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The Limits of *In re Humphrey's* Impact
on Pretrial Incarceration in California



JUNE 2024

Stephanie Campos-Bui, Rachel Wallace, Alicia Virani

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MAY 2024

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Terminology

Arraignment

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 person cannot afford an attorney, the arraignment is where they will be assigned appointed counsel.

Bail Schedule

A document created by each Superior Court in California that sets the bail amount for all felonies and most misdemeanors in that county.

Failure to Appear (FTA)

When a person who has been accused of a crime does not appear for a scheduled court hearing.

No Bail Holds

When a judge orders that a person who has been accused of a crime is not eligible for any form of release – either via money bail or release with conditions – also known as preventive detention.

Own Recognizance (OR)

When a judge orders a person to be released without requiring that person to post bail or submit to any conditions of release. The person is simply released and can fight their case outside of custody.

Risk Assessment Tools (RAT)

Algorithmic tools used by pretrial government agencies and court systems to generate numerical scores that purport to predict risk of future arrest and failure to appear for an accused person. These risk scores are relied on by judges in many jurisdictions to determine whether to grant or deny release of an accused person.

Electronic/GPS Monitoring (EM)

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

Public Records Act Request

Under the California Public Records Act (CPRA), 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.

Petition for Writ of Habeas Corpus

A petition filed on behalf of a detained person challenging a custodial decision.



Language Note

- “**Criminal legal system**” replaces “criminal justice system” to avoid ascribing outcomes of justice to the current system.
- 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.”



Introduction

In 2022, we released our report, “Coming Up Short: the Unrealized Promise of *In re Humphrey*.”¹ In that report, we analyzed the impact of the *Humphrey* decision on the behavior of various system actors and the jail population to understand whether the decision was having its intended effects. Our analysis found that there was no evidence that *Humphrey* resulted in a net decrease of the pretrial jail population in California, a decrease in median bail amounts, or a decrease in the average length of pretrial detention.

Further, we found that the case influenced criminal legal system actors’ behavior in a variety of ways. Judges were misinterpreting *Humphrey*, leading to dire consequences, such as an increase in no bail holds (holding someone in pretrial detention without setting cash bail). Defense attorneys reported that they were often dissuaded from raising *Humphrey* arguments and that they faced increased and new procedural hurdles post-*Humphrey*. Prosecutors’ offices responded inconsistently to the decision and were also encouraging the use of no bail holds. Probation departments began sharing more information with courts pretrial and proactively resourced the increased use of pretrial release conditions and probation supervision as a result of *Humphrey*.

This report comes one and a half years after our first report and three years after the *Humphrey* decision. Since our 2022 report, the pretrial landscape in California and the country continues to be a primary focus of criminal legal reform.

Some states have seen modest, but promising results after bail reform went into place with regards to its impact on accused individuals. For example, after New York’s 2019 legislation changing bail laws, New York saw an increase in pretrial releases.² However, similar to California, New York has not seen a decrease in bail amounts, leaving people languishing in jail due to the imposition of unaffordable bail.³

Additionally, in September 2023, the Illinois Pretrial Fairness Act went into effect, making Illinois the first state to successfully eliminate the use of cash bail.⁴ This new law includes a presumption of release for all accused individuals, with limited exceptions.⁵ While there is not yet data on how the state is doing now that cash bail is abolished, it can be a model for California to look to.

Various pieces of legislation in California have been proposed related to laws governing pretrial decision-making in the last few years. Assembly Bill 61 (2023), authored by Assemblymember Isaac Bryan, would have removed the weekend and holiday exemption in defining the 48-hour time frame after someone’s arrest and would have required the question of release and bail to be decided at arraignment.⁶ Senate Bill 1133 (2024), authored by Senator

The impact of *Humphrey* on the pretrial jail population across the state is unclear, and still has certainly not led to the drastic decrease in people held pretrial that was anticipated after the *Humphrey* decision.

Josh Becker and pending at the time of publication, would create more timely opportunities to contest bail amounts and pretrial release decisions by changing the timeframe for automatic bail review from five days to three days, outlining circumstances that presumptively rise to the level of good cause to revisit bail, and requiring a hearing to review pretrial conditions every

60 days.⁷ Additionally, even more expansive reforms to the use of cash bail in the state were raised by the California Reparations Committee. In their final report from 2023, the Committee recommends the prohibition of cash bail in the criminal legal system given racial disparities in pretrial detention outcomes and the setting of bail.⁸

While there is an ever-expanding body of evidence from across the country indicating that pretrial reform does not negatively affect public safety,⁹ there also continues to be loud and vocal opposition to pretrial reform in many states.¹⁰

Given the volatile landscape of pretrial justice, we decided to conduct additional and updated research on the implementation of *Humphrey* since our October 2022 report to understand the ongoing effects of the decision. Generally, we find that system actors continue to struggle with, and often misapply, the holdings of *Humphrey*. The lack of adherence to *Humphrey* continues to give rise to numerous challenges to the cash bail system through writs and affirmative litigation, indicating that wealth-based detention of Californians is still a regular occurrence. The impact of *Humphrey* on the pretrial jail population across the state is unclear, and still has certainly not led to the drastic decrease in people held pretrial that was anticipated after the *Humphrey* decision. This report's intent is to once again compile and make transparent every day pretrial release decision-making by the courts and to uplift where system actors continue to fall short.

Methodology and Data Collection

For this report, we relied on the following sources for data:

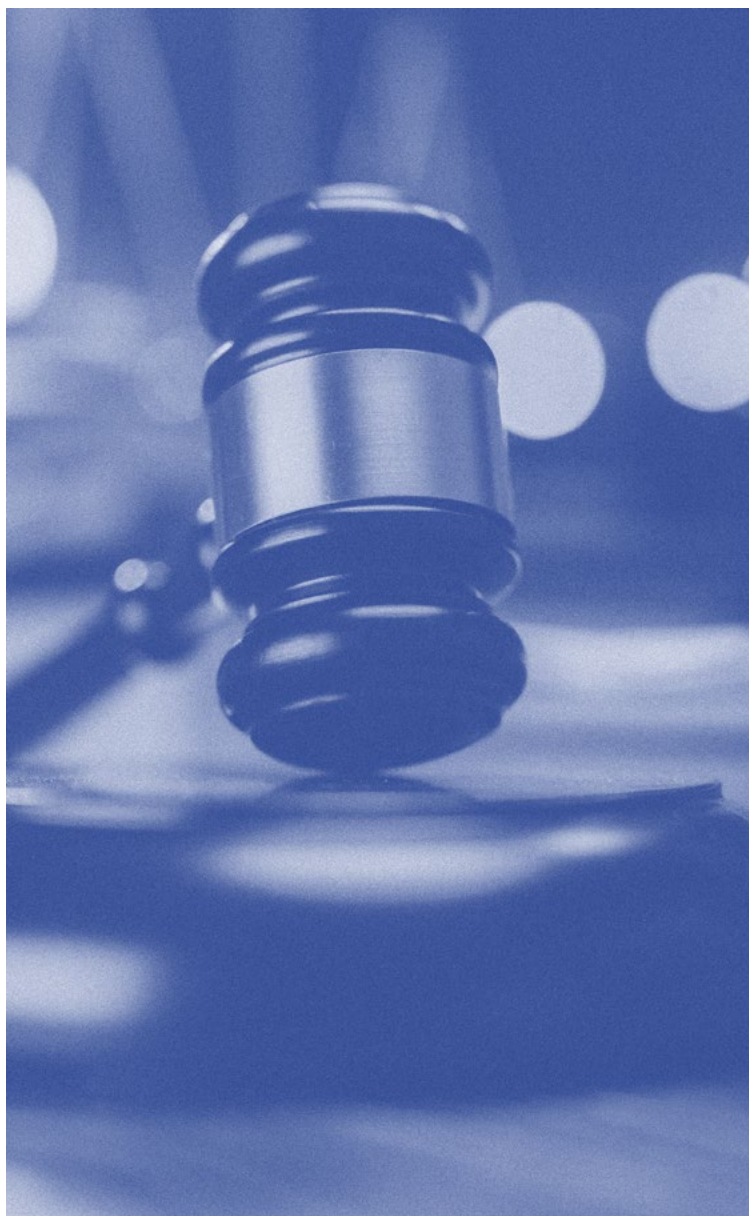
- Publicly available data from the Board of State and Community Corrections (BSCC)
- California Public Records Act (CPRA) requests
 - We submitted requests for updated data and information regarding release types and bail amounts pursuant to the California Public Records Act to counties featured in our first report (Merced, San Joaquin, and San Mateo), as well as to the California Judicial Council regarding updated data on pretrial release outcomes, internal policies, and correspondence related to the *Humphrey* decision.
 - We also sent a new request to the California Attorney General's Office for arrest data, disaggregated by release type such as bail and bail on own recognizance. We were unable to receive the data we sought through our request.¹¹
 - We sent a request to the Judicial Council of California for trainings organized and offered on the topic of pretrial decision-making and the *Humphrey* decision.
- Defense attorney survey – We sent an updated survey to defense attorneys statewide through the California Public Defender Association and outreach to individual public defender offices. The follow-up survey yielded 81 defense attorney responses across 38 counties.¹² The survey was sent in June 2023.
- District attorney survey – We again requested that the California District Attorney Association distribute our survey and conducted outreach to individual district attorney offices. Our attempts did not yield any responses.
- Writs – We reviewed writs available through legal search engines such as Westlaw and LexisNexis, as well as those we received from defense attorneys across the state for analysis. This is not a comprehensive review of all writs filed across the state, as most writs that are filed are not available through these legal search engines.

Context

In our last report, we noted several policies and intervening factors post-*Humphrey* that made it difficult to track *Humphrey* implementation. Since that report, many of these policies and intervening factors may no longer have such a large impact on the pretrial incarcerated population.

COVID-19 and the Impacts of the Pandemic

The high number of pretrial releases that occurred during the peak of the COVID-19 pandemic has slowed and, in many counties, the pretrial incarcerated population has returned to pre-COVID levels. The emergency bail schedules implemented during the pandemic, mandating zero-dollar bail for a large number of offenses, have since been repealed by almost every county.¹⁵



Pretrial Pilot Programs

At the time of publication of our 2022 report, there were not yet findings as to the impact of the sixteen Judicial Council pretrial pilots, which ostensibly were created to increase pretrial releases. In July 2023, the Judicial Council released data on the impacts of the pretrial pilots.¹⁴ Across the sixteen pretrial pilots, 422,151 people were assessed.¹⁵ The Judicial Council found that the pilots were associated with a “statistically significant 8.8% increase in pretrial release for felonies and a statistically significant 5.7% increase in pretrial release for misdemeanors.”¹⁶ However, the report is unclear about the actual numbers of people that were released after undergoing a risk assessment. In one data point about Los Angeles County, the pretrial release rate could be calculated as falling between two and six percent of all those assessed.¹⁷ Assuming the highest release rate of six percent, this is not a significantly high rate of release, even if the numbers of people released did increase from years prior.

Given that the pretrial pilots have not resulted in a huge increase in pretrial releases and that the emergency bail schedules are no longer in place, this report’s findings can be viewed as potentially a clearer view of how *Humphrey* is impacting the pretrial incarcerated population.



Ongoing Impact of the *Humphrey* Decision

Based on recent data and records received as well as interviews with and surveys of defense attorneys, we find that the *Humphrey* decision has had demonstrable impacts on courts, the pretrial population, and cash bail. But as we describe below, perhaps not in ways initially anticipated.

Courts

While *Humphrey* was heralded as the end to unaffordable cash bail, subsequent implementation throughout California fell short, as documented by our 2022 report.¹⁸ Although some of this can be attributed to judicial decision-making, what became clear through subsequent cases is that *Humphrey* presented an ambiguous ruling as to whether unaffordable cash bail is always unconstitutional and whether public safety can be an overriding factor. Below, we describe the holdings in cases decided since *Humphrey*.

A. Key Cases Post-*Humphrey*

In re Brown

Almost one year after *Humphrey* was decided, in March 2022 the Second District Court of Appeal in *In re Brown*, offered an interpretation of the *Humphrey* decision. In *Brown*, the Court of Appeal reversed a lower court's decision that failed to make any effort to consider the accused individual's financial condition by setting bail at

\$2.45 million. The court stated that “under *Humphrey*, the amount specified in the bail schedule is appropriate only if the court first determines the arrestee can afford to post it.”¹⁹ This case interpreted *Humphrey* to mean that unaffordable bail is never appropriate, stating that if affordable bail is not “sufficient to protect the state’s compelling interests, then the trial court’s only option is to order pretrial detention, assuming the evidentiary record is sufficient to support the findings necessary to justify such an order.”²⁰

In re Kowalczyk

The *In re Kowalczyk* case, decided by the First District Court of Appeal just months later in November 2022, came to a different conclusion. One of *Kowalczyk*’s holdings contradicted *Brown* by stating that “courts are not required to set bail at an amount a defendant will necessarily be able to afford.”²¹ This case interpreted *Humphrey* as allowing for unaffordable bail “in those rare instances in which a court concludes, by clear and convincing evidence, that no nonfinancial condition in conjunction with affordable money bail can reasonably protect the state’s compelling interests in public safety or arrestee appearance.”²² While this decision emphasized the rare occasion of this occurrence, this ruling provides a foundation from which courts across the state could continue to order unaffordable cash bail.

Although the Court of Appeal issued this holding in their decision, the California Supreme Court originally sent the case to the Court of Appeal to “issue an opinion that addresses which 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 can be reconciled.”²³ The *Kowalczyk* court held that the constitutional provisions are reconcilable; but after a lengthy review of the ballot initiatives that put into place both constitutional provisions, the court determined that article I, section 12 is what governs preventive detention.²⁴ Thus, cases outside of the very limited exceptions articulated in section 12 are entitled to bail or release on their own recognizance, and preventive detention should not be ordered. A petition for review of the *Kowalczyk* case was granted by the California Supreme Court on March 15, 2023.²⁵

In re Harris

In addition to *Kowalczyk*, the Second District Court of Appeal decided another case, *In re Harris*, in November 2021 with regards to evidentiary requirements as it relates to no bail holds under article I, section 12. The *Harris* case provides that in making a no bail hold determination, proffered evidence may satisfy the clear and convincing standard: “it remains within the discretion of the trial court to decide whether particular instances of proffered evidence may be insufficient, and whether to insist on the production of live testimony or other evidence in compliance with more stringent procedural requirements.”²⁶ The California Supreme Court granted review in March 2022 to answer the question: “What evidence may a trial court consider at a bail hearing when evaluating whether the facts are evident or the presumption great with respect to a qualifying charged offense, and whether there is a substantial likelihood the person’s release would result in great bodily harm to others?”²⁷

Other Case Law

Subsequent cases (both published and unpublished) that review the record of trial courts’ decision-making process continues to shed light on how *Humphrey* is being considered. At best, these cases represent judicial misinterpretation of the law. At worst, as many defense attorneys who responded to our survey indicated, judges are taking out their dislike of *Humphrey* on individual clients, punishing an individual whose attorney even dares mention the case.

These cases make it clear that there continues to be procedural and legal misunderstandings and misapplications post-*Humphrey*, such as:

- Failing to make the requisite findings to issue no bail holds that are enumerated within article I, section 12 and elaborated upon by subsequent case law.²⁸
- Thinking that good cause or a change of circumstance is needed to reconsider bail when Penal Code § 1270.2 allows for one automatic reconsideration of bail even if there is no good cause for reconsideration;²⁹
- Failing to conduct an individualized review and state for the record the court's analysis as to why other non-financial conditions will not suffice;³⁰
- Shifting the burden of proof onto the defense to show that nonfinancial conditions can alleviate public safety concerns, rather than placing the burden on the prosecution where it appropriately lies.³¹

The impact of these misapplications is evident in data provided by San Joaquin County where judges continue to set bail in significantly fewer cases post-*Humphrey*. While some of this may be attributable to more people being released on their own recognizance, which has increased, there continues to be a high percentage of no bail holds (approximately 84% of all cases) in San Joaquin County.³²

In response to our most recent survey, defense attorneys from San Joaquin County shared that judges are not meaningfully considering *Humphrey* when setting bail and that clients are either released on their own recognizance or denied bail, with very few cases that fall in between. All respondents reported that judges are issuing no bail holds in roughly 75% of all cases. More specifically, one attorney said:

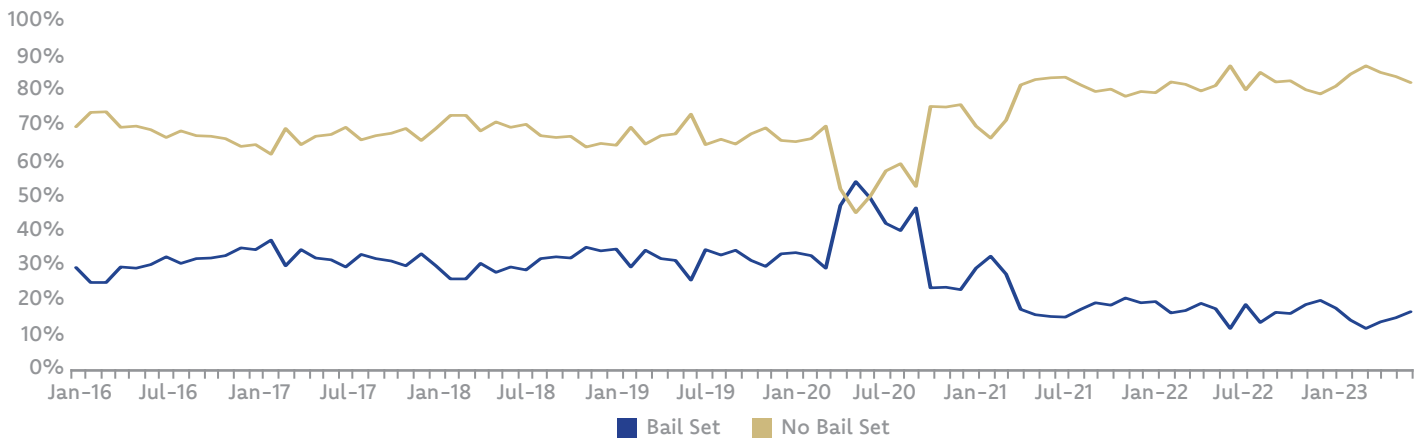
“A big point of contention is that our Superior Court judges believe (erroneously, we believe) that *Humphrey* actually gave them carte blanche to deny bail on clients whom they consider unreasonable risks to public safety even in cases where the clients' offenses are not within bail-denial provisions of article I, section 12.”

—Public Defender, San Joaquin County³³

Table A: Percentage of Cases (Felony and Misdemeanor) in which Judges Set Bail and Ordered No Bail Holds (San Joaquin County, 2016–2023)

	January 2016 – December 2017	January 2018 – February 2021	March 2021 – February 2022	March 2022– May 2023
% of Cases in which Judges Set Bail	32.6%	32.0%	18.7%	15.9%
% of Cases in which Judges Ordered No Bail Holds	68.5%	67.9%	81.1%	83.9%

Figure 1. Percentage of Cases (Felony & Misdemeanor) in which Judges Set Cash Bail as Compared to Cases with No Bail Holds (San Joaquin County, 2016–2023)



B. Judicial Guidance

As discussed in our 2022 report, the Judicial Council sent an email to the presiding judges of each Superior Court in California to provide guidance on *Humphrey*, which came in the form of a memo written by retired judge Richard Couzens. After that initial memo, Judge Couzens issued an updated analysis of *Humphrey* in April 2023. This updated analysis presumably was shared with judges across the state. Much of it remains consistent with his previous analysis that was covered in our prior report.⁵⁴ The memo contains updated summaries of case law including *Kowalczyk* and *Brown*. It also includes a summary and instructions on how to apply Penal Code section 1203.25, as the code had not yet been amended by Assembly Bill 1228 when Judge Couzens issued his first memo.⁵⁵

In this updated memo, Judge Couzens no longer provides the opening that he previously suggested: that no bail holds could be issued for a broader range of cases under the provisions of article I, section 28(f)(3) of the California Constitution. He now cites the *Kowalczyk* decision indicating that no bail holds can be issued taking into consideration the factors of 28(f)(3) subject to the limitations provided in section 12. His previous memo did not indicate that section 12 is the only provision that allowed for preventive detention. What Judge Couzens remains consistent about, among many other things, is that *any time* cash bail is set it must be affordable. He did not in his previous memo, nor the updated one, provide a scenario where bail can be set at an unaffordable amount. This is contrary to the Court of Appeals decision in *Kowalczyk*.

As discussed later in this report, there has also been a proliferation of trainings from the Judicial Council since the *Humphrey* decision to provide ongoing guidance and information to judges across the state.

C. Affirmative Litigation

In addition to criminal appeals and writs filed after the decision to detail someone pretrial, there have been several class action lawsuits filed challenging various aspects of the monetary bail system.

In November 2022, a class action lawsuit, *Urquidi*, was filed in Los Angeles County challenging the Los Angeles County Sheriff’s Department and Los Angeles Police Department’s use of the bail schedule pre-arraignment.⁵⁶ In May 2023, the judge in *Urquidi* ruled in favor of the plaintiffs, declaring the use of the bail schedule pre-arraignment to be unconstitutional.⁵⁷

In July 2023, another class action lawsuit was filed in Santa Clara County. This lawsuit challenges the practice of requiring individuals with outstanding arrest warrants to either pay the amount of bail delineated in the bail schedule or turn themselves into jail before being able to appear in court and clear their warrant.³⁸ Shortly after the lawsuit was filed, the Santa Clara Superior Court changed their policy and now allows people to make an appointment for an arraignment without requiring the payment of the cash bail amount.³⁹

Pretrial Population

Since the *Humphrey* decision, there has been a net decrease in the total number of people in pretrial detention who are unsentenced or awaiting trial. However, data show that the percentage of people in pretrial detention who are unsentenced has grown and the average length of time people are spending in pretrial detention has increased. While it is hard to provide definitive explanations as to some of these trends, in part due to inconsistencies in data, we describe what we are seeing statewide and at the county level.



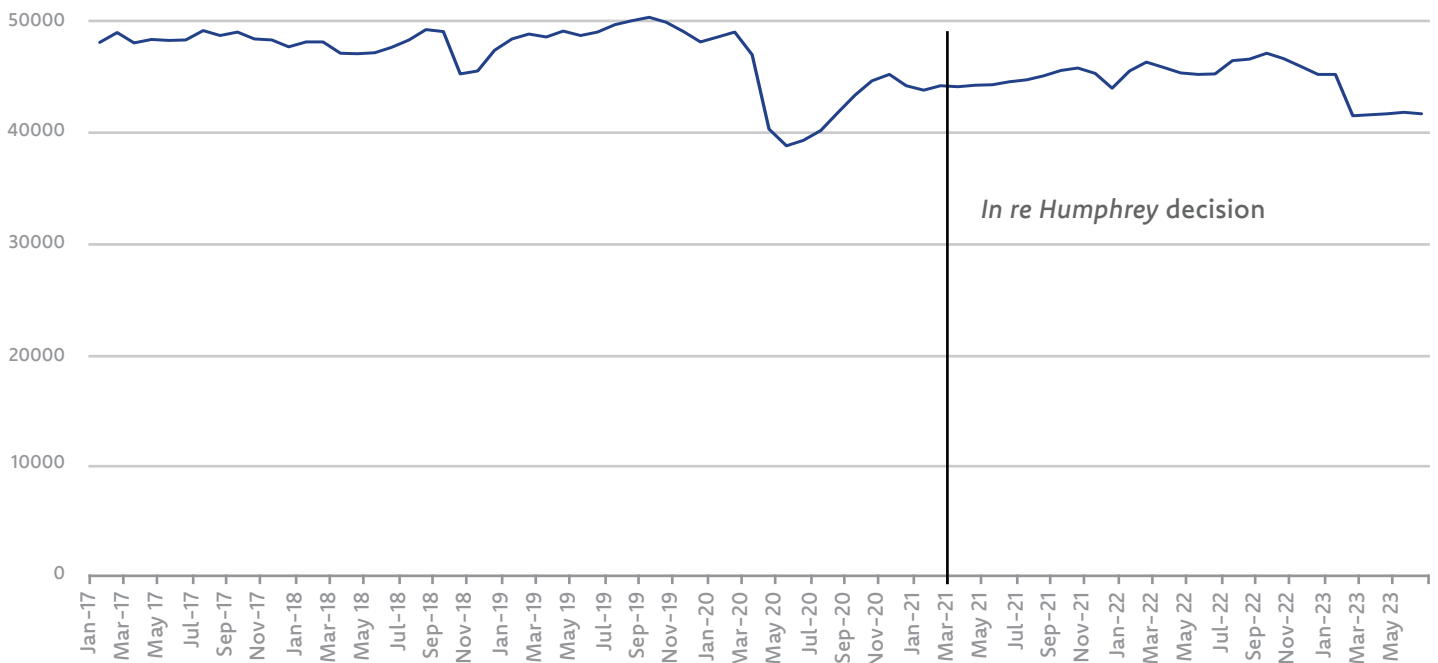
A. Unsentenced Population

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.” By forbidding the conditioning of release solely on one’s ability to pay, many expected the *Humphrey* decision to result in a decrease in the pretrial jail population. In our last report, we did not find a decrease in the unsentenced population in the jails immediately after *Humphrey*.⁴⁰

While almost half of defense attorney survey respondents said judges are releasing people pretrial at the same rate as before *Humphrey*, this number is lower in 2023 than it was in 2021-2022, indicating that judges may be releasing people pretrial at lower rates now than immediately after *Humphrey*.

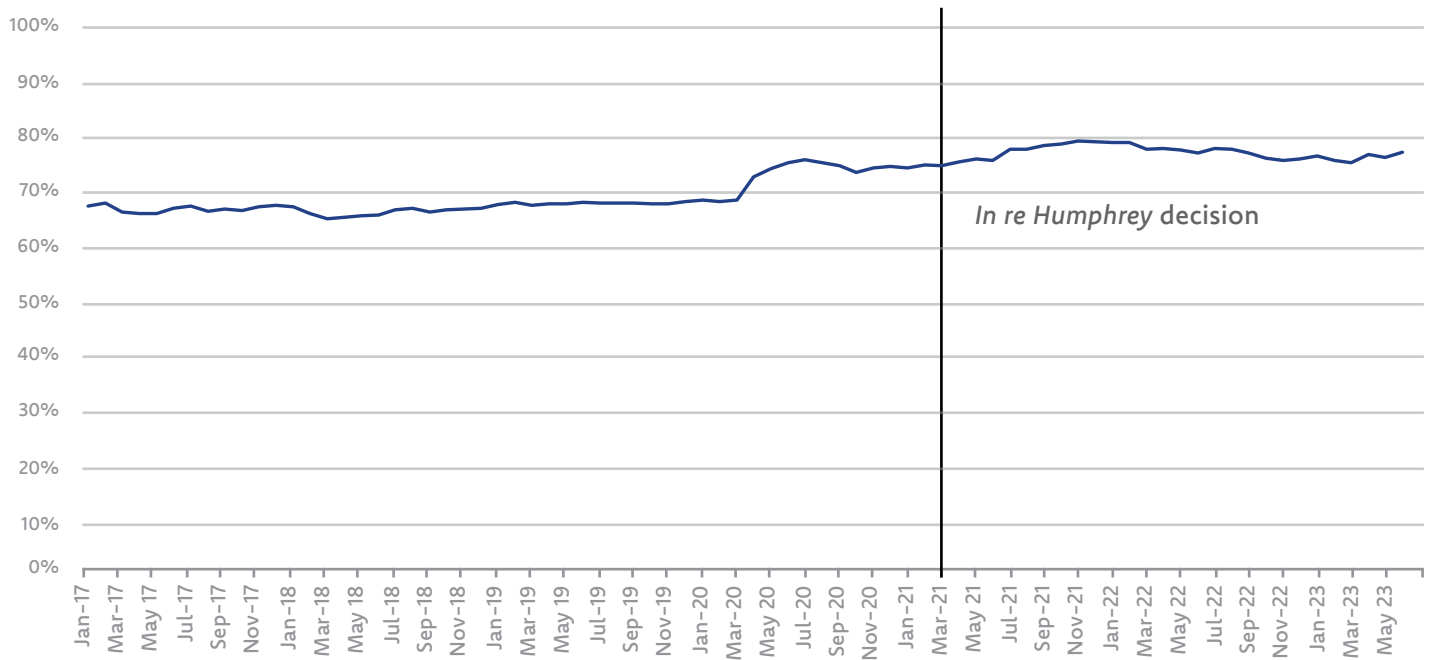
The Board of State and Community Corrections (BSCC) data tell a slightly different story. According to 2021-2023 data from the BSCC Jail Population Survey (JPS), the statewide unsentenced average daily jail population initially increased after the *Humphrey* decision but then decreased by 11.8% between since September 2022 and June 2023 (see Figure 2 below). This may indicate that there has been some improvement in *Humphrey* implementation, or this trend could be due to unrelated factors.

Figure 2. Statewide Unsentenced Average Daily Population (ADP) (2017-2023)



However, while the total number of unsentenced people in jail has decreased in recent months, the percentage of the total average daily population that is unsentenced has actually increased since the *Humphrey* decision and has remained higher than before March 2021 (see Figure 2).⁴¹ Thus, even though the total number of people who are unsentenced decreased, this might be a reflection of the fact that the total jail population overall decreased. At the same time, given that the percentage of people unsentenced has increased, it also could indicate that the rate at which judges are detaining people is increasing.

Figure 3. Monthly Statewide Unsented Jail Population as a Percentage of Total ADP, 2017-2023



These discordant findings are exemplified at the county level as well. For example, updated data provided by Merced County show that people charged with felonies are being released on their own recognizance at lower rates akin to pre-*Humphrey* levels but are being released on bond at slightly higher rates, indicating that bail amounts are possibly being set at affordable amounts.⁴² However, people charged with felonies are also remaining in custody at higher rates than in the year post-*Humphrey*, suggesting that judges may be ordering more no bail holds.⁴³

Figure 4. Percentage of People Charged with Felonies in Custody by Release Type (Merced County, 2017-2023)

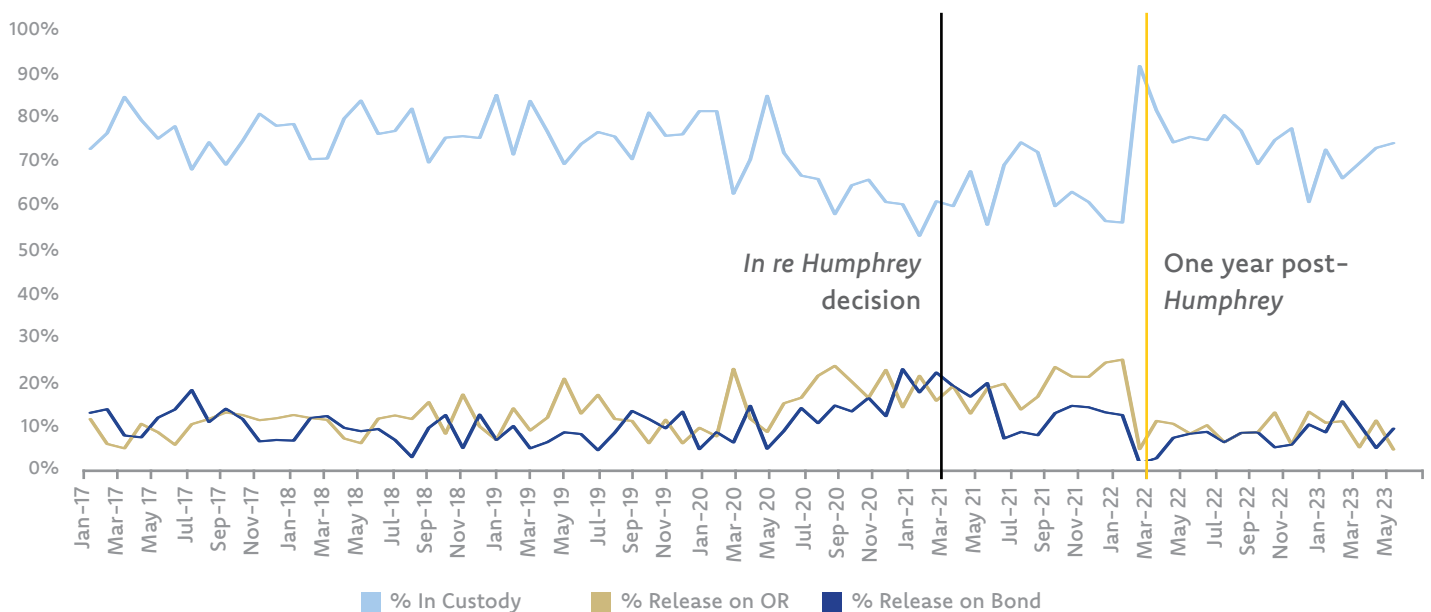


Table B: Percentage of People Charged with Felonies by Release Type (Merced County, 2017–2023)⁴⁴

	January 2017– December 2017	January 2018 – February 2021	March 2021 – February 2022	March 2022 – May 2023
% of People Charged with Felonies Released OR	9.8%	13.4%	19.5%	9.1%
% of People Charged with Felonies Released on Bond	5.3%	2.8%	3.0%	7.8%
% of People Charged with Felonies in Custody	76.0%	73.3%	63.0%	74.0%

In Merced County, people were being released on their own recognizance at higher rates immediately post-*Humphrey* but at substantially lower rates in the second year post-*Humphrey*. People charged with misdemeanors are also being released on bond at substantially lower rates than pre-*Humphrey*. While there was a decrease in the percentage of people charged with misdemeanors in custody post-*Humphrey*, that percentage has increased a year after the decision.

This data suggests that while judges in Merced County may have initially responded more faithfully to the *Humphrey* decision, the pendulum then swung in the other direction with even less pretrial releases than before the decision.

Table C: Percentage of People Charged with Misdemeanors by Release Type (Merced County, 2017–2023)⁴⁵

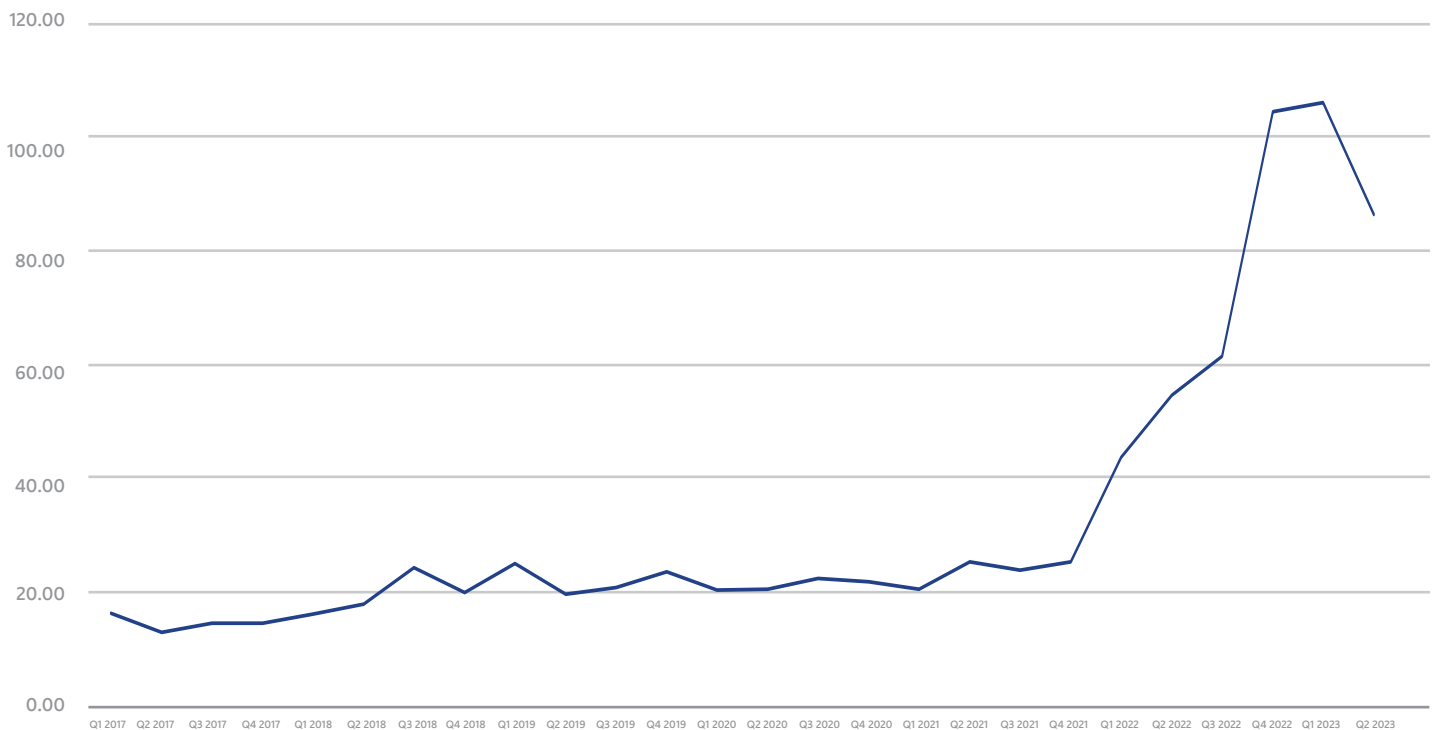
	January 2017– December 2017	January 2018 – March 2021	March 2021 – February 2022	March 2022 – May 2023
% of People Charged with Misdemeanors Released OR	59.5%	69.4%	79.7%	43.7%
% of People Charged with Misdemeanors Released on Bond	12.9%	16.3%	28.4%	5.7%
% of People Charged with Misdemeanors in Custody	22.8%	18.1%	10.9%	15.5%

B. Average Length of Pretrial Detention

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*.

In our first report, we concluded from BSCC data that there is no evidence that *Humphrey* has resulted in a decrease in the average length of pretrial detention in California. Comparing the 2022 and 2023 BSCC data, the average length of stay is substantially higher in 2022 (66.15 days averaged across Q1-Q4 2022) and 2023 (96.17 days averaged across Q1-Q2 2023) than it was immediately before (20.71 days in Q1 2021) and after the *Humphrey* decision (24.30 days averaged across Q2-Q4 2021 (see Figure 5 below)).⁴⁶

Figure 5. Statewide Average Length of Pretrial Detention in Days (2017-2023)



This indicates that average length of pretrial detention has increased since the *Humphrey* decision. This somewhat makes sense because those who are deemed a public safety risk are more likely to be held in pretrial detention for longer periods of time. However, without an understanding of the charges facing incarcerated individuals pretrial, it is difficult to determine what is causing this increase in average length of pretrial incarceration.

Cash Bail

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.”⁴⁷ Given that nearly eighty percent of all Californians who are arrested cannot afford to pay bail,⁴⁸ many expected that *Humphrey* would have resulted in an overall decrease in bail amounts across the state.

Median bail amounts (misdemeanor and felony) in San Joaquin County are lower post-*Humphrey* and have continued to stay at a median of \$25,000 since March 2022.

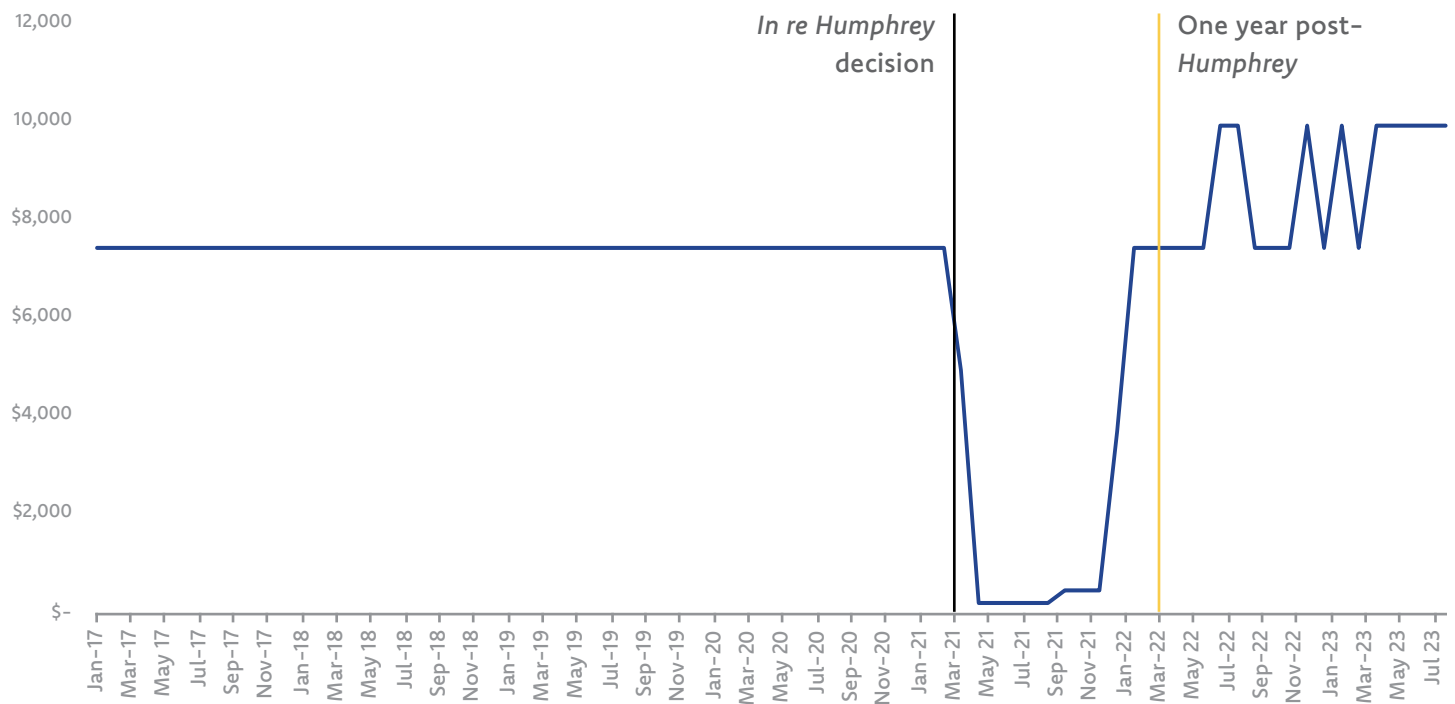
In our 2022 report, after comparing median bail amounts post-*Humphrey* across twelve counties and reviewing data on bail amounts between January 2017 and August 2021 in three counties (Merced, San Joaquin, and San Mateo), we found no evidence that *Humphrey* resulted in a decrease in median bail amounts across the state.

To evaluate any changes in bail amounts, we requested updated data (September 2021 to May 2023) from Merced,⁴⁹ San Joaquin, and San Mateo Counties. We did not receive as extensive of data on bail amounts for this report from these counties but describe responses where provided.

A. San Mateo County

Since March 2022, the median bail amount in San Mateo County has increased. The median bail amount was \$250 in the latter half of 2021 before spiking to \$3,750 in December 2021 and \$7,500 in January 2022. Since then, the median bail amount has oscillated between \$7,500 and \$10,000.

Figure 6: Median Bail Amounts (San Mateo County, 2017-2023)

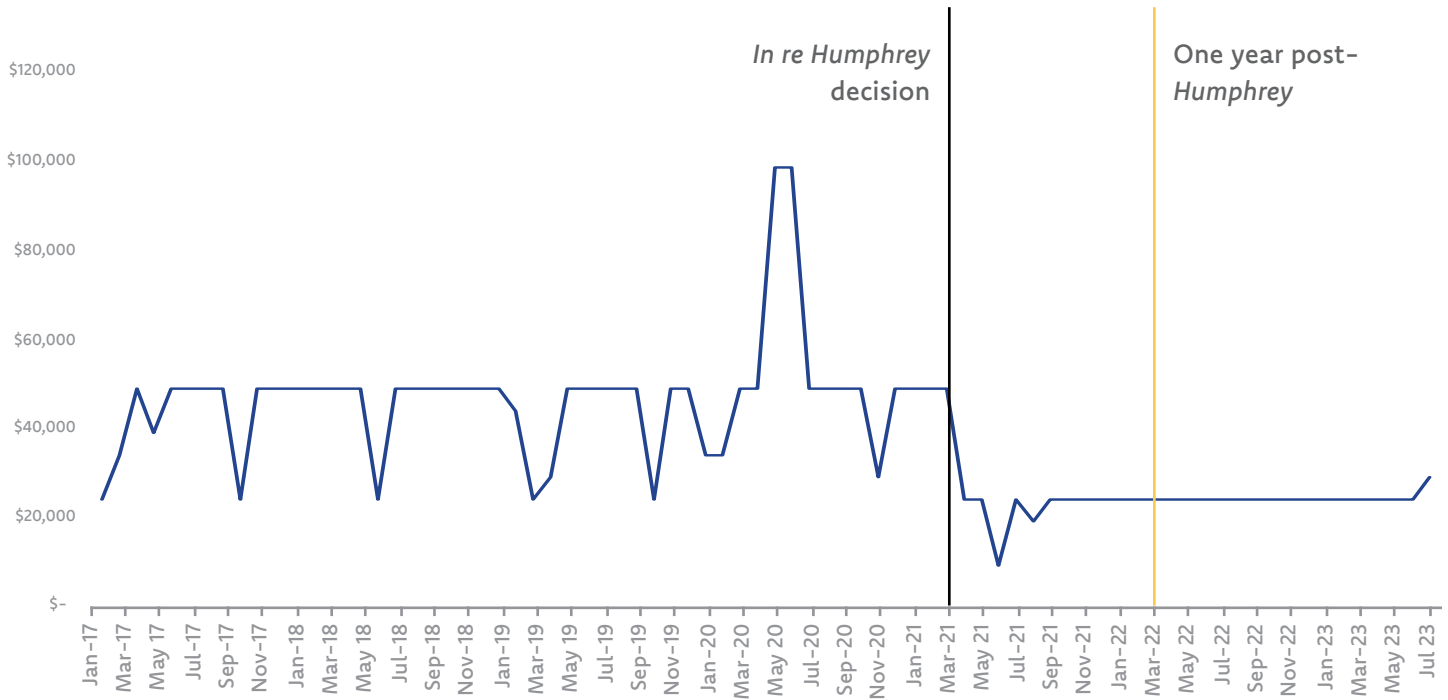


At the same time, the percentage of people in San Mateo County who had bail set and were released after posting bail is lower, 30.2% of people since March 2022 (as compared to 28.9% pre-*Humphrey* and 33.4% immediately post-*Humphrey*). This is another indicator that bail is being set at unaffordable amounts.

B. San Joaquin County

In contrast, median bail amounts (misdemeanor and felony) in San Joaquin County are lower post-*Humphrey* and have continued to stay at a median of \$25,000 since March 2022. While median bail amounts are lower, it is important to note that \$25,000 is still an unaffordable amount for most people in California.

Figure 7: Median Bail Amounts (San Joaquin County, 2017-2023)



Similar to San Mateo County, the percentage of people who were released after posting bail is lower. About 1.2% of people were able to bail out prior to 2018 compared to 17% of people immediately post-*Humphrey*. Since March 2022, 11.8% of people who had bail set were no longer in custody which suggests that more people are finding it difficult to afford bail at the amounts set by judges.



Findings from the Defense Attorney Survey

Through our updated defense attorney survey, we found that *Humphrey* continues to influence criminal legal system actors' behavior in a variety of ways. Judges continue to misinterpret *Humphrey*, leading to dire consequences including the ongoing, unlawful use of no bail holds. As a result, defense attorneys remain hesitant to raise *Humphrey* arguments as they fear negative outcomes for their clients, however they are also exploring new techniques to adapt to the landscape. Prosecutorial responses have been inconsistent across the state with very few offices adopting formal policies in response to the decision.

Judges

Judges are misinterpreting and misapplying the *Humphrey* decision which has resulted in the increased use of no bail holds, even in instances where such orders are unlawful, and the increased use of pretrial release conditions for people released on their own recognizance. As one defense attorney put it in reference to *Humphrey*:

“Judges still seem to lack a basic understanding of what the requirements are and how the procedure works, or lack appreciation for it, or lack a willingness to uphold it.”⁵⁰

–Public Defender, Kern County

A. Use of No Bail Holds

Judges continue to issue no bail holds in cases where, pursuant to the *Kowalczyk* decision, they would be considered unlawful. While that case is pending before the California Supreme Court, if it is upheld, it is important to understand for what types of cases judges are currently issuing no bail holds. Numerous cases, as well as our survey results, indicate that judges are ordering no bail holds for charges that do not fall within article I, section 12, including misdemeanor cases.⁵¹ Cases that have arisen in front of the Court of Appeal indicate that this is occurring, with no bail holds being set in non-serious and non-violent felonies such as evading the police⁵² or being a person convicted of a felony who is in possession of a firearm.⁵³

For example, one writ filed in Fresno County challenged a judicial ruling of a no bail hold in a misdemeanor case (exhibiting a weapon).⁵⁴ The judge in that case stated that there were no financial conditions that would protect the public and never once mentioned that people charged with misdemeanors are entitled to release on their own recognizance.⁵⁵ The Appellate Division of the Superior Court of Fresno issued a ruling, holding that the lower court's order was in violation of the California Constitution, since its provisions only allow preventive detention for capital cases and certain felonies when specific evidentiary standards are met.⁵⁶ The Appellate Division ruled on the case, even though it was moot as the person charged had been released, because they deemed this issue capable of repetition and evading review.⁵⁷

In response to our updated survey, slightly more defense attorneys said that judges are placing no bail holds in a higher percentage of cases in 2023 than immediately post-*Humphrey*. Almost half of defense attorneys in both data sets said that judges are placing no bail holds more frequently now than before *Humphrey*. All four reasons (public safety, victim safety, seriousness of offense, and prior non-appearance) are commonly



cited for ordering a no bail hold. The most common reason noted is public safety with ninety percent of respondents selecting this option.

Nearly one-quarter of defense attorneys state that judges are issuing no bail holds for misdemeanors.

Nearly one-quarter of defense attorneys state that judges are issuing no bail holds for misdemeanors. Further, over half of defense attorneys report that judges are setting no bail holds for

non-serious and non-violent felonies (51%), and non-article I, section 12 felonies (80%), both of which would be considered unlawful under the *Kowalczyk* decision.⁵⁸ Qualitative responses from the defense attorney survey also indicate trends in the issuing of no bail holds:

“Our judges misunderstand *Kowalczyk* to authorize denial of bail on non-article I, section 12 offenses (when it clearly doesn’t).”

—Public Defender, San Joaquin County⁵⁹

“In my experience *Kowalczyk* is not being used/cited. However, judges do not seem to understand how to apply the Article I Section 12 exception, so they deny bail altogether instead of reducing to “affordable amount” and when they do, they still make it unaffordable.”

—Public Defender, San Diego County⁶⁰

“Judges used *Brown* to order no bail holds on PVs, even misdemeanors. After a lot of fighting over this, the judges relented and don’t do that anymore.”

—Public Defender, Los Angeles County⁶¹

Additionally, some defense attorneys are stating that if a judge finds that a person is indigent such that they cannot afford any amount of bail, instead of setting zero dollars or some nominal amount of bail, judges will set no bail, even when it is not appropriate to do so under the California Constitution.

“The judge, after finding non-financial conditions adequate will take the notion that my client cannot afford to pay the bail schedule to mean that he must set no bail since client cannot afford bail schedule.”

—Public Defender, San Diego County⁶²

Similar to the responses to our last survey, several respondents identified that judges are issuing no bail holds if an individual has a probation violation in addition to a newly charged case. This is of particular note, however, as the second iteration of our survey came after legislation to address the issue of probation violations and bail effective January 1, 2022.⁶³ Whereas previously throughout the state, it was fairly common for judges to issue no bail holds for probation violations, Assembly Bill 1228 took a different approach, instituting a presumption of own recognizance release for people charged with a probation violation in advance of a hearing on the violation.⁶⁴ Own recognizance release is the default in these instances, unless a court finds clear and convincing evidence that conditions of release (non-financial or financial) would not provide “reasonable protection to the public and reasonable assurance of the person’s future appearance in court.”⁶⁵

A handful of attorneys in response to the prior survey indicated that courts were also ordering no bail holds when an individual had a record of failing to appear (FTA). In response to our second survey, these attorneys volunteered similar information:

“If a client has even one FTA, lots of judges are revoking bail altogether.”

—Public Defender, San Diego County⁶⁶

“The biggest increase from pre [*H*]umphrey in no bail holds that I see is by far the failure to appear prong. If there is a failure to appear history at all (even only one or two in the past 2 years) that often is enough to trigger no bail holds no matter the case (driving on suspended, petty theft, vandalism, simple possession, etc.) much less felonies or strike offenses.”

—Private Attorney, Del Norte County⁶⁷

“I have used *In Re Kowalzyck* to argue against No Bail holds and my Judge still believes that the case still allows no bail holds for prior failure to appear and essentially glossed over when I mentioned article 1 section 12 and just asked for case law.”

—Public Defender, Kern County⁶⁸

B. Use of Pretrial Conditions

In both our surveys, about two-thirds of respondents said that judges are imposing pretrial conditions more frequently than before *Humphrey*.

Defense attorneys reported that:

- Electronic monitoring (EM) is being used in more cases in 2023 than in 2021–2022. In 2021–2022, 33% of defense attorneys said that EM is used in at least half of cases. In 2023, that number increased to 42% of defense attorneys.
- Pretrial supervision is being used in about the same percentage of cases in 2023 as it was immediately post-*Humphrey*. In 2023, 65% of defense attorneys said that pretrial supervision is used in at least half of cases.
- Drug/alcohol testing and restraining orders are being used slightly more, with restraining orders being the most common pretrial condition cited in 2023. In 2023, 79% of defense attorneys said that restraining orders were used in at least half of cases.

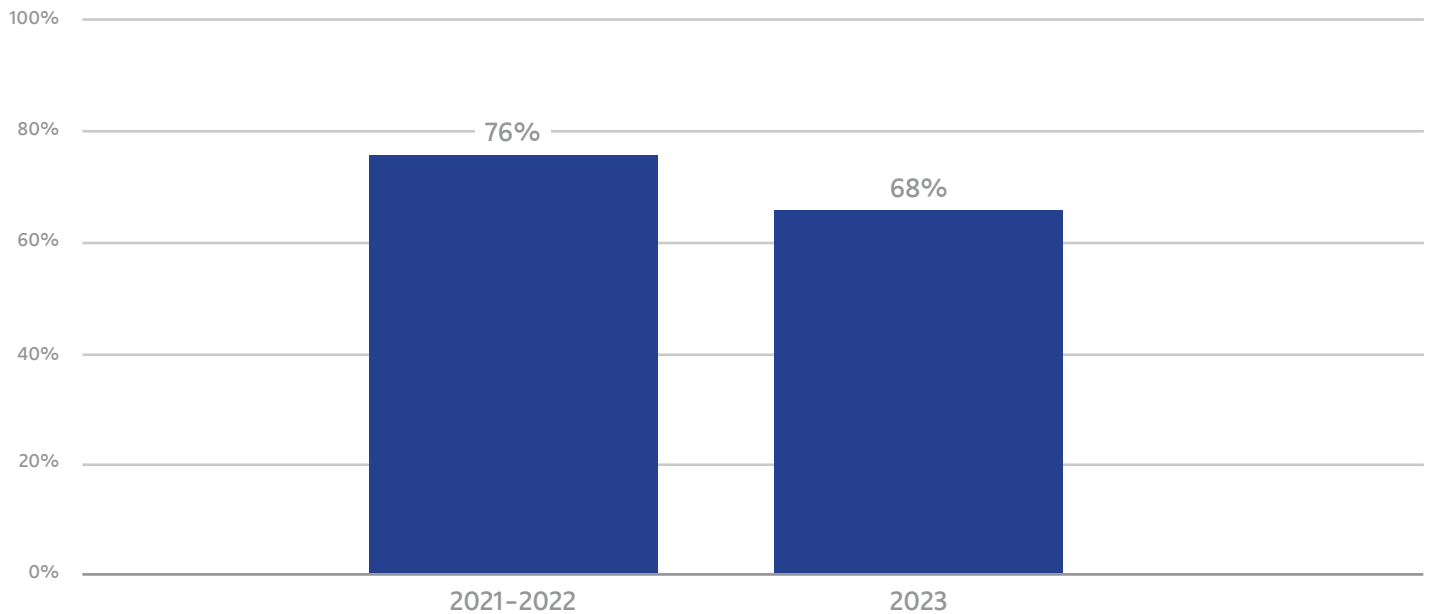
Defense Attorneys

Defense attorneys have grown increasingly hesitant to raise *Humphrey* arguments, fearing backlash against their clients. Defense attorneys are also facing greater procedural hurdles and are having to adjust to judicial behavior and understanding even when such interpretations are contrary to case law. At the same time, defense attorneys seem to be putting more effort into bail arguments and making them more frequently.

A. Bail Pitches and *Humphrey* Arguments

Defense attorneys are making more bail pitches on average in 2023 than in 2021–2022,⁶⁹ but specific *Humphrey* arguments are made in fewer cases in 2023 than immediately post-*Humphrey*. Immediately post-*Humphrey*, 76% of defense attorneys made *Humphrey* arguments in at least 75% of their bail pitches, compared to only 68% in 2023. (See Figure 8 below).

Figure 8. Percentage of Defense Attorneys that make *Humphrey* Arguments in at Least 75% of Bail Pitches



Further, even though *Humphrey* factors should be considered any time pretrial release or detention is at issue, over half of respondents said that judges only somewhat consider or do not consider *Humphrey* factors at clients' first arraignments, with 37% of respondents saying that judges do not consider *Humphrey* at all. As one defense attorney stated,

"Unfortunately I see *Humphrey* and any progeny is simply replaced with judges using the excuse of public safety..my personal belief is they don't even consider *Humphrey*."

—Private Defense Attorney, Monterey County⁷⁰

Nearly 40% of defense attorneys reported that judges do not consider *Humphrey* at all.

Almost half of defense attorneys stated that they are spending more time preparing bail motions post-*Humphrey*, including more time spent arguing motions in court to the amount of time spent preparing and seeking out mitigating information to include in a bail motion. Many attorneys

also noted that they are raising arguments around their clients' inability to pay more than before. They also stated that they are gathering information from their clients about their ability to pay bail as well as requesting judges to make the individualized ability to pay inquiry. Additionally, many defense attorneys highlighted that their arguments for release include an emphasis on less restrictive conditions. If judges were more responsive to these efforts, it is possible that we would see a significant decrease in people incarcerated pretrial.

B. Procedural Hurdles

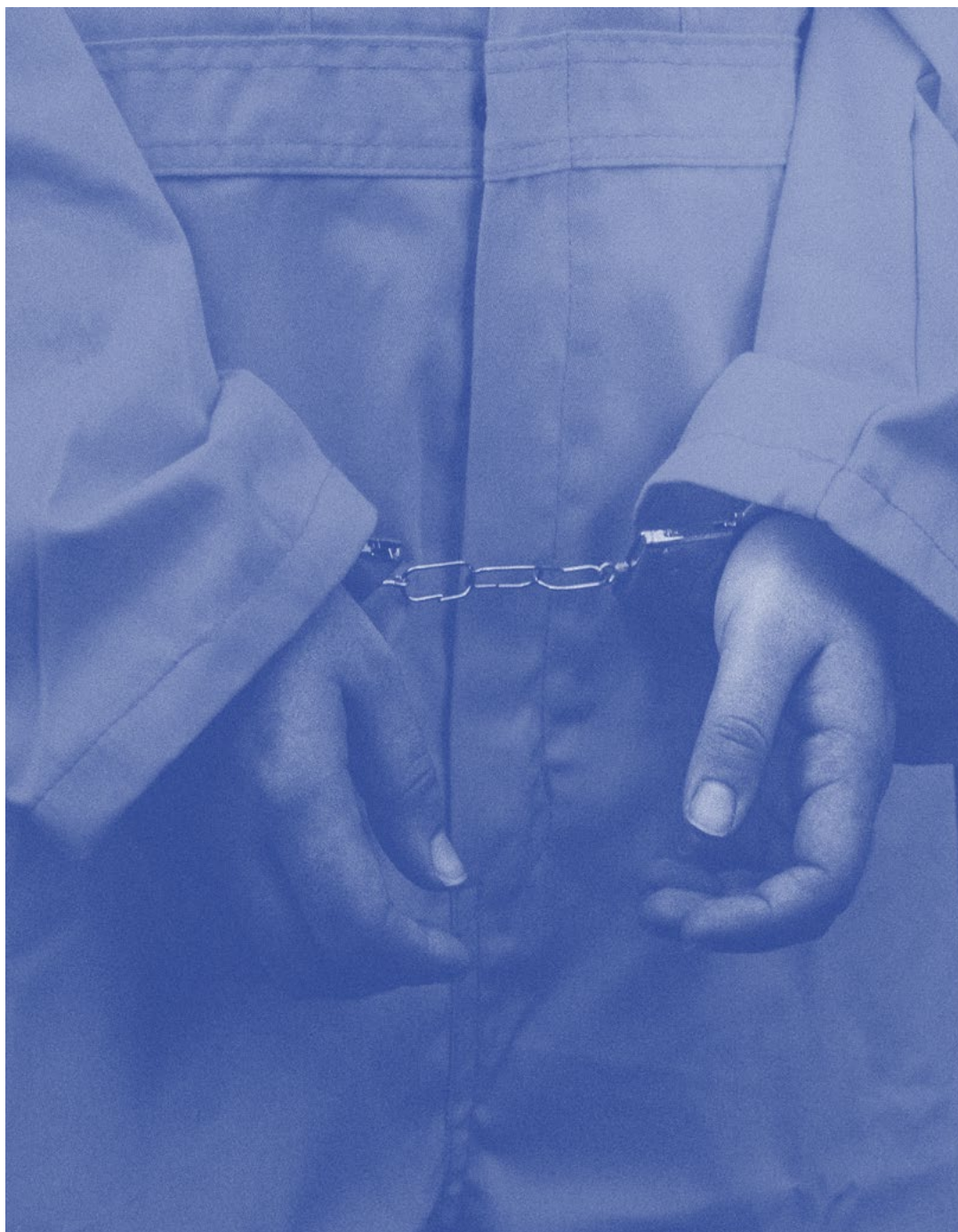
Nearly all respondents (95%) spent more or the same amount of time preparing for motions post-*Humphrey*, but defense attorneys reported far fewer procedural hurdles in 2023 than in 2021-2022. This is perhaps due to

courts adjusting better to COVID since 2021-2022 and to *Humphrey* implementation efforts. Still, most public defender offices have not created pretrial units or divisions to handle additional bail hearings since *Humphrey*.

Nineteen respondents stated that they are experiencing procedural obstacles when bringing bail motions. Three defense attorneys stated that one of the obstacles is that they did not have enough time to prepare for the hearing or enough access to their client to adequately prepare for a robust bail hearing.

“Court refuses to have in-custody arraignments with defense counsel and defendant in the courtroom... [c]lients are required to sign waivers of personal appearance consenting to remote appearance without first talking to counsel.”⁷¹

—**Court-Appointed Defense Attorney, Lassen County**



“If you ask for pre-trial release WITHOUT mentioning *Humphrey* then we have some judges that are decent on ordering releases...But if you mention the word *Humphrey* then the judge will 100% of the time issue a no bail order. 100% of the time.”

Many attorneys responded that judges are refusing to hear their bail arguments, which may suggest that judges see *Humphrey* as a procedural process distinct from the typical bail hearing. One attorney from Siskiyou County said that a judge will continue the *Humphrey* hearing until after the preliminary hearing is completed, which at minimum is ten court days after the arraignment.⁷² Another attorney from Imperial County stated that the only two felony arraignment judges keep

individuals in custody on a regular basis and do not consider *Humphrey*. Later in an individuals' case, the other felony judges in the courthouse will consider *Humphrey* and will release individuals. This could be one reason why people are held in custody pretrial longer than before *Humphrey*.

Attorneys also highlighted how bail hearings often feel unfair because judges take the facts of the police reports (as read into the record by prosecutors) or unverified pretrial services reports as true. The *Humphrey* court did state in dicta that during the bail hearing a court must accept the charges as true⁷³ and the *In re Harris* case (up for review) allowed for the introduction of evidence from the prosecutor via proffer. However, this may be creating a conflict as other cases such as *In re White* ask courts to weigh the evidence in order to make preventive detention decisions, not to simply accept the facts as written in the police report as true.

C. Adjusting to Judicial Behavior

A number of responses from defense attorneys indicated an ongoing and perhaps enhanced chilling effect since our last report. Many defense attorneys stated that any mention of *Humphrey* immediately leads judges to set a no bail hold. A Riverside defense attorney explains the issue like this:

“If you ask for pre-trial release WITHOUT mentioning *Humphrey* then we have some judges that are decent on ordering releases...But if you mention the word *Humphrey* then the judge will 100% of the time issue a no bail order. 100% of the time.”

—Public Defender, Riverside County⁷⁴

Defense attorneys, as we noted in the last report, may shift their behavior accordingly. While they may spend more time researching and preparing for their motions, they also weigh the possibility of a no bail hold when determining whether to bring a bail motion in the first place. As many have noted, this can vary tremendously within any given county depending on the particular judicial officer.

“I have to weigh the high likelihood that judges will revoke bail altogether.”

—Public Defender, Kern County⁷⁵

And some attorneys are completely deterred from doing bail hearings altogether as a result of judicial behavior:

“I do not do bail hearings anymore because our judge will impose no bail as a consequence.”

—**Public Defender, Shasta County**⁷⁶

The way that some defense attorneys talk about it is through a punitive lens. They feel that they and their clients are being punished when invoking their clients' rights under *Humphrey*:

“If there is bail set I never argue to reduce bail anymore because the judges will punish you by setting no bail.”

—**Private Attorney, San Mateo County**⁷⁷

Overall, while defense attorneys are adjusting to each unique courtroom culture, it is disconcerting to learn of the blind-eye often turned towards *Humphrey* and its judicial mandates.

D. Innovating New Practices

Many public defender's offices across the state responded quickly after the *Humphrey* decision, putting in place new processes and focusing more attention on pretrial detention hearings. While there are many counties engaging in new practices, below are just two examples of the innovative practices public defender's offices are using to address the challenge of pretrial incarceration.

Fresno County

In response to *Humphrey*, Fresno County started the Integrity Unit in late 2022.⁷⁸ The unit started by training all public defenders on *Humphrey* and its requirements. Then they began to file writs of habeas corpus and mandamus challenging arraignment decisions. While many of these mooted out, public defenders report that judges stopped issuing no bail holds in misdemeanors when they began to challenge misdemeanor no bail holds via the writ process.⁷⁹

The Fresno County Public Defender's Office also issued a memo to the court regarding the proposed 2023 bail schedule.⁸⁰ The memo argues that the bail schedule is arbitrary, prevents an individualized inquiry on the matter of release, and violates the equal protection clause as it results in wealth-based detention. (See Appendix A).

San Diego County

In 2023, the San Diego County Public Defender's Office started their Pretrial Advocacy Community Connections unit (PACC).⁸¹ This is an early representation model, meaning that someone from the Public Defender's office meets with a person post-arrest, while they are in custody, to gather information that an attorney can then use to advocate for their release at the arraignment. PACC uses a needs assessment (rather than a risk assessment) tool adapted from the Sacramento County Public Defender's tool. After the needs assessment is complete, they produce a Connections and Needs Plan that is developed in collaboration with the client.

In addition to immediate contact post-arrest with people in their county, PACC has created “PACC Landing” a physical space located three blocks from the jail, which is a safe place for clients to access upon release from jail. There, PACC workers can provide food, cell phones, and connections to long-term resources for their clients. PACC also provides court date reminders. PACC has been incredibly successful since their launch in June 2023, such that they will be expanding to each of the four courthouses in the County, with a PACC Landing in each jurisdiction. In its first four months of operation, they assessed 123 clients and made 200 connections to services; 150 of those connections were utilized.⁸² The appearance rate went from 69% in July 2023 to 73% in September 2023.⁸³

As a result of PACC services being offered, the goal is to increase the likelihood that judges will release an individual on their own recognizance rather than on supervised release, which could also result in a reduction of probation's workload.

Prosecutors

Prosecutorial behavior did not change as much as judicial behavior between 2021-2022 and 2023, but there are a few notable exceptions.

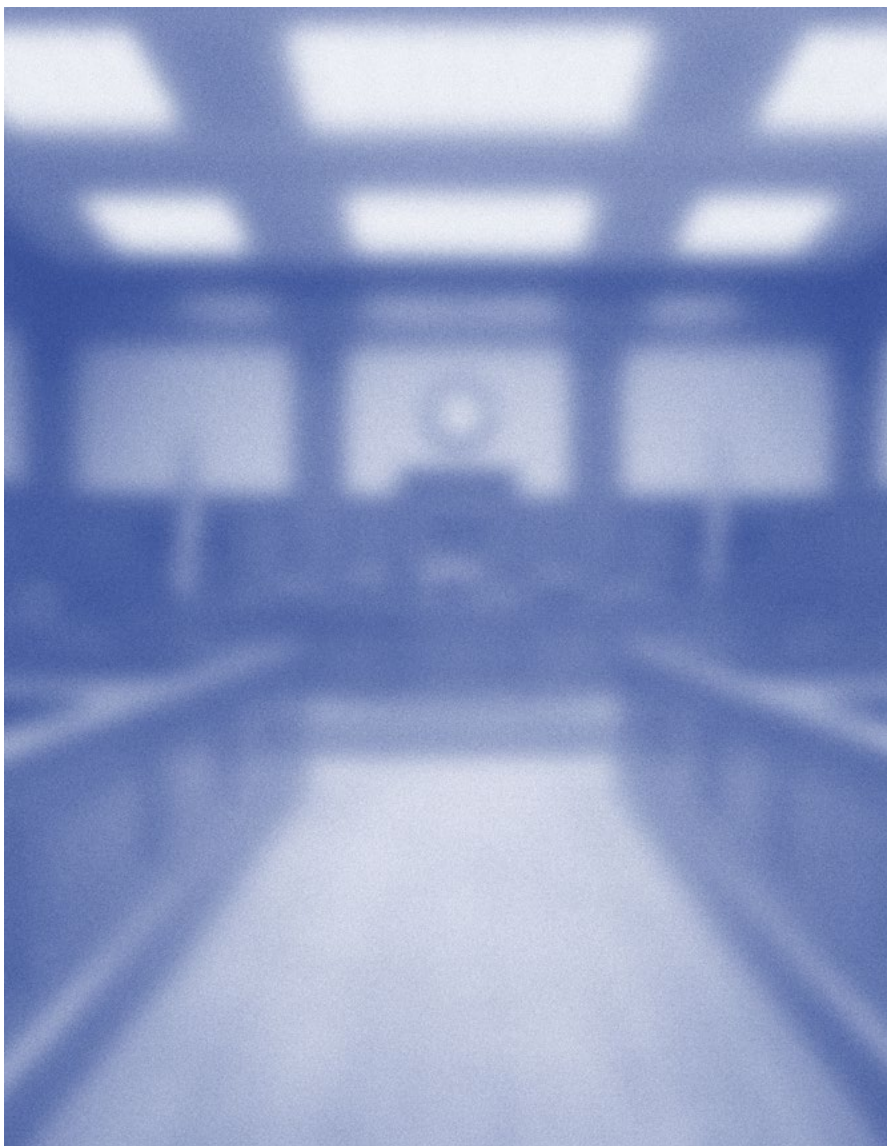
First, defense attorneys reported fewer objections to own recognizance release by prosecutors in 2023 than in 2021-2022. In 2023, 72% of defense attorneys said prosecutors objected to own recognizance release in at least 75% of cases, compared to 88% in 2021-22. Most prosecutors are objecting to own recognizance release at the same rate as before *Humphrey* in both 2023 and 2021-2022. Therefore, the *Humphrey* decision did not significantly influence prosecutors' objections to OR release in either survey data set.

Perhaps indicating a shift towards the implementation of *Humphrey* guidance, slightly fewer survey respondents said that prosecutors are requesting an increase in bail in 2023 than in 2021-2022 and that prosecutors requested

no bail holds in a slightly lower percentage of cases in 2023 than in 2021-2022. While this potentially demonstrates some progress, 35% of respondents say that prosecutors request no bail holds in at least 50% of cases post-*Humphrey*. In both surveys, nearly half of defendants said that prosecutors are requesting no bail holds more frequently post-*Humphrey* than pre-*Humphrey*.

Finally, in 2023, there was an increase in defense attorneys reporting that prosecutors are requesting pretrial conditions more frequently than before *Humphrey* than in 2021-2022. This indicates that the trend of turning towards pretrial conditions as an alternative to pretrial incarceration may continue to increase.

Overall, these statewide findings show that while implementation of the *Humphrey* case may have improved in some instances or jurisdictions, there is still progress to be made regarding judicial decision-making, unlawful no bail holds, procedural hurdles, and prosecutorial behavior.



Progress Made Toward Recommendations

In our last report, we made the following recommendations so that California can move towards ending wealth-based detention and reducing the pretrial jail population. Below, we describe any progress made toward our recommendations.

Judicial Council

A. The Judicial Council Should Require Judges to Undergo Training and Continuing Education on Pretrial Detention Procedures and Research – IN PROGRESS

The Judicial Council hosts trainings and has a repository of webinars and podcasts focused on pretrial education. For example, Criminal Justice Services hosts a pretrial court staff brown-bag webinar series which has included sessions on lessons learned from local pretrial release programs, including around accessing funding and using public safety assessments.⁸⁴

Additionally, records provided by the Judicial Council show at least 20 webinars and podcasts available to judges around bail and pretrial release, including on the “Impacts of the *In re Humphrey* decision from September 2021” and “Post-*Humphrey* Setting Bail” from June 2022.⁸⁵ In 2023 alone, the Judicial Council organized four trainings for judges specifically related to pretrial policy and practice.⁸⁶ Two of the trainings were held in Sacramento and the two others were held in San Bernardino and Shasta Counties.⁸⁷ The trainings mostly followed the same format, with sessions focused on recent case law, the use of risk assessments, and pretrial programs as well as engaging judges in hypothetical scenarios.

B. The Judicial Council Should Develop and Enforce a Statewide Uniform Zero Dollar Bail Schedule – NO PROGRESS

There is still no statewide uniform bail schedule and most courts have moved away from emergency zero bail schedules that were in place due to the pandemic.

As discussed above, in July 2023, prompted by the ruling in the *Urquidi* lawsuit, Los Angeles County approved a set of bail schedules for certain non-violent, non-serious felonies and misdemeanors out of acknowledgement of “the fundamental inequality of money bail.”⁸⁸ The new bail schedules went into effect on October 1, 2023.⁸⁹ While the impact of such schedules have yet to be seen, more than two dozen cities in Los Angeles County, including Beverly Hills, Downey, La Mirada, Manhattan Beach, and Santa Monica, immediately sued to end the new zero-bail policies. In December 2023, the cities’ request for an injunction barring the use of the bail schedule was denied, and the new bail schedules were allowed to remain in effect.⁹⁰

C. The Judicial Council Should Create and Oversee Diverse Local Commissions Charged with Monitoring Pretrial Detention and the Use of Money Bail – NO PROGRESS

There are still no oversight mechanisms, in the form of local commissions, to evaluate local court practices and behavior.

The Legislature

A. The Legislature Should Codify a Presumption of Pretrial Release for All Cases – NO PROGRESS

The Legislature has not yet codified a presumption of pretrial in all cases. Instead, there have been efforts to limit pretrial release. For example, Assemblymember Vince Fong introduced Assembly Bill 2391 (2024) which specifies that “public safety” for the purposes of determining release own recognizance includes protection from physical or economic injury.⁹¹

In its 2022 Annual Report, the Committee on the Revision of the Penal Code recommended that the Legislature “codify and clarify elements of the California Supreme Court *Humphrey* decision, including a presumption of release, when conditions of release should be imposed, and how courts should determine affordable cash bail amounts.” Senate Bill 1133 (2024), authored by Senator Becker, would codify the standard of proof articulated in *Humphrey* during automatic review hearings of the initial pretrial release decision.⁹²

B. The Legislature Should Increase Support for Indigent Defense at the Earliest Stage Possible – NO PROGRESS

The Legislature has not provided increased resources or support for the provision of indigent defense at earlier stages in the criminal legal process.⁹³

Assembly Bill 1209 (2023), authored by Assemblymember Reggie Jones-Sawyer, would have required public defenders to start representation shortly after booking to allow for meaningful arguments during a bail hearing.⁹⁴ The bill was tagged as a state mandated local program with “Costs...to the courts of unknown but potentially significant amounts” and “potentially reimbursable costs to local detention facilities and county public defender offices” to begin representing a person “as soon as feasible.” After the bill was placed on the suspense file, it did not make it out of the relevant fiscal committee and effectively died.

C. The Legislature Should Designate Funding for Jurisdictions to Establish Pretrial Services Agencies Outside of Law Enforcement Departments –IN PROGRESS

The Legislature has not required the establishment of pretrial service agencies outside of law enforcement departments nor provided funding to increase services available in communities most targeted by the criminal legal system.

Senate Bill 987 (2024), introduced by Senator Caroline Menjivar, would allow for the establishment of independent pretrial divisions by expanding the definition of “criminal justice agencies” that can take on such responsibilities.⁹⁵

Further, as discussed above, some public defender offices are starting new pretrial units to support clients at earlier points in the process and to help increase the chances that people are released without any conditions or supervision.

D. The Legislature Should Require the Judicial Council and Superior Courts to Track and Publish Data on Pretrial Detention and Releases — IN PROGRESS

Under Assembly Bill 1331 (2019), the Legislature required agencies, including courts, to report to the California Department of Justice on basic information from local and state criminal offender systems, including arrest data and reasons for release.⁹⁶ However, such data are only available upon request and are not otherwise publicly available. We submitted a request to the California Attorney General's Office for data on the number of people arrested and reasons for release and were told that preparing such aggregated data would require nearly \$5,000 in programming work in order to access.⁹⁷

Similarly, Assembly Bill 2418 (2021) requires state and local prosecution offices to collect a robust set of criminal case data beginning in 2027. The data requirements include many pretrial data points including: the amount of bail set, the pretrial release recommendation, the prosecution bail recommendation, and the court's pretrial detention determination.⁹⁸ The bill also requires the state Department of Justice to establish a Prosecutorial Transparency Advisory Board to help ensure "transparency, accountability, and equitable access to prosecutorial data" by October 1, 2023. Board members must include the Attorney General, the president of the California Public Defenders Association, a university professor who specializes in criminal justice data, and two individuals who have direct experience being prosecuted in the criminal legal system, to serve on the board. It is unclear whether the Board has been formed at the time of this report's publication. If this data becomes available to the public, this will be a huge boon to understanding the impacts of *Humphrey* and other pretrial policy and legislative efforts.

Conclusion

The findings of this report indicate that there have not been consistent decreases in pretrial incarceration nor an increase in affordable cash bail since the *Humphrey* decision. We see through various data sources that unlawful no bail holds are commonplace. Several counties that saw modest improvements immediately post-*Humphrey* are now seeing those improvements rolled back. Accused individuals are facing sanctions or unfair treatment at the mere mention of *Humphrey* or "ability to pay" in advocacy for their release. Thus, despite a landmark ruling by the California Supreme Court and ongoing legal challenges to the cash bail system and pretrial detention, the practice of pretrial incarceration remains largely untouched in the state, with many perverse and unintended consequences.

What should be clear after reading this second report is that a multi-pronged approach is required to move the criminal legal system in California away from the status quo of pretrial incarceration and unaffordable cash bail. The legislature, judges, other systems actors, and community members will all need to work together to create the will, funding, structures, legislation, and commitment to moving away from a punitive, cash bail system, and towards a system that holistically addresses the needs of all community members pretrial.

ENDNOTES

- 1 Alicia Virani, Stephanie Campos-Bui, Rachel Wallace, Cassidy Bennett, & Akruiti Chandrayya, UCLA L. Sch. Bail Practicum & Berkeley L. Pol’y Advocacy Clinic, *Coming Up Short: The Unrealized Promise of *In re Humphrey** (2022), https://law.ucla.edu/sites/default/files/PDFs/Criminal_Justice_Program/Coming_Up_Short_Report_2022_WEB.pdf.
- 2 Alissa Pollitz Worden et al., The John F. Finn. Inst. for Pub. Safety, *Evaluating Reform in New York’s Justice Courts* (2024), https://datacollaborativeforjustice.org/wp-content/uploads/2023/12/Finn_Final_Bail_Reform_Report.pdf.
- 3 *Id.*
- 4 725 Ill. Comp. Stat. Ann. 5/110-1 et seq. (West 2023).
- 5 725 Ill. Comp. Stat. Ann. 5/110-2 (West 2023).
- 6 AB 61, 2023–2024 Leg., Reg. Sess. (Cal. 2022), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240AB61. Although the bill made it through the policy and fiscal committees in the Assembly, it did not make it out for discussion in the Senate.
- 7 SB 1133, 2023–2024 Leg., Reg. Sess. (Cal. 2024), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB1133.
- 8 Cal. Task Force to Study and Develop Reparation Proposals for African Americans, Cal. Off. of the Att’y Gen., *Final Report – The California Reparations Report 749* (2023), <https://oag.ca.gov/system/files/media/full-ca-reparations.pdf>.
- 9 *See, e.g.* Sarah Staudt, *Releasing People Pretrial Doesn’t Harm Public Safety*, PRISON POL’Y INITIATIVE (July 6, 2023), <https://www.prisonpolicy.org/blog/2023/07/06/bail-reform/>.
- 10 *See* Jonathan Matisse, *Bipartisan Tennessee proposal would ask voters to expand judges’ ability to deny bail*, WMC MEMPHIS (Jan. 27, 2024, 12:52PM PST); *see also* Marc Sternfield, *More than two dozen cities have sued to end L.A. County’s zero-bail policy*, KTLA 5 (Oct. 5, 2023, 2:51PM PT).
- 11 While the Attorney General’s Office responded to our request, the fee required to prepare the data was cost-prohibitive (\$4,791).
- 12 In our 2022 *Coming Up Short* report, we discussed the results from a 2021–2022 survey of 251 defense attorney responses across 50 counties. Since that time, we modified and recirculated our survey to defense attorneys across the state and yielded results from 81 unique respondents across 38 counties. It is important to note that nearly half (40%) of respondents primarily practice in San Diego and Los Angeles counties, so these results are not fully representative of the entire state. Of these respondents, 34.6% (28 respondents) filled out our first survey and 50% (40 respondents) were familiar with our *Coming Up Short* report. Over half of the respondents have been defense attorneys in California for ten or more years, indicating a depth of knowledge about pretrial procedures, behaviors, and trends, and the impact of the *Humphrey* decision.
- 13 *Counties with COVID-19 Emergency Bail Schedules*, CAL. CTS. NEWSROOM (May 2023), <https://newsroom.courts.ca.gov/covid-19-news-center/counties-covid-19-emergency-bail-schedules>.
- 14 Jud. Council of Cal., *Pretrial Pilot Program: Final Report to the Legislature 23* (2023), https://www.courts.ca.gov/documents/Pretrial-Pilot-Program_Final-Report.pdf.
- 15 *Id.*
- 16 *Id.*
- 17 *Id.* at 29.
- 18 Virani et al., *supra* note 1.
- 19 *In re Brown*, 76 Cal. App. 5th 296 (Cal. Ct. App. 2022).
- 20 *Id.* at 308.
- 21 *In re Kowalczyk*, 85 Cal.App.5th 667, 672 (Cal. Ct. App. 2022).
- 22 *Id.* at 690.
- 23 *Id.* at 672.
- 24 *Id.* at 691.
- 25 *Kowalczyk on H.C.*, 305 Cal. Rptr. 3d 440, (2023).

- 26 *In re Harris*, 71 Cal. App. 5th 1085, 1101 (Cal. Ct. App. 2021).
- 27 *Harris on H.C.*, 291 Cal. Rptr. 3d 212 (2022).
- 28 See *In re White*, 9 Cal. 5th 455, 462 (2020); See *Yedinak v. Sup. Ct. Riverside Cty.*, 92 Cal. App. 5th 876 (Cal. Ct. App. 2023) (the court found that the judge failed to make findings as to whether the “facts were evidence or the presumption great”, a requirement under article I, section 12); see also *Ohage Newton v. Sup. Ct. Orange Cty.*, No. G062892, 2023 WL 6475928 (Cal. Ct. App. Oct. 5, 2023).
- 29 *Cocco v. Sup. Ct. Orange Cty.*, No. G062576, 2023 WL 5525618 (Cal. Ct. App. Aug. 28, 2023).
- 30 See *Yedinak*, 92 Cal. App. 5th 876; see also *In re Derek Paige*, No. B325982, 2023 WL 4942990, at *6 (Cal. Ct. App. Aug. 3, 2023) (stating that the trial court “did not ‘articulate its analytical process’ connecting those concerns to its finding that all potential less restrictive alternatives to detention, including those suggested by Paige, were insufficient to protect the government’s interest in public safety.”).
- 31 See *Paige*, 2023 WL 4942990, at *6 (a case where the Court of Appeal found that no evidence was proffered or presented by the prosecutor to “support a finding that no less restrictive alternatives would adequately ensure public safety” and yet the trial court held the accused without bail pretrial.).
- 32 According to Stephanie Bohrer, Assistant Court Executive Officer/Public Information Officer in San Joaquin County, arraignment data that reflects the ordering of \$0 bail, no bail, or null amounts means that a judge ordered a no bail hold. Even if the \$0 bail and null data points are removed, the percentage of no bail holds has increased significantly since *Humphrey*—0.9% of all cases prior to the 2021 California Supreme Court decision to 15.9% of all cases post-*Humphrey*.
- 33 Defense Attorney Survey (on file with authors).
- 34 Virani et al., *supra* note 1 at 20.
- 35 *Bill Information – AB-1228 Supervised persons: release (2021–2022)*, CAL. LEG. INFO., https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=20210220ABI228 (last visited Jan. 29, 2024).
- 36 Ex Parte Application for 1) a Temporary Restraining Order and 2) an Order to Show Cause Regarding Preliminary Injunction, *Urquidi v. City of Los Angeles et al.* (Nov. 14, 2022) (No. 22STCPO4044), <https://www.publicjustice.net/wp-content/uploads/2023/01/2022-11-14-Ex-Parte-Application-for-TRO-and-OSC-re-Preliminary-Injunction-stamped.pdf>.
- 37 Memorandum Decision and Order on Motion for Preliminary Injunction, *Urquidi v. City of Los Angeles et al.* (May 16, 2023) (No. 22STCPO4044), https://www.publicjustice.net/wp-content/uploads/2023/05/Memorandum_Decision_and_Order_on_Motion_for_Preliminary_Injunction_20230516154546.pdf.
- 38 Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief, *O’Neill Rogge et al. v. Fleming*, <https://www.aclunc.org/sites/default/files/07.%2028.31.Santa%20Clara%20Writ%20Petition%20and%20Complaint%20-%20Final.pdf>.
- 39 *In Response to Lawsuit, Santa Clara Superior Court Takes Step to Change Policy Discriminating Against Poor Defendants*, ACLU OF N. CAL. (Nov. 13, 2023), <https://www.aclunc.org/news/response-lawsuit-santa-clara-superior-court-takes-step-change-policy-discriminating-against>.
- 40 Virani et al., *supra* note 1 at 3.
- 41 We are not sure why there was a drop-off in the unsentenced population in January 2023, as there are no landmark holdings or events to explain this change.
- 42 This could suggest that for cases in which bail is being set, amounts are being set at more affordable rates.
- 43 This includes people held on no bail holds or people with bail set but who cannot or do not post bail.
- 44 Note that data featured in the table do not add up to 100% as some people charged with felonies were released on other forms of supervision, including electronic monitoring, were sentenced, or data were unavailable.
- 45 Note that data featured in the table do not add up to 100% as some people charged with misdemeanors were released on other forms of supervision, including electronic monitoring, were sentenced, or data were unavailable.
- 46 It is worth noting, however, that this data may not be fully consistent because there are many blanks in the data that could skew the results up or down.
- 47 *In re Humphrey*, 11 Cal.5th 135, 154 (2021).

- 48 Human Rights Watch, “Not in it for Justice” How California’s Pretrial Detention and Bail System Unfairly Punishes Poor People 4 (Apr. 11, 2017), <https://www.hrw.org/report/2017/04/11/notit-justice/how-californias-pretrial-detention-andbail-system-unfairly>.
- 49 In response to a request for updated data, the court provided data on release types but did not provide updated information on bail amounts or the number of cases in which bail was set. According to Court Executive Officer Amanda Toste, “The bail amounts are identified in a pdf document within each case file. For the previous extraction we were able to run specific programming script to look into the pdf. Unfortunately, due to the variety of locations the bail amount may be identified in a pdf, the script was not reliable or successful this time. There is not an extractable field for bail, only the pdf.”
- 50 Defense Attorney Survey (on file with authors).
- 51 *Dunn v. Sup. Ct. San Joaquin Cty.*, No. CO98537, 2023 WL 4310664 (Cal. Ct. App. July 3, 2023); *Hayes v. Sup. Ct. San Joaquin Cty.*, No. CO99237, 2023 WL 6138388 (Cal. Ct. App. Sept. 20, 2023); *Melcher v. Sup. Ct. San Joaquin Cty.*, No. CO99236, 2023 WL 6547461 (Cal. Ct. App. Oct. 9, 2023); *Woodward v. Sup. Ct. Nevada Cty.*, No. CO99344, 2023 WL 6564673 (Oct. 10, 2023).
- 52 *See, e.g. Melcher*, 2023 WL 6547461.
- 53 *See, e.g., Woodward*, 2023 WL 6564673.
- 54 Petition for Writ of Mandate, *Woodruff v. Sup. Ct. Fresno Cty.* (Aug. 31, 2023) (No. M23909358).
- 55 *Id.*
- 56 Order for Writ of Mandate, *Woodruff v. Sup. Ct. Fresno Cty.*, (Oct. 5, 2023) (No. M23909358).
- 57 *Id.*
- 58 *Kowalczyk on H.C.*, 305 Cal. Rptr. 3d 440, (2023).
- 59 Defense Attorney Survey (on file with authors).
- 60 *Id.*
- 61 *Id.*
- 62 *Id.*
- 63 Cal. Pen. Code § 1203.25 (West 2023).
- 64 *Id.*
- 65 *Id.*
- 66 Defense Attorney Survey (on file with authors).
- 67 *Id.*
- 68 *Id.*
- 69 There were also more outliers in 2023, which may have skewed the data.
- 70 Defense Attorney Survey (on file with authors).
- 71 *Id.*
- 72 *Id.*; Cal. Pen. Code § 859b (West 2023).
- 73 *Humphrey*, 11 Cal. 5th at 153.
- 74 Defense Attorney Survey (on file with authors).
- 75 *Id.*
- 76 *Id.*
- 77 *Id.*
- 78 Interview with Jason Crockford, Fresno Cty. Pub. Def.’s Off. (November 15, 2023).
- 79 *Id.*
- 80 *Id.*

- 81 San Diego County, "PD-PACC Public Defender Pretrial Advocacy and Community Connections Team," <https://www.sandiegocounty.gov/content/dam/sdc/psg/images/alternatives-to-incarceration/PACC%20Presentation%20-%202023%20ATI.pdf>.
- 82 *Id.*
- 83 *Id.*
- 84 Criminal Justice Services, Pretrial Court Staff Brown-Bag Webinar Series (on file with authors).
- 85 Judicial Council of California, Pretrial Education Resources: Webinar & Podcasts (on file with authors).
- 86 Judicial Council of California, Pretrial Release Policy and Practice: Training for Judicial Officers - Sacramento (Jan. 26, 2023) (on file with authors); Judicial Council of California, Pretrial Release Policy and Practice: Training for Judicial Officers - Shasta County (Apr. 18, 2023) (on file with authors); Judicial Council of California, Pretrial Release Policy and Practice: Training for Judicial Officers - San Bernardino (Sep. 14, 2023) (on file with authors); Judicial Council of California, Pretrial Release Policy and Practice: Training for Judicial Officers - Sacramento (Oct. 26, 2023) (on file with authors).
- 87 *Id.*
- 88 *News Release - Nation's Largest Trial Court Unveils Safe and Fair Pre-Arrest Release Protocols for Non-Violent, Non-Serious Felonies and Misdemeanors*, Cal. Sup. Ct. Los Angeles Cty. (July 18, 2023), <https://www.lacourt.org/newsmedia/uploads/14202371814442523NRSAFEANDJUSTPRE-ARRAIGNMENTPROTOCOLS.pdf>.
- 89 *Id.*
- 90 James Queally and Gabriel San Román, *Lawsuit challenging L.A. County's new limits on cash bail suffers major setback*, L.A. TIMES, (Dec. 11, 2013 5:13PM).
- 91 AB 2391, 2023-2024 Leg., Reg. Sess. (Cal. 2024), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240AB2391.
- 92 SB 1133, 2023-24 Leg., Reg. Sess. (Cal. 2024), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB1133.
- 93 Although not enacted, the Governor proposed in the 2023-24 budget cutting \$50 million in support of a pilot program supporting resentencing units in public defender offices. GAVIN NEWSOM, STATE OF CAL., GOVERNOR'S BUDGET SUMMARY, 2024-25 (2024), <https://ebudget.ca.gov/FullBudgetSummary.pdf>.
- 94 AB 1209, 2023-2024 Leg., Reg. Sess. (Cal. 2023), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240AB1209.
- 95 SB 987, 2023-2024 Leg., Reg. Sess. (Cal. 2024), https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=202320240SB987.
- 96 AB 1331, 2023-2024 Leg., Reg. Sess. (Cal. 2023), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB1331.
- 97 Public Records Act Request submitted to the Cal. Off. of the Att'y Gen. (on file with authors).
- 98 AB 2418, 2021-2022 Leg., Reg. Sess. (Cal. 2022), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB2418.



INTEROFFICE MEMO

COUNTY OF FRESNO

Antoinette Taillac
Public Defender

To: The Honorable Brian Alvarez
From: The Fresno County Public Defender's Office
Date: November 14, 2023
Re: 2023 Proposed Fresno County Bail Schedule

The Public Defender offers the following seven comments concerning adoption of the 2023 countywide bail schedule.

1. Background

Bail schedules provide standardized money bail amounts based on the offense charged and prior offenses. California law requires that each of California's 58 superior courts develop a countywide schedule. (Pen. Code, §1269b(c).) Schedules therefore vary widely from county to county. The process used to establish bail schedules is determined by each individual superior court. And each superior court is required to annually review its schedule. (Pen. Code, §1269b(e).) The Fresno schedule is comprised of a three-columned table that identifies the offense or Penal Code section, a description of the offense, and the bail amount.

2. Bail schedules can be arbitrary

The Fresno schedule, like most schedules, contains no instructions on how to administer its list of offenses or bail amounts, how those amounts were determined or justified in the first place, whether bail should be "stacked" in any given case, or whether prior convictions should be counted separately or together. The schedule is also somewhat arbitrary; it does not pursue the government's interest in safety equally with respect to different offenses. For example, receipt of a stolen vehicle, Pen. Code, §496(d), has a higher bail amount, \$15,000, than driving under the influence and causing injury, Pen. §23153(f), which is set at \$13,500.¹ This even though a DUI with injury would seem to implicate public safety to a greater degree than receipt of a stolen car.

¹ <https://www.fresno.courts.ca.gov/divisions/criminal/bail>



The Fresno schedule is also overinclusive: it potentially confines people who pose minimal risk because they cannot afford to post the amount assigned by the schedule. At the same time, the schedule is also underinclusive: those who pose a substantial risk go free simply because they can afford to pay a higher bail amount. A simple example—that our office sees everyday—illustrates the point: a person with means charged with armed robbery goes free while an indigent person charged with drug possession remains detained. The difference between the two defendants is money. Dangerousness has nothing to do with it.

The above hypothetical proves something. Although the Fresno Schedule on its face applies equally to all defendants, extending an equal opportunity to secure release by posting money bail, this choice is illusory for indigent defendants like those our office represents. By making release contingent on one's ability to pay, the schedule in its operational effect exposes only poor defendants to increased pretrial detention times. And, again, this despite that many detainees present minimal risk of flight or reoffending if released.

Accordingly, our office requests that, in adopting next year's schedule, the judges be cognizant of the fact that release decisions based *solely* on the bail schedule can, in many cases, result in wealth-based detention.

3. Bail schedules rest on a questionable premise

Bail schedules rest on a facile idea: more serious crimes contain higher penalties and hence it is more likely that the defendant will flee and is dangerous. But there is no support for the proposition that the severity of the charge bears on a defendant's risk.² Accordingly, the current practice in Fresno of simply setting bail "per schedule" is questionable at best. The public defender is of the view that the severity of the offense *alone* cannot be used to gauge our clients' risk. Instead, we believe risk should be holistically determined on a case-by-case basis according to each defendant's individual circumstances. We respectfully ask the judges to keep this position in mind when promulgating next year's schedule.

4. Blind reliance on the bail schedule is never appropriate

Sole reliance on the bail schedule without an individualized assessment of the defendant's circumstances is problematic.³ Release decisions must, instead, take into account an individual's ability to pay as well as other factors bearing upon dangerousness and risk of flight. Accordingly, our office believes that the paramount question when it comes to bail is *not* the amount prescribed by the schedule but the amount necessary to ensure our clients come to court. Nothing on the face of the schedule precludes judges from deviating from scheduled bail in appropriate circumstances.

²(*In re Humphrey* (2020) 19 Cal.App.5th 1006, 1043, fn. 21.)

³(*Buffin v. California, supra*, 23 F.4th 951 at p. 953, fn. 2.)



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5. Bail determinations must be individualized

The bail rule is easy: conditioning freedom on money requires judicial inquiry into whether the individual can meet the condition and the availability of non-money alternatives.⁴ But on the other hand, bail schedules undermine the judicial discretion necessary to conduct this individual assessment. What is a court to do? Our office believes that, as a matter of law, the bail schedule must yield: “unquestioning reliance on the bail schedule, without considerations of a defendant’s ability to pay, as well as other individualized factors bearing on his dangerousness and risk of flight, runs afoul of the requirement of Due Process for a decision that may result in pretrial detention.”⁵ We respectfully ask the judges to base release decisions on individualized considerations.

6. Bail schedules are required under California law

Our office does not condemn use of the schedule. Indeed, the law requires that judges consult the schedule in many cases. The schedule also serves a useful function in providing a means for our clients to obtain immediate release. And our office recognizes our Justice Partners’ compelling interest in keeping the community safe and ensuring our clients come to court.

But our office has a constitutional duty to ensure our client’s, who are indigent, are not subject to wealth-based detention. Pretrial detention affects many aspects of an individual’s life. Even a short period of detention threatens employment, housing stability, child custody, and access to health care. Whether a person is detained in custody before trial may also have an effect on case outcomes and sentences. These concerns compel the conclusion that the bail schedule is but one ingredient in the bail calculus.

7. Conclusion

Should the Judges or the Justice Partners have any questions about the above, please contact our office. We thank the judges for their time.

Sincerely

Jason Crockford,
On Behalf of the Public Defender’s Office.

CC: Justice Partners.

⁴ (*Bearden v. Georgia* (1983) 461 U.S. 660, 661.) This is the *Humphrey* rule.

⁵ (*In re Humphrey, supra*, 19 Cal.App.5th at p. 1044.)



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