



Judicial Council of California

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

www.courts.ca.gov/policy-administration/invitations-comment

INVITATION TO COMMENT

SPR25-11

Title

Criminal Law: Findings and Orders for Pretrial Release or Detention

Action Requested

Review and submit comments by May 23, 2025

Proposed Rules, Forms, Standards, or Statutes

Approve form CR-104

Proposed Effective Date

January 1, 2026

Proposed by

Criminal Law Advisory Committee
Hon. Lisa Rodriguez, Chair

Contact

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

Executive Summary and Origin

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 and recording the appropriate findings and orders for pretrial release as articulated in *In re Humphrey* and the California Constitution, the Criminal Law Advisory Committee proposes a new form for optional use.

Background

In *In re Humphrey*, the Supreme Court observed that pretrial detention should be a limited exception to the norm of pretrial release¹ and articulated a framework for bail determinations based on public and victim safety:

- Whether nonfinancial conditions of release may reasonably protect the public or victim and assure future court appearances by the defendant.²

¹ *In re Humphrey*, *supra*, 11 Cal.5th at p. 156.

² *Id.* at p. 154.

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 It is circulated for comment purposes only.

- 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.³
- 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.⁴
- 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.⁵
- 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.⁶ In the latter case, the court may set no bail or preventively high bail.⁷

Article I, sections 12 and 28(f) of the California Constitution also address when a court may deny bail. Article I, section 12 specifies, in relevant part, that a person must be released on bail by sufficient sureties except for (1) capital crimes;⁸ (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;⁹ 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.¹⁰ Even if the defendant meets these requirements, the court retains the discretion to grant bail or release the defendant on their own recognizance.¹¹

Article I, section 28(f)(3) states, in relevant part, that

³ *Ibid.*

⁴ *Id.* at p. 143.

⁵ *Id.* at p. 154.

⁶ *Id.* at p. 156.

⁷ The California Supreme Court granted review in *In re Kowalczyk* (2022) 85 Cal.App.5th 667 on the issue of whether a court may set preventively high bail above an arrestee’s ability to pay.

⁸ Cal. Const., art. I, § 12(a).

⁹ *Id.* at § 12(b).

¹⁰ *Id.* at § 12(c).

¹¹ *In re White* (2020) 9 Cal.5th 455, 469.

[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.¹²

Additionally, a person may be released on their own recognizance in the court's discretion, subject to the same factors considered in setting bail.¹³

The court's reasons for its decision on pretrial release or detention must be stated in the record and in the court's minutes. (See Cal. Const., art. I, § 12(a); *In re Humphrey, supra*, 11 Cal.5th at pp. 155-156.)

The 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, sections 12 and 28(f) of the California Constitution.

After noting 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 or setting preventively high bail. 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.

Alternatives Considered

The committee did not develop 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

¹² Cal. Const., art. I, § 28(f)(3).

¹³ *Ibid.*

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 for the oral and written record, and transparent. The committee has been monitoring caselaw and issues identified by courts in this area and intends to continue developing rules and forms that are responsive to both.

The form was modeled on a pretrial determination minute order and script developed by the Superior Court of San Diego County. The original draft of the form called for details of the specific case, such as the charges. Committee members felt strongly that this form be (1) as succinct as possible and not replicate information already collected in the minute order, which could have an adverse impact on court staff and court operations; and (2) provide all the necessary components that a judicial officer must consider.

On item 8c of the form, the committee initially proposed two separate checkboxes for the court to indicate that either the “facts are evident” or the “presumption is great” that the defendant committed the offense, as stated in Article I, sections 12(b) and (c) and 28(f)(3) of the California Constitution. The committee discussed whether to instead 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. The committee seeks specific comments on the utility of this approach versus the others.

Fiscal and Operational Impacts

The committee does not anticipate significant fiscal and operational impacts, as the form reflects the application of existing law and is intended to assist courts with implementing the factors from *In re Humphrey* in a clear and uniform manner. Expected costs include training, case management system updates, and the production of new forms.

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?
- 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?
- 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*?

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?

Attachments and Links

1. Form CR-104, at pages 6–9

SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	<i>FOR COURT USE ONLY</i> 04/08/2024 DRAFT Not approved by the Judicial Council
PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	CASE NUMBER:
FINDINGS AND ORDERS FOR PRETRIAL RELEASE OR DETENTION	<i>FOR COURT USE ONLY</i> Date: Time: Department:

1. Procedural Posture

The court is addressing pretrial release at:

- a. Arraignment.
- b. Bail review per Penal Code section 1270.2. No changed circumstances required.
- c. Bail review after preliminary examination per Penal Code section 1277. No changed circumstances required.
- d. 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) Statements/proffer of witnesses:
- d. The defense argument and
 - (1) Attachments/exhibits:
 - (2) Amount of bail the defendant can afford:
 - (3) Statements/proffer of witnesses:
- e. Criminal history.
- f. History of appearance.
- g. Police report/probable cause declaration.
- f. Proposed conditions of release:
- g. 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.

PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	CASE NUMBER:
---	--------------

- (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/PRCS/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 OR. (See item 7.)
- b. Finds defendant presents a flight risk and/or a public safety risk, but that risk can be mitigated by nonfinancial conditions. (See item 5.)
- c. 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.)

PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:

CASE NUMBER:

4. Finding for Release or Detention

- d. Finds defendant presents a flight risk and/or a public safety risk, but that risk can be mitigated by nonfinancial conditions with monitoring by Pretrial Services. (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)*: **and further finds the defendant has the ability to pay that amount** coupled with the following least restrictive nonfinancial conditions. (See items 5 & 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) and thus
- (1) denies bail. (See item 8.)
- (2) sets preventively high bail. (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 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 item 6 and 8.)

6. Imposition of Financial Condition of Release

- a. **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:
- (1) Nonfinancial conditions considered by the court (if not imposed in item 5):
- (2) Reasons the court finds they are insufficient to protect the government's interests:
- (3) The court will set economic bail in the amount of:
- (4) 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

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, 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 defendant presents
- (1) A flight risk and/or
- (2) A danger to the safety of the public or any victim

PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	CASE NUMBER:
---	--------------

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.

Date:

 _____
JUDICIAL OFFICER