



## Judicial Council of California

455 Golden Gate Avenue · San Francisco, California 94102-3688

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# INVITATION TO COMMENT

## SP26-03

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### **Criminal Law: Pretrial Release or Detention**

#### **Invitation to Comment Details**

**Proposed Rules, Forms, Standards, or Statutes**

Revise form CR-104

**Action Requested**

Review and Submit Comments by June 24, 2026, to [invitations@jud.ca.gov](mailto:invitations@jud.ca.gov)

**Proposed by**

Criminal Law Advisory Committee  
Hon. Lisa Rodriguez, Chair

**Proposed Effective Date**

January 1, 2027

**Contact**

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*(This proposal has not been approved by the Judicial Council and is not intended to represent the views of the council, its Rules Committee, or its Legislation Committee. It is circulated for comment purposes only.)*

#### **Executive Summary and Origin**

In its recent decision in *In re Kowalczyk*, the California Supreme Court provided important guidance regarding the constitutional parameters for pretrial release or detention. These clarifications include confirming *In re Humphrey*'s framework for pretrial release based on public and victim safety; specifying the circumstances under which a court may order the detention of a defendant prior to trial; and generally setting reasonable and attainable monetary bail based on an individualized assessment of the totality of the circumstances, except for cases falling under article I, section 12 of the California Constitution. To assist courts with making the appropriate findings and orders for pretrial release or detention as articulated in these recent decisions and in line with statutory and constitutional requirements, the Criminal Law Advisory Committee recommends amending *Findings and Orders for Pretrial Release or Detention* (form CR-104).

## Background

### *In re Humphrey* and *In re Kowalczyk*

In *In re Humphrey* (2021) 11 Cal.5th 135 (*Humphrey*), the Supreme Court held that the common practice of detaining defendants based solely on their financial condition violated state and federal equal protection and due process principles<sup>1</sup> and articulated a framework for pretrial release based on public and victim safety. Specifically, the court outlined the following considerations for trial courts when determining pretrial release or detention:

- Whether nonfinancial conditions of release may reasonably protect the public and victim or reasonably assure the arrestee’s presence at trial.<sup>2</sup>
- If nonfinancial conditions alone will be insufficient, whether a financial condition, such as cash bail, 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 if there is no valid basis to detain must set bail at an amount the defendant can reasonably afford.<sup>3</sup>
- 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 and victim safety and ensure arrestee appearance.<sup>4</sup>

In addition, the court’s reasons for its decision on pretrial release or detention must be stated in the record and in the court’s minutes.<sup>5</sup>

While *Humphrey* requires pretrial release or 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).<sup>6</sup>

The Supreme Court addressed these issues in *In re Kowalczyk* (Apr. 30, 2026, No. S277910) \_\_ Cal.5th \_\_ (*Kowalczyk*).<sup>7</sup> (See Link A). First, the court held that the two sections can be reconciled. In noncapital cases, pretrial detention is only authorized for offenses specified in

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<sup>1</sup> *In re Humphrey, supra*, 11 Cal.5th at pp. 143, 151.

<sup>2</sup> *Id.* at p. 154.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Id.* at pp. 143, 153.

<sup>5</sup> Cal. Const., art. I, § 12(a); *In re Humphrey, supra*, 11 Cal.5th at pp. 155–156.

<sup>6</sup> *In re Humphrey, supra*, 11 Cal.5th at p. 155, fn. 7.

<sup>7</sup> All subsequent page references are from the opinion available at *In re Kowalczyk* (Apr. 30, 2026, No. S277910) \_\_ Cal.5th \_\_.

article I, section 12(b) and (c) of the California Constitution.<sup>8</sup> While section 28(f)(3) requires courts to prioritize public and victim safety when setting bail, it does not permit pretrial detention for offenses other than those specified in section 12(b) and (c).<sup>9</sup> Second, the court held that if a trial court finds that monetary bail is required, it must be set at a reasonable amount, based on an individualized assessment of the totality of the circumstances,<sup>10</sup> including the defendant’s financial situation.<sup>11</sup> The burden is on the defendant to demonstrate an inability to pay with reliable evidence.<sup>12</sup> Finally, courts may not set artificially high or objectively unattainable bail to effectuate pretrial detention when a detention is not authorized under article I, section 12 of the California Constitution.<sup>13</sup>

## **Related Judicial Council Materials**

To assist courts to comply with the requirements of *Humphrey* by ensuring that all matters considered in the decision-making process are substantiated, documented, and transparent, the Judicial Council approved an optional form, Findings and Orders for Pretrial Release or Detention (form CR-104), effective January 1, 2026. In light of *Kowalczyk*, the committee proposes further revising form CR-104.

## **The Proposal**

The committee proposes the following revisions to form CR-104 to incorporate the holdings in *Kowalczyk*:

- Add to item 4f that the court orders detention without bail, in addition to finding risk of flight or public safety.
- Add a reference to article I, section 12 of the California Constitution in item 4g, which allows the parties to present additional evidence to support a denial of bail.
- Revise item 7c to state a court’s order of monetary bail and add associated findings that the amount is reasonable under the totality of the circumstances, including the defendant’s financial situation, and that the court considers bail in this amount to be reasonably attainable for the defendant.

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<sup>8</sup> *In re Kowalczyk, supra*, \_\_Cal.5th\_\_ [pp. 2–3].

<sup>9</sup> *Id.* at p. 3.

<sup>10</sup> “These circumstances include, ‘the protection of the public as well as the victim, the seriousness of the charged offense, the arrestee’s previous criminal record and history of compliance with court orders, and the likelihood that the arrestee will appear at future court proceedings.’” (*Ibid.*, quoting *In re Humphrey, supra*, 11 Cal.5th at p. 152.)

<sup>11</sup> *Ibid.*

<sup>12</sup> *Id.* at pp. 40–41.

<sup>13</sup> *Id.* at p. 32.

- Remove item 8d, which allowed a court to cite to other legal authority outside of article I, section 12 of the California Constitution to detain a defendant prior to trial.<sup>14</sup>

The committee proposes the following revisions to form CR-104 to simplify the format of the form, and clarify existing items:

- Update item 3a(1) to distinguish whether the defendant has a history of failures to appear that is “significant.”
- Rephrase item 3a(3) for greater clarity.
- Delete subitem (3) from item 3b and incorporate its content into item 3a(10) and renumbered 3b(9).
- Update renumbered item 3b(10) to include an instruction to describe any mitigating factors that were present.
- Update the title of item 4 as “General Findings for Release or Detention,” and modify item 4c, d, e, and f to clarify that the referenced additional form items must be completed when applicable.
- Remove unnecessary checkboxes in item 4e.
- Clarify in items 4e and 4f that the court must make findings on the defendant’s flight risk and/or public safety risk by clear and convincing evidence.
- Move the mandatory conditions for pretrial release in item 7 to item 5 and update the title to “Mandatory Conditions for All Pretrial Release Orders (Nonfinancial and Financial).”
- Renumber items 5 and 6 to 6 and 7 and update the titles for greater accuracy.
- Update item 6 on nonfinancial conditions to remove a reference to Pretrial Services and replace it with a fill-in item.
- Delete from item 6, a finding that no nonfinancial conditions are sufficient to protect the government’s interests, as duplicative of item 4e.
- Delete text preceding lettered items in item 7 and revise item 7a and 7b, addressing findings and orders for monetary bail, for clarity and to remove duplication.
- Update the title to item 8 to “Additional Findings and Orders for Detention.”

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<sup>14</sup> Item 8d was included in form CR-104 while *Kowalczyk* was pending for judges who found it necessary to set preventively high bail or deny bail under article I, section 28(f)(3).

- Remove item 8a, a finding that the court finds clear and convincing evidence that the defendant is a flight and/or public safety risk, as duplicative of the findings in item 4f.
- Add clarifying language to item 8b(2).

### **Alternatives Considered**

The committee discussed proposing a rule of court to provide trial courts with guidance on pretrial release, conditions of bail, and detention, considering *Humphrey*, *Kowalczyk*, and other recent cases addressing pretrial release or detention. However, the committee decided to delay action until further case law clarifies additional issues relevant to setting monetary bail.

The committee also considered an alternate option for item 7c. Nine out of fourteen committee members preferred the option that is reflected in the proposed form, which directs a court to set monetary bail at “an amount it finds reasonable under the totality of the circumstances, including the defendant’s financial situation. The court considers bail in this amount to be reasonably attainable for the defendant.” The alternate option would also allow a court, after making the appropriate findings, to order a specific amount of monetary bail. The option would state that when the court orders monetary bail, it should be set at an amount that “is reasonably attainable for the defendant and designed to effectuate a defendant’s general right to pretrial release.”<sup>15</sup> All committee members felt that both options are accurate statements of the law, but the majority preferred the style and emphasis of the first option. The committee requests specific comment on whether the alternate option referring to a bail amount designed to effectuate pretrial release provides helpful guidance to trial courts and is preferred over the one proposed by the committee.

### **Fiscal and Operational Impacts**

Any fiscal and operational impacts around pretrial release or detention decisions would be due to the application of current law, not the form. The form is intended to assist courts with implementing the factors from *Humphrey* and the requirements of *Kowalczyk* in a clear and uniform manner.

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### **Request for Specific Comments**

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?
- Does the alternate option for item 7c, requiring bail to be set in an amount that is reasonably attainable for the defendant and designed to effectuate a defendant’s general

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<sup>15</sup> See *In re Kowalczyk*, *supra*, \_\_ Cal. 5th \_\_ [p. 42] (“While the amount of bail need not be easily affordable or convenient to the defendant, the court must set bail in an amount that is consistent with, and designed to effectuate, a defendant’s general right to pretrial release, subject only to the exceptions set forth in section 12.”)

right to pretrial release, provide helpful guidance to courts using the form? If so, is it preferred to the option proposed by the committee?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- 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?
- Would two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

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### **Attachments and Links**

1. Form CR-104, at pages 7–10
2. Link A: [\*In re Kowalczyk\* \(Apr. 30, 2026, No. S277910\) \\_\\_Cal.5th\\_\\_](#)

<b>SUPERIOR COURT OF CALIFORNIA, COUNTY OF</b> STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	<i>FOR COURT USE ONLY</i>  <b>DRAFT</b> <b>5/20/2026</b> Not approved by the Judicial Council
PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	CASE NUMBER:
<b>FINDINGS AND ORDERS FOR PRETRIAL RELEASE OR DETENTION</b>	<i>FOR COURT USE ONLY</i> Date: Time: 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 **significant** prior history of failures to appear.
    - (a)  Has always made prior court appearances.



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- (b)  Has a minimal history of failing to appear.
- (c)  Has a significant history of *(number)*: \_\_\_\_\_ failures to appear.
- (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 **ties to the community that are:**
  - minimal
  - significant, 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 **evidence that defendant**  **does**  **does not present a flight risk** *(describe)*:

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 *(describe)*:
  - (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** have a history of violence.
- (4)  Defendant's criminal record demonstrates a history of violence.
- (5)  Defendant is alleged to have violated a restraining order.
- (6)  Defendant has a history of violating restraining orders.
- (7)  Defendant has a history of untreated mental health or substance abuse issues.
- (8)  The crime involved a large quantity of a controlled substance *(describe)*:
- (9)  **Other evidence that defendant**  **does**  **does not present a danger to public safety** *(describe)*:



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(10)  Mitigating factors were present (*describe*):

**4. General Findings 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 5.)
- 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. (Complete item 6.)
- 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. (Complete item 6.)
- e.  finds by clear and convincing evidence that the 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, coupled with the least restrictive nonfinancial conditions. (Complete items 6 and 7.)
- f.  finds by clear and convincing evidence that the defendant presents  a flight risk and/or  a public safety risk and must be detained without bail, and finds by clear and convincing evidence there are no less restrictive conditions that will ensure a return to court or protect the public and victim(s). (Complete 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 under article 1, section 12 of the California Constitution.
  - (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. Mandatory Conditions for All Pretrial Release Orders (Nonfinancial and Financial)**

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.

**6. Additional Findings and Orders for Nonfinancial Conditions of Release**

- The defendant must abide by 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 victim:
  - a.  pretrial monitoring by (*agency name*):
  - b.  other conditions:

**7. Additional Findings and Orders for Financial Condition of Release (Monetary Bail)**

- a.  In making the finding under item 4e, the court considered the following nonfinancial conditions:
  
- b.  The court finds those are insufficient to protect the public or ensure return because:



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- c.  The court orders monetary bail in the amount of \$ \_\_\_\_\_, which is an amount it finds reasonable under the totality of the circumstances, including the defendant's financial situation. The court considers bail in this amount to be reasonably attainable for the defendant.
- d. In addition to monetary bail, the court also orders the nonfinancial conditions set forth in item 6.

**8. Additional Findings and Orders for Detention**

a. 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:

- b.  Defendant is to be held without bail pursuant to article 1, 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 person or felony sexual assault offense on another person, 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.

Date:

\_\_\_\_\_  
Judicial Officer