

## **Staff Memorandum 2022-10**

### **Bail, Pretrial Release, and Related Matters**

At its October 2022 meeting, the Committee on Revision of the Penal Code will address cash bail, pretrial release, and issues related to these determinations. This issue is one of the most complicated and fraught in the criminal legal system and, despite recent action by the courts and the Legislature, many questions about how to best protect public safety and ensure appearance in court while reducing racial disparities and improving equity remain unresolved.

This memorandum gives general background on these issues and presents possible recommendations for the Committee's consideration. In an attempt to focus the Committee's discussion, it does not discuss the important issues of how pretrial services can best be structured and administered, the most effective use of risk assessment instruments, or, for reasons discussed below, whether California's cash bail system should be eliminated.

A supplement to this memorandum, which will be released shortly, will present written submissions from invited panelists.

### **Introduction**

Bail is the process of releasing someone from jail with conditions set to provide reasonable assurance of a person's appearance in court and to maximize public safety.<sup>1</sup> As United States Supreme Court Justice Robert Jackson has observed, the bail system was designed "not [as] a device for keeping persons in jail ... [but] to enable them to stay out of jail until a trial has found them guilty."<sup>2</sup> The United States Supreme Court has noted that without a meaningful right to bail, "the presumption of innocence, secured only after centuries of struggle, would lose its meaning."<sup>3</sup>

But the bail system today is often one of "cash bail" that relies on paying money to the court or — far more frequently — to a commercial bail agent to obtain

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<sup>1</sup> The term "bail" is used differently across the country, in the law, and by history. It is used as both a noun and verb and can be defined variously as money, as a person, a particular form of bond, and the process of release. Timothy R. Schnacke, National Institute of Corrections, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform*, September 2014, 14.

<sup>2</sup> *Stack v. Boyle*, 342 U.S. 1, 8 (1951) (opinion of Justice Jackson).

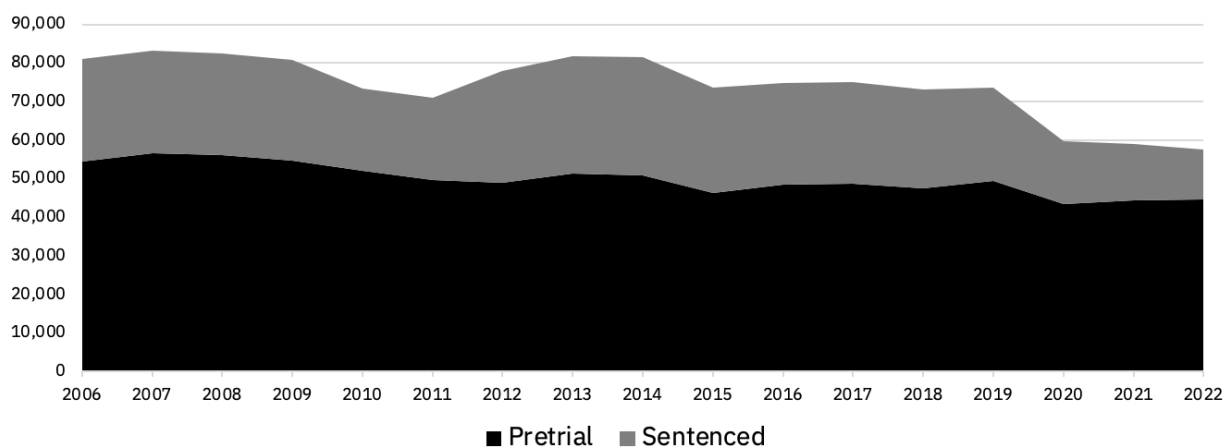
<sup>3</sup> *Stack*, 342 U.S. at 4.

release.<sup>4</sup> The fairness and effectiveness of this system has been questioned for centuries.<sup>5</sup>

People not released on cash bail may be released on their own recognizance, meaning they promise to come back to court. Still others may be released after agreeing to certain conditions, ranging from checking in with a probation officer to wearing an electronic monitoring device. Finally — though it is supposed to be a rare exception — some people are ordered detained before trial without any opportunity for release because a court has deemed them to be too dangerous. And many others are also functionally detained because the cash bail amount set for their release is impossible for them to pay.<sup>6</sup>

The most recent data shows that more than 40,000 people are in California’s jails awaiting resolution of their case, more than 75% of the jail population.

California Jails Average Daily Population  
2006 – June 2022



Source: California Board of State and Community Corrections, *Jail Population Trends*, updated Sept. 15, 2022, Table 1.

Studies have repeatedly shown that cash bail does not improve people’s law abiding behavior.<sup>7</sup> And a system based on cash bail has created several

<sup>4</sup> Schnacke, *Fundamentals of Bail* at 38.

<sup>5</sup> *Id.* at 35–37.

<sup>6</sup> The most recent available data on how many people in California’s jails are there because they cannot afford to pay cash bail is from 2015 and 2016 and ranges from 15–59%. This estimate is based on data from three counties: Fresno (15%), San Francisco (53%), and San Mateo (59%). Pretrial Detention Reform Workgroup, *Pretrial Detention Reform: Recommendations to the Chief Justice*, 25, n. 71, October 2017.

<sup>7</sup> See e.g., Aurelie Ouss & Megan T. Stevenson, *Does Cash Bail Deter Misconduct?*, Jan. 2022. (evaluating data before and after the Philadelphia District Attorney’s Office implemented a new bail policy, finding no evidence that financial incentives increased compliance); Michael Jones, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option*, Pretrial Justice Institute

problems: the unnecessary incarceration of people who are safe to release but cannot afford to pay cash bail while allowing release of people who are high-risk but can afford to pay cash bail.<sup>8</sup> This system of wealth-based detention also worsens existing racial disparities in the criminal legal system.<sup>9</sup>

Studies have also shown that cash bail does not improve the rate at which people return to court.<sup>10</sup> People most often miss court dates for innocuous reasons or reasons beyond their control — such as issues with getting time off of work, finding childcare, securing transportation, or simply forgetting — that are unrelated to criminal behavior or a desire to flee prosecution. Failure to appear rates also do not distinguish between a person who arrives an hour late or who intentionally leaves the state.<sup>11</sup> Because non-appearance in court is rarely a deliberate choice, interventions such as court date notification systems have been effective ways to increase appearances in court.<sup>12</sup>

### **Timeline of Key Reform Efforts in California**

In 2016, Chief Justice Tani Cantil-Sakauye established a Pretrial Detention Reform Workgroup that developed 10 recommendations to achieve a pretrial release and detention system that balanced public safety, the presumption of innocence, and due process. Among other reforms, the group recommended implementing a risk-based pretrial assessment and supervision system to replace the current cash bail system, making release and detention decisions earlier in the pretrial process, and providing guidance on when preventive detention is appropriate.<sup>13</sup>

A landmark bail reform bill, SB 10 (Hertzberg), was signed into law in 2018 and would have ended cash bail and replaced it with a risk assessment model for pretrial detention. But a referendum, Proposition 25, was approved by voters

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(2013); Tracey Meares & Arthur Rizer, *The “Radical” Notion of the Presumption of Innocence*, The Square One Project, May 2020, 26–28.

<sup>8</sup> Schnacke, *Fundamentals of Bail* at 38.

<sup>9</sup> On average Black and Latino people detained pretrial are less likely to be able to post cash bail as a condition of release and often receive cash bail amounts higher than white defendants. See, e.g., Meghan Sacks, Vincenzo A. Sainato & Alissa R. Ackerman, *Sentenced to Pretrial Detention: A Study of Bail Decisions and Outcomes* (2014) 40 Am. J. Crim. Justice 661; Traci Schlesinger, *Racial and Ethnic Disparity in Pretrial Criminal Processing* (2005) 22 Justice Quarterly 170, 187–188.

<sup>10</sup> See, e.g., Ouss & Stevenson, *Does Cash Bail Deter Misconduct?*; Jones, *Unsecured Bonds*.

<sup>11</sup> Advancing Pretrial Policy & Research, *Pretrial Research Summary: Court Date Notification Systems*, April 2021, 1.

<sup>12</sup> Joanna Thomas & Abdaziz Ahmed, New York City Criminal Justice Agency, *Court Date Notifications: A Summary of the Research and Best Practices for Building Effective Reminder Systems*, March 2021, 29–30.

<sup>13</sup> Pretrial Detention Reform Workgroup, *Pretrial Detention Reform: Recommendations to the Chief Justice*, 2–3, October 2017.

with 55% of the vote in 2020, which reversed SB 10 before it went into effect.<sup>14</sup> As a result, the Legislature is prevented from reenacting any policies that are similar to SB 10, although the exact contours of what is permissible are highly uncertain.<sup>15</sup>

While the fate of SB 10 was unknown, the Legislature earmarked \$75 million in the Budget Act of 2019 to fund pretrial pilot projects throughout the state.<sup>16</sup> In the same year, SB 36 (Hertzberg) established reporting and validation requirements, including tracking disparate impacts based on race or gender, for pretrial services agencies using a risk assessment tool. Both of these legislative actions require the Judicial Council to report annually to the Legislature, with final reports due in July 2023.<sup>17</sup>

Most recently, SB 129, part of the 2021 budget, provided \$140 million to the Judicial Council to further fund pretrial release programs that impose the least restrictive conditions to address public safety and appearance in court. The first annual report to the Legislature is also due in July 2023.

Finally, in April 2020, an emergency rule of court ordered cash bail for many nonviolent offenses to be set at \$0 in order to lower jail populations at the inception of the COVID-19 pandemic.<sup>18</sup> After the statewide order was rescinded two months later, many counties continued to employ \$0 bail, although by September 2022 only a handful of counties still used it. Data is limited, but in Los Angeles County, where the \$0 bail policy expired on June 30, 2022, failure to appear and re-arrest rates were lower or the same as pre-pandemic levels.<sup>19</sup>

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<sup>14</sup> Patrick McGreevy, *Prop. 25, which would have abolished California's cash bail system, is rejected by voters*, L.A. Times, Nov. 3, 2020.

<sup>15</sup> After a successful referendum, a law on the same topic must be “‘essentially different’ from the rejected provision and [] enacted ‘not in bad faith, and not with intent to evade the effect of the referendum petition.’” *Assembly v. Deukmejian*, 30 Cal.3d 638, 678 (1982) (quoting *Gilbert v. Ashley*, 93 Cal.App.2d 414, 415–16 (Cal. Court of Appeals 1949)). As there have only been a handful of successful statewide referenda in the last 40 years, the limits of this doctrine are difficult to map.

<sup>16</sup> Judicial Council of California, *Pretrial Pilot Program: Report to the Legislature*, July 2022, 3.

<sup>17</sup> This data, which the Judicial Council has released in interim reports, provides demographic information, risk levels, offense level, release types, court appearance rate, and supervision levels. The data, however, continues to be affected by pandemic emergency rules on arrest and release, and thus the population of program participants is likely different than in the absence of the pandemic. See Judicial Council of California, *SB 36: Pretrial Pilot Program Aggregated Data Report*, July 2022, 3.

<sup>18</sup> California Emergency Rule of Court, Rule 4 (April 6, 2020).

<sup>19</sup> Ricard Basurto-Davila, Irene Vidyanti, & Chun Liu, *Data Collection to Support Pretrial Reform*, Los Angeles County Office of the CIO, 1, February 2022. The Yolo County District Attorney's Office recently released a review of the almost 600 people released from custody under the county's \$0 bail schedule, finding that 70% of the people released were rearrested. See Yolo County District Attorney's Office, *Yolo County Emergency Bail Analysis*, Aug. 5, 2022. This report contains several unanswered questions that counsel against relying too heavily on its analysis. First, the report focuses on rearrests from an open-ended period of time following release — for some people, up

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## Overview of Current Law and Practice

### Negative effects of pretrial incarceration

For people who cannot pay bail and remain incarcerated, research shows that pretrial incarceration has adverse effects on public safety.<sup>20</sup> Staying in jail results in increased pressure to take a plea, greater likelihood of a guilty verdict, harsher sentences, higher rates of new arrests, and the disruption or loss of housing, employment, parental rights, and family support.<sup>21</sup> Pretrial detention impacts mental and physical health with people in pretrial detention reporting higher levels of anxiety and depression than those released pretrial.<sup>22</sup>

### Racial disparities

National studies of felony cases in large urban counties show that there are significant racial disparities in the pretrial process. Rates of pretrial detention are higher on average for Black and Latino defendants.<sup>23</sup> And once cash bail is set, amounts are also consistently higher for Black and Latino defendants, even though they are less able to afford money bail.<sup>24</sup>

### Cite and release

For many misdemeanor offenses, the Penal Code provides presumptive release and law enforcement may release the arrested person without booking them into jail as long as they sign a citation promising to appear in court on a specified date.<sup>25</sup> There are numerous exceptions to this policy, including for domestic violence offenses and various safety-related circumstances. Felony offenses are excluded from the Penal Code's cite and release provisions.<sup>26</sup> Local policies and

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to two years after their initial arrest, which may have been well after their charges were resolved — rather than examining only the pretrial period. Second, the report does not contain any comparison or control group data, such as comparison to rearrest rates in other years among a similar population or whether any of the group would nonetheless have been released without the \$0 bail schedule.

<sup>20</sup> See, e.g., Sandra Susan Smith, *Pretrial Detention, Pretrial Release & Public Safety*, Arnold Ventures, July 2022; Christopher Lowenkamp, *The Hidden Costs of Pretrial Detention Revisited*, Core Correctional Solutions, March 2022; Human Rights Watch, *Not in it for Justice: How California's Pretrial Detention and Bail System Unfairly Punishes Poor People*, April 2017, 6.

<sup>21</sup> See, e.g., Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, *Journal of Law, Economics, and Organization*, Sept. 2018, 34(4): 511-542; Will Dobbie, Jacob Goldin, and Crystal S. Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence From Randomly Assigned Judges*, *American Economic Review* (2018), 108(2), 203-205.

<sup>22</sup> See Meares & Rizer, *The 'Radical' Notion of the Presumption of Innocence*.

<sup>23</sup> Wendy Sawyer, *How Race Impacts Who Is Detained Pretrial*, Prison Policy Initiative, Oct. 9, 2019.

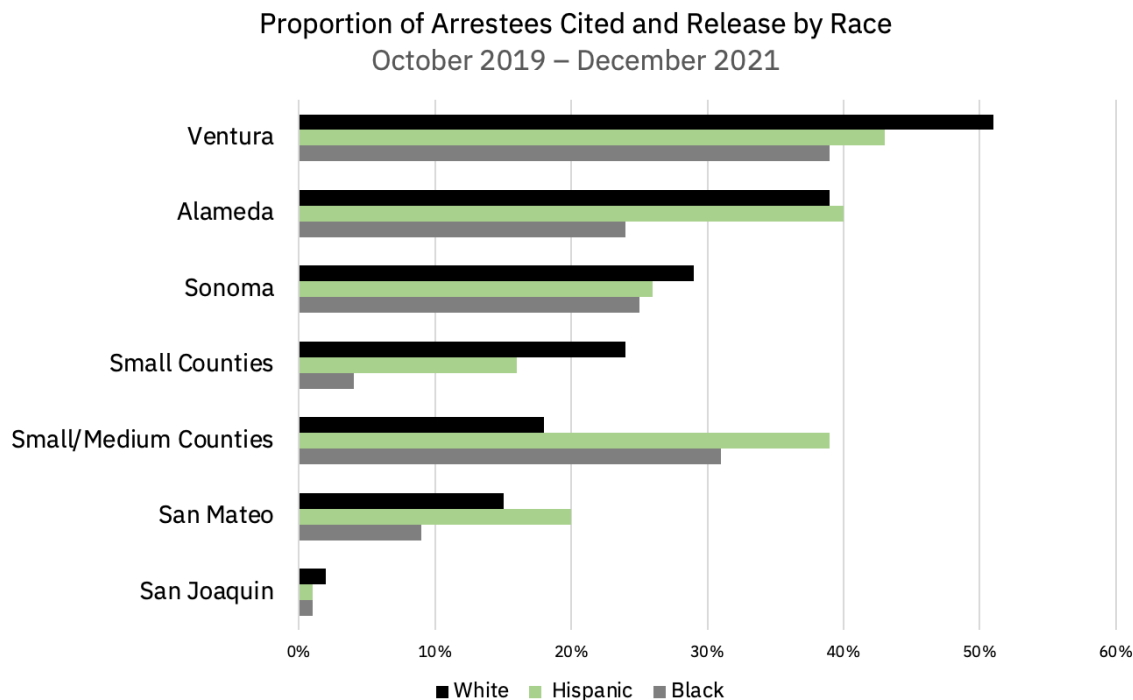
<sup>24</sup> David Arnold, Will Dobbie, & Crystal Yang, *Racial Bias in Bail Decisions*, *Quarterly Journal of Economics*, 2018, vol. 133, no. 4, pp. 1885-1932

<sup>25</sup> Penal Code § 853.6.

<sup>26</sup> Penal Code § 853.85.

court orders grant jail officials additional discretion in releasing people with a promise to appear.<sup>27</sup>

As the figure below shows, there is significant variation among counties and demographics in the cite and release practices. (Note that the Judicial Council, the source of much of the data in this report, cautions against drawing generalizations from this information because much of the reporting period was during the COVID-19 pandemic.)<sup>28</sup>



Source: Judicial Council of California, *SB 36: Pretrial Pilot Program Aggregated Data Report*, July 2022, Table 3a–c. Data includes only people cited and released within two court days of arrest. Los Angeles, Tulare, and Sacramento Counties were excluded because they did not report standardized data. “Small counties” are Calaveras, Modoc, Tuolumne, and Yuba. “Small/Medium Counties” are Kings, Napa, and Nevada-Sierra.

**Bail schedules and release before court**

After booking, anyone — regardless of their public safety risk — charged with a bail-eligible offense can pay to be released from jail by posting the amount authorized in the county bail schedule.<sup>29</sup> Like in most other jurisdictions with

<sup>27</sup> Penal Code § 1269b. For jail facilities operating under a court-imposed population cap, the sheriffs are also often authorized to make capacity releases when the jail exceeds its mandated population threshold. See Sarah Lawrence, *Court-Ordered Population Caps in California County Jails*, Stanford Criminal Justice Center, December 2014, 6 (at time of report, 19 county jail systems had court ordered population caps and housed 65% of jail inmates in California).

<sup>28</sup> Judicial Council of California, *SB 36: Pretrial Pilot Program Aggregated Data Report*, July 2022, 6.

<sup>29</sup> Penal Code § 1269b(b).

cash bail, people primarily use a commercial bail bond to secure release from custody.<sup>30</sup> A bail agent charges a fee (bail premium), typically 10% of the value of the bond, and the bail agent assumes risk of forfeiture of the bond to the court. (The 10% premium amount is not set by statute or law.)<sup>31</sup> In California, people often arrange payment plans to finance the premium, and are required to pay the premium after their case is resolved.<sup>32</sup> The bail premium is nonrefundable — meaning even if someone makes all their court appearances or even if their case is dismissed within a few days of their arrest, the amount paid to the bail agent will not be returned to them.

Research has shown that nonrefundable bail fees fall heavily on low-income communities. In San Francisco, over 99% of people who post bail use a commercial bond agency and bail agencies collected as much as \$10–15 million in nonrefundable fees in 2017.<sup>33</sup> In Los Angeles, between 2012 and 2016, bail bond agencies collected an estimated \$193 million in nonrefundable premiums from people who paid bail before arraignment.<sup>34</sup> These fees are primarily paid by low-income communities and people of color, especially women,<sup>35</sup> who cut back on food, rent, or other bills, or work more hours to pay for their loved one’s release.<sup>36</sup>

California bail schedules are among the highest in the country.<sup>37</sup> As of 2009, the median cash bail amount set in California was \$50,000, five times the amount in the rest of the country.<sup>38</sup> Each of California’s 58 superior courts develops its own

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<sup>30</sup> Pretrial Detention Reform Workgroup at 29. Data provided to the Workgroup by three courts showed that, over a one-year term, full cash bail was only posted in less than 2% of total cases. *Id.* at 31.

<sup>31</sup> *Id.* at 30.

<sup>32</sup> Human Rights Watch, “*Not in it for Justice*”: *How California’s Pretrial Detention and Bail System Unfairly Punishes Poor People*, April 2017, 6.

<sup>33</sup> Financial Justice Project, San Francisco Office of the Treasurer, *Do the Math: Money Bail Doesn’t Add Up for San Francisco*, June 2017, 4, 6.

<sup>34</sup> Isaac Bryan, Terry Allen, Kelly Lytle Hernandez, & Margaret Dooley-Sammuli, *The Price for Freedom: Bail in the City of L.A.*, UCLA Ralph J. Bunche Center for African American Studies, Dec. 5, 2017, 1.

<sup>35</sup> Saneta deVuono-powell, Chris Schweidler, Alicia Walters, & Azadeh Zohrabi, *Who Pays? The True Cost of Incarceration on Families*, Ella Baker Center, 2015, 9.

<sup>36</sup> *Id.*; Gina Clayton, Endria Richardson, Lily Mandlin, & Brittany Farr, *Because She’s Powerful: The Political Isolation and Resistance of Women with Incarcerated Loved Ones*, Essie Justice Group, May 2018, 13; Joshua Page, Victoria Piehowski, & Joe Soss, *A Debt of Care: Commercial Bail and the Gendered Logic of Criminal Justice Pedation*, *The Russell Sage Foundation Journal of the Social Sciences* 5(1): 150–172, 2019.

<sup>37</sup> Only a few other states use bail schedules, such as Colorado, Indiana, and Louisiana. See e.g. Colorado Bond Schedules by Judicial District, Pretrial Release Task Force, Colorado Commission on Criminal & Juvenile Justice, Oct. 10, 2017; Bond Schedule By County, Indiana Public Defender Council, April 2019; Louisiana Code Crim. Proc. § 315.

<sup>38</sup> Sonya Tafoya, Public Policy Institute of California, *Pretrial Detention and Jail Capacity in California*, July 2015, 4. This statistic on national bail is cited in several reports and comes from

bail schedule, except for infractions and misdemeanors in the Traffic Code, which follow a statewide schedule set by the Judicial Council.<sup>39</sup> Some counties combine bail amounts for each charge and enhancement, referred to as bail “stacking,” while other counties only use the highest cash bail amount of all the charges.<sup>40</sup> As a result, bail schedule amounts vary widely from county to county.<sup>41</sup>

<b>California 2022 Bail Schedules</b>							
	Alameda	El Dorado	Fresno	Los Angeles	Monterey	Napa	<b>Range</b>
Robbery first-degree (PC § 211)	\$100k	\$50k	\$25k	\$100k	\$40k	\$100k	<b>\$25–100k</b>
Corporal injury to partner (PC § 273.5)	\$20-50k plus enhancements	\$50k	\$25k	\$50k	\$20k	\$25k	<b>\$20–50k</b>
Criminal threats (PC § 422)	\$20-50k	\$50k	\$20k	\$50k	\$30k	\$25k	<b>\$20–50k</b>
Residential burglary (PC § 459)	\$50k	\$50k	\$30k	\$50k	\$50k	\$100k	<b>\$30–100k</b>
Vehicle theft (Veh. Code § 10851)	\$25k	\$25k	\$15k	\$25k	\$15k	\$25k	<b>\$15–25k</b>

Source: County bail schedules.

Two federal district courts have found that the use of pre-arraignment bail schedules are unconstitutional because they fail to account for an arrested person’s ability to pay the cash bail amount. One case, which considered the system in San Francisco, was decided in March 2019 and, for people arrested for nonviolent/nonserious offenses, the remedy generally provides for courts to either make a bail determination within 18 hours or the arrested person is

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2009, which is the last year the federal State Court Processing Statistics provided data for felony defendants in 40 of the country’s largest 75 counties.

<sup>39</sup> Penal Code § 1269b(c); Vehicle Code § 40310.

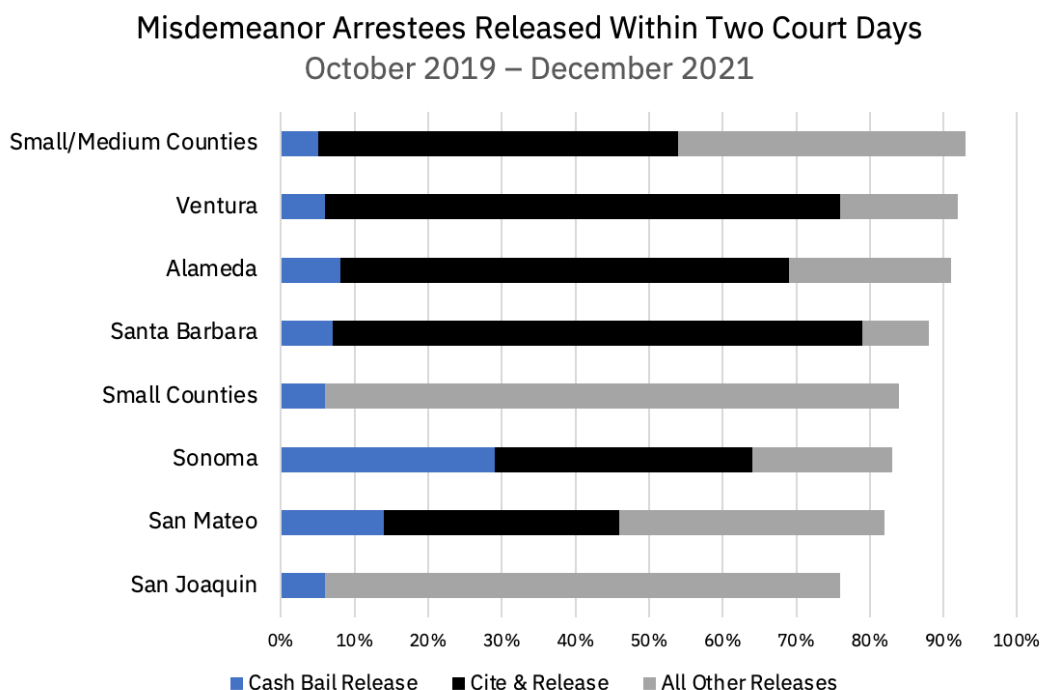
<sup>40</sup> See e.g. Superior Court of California County of Alameda, *2022 Misdemeanor and Felony Bail Schedule*, Apr. 30, 2022, 2.

<sup>41</sup> Pretrial Detention Reform Workgroup at 29.



released.<sup>42</sup> The remedy in the other case, from Sacramento County and decided in September 2022, has not yet been ordered.<sup>43</sup> The federal Ninth Circuit Court of Appeals has not reviewed the merits of either decision.<sup>44</sup>

Together, citation and release and the use of cash bail before arraignment account for a significant number of the people released soon after arrest, as the following figures show.



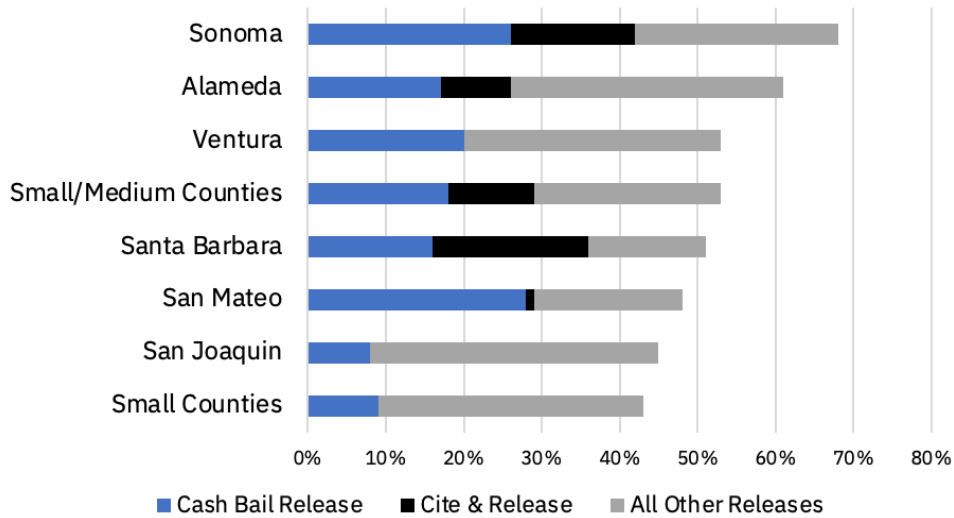
Source: Judicial Council of California, *SB 36: Pretrial Pilot Program Aggregated Data Report*, July 2022, Table 1a. Los Angeles, Tulare, and Sacramento Counties were excluded because they did not report standardized data. “All Other Releases” includes charges not filed or dismissed, convictions, zero bail releases, own recognizance releases, and unclear release type.

<sup>42</sup> *Buffin v. City and County of San Francisco*, Northern District of California, Case No. 15-cv-04959. The court’s order granting summary judgment issued March 4, 2019, and the order on remedy issued September 3, 2019. Arrested people will not be released if a pretrial assessment indicates that release is not recommended.

<sup>43</sup> *Welchen v. Bonta*, Eastern District of California, Case No. 16-cv-00185. The court’s order on summary judgment issued September 22, 2022.

<sup>44</sup> The Ninth Circuit ruled on fees in the case but did not address the merits. See *Buffin v. City and County of San Francisco*, 23 F.4th 951 (9th Cir. 2022).

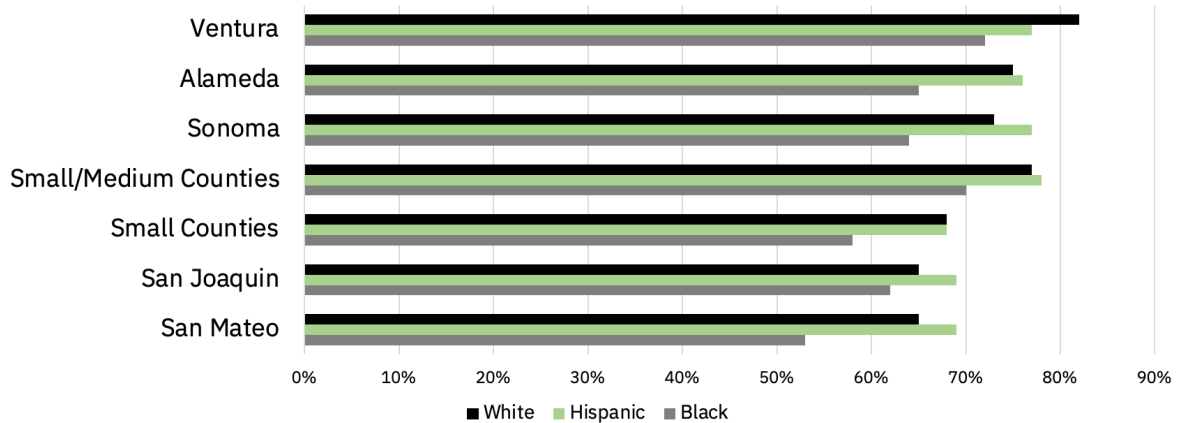
### Felony Arrestees Released Within Two Court Days October 2019 – December 2021



Source: Judicial Council of California, *SB 36: Pretrial Pilot Program Aggregated Data Report*, July 2022, Table 1b. Los Angeles, Tulare, and Sacramento Counties were excluded because they did not report standardized data. “All Other Releases” includes charges not filed or dismissed, convictions, zero bail releases, own recognizance releases, and “unclear release type.”

Data from the Judicial Council also shows variation by race in the proportion of arrestees released within two days:

### Proportion of All Arrestees Released Within Two Days By Race October 2019 – December 2021



Source: Judicial Council of California, *SB 36: Pretrial Pilot Program Aggregated Data Report*, July 2022, Tables 3a–c. Los Angeles, Tulare, and Sacramento Counties were excluded because they did not report standardized data.

## Court process

If a person has not been released from jail, the first court appearance, or arraignment, must occur “without unnecessary delay” but no more than 48 hours after arrest, excluding Sundays and holidays.<sup>45</sup> At arraignment, judges have discretion in setting the amount of cash bail — keeping it the same as the bail schedule or lowering or raising the amount, though they must find “unusual circumstances” to set a lower cash bail amount when the charges are serious or violent<sup>46</sup> — or releasing someone on their own recognizance or with certain conditions.<sup>47</sup>

In considering bail, courts are to consider “the protection of the public, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at trial or at a hearing of the case.”<sup>48</sup> People arrested for a misdemeanor offense are presumptively eligible for release on their own recognizance.<sup>49</sup>

Both the California and United States constitutions forbid “excessive” bail, but these limitations are rarely addressed by courts and seem to have had no impact on how cash bail amounts are set.<sup>50</sup>

The state constitution also allows courts to order “no bail,” or pretrial detention, in limited circumstances, though the rules for detention orders are unsettled as will be discussed below. The United States Supreme Court has explained that pretrial detention should be a “carefully limited exception.”<sup>51</sup>

The Penal Code allows a defendant to request review of a bail determination within five days of the initial decision<sup>52</sup> and the decision can be revisited later in the case — including by another judge — for “good cause.”<sup>53</sup> Immediate appeals of bail decisions are also available.<sup>54</sup>

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<sup>45</sup> Penal Code § 825(a)(1).

<sup>46</sup> Penal Code § 1275(c).

<sup>47</sup> Penal Code §§ 1269b(b), 1275. Courts are also required to have a magistrate available on call for setting bail orders. Penal Code § 810.

<sup>48</sup> Penal Code § 1275(a)(1). Consideration of “seriousness of the offense charged” is additionally supposed to be encompass “the alleged injury to the victim, and alleged threats to the victim or a witness to the crime charged, the alleged use of a firearm or other deadly weapon in the commission of the crime charged, and the alleged use or possession of controlled substances by the defendant.” Penal Code § 1275(a)(2). See also Penal Code § 1270.1(c) (additional considerations for deviating from the bail schedule or recognizance release for certain offenses).

<sup>49</sup> Penal Code § 1270(a).

<sup>50</sup> Cal. Const Art 1 § 12; U.S. Const., 8th Amendment.

<sup>51</sup> *United States v. Salerno*, 481 U.S. 739, (1987).

<sup>52</sup> Penal Code § 1270.2

<sup>53</sup> Penal Code § 1289. See also *In re Alberto*, 102 Cal.App.4th 421, 430 (2002).

<sup>54</sup> Penal Code § 1490; *In re McSherry*, 5 Cal.Rptr.3d 497, 499–500 (2d Dist. 2003).

**Probable cause determinations**

In addition to reviewing bail, courts must also comply with the Fourth Amendment requirement that a judge promptly — and no more than 48 hours after arrest — review every warrantless arrest and determine if it was supported by probable cause. Though the United States Supreme Court addressed this requirement more than thirty years ago, California has not incorporated it into the Penal Code.<sup>55</sup>

**Release decisions for violations of probation**

Until this year, courts commonly issued “no bail” arrest warrants for persons who violated the terms of community supervision.<sup>56</sup> However, AB 1228 (Lee), which went into effect on January 1st, now requires courts, among other things, to release people arrested for probation violations on their own recognizance unless there is clear and convincing evidence that conditions are necessary to protect the public and ensure return to court. People on other types of community supervision, including parole and post-release community supervision, are excluded from this reform and still subject to “no bail” holds.

**Electronic monitoring**

Some courts have increasingly relied on electronic monitoring, which uses a GPS-equipped ankle monitor to track a person’s location. A recent study of Los Angeles County showed an increase from 24 people placed on electronic monitoring in 2015 to 1,284 people in 2021.<sup>57</sup> In San Francisco, the Sheriff estimates that 701 people were on electronic monitoring in 2018, which more than doubled to 1,720 people in 2021.<sup>58</sup>

There is no evidence that electronic monitoring is effective or reduces incarceration.<sup>59</sup> In fact, monitoring increases the risk of technical violations — such as failing to charge the device or going to the doctor or work without pre-approval — which can send someone back to jail. The Legislature recently acknowledged some of these issues in the Budget Act of 2021, noting electronic monitoring funded under SB 129 “may only be used in limited cases after other less restrictive interventions are deemed insufficient to enhance public safety and to ensure the defendant’s return to court.”<sup>60</sup> The Governor also recently

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<sup>55</sup> See *County of Riverside v. McLaughlin*, 500 US. 44 (1991).

<sup>56</sup> Pretrial Detention Reform Workgroup at 55.

<sup>57</sup> Alicia Virani, *Pretrial Electronic Monitoring in Los Angeles County: 2015 through 2021*, UCLA School of Law Criminal Justice Program, 2.

<sup>58</sup> This data is obtained from a lawsuit recently filed against the San Francisco Sheriff’s Office challenging the constitutionality of certain rules of the electronic monitoring program. *Simon et al v. Miyamoto*, Northern District of California, Case No. 22-601686, Complaint, Sept. 8, 2022, 15.

<sup>59</sup> Belur et al., *A Systematic Review of the Effectiveness of the Electronic Monitoring of Offenders*, 68 J. of Crim. Just. (2017); James Kilgore, Emmett Sanders, & Kate Weisburd, *The Case Against E-carceration*, Inquest, July 30, 2021

<sup>60</sup> SB 129 (Skinner 2021), Sec. 4, Item 11.

signed AB 2658 (Bauer-Kahan), which addresses juvenile cases and, among other reforms, requires a court to hold monthly hearings to review the conditions of electronic monitoring and to consider whether less restrictive conditions of release are available.

In many states, people on electronic monitoring are required to pay for the monitoring and failure to pay can result in extended supervision, additional fees or even jail.<sup>61</sup> In recent years, California has twice adopted legislation that prohibited the imposition of administrative fees for electronic monitoring, including by private companies,<sup>62</sup> but some counties may still be charging fees.<sup>63</sup>

### ***Humphrey***

In March 2021, the California Supreme Court unanimously held in *In re Humphrey* that conditioning pretrial release solely on whether a person can afford cash bail is unconstitutional.<sup>64</sup> Instead, if a court determines that financial conditions of release are required to protect the state's interests, and concludes that imposing cash bail would protect the public and ensure an arrested person's appearance in court, the judge must consider the person's ability to pay and set cash bail at a level "the arrestee can reasonably afford."<sup>65</sup>

While *Humphrey* had the potential to end the practice of using unaffordable cash bail amounts as de facto detention orders, experts and practitioners consulted by Committee staff suggest that it has had minimal impact.<sup>66</sup> Appellate courts have also noted confusion in the trial courts.<sup>67</sup> And in San Francisco (which began adhering to *Humphrey* in January 2018 after the initial appellate decision) research from the California Policy Lab found that the overall likelihood of detention declined from 25% to 22% and the total jail population remained relatively stable.<sup>68</sup>

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<sup>61</sup> Fines & Fees Justice Center, *A 50-State Survey of the Costs Assessed to People on E-Supervision*, Sept. 2022, 1.

<sup>62</sup> Penal Code §§ 1208.2(b)(1), 1208.2(b)(2). The latter provision was part of AB 199 (Committee on Budget 2022).

<sup>63</sup> *50-State Survey* at 6.

<sup>64</sup> *In re Humphrey*, 11 Cal.5th 135, 143 (2021).

<sup>65</sup> *Id.* at 151.

<sup>66</sup> See generally, Silicon Valley De-Bug, *Discord and Inaction: Bail and Detention Decisions One Year After Humphrey*, 3, 5, May 4, 2022 (cash bail was set in 68% of cases observed in the Bay Area in February 2022 and less than 1% of people had an explicit ability-to-pay determination made by the court).

<sup>67</sup> See e.g. *In re Brown*, 76 Cal.App. 5th 296, 306 (2022).

<sup>68</sup> Johanna Lacoë, Alissa Skog, & Mia Bird, *Bail Reform in San Francisco: Pretrial release and intensive supervision increased after Humphrey*, California Policy Lab, May 25, 2021, 1.

## Unresolved Legal Issues

Crucial questions remain unresolved after *Humphrey* about how California law addresses pretrial release — and in particular under what circumstances someone may be detained before trial without bail.

### Conflicting constitutional provisions on pretrial detention

The California constitution addresses pretrial detention in two separate places, both in article 1:

- Section 12 provides that “[a] person shall be released on bail by sufficient sureties.”<sup>69</sup> This provision is understood as creating a right to bail release, except in the specified circumstances where a court can order someone detained pretrial.<sup>70</sup> These circumstances include capital crimes and other specified felony offenses — though that exact scope is uncertain, as addressed below — where people present risks of causing “great bodily harm” to others.<sup>71</sup> This section does not authorize pretrial detention for any misdemeanor offense.
- Section 28(f)(3) takes a different approach. It uses “may” instead of “shall” in describing when people can be released on bail. This phrasing may make pretrial release entirely a discretionary decision by the court instead of limiting detention to specified circumstance as Section 12 does.<sup>72</sup>

The California Supreme Court — including in *Humphrey* — has acknowledged that the rules from Section 12 and Section 28(f)(3) may conflict but has not resolved the issue.<sup>73</sup> This situation arose because both Section 12 and Section 28 were created by successful voter initiatives in the same election in 1982.<sup>74</sup> Parts of the voter initiatives conflicted and the California Supreme Court determined

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<sup>69</sup> Cal. Const. Art. 1 § 12

<sup>70</sup> See, e.g., *In re White*, 9 Cal.5th 455, 462 (2020); *In re Christie*, 92 Cal.App.4th 1105, 1109 (2d District 2001); *In re York*, 9 Cal.4th 1133, 1139–40 (1995). See also Penal Code § 1271 (for non-capital offenses, defendant “may be admitted to bail before conviction, as a matter of right”).

<sup>71</sup> Cal. Const. Art. 1 §§ 12(b) & (c).

<sup>72</sup> See *People v. Standish*, 38 Cal.4th 858, 877 (2006).

<sup>73</sup> *Humphrey*, 11 Cal. 5th at 155, n.7. See also *In re White*, 9 Cal. 5th 455, 470 (2020) (“Nor do we decide how section 12(b) and section 28, subdivision (f)(3) interact more broadly.”)

<sup>74</sup> See *Standish*, 38 Cal.4th at 874–878. The California constitution has provided a right to bail since 1849. Until 1974, article I, § 6 of the constitution stated that “[a]ll persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great. Excessive bail shall not be required.” A 1974 voter initiative added a court’s ability to allow “own recognizance” releases. Voter initiatives in 1982 were the first time the constitution allowed for preventative detention in non-capital cases. See Pretrial Detention Reform Workgroup at 19–23.

that Section 28 had no effect because Section 12 had received more votes.<sup>75</sup> While legally inoperative, the relevant portions of Section 28 remained in the constitution and were amended by another voter initiative in 2008, though the ballot materials for the 2008 initiative did not mention overruling Section 12.<sup>76</sup> The California Supreme Court recently ordered an appellate court to consider the interplay of these two constitutional provisions.<sup>77</sup>

### **Eligibility for pretrial detention under Section 12(b)**

Section 12(b) allows a court to order pretrial incarceration of people who present a risk of causing “great bodily harm to others” if they are charged with “[f]elony offenses involving acts of violence on another person.”<sup>78</sup> There appears to be no case law defining “offenses involving acts of violence on another person.”<sup>79</sup> The California Supreme Court recently ordered an appellate court to consider this issue.<sup>80</sup>

### **Procedures for court considering detention under Section 12(b)**

Section 12(b) further specifies that there must be “clear and convincing evidence” of that risk of great bodily harm before a court can order pretrial detention. There is limited guidance about what types of evidence — such as proffers by the parties — are appropriate for courts making these determinations to consider. The California Supreme Court is currently reviewing this issue.<sup>81</sup>

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<sup>75</sup> *Standish*, 38 Cal.4th at 874–878.

<sup>76</sup> Proposition 9 (2008).

<sup>77</sup> *In re Kowalczyk* (California Supreme Court Case No. S274181) (on June 22, 2022, the California Supreme Court ordered the First Appellate District to consider “which constitutional provision governs the denial of bail in noncapital cases — article I, section 12, subdivisions (b) and (c), or article I, section 28, subdivision (f)(3), of the California Constitution — or, in the alternative, whether these provisions can be reconciled.”). At least three courts have held or strongly suggested that Section 28(f)(3) does not negate Section 12’s broader right to bail. See *In re Humphrey*, 19 Cal.App.5th 1006, 1046–48 (1st Dist. 2018); *In re Ung*, 2020 WL 4582595, \*4 (6th Dist. 2020); *In re Cardona*, Los Angeles Superior Court, Case No. 2SV02027, 6–7 (Sept. 8, 2022).

<sup>78</sup> People charged with “felony sexual assault offenses on another person” may also be detained pretrial under Section 12(b). And, under Section 12(c), anyone charged with a felony who “has threatened another with great bodily harm” may also be incarcerated pretrial if “there is a substantial likelihood that the person would carry out the threat if released.”

<sup>79</sup> In cases arising under Section 12, the issue of whether an offense qualifies is rarely addressed by the court. See, e.g., *In re White*, 9 Cal.5th 455, 463 (2020) (defendant did not “dispute that he was charged with one or more qualifying felonies involving acts of violence or sexual assault.”).

<sup>80</sup> *In re O’Connor* (California Supreme Court Case No. S273967) (on June 22, 2022, the California Supreme Court ordered the Sixth Appellate District to consider this issue).

<sup>81</sup> *In re Harris* (California Supreme Court Case No. S272632).

### **Ability to pay determinations**

Though *Humphrey* specified that a court must consider someone's ability to pay cash bail, it did not address how a court should make this determination.<sup>82</sup> For example, can funds from family members or friends be considered? Should a court consider the entire bail amount or just the typical 10% premium payable to a bail bond agent? What evidence on these issues is permissible — would a defendant's sworn statement suffice? While some sections of the Penal Code address ability-to-pay determinations in other contexts, none do it for pretrial release.<sup>83</sup> Legislation was introduced in 2021 that created "ability to pay" standards, but it was not successful.<sup>84</sup>

## **Results in Other States**

### **New Jersey**

In 2017, New Jersey implemented substantial changes to its system, moving from a money-based bail system to a risk-based system of pretrial detention and release.<sup>85</sup> While cash bail is still available, it is now used very rarely.<sup>86</sup> People released under the risk-based system are no more likely to be charged with a new offense or fail to appear in court than defendants released on bail under the old system.<sup>87</sup> In addition:

- In the two years after these changes, crime dropped in every category, including a 32% drop in homicides, a 30% drop in burglaries, and a 37% drop in robberies.<sup>88</sup>
- The jail population dropped by 47% from 2012 to 2019.<sup>89</sup>
- The percentage of people in jail on bail of \$2,500 or less dropped from 12% in 2012 to just 0.2% in 2020.<sup>90</sup>

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<sup>82</sup> *Humphrey*, 11 Cal. 5th at 151.

<sup>83</sup> See, e.g., Penal Code § 3006(b).

<sup>84</sup> The bill, SB 262 (Hertzberg) defined "ability to pay" as "the payer's present ability with income or assets available to them to pay the specified amount without borrowing money, selling personal property, obtaining a loan, taking money from family or friends, accessing a means tested public benefit in which they are enrolled, or paying a bond premium."

<sup>85</sup> The reform was motivated in part by a study in 2013 that showed 12% of New Jersey's jail population was being held in jail because they could not afford bail of \$2,500 or less. Diana Dabruzzo, *New Jersey Set Out to Reform Its Cash Bail System. Now, the Results Are In*, Arnold Ventures, Nov. 14, 2019.

<sup>86</sup> New Jersey Courts, *Annual Report to the Governor and the Legislature (Jan. 1–Dec. 31, 2020)*, Oct. 2021, 2.

<sup>87</sup> *Id.* at 3.

<sup>88</sup> Rebecca Ibarra, *Crime Rates Plunge in New Jersey, And Bail Reform Advocates are Gloating*, WNYC News, Nov. 28, 2018.

<sup>89</sup> New Jersey Courts, *Annual Report*, 18.

<sup>90</sup> *Id.* at 19.



- The percentage of people re-arrested and charged has held at 13% from 2017 to 2019 and fewer than 1% were charged with new serious offenses.<sup>91</sup>
- By 2019, the court appearance rate passed 90% for the first time.<sup>92</sup>

### **New York**

In April 2019, the New York State Legislature passed sweeping reforms to state bail laws. One year later, the state legislature rolled back some of the reforms, which took effect in July 2020.<sup>93</sup> While the number of people subject to bail significantly declined, the average bail amounts have risen, despite ability to pay standards.<sup>94</sup>

Recent reports from both the New York City Comptroller and the state Division of Criminal Justice Services found that the failure to appear rate and pretrial re-arrest rates have largely remained stable pre- and post-bail reform (for all types of re-arrests, including violent felonies, non-violent felonies, and misdemeanors):

- In New York City, the failure to appear rate declined from 15% in 2019 to 9% in the first 9 months of 2021.<sup>95</sup>
- In the rest of the state, the failure to appear rate remained relatively stable at 17% in 2019 to 18% in the first 9 months of 2021.<sup>96</sup>
- The rearrest rate in the first 180 days after arraignment was 19% in 2019 and 20% in the first 9 months of 2021 in New York City. In the rest of the state it increased from 16% to 21%, although the overall number of cases went down.<sup>97</sup>

### **Harris County (Houston), Texas**

A class action filed in federal court in Harris County, Texas, alleged that the misdemeanor bail system, which largely relied on cash bail schedules, was unconstitutional. The resulting settlement in 2019 reformed the misdemeanor bail system and allowed for pretrial release for most people charged with misdemeanor crimes.<sup>98</sup>

- In the two years following the consent decree, there are less people in the misdemeanor system, fewer people coming back into the system, and

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<sup>91</sup> *Id.* at 8-9.

<sup>92</sup> *Id.* at 10.

<sup>93</sup> New York City Comptroller, *NYC Bail Trends Since 2019*, Mar. 2022, 2.

<sup>94</sup> *Id.*

<sup>95</sup> New York State Division of Criminal Justice Services, *Supplemental Pretrial Release Data Summary Analysis: 2019–2021*, Sept. 21, 2022, slide 23.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at slides 25–27.

<sup>98</sup> *O'Donnell et al. v. Harris County et al.*, Case No. 16-cv-01414, Southern District of Texas. The Consent Decree was filed on Nov. 21, 2019.

recidivism rates have remained flat with no adverse impact on public safety.<sup>99</sup>

- Another analysis found that guilty plea rates fell by 15%, the likelihood of jail fell by 17%, the average sentence length fell by 15%, and there was no measurable increase in new cases for the people who had been released.<sup>100</sup>

### **Other forms of bail**

In some states, courts may set partially secured bonds — which require payment to the court of a refundable 10% (or less) of the bail amount— or unsecured bonds, which require no upfront payment.<sup>101</sup> Research has shown that these bonds are just as effective at achieving public safety and appearance in court as secured bonds provided by commercial bail agents.<sup>102</sup>

Though California does not currently have such a system, a statewide pilot project in the early 1980s allowed people arrested for misdemeanors to be released after depositing 10% of the bond with the court and signing a personal appearance bond for the remainder.<sup>103</sup>

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<sup>99</sup> Monitoring Pretrial Reform in Harris County, *Fourth Report of the Court-Appointed Monitor*, Mar. 3, 2022; Matt Keyser, *Misdemeanor Cases Steadily Declining Following Bail Reform in Harris County*, National Partnership for Pretrial Justice, Mar. 21, 2022.

<sup>100</sup> Paul Heaton, *The Effects of Misdemeanor Bail Reform*, Quattrone Center for the Fair Administration of Justice, Aug. 16, 2022.

<sup>101</sup> At least New York, Kentucky, North Dakota, South Carolina, Ohio, Indiana, and Alaska all allow for release through partially secured or percent bonds, which are payable to the court and are refundable minus a small court fee. Alaska Stat. § 12.30.020; Ky. Rev. Stat. Ann. §§ 431.520, 431.530; N.D.R. Crim. P. 46(a)(2)(K); N.Y. Crim. Proc. Law § 500.10(18)-(19); S.C. Code Ann. § 17-15-15(A).

<sup>102</sup> Jones, *Unsecured Bonds* at 3; Insha Rahman, *Against the Odds: Experimenting with Alternative Forms of Bail in New York City's Criminal Courts*, Vera Institute of Justice, Sept. 2017; Claire M.B. Brooker, Michael R. Jones, Timothy R. Schnacke, Pretrial Justice Institute, *The Jefferson County Bail Project: Impact Study Found Better Cost Effectiveness for Unsecured Recognizance Bonds Over Cash and Surety Bonds*, June 2014.

<sup>103</sup> The system was created by AB 2 (Berman 1979).

### Areas for Further Exploration

The Committee may wish to consider the following proposals to address the issues raised in this memorandum. Ending cash bail is not addressed because, as addressed above, the process for enacting such a change is highly uncertain.

#### Cash Bail

- **Require Judicial Council to develop a statewide bail schedule.** Each of the state's 58 counties set their own schedule and the amounts vary widely. Setting a statewide bail schedule with input from stakeholders and guided by evidence-based practices would limit the financial burdens placed on people who have to pay for their release and promote uniformity throughout the state.
- **Create a way to pay or promise to pay cash bail directly to the court.** As other states do, allow courts to accept an arrested person's promise to pay cash bail directly to the court, whether through a 10% (or less) refundable deposit or a written promise.

#### Codify and Clarify *Humphrey*

- **Codify *Humphrey's* holding that cash bail may only be set after considering all other nonfinancial conditions.** *Humphrey* held that after a court deems a person a flight risk or a danger to public or victim safety, the court must first consider whether conditions other than cash bail may protect the state's interests.<sup>104</sup> If nonfinancial conditions of release cannot reasonably satisfy those interests, only then may the court set cash bail at an amount the person can afford.<sup>105</sup> Yet confusion remains in the trial courts about this sequence<sup>106</sup> and the Penal Code could also contain a statement setting forth this rule.
- **Create standards and procedures for determining ability to pay.** Since *Humphrey*, courts have been left without clear guidance how to determine a person's ability to pay cash bail. In addition, the Penal Code could contain a statement that cash bail should not be set at an amount that the court intends an arrested person not to pay.
- **Create a detention standard in the Penal Code.** Regardless of how the questions about Section 12 or 28 are resolved, there is space for the Penal Code to specify the rules for when courts can detain someone without

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<sup>104</sup> *Humphrey*, 11 Cal.5th at 154.

<sup>105</sup> *Id.*; *Brown*, 76 Cal.App.5th at 307–08.

<sup>106</sup> *Id.* at 306.

cash bail. These rules could be based on the standard in Section 12 and include what circumstances make someone eligible for detention and the specific factual findings a judge must make on the record before detention is permissible, including that no condition or combination of conditions of release would safeguard against a substantial likelihood of great bodily harm to others.

### Other Pretrial Issues

- **Provide guidance on electronic monitoring and other conditions of release.** In SB 129 and AB 2658 the Legislature recently indicated their support on limitations of electronic monitoring.<sup>107</sup> Codifying this language into the Penal Code would ensure that courts consider non-restrictive measures first and review conditions at regular intervals. Electronic monitoring and other conditions of release should also not be a financial burden and any costs related to conditions of release should not be the responsibility of the arrested person, except in unusual circumstances.
- **Arraignment — including judicial bail determinations — should occur no later than 48 hours of arrest without exceptions.** For people who remain in jail, current law allows an arraignment (which typically includes a judicial determination of bail) to occur 48 hours after arrest not including Sundays and holidays. The exceptions for Sundays and holidays can be removed, which aligns California with other jurisdictions that provide prompt access to counsel, arraignment, and individualized bail determinations.
- **Codify the Fourth Amendment requirement of a prompt judicial review of probable cause for warrantless arrests.** The 31-year old requirement from *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), that a court promptly determine whether an arrest was supported by probable cause should be in the Penal Code and courts should be required to make a record of the determination in each case.
- **Extend AB 1228 to people on all forms of supervision.** One of the Pretrial Detention Workgroup's recommendations was to apply pretrial release and detention screening procedures to persons charged with violations of

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<sup>107</sup> Illinois recently imposed limits on the use of electronic monitoring for people on pretrial release, limiting it to cases where the person is eligible for detention and where no other less restrictive condition of release would ensure the appearance of the defendant or it is necessary to protect an identifiable person from imminent threat of serious harm. H.B. 3653, 101st Gen. Assemb., Reg. Sess. § 110-5(g) (Ill. 2021).

all forms of supervision.<sup>108</sup> While AB 1228 extended several reforms to persons charged with probation violations, persons charged with violations of parole, postrelease community supervision, and mandatory supervision were not included.

### **Conclusion**

Policies on cash bail and pretrial release and detention are complex, but recent experience in California and other states that have undertaken pretrial reform show that the state can make release decisions that treat people fairly, protect the public, and ensure people return to court. The Committee should consider possible recommendations that support these important interests.

Respectfully submitted,

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<sup>108</sup> Pretrial Detention Workgroup at 55.