Judicial Council *of* California

455 Golden Gate Avenue · San Francisco, California 94102-3688
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# REPORT TO THE JUDICIAL COUNCIL

*Item No.: 25-144*
For business meeting on October 24, 2025

**Title**
Criminal Law: Findings and Orders for Pretrial Release or Detention

**Rules, Forms, Standards, or Statutes Affected**
Approve form CR-104

**Recommended by**
Criminal Law Advisory Committee
Hon. Lisa Rodriguez, Chair

**Report Type**
Action Required

**Effective Date**
January 1, 2026

**Date of Report**
October 9, 2025

**Contact**
Sarah Fleischer-Ihn, 415-865-7702
sarah.fleischer-ihn@jud.ca.gov

## Executive Summary

In *In re Humphrey* (2021) 11 Cal.5th 135, the Supreme Court held that conditioning pretrial release from custody solely on whether an arrestee can afford bail is unconstitutional and articulated a framework for bail determinations based on public and victim safety. To assist courts with making the appropriate findings and orders for pretrial release or detention as articulated in *In re Humphrey* and in line with statutory and constitutional requirements, the Criminal Law Advisory Committee recommends a new form for optional use.

## Recommendation

The Criminal Law Advisory Committee recommends that the Judicial Council, effective January 1, 2026, approve *Findings and Orders for Pretrial Release or Detention* (form CR-104).

The proposed form is attached at pages 10–13.

## Relevant Previous Council Action

In October 2016, former Chief Justice Tani Cantil-Sakauye appointed the Pretrial Detention Reform (PDR) Workgroup. The PDR Workgroup conducted a yearlong study and presented its

report and recommendations to the Judicial Council in November 2017.[1] The recommendations included replacing money bail with a risk-based assessment and supervision system for releasing and detaining defendants before trial based on their threat to public safety and their likelihood of appearing for court. The Judicial Council also approved advocating for legislation to implement the PDR Workgroup's recommendations as a legislative priority for 2018.

In January 2019, former Chief Justice Cantil-Sakauye appointed the Pretrial Reform Operations Workgroup (PROW). PROW's charge was to review progress on reforms to California's system of pretrial detention and release, develop recommendations for funding allocations of court pilot projects, develop a plan for judicial branch education on pretrial issues, and conduct an examination of pretrial risk assessment instruments. In November 2020, PROW presented its recommendations on the use of pretrial risk assessment instruments to the Judicial Council.[2]

As a continuation of the judicial branch's work on pretrial justice issues, the Budget Act of 2021 (Senate Bill 129) allocated $140 million to the Judicial Council for the implementation and operation of ongoing court programs and practices that promote the safe, efficient, fair, and timely pretrial release of individuals booked into jail. The California Pretrial Release Program within the Judicial Council's Criminal Justice Services office administers this annual funding allocation to courts.

In 2024, the Rules Committee approved the Criminal Law Advisory Committee's request to create a standing Pretrial Policy and Data Subcommittee, charged with considering bail and pretrial-related legislation and recommendations on statewide pretrial issues, including bail practices, pretrial release decisions, conditions of pretrial release, and the use of pretrial risk assessments.

## Analysis/Rationale

In *In re Humphrey* (*Humphrey*), the Supreme Court observed that pretrial detention should be a limited exception to the norm of pretrial release[3] and articulated a framework for bail determinations based on public and victim safety. Specifically, the court posed the following considerations for trial courts when determining pretrial release:

- Whether nonfinancial conditions of release may reasonably protect the public or victim and assure future court appearances by the defendant.[4]

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[1] Pretrial Detention Reform Workgroup, *Pretrial Detention Reform: Recommendations to the Chief Justice* (Oct. 2017), *www.courts.ca.gov/sites/default/files/courts/default/2024-08/pdrreport-20171023.pdf*.

[2] Pretrial Reform Operations Workgroup, *Pretrial Reform: Pretrial Reform and Operations Workgroup Update and Recommendations on Use of Pretrial Risk Assessment Instruments* (Nov. 13, 2020), *https://jcc.legistar.com/View.ashx?M=F&ID=8870018&GUID=AFC468B3-B307-45AC-9AB2-A77DE0A692C9*.

[3] *In re Humphrey*, *supra*, 11 Cal.5th at p. 156.

[4] *Id*. at p. 154.

- If nonfinancial conditions alone will be insufficient, whether a financial condition, such as cash bail, coupled with or without nonfinancial conditions, is "reasonably necessary" to protect the public or the victim and/or assure future court appearances. If so, the court must consider the defendant's ability to pay, and bail must be set at an amount the defendant can reasonably afford.[5]

- If nonfinancial conditions are necessary, they must be the least restrictive conditions necessary to ensure a return to court and to protect the public or the victim.[6]

- The court may order pretrial detention if it concludes, by clear and convincing evidence, that no nonfinancial condition in conjunction with affordable money bail can reasonably protect public safety or arrestee appearance.[7] The detention must otherwise comply with statutory and constitutional requirements.[8]

- The court's reasons for its decision on pretrial release or detention must be stated in the record and in the court's minutes.[9]

In addition to *Humphrey*, relevant statutory and constitutional provisions regarding bail include:

- Penal Code section 1270, which states that defendants arrested for a misdemeanor are entitled to release on one own's recognizance unless release will compromise public safety or will not reasonably assure the appearance of the defendant as required.

- Article I, section 12 of the California Constitution, which specifies, in relevant part, that a person must be released on bail by sufficient sureties except for (1) capital crimes;[10] (2) felony offenses involving acts of violence on another person or sexual assault offenses, where the court finds that there is a substantial likelihood the person's release would result in great bodily harm to others;[11] or (3) felony offenses where the court finds 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.[12] Even if the defendant meets these requirements, the court retains the discretion to grant bail or release the defendant on their own recognizance.[13]

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[5] *Ibid*.

[6] *Id*. at p. 154.

[7] *Id*. at p. 143.

[8] *Ibid*.

[9] Cal. Const., art. I, § 12(a); *In re Humphrey*, *supra*, 11 Cal.5th at pp. 155–156.

[10] Cal. Const., art. I, § 12(a).

[11] *Id*., § 12(b).

[12] *Id*., § 12(c).

[13] *In re White* (2020) 9 Cal.5th 455, 469.

- Article I, section 28(f)(3) of the California Constitution, which states, in relevant part, that "[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."[14] A person may be released on their own recognizance in the court's discretion, subject to the same factors considered in setting bail.[15]

While *Humphrey* requires pretrial detention to conform to statutory and constitutional requirements, it did not address how article I, sections 12 and 28(f)(3) of the California Constitution can or should be reconciled, including whether pretrial detention of noncapital defendants can be authorized or prohibited outside of sections 12(b) and (c).[16] The questions of which provision governs the denial of bail in noncapital cases, or, in the alternative, whether the two provisions can be reconciled, and whether a trial court may set pretrial bail above an arrestee's ability to pay are pending before the Supreme Court in *In re Kowalczyk*, review granted March 15, 2023, S277910.[17]

Although these key pretrial detention issues remain pending, the committee believes that the form should move forward now in order to provide helpful guidance for courts. This form will assist courts to comply with the ongoing requirements of *Humphrey* by ensuring that all matters

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[14] Cal. Const., art. I, § 28(f)(3).

[15] *Ibid.*

[16] *In re Humphrey*, *supra*, 11 Cal.5th at p. 155, fn. 7.

[17] *In re Kowalczyk* (2023) 305 Cal.Rptr.3d 440. In *Kowalcyzk*, the First District Court of Appeal held that the two constitutional provisions were reconcilable and that both governed bail determinations in noncapital cases:

> [S]ection 12's general right to bail in noncapital cases remains intact, while full effect must be given to section 28(f)(3)'s mandate that the rights of crime victims be respected in all bail and OR release determinations. In so concluding, we reject any suggestion that section 12 guarantees an unqualified right to pretrial release or that it necessarily requires courts to set bail at an amount a defendant can afford.

(*In re Kowalczyk* (2022) 85 Cal.App.5th 667, 672.)

In contrast to *Kowalcyzk*, the Second District Court of Appeal in *In re Brown* (2022) 76 Cal.App.5th 296 held that if under *Humphrey* a court determines that the defendant is a flight risk and a risk to public safety, and that there are no financial or nonfinancial conditions that may sufficiently protect the state's interests, the court's only option is to order pretrial detention, and the court may not set preventively high bail. Pending review, trial courts may exercise their discretion to set preventively high bail under *Kowalczyk* or follow *In re Brown*. (Cal. Rules of Court, rule 8.115(e); *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456.)

considered in the decision-making process are substantiated, documented, and transparent.[18] The committee will continue to monitor relevant cases and issues, including the ultimate outcome of *Kowalcyzk*, and respond with any necessary or helpful proposed changes to this form.

### Proposal

*Findings and Orders for Pretrial Release or Detention* (form CR-104) leads a judicial officer chronologically through the process of making findings and an order of pretrial release or detention based on the factors articulated in *In re Humphrey* and article I, section 12 of the California Constitution.

After addressing the procedural posture of the case and evidence reviewed, the form guides the judicial officer through factors relevant to the risk of nonappearance or to public or victim safety, such as the defendant's past history of nonappearances, community ties, and whether a victim sustained any injuries, so that the judicial officer can note their reasons for a finding that the defendant is or is not a flight risk or a danger to the safety of the public or victim. Based on these findings, the court may order pretrial release with appropriate nonfinancial and financial conditions or detain the defendant by denying bail under article I, section 12 of the Constitution, or based on other legal authority. The form also allows the court to set provisional bail if the parties wish to present additional evidence on the matter at a later date.

The form also details the least restrictive conditions imposed by the judicial officer and any additional conditions ordered, guides the judicial officer through the process of imposing financial conditions of release with or without nonfinancial conditions, outlines mandatory conditions required of all defendants released pretrial, and includes findings and orders relevant to preventive detention.

### Policy implications

The key policy implications are ensuring that the form correctly implements the law. This proposal is consistent with the *Strategic Plan for California's Judicial Branch*, specifically the goals of Modernization of Management and Administration (Goal III) and Quality of Justice and Service to the Public (Goal IV).

### Comments

The proposal circulated for comment from April 14 to May 23, 2025. The committee received 12 comments and greatly appreciates the time and attention of the commenters. One commenter agreed with the proposal (Judge Linda Colfax), and four agreed with the proposal if modified (Superior Court of Los Angeles County, Superior Court of Orange County, Joint Rules Subcommittee of the Trial Court Presiding Judges Advisory Committee and the Court Executives Advisory Committee, and the Orange County Bar Association). Two commenters

[18] It is the committee's understanding that writs of habeas corpus and mandate challenging insufficient findings for pretrial detention decisions under *Humphrey* are being filed throughout the state (see, e.g., *Ferrer v. Solano County Superior Court* (June 11, 2025, A173140) [2025 WL 1649417] [nonpub. opn.]; *Pasene v. Superior Court of San Francisco* (Nov. 19, 2024, A171444) [2024 WL 4861815] [nonpub. opn.]).

opposed the proposal (San Diego District Attorney's Office and Los Angeles County Alternate Public Defender). Five commenters did not indicate a position (Judge Frank Birchak, Alicia Virani, Chief Probation Officers of California, Civil Rights Corps and 17 additional signatories, and Vera Institute). The substantive comments and the committee's responses are summarized below. All comments received and the committee's responses are provided in the attached chart of comments at pages 14–46.

***Issues pending review in* Kowalczyk**

Several commenters raised concerns with item 8d of the form as circulated for comment, which allowed a court to set no bail or preventively high bail under either section 12 or 28 of the Constitution. As noted above, the issue of which section governs the denial of bail in noncapital cases is pending in *Kowalczyk*. In the interim, the form was drafted to allow judges, when relevant findings were made, to use their discretion to deny bail under either section 12 or section 28 or to set preventively high bail:

**8. Preventive Detention**

a. The court finds that there is ***clear and convincing*** evidence that defendant presents
   (1) ☐ A flight risk and/or
   (2) ☐ A danger to the safety of the public or any victim

b. The court ***has considered*** the following less restrictive nonfinancial and financial conditions and finds by ***clear and convincing evidence*** that they are insufficient to ensure a return to court and/or protect the public:
   (1) ☐ Conditions considered by the court:
   (2) ☐ Evidence supporting the court's findings, in addition to those listed in item 3:

c. The court finds that the ☐ facts are evident and/or ☐ presumption is great that the defendant committed the offense.

d. The court is setting ☐ no bail ☐ preventively high bail in in the amount of:

Under
   (1) ☐ Article I, section 12:
      (a) ☐ Capital crime.
      (b) ☐ Committed felony offenses involving an act of violence on another or felony sexual assault offense on another, and the court finds by clear and convincing evidence there is a substantial likelihood release will result in great bodily harm to others.
      (c) ☐ Committed a felony and the court finds by clear and convincing evidence that the person has threatened another with great bodily harm and there is a substantial likelihood that the person will carry out the threat if released.
   (2) ☐ Article I, section 28:
      (a) ☐ Capital crime.
      (b) ☐ Protection of the public based on the safety of the victim, seriousness of the offense, prior criminal record.
      (c) ☐ There is a probability the person will not appear at trial or a hearing of the case.

Six commenters recommend postponing the form until *Kowalczyk* is decided, noting that the form in its circulated state would be premature and prejudge the outcome of *Kowalczyk*, and that it was prudent to wait for the Supreme Court decision to ensure that the form is consistent with legal authority. Additionally, Judge Birchak noted that including an option on the form to deny bail under section 28 disregards controlling case law and the rules of precedent.

The committee discussed, at length, whether to postpone the form until *Kowalczyk* is decided. Ultimately, the committee sought to balance the commenters' concerns with the ongoing need to provide courts with guidance in implementing *Humphrey*. Accordingly, the committee recommends a revised version of item 8 that provides judicial officers with guidance on settled law under *Humphrey* and the denial of bail under section 12, removes checkboxes allowing the setting of preventively high bail or denial of bail under section 28, and replaces those checkboxes with an "Other, with legal authority:" checkbox for judges who find it necessary to set preventively high bail or deny bail under section 28 pending the decision in *Kowalczyk*:

c. ☐ Defendant is to be held without bail pursuant to Article I, section 12 because the court finds the facts are evident or the presumption is great that the defendant committed an offense that is a:

(1) ☐ Capital Crime

(2) ☐ Felony involving an act of violence on another or felony sexual assault offense on another and the court finds by clear and convincing evidence there is substantial likelihood release will result in great bodily harm to others.

(3) ☐ Felony and the court finds by clear and convincing evidence that the person has threatened another with great bodily harm and there is a substantial likelihood that the person will carry out the threat if released.

d. ☐ Other, with legal authority:

***Concerns that a form is not an appropriate tool***

The Civil Rights Corps (and signatories) and the Los Angeles County Alternate Public Defender commented that while trial courts need guidance for *Humphrey* compliance, a form was not the appropriate tool as it could encourage rote decision-making by courts. The San Diego District Attorney's Office also commented that the form was lengthy and complex and would be challenging for a judge to complete in a busy arraignment calendar. The committee considered these concerns and decided that the optional form is appropriately designed to guide judges in considering pretrial release or detention as required by *Humphrey* and ensuring that the findings are transparent, substantiated, and included in the record and on the minutes.

***Request for separate forms for misdemeanors and felonies***

The Los Angeles County Alternate Public Defender commented that bail analysis differs depending on the charge and that the form did not account for those differences. The committee does not recommend separate forms, since the *Humphrey* analysis is the same for misdemeanors and felonies. However, the committee recommends adding checkboxes to indicate whether the case involves a misdemeanor or a felony, and if the case is for a misdemeanor, noting that there is a statutory presumption for release on one's own recognizance.

***Undue emphasis on grounds for detention***

The Los Angeles County Alternate Public Defender commented that the form placed undue emphasis on the grounds for detention when the presumption is release. The commenter noted that item 3 included numerous grounds for detaining an individual based on a prior record but did not include a box indicating no prior history or a minimal criminal record. While the committee agrees that the presumption is release, it believes that the form properly allows the court to identify relevant factors that identify whether the defendant is a flight risk or a danger to public or victim safety.

***"The facts are evident and/or presumption is great that the defendant committed the offense."***
The committee requested specific comments on whether there were preferred alternatives for the court to indicate that "the facts are evident and the presumption is great" that the defendant committed the offense (Cal. Const., art. I, §§ 12(b) & (c), 28(f)(3)), item 8c of the circulated form:

c. The court finds that the ☐ facts are evident and/or ☐ presumption is great that the defendant committed the offense.

Prior to circulation, the committee discussed whether to include one checkbox indicating that "the facts are evident or the presumption is great" that the defendant committed the offense, noting that the law was not clear on whether this is one finding or two separate findings. The committee sought to bridge both interpretations by keeping two separate checkboxes but revising the item to state that "the facts are evident and/or presumption is great" to allow a court to check one or both boxes.

Based on comments received noting that the Supreme Court has interpreted the phrase holistically as one standard,[19] the committee recommends using the phrase as one standard. Two commenters recommend replacing the provision with the caselaw interpretation that "the evidence appears sufficient to obtain the conviction," but the committee prefers the constitutional language.

***Court minutes***
The committee requested specific comments on whether the form should be retitled to refer to inclusion in the court minutes, such as *Minute Attachment on Findings and Orders for Pretrial Release or Detention*. Some commenters agreed with retitling the form while others did not think it was necessary. In response, the committee recommends adding new language to the form noting that the court must make oral findings and include them in the court minutes. (*In re Humphrey* (2021) 11 Cal.5th 135.)

The San Diego District Attorney's Office commented that while the form addresses pretrial release and detention, only findings related to detention orders must be on the record and in the minutes. The committee's position is that courts should memorialize their findings and orders on all pretrial release or detention decisions.

***Implementation***
One court noted that two months was sufficient to implement the form, while the Joint Rules Subcommittee commented that courts would need four to six months. While the committee appreciates the amount of work involved in implementing new forms, it does not recommend delaying implementation of this optional form, which has been designed to assist judicial officers in their pretrial detention and bail determinations.

[19] See *In re White* (2020) 9 Cal.5th 455, 463.

### Alternatives considered

The committee considered not taking action by not developing a form to assist courts with pretrial release or detention findings and orders immediately after *In re Humphrey* was decided. In light of feedback from courts and justice system partners, the committee determined that an optional form detailing the required findings for pretrial release or detention would be helpful for courts to ensure that all matters considered in the decision-making process are substantiated, documented, and transparent. As discussed above, the committee also considered and rejected postponing this proposal to wait for additional developments in the law.

The committee discussed including language in proposed item 8d directing courts to relevant legal authorities (e.g., "Judges may want to consult article I, section 28; *In re Kowalczyk* (2022) 85 Cal.App.5th 667, 686–691, review granted March 13, 2023; and *In re Brown* (2022) 76 Cal.App.5th 296, 306–309"). However, the committee concluded that that level of detail was not necessary.

## Fiscal and Operational Impacts

Commenting courts anticipated costs associated with training staff, judicial officers, and justice system partners, updating court technology, adding new docket codes, and ordering and printing new forms.

## Attachments and Links

1. Form CR-104, at pages 10–13
2. Chart of comments, at pages 14–46

| SUPERIOR COURT OF CALIFORNIA, COUNTY OF<br>STREET ADDRESS:<br>MAILING ADDRESS:<br>CITY AND ZIP CODE:<br>BRANCH NAME: | *FOR COURT USE ONLY*<br>**10/09/2025**<br>**DRAFT**<br>**Not approved by the Judicial Council** |
|---|---|
| PEOPLE OF THE STATE OF CALIFORNIA<br>v.<br>DEFENDANT: | |
| **FINDINGS AND ORDERS FOR PRETRIAL RELEASE OR DETENTION** | CASE NUMBER:<br>*FOR COURT USE ONLY*<br>Date:<br>Time:<br>Department: |

The court must make oral findings and include them in the court minutes. (*In re Humphrey* (2021) 11 Cal.5th 135.)

**1. Procedural Posture**

The court is addressing pretrial release at

a. ☐ arraignment on a ☐ misdemeanor and/or ☐ felony offense.

b. ☐ bail review per Penal Code section 1270.2. No changed circumstances required.

c. ☐ bail review per Penal Code section 1277. No changed circumstances required.

d. ☐ another hearing based on good cause due to change in circumstances per Penal Code section 1289.

**2. The court has reviewed and considered the following items:**

a. ☐ The complaint and/or ☐ information in this case.

b. ☐ The pretrial services report/risk assessment.

c. ☐ The People's argument and

(1) ☐ attachments/exhibits:

(2) ☐ amount of bail the defendant can afford:

(3) ☐ statements/proffer of witnesses or evidence:

d. ☐ The defense argument and

(1) ☐ attachments/exhibits:

(2) ☐ amount of bail the defendant can afford:

(3) ☐ statements/proffer of witnesses or evidence:

e. ☐ Criminal history.

f. ☐ History of appearance.

g. ☐ Police report/probable cause declaration.

h. ☐ Proposed conditions of release:

i. ☐ Other:

**3. Risk of Nonappearance or to Public/Victim Safety**

a. The court finds the following factors regarding flight risk:

(1) ☐ Does or ☐ does not have a prior history of failures to appear.

(a) ☐ Has always made prior court appearances.

(b) ☐ Has a minimal history of failing to appear.

(c) ☐ Has a significant history of *(number):* failures to appear.

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(d) ☐ Previously absconded from the court process for:

(e) ☐ Previously cut off GPS device.

(f) ☐ Previously attempted to avoid court process by:

(g) ☐ Has demonstrated an intention to subvert the criminal process by:

(2) ☐ Has been released since *(date):* and is here in court today.

(a) ☐ Has posted a bond and returned to court.

(b) ☐ Has posted bail with the court and returned to court.

(3) ☐ Has ☐ minimal ☐ significant ties to the community including:

(4) ☐ Has stated a willingness to follow any conditions deemed reasonable by the court.

(5) ☐ Previously failed to comply with court orders including:

(6) ☐ Has *(enter number):* outstanding felony/misdemeanor warrant(s).

(7) ☐ Was on probation/parole/postrelease community supervision/mandatory supervision at the time of the offense.

(8) ☐ Faces a potential penalty for the charged offense that is great.

(9) ☐ Has a history of untreated mental health or substance abuse issues.

(10) ☐ Other:

b. The court finds the following factors regarding danger to the safety of the public or the victim:

(1) ☐ The alleged crime ☐ does ☐ does not involve a victim.

(a) ☐ The victim sustained injuries. ☐ The injuries are serious:

(b) ☐ Defendant threatened witness(es) or victim(s) by:

(2) ☐ The alleged crime ☐ is ☐ is not a crime of violence ☐ including:

(a) ☐ A firearm was used in the commission of the crime.

(b) ☐ A deadly weapon *(describe):* was used in the commission of the crime.

(3) ☐ Defendant ☐ does ☐ does not present a danger to public safety because:

(4) ☐ Defendant ☐ does ☐ does not have a history of violence.

(5) ☐ Defendant's criminal record demonstrates a history of violence.

(6) ☐ Defendant is alleged to have violated a restraining order.

(7) ☐ Defendant has a history of violating restraining orders.

(8) ☐ Defendant has a history of untreated mental health or substance abuse issues.

(9) ☐ The crime involved a large quantity of a controlled substance *(describe):*

(10) ☐ Mitigating factors were presented:

(11) ☐ Other:

**4. Finding for Release or Detention**

Based on the factors in item 3, the court

a. ☐ finds that defendant does not pose a flight risk or a public safety risk, and will release the defendant on their own recognizance. (See item 7.)

b. ☐ finds that the defendant is charged with a misdemeanor offense and the presumption for own recognizance release has been overcome.

c. ☐ finds defendant presents a ☐ flight risk and/or ☐ a public safety risk,but that risk can be mitigated by nonfinancial conditions. (See item 5.)

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d. ☐ finds defendant has previously bailed out or was released on their own recognizance but still presents ☐ a flight risk and/or ☐ a public safety risk, but that risk can be mitigated by nonfinancial conditions. (See item 5.)

e. ☐ finds defendant presents a ☐ flight risk and/or ☐ a public safety risk,and finds by clear and convincing evidence that nonfinancial conditions are not sufficient to ☐ ensure a return to court or ☐ protect the public or victims, and will impose a **financial condition** of *(amount):* , **which the defendant has the ability to pay,** ☐ coupled with the following least restrictive nonfinancial conditions. (See items 5 and 6.)

f. ☐ finds the defendant presents a ☐ flight risk and/or ☐ public safety risk by clear and convincing evidence and finds by clear and convincing evidence there are no less restrictive nonfinancial conditions or financial conditions that will ensure a return to court or protect the public or victim(s). (See item 8.)

g. ☐ finds defendant presents a flight risk and/or public safety risk but that the parties wish to present additional evidence regarding

(1) ☐ evidence to support a denial of bail or preventively high bail

(2) ☐ evidence of alternative available conditions

(3) ☐ evidence regarding ability to pay

and sets **provisional** bail in the amount of:

and a bail review hearing on *(date):*

**5. Imposition of the Least Restrictive Conditions**

a. ☐ In addition to the mandatory conditions in item 7, the defendant ☐ is subject to monitoring by Pretrial Services, and ☐ must obey the following orders that the court finds are the least restrictive conditions necessary to ensure a return to court and to protect the safety of the public or victim because *(explain):*

b. ☐ The court finds that nonfinancial conditions are insufficient to protect the government's interests. (See items 6 and 8.)

**6. Imposition of Financial Condition of Release**

☐ **Setting financial condition alone or coupled with nonfinancial conditions:** The court has considered nonfinancial conditions and finds that without a financial condition, they would be insufficient to ensure a return to court and/or protect the public:

a. ☐ Nonfinancial conditions considered by the court (if not imposed in item 5):

b. ☐ Reasons the court finds they are insufficient to protect the government's interests:

c. ☐ The court will set economic bail in the amount of:

d. ☐ The court finds that the defendant has the ability to pay this amount based on counsel's statements or the evidence presented.

**7. Mandatory Conditions for Pretrial Release**

The defendant must comply with the terms and conditions of Penal Code section 1318. The defendant is ordered to appear at all times and places by this court and as ordered by any court in which the charge is pending, obey all laws, immediately notify the court of any change of physical or mailing address, not depart the state without leave of the court, and waive extradition if the defendant fails to appear and is apprehended outside the state of California.

**8. Preventive Detention**

a. ☐ The court finds that there is ***clear and convincing*** evidence that the defendant presents a flight risk and/or a danger to the safety of the public or any victim.

b. The court ***has considered*** the following less restrictive nonfinancial and financial conditions and finds by ***clear and convincing evidence*** that they are insufficient to ensure a return to court and/or protect the public:

(1) ☐ Conditions considered by the court:

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|---|---|

(2) ☐ Evidence supporting the court's findings, in addition to those listed in item 3:

c. ☐ Defendant is to be held without bail pursuant to article I, section 12 of the California Constitution because the court finds the facts are evident or the presumption is great that the defendant committed an offense that is a

(1) ☐ capital crime.

(2) ☐ felony involving an act of violence on another or felony sexual assault offense on another and the court finds by clear and convincing evidence there is substantial likelihood release will result in great bodily harm to others.

(3) ☐ felony and the court finds by clear and convincing evidence that the person has threatened another with great bodily harm and there is a substantial likelihood that the person will carry out the threat if released.

d. ☐ Other, with legal authority:

Date:

▶ _____

JUDICIAL OFFICER

## SPR25-11

**Criminal Law: Findings and Orders for Pretrial Release or Detention** (Approve form CR-104)

All comments are verbatim unless indicated by an asterisk (*).

| | Commenter | Position | Comment | Committee Response |
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| 1. | Chief Probation Officers of California<br>by Karen A. Pank, Executive Director | NI | The Chief Probation Officers of California (CPOC) write to offer our public comment on the proposed *Findings and Orders for Pretrial Release or Detention* form (CR-104).<br><br>**Consider Information Already Listed in Pretrial Report**<br><br>You may wish to consider that some of the information listed in the form is already included in the pretrial services report and therefore does not to be further enumerated. Including reiterative information can lead to the request for information that is already included in the report. This can potentially create duplicative work and delay the decision of pretrial release or detention. Additionally, you may wish to consider the time involved in relation to the information listed in the form and how this might affect the timeline for making a decision of pretrial release or detention.<br><br>**Add Option for Pre-Arraignment**<br><br>Lastly, we request revising the form to include an additional option under "1. Procedural Posture" on page 1 to include an option for "pre-arraignment". We request revising the form to specifically list this option seeing as some jurisdictions address pretrial release at the pre-arraignment stage. | The committee appreciates the comment.<br><br>The committee prefers to keep the pretrial services report as one of multiple sources of information reviewed and considered by a court.<br><br>Because pre-arraignment release review differs significantly from the other forms of review, and all counties do not have access to all the information detailed in the form, the committee declines to include pre-arraignment as one of the procedural posture options. |
| 2. | Hon. Frank Birchak, Judge<br>Superior Court of California, County of San Diego | NI | Thank you for the significant effort and work put into this proposed CR-104. It is something that is incredibly useful and clearly had a lot of people working hard to put it together. It will help judges create a clearer record and remind us of the important factors we must consider.<br><br>But I do have concerns with two parts of the form: Paragraph 4(f)(2) and Paragraph 8(d)(2). As a form coming from the Judicial Council, there is an implication that the options in the | The committee appreciates the comment. |

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| | | | form are the clear state of the law. These two paragraphs are not based on settled law and there is published case law saying courts do not have the authority to make these orders. Because of that—especially with nothing in the form highlighting the conflicting law—it seems imprudent to include these options.<br>**Paragraph 4(f)(2)**<br>While *In re Kowalczyk* (2022) 85 Cal.App.5th 667 did hold that courts can set bail higher than a defendant can afford, the case of *In re Brown* (2022) 76 Cal.App.5th 296, held that courts cannot. The form does not inform judges in any way of the conflicting authority. When appellate court decisions are in conflict, "the court exercising inferior jurisdiction can **and must** make a choice between the conflicting decisions." (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 456.) Having a check box that does not reference the conflict in any way, implies that the issue is settled law and does not highlight to judges that they must evaluate the two conflicting lines of cases and choose which they believe is correct.<br><br>If the decision is to continue to include this option, I would recommend that the form have some acknowledgement of the conflicting law and holding in *In re Brown* so judges are made aware of their duty to decide which of the conflicting lines of cases they are going to follow. One possible way to do this could be modifying the language of 8(d)(4) to read: "The court is setting . . . preventively high bail and finding the reasoning under *In re Kowalczyk* (2022) 85 Cal.App.5th 667 more persuasive than the reasoning of *In re Brown* (2022) 76 Cal.App.5th 296, bail is set in the amount of:" There appears to be plenty of space on the page to accommodate the additional language, it would trigger judges to consider the two cases, and would make a clear record that the cases have been considered and the court is satisfying its obligations under *Auto Equity Sales*. | In response to other comments, the committee has replaced checkboxes on preventively high bail and no bail under article I, section 28, with an "Other, with legal authority:" checkbox while *In re Kowalcyzk* is under review. |

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| | | | **Paragraph 8(d)(2)**<br>As to Paragraph 8(d)(2), existing caselaw holds that article I, section 12, of the California Constitution, is the only basis for denying bail. "Although article I, section 12 of the California Constitution permits preventive detention, there is no contention that the instant matter qualifies. **For all other offenses, bail is a matter of right.**" (*In re Christie* (2001) 92 Cal.App.4th 1105, 1109.) This case has no negative treatment listed in WestLaw and has never been overruled. | The California Supreme Court has granted review of *In re Kowalczyk* on 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 be reconciled. The committee has replaced checkboxes on preventively high bail and no bail under article I, section 28, with an "Other, with legal authority:" checkbox while *In re Kowalcyzk* is under review. |
| | | | Existing caselaw holds that where section 28 conflicts with section 12, section 28's provisions did not go into effect. Proposition 8 is what created section 28. And Proposition 4 created the current language of section 12. "Because Proposition 4 received a greater number of votes, **the bail provisions of Proposition 8 never went into effect**." (*People v. Barrow* (1991) 233 Cal.App.3d 721, 723 citing *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 255 which cited Cal. Const., art. XVIII, § 4; see also *People v. Cortez* (1992) 6 Cal.App.4th 1202, 1211.) "In relying on the bail and OR provisions of Proposition 8, the People fail adequately to take account of a series of opinions, including one by this court, that has concluded that the relevant provision of Proposition 8 never became effective, because a competing initiative measure on the same ballot (Proposition 4) garnered more votes than Proposition 8." (*People v. Standish* (2006) 38 Cal.4th 858, 874–875; see also *In re York* (1995) 9 Cal.4th 1133, 1140, fn. 4.) No cases have overruled these cases. | See the committee's response above. |

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| | | | There is no case holding that a court may deny bail under Article I, section 28, subdivision (f)(3). Therefore, unlike with Paragraph 4(f)(2), there is no conflicting authority that would allow courts to choose between conflicting lines of cases. | See response above. |
| | | | The California Supreme Court in *Humphrey II* did not hold that bail can be denied outside of the circumstances specified in article I, section 12. "Even when a bail determination complies with the above prerequisites, the court must still consider whether the deprivation of liberty caused by an order of pretrial detention is consistent with state statutory and constitutional law specifically addressing bail — **a question not resolved here**[7] —and with due process." (*In re Humphrey* (2021) 11 Cal.5th 135, 155.) In the footnote from the cite above, the Court goes on to indicate "[b]ecause this case does not involve an order denying bail, **we leave for another day the question of** how two constitutional provisions addressing the denial of bail — article I, sections 12 and 28, subdivision (f)(3) — can or should be reconciled, including **whether these provisions authorize or prohibit pretrial detention of noncapital arrestees outside the circumstances specified in section 12, subdivisions (b) and (c)."** (*In re Humphrey* (2021) 11 Cal.5th 135, 155, fn. 7.) Nor did the California Supreme Court create an independent basis to deny bail for failure to appear in *Humphrey II*. "We have not been asked to decide and **do not determine here whether the California Constitution permits pretrial detention based on risk of nonappearance or flight alone**, divorced from public and victim safety concerns." (*In re Humphrey* (2021) 11 Cal.5th 135, 153, fn. 6.) | See response above. |
| | | | Until—and unless—an appellate court creates a conflict or finds a case superseded, superior court judges do not have the authority to disregard existing court of appeal decisions or find that they have been superseded. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 197–198; *People v. Franc* (1990) 218 | See response above. |

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| | | | Cal.App.3d 588, 593–594.) And unless the California Supreme finds that one of its decisions is no longer good law, superior court judges do not have the authority to disregard existing California Supreme Court decisions or find that they have been superseded. (*Ibid*.) Including an option on the form indicating judges can deny bail on the basis of Article I, section 28, subdivision (f)(3), is inviting courts to ignore existing controlling case law and the rules of precedent outlined in *People v. Letner and Tobin* and *People v. Franc*.<br><br>Some have argued that Marsy's Law—Proposition 9 enacted in 2008—somehow resurrected the language from Proposition 8 in section 28. Nothing in Marsy's Law specifically indicated an intent to do so and it only added language indicating that safety of victims is to be taken into consideration on bail determinations and added victims to those who need to be notified of a hearing before someone charged with a serious felony is released on bail. "'We cannot presume that ... the voters intended the initiative to effect a change in law that was not expressed or strongly implied in either the text of the initiative or the analyses and arguments in the official ballot pamphlet.'" (*People v. Valencia* (2017) 3 Cal.5th 347, 364.) The arguments indicate a belief that Marsy's Law could be viewed as repealing conflicting language in section 12 by implication. But those arguing this do not address how disfavored repeals by implication are. ""[A]ll presumptions are against a repeal by implication." (*Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist.* (1989) 49 Cal.3d 408, 419.) Repeals by implication "will occur only where the two acts are so inconsistent that there is no possibility of concurrent operation, or where the later provision gives undebatable evidence of an intent to supersede the earlier; the courts are bound to maintain the integrity of both statutes if they may stand together." (*Hays v. Wood* (1979) 25 Cal.3d 772, 784.) And this argument ignores the holding of *People v.* | See response above. |

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| | | | *Standish* (2006) 38 Cal.4th 858 and the rule of precedent that holds that the California Supreme Court is the one to say if *Standish* has been superseded.<br><br>Additionally, preventative detention is only constitutional under the Federal Constitution where it is a carefully limited exception with numerous procedural safeguards. (*U.S. v. Salerno* (1987) 481 U.S. 739 & *Foucha v. Louisiana* (1992) 504 U.S. 71, 81–82.) "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." (*U.S. v. Salerno* (1987) 481 U.S. 739, 755.) When preventative detention schemes are not carefully limited, they are unconstitutional. (*Foucha v. Louisiana* (1992) 504 U.S. 71, 81–82.)<br><br>The interpretation of section 28 that is proposed in this form seems to be that courts have unfettered discretion to deny bail on any charge. Unlike section 12 and the federal scheme in *Salerno*, section 28 doesn't include the procedural protections of a heightened burden of proof or narrow charges that the denial could apply to. Because of that, it appears section 28 applied as suggested would violate the 5th and 14th Amendments of the United States Constitution, this is especially true considering the interpretation that bail can be denied in misdemeanors under Article I, section 28, subd. (f)(3).<br><br>The United States Supreme Court in *Salerno* found that the Federal Bail Reform Act was constitutional based on the significant procedural protections contained in the Act. These protections included defendants' right to counsel, to "testify in their own behalf, present information by proffer or otherwise, and cross-examine witnesses who appear at the hearing," a clear and convincing evidence burden of proof, and the requirement of "a written statement of reasons for a decision to | No response required.<br><br>See response above.<br><br>No response required. |

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| | | | detain." (*U.S. v. Salerno* (1987) 481 U.S. 739, 751–752.) The Court also considered that the Act "carefully limits the circumstances under which detention may be sought to the most serious of crimes." (*U.S. v. Salerno* (1987) 481 U.S. 739, 747) These most serious crimes include crimes of violence, certain non-violent crimes whose punishment includes a maximum term of 10 years, crimes for which the maximum punishment is life imprisonment or death, non-violent felonies with minor victims, felonies involving firearms or other dangerous weapons, failure to register under SORNA (which carries a maximum punishment of 10 years), and federal crimes of terrorism. (18 U.S.C. § 3142(f).) The Court also considered the limited length of the detention based on the federal Speedy Trial Act. To fall under the careful limited exception for preventative detention the "numerous procedural safeguards detailed above must attend this adversary hearing." (*U.S. v. Salerno* (1987) 481 U.S. 739, 755.) | No response required. |
| | | | Except for California's statutory speedy trial rights, none of the Federal Bail Reform Act's procedural safeguards are contained in section 28. Unlike section 12, section 28 does not contain any mention of a heightened burden of proof or restrict the crimes for which preventative detention may be sought. Neither section contains the other procedural protections relied on by the United States Supreme Court in *Salerno*. Therefore, it seems unlikely that section 28 can meet the federal constitutional requirements for preventative detention. | No further response required. |
| | | | Given the weight the United States Supreme Court in *Salerno* gives to the careful limitations of crimes to which preventative detention is applied to, an argument that section 28 authorizes trial courts to engage in preventative detention for misdemeanors seems inaccurate and unconstitutional. The California Supreme Court has cautioned that "**courts should likewise bear in mind that *Salerno* upheld a scheme whose** | See response above. |

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| | | | **scope was 'narrowly focuse[d] on a particularly acute problem.'** (*Id*. at p. 750, 107 S.Ct. 2095.) Indeed, the law under review there authorized pretrial detention 'only on individuals who have been arrested for a specific category of extremely serious offenses.'" (*In re Humphrey* (2021) 11 Cal.5th 135, 155.) This language does not support an interpretation allowing denial of bail for misdemeanors.<br><br>*Salerno* is focused on Substantive Due Process analysis, which requires a weighing of the competing interests—the individual's right to liberty and the government's interest in crime prevention. (*U.S. v. Salerno* (1987) 481 U.S. 739, 748–751.) The difference between misdemeanors and felonies can be viewed reflecting different policy interests. (*Burris v. Superior Court* (2005) 34 Cal.4th 1012, 1018–1019.) The United States Supreme Court has described misdemeanors as "those 'smaller faults, and omissions of less consequence,'". (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 480, fn. 7.) In *Salerno*, the Court weighed a heightened government interest where there is "convincing proof that the arrestee, already indicted or held to answer for a **serious crime**, presents a demonstrable danger to the community. Under these narrow circumstances, society's interest in crime prevention is at its greatest." (*U.S. v. Salerno* (1987) 481 U.S. 739, 750.) The balancing conducted in *Salerno* does not address misdemeanors—or even non-serious felonies. To say that balancing the individual's strong right to liberty against the smaller faults and omissions of misdemeanor conduct justifies preventative detention seems a far leap from the analysis in *Salerno*.<br><br>For these reasons, I do not believe Paragraph 8(d)(2) is an accurate statement of the law. Nor do I believe that it should remain in the form. | See response above.<br><br>See response above. |

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| | | | Again, it is clear a tremendous amount of thought and work went into the creation of this and it will be a wonderful tool. Thank you all for your efforts. | |
| 3. | Civil Rights Corps; ACLU of Northern California; Criminal Law & Justice Center at University of California, Berkeley School of Law; California Public Defender's Association; Public Defender's Office of Contra Costa County; Public Defender's Office of Marin County; Public Defender's Office of Monterey County; Public Defender's Office of Nevada County; Public Defender's Office of San Bernardino County; Public Defender's Office of San Diego County; Public Defender's Office of San Francisco County; Public Defender's Office of Santa Clara County; Public Defender's Office of Santa Cruz County; Public Defender's Office of Solano County; Public Defender's Office of Sonoma County; Public Defender's Office of Stanislaus County; Public | NI | We are writing with great concern over elements in the Judicial Council's proposed "Findings and Orders for Pretrial Release or Detention" form. We agree that trial courts are in dire need of guidance and that a standardized tool promulgated by the Judicial Council would help ensure *Humphrey* compliance. But we cannot agree that a detention checklist is the appropriate tool. It is evident that an enormous amount of work and care went into the creation of this form. But we are concerned that—rather than encouraging the careful, robust and transparent analysis the form was designed to elicit—a *checklist* flattens the nuanced case law governing pretrial release and will encourage rote decision- making.[1]<br><br>_____<br>[1] Some justice partners have instead provided their courts with a flow chart that guides judges through the analysis required by *Humphrey* and section 12. A similar tool could capture virtually all of the information contained in this proposed form without inadvertently communicating to courts that they are free to deprive a constitutionally innocent person of their liberty pretrial by simply checking a box.<br><br>Moreover, the form prejudges the outcome of Kowalczyk, a case currently under review at the California Supreme Court, by inviting courts to intentionally detain defendants using unaffordable money bail (lines 4(f)(2), 8(d)) and to detain them without bail under article I, section 28(f)(3) of the California Constitution (line 8(d)(2)).<br><br>**Unaffordable Money Bail.** There is currently a split in authority as to whether *Humphrey* permits unaffordable money | The committee appreciates the comment.<br><br>The committee believes that the form is appropriately designed to guide judges in considering pretrial release or detention as required by *In re Humphrey* and ensuring that the findings are transparent, substantiated, and included in the record and on the minutes.<br><br>The committee has replaced checkboxes on preventively high bail and no bail under article I, section 28, with an "Other, with legal authority:" checkbox while *In re Kowalcyzk* is under review.<br><br>See response above. |

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| | Defender's Office of Yolo County<br>by Carson White, Senior Attorney, Civil Rights Corps; Mica Doctoroff, American Civil Liberties Union, Northern California; Chesa Boudin, Executive Director, Criminal Law & Justice Center, University of California, Berkeley School of Law; Kate Chatfield, Executive Director, California Public Defenders Association; Ellen McDonnell, Public Defender, Contra Costa County; David Sutton, Public Defender, Marin County; Susan Chapman, Public Defender, Monterey County; Keri Klein, Public Defender, Nevada County; Thomas W. Sone, Public Defender, San Bernardino County; Paul Rodriguez, Public Defender, San Diego County; Sujung Kim, San Francisco Public Defender's Office; Damon Silver, Acting Public Defender, Santa Clara | | bail. While the question is under review by the California Supreme Court, trial courts have the discretion to decide, based on their own analysis, whether unaffordable money bail is constitutional. The Judicial Council inviting courts to set unaffordable money bail places a heavy thumb on the scale and incorrectly communicates that the constitutionality of intentionally unaffordable money bail is settled law.<br><br>**Detention Without Bail Under Section 28(f)(3).** The form's invitation to detain a defendant pretrial without bail under article I, section 28(f)(3) of the California Constitution is even more precarious. Article I, section 12 of the state constitution limits preventive detention to cases where someone is accused of committing a narrow set of serious felonies in which they have hurt, or threatened to hurt, someone. A court must also make additional findings about the strength of the evidence against them and their future dangerousness.[2]<br><br>[2] The form risks confusion on this point too by suggesting that a court may detain someone without bail under section 12 by making only some of these findings.<br><br>But this form invites courts to detain defendants without bail under a separate provision of the California Constitution—article I, section 28(f)(3)—regardless of charge, guilt or dangerousness. As constructed, this form gives the impression that courts are free to detain people accused of misdemeanors or infractions without bail, for example. This is contrary to the decision of *every Court of Appeal to have considered the question*. They have *all* held that section 28(f)(3) does not authorize detaining defendants without bail outside the limits of section 12.[3] The *Kowalczyk* Court of Appeal explicitly held that there is "no support" for the argument that section 28(f)(3) allows courts to deny bail outside the limitations of section 12.[4] | The committee believes that item 8 sufficiently addresses the required findings for setting no bail under section 12.<br><br>See response above.<br><br>The committee has added additional checkboxes indicating whether the case involves a misdemeanor or felony (see item 1a), and if a misdemeanor case, that there is a presumption for OR release (new item 4a). The committee disagrees that the form would be construed as allowing for no bail holds of people charged with infractions. |

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| | County; Heather Rogers, Public Defender, Santa Cruz<br>County; Elena D'Agustino, Public Defender, Solano County; Brian Morris, Public Defender, Sonoma County; Jennifer Jennison, Public Defender, Stanislaus County; Tracie Olson, Public Defender, Yolo County | | [3] *In re Kowalczyk*, 85 Cal.App.5th 667, 684-686 (2022) (holding that section 28(f)(3) does not authorize courts to deny bail outside the limitations of section 12), *review granted* (Mar. 15, 2023); *In re Ung*, No. H048152, 2020 WL 4582595, (Cal. Ct. App. Aug. 10, 2020) (same) (unpublished); *see also In re Humphrey*, 19 Cal. App. 5th 1006, 1047 n.28 (2018) ("the provenance of section 28 gives no indication it was meant to render section 12 ineffective" by allowing preventive detention outside section 12).<br>[4] *Kowalczyk*, 85 Cal.App.5th at 684.<br><br>**The Risk of Confusion in Trial Courts.** Prejudging *Kowalczyk* raises additional, more practical concerns: whatever the outcome, the California Supreme Court's decision will significantly shape the legal framework governing pretrial detention. Afterward, the legislature may pass new laws in response. There may well be a constitutional referendum. It is unlikely that, when the dust settles, this form will conform to the new legal landscape. The Council and superior courts will have to claw back this form and issue a new one. This is a recipe for confusion in trial courts which are, after over 4 years, still struggling to implement *Humphrey*.<br><br>We urge the Judicial Council not to release a detention checklist and to delay the release of any release-decision tool until after *Kowalczyk* has been decided. If the Judicial Council is unwilling to do so, it should remove the discrete portions of the form that prejudge the outcome of that case. Limiting the form to the well-settled legal principles in *Humphrey* and section 12 significantly lowers the risk of judicial whiplash. | The committee is closely monitoring pretrial detention issues and intends to recommend timely revisions in response to changing law.<br><br>See response above. |
| 4. | Hon. Linda Colfax, Judge, Superior Court of California, County of San Francisco | A | I write to commend and thank you for your efforts in putting together this proposed new form for judges to use when they consider the Humphrey factors and make pre-trial release | The committee appreciates the comment. |

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| | | | decisions. I think the form is clear, concise, easy to use and guides a bench officer through the decision making process.<br><br>I do fear that the form will receive push back from my colleagues that it is too time consuming or inefficient; I do not share that view because we are required to consider each of the items referenced in the form and, while it might take a few days to get accustomed to filling out the form, it will lead to a clearer and better record in each of these case.<br><br>As to your specific questions:<br>1. Does the proposal appropriately address the stated purpose? **Yes**<br>2. In denying bail because the "facts are evident or the presumption is great" that the defendant committed the offense (Cal. Const., art. I, §§ 12(b) & (c), 28(f)(3)), are there preferred alternatives for the court to indicate this finding than the one proposed by the committee? **No**<br>3. Since the form is intended to be part of the court's minutes, would it be helpful to refer to the minutes in the form title, such as Minute Attachment on Findings and Orders for Pretrial Release or Detention? **I don't think so. I might suggest adding "after hearing" to Findings and Orders <u>after hearing</u> (FOAH) For Pretrial Release or Detention. This is how it is done in family law proceedings. However, the minutes themselves should refer to the FOAH.** | No response required.<br><br>Based on other comments received, the committee has revised the form to include the necessary finding that "the facts are evident or the presumption is great" as part of item 8c.<br><br>The committee has added language to the form noting that the court must make oral findings and include them in the court minutes. (*In re Humphrey* (2021) 11 Cal.5th 135.) |
| 5. | Los Angeles County Alternate Public Defender by Erika Anzoategui | N | The Law Offices of the Los Angeles County Alternate Public Defender respectfully submits the following comments to proposed Judicial Council Form, CR-104, titled "Findings and Orders for Pretrial Release or Detention." The Los Angeles County Alternate Public Defender has carefully reviewed the proposed form in light of the California Supreme Court's | The committee appreciates the comment. |

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| | | | opinion in *In re Humphrey* (2021) 11 Cal.5th 135 and its progeny.<br><br>The Alternate Public Defender opposes adoption of a form for use in making bail decisions. Adoption of a checklist form thwarts the overarching goal of *Humphrey.* In *Humphrey,* the Supreme Court held that pretrial release decisions must be based on an individualized analysis of the relevant factors. *(Humphrey, supra,* 11 Cal.5th at pp. 14 7, 153, 156.) The Court also held that trial courts must set forth the reasons for their decisions on the record and in the minutes to "facilitate review of the detention order, guard against careless or rote decision-making, and promote public confidence in the judicial process." *(Id.,* at pp. 155-156.) Judges presented with a form will likely revert to the type of rote decision-making *Humphrey* says must be avoided. Instead of making a record of the court's reasons and analysis, which necessarily requires a more careful review of the individual standing before the court, judges will simply check a box. Pretrial release decisions, which by their very nature are individualized, cannot and should not be reduced to a dehumanized rubric given the high stakes involved.<br><br>Additionally, the form as drafted fails to meet the stated goal of the Committee. The form as drafted is confusing, inaccurate, and invites more error. Accordingly, the Alternate Public Defender opposes adoption of CR-104 in its current form for the following reasons:<br><br>*(1)Form CR-104 Has the Potential to Result in More Errors and Undermine the Goal of Limiting Pretrial Detention as Stated in Humphrey.*<br>The Supreme Court clearly stated that in California "'liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.'" [citations] *(Humphrey, supra,* 11 Cal.5th at p. 156.) The court then provided a clear four-part, | The committee believes that the form is appropriately designed to guide judges in considering pretrial release or detention as required by *In re Humphrey* and ensuring that the findings are transparent, substantiated, and included in the record and on the minutes. |

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| | | | step-by-step analysis courts should follow when making pretrial release decisions.<br><br>The form as structured fails to start with the presumption of release by placing undue emphasis on the grounds for detention. The grounds for detention are prominently set forth in section 3, directly below the recitation of what information the court considered. This section contains numerous grounds for detaining an individual based on their prior record. (see sections 3a(l); 3a(5)-(7); 3b(4)-(7).) Conversely, there is no box on the form for individuals with no prior criminal record or minimal criminal record – an established ground weighing in favor of release. As a result, trial courts relying on this form may erroneously detain individuals who otherwise are eligible for release, including people charged with misdemeanors or who fall outside the narrow exception set forth in Art. 1, sec. 12 of the California Constitution.<br><br>(2) *Form CR-104 Does not Account for the Different Analysis a Court Must Conduct when Making Bail Decisions Depending Upon the Level of Crime and Nature of the Charge.*<br>Bail analysis differs depending upon whether an arrestee is charged with a misdemeanor, a felony that falls outside of Art. 1, sec. 12, a felony that falls within Art. 1, sec. 12, or a capital offense. The form does not account for these differences.<br><br>All persons charged with a misdemeanor are statutorily entitled to release on their own recognizance "unless the court makes a finding on the record, in accordance with Section 1275, that an own recognizance release will compromise public safety or will not reasonably assure the appearance of the defendant as required." (Pen. Code Sec. 1270.) Similarly, individuals charged with felonies that fall outside Art. 1, sec. 12, are entitled to bail as a matter of right, and may be released on their | The committee agrees that the presumption is release but disagrees with the comment. Item 3 allows the court to identify whether the defendant is a flight risk or a danger to public or victim safety based on a number of relevant factors.<br><br>The committee agrees, in part, and has added additional checkboxes indicating whether the case involves a misdemeanor or felony (see item 1a), and if a misdemeanor case, that there is a presumption for OR release (new item 4a). Because the court must assess whether the defendant is a flight risk or risk to public safety in both misdemeanors and felonies |

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| | | | own recognizance. (Cal. Penal Code Sec. 1271.) Under *Humphrey,* the presumption is release, unless the court finds, by clear and convincing evidence, that release poses a risk of harm or flight that cannot be addressed through non-financial alternatives to detention.<br><br>The analysis is different for arrestees charged with a qualifying felony under Art. 1, sec. 12.[1] Those individuals may only be detained pretrial if the court finds 1) that the facts are evident or the presumption great; and 2) the court finds by clear and convincing evidence that there is a substantial likelihood that release would result in either great bodily harm to others or flight. If a court does not find both conditions, arrestees charged with a qualifying offense under Art. 1, sec. 12 are entitled to affordable bail and may be released on their own recognizance.<br><br>[1] Those felonies include felony offenses involving acts of violence on another person, felony sexual assault offenses, or felony offenses where the person has threated another with great bodily harm.<br><br>Because the form makes no distinction between the different analysis a court must undertake based on the nature and level of the charge, and instead focuses on the grounds for denying release, it will likely result in trial courts erroneously detaining arrestees who are entitled to release.<br><br>(3) *Form CR-104 Misstates the Findings a Court Must Make Before it can Issue a No Bail Detention Order Under Art. 1, secs. 12(b) and (c).*<br>Article I, section 12 of the constitution sets forth the exceptions to release on bail for individuals charged with certain felonies. For each exception to release on bail, there is a condition precedent that "the facts are evident or the presumption great." | under *In re Humphrey*, the committee does not believe that further differentiation is needed in the form.<br><br>For a qualifying felony offense specified in Art. 1, section 12, the form takes a judge through the considerations under *In re Humphrey* as well as the relevant constitutional considerations.<br><br>As stated, the committee has added additional language regarding the presumption of OR release for misdemeanor offenses. The committee does not believe further differentiation is needed in the form. |

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| | | | The supreme court has interpreted this language to mean sufficient evidence to support a hypothetical verdict of guilt *(In re White* ((2020) 9 Cal.5th 455, 463.) If the evidence presented at a bail hearing falls below this standard, the arrestee is eligible for release.<br><br>The proposed form treats the necessary finding that "the facts are evident or the presumption great" as the third step in the analysis under section 8, rather than as a condition precedent to the additional findings a court must make pursuant to Art. 1, sec. 12(b) or (c) relating to risk of harm or flight. This structure will result in a misapplication of the law and will result in further confusion and error on the part of trial courts.<br><br>(4) *Adoption of CR-104 Is Premature Since Kowalczyk is Currently Pending in the Supreme Court.*<br>Section 8 of the form treats Art. 1, sec. 12 and Art. 1, sec. 28(f)(3) as two alternative grounds for denying bail under the constitution and implies that the law is settled in this area. It is not. Not only does this treatment contradict the holding in *Kowalczyk* (2022) 85 Cal.App.5th 667, review granted March 15, 2023, S277910, the California Supreme Court has granted review in the case. In granting review, the court asked the parties to address the following issues: "1) 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), - or, in the alternative, can these provisions be reconciled? 2) May a superior court ever set pretrial bail above an arrestee's ability to pay?"<br><br>The court of appeal in *Kowalczyk,* reconciled the two constitutional provisions by interpreting Art. 1, sec. 28, subdivision (f)(3) "as a declarative statement recognizing that bail may or may not be denied under existing law. | The committee agrees, in part, and has revised the form to include the necessary finding that "the facts are evident or the presumption is great" as part of item 8c.<br><br>The committee has replaced checkboxes on preventively high bail and no bail under article I, section 28, with an "Other, with legal authority:" checkbox while *In re Kowalcyzk* is under review. |

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| | | | Under this construction, section 12's general right to bail remains intact, while full effect is accorded to section 28(f)(3)'s mandate that the rights of crime victims be respected in bail and OR release determinations." *(Kowalczyk, supra,* 85 Cal.App.5th at p. 686.) In other words, arrestees charged with non-capital offenses are entitled to bail, and bail/release decisions must respect the rights of crime victims and public safety.<br><br>In addition to being an incorrect statement of the law as it currently stands, section 8 may need to be amended when the Supreme Court issues an opinion in *Kowalczyk.* By adopting a form now that contradicts the court of appeal in *Kowalczyk* and which may need to be changed in the future, the committee risks further confusing trial courts and creating more error in bail determinations - the exact opposite of the stated goal of the form.<br><br>For these reasons, the Alternate Public Defender opposes the use of a form for making bail decisions and adoption of the proposed form as currently drafted. | The committee is closely monitoring pretrial detention issues and intends to recommend timely revisions in response to changing law. |
| 6. | Orange County Bar Association<br>by Mei Tsang, President | AM | 1) The proposal appropriately addresses the stated purpose. However, it includes options for courts to set no bail or preventatively high bail that have not been endorsed by the California Supreme Court. First, Item 4(f) includes options to deny or set preventatively high bail and refers to Item 8. Item 8 then addresses preventative detention. Item 8 also has a box to select setting preventatively high bail. It also allows the court to select if it is making a preventative detention order under section 12 or section 28 of Art. I. *In re Kowalczyk,* S277910 remains undecided in the California Supreme Court and purports to resolve if section 12 or section 28 or both govern preventative detention and also if a superior court may or may not set pretrial bail above an arrestee's ability to pay. Therefore, depending on the | The committee appreciates the comment.<br><br>The committee has replaced checkboxes on preventively high bail and no bail under article I, section 28, with an "Other, with legal authority:" checkbox while *In re Kowalcyzk* is under review. |

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| | | | resolution of these questions, the form may contain unconstitutional options for the Superior Court to select.<br><br>2) The terms "facts are evident" and "presumption is great" both appear in section 12 and section 28. In *Yedinak v. Sup Ct* (2023) 92 C.A.5th 876, 884, the court affirmed this amounts to "the record contains sufficient evidence of the crime to 'sustain a [conviction]' on appeal." The terms on the proposed form should be substituted out and replace with "The evidence appears sufficient to obtain a conviction."<br><br>3) Yes, it would be helpful to title the form "Minute Attachment..." | The committee prefers to keep the direct language from the Constitution.<br><br>The committee has added language to the form noting that the court must make oral findings and include them in the court minutes. (*In re Humphrey* (2021) 11 Cal.5th 135.) |
| 7. | San Diego District Attorney's Office<br>by Summer Stephan, District Attorney;<br>Linh Lam, Deputy District Attorney<br>Chief, Appellate and Training Division;<br>Valerie Ryan, Deputy District Attorney<br>Asst. Chief, Appellate and Training Division;<br>Emmaline Campbell, Deputy District Attorney | N | Thank you for the opportunity to comment on the proposed pretrial release/detention form. We appreciate the efforts of the Criminal Law Advisory Committee to provide guidance to the trial courts on the important issue of pretrial detention. We write to express our concerns and comments in response to the proposal.<br><br>**Our Big Picture Concerns About the Proposed Form**<br><br>First, the form is lengthy and complex, which may present challenges for practical application. Judges overseeing busy arraignment calendars may find it difficult to complete a four-page form for each case on calendar. Additionally, the form does not clearly distinguish which items apply to the various types of orders (e.g., no-bail versus release on O.R.). As a result, judges would need to review the entire form line by line to determine which sections are relevant to each case—an | The committee appreciates the comment.<br><br>The committee acknowledges that the form is lengthy, but believes that it is appropriately designed to guide judges in considering pretrial release or detention as required by *In re Humphrey* and ensuring that the findings are transparent, substantiated, and included in the record and on the minutes. |

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| | | | especially time-consuming task given that the form includes over 100 checkboxes. Furthermore, any inadvertent errors in completing the form could potentially be cited as grounds for challenging the court's order through a writ of habeas corpus. (See *In re Humphrey* (2021) 11 Cal.5th 135, 155-156 (*Humphrey*).)<br><br>Second, releasing a new bail form while a seminal bail case is pending before the California Supreme Court may be premature. (*In re Kowalczyk* (2022) 85 Cal.App.5th 667, rev. granted Mar. 15, 2023.) It would be more prudent to await our high court's forthcoming decision to ensure that any form is consistent with the most salient legal authorities<br><br>**Specific Provisions That Raise Concerns**<br><br>Should the form be approved despite the concerns outlined above, we respectfully offer the following detailed feedback.<br><br>**1. Pretrial Release:**<br>The form addresses both pretrial release and pretrial detention. But while pretrial detention requires the court to make findings on the record and in the minutes, pretrial release does not. (See Cal. Const., art. I, §§ 12; 28, subd. (f)(3); Humphrey, supra, 11 Cal.5th at pp. 155-156.) The inclusion of pretrial release on the form adds unnecessary complexity. Additionally, there are specific problems with respect to the portions of the form dealing with pretrial release:<br><br>**a. Release Conditions:** In item (5), the prompt conflates two distinct questions: *which* release conditions the court is ordering, and *why* the conditions are necessary.<br><br>**b. O.R. Agreement Terms:** Item (7) states that the defendant must agree to comply with Penal Code section 1318[1], but this is | The committee has replaced checkboxes on preventively high bail and no bail under article I, section 28, with an "Other, with legal authority:" checkbox while *In re Kowalcyzk* is under review.<br><br>The committee's position is that courts should memorialize their findings and orders on all pretrial release or detention decisions.<br><br>The committee's position is that this is an interrelated order and finding. |

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| | | | confusing for several reasons. First, section 1318 applies exclusively to pretrial release, yet the form does not clearly reflect that limitation. More significantly, the inclusion of section (7) appears unnecessary. Section 1318 already mandates that the defendant execute a signed release agreement encompassing the terms set forth in section (7). Reiterating that language on this form – which the defendant does not sign – offers little added value and may instead create confusion.<br><br>**2. Provisional Bail:**<br>Item (4)(g) appears to introduce a new procedural requirement that lacks grounding in existing legal authority. Under current San Diego County practice, if the defense is not prepared at arraignment to present evidence in support of its bail position, the court simply sets bail without prejudice, and the defense may present its evidence at the automatic bail review pursuant to section 1270.2. (See *Bunker v. Superior Court* (2025) 108 Cal.App.5th 1044.) Courts do not presently require either party to precommit to the specific issues they intend to raise at that review—such as ability to pay (item (4)(g)(3)) or proposed alternative conditions of release (item (4)(g)(2)).<br><br>**3. Lack of Clarity and/or Specificity:**<br>The following portions of the form will lead to confusion or misunderstandings.<br><br>**a. Probation Violations:** The form does not make clear that it is intended to apply solely to open criminal cases. Defendants arrested for probation violations are subject to a distinct statutory framework that specifically governs their custody and potential release prior to a violation hearing. (See § 1203.25.)<br><br>**b. Automatic Bail Review:** Item (1)(b) fails to distinguish between an automatic bail review conducted under section 1270.2 and a subsequent bail modification hearing held | The committee prefers to keep item 7, as it is part of the court's orders when a person is released. The committee has added a note to the heading that it only applies to pretrial release.<br><br>The committee prefers to keep item 4g as an option for courts.<br><br>The form is entitled *Findings and Orders for Pretrial Release or Detention*, so the committee believes it is sufficiently clear that it is not intended for release decisions on probation violations. |

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| | | | pursuant to section 1289. This distinction is important because each statute establishes different procedural requirements and timelines. Section 1270.2 mandates that an automatic bail review occur "not later than five days from the time of the original order fixing the amount of bail." In contrast, section 1289 governs later requests to modify bail and does not impose the same time constraints. Without clear guidance, the form may cause confusion about which type of hearing is being referenced, potentially leading to procedural errors or misapplication of the law. | The committee believes the statutory citations sufficiently distinguish the procedures. |
| | | | **c. Good Cause Bail Review:** Item (1)(d) appears to reverse the proper order of operations for non-mandatory bail reviews. Defendants often request such reviews to challenge their continued pretrial detention, and it is the court's responsibility to determine whether good cause exists based on a change in circumstances. (See § 1289; In re Alberto (2002) 102 Cal.App.4th 421, 426.) By framing the bail review as occurring because good cause has been found, the form presumes the outcome of a determination the judge has yet to make—effectively putting the cart before the horse. | The committee anticipates the form would be used after the court finds good cause exists. |
| | | | **d. Proffer:** Item (2)(c)(2) provides a checkbox for the court to indicate that it reviewed and considered a "Statement/proffer of witness." However, in practice, it is typically the attorneys—not the witnesses—who make proffers at bail hearings. Moreover, these proffers often involve evidence unrelated to witness statements, such as DNA results, surveillance footage, or other investigative findings. (See In re Harris (2024) 16 Cal.5th 292.) | The committee has added a reference to proffers of evidence. |
| | | | **e. Ability to Pay:** | |
| | | | **i.** In item (2)(d)(2), the form provides space for the court to indicate that it reviewed and considered "The defense argument | The committee declines to make the change. |

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| | | | and… Amount of bail the defendant can afford." But that is not entirely accurate. The court can consider what the defendant says they can afford, but that's not the same as knowing what they can actually afford. It's an important difference.<br>**ii.** Additionally, although ability to pay appears only under the "defense argument" section, the People are also entitled to present evidence on this issue. Relevant information the prosecution may offer includes, for example: the amount of cash seized during a narcotics investigation, or bank records showing substantial balances in a fraud case.<br><br>**f. Preventative Detention:**<br><br>**i. Why Conditions Are Insufficient:** Item (8)(b) fails to reflect a critical finding required for lawful pretrial detention: not just which conditions were considered by the court, but why those conditions are inadequate. As the California Supreme Court made clear in *Humphrey*, *supra*, 11 Cal.5th at pages 151–152, "detention is impermissible unless no less restrictive conditions of release can adequately vindicate the state's compelling interests." Yet item (8)(b)(2) merely points—several pages back—to general case factors (e.g., the defendant's criminal history). Listing such factors, like a prior failure to appear, is not the same as making a specific finding that, for example, GPS monitoring would be insufficient to protect public safety or ensure court appearance.<br><br>**ii. Facts Evident/Presumption Great:** Item (8)(c) asks the court to determine whether facts are evident and/or the presumption great. There are two problems here.<br><br>**1. No-Bail Only:** First, the item does not clarify that it applies only to no-bail detentions (Cal. Const., art. I, § 12) and does not apply in detentions based on preventatively high bail (id. § 28, subd. (f)(3)). | The committee agrees and has added the defendant's ability to pay as new item 2c(2).<br><br>Item 8b(2) requires the court to state evidence supporting its finding that the listed conditions are insufficient to ensure a return to court and/or protect the public, in addition to those listed in item 3.<br><br>The committee has replaced checkboxes on preventively high bail and no bail under article I, section 28, with an "Other, with legal |

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| | | | | authority:" checkbox while *In re Kowalcyzk* is under review. |
| | | | **2. One Standard, Not Two:** Second, as noted in the Invitation to Comment, it is unnecessary—and potentially confusing—to separate "the facts are evident" and "the presumption is great" into distinct checkboxes. The Supreme of California has interpreted the phrase holistically to represent one standard. (*In re White* (2020) 9 Cal.5th 455, 463 ["Our court, in step with the broad consensus that has since emerged in other states, has interpreted this odd terminology to require *evidence that would be sufficient to sustain a hypothetical verdict of guilt on appeal."*], italics added.) | The committee agrees and has updated the form to use the phrase as one standard. |
| | | | **iii. Constitutional Authorities:** Item (8)(d) fails to convey that no-bail is always ordered pursuant to article I, section 12, and preventatively high bail is always ordered pursuant to section 28. (See Cal. Const., art. I, § 12 [setting forth the no-bail categories].) | See response above. |
| | | | In closing, we respectfully oppose adoption of the proposed pretrial release/detention form due to the numerous concerns outlined in this letter. As a potential resource for the Judicial Council's consideration of alternatives, we have attached the simplified Pretrial Detention Worksheets developed last year by the San Diego County District Attorney's Office. These worksheets have received positive feedback from our attorneys for their clarity, efficiency, and ease of use. | |
| | | | _____<br>[1] All further statutory references are to the Penal Code unless otherwise indicated. | |
| 8. | Superior Court of California, County of Los Angeles | AM | The following comments are representative of the Superior Court of California, County of Los Angeles, and do not | The committee appreciates the comment. |

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| | by Stephanie Kuo | | represent or promote the viewpoint of any particular officer or employee.<br><br>In response to the Judicial Council of California's "ITC SPR25-11 Criminal Law: Findings and Orders for Pretrial Release or Detention," the Superior Court of California, County of Los Angeles (Court), agrees with the proposed changes if modified.<br><br>The Court agrees that the proposal appropriately addresses the stated purpose and will help judicial officers methodically go through the process of making findings. It also supports the judicial officer's order for pretrial release or detention.<br><br>The Court does believe that the language related to denying bail because the "facts are evident or the presumption is great" is confusing on the form because it neglects that the language is used for capital crimes as an exception for sufficient sureties but the form does not specify that the language is related to a capital crime. The exact language for Cal. Const., art. I, §§ 12(b) & (c), 28(f)(3) states the following: Capital crimes when the facts are evident or the presumption great.<br><br>To implement the proposal, the Court would need to train court staff and its technology services division would need to create new codes to reflect all the findings and order language. | The committee acknowledges the commenter's agreement.<br><br>The committee appreciates the comment.<br><br>A court must also find that the "facts are evident or the presumption is great" that the defendant committed the specified noncapital offenses under Cal. Const., art. I, §§ 12(b) & (c).<br><br>The committee appreciates the comment. |
| 9. | Superior Court of California, Couty of Orange<br>by Thomas Anthony Williams, Operations Analyst II | AM | • *Does the proposal appropriately address the stated purpose?* The proposal appropriately addresses the purpose as indicated.<br><br>• *In denying bail because the "facts are evident or the presumption is great" that the defendant committed the offense (Cal. Const., art. I, §§ 12(b) & (c), 28(f)(3)), are there preferred alternatives for the court to indicate this finding than the one proposed by the committee?* | The committee appreciates the comment. |

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| | | | An alternative to the completion of the findings form would be to state findings on the record prior to the setting of bail. | The form is for optional use; courts may use alternate ways of making the required findings and orders. |
| | | | • *Since the form is intended to be part of the court's minutes, would it be helpful to refer to the minutes in the form title, such as Minute Attachment on Findings and Orders for Pretrial Release or Detention?* | |
| | | | Inclusion of reference to the Minutes would not be necessary. In Orange County, filed documents are imaged into the case files and available through the Minutes. | To address other comments recommending a reference to the minutes, the committee has added language to the form noting that the court must make oral findings and include them in the court minutes. (*In re Humphrey* (2021) 11 Cal.5th 135.) |
| | | | • *Would the proposal provide cost savings? If so, please quantify.* | |
| | | | Cost savings would not be provided as our Court would have to allocate costs to maintain and print copies of the forms. | No response required. |
| | | | • *What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?* | |
| | | | To implement the recommended, training for staff and judicial officers would be needed. Approximate time estimate for training would be 30-60 minutes. Creation/modification of case management system docket codes and procedure related material would additionally be required. Approximate time estimate for completion would be 9 hours. | No response required. |

## SPR25-11

**Criminal Law: Findings and Orders for Pretrial Release or Detention** (Approve form CR-104)

All comments are verbatim unless indicated by an asterisk (*).

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| | | | *• Would two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?*<br><br>Two months would be sufficient time for implementation.<br><br>*• How well would this proposal work in courts of different sizes?*<br><br>N/A | <br><br><br><br>No response required.<br><br><br><br>No response required. |
| 10. | Trial Court Presiding Judges Advisory Committee (TCPJAC) and the Court Executives Advisory Committee (CEAC)<br>by TCPJAC/CEAC Joint Rules Subcommittee (JRS) | AM | The JRS notes that the proposal should be implemented because the form reflects the application of existing law.<br><br>The JRS also notes the following impact to court operations:<br>• Impact on existing automated systems.<br>  o The form will have to be added to a court's CMS, preferably automated and fillable. Courts will have to determine the use and filing of the form within their current criminal case management protocols.<br>• Results in additional training, which requires the commitment of staff time and court resources.<br>  o Both court staff and bench officers will have to be trained on the use of the form.<br><br>**Suggested modification(s):**<br>The committee should consider adding item #9 with language indicating the court is ordering the form be attached to the minutes and be made part of the record of the case.<br><br>**Request for Specific Comments:**<br>1. The proposal adequately addresses the stated purpose.<br>2. The proposed language in denying bail is appropriate and comports with the current state of the law. | The committee appreciates the comment.<br><br><br><br>No response required.<br><br><br><br>No response required.<br><br><br><br>The committee has added language to the recommended form noting that the court must make oral findings and include them in the court minutes. (*In re Humphrey* (2021) 11 Cal.5th 135.)<br><br><br>The committee appreciates the information provided in response to its specific questions. With respect to comment no. 6, the committee |

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| | | | 3. The proposed form title appropriately defines the form and its use. The committee should consider adding item #9 with language indicating the court is ordering the form be attached to the minutes and be made part of the record of the case.<br>4. In using the form, no cost savings have been identified.<br>5. Implementation of the form would require training of staff and bench officers which would take up to 2 - 5 court days depending on the size of the court; revising processes and procedures including updating the Case Management System and creating new docket codes; and updating justice partners on the use of the form.<br>6. Sufficient time for implementation would take four to six months from Judicial Council approval due to the issues identified above.<br>7. The proposed form could be used in courts of different sizes. | appreciates the amount of work involved in implementing new forms, but the committee does not recommend delaying implementation of this proposal. |
| 11. | Vera Institute of Justice by Michelle Parris, Director, Vera California; Madeline Bailey Advocacy Manager, Beyond Jails | NI | Thank you for the opportunity to submit comment on proposed form CR-104. I write on behalf of the Vera Institute of Justice, a national criminal justice research and policy organization that has worked to reform pretrial systems across the country—from New Jersey to Michigan to California—for more than 60 years. Our Los Angeles-based initiative, Vera California, partners with advocates and stakeholders across the state to improve bail and pretrial practices through research and advocacy. Throughout our work across the country, our experience has been that well-crafted bail policies make communities safer, improve case outcomes, and conserve state resources all at the same time.<br><br>We appreciate the Judicial Council's efforts to pursue compliance with *Humphrey* in courtrooms across the state. Existing research suggests inconsistent implementation of *Humphrey* across counties, resulting in thousands of people stuck in pretrial detention due to high, unaffordable bail | The committee appreciates the comment. See the committee's responses to the commenter's substantive comments, below. |

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| | | | amounts.[1] A forthcoming report from the Vera Institute of Justice finds that for the six California counties where data was available (Kern, Monterey, Placer, Riverside, Solano, and Tulare counties), among cases with only a single charge that had bail set, median bail in 2024 was $10,000.[2] Even people charged with a single count of a single misdemeanor had a median bail amount of $5,000.[3] Further, in the five counties where data is available (Kern, Monterey, Placer, Solano, and Tulare counties), since the *Humphrey* decision was announced, among cases with only a single charge, judges have set bail over the bail schedule recommendation in 45 percent of cases.[4]<br><br>[1] See Alicia Virani, Stephanie Campos-Bui, and Rachel Wallace, et al., *Coming Up Short: The Unrealized Promise of In re Humphrey* (Los Angeles and Berkeley, CA: UCLA School of Law and Berkeley Law, 2022), http://perma.cc/HL3R-W745; Stephanie Campos-Bui, Rachel Wallace, Alicia Virani, et al., *Largely Unchanged: The Limits of In re Humphrey's Impact on Pretrial Incarceration in California* (Los Angeles, CA, and Berkeley, CA: UCLA School of Law and Berkeley Law, 2024), https://www.law.berkeley.edu/wp-content/uploads/2024/06/UCLAxUCB-2024-Largely-Unchanged_WEB_Pages.pdf; and Stephanie Campos-Bui, Rachel Wallace, Alicia Virani, *Largely Unchanged: The Limits of In re Humphrey's Impact on Pretrial Incarceration in California* (Los Angeles, CA, and Berkeley, CA: UCLA School of Law and Berkeley Law, 2024), https://www.law.berkeley.edu/wp-content/uploads/2024/06/UCLAxUCB-2024-Largely-Unchanged_WEB_Pages.pdf at 13<br>[2] Christopher Kaiser-Nyman et al., Report on Bail-Setting in California post-Humphrey (New York, Vera Institute of | |

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| | | | Justice, forthcoming). For more information on this analysis, please contact Michelle Parris at mparris@vera.org.<br>[3]Ibid.<br>[4]Ibid.<br><br>The Judicial Council is right to seek a solution that promotes consistency and fairness, but the proposed form sidelines the presumption of innocence by focusing almost exclusively on factors that would indicate towards setting bail or ordering detention, as opposed to offering guidance on inquiring into more expansive mitigating factors that would indicate release. It also gets ahead of a pending California Supreme Court case in a way that may lead to unlawful detention, and does not meaningfully address ability to pay bail as required by Humphrey.<br><br>We are grateful for the opportunity to detail our concerns.<br><br>**1) The detention findings section implicates serious pending questions before the California Supreme Court in *In re Kowalczyk* and could lead courts towards setting unlawful "no-bail" holds.**<br><br>The final section of the proposed form suggests that judges are authorized to set "no bail" for any offense—even an offense outside of those enumerated by Article I, section 12 of the California Constitution—based on the broad language of Article I, section 28.[5] It does this by asking courts to check a box indicating whether they are setting "no bail" under the authority of either Section 12 or Section 28.<br><br>[5]Cal. Const. art. I, § 12, 28.<br><br>Indeed, the central question before the California Supreme Court in the pending *In re Kowalczyk* case is which section of the state constitution governs pretrial detention determinations.[6] This question has yet to be answered by the | Item 3 allows the court to identify whether the defendant is a flight risk or a danger to public or victim safety based on a number of relevant factors. The committee has added additional checkboxes indicating whether the case involves a misdemeanor or felony (see item 1a), and if a misdemeanor case, that there is a presumption for OR release (new item 4a).<br><br>The committee has replaced checkboxes on preventively high bail and no bail under article I, section 28, with an "Other, with legal authority:" checkbox while *In re Kowalcyzk* is under review. |

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| | | | Court, and until the proper legal framework for detention decisions has been settled, courts using the proposed form may be led towards ordering erroneous no-bail holds that lead to unlawful and harmful pretrial detention.<br><br>[6]*In re Kowalczyk on H.C.*, 305 Cal. Rptr. 3d 440, (2023).<br><br>Unless the California Supreme Court rules otherwise, we respectfully suggest clearly reserving "no-bail" on the proposed form for only those offenses enumerated under Article I, Section 12 of the California Constitution.<br><br>**2) The proposed form should provide additional guidance to courts on how to meaningfully assess ability to pay bail as required by *Humphrey*.**<br><br>The *Humphrey* decision requires that courts consider a defendant's financial circumstances when setting bail, establishing this as a core constitutional requirement.[7] However, the proposed form provides limited guidance as to how courts should conduct, document, or apply this analysis in practice.<br><br>To better ensure that ability-to-pay determinations are accurate and meaningful, the proposed form could include fields for documenting the accused person's income, assets, and financial obligations, as well as guidance on using those figures to calculate a person's approximate disposable income. The form could then indicate a suggested percentage of a person's total disposable income that should serve as the amount of bail they have the ability to pay, such that an "affordable" bail amount would not completely wipe out a person's available resources.[8] Such tools would help courts determine how to set actually affordable bail according to a person's ability to pay, as well as more broadly ensure that the ability-to-pay analysis is more than a procedural formality. | The committee acknowledges this concern and is considering developing tools to assist with an ability to pay determination. |

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| | | | [7]*In re Humphrey*, 482 P.3d 1008, 1012 (Cal. 2021).<br><br>[8]Sandra van den Heuvel, Anton Robinson, and Insha Rahman, *A Means to an End: Assessing the Ability to Pay Bail* (New York: Vera Institute of Justice, 2019), 4-6, https://vera-institute.files.svdcdn.com/production/downloads/publications/a-means-to-an-end-assessing-the-ability-to-pay- bail.pdf.<br><br>**3) If the Judicial Council implements this form, with the corrections suggested above, it should promote consistent use and be transparent about the form's impact on pretrial determinations.**<br><br>While we understand the value of providing flexibility to courts, making the proposed form completely optional will likely only perpetuate the problem of varying applications of *Humphrey* across jurisdictions, including the continued use of bail schedules in courts that choose not to adopt the form.<br><br>Instead, the Judicial Council might consider piloting the form in a set of jurisdictions—once critical issues are resolved—and publicly releasing data from the underlying forms on charges, bail amounts, and release and detention determinations. Doing so will protect against unintended consequences and ensure that the form is adequately protecting the constitutional rights that *Humphrey* underscores.<br><br>Thank you again for the opportunity to provide comment. | The committee intends for the form to help guide pretrial release or detention decisions in line with *In re Humphrey* and the Constitution, but does not believe it is necessary to make the form mandatory.<br><br>The form is not intended for data collection purposes. |
| 12. | Alicia Virani, Attorney | NI | This document reflects my comments regarding proposed form CR-104. Over the past seven years, I have conducted extensive research and legal analysis on pretrial procedures and outcomes in the state of California, particularly with respect to the *Humphrey* decision. I have also supervised dozens of students conducting *Humphrey* hearings and engaged in court watching | The committee appreciates the comment. |

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| | | | to see how judges are implementing the *Humphrey* decision. This comment reflects my extensive experience in this arena.<br><br>First and foremost, I would strongly recommend against using this form because of its misstatement of the law. I refer specifically to this language: "A defendant cannot be held in custody unless the defendant has the ability to pay but chooses not to post bail or detention is necessary to protect public safety or ensure their future appearance in court and there is clear and convincing evidence of no less restrictive alternative. In the latter case, the court may set no bail or preventively high bail."[1] This is an inaccurate statement of the *Humphrey* decision, as that decision consistently reminds us that a setting of no bail is subject to constitutional limitations.<br><br>[1] Judicial Council of California, *Invitation to Comment*, 2.<br><br>As you are aware, the California Supreme Court has yet to render a decision in *Kowalczyk*, which would clarify the state of the law regarding which provision of the constitution sets the limitations for no bail holds. I think it would behoove the Judicial Council to wait for that decision to be issued before distributing such a form.<br><br>My concern with how the law is summarized in this form stems from my research which showed that the *Humphrey* decision has already been wrongly interpreted by judges across the state, resulting in the imposition of unlawful and unconstitutional no bail holds on indigent clients.[2]<br><br>[2] Virani et al., *Coming Up Short, The Unrealized Promise of In Re Humphrey* (2022) available at: https://www.law.berkeley.edu/wp-content/uploads/2022/10/Coming-Up-Short-Report-2022-WEB.pdf. | The quoted language is not recommended on the form.<br><br>The committee has replaced checkboxes on preventively high bail and no bail under article I, section 28, with an "Other, with legal authority:" checkbox while *In re Kowalcyzk* is under review. |

## SPR25-11

**Criminal Law: Findings and Orders for Pretrial Release or Detention** (Approve form CR-104)

All comments are verbatim unless indicated by an asterisk (*).

| | Commenter | Position | Comment | Committee Response |
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| | | | If the form is going to be instituted, here are additional comments regarding its provisions:<br><br>1. Item 4(c) on page 2 of the proposed form seems to allow a judge to alter conditions of release but does not ask for good cause/change in circumstance, which should be required.<br>2. One of the biggest changes *Humphrey* made was the requirement that a judge must consider an individual's ability to pay. In my opinion, there should be a section devoted to ability to pay to help guide and document a judge's analysis regarding an individual's ability to pay. After court watching for a month in two Los Angeles courtrooms, court watchers found that in less than a quarter of the cases did a judge engage in an ability to pay analysis.[3] Any form related to pretrial detention should seek to correct this problem.<br><br>[3] *Presumed Guilty, The Pretrial Incarceration Crisis in LA County*, La Defensa & UCLA Law's Pretrial Justice Clinic (2024), available at: https://courtwatchla.org/wp-content/uploads/2024/06/Court-Watch-LA-Report-V4.pdf.<br><br>3. In section 8, there could be a greater clarification around the law regarding what is required to find that facts are evident or the presumption is great. This could mean including some language from *In re White* that can help guide the court.<br>4. I would hope that the Judicial Council would utilize these forms to expand the data available about judicial pretrial decisions. Such a standardized form would lend itself to data collection and if this form is implemented, I hope that robust data would be reported on.<br><br>Thank you for your consideration of these comments. | A court may reconsider bail determinations made prior to arraignment without good cause shown.<br>The committee acknowledges this concern and is considering developing rules and forms to assist with an ability to pay determination.<br><br>The committee prefers to keep the direct language from the Constitution.<br><br>The form is not intended for data collection purposes. |