1. Sec. 28(f) we are limited to serious and violent felonies. But it seems all we have to prove is D committed the serious or violent felony (according to Humphrey the court must assume the truth of the criminal charges) and that no lesser restraint will assure the safety of the public and victim or the appearance of D in court. We never get to Humphrey or zero bail."[90]

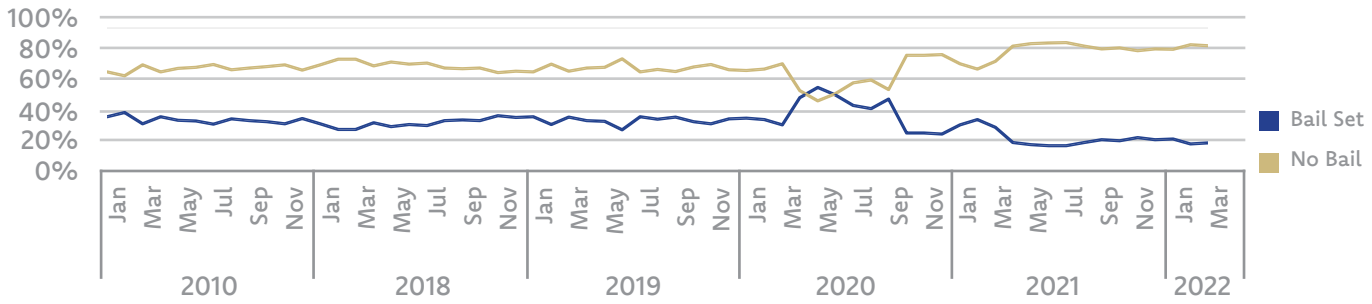
Further, half of defense attorneys surveyed reported that judges are more likely to place no bail holds than before *Humphrey*. Forty-four percent of defense attorneys said that no bail holds were being used for cases where no bail is allowed under Article I Section 12 of the California Constitution. However, 30% indicated that no bail holds were being used for cases outside of that constitutional provision. When asked for which types of cases no bail was being imposed, some defense attorneys reported the following:

> *"All charges. It happened for a public intoxication 647(f)* [a misdemeanor] *for one client. Also, suspended license cases. Most often, felonies and DV* (domestic violence) *will get denied bail."*—Public Defender, Kern County
>
> *"Everything from petty theft, driving on a suspended license, shoplifting, to DV."*—Public Defender, Contra Costa County
>
> *"All felonies. Our primary arraignment judge consistently sets NO BAIL on all felonies and all clients remain in custody."*—Public Defender, San Joaquin County
>
> *"The judges applying the Humphries factors are placing more emphasis on the public safety and failure to appear history so that many lesser charged individuals who would have otherwise had minimal bail or an OR release are now being held on no bail holds."*—Public Defender, Del Norte County
>
> *"We have two judges in San Bernardino who consistently do this* [set no bail]*, regardless of the charges, whenever we argue that a client cannot afford to post a bond due to indigency and should be granted O.R. release."* —Public Defender, San Bernardino County

These defense attorneys' responses indicate that no bail holds are now being used even in misdemeanor cases pursuant to *Humphrey*.

In particular, San Joaquin County drew our attention because out of the 13 defense attorneys that responded to the survey, twelve of them said that judges are revoking bail and placing a no bail hold more frequently than before *Humphrey*. Ten out of 13 stated that prosecutors are also requesting no bail holds more frequently than prior to *Humphrey*. Data received from the San Joaquin Superior Court pursuant to our CPRA request shows this to be true. Figure 6 shows that while no bail holds were 67% in February 2021, after March 2021 no bail holds increased to over 80% of those detained and have remained over 80% since March 2021.

Figure 6. No Bail Holds in San Joaquin County from 2017-2022[91]



Some defense attorneys said that no bail holds are occurring more frequently because judges are misinterpreting *Humphrey.*

> *"The arraignment judges in my county misinterpret the Humphrey decision, whether intentionally or out of laziness, and use the decision as a basis to hold defendants without bail, something they seem to relish."* —Public Defender, San Joaquin County

News articles have brought this issue of misapplication to light as well. For example, in Sacramento County Superior Court, a judge relied on *Humphrey* to justify revoking a woman's bail set at $50,000 and failed to consider alternative methods of release.[92] According to the judge, he interpreted *Humphrey* as providing only a binary option, either a no bail hold or release.[93] In Riverside County, Lisa Grassley, a candidate for Riverside District Attorney stated that, "…we have judges who say, 'Well, even if they can't afford it, I'm just going to preventively detain them.' So, then you're going to have so many preventive detentions that the jail overcrowding problem is going to get way, way worse."[94]

Judge Couzens' interpretation of *Humphrey* as it relates to Article I Section 28(f)(3) of the California Constitution has set the stage for some stakeholders to understand that, as a result of the *Humphrey* decision, their options to advocate for or set no bail have expanded beyond the bounds of Article I Section 12.[95]

B. Judges Often Ignore the Requirement That They Consider Less Restrictive Alternatives to Detention

Humphrey requires that before a court detains a person, they must make a finding that "detention is necessary to protect victim or public safety, or ensure the defendant's appearance, and there is clear and convincing evidence that no less restrictive alternative will reasonably vindicate those interest."[96]

Yet, judges either misinterpret the *Humphrey* decision or flatly refuse to follow it.

- In a case from Los Angeles County, *In re Brown*, the petitioner provided several alternatives to detention that the trial court did not consider when making its ruling.[97]
- In a case that made its way to the Court of Appeal from San Mateo County, *In re Harris*, the trial court also did not consider less restrictive alternatives. The Court of Appeal stated, "the court did not actually address any less restrictive alternatives to pretrial detention and did not articulate its analytical process as to why such alternatives could not reasonably protect the government's interests."[98]
- In yet another case from Los Angeles County, the judicial officer failed to consider a host of less restrictive alternatives that counsel provided, stating, "Well, I am saying I'm considering his lack of

ability to pay. I'm considering all those factors. I'm considering by clear and convincing evidence, by a strong suspicion based on my review of that entirety of the record, this is not a bail case. I am revoking bail."[99]

While these are only some instances in which we have written documentation of trial courts' rulings, defense attorneys also reported that judges often do not consider less restrictive alternatives.

> *"Even though Humphrey requires courts to consider less restrictive means of incarceration if those means can reasonably protect vic[tim]/public and can reasonably guarantee clients' future appearances, the judges I appear in front of do not consider alternatives to the cage."*—Public Defender, Contra Costa County

C. Judges Are Procedurally Misapplying Humphrey

Across the state, judges are not only misinterpreting the holding in *Humphrey* but also its procedural requirements. In *In re Brown*, a case from Los Angeles County, the court held that the petitioner, Mr. Brown, was entitled to a new bail hearing as the trial court "misunderstood its scope and, accordingly, deprived Brown of his right to a bail determination that complied with the Supreme Court's decision."[100] In this case, the trial court stated that because Mr. Brown was charged with a serious and violent felony, the *Humphrey* case did not apply.[101] The trial court further went on to state that *Humphrey* required "consideration of an arrestee's financial condition only if the court first determined there existed unusual circumstances justifying a deviation from the approved bail schedule."[102] The Court of Appeal ruled that both of these interpretations of *Humphrey* were incorrect, given that the petitioner in *Humphrey* himself was charged with a serious and violent felony, and that *Humphrey* does in fact require courts to always consider a person's ability to pay when setting bail, and to "'set bail at a level the arrestee can reasonably afford.'"[103]

Additionally, many defense attorneys reported that arraignment judges are refusing to consider *Humphrey* at all when the attorney raises the issue at arraignment. Some judges are requiring an additional bail hearing to be set, which further prolongs the time someone is incarcerated pretrial. This is a clear misunderstanding, as the *Humphrey* factors should be considered any time a judge is ruling on the issue of bail. The Couzens' memo encourages this confusion by speaking to how "setting of bail is a normally [sic] part of the arraignment process" and should be set then if possible.[104]

While the overwhelming majority of respondents to the defense attorney survey cited negative consequences of the *Humphrey* decision, some defense attorneys wrote that judges are genuinely trying to follow the law, are looking for other alternatives to incarceration, and are releasing more people than before *Humphrey*. Other respondents observed that judges are taking extra precaution to document *Humphrey* determinations in an effort to make the requisite record and findings.

Defense Attorneys

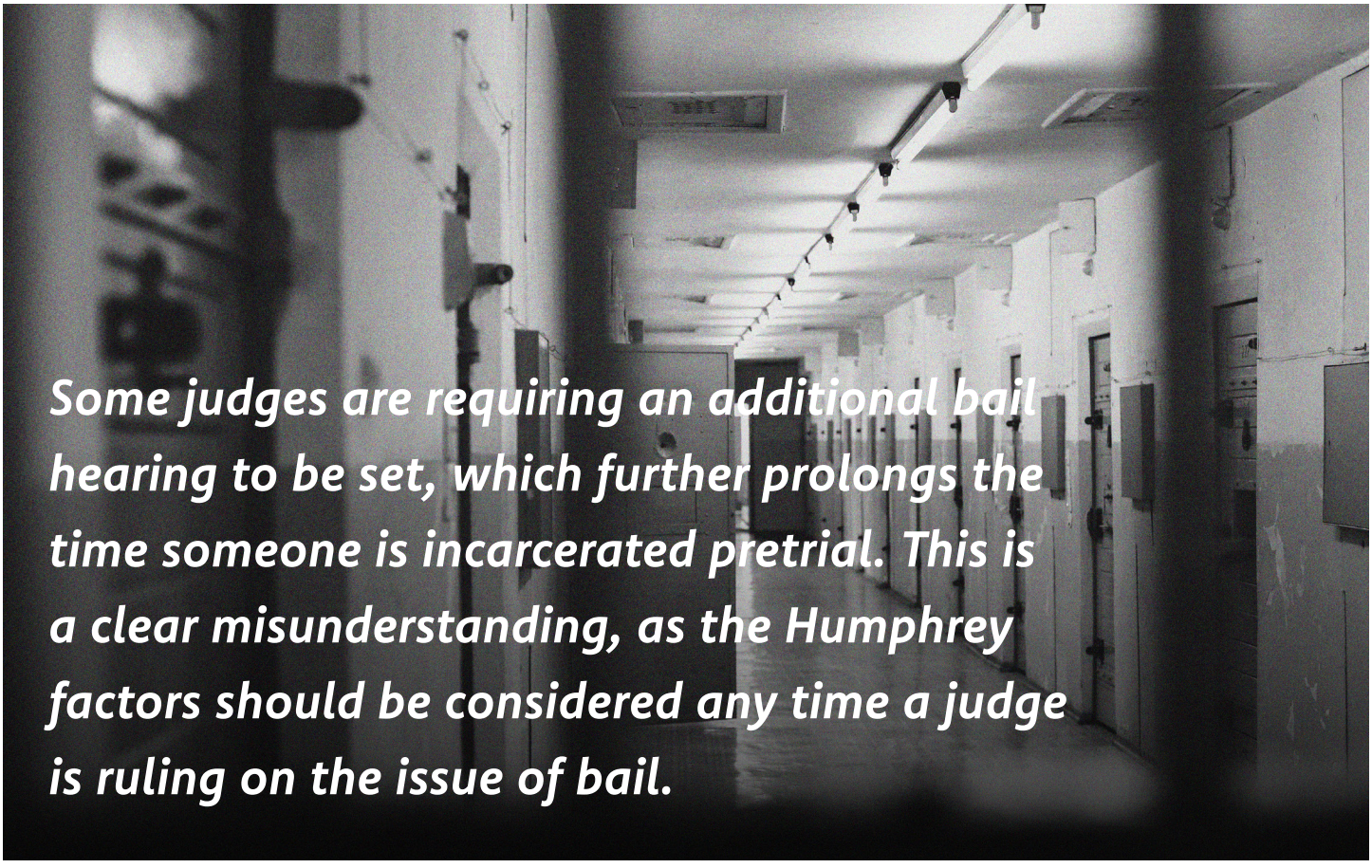
Based on responses to the defense attorney survey and discussions during the two public defender roundtables, defense attorneys are facing significant challenges post-*Humphrey*, including barriers posed by new policies as well as ongoing misunderstanding of *Humphrey* as discussed in the prior section.

A. Defense Attorneys are Often Dissuaded from Raising Humphrey Arguments

Judicial misapplications of *Humphrey* have had a chilling effect on whether accused individuals argue for a robust bail hearing. Some defense attorneys adjusted their practices so that they no longer make *Humphrey* arguments at all–or at least not in certain cases—if they are fearful that a judge will order a no bail hold. Defense attorneys in 13 counties[105] have noted this issue being a significant factor in their decision to even make an argument based on the *Humphrey* case.

> *"Most local judges in San Joaquin County seem to have taken the Humphrey decision as an invitation to set "no bail" for most felony cases. As a result, I now have to avoid asking for a bail review pursuant to the Humphrey decision because of the high likelihood my client will be denied bail."*—Defense Attorney, San Joaquin County

One attorney from Riverside County recounted that, in one day, six clients charged with felonies all had their bail revoked after a hearing. This was so aggressive and persistent that his client with a scheduled hearing later that day requested a cancellation of the bail hearing and the client borrowed money to make bail instead of even attempting to make a *Humphrey* argument. Another case documented in the news from Sacramento County quotes a judge instilling this type of chilling effect in attorneys, stating, "I would caution you Humphrey is a double-edged sword…this $50,000 can go to no bail very easily on this type of charge."[106]



B. Defense Attorneys Lack Meaningful Access to Clients Pre-Arraignment

Many defense attorneys recounted that they often do not have sufficient time to speak with their clients, gather information, and make a robust bail argument in accordance with *Humphrey*. This lack of access and time can be traced to multiple factors that limit the quality of the interactions that public defenders and other defense attorneys have with their clients. For example, a public defender from Solano County claimed, "Attorneys have no time to talk to clients because of some problem with getting the clients to the holding cell on time [when clients are in custody]." Further, a public defender from Orange County noted, "OC's access to their clients is very restricted and only on zoom, so they're only getting 5-10 minutes with their clients. [This is] not effective since so many of them are fresh off the arrest, and it is hard to get helpful info[rmation] from them."

Other times, attorneys stated that, because of COVID-19, most of them continue to have additional difficulties in communicating with their clients. Due to the pandemic, attorneys may meet their clients over Zoom or other platforms and often must deal with technical issues that make it hard to hear or disrupt the flow of conversations. Others remain worried about confidentiality issues when using programs like Zoom or WebEx to speak to their clients. One public defender from Mendocino County stated, "We are not able to consult confidentially with our clients at their first appearance since they appear by Zoom from jail and we are not allowed in jail with them."

Additional COVID-19 effects include clients not being brought to in-person arraignments because they are being quarantined due to possible exposure while in jail. A client's inability to be present in court often extends pretrial detention and severely restricts the ability of defense attorneys to connect with their clients and gather crucial information. The inability to meet with clients makes it difficult to make a strong *Humphrey* argument.

In Alameda County, lack of access to clients prompted the establishment of a bail court to hear bail motions. One felony courtroom in the county hears all post-arraignment bail hearings. Defense attorneys who filed a written *Humphrey* motion would have their cases calendared in this courtroom. Initially, the court was only hearing these motions on Mondays, which caused long delays for clients incarcerated pretrial. The public defenders' office advocated for the expansion of this court and, in 2022, it expanded to everyday operation with another bail court set to open in the Dublin courthouse in 2022. The current *Humphrey* courtroom hears ten bail motions per day. These are not evidentiary hearings; instead, they are usually decided on the papers, with perhaps brief oral argument.[107]

Another solution some offices have put forth to address the lack of access to clients pre-arraignment is early representation. For example, in 2018 and as a result of the Court of Appeal decision in *Humphrey*, the Santa Clara County Public Defender's Office requested the support of their Board of Supervisors to start a Pre-arraignment Representation and Review Team (PARR). Established on September 30, 2019, the PARR program consists of public defenders, social workers, investigators, and paralegals. Every incarcerated client is interviewed pre-arraignment and a release plan is developed. In its first quarter of operation, 79% of clients represented by the PARR Team were released.[108] The majority were released on the County's Supervised Own Recognizance Program, which is connected to their Probation Department's Office of Pretrial Services.[109] The program later expanded to provide what they call "Rapid Representation," or representation at the time of booking.[110] Their goal in 2022 is to expand their team to six attorneys.

C. Defense Attorneys Face New Procedural Hurdles Post-Humphrey

Defense attorneys also mentioned encountering additional procedural hurdles post-*Humphrey*, such as judges requiring written motions, and continuing bail hearings for long periods of time.

In Tulare County, defense attorneys used to be able to request a bail hearing and receive one immediately. Post-*Humphrey*, judges are requiring a probation report, sometimes even a written motion from the defense, and time for the District Attorney to respond. If defense attorneys push judges on this timeline, they often threaten to revoke or increase bail because they "won't have all the information in front of them." These practices make an accused person's right to a bail hearing almost meaningless, as the fear of a worse outcome or prolonging their pretrial incarceration can persuade individuals and/or their attorneys not to argue *Humphrey* and often instead resolve their case rather than exercising their rights.

D. Defense Attorneys See Little Relief Through Writs

When a lower or trial court judge issues a bail decision, the accused person can challenge that decision through a writ of habeas corpus. In practice, however, filing writs to challenge bail decisions can result in little relief for several reasons.

First, defense attorneys reported that the record made at a bail hearing is often insufficient, particularly when they take place at arraignment. This is because, pre-arraignment, defense attorneys generally do not have access to their clients to gather information relevant to the factors a judge takes into consideration at a bail hearing. A public defender from Alameda County observed, "The arraignment court is moving so quickly that the record is not robust." With a minimal record at arraignment, defense attorneys have found it particularly hard to file writs for relief when lower courts deny their *Humphrey* motions.

Second, defense attorneys noted that the time it takes to file a writ can often be prolonged for various reasons, which can lead to the writ becoming moot. One public defender from Los Angeles County remarked that judges are very slow in ordering the transcripts of arraignment or bail hearings when filing writs. He stated that judges sometimes take between 30 days and six weeks to order a transcript. In that time, if the client pleads guilty or is released pretrial through some other mechanism, the writ would likely be moot.

Third, courts reviewing these writs seem to be hesitant to reverse lower courts' decisions. Very often, rather than a reversal of the lower court's decision, appellate courts remand cases back to the original lower court that denied bail initially where defense attorneys must make another *Humphrey* motion.[111]

For example, in a case from Fresno County, the petitioner filed a writ challenging the lower court's denial of his motion to modify his bail.[112] The petitioner argued that the court failed to take into consideration the factors set forth in *Humphrey*. While the appellate court granted relief in favor of the petitioner and vacated the lower court's order denying bail, it remanded the matter back to the lower court to conduct a new bail hearing that would consider the *Humphrey* factors. The appellate court was explicit in mentioning that they did not take any position regarding whether the petitioner was entitled to a reduction in bail or if the terms of his pretrial detention should otherwise be modified.

Lastly, there are several small public defender offices that stated they did not have the personnel resources to file writs.

Given the repetitive and widespread misinterpretation of and/or refusal to follow *Humphrey* by judges laid out in the previous section, writs are the only mechanism to provide a check on judges' interpretation of the case. However, public defenders' offices may be so overstretched, lacking in resources, or fail to place enough of an emphasis on filing writs to make a meaningful intervention via the writ process.

Prosecutors

Our research team sent CPRA requests to all 58 district attorney offices and reached out on multiple occasions to the California District Attorneys Association and individual offices with a survey tool. Unfortunately, we only received one response to our survey. Nevertheless, we share what can be gleaned from the records provided by district attorney offices across the state.

A. Very Few District Attorney Offices are Tracking Information about Bail Hearings and Outcomes

In our CPRA requests, we asked for information about the number of people arraigned and the number of bail hearings held, including information on the type of objections made at such hearings (if any). Most offices reported they do not track this information. A few offices provided data on the number of arraignments by month.[113] Only two offices that responded with data—Los Angeles and Tulare Counties—are tracking the number of bail hearings. For example, in Tulare County from April 2021 to August 2021, there were 4,538 arraignments on 3,541 unique cases and 1,414 bail hearings in 861 cases. Santa Barbara County did not provide the number of bail hearings but did share that there were ten Humphrey motions made by defense attorneys between April and August 2021, with the District Attorney's office objecting to all such motions.

Orange County District Attorney Todd Spitzer tweeted that his office "has been keeping statistics in order to understand the impact of the emergency court orders during the pandemic, including early release and $0 bail."[114] However, the office denied our request for such information as they "would have to create a new record"[115] which they are not required to do under the CPRA.

Some offices understand the value of tracking such information for evaluation purposes. For example, Yolo County appears to be working with Measures for Justice on "a potential research project to look at the impact of the multiple bail policy changes in the past two years in Yolo."[116] But, again, this is not common practice.

B. District Attorneys' Interpretation of the Prosecutorial Role Pretrial Varies Widely

District attorneys do not appear to share a common interpretation of their role under *Humphrey*. In several counties, for example, district attorneys base their pretrial position according to the court's bail schedule. In other counties, district attorneys report handling cases on an "individualized basis" but do not articulate a particular guiding policy.

Some district attorneys reported that they are increasingly relying on probation departments' risk assessments when making their recommendations before the court. For example, the one survey respondent noted that "Probation appears to have higher workload with pretrial reports and pretrial supervision" because of the *Humphrey* decision.

Some offices did recognize the overall impact that the *Humphrey* decision would have on day-to-day operations. For example, the Inyo County District Attorney Thomas Hardy sent an email to the Sheriff's department reassuring them that the decision would not have "any direct impact on the work of your troops" and promising that the office "will be doing our best to protect the public and victims[,]…to avoid the regular OR of our 'frequent flyers,'…[and] to make sure that we can maintain as much supervision as possible."[117]

C. Few District Attorney Offices Have Adopted Formal Policies in Response to Humphrey

Several district attorney offices sent office-wide memos or held trainings shortly after the *Humphrey* decision was decided. For example, the day after the decision, Chief District Attorney Lisa A. Smittcamp from Fresno County sent a memorandum to all staff about the case and its holding.[118] In addition, the memorandum noted what was not changed by *Humphrey*, emphasizing the Court's silence on whether Article 1, Section 28 conflicts with Section 12. The San Joaquin District Attorney's Office circulated a four-page "Best Practices for Bail Procedure" document and the Ventura County District Attorney's Office sent out a memorandum on the "New Rules for Bail in California"

District Attorneys have made statements expressing their strong disapproval of the new law.

just days after the decision.[119] The San Mateo District Attorney's Office distributed a flowchart about the options to release a person shortly after the decision.[120] Tulare County District Attorney's Office conducted an office training on "Non-Monetary Bail in California Post-Humphrey," walking through the details of the case and focusing on the types of evidence that attorneys should prepare to combat the defense's arguments regarding financial inability to pay.[121] The office also circulated a template people's opposition to motion for bail/release hearing.[122]

Only a few offices shared written policies that reflect the *Humphrey* decision. The San Diego County District Attorney's Office's "Legal Policies Guide" reflects that "San Diego Deputy District Attorneys shall not argue to hold accused individuals in custody pretrial due to an inability to post monetary bail." It goes on to describe other policies consistent with the *Humphrey* decision.[123] The San Francisco District Attorney's Office's bail policies were updated on January 19, 2022, and explicitly reference *Humphrey* in the policy.[124]

Riverside County, on the other hand, in its policy guide on bail, does not mention any language from the *Humphrey* decision and in fact directs Riverside County district attorneys to use the bail schedule as "the starting point for evaluating each defendant."[125] This flies in the face of the requirements under *Humphrey*—an individualized determination of one's circumstances and ability to pay. The majority of responses from district attorney offices stated they had no written policy on bail or pretrial detention.

Other District Attorneys have made statements expressing their strong disapproval of the new law. For example, Kern County's District Attorney Cynthia Zimmer stated that the *Humphrey* decision was an indication of the "bias and lengths to which actors within the State government will go to achieve policy objectives designed to benefit criminals."[126] The Inyo County District Attorney Thomas Hardy expressed some frustration about the decision to Chief Probation Officer Jeff Thomson saying: "Obviously, the Supremes kind of dumped bail reform into our laps without much detail and guidance—but we'll work through it."[127]

D. Overall Prosecutorial Behavior Has Not Changed Post-Humphrey

From the perception of defense attorneys, *Humphrey* has not resulted in a change in prosecutorial behavior. Nearly 90% of defense attorney survey respondents indicated that prosecutors object to release on own recognizance 75-100% of the time. Most of these respondents stated that this is the same as it was prior to *Humphrey*. Nearly half (46%) of defense attorneys reported that prosecutors are requesting no bail holds more frequently than before the *Humphrey* decision.

Similarly, some district attorney offices raised questions about the impact that the *Humphrey* decision would have. Placer County District Attorney David Tellman noted that, "Our courts have been previously considering ability to pay when setting bail, so it will remain to be seen what the true impact of this decision will be."[128]

Other district attorney offices noted an increase in the time needed to prepare for bail hearings. For example, an email between attorneys in Del Norte County show a conscious effort to build up evidence to underscore any arguments made to detain people pretrial: "We should not just rely on Probation's work. Yesterday, Eric did a good job researching Huffman's prior history on the ankle monitor to show that it was not a viable option. The judge noted that as a reason for keeping Huffman detained with no bail."[129]

Probation

Many probation departments across the state have historically been involved in supervising people released pretrial. The involvement of probation departments in pretrial supervision increased after the Judicial Council funded pretrial pilots in 2020. Our research found that after the California Supreme Court's decision in *Humphrey*, probation departments—either by their own initiative or upon request by other system actors—have expanded or created new pretrial supervision units.

Immediately after the *Humphrey* decision, the Chief Probation Officers of California (CPOC) circulated a media statement to Probation Chiefs applauding the decision: "After today's ruling, probation departments throughout the state will continue to work to create programs that eliminate the role of wealth or financial status in pretrial release."[130]Additionally, within that email, CPOC included proposed media talking points one of which stated that "pretrial programs like the ones many probation departments are currently doing, should be supported, and utilized to help courts effectively strike the balance outlined in today's decision." This email was issued the same day as the *Humphrey* decision, indicating how quickly probation departments were positioning themselves as the entities that should be overseeing pretrial releases. A few months later, CPOC sent a letter to Governor Gavin Newsom requesting "the establishment of a statewide judicial pretrial program in the 2021-22 State Budget."[131] CPOC centered probation departments as the entities that "are uniquely situated to be a connector in the justice system."[132]

Many of the documents our research team received revealed that several probation departments across the state were having similar conversations in the immediate wake of the *Humphrey* decision. Some probation departments created new information sharing initiatives with courts prior to trial, others formed new pretrial units, and many turned to resourcing the expanded use of pretrial release conditions.

A. Probation Departments are Increasingly Sharing Information with Courts Pretrial

Some counties have adapted the practices of their probation departments to help supply the court with more information to contribute to the individualized consideration required by *Humphrey*. Some of these new practices date back to the 2018 Court of Appeals decision. For example, Kings County indicated a shift in practice after the 2018 *Humphrey* decision, stating, "Our presiding judge is now ordering Probation to prepare pretrial reports about an individual's suitability for release, and it looks like this will be for every in-custody case. They've not done this traditionally."[133] Similarly, in 2018, Fresno County Probation altered their pretrial report to address whether there are "less restrictive forms of custody that will be reasonable to assure the safety of the community and victim" as well as to address "flight risk, community ties, family attachments, residence, and prior failure to appear for court."[134] In Sonoma County, Probation amended their forms to include two questions related to financial conditions after the 2018 *Humphrey* decision.[135]

A similar shift happened in Inyo County after the 2021 *Humphrey* decision. The Inyo County District Attorney's Office emailed the Chief Probation Officer letting them know that they will now need an individual's record of criminal convictions and failures to appear in the pretrial reports as well as a way for Probation to notify the District Attorney when an individual released from custody is not compliant so they can file for a warrant "to get them back in custody." The District Attorney stated, "…given the reality of *Humphreys* [sic], we really need to step up our supervision of pretrial releases—regardless of Covid. If these folks can't be in jail, they need to be testing and reporting (in person) and complying with treatment, and if they can't do that, they need to be back in jail. I don't really have a problem with most folks being released pretrial, but we need to make sure that the supervision is meaningful."[136]

This creation or expansion of pretrial services means that some jurisdictions have also adopted risk assessment tools that may not have previously been in use. As mentioned earlier, San Luis Obispo identified a risk assessment tool, the Public Safety Assessment,[137] to be used in their pretrial release program, whereas they had previously not used a risk assessment tool.

B. Probation Departments Have Taken the Lead to Create New Pretrial Programs

While many jurisdictions seized upon the Couzens' memo to deny bail, others believed *Humphrey* would lead to more pretrial releases and were thinking about how to create or expand pretrial services units within Probation Departments to act as the lead entity in pretrial supervision.

For example, in their response to our CPRA request, Mendocino County stated that "Mendocino County Probation is currently collaborating with the Courts and other criminal justice stakeholders in order to establish a Pretrial Supervision program in response to *In re Humphrey* (2021)."[138]

The day after the *Humphrey* decision, San Luis Obispo County's Chief Probation Officer and district attorneys exchanged emails regarding whether they should formalize a pretrial program. The San Luis Obispo County District Attorney's office has interpreted the *Humphrey* decision as requiring pretrial services, stating that the decision "will require our county to create a 'pre trial services/release' program like we had considered when SB 10 was passed…"[139] San Luis Obispo County Probation responded stating that they "have a program developed, an assessment tool identified, and due to AB 1950[140] [I] have the bandwidth to move some resources around."[141] Not long after, San Luis Obispo County's Probation Department established the Post Arraignment Monitoring Program (PAMP).

Similarly, the Kern County Probation Department saw it as their duty to take on pretrial monitoring post-*Humphrey*. In an email to all employees, the Chief Probation Officer stated, "This [*Humphrey*] will likely result in more defendants being released pretrial under Court ordered conditions. This new process will result in an increased workload to the Probation Department."[142] He then goes on to detail the reorganization of the department in order to create a new pretrial unit. An internal email from the Probation Department suggests the creation of this unit was spurred by the courts, reading:

> "In order to comply with this decision, the Superior Court of Kern has directed the Probation Department to assist them in making informed decisions regarding defendants at arraignment. This would require the Probation Department to gather and submit defendants' financial information along with providing the Court a summation of their criminal histories at the time of arraignment. The Court would also require the Probation Department to provide monitoring services for defendants released on their own recognizance."[143]

The Probation Department requested $1,284,424 in funding from the Community Corrections Partnership[144] to fund its new pretrial services division.[145]

In 2019 Merced County changed their procedures, possibly in response to the Court of Appeal *Humphrey* decision. Now, at arraignment, if bail is ordered, the court then schedules a bail review hearing to be held approximately two days later. The Probation Pretrial team then reviews the case and provides a bail report, among other things, addressing the defendant's appearance history, ties to the community, living arrangement, and employment status."[146] The Probation Department and Sheriff's Office oversee pretrial services in the county. Three probation assistants provide the aforementioned assessments to the court and an additional position was added in 2021.

On the other hand, an internal document from Shasta County Probation revealed that "they [judges] do not really want to do a pretrial program unless there is a law that orders them to."[147]

Additionally, it does not seem that any jurisdiction thought to adopt a model separate and apart from law enforcement, except for Los Angeles County.[148] In Los Angeles County, the Board of Supervisors passed a motion on March 1, 2022, requiring the creation of an independent pretrial services agency.[149] There is understandable concern with the operation of pretrial service programs by law enforcement agencies like probation departments. The mere housing of such programs within the carceral system can impact outcomes, including the likelihood of recidivism, whereas community-based programs have been shown to relate to positive psychological and behavioral outcomes as well as reduced chances of recidivism.[150]

C. Probation Departments Have Proactively Resourced the Increased Use of Pretrial Release Conditions

With the expansion of pretrial services within probation departments comes an increasing reliance on pretrial release conditions. Responses to our defense attorney survey confirm an increase in pretrial release conditions since the *Humphrey* decision. Almost half of the defense attorneys we surveyed stated that since *Humphrey* prosecutors are requesting pretrial release conditions more frequently. Approximately two-thirds of defense attorneys reported that judges are imposing pretrial release conditions more frequently.

> *"Because they are more limited in their ability to effectively detain with high bail, they are imposing more conditions of release."*—Defense Attorney, San Francisco County
>
> *"Judges assert Humphrey allows them to impose pretrial release conditions."*—Public Defender, Imperial County
>
> *"Humphrey gave them the ability to impose more conditions as well as find that it was too risky to release someone at all."*—Public Defender, Nevada County

Many other attorneys commented on how the use of release on own recognizance without conditions seems to have become obsolete; that judges are either detaining people with no bail or releasing people with conditions. In fact, 88% of the survey respondents stated that judges only release people OR without conditions 25% of the time or less. Most respondents (87%) indicated that conditions are imposed on release cases 25-75% of the time.

> *"On balance, around the same number of people are released, but there are now more conditions imposed."*—Public Defender, Alameda County
>
> *"Frankly, I've seen Humphrey have two results (1) MORE pretrial conditions on the same kinds of clients/cases and (2) MORE clients being detained without bail at all, particularly on felony cases. It's been better for misdemeanor clients."*—Defense Attorney, San Francisco and Contra Costa Counties
>
> *"With more people being released judges are adding on conditions when they normally would not have previously."*—Public Defender, Tulare County

Of those conditions imposed, the most common reported by defense attorneys is pretrial supervision (75-100% of cases where conditions are imposed). The least common condition cited was electronic monitoring, although some county probation departments saw an increase in the costs and scopes of their electronic monitoring contracts. For example, seven probation departments increased their funding for monitoring equipment in the period between 2020 to 2022.[151]

Such an increase appears to have enabled judges to ignore release on own recognizance without conditions as an option, even though this is not what the *Humphrey* decision outlines. *Humphrey* requires the least restrictive conditions to be imposed, ostensibly conditions that would not require the oversight of a law enforcement agency or burdensome pretrial conditions. This trend away from straight release on own recognizance may be misguided, as one study of the Philadelphia court system and its pretrial release system found that an increase in releases on own recognizance did not cause higher rates of failures to appear or recidivism.[152]

The issue with increased pretrial release conditions, as some have argued, is that they "represent a potentially more insidious form of control and future incarceration than the system of bail they replaced."[153] Pretrial release conditions that are overseen by law enforcement agencies can be overly burdensome and are often imposed without a direct connection (a nexus) between the condition and the charged offense.[154] As one private attorney from Marin County stated, "Judges are…using pre-trial conditions -often without much of a nexus- as a half-way measure instead of bail." Further, the burdensome nature of these pretrial conditions can often lead to people being reincarcerated if they do not abide by these conditions. Defense attorneys corroborate this reality:

> *"…people are being re-incarcerated when they don't comply with the conditions of their release either OR on bail."*—Public Defender, Imperial County

> *"Most judges are ignoring Humphrey; a few are not, but loading homeless mentally ill clients with conditions that they can never abide by, then incarcerating them when they fail."*—Public Defender, San Francisco County

There are also collateral consequences of pretrial conditions. For example, one study found that 22% of people placed on electronic monitoring were fired or asked to leave their job because of the electronic monitor.[155]

In sum, a consequence of *Humphrey* seems to be an increase in pretrial release conditions as well as funding to probation departments in order to expand or create pretrial supervision units. Once these pretrial units are built or expanded, it may be a "if you build it, they will come" phenomenon where courts become increasingly reliant on pretrial release conditions supervised by law enforcement rather than making individualized inquiries into whether someone needs any release conditions at all. Given that it does not seem that *Humphrey* has contributed to a significant increase in releases on own recognizance across the state, it appears that conditional releases may be supplanting releases on own recognizance, which is not what the *Humphrey* court had in mind.

Recommendations

We make the following recommendations so that California can move towards ending wealth-based detention and reducing the pretrial jail population:

Judicial Council

1. The Judicial Council Should Require Judges to Undergo Training and Continuing Education on Pretrial Detention Procedures and Research
2. The Judicial Council Should Develop and Enforce a Statewide Uniform Zero Bail Schedule for Criminal Offenses
3. The Judicial Council Should Create and Oversee Diverse Local Commissions Charged with Monitoring Pretrial Detention and the Use of Money Bail

Legislature

1. The Legislature Should Codify a Presumption of Pretrial Release for All Cases
2. The Legislature Should Increase Support for Indigent Defense at the Earliest Stage Possible
3. The Legislature Should Designate Funding for Jurisdictions to Establish Pretrial Services Agencies Outside of Law Enforcement Departments
4. The Legislature Should Require the Judicial Council and Superior Courts to Track and Publish Data on Pretrial Detention and Release

Judicial Council

The Judicial Council Should Require Judges to Undergo Training and Continuing Education on Pretrial Detention Procedures and Research

Under *Humphrey*, courts are required to conduct an individualized determination of threat to victim or public safety, specifically as defined by Article I Section 12 of the California Constitution. A court cannot detain someone pretrial based on concerns regarding the safety of the public or the crime survivor unless the court has first found clear and convincing evidence that no other conditions of release could reasonably protect those interests. Article I Section 12 "was intended to abrogate the common law rule that bail was a matter of judicial discretion by conferring an absolute right to bail except in a narrow class of cases".[156]

However, the Judicial Council guidance and anecdotes from defense attorneys show that Article I Section 28 of the California Constitution is being construed to limit access to bail beyond what Article I Section 12 allows. No longer able to use unaffordable bail as a way of limiting release, some judges have turned to alleged concerns with public safety and risk to crime survivors to order more no bail holds.

While the California Supreme Court declined to answer this question in *In re Humphrey*, in June 2022, the Court issued a grant and transfer to the Court of Appeal in *In re Gerald John Kowalczyk,* requesting briefing regarding the constitutional provisions governing the denial of bail in noncapital cases, specifically Article I Section 12 and Section 28.[157]

Once there is more clarity on the relationship between Article I Section 12 and Section 28, judges should be required to undergo training on preventive detention requirements. Specifically, judges should receive instruction on the availability and efficacy of least restrictive conditions in order to reduce the reach of the legal system and to minimize the chance that people are released with invasive conditions like electronic monitoring. Such training should include a review of the latest in pretrial justice research, lessons learned from other states that have successfully adopted pretrial reform, and an in-depth discussion of the harms of pretrial detention led by those most impacted by incarceration. Any instruction should also incorporate anti-racist and implicit bias training, given the role of judicial discretion in pretrial release decisions.

The Judicial Council Should Develop and Enforce a Statewide Uniform Zero Dollar Bail Schedule

Under state law, each year trial court judges in every county must review and adopt countywide bail schedules for all felonies, misdemeanors, and infractions except for Vehicle Code infractions.[158] Judges are required to consider "the seriousness of the offense charged" in developing a bail schedule,[159] but otherwise the amounts are left to what "the judges determine to be appropriate."[160]

California has some of the highest bail amounts in the country, nearly five times the national average as of 2015.[161] Based on responses to the defense attorney survey and data provided by courts across the state, bail amounts not only vary widely by county but by courtroom. For example, according to current bail schedules, bail for a misdemeanor for spousal battery in Merced County is $10,000[162] and $2,500 in Imperial County.[163]

The Judicial Council already promulgates uniform bail and penalty schedules for certain offenses relating to traffic, boating, forestry, fish and game, public utilities, parks and recreation, and business licensing "in order to achieve a standard of uniformity in the handling of these offenses."[164] Similarly, the Judicial Council should adopt a statewide uniform zero bail schedule for criminal offenses. Research shows that the variation in bail amounts cannot be easily explained—the relationship between crime rates and bail amounts is weak, as is the relationship between bail amounts and region.[165] Creating a statewide uniform bail schedule would address equity concerns by reducing the varying financial impact that people may face when charged with the same offense in different counties.[166]

In 2021, acknowledging the harm caused by pretrial detention generally and the consequences of a system that keeps people incarcerated pretrial simply because they cannot afford to pay bail, Senators Bob Hertzberg and Nancy Skinner introduced Senate Bill 262 which would (as introduced) have required the Judicial Council to adopt a statewide zero bail schedule.[167] While the bill made it out of the Senate, it did not garner the votes needed to move out of the Assembly.[168]

After nearly a year of COVID-19 emergency zero bail schedules in place, data from several California counties demonstrated low rates of rearrest and recidivism. Zero-dollar bail schedules were found to have no negative effects on people's ability to follow through with court requirements. In fact, data from the Los Angeles County Chief Executive Office show that court appearance and rearrest rates have remained steady or decreased since its zero bail policy was put in place.[169]

The Judicial Council Should Create and Oversee Diverse Local Commissions Charged with Monitoring Pretrial Detention and the Use of Money Bail

Even after the California Supreme Court decided *Humphrey*, judges across the state continue to impose unaffordable money bail and, in fact, may have turned to issuing no bail holds in more cases than before. And yet, there is currently no oversight mechanism to evaluate such practices and behavior.

The Judicial Council should require that each superior court create a local commission or working group to gather data and monitor pretrial detention rates, including the implementation of *Humphrey*. These commissions should be made up of a diverse set of stakeholders, including community-based organizations and impacted people, and be required to report out on its activities and findings on a biannual basis. Data should be made readily available to these commissions and where data may not be available, the commission should have the authority to require the tracking of such data.

The commission should also set guiding principles and milestones to limit the use of pretrial detention and money bail. Guiding principles should include developing a system that is permanent (can work well in the long-term), evidence-based, transparent, and promotes racial equity. Milestones should be set according to aggressive release goals, such as a 90% release rate for all persons arrested, in order to see meaningful progress towards reducing pretrial detention rates.[170]

The Legislature

The Legislature Should Codify a Presumption of Pretrial Release for All Cases

More than half of the states have codified a presumption of own recognizance release or non-monetary conditions.[171] California is in the minority of the states where the statutory presumption is limited to misdemeanor cases.[172]

Deprivation of liberty pending trial can be harsh and oppressive, subjecting people to financial and emotional hardship, interfering with their ability to defend themselves, and depriving their families and loved ones of support. In its standards on pretrial release, the American Bar Association has underscored that "the law favors the release of individuals pending adjudication of charges."[173] Such standards include releasing people under least restrictive conditions, using citations in lieu of arrest, and promoting the release of people on their own recognizance.[174] While pretrial conditions such as electronic monitoring and substance abuse testing offer attractive alternatives to detention, the use of such burdensome conditions should be met with skepticism given that the research on whether these conditions "improve pretrial court appearance or public safety is inconclusive at best."[175]

Acknowledging the harms of pretrial detention, the Legislature should create an enforceable legal presumption of pretrial release in all cases. Any legislation should also require courts to impose the least restrictive conditions.

The Legislature Should Increase Support for Indigent Defense at the Earliest Stage Possible

In California, there is no state funding for public defense services. Public defender offices are funded at the county level and funding can fluctuate depending on the tax base. Yet, compared with their prosecutor counterparts, public defenders are often working with half the resources. For example, in San Diego County, the District Attorney's office received $217 million in funding while the Public Defender's Office received $92 million.[176]

In the 2020-21 budget, Governor Newsom included $4 million annually to expand the Office of the State Public Defender, a 28% increase over the agency's budget, to support training and technical assistance for county trial-level indigent criminal defense in non-capital cases.[177] The budget also included $10 million for the BSCC to administer a program to provide grant funding to local public defense systems.

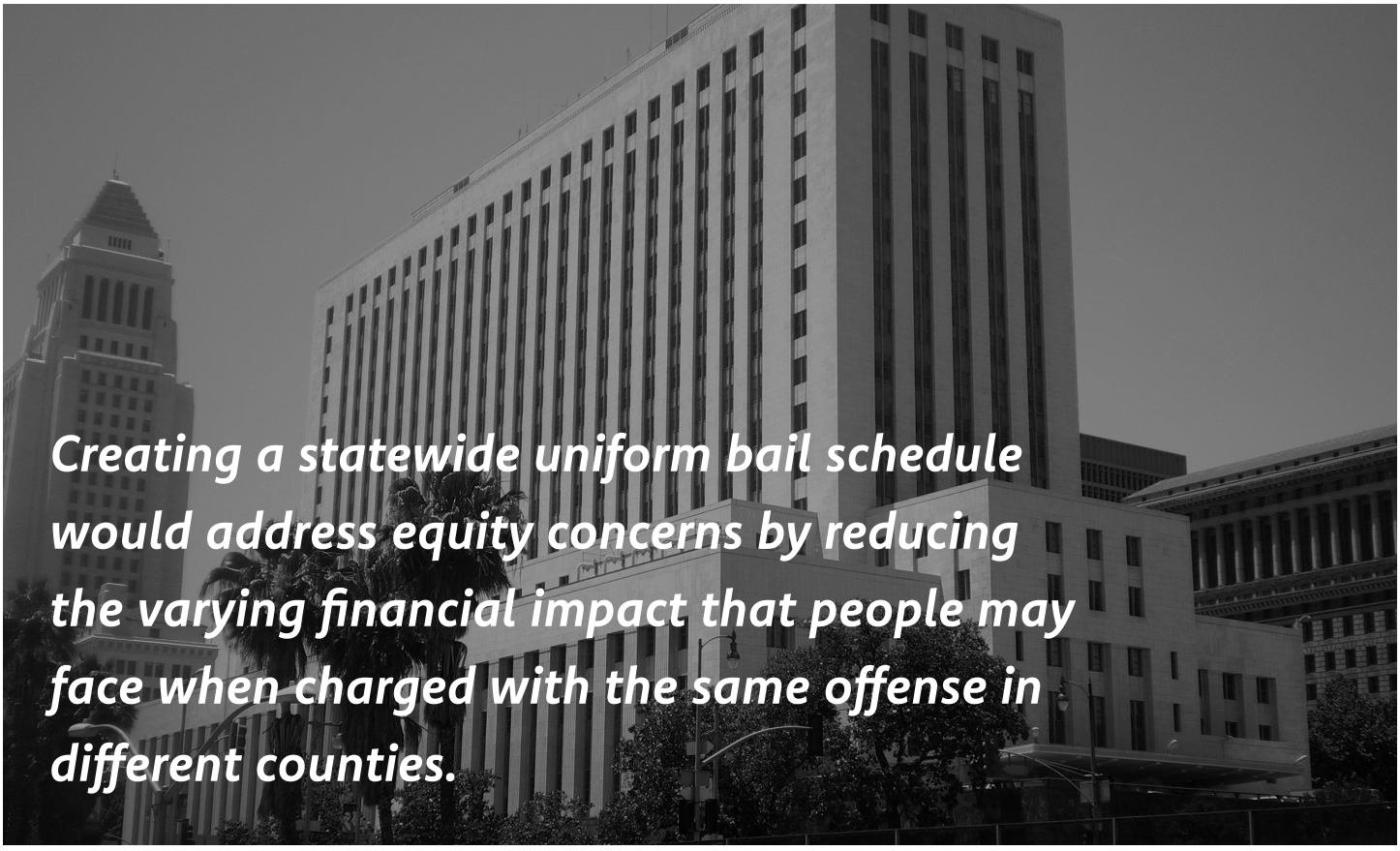
Research shows that investments in pre-arraignment representation significantly impact the likelihood of release at arraignment.[178] People are more likely to be released and bail amounts will likely be lower.[179] For example, in October 2017, the San Francisco Public Defender's Office began providing pre-arraignment representation to some people as part of its Pre-Trial Release Unit (PRU). An analysis of the program found that people who received arrest-responsive services were twice as likely to be released at arraignment. Similarly, after the Santa Clara County Public Defender's Office created its PARR team, 79% of clients were released in the first quarter of operation.

The Legislature should provide additional resources to county-level public defender offices to increase the number of people with representation pre-arraignment.

The Legislature Should Designate Funding for Jurisdictions to Establish Pretrial Services Agencies Outside of Law Enforcement Departments

Most California counties now utilize pretrial services to manage its jail population. However, the bulk of such programs are operated by traditional law enforcement agencies. According to a report by Californians for Safety and Justice, 43% of programs are run by probation departments and 13% by sheriff departments.[180] Only 4% are operated by independent nonprofit organizations.

It is important to remember that people in the pretrial phase of their case are legally presumed innocent. Thus, people released pretrial should not be subject to heightened supervision by law enforcement or be required to waive important constitutional rights like the right to be free from unlawful searches and seizures. The focus of pretrial should be primarily to ensure that people have the support that they need to return to court, and that if any services are needed, they are connected to those services on a voluntary basis.[181] As *Humphrey* requires, the least-restrictive means should be employed in order to ensure a return to court and to protect public safety.



Many jurisdictions across the country are embracing these ideals by investing in pretrial services agencies that are separate from law enforcement, including San Francisco County,[182] Santa Clara County,[183] and New York City.[184] These agencies rely on case managers and community-based services to support people in the pretrial phase of their case. Additionally, as mentioned, Los Angeles County allocated $8 million to establish an independent pretrial services agency that will possibly use a strengths and needs assessment rather than an assessment that centers on risk.[185]

These models have shown success. New York City's Supervised Release Program has not increased arrests for new crimes, and people on Supervised Release were not significantly more likely to fail to appear in court.[186] In San Francisco, people provided with "light-touch monitoring" by the San Francisco Pretrial Diversion Project, a non-profit, had a 94% appearance rate and a 95% public safety rate.[187]

Since California voters rejected SB 10, which would have required the use of risk assessments and for law enforcement to establish pretrial services agencies, legislators should take seriously the idea of alternatives like what already exists in San Francisco County. Any legislation related to bail should include funding for counties to establish an independent pretrial services agency *as well as* funding to increase the services available in the communities most targeted by the criminal legal system.

The Legislature Should Require the Judicial Council and Superior Courts to Track and Publish Data on Pretrial Detention and Releases

As has been mentioned throughout this report, data collected across California related to pretrial outcomes are incomplete, difficult to analyze, and not standardized. The Board of State and Community Corrections—which regularly collects data from law enforcement agencies—admits this with regards to law enforcement agencies, stating, "Local agencies work hard to submit accurate data, but data collection is not uniform throughout the state. Due to local agency-specific data collection limitations some agencies cannot report all data elements."[188]

The lack of data made it difficult to understand statewide pretrial release and detention trends. As pretrial reforms continue to be enacted, it is imperative that government officials and the public have access to comprehensive, good, and transparent data. At the most basic level, superior courts in every county should have the responsibility of collecting data on pretrial release outcomes. All entities should make this data publicly available on a quarterly basis.

Data should include:

1. Demographics (self-identified race and ethnicity, gender identity, sexual orientation, age, primary language, etc.)
2. Charges (specific charge code and whether it is a felony or misdemeanor)
3. Date of arraignment
4. Pretrial release decision at arraignment (OR release, detention, etc.)
5. Whether bail was ordered (zero bail, bail amount set, no bail hold, etc.)
6. Bail amount ordered (where applicable)
7. Date of subsequent bail review hearings
8. Outcomes of subsequent bail review hearings

9. Conditions of release that are imposed, including electronic monitoring
10. Whether a person was returned to court for a violation of pretrial release conditions and the outcome of the violation
11. Any failures to appear while the person was released pretrial
12. Date of final case disposition
13. Final disposition of the case
14. Writs filed related to pretrial release/detention and the outcome of the writ

Conclusion

It has been over one year since *Humphrey* was decided and the expected change in practices has not occurred. As California contemplates the future of bail reform and pretrial justice, it is imperative that we learn from the stasis that followed the *Humphrey* decision. *Humphrey* on its own was not enough to change judicial approaches to pretrial detention. Moving forward, pretrial reforms must take a multi-pronged approach. The Legislature must be clear about the procedure and criteria for preventively detaining people pretrial. Budget allocations need to prioritize more community-based resources that can support people in the pretrial phase of their case so that judges have options when considering release. Judges are in need of additional training, using empirical data, to show that pretrial release is feasible and should be the presumption without risking public safety. Accountability measures must be taken so that the results of any such changes are transparent and can be meaningfully tracked by communities that have a vested interest in these issues. And the public needs to be provided with education and data that indicates that pretrial reform does not cause a decrease in public safety. Leading from the experiences of those most impacted by pretrial incarceration, and keeping the presumption of innocence as paramount, California has the opportunity now to be a leader in pretrial reform and should take action to do so with haste.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Endnotes

1 See, e.g., Katherine Hood and Daniel Schneider, *Bail and Pretrial Detention: Contours and Causes of Temporal and County Variation*, 5 *RSF:* The Russell Sage Found. J. of the Soc. Sciences *126* (2019); Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes,* 34 The J. of Law, Econ., and Organization 511 (2018).

2 ACLU, Reforming Money Bail: A Tool to Reduce the Number of Incarcerated People with Mental Health Conditions (2017) https://www.aclunc.org/docs/20170414-bail_reform_mental_health.pdf.

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6 Alan Butkovitz, Economic Impacts of Cash Bail on the City of Philadelphia 8–9 (Office of the Controller, 2017).

7 *Id.*

8 *See, e.g.* Ellen A. Donnelly and John M. MacDonald, *The Downstream Effects of Bail and Pretrial Detention on Racial Disparities in Incarceration,* 108 J. of Crim. Law and Criminology 775 (2018), finding that Black people were more likely to be detained pretrial than white people in Delaware; *see also* Stephen Demuth, *Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black, and White Felony Arrestees,* 41 Criminology 873, finding that Hispanic people in urban courts across the country were more likely to be detained pretrial than their Black or white counterparts.

9 Bd. of State and Comm. Corr., Jail Profile Survey 2 (2021), https://bscc.ca.gov/wp-content/uploads/Jail-Pop-Trends-Through-Q1-2021.pdf.

10 This is also nearly two thirds of the median family household income in California. 2020 U.S. Census Bureau data.

11 Sonya Tafoya, Pretrial Detention and Jail Capacity in California (Pub.Pol'y Institute of CA, 2015), https://www.ppic.org/wp-content/uploads/content/pubs/report/R_715STR.pdf.

12 Human Rights Watch, "Not in it for Justice" How California's Pretrial Detention and Bail System Unfairly Punishes Poor People 4 (Apr. 11, 2017) [hereinafter HRW Report], https://www.hrw.org/report/2017/04/11/not-it-justice/how-californias-pretrial-detention-and-bail-system-unfairly.

13 Wendy Sawyer, How Race Impacts Who is Detained Pretrial (Prison Pol'y Initiative, 2019), https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/.

14 Gina Clayton-Johnson, Rena Karefa-Johnson, and Titilayo Rasaki, Essie Justice Group, Written Testimony for the Civil Rights Implications of Cash Bail Briefing before the U.S. Commission on Civil Rights, Feb. 26, 2021, p. 1; *see also* Ella Baker Center for Human Rights, Who Pays? The True Cost of Incarceration for Families (2015).

15 Cal. Sen. Bill 10, available at: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=20172018SB10.

16 *In re Humphrey*, 11 Cal.5th 135 (2021).

17 Garrett et al., Monitoring Pretrial Reform in Harris County: Fourth Report of the Court-Appointed Monitor 38 (2022), https://jad.harriscountytx.gov/Portals/70/documents/ODonnell-Monitor-Fourth-Report-Final.pdf?ver=0KyJYoW_QePq2J2VntQ8fg%3d%3d.

18 *Id.* at viii.

19 *Id.* at 38.

20 Paul Heaton, The Effects of Misdemeanor Bail Reform (Quattrone Center, 2022), https://www.law.upenn.edu/institutes/quattronecenter/reports/bailreform/#/.

21 Michael Rempel & Krystal Rodriguez, Bail Reform Revisited: The Impact of New York's Amended Bail Law on Pretrial Detention 12 (Ctr. for Ct. Innovation, 2020), https://www.courtinnovation.org/sites/default/files/media/ document/2020/ bail_reform_revisited_05272020.pdf.

22 *Id.*

23 Rempel, *supra* note 21, at 17.

24 Heaton, *supra* note 20.

25 Chloe Anderson et al., Pretrial Justice Reform Study: Evaluation of Pretrial Justice System Reforms That Use the Public Safety Assessment (MDRC Ctr. for Crim. Just. Rsch., 2019), https://www.mdrc.org/sites/ default/files/ PSA_New_Jersey_Report_%231.pdf.

26 Rempel, *supra* note 21, at 17.

27 Christopher Lowenkamp, The Hidden Costs of Pretrial Detention Revisited (Core Correctional Solutions, 2022), https://craftmediabucket.s3.amazonaws.com/uploads/HiddenCosts.pdf.

28 Evan Mintz, *Cops and Conservatives Backed This Texas Bail Reform. Now Researchers Show It To Be a Success,* Arnold Ventures (Aug. 30, 2022), https://www.arnoldventures.org/stories/cops-and-conservatives-backed-this-texas-bail-reform-now-researchers-show-it-to-be-a-success.

29 *Id.*

30 *In re Humphrey*, 19 Cal.App.5th 1006, 1017 (2018).

31 *Id.* at 1018.

32 *Id.* at 1006.

33 *Id.*

34 *Humphrey*, 11 Cal.5th at 146.

35 *Id.* at 147.

36 *Humphrey (Kenneth) on H.C.*, 417 P.3d 769 (2018).

37 Humphrey, 11 Cal.5th at 135.

38 CA Constitution Art 1 § 12 reads: "A person shall be released on bail by sufficient sureties, except for: (a) Capital crimes when the facts are evident or the presumption great; (b) Felony offenses involving acts of violence on another person, or felony sexual assault offenses on another person, when the facts are evident or the presumption great and the court finds based upon clear and convincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others; or (c) Felony offenses when the facts are evident or the presumption great and the court finds based on clear and convincing evidence that the person has threatened another with great bodily harm and that there is a substantial likelihood that the person would carry out the threat if released. Excessive bail may not be required. In fixing the amount of bail, the court shall take into consideration the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case. A person may be released on his or her own recognizance in the court's discretion." Art 1 § 28(f)(3) reads: "Public Safety Bail. A person may be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great. Excessive bail may not be required. In setting, reducing or denying bail, the judge or magistrate shall take into consideration the protection of the public, the safety of the victim, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case. Public safety and the safety of the victim shall be the primary considerations."

39 *Humphrey*, 11 Cal.5th at 156.

40 *In re Harris*, 71 Cal.App.5th 1085 (2021), *cert. granted, Harris on H.C.*, 506 P.3d 2 (Cal. 2022).

41 Maria Dinzeo, *Historic California Supreme Court Bail Ruling Leaves Pretrial Detention Question Unanswered,* Courthouse News Service (Mar. 26, 2021), https://www.courthousenews.com/historic-california-supreme-court-bail-ruling-leaves-pretrial-detention-question-unanswered/.

42 Maura Dolan, *California's top court ends cash bail for some defendants who can't afford it,* L.A. Times (Mar. 25, 2021), https://www.latimes.com/california/story/2021-03-25/california-supreme-court-nixes-cash-bail-some-defendants.

43 Bd. of State and Cmty. Corr., https://www.bscc.ca.gov/s_fsojailprofilesurvey/ (last visited Sep. 20, 2022).

44 A full outline of records received by county can be found in Appendix B.

45 The counties that were not represented at all among the respondents include: Alpine, Calaveras, Inyo, Modoc, Mono, Plumas, Sierra, and Trinity.

46 While the counties represented are diverse across geographic location and population size, the respondents are disproportionately concentrated in larger, more urban counties. For example, 54 participating attorneys practice either primarily or secondarily in Los Angeles County. While we did receive multiple responses from defense attorneys in 33 counties, including smaller/rural counties, our team is cautious about declaring this a truly representative sample due to the overrepresentation of large, urban counties. Still, the consistency of several themes in the responses indicate that there are common conclusions that can be drawn from this data.

47 We sent a follow-up email to the California District Attorney Association but did not receive an acknowledgment or additional responses to the survey.

48 Jud. Council of CA, 2021 Court Statistics Report: Statewide Caseload Trends (2021), https://www.courts.ca.gov/ documents/2021-Court-Statistics-Report.pdf.

49 Pretrial Pilot Program Data Elements Inventory, https://www.courts.ca.gov/documents/pdr-rfa-Attachment-D.pdf.

50 Data and Research – Bd. of State and Comm. Corr., https://bscc.ca.gov/m_dataresearch/ (last visited Sep. 15, 2022).

51 Those sixteen counties are: Alameda, Calaveras, Kings, Los Angeles, Modoc, Napa, Nevada-Sierra, Sacramento, San Joaquin, San Mateo, Santa Barbara, Sonoma, Tulare, Tuolumne, Ventura, and Yuba. *See* Merill Balassone, *Judicial Council Funds 16 Pretrial Pilot Programs,* CA Courts Newsroom (Aug. 9, 2019), https://newsroom.courts.ca.gov/news/judicial-council-funds-16-pretrial-pilot-programs.

52 Cal. Budget Act of 2019, Assemb. B. 74., 2019-2020 Reg. Sess. (Cal. 2019).

53 *Id.*

54 *Ca. Jud. Council*, *Emergency Rules of the California Rules of Court* (April 6, 2020), available at https://jcc.legistar.com/View.ashx?M=F&ID=8234474&GUID=796115436A40-465C-8B8B-D324F5CAE349.

55 *Humphrey*, 11 Cal.5th at 143.

56 HRW Report, *supra* note 12, at p. 4.

57 Data source: https://app.bscc.ca.gov/joq/jps/QuerySelection.asp. The statewide average daily population is weighted based on the total (unsentenced and sentenced) jail population in order to take into account population variations by county.

58 Data source: https://app.bscc.ca.gov/joq/jps/QuerySelection.asp.

59 Johanna Lacoe et al., Bail Reform in San Francisco: Pretrial release and intensive supervision increased after Humphrey 4 (CA Policy Lab, 2021), https://www.capolicylab.org/wp-content/uploads/2021/05/Bail-Reform-in-San-Francisco-Pretrial-Release-and-Intensive-Supervision-Increased-after-Humphrey.pdf.

60 *Id.*

61 The counties that saw an increase in the percentage of the jail population that was unsentenced are: Alameda, Amador, Butte, Colusa, El Dorado, Humboldt, Imperial, Kings, Lassen, Los Angeles, Madera, Mariposa, Mono, Monterey, Nevada, Placer, Plumas, Riverside, San Benito, San Bernardino, San Diego, San Mateo, Santa Clara, Shasta, Siskiyou, Solano, Sonoma, Sutter, Tehama, Trinity, Tulare, Tuolumne, Ventura, and Yolo.

62 We calculated unsentenced percentages for the county-level analysis instead of using total unsentenced jail population numbers to control for general trends in population numbers. The percentages calculated for each county are quarterly averages of the monthly percentages of the average daily jail population who are "unsentenced," or pretrial.

63 We compared Q2-Q4 of 2021 to Q1 of 2021 to isolate the effects of *Humphrey* as much as possible. Because counties have seen trends in pretrial population over time since 2017 and saw unusual trends in 2020 due to the COVID-19 pandemic, we chose not to make a cross-year comparison. To further analyze any potential correlation between trends and the *Humphrey* decision, we compared the change between Q2-Q4 and Q1 of 2021 to the respective changes in other years. In some counties, the data was extremely inconsistent, with certain years seeing drastic, unexplained changes. However, for the most part, there was not a consistent increase or decrease between Q1 and Q2-Q4 across counties from

2017-2019 (2020 was not included in this analysis due to COVID-19) that would play a significant role in explaining the changes across quarters in 2021.

64 The counties that saw a decrease in the percentage of the jail population that was unsentenced are: Calaveras, Contra Costa, Del Norte, Fresno, Glenn, Inyo, Kern, Lake, Marin, Merced, Modoc, Napa, Orange, Sacramento, San Francisco, San Joaquin, San Luis Obispo, Santa Barbara, Santa Cruz, Stanislaus, and Yuba.

65 The three counties that did not have sufficient data to analyze are: Alpine, Mendocino, and Sierra.

66 53% of counties (31 counties) saw an increase in the number of unsentenced people from Q1 to Q2-Q4 of 2021, while 41% (24 counties) saw a decrease, and 3% (2 counties) had insufficient data. Only 50% of counties saw an increase between Q1 and Q2-Q4 across an average of 2017-2019 data.

67 *Humphrey,* 11 Cal.5th at 154.

68 HRW Report, *supra* note 12, at p. 4.

69 While we were interested in bail amounts ordered at arraignment, most data we received on bail amounts are from booking data provided by Sheriff Departments. It is possible that such amounts reflect amounts ordered at arraignment but the way in which the data were provided does not provide such clarity.

70 These three counties were selected because they provided the most robust data over a substantial time period.

71 San Joaquin County did not provide data that could be disaggregated into misdemeanors and felonies.

72 San Mateo County Emergency Bail Order (Oct. 29, 2021), available at https://www.sanmateocourt.org/documents/ court_news_and_notices/102921a.pdf.

73 Silicon Valley De-Bug, Discord & Inaction: Bail and Detention Decisions One Year After Humphrey (on file with authors).

74 *Id.*

75 *Id.*

76 *In re Shir Eitan* San Mateo County. Sup. Court No. 22-NM-004661-A.

77 *Humphrey,* 11 Cal.5th at 156.

78 Lacoe, *supra* note 59, at 4.

79 It is of note that the average lengths of stay could be skewed due to outliers, as they were calculated by BSCC as means, not medians. See previous footnote for notes on why we selected quarterly comparisons.

80 The counties that saw an increase in average length of stay are Amador, Butte, Del Norte, Fresno, Glenn, Humboldt, Imperial, Lassen, Madera, Mendocino, Mono, Orange, Plumas, Sacramento, San Diego, San Joaquin, San Mateo, Santa Cruz, Shasta, Siskiyou, Sonoma, Tehama, and Trinity.

81 The counties that saw a decrease in average length of stay are El Dorado, Inyo, Kern, Kings, Los Angeles, Marin, Mariposa, Monterey, Napa, Placer, San Bernardino, San Francisco, Santa Barbara, Solano, and Yuba.

82 The counties that did not have sufficient data to analyze are Alameda, Alpine, Calaveras, Colusa, Contra Costa, Lake, Merced, Modoc, Nevada, Riverside, San Benito, San Luis Obispo, Santa Clara, Sierra, Stanislaus, Sutter, Tulare, Tuolumne, Ventura, and Yolo.

83 Email from Shelley Curran, Dir. of Crim. Just. Serv. of the Judicial Council of CA, to "JCC PJs-All Trial Courts; JCC Court Execs – ALL Trial Courts," (Apr. 2, 2021) (on file with the authors).

84 *See* Appendix D, Judge Couzens' Memo, at 2-3.

85 *Humphrey,* 11 Cal.5th at 154.

86 *Id.* at 155.

87 *See* Appendix D, Judge Couzens' Memo, at 8.

88 Article I Section 12 of the California Constitution provides that a person *shall* be released on bail except 1) capital crimes where the facts are evident or the presumption great; 2) felonies involving violence or sexual assault where the facts are evident or the presumption great and there is clear and convincing evidence that there is a substantial likelihood the release of the person would result in great bodily harm to others; or 3) felonies where the facts are evident or the presumption great and there is clear and convincing evidence that the "person has threatened another with great bodily harm and that there is a substantial likelihood that the person would carry out the treat if released."

89 Email from Berkley Brannon, to 224-Attorney List (May 6, 2021) (on file with authors).

90 *Id.*

91 Records received from San Joaquin County (on file with authors).

92 Lauren Smith, *Judge Uses 'Humphrey' Bail Case to Refuse to Release 'Good Person' on No Bail,* Davis Vanguard (April 14, 2021), https://www.davisvanguard.org/2021/04/judge-uses-humphrey-bail-case-to-refuse-to-release-good-person-on-no-bail.

93 *Id.*

94 Kevin Fitzgerald, *Candidate Q & A: Meet the Three Candidates Running for Riverside County District Attorney,* Coachella Valley Independent (May 2022).

95 The American Civil Liberties Union lays out a lengthy historical analysis of the two constitutional provisions (section 12 and 28 (f)(3)) in an amicus brief in both *In re Humphrey* and *In re Kowalzcyk*. The ACLU extensively analyzes Proposition 9 that was put to voters, which ultimately passed and amended section 28 to include section 28 (f)(3). The ACLU concludes that the voters, in voting for Proposition 9, did not intend to repeal section 12. Brief for ACLU of Northern California, ACLU of Southern California, ACLU of San Diego and Imperial Counties and California Law Professors et al. as Amici Curiae Supporting Respondent, In re. Kenneth Humphrey, 11 Cal. 5th 135 (2021) 2018 WL 4941976.

96 *Humphrey,* 11 Cal.5th at 156.

97 *In re Brown,* 76 Cal. App.5th 296, 308 (2022).

98 *Harris, supra* note 40.

99 Transcript of Record at 15, People of the State of California v. Brandon Bibbs, VA134204 (on file with authors).

100 *Brown,* 76 Cal. App. 5th at 306.

101 *Id.* at 300.

102 *Id.*

103 *Id.* at 308 (citing Humphrey, 11 Cal.5th at 151).

104 Judge Richard Couzens, Procedure for Bail Setting in Accordance with In Re Humphrey (2021) 5 (April 1, 2021).

105 Those counties are Alameda, Fresno, Humboldt, Kern, Los Angeles, Marin, Placer, Riverside, Sacramento, San Bernardino, San Joaquin, Stanislaus, and Ventura Counties.

106 Smith, *supra* note 96.

107 While the defense attorneys generally appreciated the development of this court, they also presented some cautionary information. One defense attorney from Alameda County said that the judge in this courtroom will give an indicated ruling on each case in the morning, but this has led to some coercive practices. For example, if the judge indicates that they will grant a bail motion, the judge will then turn to the DA and suggest that the DA make the client a good plea offer. So, instead of getting out of custody and fighting their case from the outside, many clients will plead guilty and resolve their case.

108 Memo to Molly O'Neal from PARR Attorneys Carson White & Carlie Ware, Re: Parr's Mission and Service Model (Oct. 15, 2020) (on file with authors).

109 *Id.*

110 Memo to Re-Entry Network from Charles Hendrickson, Assistant Public Defender, Subject: Pre-Arraignment Representation and Review (PARR) team (Feb. 9, 2022) (on file with authors).

111 *See Harris, supra* note 40. (The Court of Appeal vacated the trial court order and remanded petitioner's case to the trial court for a new bail hearing).

112 *In re Desatoff*, 2021 WL 1712201 (Cal. Ct. App. 2021).

113 We received data on the number of arraignments from district attorney offices in Calaveras, Colusa, Kings, Los Angeles, Monterey, San Diego, San Joaquin, Santa Barbara, Santa Clara, Tulare, and Tuolumne Counties.

114 @OCDAToddSpitzer, *Twitter* (Sep. 10, 2021, 3:11PM), https://twitter.com/OCDAToddSpitzer/status/1436452172489641987?s=20.

115 Letter from Johanna Kim, Sr. Deputy District Attorney, Orange County to our research team (Mar. 31, 2022) (on file with authors).

116 Email from Gipsy Escobar, to Melinda Aiello, Jonathan Raven, Ryan Couzens, William Ferrier, & Jeff Reisig (June 16, 2021, 8:21 AM).

117 Email from Thomas Hardy to Jeff Hollowell et. al, Subject: "New Case on Bail" (Apr. 9, 2021) (on file with authors).

118 Lisa Smittencamp, Memorandum re: Cash Bail and *In re Humphrey* (Mar. 26, 2021) (on file with authors).

119 Tori Verber Salazar, In re Humphrey, Best Practices, State of the Law (Mar. 29, 2021) (on file with authors); Memorandum from Lisa Lyytikainen to All Deputy District Attorneys, Subject: In re Humphrey – New Rules for Bail in California (Mar. 25, 2021) (on file with authors).

120 *In re Humphrey* Flow Chart (on file with authors).

121 Slideshow by Katrina Brownson and Eric Wang in the Tulare District Attorney's Office (on file with authors).

122 Humphrey ORB Motion-OPP (on file with authors).

123 San Diego Cnty. Dist. Atty's Off. Dist. Att'y Summer Stephan, Legal Policies Guide (Dec. 2021), available at https://www.sdcda.org/content/prosecuting/Legal%20Policies%20Guide.pdf.

124 San Francisco Cnty. Dist. Atty's Off. Dist. Att'y Chesa Boudin, Policy Directive 1.1 Pretrial Release Conditions and Detention Policy (2022), available at https://sfdistrictattorney.org/wp-content/uploads/2022/01/1.1_Pretrial-Release-and-Detention-Policy_Updated-1.19.2022.pdf.

125 Riverside Dist. Att'y, *Case Related Policies* (Feb. 14, 2022) (on file with authors).

126 Don Thompson, *California high court: Judges must weigh ability to pay bail,* Bakersfield.com (Mar. 25, 2021), https://www.bakersfield.com/news/california-high-court-judges-must-weigh-ability-to-pay-bail/article_bce54492-8dc0-11eb-9481-cfb54c72286a.html).

127 Email from Thomas L. Hardy, Subject: "Follow-up on Humphreys Meeting today" (Apr. 28, 2021) (on file with authors).

128 Email from David Tellman, Subject: "Cal Supreme Court Case severely limiting cash bail" (Mar. 25, 2021) (on file with authors.

129 Email from Todd Zocchi to Lisa Specchio et al., Subject: "pretrial release" (Apr. 8, 2021) (on file with authors).

130 Email from Laura Dixon, Commc'n Dir. of the Chief Probation Officers of CA, to Karen Pank (March 25, 2021) (on file with authors).

131 Letter from Karen Pank and Danielle Sanchez, CPOC, to Gavin Newsom, Re: Statewide Program to Safely Reduce Pretrial Detention (June 12, 2021) (on file with authors).

132 *Id.*

133 Email from Carrie R. Woolley, Deputy County Counsel (Feb. 7, 2018) (on file with authors).

134 Fresno County Probation Department Pretrial Services Program PowerPoint Presentation, Oct. 5, 2018. On file with authors.

135 Email from Matt Perry, Deputy Chief Probation Officer, to Robert LaForge et al., (July 5, 2018).

136 Email from Thomas Hardy, Dist. Att'y, to Julie Weir & Jeff Thomson, Chief Probation Officer (Apr. 26, 2021).

137 The Public Safety Assessment is a risk assessment tool developed by the Laura and John Arnold Foundation to be used in the pretrial context to determine each person's risk of failure to appear, future criminal activity, and future violence. http://craftmediabucket.s3.amazonaws.com/uploads/PDFs/PSA-Risk-Factors-and-Formula.pdf.

138 Letter from Cathy White, to our research team (Oct. 27, 2021) (on file with authors).

139 Email from Dan Dow, Dist. Att'y, to Robert Reyes, Chief Probation Officer, (Mar. 26, 2021) (on file with authors).

140 Assembly Bill 1950 was a legislative measure approved by the Governor in 2020 that reduced the amount of time for which probation could be imposed on a person convicted of a misdemeanor.

141 Email from Robert Reyes, Chief Probation Officer, to Ian Parkinson & Dan Dow, Dist. Att'ys, (Mar. 26, 2021) (on file with authors).

142 Email from TR Merickel, Chief Probation Officer, to

Probation—All Employees (Apr. 16, 2021) (on file with authors).

143 Email from Victor Cotera, Div. Dir.-Adult Serv. Kern County Probation, to Frank Herrerra, (Apr. 14, 2021) (on file with authors).

144 The Community Corrections Partnership oversees funding distribution of funds made available through AB 109. AB 109, commonly knowns as "realignment", was passed by California voters in 2011. It was passed to alleviate overcrowding in the state prison system by shifting people charged with certain low-level felonies to the supervision of county jails and probation. Ass. Bill 109.

145 Kern County Probation Department Memo from Chief Probation Officer TR Merickel to Community Corrections Partnership, June 2, 2021, Subject: "Proposed Probation Plan for FY 2021/22". On file with authors.

146 Merced County Probation Department, Pretrial Services, https://www.countyofmerced.com/3693/Pretrial-Services.

147 Email from Carol Ulloa to Richard Carl & Jason Davis (July 23, 2021) (on file with authors).

148 San Francisco and Santa Clara Counties already have non-profit pretrial agencies that existed long before the *Humphrey* decision.

149 Motion by Supervisor Sheila Kuehl, "Care First, Jails Last: Establishing a Justice, Care, and Opportunities Department to Promote Collaboration and Transparency in a Person-Centered Justice System" (Mar. 1, 2022).

150 Johanna B. Folk et al., *Connectedness to the criminal community and the community at large predicts 1-year post-release outcomes among felony offenders,* Eur. J. Soc. Psychol. (2015), https://www.ncbi.nlm.nih.gov/ pmc/articles/PMC4978434/; *Michael Tonry, Cmty. Punishments* (Academy for Justice, 2017), https://law.asu.edu/sites/default/files/pdf/academy_for_justice/10_Criminal_Justice_Reform_Vol_4_Community-Punishments.pdf.

151 Tulare County approved an agreement to provide EM equipment and increased spending from $450,000 in 2020-21, to $950,000 in 21-22. See Second Amendment to Tulare County Agreement No. 29817 (on file with authors).
Sonoma County increased their spending on EM from $370,649 in 2019-20 to $437,010.13 in 2020-21. See Humphrey PRA Docs.xlsx (on file with authors). Solano County amended its EM contract, simultaneously increasing the contract price from $65,000 to $120,000 in 2019 and eventually to $250,000 by 2021. See Second Amendment to Standard Contract Between County of Solano and Leaders in Community Alternatives, Inc.; Third Amendment to Standard Contract Between Solano and Leaders in Community Alternatives, Inc.; Fourth Amendment Between County of Solano and Leaders in Community Alternatives, Inc. Santa Barbara County entered into a contract for SCRAM technology for $70,000 in 2019-20 before entering new contracts in 2020-21 and 2021-22 for $110,000 and $155,000 respectively. *See* County of Santa Barbara Order CN23902 dated Jul/01/2020 and County of Santa Barbara Order CN22780 dated Jul/01/2019; County of Santa Barbara CN24954 dated Jul/01/2021. Mariposa County's contract prices for pretrial services has fluctuated over the last few years, from $25,839 in 2018-19, $18,077 in 19-20, to $22,644 in 20-21. *See Humphrey* Implementation Request.pdf at Page 14. Kings County reported spending $29,095 on EM from August 2020 to February 2021, and $59,864 from March 2021 to August 2021. See Kings County Probation Department Pretrial Pilot Program (PPP) Invoice Number PPP-008 dated 10/05/2021; Kings County Probation Department Pretrial Pilot Program (PPP) Invoice Number – PPP – 007 dated 07/09/2021; Kings County Probation Department Pretrial Pilot Program (PPP) Invoice Number PPP-006 dated 04/01/2021; Kings County Probation Department Pretrial Pilot Program (PPP) Invoice Number PPP-005 dated 01/12/2021. Los Angeles County approved a $1.4 million increase to the Probation Department for its EM Program in October 2021, a 159% increase in the budget for this program. L.A. Cnty., Cal., Recommended Adjustments to the Fiscal Year (FY) 2021-22 Adopted County Budget to Reflect Various Changes and Authorization to Execute Funding Agreements, Adopted Oct. 5, 2021, https://perma.cc/N4KG-MST6, (last accessed Nov. 24, 2021).

152 Aurélie Ouss & Megan Stevenson, Bail, Jail and Pretrial Misconduct: The Influence of PRosecutors 21 (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3335138.

153 Jenny E. Carroll, B*eyond Bail, 73 Fla. L. Rev.* 134, 183 (2021).

154 *See In re Webb,* 7 Cal.5th 270, 278 (2019), stating that "[a]ny condition must be *reasonable,* and there must be a sufficient nexus between the condition and the protection of public safety."

155 *Jack Kasten & Darrell M. West, Decades Later, Electronic Monitoring of Offenders is Still Prone to Failure,* Brookings Inst. (Sep. 21, 2017) https://www.brookings.edu/blog/techtank/2017/09/21/decades-later-electronic-monitoring-of-offenders-is-still-prone-to-failure/.

156 *In re Law* 10 Cal.3d 21, 25 (1973) (citing *In re Underwood,* 9 Cal.3d 345 (1973) and *Ex parte Voll,* 41 Cal. 29 (1871)).

157 *In re Gerald John Kowalczyk* on Habeas Corpus, A162977.

158 Cal. Penal Code Ann. § 1269b.

159 Cal. Penal Code Ann. § 1269b(e).

160 Cal. Penal Code Ann. § 1269b(f).

161 Tafoya, *supra* note 11.

162 Merced Superior Court, Misdemeanor Bail Schedule (Mar. 19, 2022), https://www.merced.courts.ca.gov/system/files/2022-misdemeanor-bail-schedule.pdf.

163 Imperial county Superior Court, Felony and Misdemeanor Bail Schedule 2021 (Jan. 1, 2021), http://ecourt.imperial.courts.ca.gov/CourtDocumentsVB/Docs/Penalty/2021/2021%20Felony%20&%20Misd%20Bail%20Schedule.pdf; *see also* Sonya M. Tafoya, Assessing the Impact of Bail on California's Jail Population (PPIC, 2013), https://www.ppic.org/wp-content/uploads/rs_archive/pubs/report/R_613STR.pdf.

164 Judicial Council of CA, Uniform Bail and Penalty Schedules (2021), https://www.courts.ca.gov/documents/UBPS-2021-Final.pdf.

165 Tafoya, *supra* note 11.

166 SB-262, 2021-2022 Reg. Sess. (Cal. 2021).

167 *Id.*

168 *Id.*

169 Cnty. of LA Chief Exec. Off., First Quarterly Update on Data Collection to Support Pretrial Reform in Los Angeles County (Mar. 9, 2022), https://knock-la.com/wp-content/uploads/2022/04/2022-3-9-First-Quarterly-Update-on-Data-Collection-to-Support-Pretrial-Reform-in-LA-County-1.pdf.

170 A 90% release rate for all people arrested is a reasonable goal given empirical data on risk of release. *See* Shima Baradaran and Frank L. McIntyre, Predicting Violence, 90 Tex. L. Rev. 497, 537 (2012) ("5% of defendants have more than a 5% chance of being rearrested on a violent felony charge, with a few having higher than a 10% chance.").

171 Statutory Framework of Pretrial Release, Nat'l Conf. of State Legislators (Nov. 18, 2020), https://www.ncsl.org/research/civil-and-criminal-justice/the-statutory-framework-of-pretrial-release.aspx.

172 Cal. Penal Code Ann. § 853.6.

173 *Criminal Justice Section Standards: Pretrial Release,* ABA, https://www.americanbar.org/groups/criminal_justice/ publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_blk/?q=&fq=(id%3A%5C%2Fcontent%2Faba-cms-dotorg%2Fen%2Fgroups%2Fcriminal_justice%2F*)&wt=json&start=0.

174 *Id.*

175 Vera Institute of Justice, Successful Pretrial Systems Rely on Supportive Pretrial Services, https://vera-advocacy-and-partnerships.s3.amazonaws.com/Supportive%20Pretrial%20Services%20fact%20sheet.pdf.

176 Jeff McDonald, *Scales of justice can be tipped by spending on prosecutions, public defenders,* SD Union Tribune (Jul. 20, 2020) https://www.sandiegouniontribune.com/news/watchdog/story/2020-07-20/scales-of-justice-can-be-tipped-by-public-spending. The 2022-23 Approved Budget includes $237 million to the District Attorney's Office and $110 million to the Public Defender's Office. Public Safety GRoup, Adopted Operational Plan Fiscal Years 2021-22 and 2022-23, https://www.sandiegocounty.gov/content/dam/sdc/auditor/pdf/adoptedplan_21-23_psg.pdf.

177 The result of a settlement in *Phillips v. California.* Off. of the State Pub. Def., https://www.ospd.ca.gov/about-us/ (last visited Sep. 16, 2022).

178 Alena Yarmosky, The Impact of Early Representation: An Analysis of the San Francisco Public Defender's Pre-Trial Release Unit (CA Policy Lab, 2018), https://www.capolicylab.org/wp-content/uploads/2018/06/Policy-Brief-Early-Representation-Alena-Yarmosky.pdf.

179 Douglas L. ColbeRt, Ray Paternoster & Shawn Bushway, Do Attorneys Really Matter? The Empirical and Legal Case for Representation at Bail, 23 Cardozo L. Rev. 1719, 1720 (2002) (With representation, data shows that an incarcerated defendant charged with a nonviolent crime stands two and a half times as likely to be released on recognizance or affordable bail than an unrepresented defendant.).

180 Pretrial PRogress: A SuRvey of Pretrial Practices and SeRvices in California (CRJ, 2015), https://safeandjust.org/wp-content/uploads/PretrialSurveyBrief_8.26.15v2.pdf.

181 *Id.* stating that "What is conclusive from the research, however, is that these onerous conditions carry harmful collateral consequences and expose people to more, not less, pretrial failure."

182 *See* SF Pretrial Diversion Project, https://sfpretrial.org. (last visited Sep. 16, 2022).

183 *See* Cnty. of Santa Clara Off. of Pretrial Serv., https://pretrialservices.sccgov.org/about-us/office-pretrial-services-overview. (last visited Sep. 16, 2022).

184 NYC Mayor's Off. of Pretrial Justice Initiatives, https://criminaljustice.cityofnewyork.us/programs/office-of-pretrial-justice-initiatives/ (last visited Sep. 16, 2022).

185 LA Cnty. Chief Executive Off., https://ceo.lacounty.gov/2021/08/10/ati-newsroom/care-first-community-investment-spending-plan-invests-in-equity-and-community/ (last visited Sep. 16, 2022).

186 Melanie Skerner et al., *Pursuing Pretrial Justice Through an Alternative to Bail, Findings from an Evaluation of New York City's Supervised Release Program,* (MDRC Ctr. for Crim. Just. Rsch. (2020)), https://www.mdrc.org/publication/pursuing-pretrial-justice-through-alternative-bail.

187 SF Pretrial Diversion Project, 2019-2020 Fiscal Year Recap, https://sfpretrial.org/wp-content/uploads/2020/10/19-20-Annual-Outcomes-Infographics-Final-3.pdf.

188 BSCC Jail Profile Survey, https://www.bscc.ca.gov/s_fsojailprofilesurvey/ (last visited Sep. 16, 2022).

Appendices

Appendix A: Record Act Requests

VIA EMAIL

Re: Implementation of *Humphrey*

Dear Court Administrator:

I am writing to request a copy of the records detailed below. We are researching how California counties are implementing *In re Humphrey* (2021) 11 Cal.5th 135. In March 2021, the California Supreme Court decided that judges must consider a person's ability to pay when setting bail amounts and that detention only be used when no other less restrictive option will ensure follow-up appearance in court and guarantee public safety.

To the extent that you are aware of records that may be directly related or relevant to this request, but which we do not specifically describe, we ask that you provide these records in addition to the records specifically requested below.

Unless otherwise specified below, we request all records from April 1, 2021, through the present.

Please provide all records relating to:

1. The number of people arraigned by month.
2. Individual-level information about people arraigned broken down by:
    a. Demographic (race/ethnicity, gender, age, etc.),
    b. Release type, including:
        - Held on bail
        - Held without bail
        - Release on bail
        - Release on own recognizance
        - Release with conditions (electronic monitoring, supervision, drug/alcohol testing, etc.)
    c. Bail amount (if applicable)
    d. Date of booking/arrest
    e. Date of disposition
3. The number of *Humphrey* hearings/hearings in which a person's ability to pay was considered in determining bail amounts, by month
4. The factors and/or outcomes being tracked or noted in case management systems for cases involving *Humphrey* hearings, including bail amounts, release conditions, etc.

5. The standard being used when determining whether an individual should be detained or not.
6. Ability to pay standards, processes, forms, and policies being utilized when setting bail amounts.
7. Training materials and bench cards provided to judges and court staff on bail, pretrial release, and any updates post-*Humphrey*.
8. Internal memos and materials regarding the court's practice or policies related to bail, Humphrey, ability to pay, release on own recognizance, and conditions of release.
9. Correspondence regarding *Humphrey*, regardless of the author, source, or form in which reference to the decision appears in records.

To the extent possible, please note which records relate to which requests according to the numbered sections above.

This public records request applies to all nondeliberative and nonadjudicative Court records and management information in your possession. If specific portions of any documents are exempt from disclosure, please provide the non-exempt portions.

If you maintain records in electronic format, please provide all requested documents in one of the following electronic formats: .xlsx, .xls, or .csv. For records containing correspondence, we ask you provide those in .pdf or .doc electronic formats.

We are not requesting personally identifying information for any individual. All information we are seeking is statistical or aggregated information.

Please acknowledge receipt of this request and respond within ten (10) days, either by providing all the requested records or by providing a written response setting forth the legal authority for withholding or redacting any document and stating when the documents will be made available.

Please note that the California Rules of Court allows a member of the public to request records by describing their content, rather than asking for specific documents by name; an agency that receives such a request must "assist the requester in identifying records and information responsive to the request." Please provide entire documents, even if only parts of them are responsive to this request.

If I can provide any clarification that will help identify responsive documents or focus this request, please contact me by email at humphreyimplementation@gmail.com.

Thank you for your time and attention to this matter.

VIA EMAIL

Re: Implementation of *Humphrey*

Dear District Attorney:

I am writing to request a copy of the records detailed below. We are researching how California counties are implementing *In re Humphrey* (2021) 11 Cal.5th 135. In March 2021, the California Supreme Court decided that judges must consider a person's ability to pay when setting bail amounts and that detention only be used when no other less restrictive option will ensure follow-up appearance in court and guarantee public safety.

To the extent that you are aware of records that may be directly related or relevant to this request, but which we do not specifically describe, we ask that you provide these records in addition to the records specifically requested below.

Unless otherwise specified below, we request all records from April 1, 2021, through the present.

Please provide all records relating to:

1. The number of people arraigned, by month,
2. Individual-level information about people arraigned broken down by:
    a. Demographic (race/ethnicity, gender, age, etc.),
    b. Release type, including:
        - Held on bail
        - Held without bail
        - Release on bail
        - Release on own recognizance
        - Release with conditions (electronic monitoring, supervision, drug/alcohol testing, etc.)
    c. Bail amount (if applicable)
    d. Date of booking/arrest
    e. Date of disposition
3. The number of *Humphrey* hearings/hearings in which a person's ability to pay was considered in determining bail amounts, by month
4. The number of *Humphrey* hearings where objections were made to reduction in bail or release on own recognizance, by month
5. The factors and/or outcomes being tracked or noted in case management systems for cases involving *Humphrey* hearings, including bail amounts, release conditions, etc.
6. Trainings and materials provided to prosecuting attorneys and staff on bail, pretrial release, and any updates post-*Humphrey*.

7. Internal memos and materials regarding the office's practice or policies related to bail, *Humphrey*, ability to pay, release on own recognizance, and conditions of release.
8. Correspondence regarding *Humphrey*, regardless of the author, source, or form in which reference to the decision appears in records.

To the extent possible, please note which records relate to which requests according to the numbered sections above.

This public records request applies to all documents in your agency's possession, including emails, video, audiotapes, and other electronic records. It also includes documents that were created by a member of another government agency or a member of the public. If specific portions of any documents are exempt from disclosure, please provide the non-exempt portions.

If you maintain records in electronic format, please provide all requested documents in one of the following electronic formats: .xlsx, .xls, or .csv. For records containing correspondence, we ask you provide those in .pdf or .doc electronic formats.

We are not requesting personally identifying information for any individual youth or his/her family. All information we are seeking is statistical or aggregated information and, thus, the exceptions for certain criminal justice records and for certain personal information relating to minors do not apply.

Please acknowledge receipt of this request and respond within ten (10) days, either by providing all the requested records or by providing a written response setting forth the legal authority for withholding or redacting any document and stating when the documents will be made available.

Please note that the Public Records Act allows a member of the public to request records by describing their content, rather than asking for specific documents by name; an agency that receives such a request must "search for records based on criteria set forth in the search request." Please provide entire documents, even if only parts of them are responsive to this request.

If I can provide any clarification that will help identify responsive documents or focus this request, please contact me by email at humphreyimplementation@gmail.com.

Thank you for your time and attention to this matter.

VIA EMAIL

Re: Implementation of *Humphrey*

Dear [COUNTY] Probation:

I am writing to request a copy of the records detailed below. We are researching how California counties are implementing *In re Humphrey* (2021) 11 Cal.5th 135. In March 2021, the California Supreme Court decided that judges must consider a person's ability to pay when setting bail amounts and that detention only be used when no other less restrictive option will ensure follow-up appearance in court and guarantee public safety.

To the extent that you are aware of records that may be directly related or relevant to this request, but which we do not specifically describe, we ask that you provide these records in addition to the records specifically requested below.

Unless otherwise specified below, we request all records from January 1, 2017, through the present. Please provide all records relating to:

1. Number of people referred to your department for pretrial supervision, by month.
2. Individual-level information about people referred broken down by:
    a. Demographic (race/ethnicity, gender, age, etc.),
    b. Risk assessment score
    c. Supervision type, including, but not limited to:
        - Electronic monitoring (including GPS monitoring, SCRAM, or any other type of monitoring)
        - Drug and/or alcohol testing
        - Referral for services (e.g., anger management or counseling)
        - Alcoholics Anonymous (AA) and/or Narcotics Anonymous (NA) meetings
        - Other supervision types
    d. Date of booking/arrest
    e. Date of release from custody pretrial
    f. Date of referral to your department
    g. Violations of pretrial probation terms
        - Type of violation
        - Result of violation

h. Failures to appear

3. Assessment of fees and/or costs to individuals for the aforementioned services or any other services provided pre-trial, including, but not limited to:

    a. Total amount (in dollars) of fees and/or costs assessed, charged, waived, and/or reduced, described by month and by type and number of individuals or accounts

    b. Ability to pay standards, processes, forms, and policies being utilized when setting fee and/or cost amount

4. Training materials, bench cards, internal memos or materials, correspondence, and/or any updates provided to probation staff on pretrial supervision post-*Humphrey*, regardless of the author, source, or form in which reference to the decision appears in records.

5. Documentation and/or protocol related to pretrial probation violations, including information about consequences for violations.

6. Financial and/or other budgetary information or documentation related to pretrial supervision services or programs, including:

    a. Expenditures on pre-trial supervision unit personnel, overhead, and other expenses, by year (and month if available)

    b. Contracts for services, equipment, etc. related to pre-trial supervision

    c. Requests for public funding to cover expenses related to pre-trial supervision

This public records request applies to all documents in your agency's possession, including emails, video, audiotapes, and other electronic records. It also includes documents that were created by a member of another government agency or a member of the public. Please provide entire documents, even if only parts of them are responsive to this request. If specific portions of any documents are exempt from disclosure, please provide the non-exempt portions.

Please acknowledge receipt of this request and respond within ten (10) days, either by providing all the requested records or by providing a written response setting forth the legal authority for withholding or redacting any document and stating when the documents will be made available.

Whenever possible, I request that you provide all information including dollar amounts in one of the following electronic formats: .xslx, .xls, or .csv. If you already maintain records in an electronic format, please provide them in that same format to avoid duplication costs. I ask that you notify me of any administrative costs before you duplicate the records.

We are not requesting personally identifying information for any individual. All information we are seeking is statistical or aggregated information.

If I can provide any clarification that will help identify responsive documents or focus this request, please contact me by email at humphreyimplementation@gmail.com.

Thank you in advance for your timely attention to this matter.

VIA EMAIL

Re: Implementation of *Humphrey*

Dear Sheriff:

I am writing to request a copy of the records detailed below. We are researching how California counties are implementing *In re Humphrey*. In March 2021, the California Supreme Court decided that judges must consider a person's ability to pay when setting bail amounts and that detention only be used when no other less restrictive option will ensure follow-up appearance in court and guarantee public safety.

To the extent that you are aware of records that may be directly related or relevant to this request, but which we do not specifically describe, we ask that you provide these records in addition to the records specifically requested below.

Unless otherwise specified below, we request all records from April 1, 2021, through the present.

Please provide all records relating to:

1. People booked into custody, by month, disaggregated by:
    a. Demographic (race/ethnicity, gender, age, etc.),
    b. Release type, including:
        - Held on bail
        - Held without bail
        - Release on bail
        - Release on own recognizance
        - Release with conditions (electronic monitoring, supervision, drug/alcohol testing, etc.)
    c. Bail amount
    d. Date of booking/arrest
    e. Date of disposition
2. The number of people released due to pretrial capacity limitations, by month
3. Correspondence regarding *Humphrey*, regardless of the author, source, or form in which reference to the decision appears in records.

To the extent possible, please note which records relate to which requests according to the numbered sections above.

This public records request applies to all documents in your agency's possession, including emails, video, audiotapes, and other electronic records. It also includes documents that were created by a member of another government agency or a member of the public. If specific portions of any documents are exempt from disclosure, please provide the non-exempt portions.

If you maintain records in electronic format, please provide all requested documents in one of the following electronic formats: .xlsx, .xls, or .csv. For records containing correspondence, we ask you provide those in .pdf or .doc electronic formats.

We are not requesting personally identifying information for any individual youth or his/her family. All information we are seeking is statistical or aggregated information and, thus, the exceptions for certain criminal justice records and for certain personal information relating to minors do not apply.

Please acknowledge receipt of this request and respond within ten (10) days, either by providing all the requested records or by providing a written response setting forth the legal authority for withholding or redacting any document and stating when the documents will be made available.

Please note that the Public Records Act allows a member of the public to request records by describing their content, rather than asking for specific documents by name; an agency that receives such a request must "search for records based on criteria set forth in the search request." Please provide entire documents, even if only parts of them are responsive to this request.

If I can provide any clarification that will help identify responsive documents or focus this request, please contact me by email at humphreyimplementation@gmail.com.

Thank you for your time and attention to this matter.

Appendix B: Records Received

	Court	District Attorney	Probation	Sheriff	# of Stakeholders That Responded
Alameda	x	x			2
Alpine				x	1
Amador	x	x	x		3
Butte	x		x	x	3
Calaveras		x	x	x	3
Colusa	x	x	x	x	4
Contra Costa	x	x	x	x	4
Del Norte	x	x			2
El Dorado					0
Fresno	x	x	x	x	4
Glenn		x	x		2
Humboldt	x		x	x	3
Imperial			x	x	2
Inyo		x	x		2
Kern	x		x	x	3
Kings	x	x	x	x	4
Lake	x	x	x		3
Lassen	x		x	x	3
Los Angeles	x	x			2
Madera	x	x	x		3
Marin		x			1
Mariposa	x		x	x	3
Mendocino	x		x		2
Merced	x	x	x	x	4
Modoc		x	x	x	3
Mono			x	x	2
Monterey	x	x	x	x	4
Napa	x		x	x	3
Nevada	x	x		x	3
Orange		x		x	2
Placer	x	x	x	x	4

Plumas		x	x		2
Riverside	x	x		x	3
Sacramento	x	x	x		3
San Benito	x	x	x	x	4
San Bernardino	x	x	x	x	4
San Diego	x	x	x		3
San Francisco				x	1
San Joaquin	x	x	x	x	4
San Luis Obispo		x	x		2
San Mateo		x	x	x	3
Santa Barbara		x	x		2
Santa Clara		x	x		2
Santa Cruz		x	x		2
Shasta	x	x	x	x	4
Sierra		x			1
Siskiyou	x	x			2
Solano	x		x	x	3
Sonoma		x	x	x	3
Stanislaus		x		x	2
Sutter			x		1
Tehama	x	x			2
Trinity		x	x	x	3
Tulare	x	x	x	x	4
Tuolumne		x	x	x	3
Ventura	x	x	x	x	4
Yolo	x	x	x	x	4
Yuba	x	x	x	x	4
Total	**35**	**44**	**44**	**36**	

Appendix C: Defense Attorney Survey

Humphrey Survey--Defense Attorneys

This survey is being conducted by attorneys and researchers at UC Berkeley School of Law's Policy Advocacy Clinic and UCLA School of Law's Criminal Justice Program.

This survey is intended for defense attorneys who have engaged in at least one arraignment or bail hearing where In re Humphrey or a Humphrey analysis was invoked. If you are not in an assignment where you are making bail arguments, you do not need to fill out this survey.

The California Supreme Court decided In re Humphrey in March 2021. Thus, when survey questions reference March 2021, this is what we are referring to.

The results of this survey will be used to evaluate your county/court's compliance with Humphrey, not your or your office's practices or behavior. Please feel free to circulate this survey within your office. You will be given the option at the end to provide your name and contact information, but are not required to do so.

Reasonably identifiable information will be kept confidential to the research team, but we may share data we receive in an anonymized and aggregated form. Identifying information such as contact information will only be used for follow-up purposes and will not be shared outside of the research team. No data collected during this study, including de-identified data will be shared for future research.

If you have any questions about the survey, please reach out to Alicia Virani or Stephanie Campos-Bui at humphreyimplementation@gmail.com.

* Required

1. In what county do you primarily practice? *

Mark only one oval.

- Alameda
- Alpine
- Amador
- Butte
- Calaveras
- Colusa
- Contra Costa
- Del Norte
- El Dorado
- Fresno
- Glenn
- Humboldt
- Imperial
- Inyo
- Kern
- Kings
- Lake
- Lassen
- Los Angeles
- Madera
- Marin
- Mariposa
- Mendocino
- Merced
- Modoc
- Mono
- Monterey
- Napa
- Nevada
- Orange

- [ ] Placer
- [ ] Plumas
- [ ] Riverside
- [ ] Sacramento
- [ ] San Benito
- [ ] San Bernardino
- [ ] San Diego
- [ ] San Francisco
- [ ] San Joaquin
- [ ] San Luis Obispo
- [ ] San Mateo
- [ ] Santa Barbara
- [ ] Santa Clara
- [ ] Santa Cruz
- [ ] Shasta
- [ ] Sierra
- [ ] Siskiyou
- [ ] Solano
- [ ] Sonoma
- [ ] Stanislaus
- [ ] Sutter
- [ ] Tehama
- [ ] Trinity
- [ ] Tulare
- [ ] Tuolumne
- [ ] Ventura
- [ ] Yolo
- [ ] Yuba

2. If you practice in any other counties, please list them below.

3. Which of the following best describes your role? *

Mark only one oval.

- ◯ Public defender
- ◯ Court-appointed attorney/bar panel attorney
- ◯ Private attorney
- ◯ Other: _____

4. How long have you been a defense attorney in California *

We ask this question to contextualize any responses you provide with respect to the timeline of the Humphrey decision. Please round up if necessary.

Mark only one oval.

- ◯ Less than 1 year
- ◯ 1 year
- ◯ 2 years
- ◯ 3 years
- ◯ 4 years
- ◯ 5 years
- ◯ 6 years
- ◯ 7 years
- ◯ 8 years
- ◯ 9 years
- ◯ 10 years and over

5. What types of cases do you work on currently? *

Mark only one oval.

- ◯ Misdemeanors
- ◯ Felonies
- ◯ Both misdemeanors and felonies

6. On average, how many bail pitches do you conduct a week (including those made at arraignment)? *

_____

7. In approximately what percentage of those bail pitches do you make arguments based on Humphrey/ability to pay to advocate for pretrial release? *

Mark only one oval.

- 75-100%
- 50-75%
- 25-50%
- 0-25%

8. What factors into your decision to make these arguments or not?

Prosecutors' Behavior & Humphrey Hearings

9. When you make arguments based on Humphrey/ability to pay, approximately what percentage of the time *

Mark only one oval per row.

	100%	75%	50%	25%	0%
do prosecutors object to O.R. release?	◯	◯	◯	◯	◯
do prosecutors request an increase in bail?	◯	◯	◯	◯	◯
do prosecutors request for a complete revocation of bail (a no bail hold)?	◯	◯	◯	◯	◯
do prosecutors refrain from objecting?	◯	◯	◯	◯	◯

10. In your opinion, since March 2021 are prosecutors *

Mark only one oval per row.

	At the same rate as before March 2021	More frequently than before March 2021	Less frequently than before March 2021
objecting to O.R. release	◯	◯	◯
requesting an increase in bail	◯	◯	◯
requesting no bail holds	◯	◯	◯
not objecting to pretrial release	◯	◯	◯
requesting pretrial release conditions imposed on your clients	◯	◯	◯

Judicial Behavior & Humphrey

11. In your opinion, are judges in your county *

Mark only one oval per row.

	At the same rate as before March 2021	More frequently than before March 2021	Less frequently than before March 2021
releasing people pretrial	◯	◯	◯
revoking bail (placing a no bail hold)	◯	◯	◯
imposing pretrial release conditions	◯	◯	◯

12. If there has been a change in judge's behavior since March 2021, why do you think that's the case?

13. If your request for pretrial release is denied, approximately what percentage of the time do judges *

Mark only one oval per row.

	100%	75%	50%	25%	0%
maintain bail at the same amount?	◯	◯	◯	◯	◯
increase bail?	◯	◯	◯	◯	◯
revoke bail (order a no bail hold)?	◯	◯	◯	◯	◯

14. Approximately what percentage of the time do judges *

Mark only one oval per row.

	100%	75%	50%	25%	0%
reduce bail to an unaffordable amount?	◯	◯	◯	◯	◯
reduce bail to an affordable amount ?	◯	◯	◯	◯	◯
release your client on OR with no conditions of release?	◯	◯	◯	◯	◯
release your client on OR with release conditions?	◯	◯	◯	◯	◯

15. If your client is released with pretrial conditions, approximately what percentage of the time are they placed on *

Mark only one oval per row.

	100%	75%	50%	25%	0%
electronic monitoring	◯	◯	◯	◯	◯
pretrial supervision	◯	◯	◯	◯	◯
drug/alcohol testing	◯	◯	◯	◯	◯
restraining order	◯	◯	◯	◯	◯
other conditions	◯	◯	◯	◯	◯

16. If judges in your county are detaining people pretrial and not setting money bail, for what charges are they doing this?

17. What evidence are judges requiring and standards are they using to determine your clients' ability to pay?

18. Does your office collect data on Humphrey hearings? *

Mark only one oval.

- ◯ Yes
- ◯ No
- ◯ Don't know

19. If you have seen an increase in pretrial releases, do you have a sense of whether this is due to Humphrey, COVID-19 or both? Please explain.

20. Have you encountered procedural hurdles from prosecutors, court staff, or judges that impede your ability to bring Humphrey motions?

Mark only one oval.

- ◯ Yes
- ◯ No

21. If yes, please explain any procedural hurdles you have encountered.

22. What do you think needs to change in order for judges/prosecutors to adhere to the Humphrey decision?

23. Please share anything else that you would like to let us know about pretrial decisions or Humphrey hearings in your county/court.

Are you willing to be contacted with follow up questions? (optional)

Your contact information will not be shared outside of the research team and will only be used for follow-up purposes. If you are open to a follow-up conversation, please leave your full name, email address and phone number below.

24. Full Name

25. Email Address

26. Phone Number

Appendix D: Prosecutor Survey

Humphrey Survey--Prosecutors

This survey is being conducted by attorneys and researchers at UC Berkeley School of Law's Policy Advocacy Clinic and UCLA School of Law's Criminal Justice Program to better understand the impact of the recent California Supreme Court decision, In re Humphrey. Individual responses will be kept confidential but we are happy to share out high-level findings from this survey.

This survey is intended for prosecutors who have engaged in at least one arraignment or bail hearing where In re Humphrey or a Humphrey analysis was invoked. If you are not in an assignment where you are making bail arguments, you do not need to fill out this survey.

The California Supreme Court decided In re Humphrey in March 2021. Thus, when survey questions reference March 2021, this is what we are referring to.

You will be given the option at the end to provide your name and contact information, but are not required to do so. Reasonably identifiable information will be kept confidential to the research team, but we may share data we receive in an anonymized and aggregated form. Identifying information such as contact information will only be used for follow-up purposes and will not be shared outside of the research team. No data collected during this study, including de-identified data will be shared for future research.

Please feel free to circulate this survey within your office.

If you have any questions about the survey, please reach out to Alicia Virani or Stephanie Campos-Bui at humphreyimplementation@gmail.com.

* Required

1. In what county do you primarily practice? *

Mark only one oval.

- Alameda
- Alpine
- Amador
- Butte
- Calaveras
- Colusa
- Contra Costa
- Del Norte
- El Dorado
- Fresno
- Glenn
- Humboldt
- Imperial
- Inyo
- Kern
- Kings
- Lake
- Lassen
- Los Angeles
- Madera
- Marin
- Mariposa
- Mendocino
- Merced
- Modoc
- Mono
- Monterey
- Napa
- Nevada
- Orange

- [ ] Placer
- [ ] Plumas
- [ ] Riverside
- [ ] Sacramento
- [ ] San Benito
- [ ] San Bernardino
- [ ] San Diego
- [ ] San Francisco
- [ ] San Joaquin
- [ ] San Luis Obispo
- [ ] San Mateo
- [ ] Santa Barbara
- [ ] Santa Clara
- [ ] Santa Cruz
- [ ] Shasta
- [ ] Sierra
- [ ] Siskiyou
- [ ] Solano
- [ ] Sonoma
- [ ] Stanislaus
- [ ] Sutter
- [ ] Tehama
- [ ] Trinity
- [ ] Tulare
- [ ] Tuolumne
- [ ] Ventura
- [ ] Yolo
- [ ] Yuba

2. How long have you been a prosecutor? *

We ask this question to contextualize any responses you provide with respect to the timeline of the Humphrey decision. Please round up if necessary.

Mark only one oval.

- ◯ Less than 1 year
- ◯ 1 year
- ◯ 2 years
- ◯ 3 years
- ◯ 4 years
- ◯ 5 years
- ◯ 6 years
- ◯ 7 years
- ◯ 8 years
- ◯ 9 years
- ◯ 10 years and over

3. What types of cases do you work on currently? *

Mark only one oval.

- ◯ Misdemeanors
- ◯ Felonies
- ◯ Both misdemeanors and felonies

4. On average, on how many bail hearings or arraignments do you appear in a week?

_____

Humphrey Hearings

5. When a defense attorney makes arguments based on Humphrey/ability to pay, approximately what percentage of the time *

Mark only one oval per row.

	100%	75%	50%	25%	0%
do you object to O.R. release?					
do you request an increase in bail?					
do you request a revocation of bail (a no bail hold)?					
do you refrain from making an objection?					
do you request pretrial release conditions?					

6. In your opinion, since March 2021, are defense attorneys *

Mark only one oval per row.

	At the same rate as before March 2021	More frequently than before March 2021	Less frequently than before March 2021
Requesting O.R. release			
Requesting a reduction in bail			

7. If you are requesting a cash bail amount, how do you determine the dollar amount to request? *

8. In your opinion, are judges in your county *

Mark only one oval per row.

	At the same rate as before March 2021	More frequently than before March 2021	Less frequently than before March 2021
releasing people pretrial			
revoking bail (placing a no bail hold)			
imposing pretrial release conditions			

9. If there has been a change in judge's behavior since March 2021, why do you think that's the case?

10. Approximately what percentage of the time do judges *

Mark only one oval per row.

	100%	75%	50%	25%	0%
grant your request for a revocation of bail (a no bail hold)?	◯	◯	◯	◯	◯
grant your request to increase bail?	◯	◯	◯	◯	◯
agree with your objection to O.R. release?	◯	◯	◯	◯	◯
grant the defense attorney's request to lower bail?	◯	◯	◯	◯	◯
grant the defense attorney's request to O.R. release?	◯	◯	◯	◯	◯

11. If a judge agrees to release the defendant, approximately what percentage of the time do they *

Mark only one oval per row.

	100%	75%	50%	25%	0%
release the defendant on O.R. with no conditions?	◯	◯	◯	◯	◯
release the defendant on O.R. with conditions?	◯	◯	◯	◯	◯

12. If a defendant is released with pretrial conditions, approximately what percentage of the time are they placed on *

Mark only one oval per row.

	100%	75%	50%	25%	0%
electronic monitoring	◯	◯	◯	◯	◯
pretrial supervision	◯	◯	◯	◯	◯
drug/alcohol testing	◯	◯	◯	◯	◯
restraining order	◯	◯	◯	◯	◯
other conditions	◯	◯	◯	◯	◯

13. In cases where judges are not setting money bail and detaining a defendant pretrial, on what charges are they doing this?

Additional Information

14. Does your office collect data on Humphrey hearings? *

Mark only one oval.

- ◯ Yes
- ◯ No
- ◯ Maybe

15. What are the challenges you/your office have faced since the Humphrey decision?

16. How have other agencies and departments (Sheriff, Probation, etc.) in your county been impacted by the Humphrey decision?

17. Please share anything else that you would like to let us know about pretrial decisions or Humphrey hearings in your county/court.

Are you willing to be contacted with follow up questions? (optional)

Your contact information will not be shared outside of the research team and will only be used for follow-up purposes. If you are open to a follow-up conversation, please leave your full name, email address and phone number below.

18. Full Name

19. Email Address

20. Phone Number

Appendix E: Couzens' Memo

PROCEDURE FOR BAIL SETTING IN ACCORDANCE WITH *IN RE HUMPHREY* (2021) ___ Cal.5th ___ [S247278]

J. Richard Couzens
Judge of the Placer County Superior Court (Ret.)

I. KEY ELEMENTS OF *IN RE HUMPHREY*

The following are the key elements of the Supreme Court's decision in *In re Humphrey* (2021) ___ Cal.5th ___ [S247278] (*Humphrey*)

- *"The common practice of conditioning freedom solely on whether an arrestee can afford bail is unconstitutional."* (*Humphrey*, at p. ___; italics added [p. 1].) Setting bail beyond the ability of the defendant to pay constitutes a detention. Pretrial detention should be rare – release of the defendant should be the normal practice, with detention being the exception. "[D]etention is impermissible unless no less restrictive conditions of release can adequately vindicate the state's compelling interests." (*Humphrey*, at p. ___ [p. 17].)

- "When making any bail determination, *a superior court must undertake an individualized consideration of the relevant factors.*" (*Humphrey*, at p. ___ ; italics added [p. 18].)

- The court first must consider whether nonfinancial conditions will reasonably protect the safety of the public or the victim, and assure future court appearances by the defendant. (*Humphrey*, at pp. ___ [pp. 2, 17].)

- Where the court determines a financial condition, such as cash bail or bail bond, is necessary to secure the state's interests, the court must consider the defendant's ability to pay the amount set. (*Humphrey*, at p. ___ [p. 2].) The bail must be set at a level the defendant can reasonably afford. (*Humphrey*, at p. ___ [p. 20].)

- *" In order to detain an arrestee . . . , a court must first find by clear and convincing evidence that no condition short of detention could suffice and then ensure the detention otherwise complies with statutory and constitutional requirements."* (*Humphrey*, at p.___ [pp. 2-3]; italics added.)

- "An arrestee may not be held in custody pending trial unless the court has made an individualized determination that (1) the arrestee has the financial

ability to pay, but nonetheless failed to pay, the amount of bail the court finds reasonably necessary to protect compelling government interests; or (2) detention is necessary to protect victim or public safety, or ensure the defendant's appearance, and there is clear and convincing evidence that no less restrictive alternative will reasonably vindicate those interests. [Citation.]" (*Humphrey*, at p. ___ [p. 24].)

II. ISSUES NOT RESOLVED BY *HUMPHREY*

There are a number of issues regarding the setting of bail the Supreme Court did not resolve, but left them "to another day." Such issues include:

- The interplay between California Constitution, article I, sections 12 and 28(f)(3).
- Whether there is a different standard for the detention of a defendant based solely on flight risk – *Humphrey* was based on consideration of public safety and flight risk together. (*Humphrey*, at p. ___, fn. 6 [p. 20].)
- How "public safety" is defined.
- The level of risk of future nonappearance that justifies detention.
- The elements of procedural due process for determining detention.
- What conditions of release are considered "reasonable."
- Whether there is an allocated burden of proof in the determination of detention and ability to pay.
- Who is responsible for the cost of conditions imposed by the court.
- Whether the ability to pay includes consideration of the ability to pay a bond premium.
- Whether the court is required to conduct a review of all persons currently in custody to assure bail is set in compliance with *Humphrey*.

III. DETERMINE WHETHER DEFENDANT MAY BE RELEASED ON CONDITIONS, INCLUDING BAIL

Humphrey requires the court to approach the question of release by considering increasing levels of restraint. Any conditions of restraint should be in the least amount necessary to secure the state's interest in protection of the public and victim, and assuring the appearance of the defendant in court. (See *Humphrey*, at p. ___ [pp. 20-21].) Accordingly, the levels of restraint, from the least restrictive to the most restrictive are:

- **Release on the defendant's Own Recognizance (O.R.) without restriction, where there is little or no risk of flight or to public safety.**
- **Release on the defendant's O.R. with nonfinancial conditions reasonably necessary for the protection of the public and victim, or to secure the**

defendant's appearance at future court proceedings, where there is some risk to the public or the victim, or of nonappearance.

- **Payment of monetary bail if reasonably necessary to protect the interests of the state, but at a level the defendant can reasonably afford.**
- **Detention of the defendant if the court concludes that protection of the public or the victim, or future appearance in court cannot be reasonably assured if the defendant is released, if the court finds by clear and convincing evidence that no less restrictive condition of release can reasonably protect the state's interest, and that such detention is consistent with the constitution and related statutes.**

Right to reasonable bail (felony): Unless there are grounds for detention, a defendant charged with a felony (other than capital case) is entitled to setting of non-excessive bail. (Cal. Const., art. I, § 12; PC §§ 1270(a), 1271.)

Right to O.R. (misdemeanor): Defendants arrested for a misdemeanor are entitled to O.R. release unless the court makes a finding on the record, in accordance with section 1275, such a release will "compromise public safety." Defendants arrested for a misdemeanor DV related offense listed in PC § 1270.1 cannot be released O.R. or on reduced bail without a hearing. The court is to set bail and any conditions of release. (PC § 1270(a).) Any bail setting likely must comply with *Humphrey* unless the court finds grounds for preventive detention.

Determining risk of the defendant: In determining the public safety or flight risk of the defendant in setting or denying bail, the court must at least consider the factors listed in art. I, § 28(f)(3), of the constitution and PC §§ 1270.1 and 1275:

1. The protection of the public [safety of the public shall be the primary consideration] and the danger if released;
2. The seriousness of the offense charged, including consideration of the alleged injury to the victim, and alleged threats to the victim or a witness to the crime charged, the alleged use of a firearm or other deadly weapon in the commission of the crime charged, the alleged use or possession of controlled substances by the defendant, and the potential sentence;
3. In considering domestic violence DV cases, current or past violations of restraining or protective orders, evidence of lethality (e.g., strangulation), safety of victim's children or any other person, threats made by defendant to the victim, past violence against a partner, and evidence presented by the prosecutor pursuant to PC § 273.75(a);
4. The previous criminal record of the defendant;
5. The probability of his or her appearing at trial or at a hearing of the case, including rate of past appearances; and
6. In considering offenses charged under the Health and Safety Code, the court shall consider the following: (1) the alleged amounts of controlled substances

involved in the commission of the offense, and (2) whether the defendant is currently released on bail for an alleged violation of the Health and Safety Code.

The factors to be considered by the court in making an individualized assessment of the defendant's risk include:

- Protection of the public as well as the victim
- The seriousness of the charged offense
- The arrestee's previous criminal record
- The arrestee's history of compliance with court orders
- The likelihood that the arrestee will appear at future court proceedings

(*Humphrey*, at p. ___ [p. 18].)

A court's determination of risk "should focus . . . on risks to public or victim safety or to the integrity of the judicial process that are reasonably likely to occur." (*Humphrey*, *supra*, ___ Cal.5th at p. ___ [p. 21].)

Risk assessments: The court likely may consider information generated by a validated actuarial risk assessment tool. The use of such a tool was not addressed in *Humphrey* nor any other California appellate decision to date.

Truth of the charges: The court is to assume the truth of the criminal charges. (*Humphrey*, *supra*, ___ Cal.5th at p.___ [p. 18].)

Conditions of release: The court has authority to impose reasonable conditions on release related to the protection of the public and to assurance future court appearances. (*In re Webb* (2019) 7 Cal.5th 270, 278.) In accordance with *Humphrey*, such conditions may include:

- Electronic monitoring
- Regular check-ins with a pretrial case manager
- Community housing or shelter
- Drug and alcohol treatment (*Humphrey*, at p. ___ [p. 2].)

In addition, the court may wish to consider additional restrictions:

- Search and seizure waiver
- Drug testing
- Stay away/no contact orders

Cost of conditions of release: *Humphrey* did not determine who should pay for the costs incurred in connection with the release conditions. Likely the court may require the payment of such costs by the defendant, but only according to the ability

to pay, such as on a sliding scale. Imposing the burden to pay for a condition of release beyond the defendant's ability to pay likely is contrary to *Humphrey* because release then is effectively determined by the defendant's financial status, something expressly prohibited by the constitution. (*Humphrey*, at p. ___ [p. 2].)

Setting of monetary bail: If the court determines monetary bail is reasonably necessary to preserve the state's interests in protecting the public and the victim and securing the defendant's future court appearance, the court may set bail but "must consider the individual arrestee's ability to pay, along with the seriousness of the charged offense and the arrestee's criminal record, and – unless there is a valid basis for detention – set bail at a level the arrestee can reasonably afford." (*Humphrey*, at p. ___ [p. 20].) (See discussion of setting bail beyond the defendant's ability to pay, *infra*.)

Although not discussed in *Humphrey*, likely the consideration of the amount of bail the defendant can afford includes the ability of the defendant to obtain a corporate bond with payment or partial payment of the bond premium.

Determining ability to pay: In determining defendant's ability to pay, the court may take guidance from PC § 987.8(g)(2) for reimbursement of counsel costs: "'Ability to pay' means the overall capability of the defendant to reimburse the costs, or a portion of the costs, of the legal assistance provided to him or her, and shall include, but not be limited to, all of the following: [¶] (A) The defendant's present financial position. [¶] (B) The defendant's reasonably discernable future financial position. In no event shall the court consider a period of more than six months from the date of the hearing for purposes of determining the defendant's reasonably discernable financial position.... [¶] (C) The likelihood that the defendant shall be able to obtain employment within a six-month period from the date of the hearing. [¶] (D) Any other factor or factors which may bear upon the defendant's financial capability to reimburse the county for the costs of the legal assistance provided to the defendant."

Determining ability to pay may be aided by the use of Judicial Council form CR-115.

Burden of proof: *Humphrey* did not assign a burden of proof to the determination of the ability to pay. The court, however, has the duty to inquire into the defendant's financial circumstances and to determine whether restrictions less than detention will reasonably meet the interests of the state. (*Humphrey*, at p. ___ [p. 24].)

Continuance of the bail hearing and provisional bail: Setting of bail is a normally part of the arraignment process and, if possible, should be accomplished at that time. It may be proper to set bail provisionally to allow a reasonable opportunity to assess the defendant's safety and flight risk, the defendant's financial resources, and the availability of less restrictive alternative conditions of release. It is suggested

that if a continuance of the bail determination is needed for any reason, that it not be longer than the five days authorized by PC § 1270.2.

Reconsideration of bail setting: A defendant unable to post bail may request "an automatic review" of the amount set by the court at a hearing held not later than five days after the original bail setting. (PC § 1270.2; *Humphrey*, at p. ___, fn. 8 [p.23].)

Setting monetary bail different than schedule; findings by the court: If the crime is listed in section 1270.1 and the court sets bail either higher or lower than specified in the bail schedule, the court must state the reasons for the decision on the record. (PC § 1270.1(d).) If the court is adjusting the amount of bail based on ability to pay as required by *Humphrey*, such a reason should be included in the court's statement.

RELEASE WITH CONDITIONS: If the prosecutor is requesting release with conditions, and the court agrees:

(1) After consideration of the factors listed in art. I, § 28(f)(3) and PC §§ 1270.1 and 1275, determine whether defendant is safe to release with less restrictive conditions such as release on O.R with or without conditions.

(2) If defendant is safe to release with conditions, impose the least restrictive conditions that will adequately protect the public and the victim. The court has authority to impose reasonable conditions of release related to future criminality. (*In re Webb* (2019) 7 Cal.5th 270, 278.)

(3) **Cost of conditions of release:** Likely the court may require the defendant to pay any costs associated with the conditions of release, but within the ability to pay.

(4) If monetary bail is considered necessary to secure the state's interests in public safety and future court appearance, the court may set bail in an amount the defendant can reasonably afford.

(5) In addition to any other terms of release, the following conditions must be imposed on OR or bail (PC § 646.93(c)):

- Defendant is to have no contact with victim by any means.
- Stay away 100 yds. from victim, residence and employment.
- Not possess any deadly weapons or firearms.
- Obey all laws.
- Provide court, if requested, with contact information for residence and employment.

(6) Court must consider issuing criminal protective order on it's own motion in domestic violence cases. (PC § 136.2(a)(1)(G)(ii)(1).)

IV. DETERMINE WHETHER DEFENDANT IS TOO HIGH A RISK TO SAFETY OF PUBLIC OR VICTIM OR IS TOO GREAT A FLIGHT RISK – PREVENTIVE DETENTION

A. Determine whether crime is listed in art. I, § 12 - authorizing denial of bail

1. Capital crime where "facts are evident or the presumption great" that defendant committed the offense. (Cal. Const., art. I, § 12(a).) This phrase requires "evidence that would be sufficient to sustain a hypothetical verdict of guilt on appeal." (*In re White* (2020) 9 Cal.5th 455, 463 (*White*).)
2. Felony offenses involving acts of violence on another person or felony sexual assault, where "the facts are evident or the presumption great" that defendant committed offense and the court finds by clear and convincing evidence that there is a substantial likelihood defendant's release would result in GBI to others. (Cal. Const., art. I, § 12(b).) A finding of "substantial likelihood" is subject to review under a substantial evidence standard. (*White*, *supra*, 9 Cal.5th at p. 467.) "Clear and convincing evidence" means a showing that there is a "high probability" that the fact or charge is true. (*Ibid*.)
3. Felony offenses where "the facts are evident or the presumption great" that defendant committed the offense and court finds by clear and convincing evidence that defendant threatened another with GBI and there is substantial likelihood defendant would carry out the threat if released. (Cal. Const., art. I, § 12(c).)
4. Even if the defendant meets the requirements noted above, the court, in its discretion, may grant bail or release the defendant on their O.R. (*White*, *supra*, 9 Cal.5th at p. 469.)

DEFENDANT TO BE DENIED BAIL: If defendant fits one of foregoing categories and the court intends to deny bail:

(1) State findings on the record and include in the minutes. The findings must include:

- "The facts are evident or the presumption great" the defendant committed one of the crimes listed in § 12(a), (b) or (c).

- Depending on whether § 12(b) or 12(c) is used, a finding by clear and convincing evidence there is either a substantial likelihood defendant's release would result in GBI to others, or the defendant threatened others with GBI and there is a substantial likelihood that defendant would carry out the threat if released.

(2) Set custody status at "NO BAIL."

B. Determine whether defendant is a danger to the public or victim under art. I, § 28(f)(3)

Constitution, article I, § 28, provides a potential alternative means of preventive detention from that of article I, § 12. A finding under the factors listed in section 28(f)(3), together with a consideration of the factors listed in PC §§ 1270.1 and 1275, may permit the court to enter an order holding a person without bail if the court also finds "the facts are evident or the presumption great" the defendant committed the qualified offense and by clear and convincing evidence that no lesser condition or combination of conditions of restraint will reasonably assure the safety of the public or the victim, or the appearance of the defendant in court.

"In setting, reducing or denying bail, the judge or magistrate shall take into consideration the protection of the public, the safety of the victim, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case. Public safety and the safety of the victim shall be the primary consideration." (Cal. Const., art. I, §§ 12 and 28(f)(3); emphasis added.)

"[A]n order of detention requires an interest that 'is sufficiently weighty' in the given case – and courts should likewise bear in mind that [*United States v. Salerno* (1987) 481 U.S. 739,] upheld a scheme whose scope was 'narrowly focuse[d] on a particularly acute problem.'" (*Humphrey, supra*, ___ Cal.5th at p. ___ [p. 22].) Pretrial detention should be limited to the most serious of crimes. (*Humphrey*, at p. ___ [p. 23].)

THE COURT'S ORDER FOR DETENTION UNDER ART. I, § 28(F)(3): The court should set forth findings on the record, including the weighing of any relevant factors, and in the minutes:

(1) The facts are evident or the presumption great the defendant committed the charged offense.

(2) If the court so finds, it can state, "the court finds by clear and convincing evidence that no condition or combination of conditions will reasonably assure the protection of the public or safety of the victim."
(3) If the required findings are made for detention, the court should set the custody status: "Although the defendant is eligible for bail, after consideration of the foregoing factors, and the provisions of article I, § 28(f)(3) and Penal Code § 1275, the court finds defendant's [risk to the public/victim] [risk of nonappearance] outweighs such eligibility and sets custody at 'NO BAIL.' "

NOTE: The best practice is to set a "no bail" order rather than intentionally setting bail beyond the defendant's ability to pay. The act of setting bail is premised on the suitability of the defendant's release at the amount set and is inconsistent with the intent to detain. If bail is set, it must be in an amount within the defendant's ability to pay.

V. DETERMINE WHETHER DEFENDANT IS A FLIGHT RISK

Humphrey did not discuss the ability to detain based solely on flight risk, without consideration of dangerousness. However, the opinion repeatedly referenced public safety *or* flight risk in discussion preventive detention. Where there was an opportunity, the court applied the same standards to both types of risk. (See *Humphrey*, at p. ___ [pp. 19-20].) Accordingly, it is reasonable to assume the court will not impose a *lesser* standard for detention based solely on flight risk.

VII. OTHER BAIL ISSUES

A. Use of bail schedules

The Supreme Court in *Humphrey* did not discuss the appropriate use of bail schedules. The court of appeal decision in *Humphrey* strongly criticized the use of bail schedules, primarily because they set bail for specified crimes without consideration of the individual circumstances of a defendant, including the defendant's ability to pay the amount set. Nevertheless, the opinion acknowledged that bail schedules remain a valid tool in certain circumstances. Bail schedules may properly be used:

(1) To determine the relative seriousness of the current crime and the defendant's criminal record, relevant to the determination of the defendant's dangerousness;
(2) To permit persons to obtain release prior to court involvement by the posting of the scheduled bail;

(3) As a starting point in the determination of the proper bail to be set when the court issues a warrant;
(4) As a starting point "for a court setting bail provisionally in order to allow time for assessment of a defendant's financial resources and less restrictive alternative conditions by the pretrial services agency;" and
(5) To set bail when the defendant does not oppose detention.

(*In re Humphrey* (2018) 19 Cal.App.5th 1006, 1043-1044.)

It does not appear any of the foregoing uses are in conflict with the Supreme Court's decision in *Humphrey*.

B. Application of *Humphrey* to prearraignment procedures

It does not appear likely *Humphrey* applies to any bail setting prior to arraignment. There is nothing in *Humphrey* that suggests the court must make a determination of the defendant's ability to pay when setting bail for the issuance of a warrant, performing on-call magistrate functions under PC § 1269c, or setting conditions of release as part of a prearraignment release program. Most of these procedures are conducted *ex parte* without the direct involvement of or appearance by the defendant – there simply is no reasonable opportunity to obtain the necessary information to make the ability to pay determination. Furthermore, bail setting that departs from the scheduled amount without a prior hearing in open court violates PC § 1270.1 as to its designated crimes.

C. Setting bail beyond the defendant's ability to pay

The court should not intentionally set bail out of the reach of the defendant's ability to pay if the intent is to keep the defendant in custody. First, such a setting, under *Humphrey*, would be tantamount to an order of detention – at the very least such a setting must be accompanied by all the findings and authority justifying an order of preventive detention discussed, *supra*.

Second, such as setting is inconsistent with the intent to detain because the defendant may find the ability to post the amount and achieve release.

Third, the court of appeal decision in *Humphrey* discussed the ability of the court, after review of the defendant's circumstances (including the ability to pay), to set bail in an amount the court considers necessary to secure the defendant's future court appearances, even though the amount is beyond the defendant's ability to pay, so long as the court finds by clear and convincing evidence that no less restrictive nonfinancial conditions would assure the defendant's appearance. (*In re Humphrey* (2018) 19 Cal.App.5th 1006, 1037.) That alternative was not discussed in the Supreme Court's opinion.

Fourth, and finally, *Humphrey* concluded a defendant may be held in detention only if "(1) the arrestee has the financial ability to pay, but nonetheless failed to pay, the amount of bail the court finds reasonably necessary to protect compelling government interests; or (2) detention is necessary to protect victim or public safety, or ensure the defendant's appearance, and there is clear and convincing evidence that no less restrictive alternative will reasonably vindicate those interests." Setting bail beyond defendant's ability is not listed as an option.

In setting any amount of bail, the court has determined the defendant is suitable for release and bail must be set in an amount the defendant can reasonably afford; otherwise, the defendant should be detained under the standards set by *Humphrey*. The proper order should be "no bail."

D. Application of Humphrey to persons currently in custody

Humphrey likely applies to persons currently in custody who are being held on a setting of monetary bail where the court did not set bail in compliance with the Supreme Court's decision. PC § 1270.2 likely grants to defendants who have been unable to post bail an automatic review of the bail setting in accordance with *Humphrey*.

Nothing in *Humphrey* suggests it applies to persons on post-conviction holds based on a violation of probation, mandatory supervision, PRCS or parole. The constitutional right to bail applies only prior to trial. There is no right to bail because of a restraint imposed after the finality of a judgment of conviction. (*In re Law* (1973) 10 Cal.3d 21, 25-26.)

E. Verification of proper notice

Prior to setting bail, the court should verify proper notice has been given when required. There are several circumstances where counsel and/or the victim must be given notice of a bail proceeding:

1. Where the defendant is charged with a serious felony (Cal. Const., art. I, § 18(f)(3): "Before any person arrested for a serious felony may be released on bail, a hearing may be held before the magistrate or judge, and the prosecuting attorney and the victim shall be given notice and reasonable opportunity to be heard on the matter.") **A prior request for notice is not required.**
2. Where the victim has requested notice and/or an opportunity to be heard. (Cal. Const., art. I, § 28(b)(8); PC § 646.93(b).)

3. Written 2-days' notice where bail is to be set either higher or lower than schedule if defendant is charged with a serious or violent felony (except residential burglary), witness intimidation (§ 136.1), spousal rape (§ 262), corporal injury to spouse (§ 273.5), criminal threats (§ 422), stalking (§ 646.9), battery with traumatic condition (§ 273.5), spousal battery (§ 243(e)(1)), or violation of DV order (§ 273.6). (PC §§ 1270.1(a)-(b); 1319(a).)
4. Defendant is charged with a violent felony with a prior FTA on a felony matter. (PC § 1319(b).)

NOTICE: If proper notice has not been given, the court should not continue with the bail hearing, but should order a short continuance of not more than five days while notice is given. (See PC § 1270.2.) Provisional bail should be set pending the full bail hearing held after proper notice is given. The amount set generally should not be less than schedule or less than any amount specially set by a judge.

The prosecutor must "make all reasonable efforts" to notify the victim of a bail hearing. (PC § 646.93(b).)

UCLA School of Law
Bail Practicum

Berkeley Law
Policy Advocacy Clinic