DETERMINING CUSTODY STATUS UNDER *IN RE HUMPHREY* AND PENAL CODE, § 1203.25

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I. INTRODUCTION

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The California Supreme Court issued its opinion in *In re Humphrey* (2021) 11 Cal.5th 135 (*Humphrey*), on March 25, 2021. The opinion followed from the granting of review of the Court of Appeal's decision in *In re Humphrey* (2018) 19 Cal.App.5th 1006. Neither party had challenged the Court of Appeal's decision; however, the California Supreme Court granted review on its own motion "to address the constitutionality of money bail as currently used in California as well as the proper role of public and victim safety in making bail determinations." (*Humphrey*, *supra*, 11 Cal.5th at pp. 146-147.)

In re Brown (2022) 76 Cal.App.5th 296 (*Brown*)[1] summarized the California Supreme Court's holding:

> In [*Humphrey*] the Supreme Court held conditioning pretrial release from custody solely on whether an arrestee can afford bail is unconstitutional. When nonmonetary conditions of release would be inadequate to protect public and victim safety and to ensure an arrestee's appearance at trial and a financial condition is necessary, the trial court 'must consider the arrestee's ability to pay the stated amount of bail—and may not effectively detain the arrestee "solely because" the arrestee "lacked the resources" to post bail.' [Citation.] When no option other than refusing pretrial release can reasonably protect the State's compelling interest in victim and community safety, the *Humphrey* Court continued, 'a court must first find by clear and convincing evidence that no condition short of detention could suffice and then ensure the detention otherwise complies with statutory and constitutional requirements.' [Citation.] What the trial court may not do is make continued detention depend on the arrestee's financial condition.
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> (*Brown*, *supra*, 76 Cal.App.5th at pp. 298-299.)

[1] The Supreme Court denied review of *Brown* on June 22, 2022.

Release decisions at arraignment on probation violation

In 2021, the Legislature enacted Assembly Bill No. 1228 (Stats. 2021-2022, Ch. 533) (AB 1228) which amended Penal Code section 1203.2[2] and added section 1203.25 to establish the circumstances under which persons accused of a violation of probation are entitled to release from custody pending a formal hearing on the violation. The legislation makes available to persons on post-conviction probation supervision many of the procedural protections applicable to pretrial release outlined by the Supreme Court in *Humphrey*.

II. KEY ELEMENTS OF *HUMPHREY*

The following are the key elements of *Humphrey*:

- "*The common practice of conditioning freedom solely on whether an arrestee can afford bail is unconstitutional."* (*Humphrey*, *supra*, 11 Cal.5th at p. 143, italics added.) Setting bail beyond the ability of the defendant to pay constitutes a detention. (*Humphrey*, *supra*, 11 Cal.5th at p. 151.)
- Pretrial detention should be rare – release of the defendant should be the normal practice, with detention being the exception. (*Humphrey*, *supra*, 11 Cal.5th at p. 156.)
- "[D]etention is impermissible unless no less restrictive conditions of release can adequately vindicate the state's compelling interests." (*Humphrey, supra,* 11 Cal.5th at pp. 151-152.)
- "When making any bail determination, *a superior court must undertake an individualized consideration of the relevant factors.*" (*Humphrey*, *supra*, 11 Cal.5th at p. 152, italics added.)
- The court first must consider whether nonfinancial conditions will reasonably protect the safety of the public or the victim and assure future court appearances by the defendant. (*Humphrey*, *supra*, 11 Cal.5th at p. 154.)
- Where the court determines a financial condition, such as cash bail, is necessary to secure the state's interests, the court must consider the defendant's ability to pay the amount set. The bail must be set at a level the defendant can reasonably afford. (*Humphrey*, *supra*, 11 Cal.5th at p. 154.)
- *" In order to detain an arrestee . . . , a court must first find by clear and convincing evidence that no condition short of detention could suffice and then ensure the detention otherwise complies with statutory and constitutional requirements*." (*Humphrey*, *supra*, 11 Cal.5th at p. 143, italics added.)
- "An arrestee may not be held in custody pending trial unless the court has made an individualized determination that (1) the arrestee has the financial ability to pay, but nonetheless failed to pay, the amount of bail the court finds reasonably necessary to protect compelling government interests; or (2) detention is necessary to protect victim or public safety, or ensure the defendant's appearance, and there is clear and

[2] Unless otherwise indicated, all further statutory references are to the Penal Code.

convincing evidence that no less restrictive alternative will reasonably vindicate those interests. [Citation.]" (*Humphrey*, *supra*, 11 Cal.5th at p. 156.)

- The determination of bail must comply with state statutory and constitutional law and "must also comport with other traditional notions of due process to ensure that when necessary, the arrestee is detained 'in a fair manner.' [Citations.] Among those fair procedures is the court's obligation to set forth the reasons for its decision on the record and to include them in the court's minutes. [Citation.] Such findings facilitate review of the detention order, guard against careless or rote decision-making, and promote public confidence in the judicial process." (*Humphrey*, *supra*, 11 Cal.5th at pp. 155-156.)

Issues left unresolved by *Humphrey*

There are a number of issues regarding the setting of bail the Supreme Court did not resolve, but instead left to future cases. Such issues include:

- The interplay between California Constitution, article I, sections 12 and 28(f)(3).
- Whether there is a different standard for the detention of a defendant based solely on flight risk – *Humphrey* was based on consideration of public safety and flight risk together. (*Humphrey*, *supra*, 11 Cal.5th at p. 153, fn. 6.)
- How "public safety" is defined.
- The level of risk of future nonappearance that justifies detention.
- The elements of procedural due process for determining detention.
- What factors must the court consider in determining a defendant's ability to pay.
- What conditions of release are considered "reasonable."
- Whether there is an allocated burden of proof in the determination of detention and ability to pay.
- Who is responsible for the cost of conditions imposed by the court.
- Whether the ability to pay includes consideration of the ability to pay an appearance bond premium.

III. PRETRIAL RELEASE OF A DEFENDANT, INCLUDING SETTING OF BAIL

A. Levels of restraint

Humphrey requires the court to approach the question of release by considering increasing levels of restraint. Any conditions of restraint should be in the least amount necessary to secure the state's interest in protection of the public and victim, and to assure the appearance of the defendant in court. (See *Humphrey*, *supra*, 11 Cal.5th at p. 154.)

Brown outlines the sequence of considering the levels of restraint. "The *Humphrey* Court explained a trial court must first determine whether an arrestee is a flight risk or a danger to

public or victim safety. If the arrestee does pose one or both of these risks, then the court should consider whether 'nonfinancial conditions of release may reasonably protect the public and the victim or reasonably assure the arrestee's presence at trial.' [Citation.] Although 'no condition of release can entirely *eliminate* the risk that an arrestee may harm some member of the public,' the Court observed, '[t]he experiences of those jurisdictions that have reduced or eliminated financial conditions of release suggest that releasing arrestees under appropriate nonfinancial conditions—such as electronic monitoring, supervision by pretrial services, community housing or shelter, stay-away orders, and drug and alcohol testing and treatment [citations]—may often prove sufficient to protect the community.' [Citation.] [¶] Having considered potential nonfinancial conditions, if the trial court nonetheless concludes money bail is 'reasonably necessary' to protect the public and ensure the arrestee's presence at trial, then bail must be 'set at a level the arrestee can reasonably afford' unless the court concludes, by clear and convincing evidence, that no nonfinancial condition in conjunction with affordable money bail can reasonably protect public safety or arrestee appearance. [Citation.] Quoting from the United States Supreme Court's decision in *United States v. Salerno* (1987) 481 U.S. 739, 755, 107 S.Ct. 2095, 95 L.Ed.2d 697, the *Humphrey* Court emphasized, 'While due process does not categorically prohibit the government from ordering pretrial detention, it remains true that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." ' [Citation.]" (*Brown*, *supra*, 76 Cal.App.5th at pp. 305-306, italics original.)

Accordingly, the levels of restraint, from the least restrictive to the most restrictive are:

- **Release on the defendant's Own Recognizance (O.R.) without restriction or conditions (except routine conditions such as "make all court appearances," and "obey all laws") where there is little or no risk of flight or to public safety.**

- **Release on the defendant's O.R. with nonfinancial conditions reasonably necessary for the protection of the public and victim, or to secure the defendant's appearance at future court proceedings, where there is some risk to the public or the victim, or of nonappearance. Conditions may include such things as electronic monitoring, drug testing, and stay-away orders.**

- **Payment of monetary bail, either with or without conditions, if reasonably necessary to protect the interests of the state, but at a level the defendant can reasonably afford.**

- **Detention of the defendant if the court concludes that protection of the public or the victim, or future appearance in court cannot be reasonably assured if the defendant is released, if the court finds by clear and convincing evidence that no less restrictive affordable monetary or nonmonetary condition of release can reasonably protect the state's interests, and that such detention is consistent with the California constitution and related statutes.**

B. Statutory provisions considered with *Humphrey*

Application of the factors outlined in *Humphrey* must be done in the context of existing statutory and constitutional provisions governing the setting of bail. (*Humphrey*, *supra*, 11 Cal.5th at p. 143.) The following statutory provisions address the setting of bail.[3]

1. Right to O.R. (misdemeanor)

Defendants arrested for a misdemeanor are entitled to O.R. release pursuant to section 1270, subdivision (a), "unless the court makes a finding on the record, in accordance with section 1275, that an own recognizance release will compromise public safety or will not reasonably assure the appearance of the defendant as required."

Defendants arrested for a misdemeanor domestic violence-related offense listed in section 1270.1 cannot be released O.R. or on reduced bail without a hearing. (§ 1270.1, subd. (a).) The court is to set bail and any conditions of release. Any bail setting must comply with *Humphrey* unless the court finds grounds for preventive detention.

2. Right to reasonable bail (felony)

Unless there are constitutional grounds for detention, a defendant charged with a felony (other than a capital case) is entitled to the setting of non-excessive bail. (Cal. Const., art. I, §§ 12 and 28(f)(3); §§ 1270, subd. (a), 1271.)

3. Serious and violent felonies (§ 1275)

Humphrey applies to serious and violent felonies. As observed in *Brown*: "[T]he [trial] court incorrectly stated *Humphrey* was inapplicable in cases in which the defendant had been charged with a serious or violent felony. Nothing in *Humphrey*'s discussion of the constitutional constraints on the use of money bail suggests that limitation. To the contrary, Humphrey himself was charged with first degree robbery, a serious felony within the meaning of section 1192.7, subdivision (c)(19), and a violent felony within the meaning of section 667.5, subdivision (c)(5). [Citations.]" (*Brown*, *supra*, 76 Cal.App.5th at p. 306.)

Section 1275, subdivision (c), states, "Before a court reduces bail to below the amount established by the bail schedule approved for the county, ... for a person charged with a serious felony, as defined in subdivision (c) of Section 1192.7, or a violent felony, as defined in subdivision (c) of Section 667.5, the court shall make a finding of unusual circumstances and shall set forth those facts on the record."

[3] See discussion, *infra*, of the provisions of the California Constitution governing the setting of bail.

If the court determines bail is appropriate, *Brown* emphasizes the amount of bail must be set in accordance with *Humphrey*, including consideration of the defendant's ability to pay the amount of bail set by the court. The limits of the court's discretion are not prescribed by the bail schedule. "Under *Humphrey* the amount specified in the bail schedule (or any other amount of bail, for that matter) is appropriate only if the court first determines the arrestee can afford to post it. Otherwise, the Supreme Court explained, 'requiring money bail in a particular amount is likely to operate as the functional equivalent of a pretrial detention order.' [Citation.]" (*Brown*, *supra*, 76 Cal.App.5th at p. 307.)

Accordingly, although the court is required by section 1275, subdivision (c), to find unusual circumstances before reducing bail for a serious or violent offense below schedule, if the court determines the only amount of bail the defendant can reasonably afford is below schedule, the court must set bail in accordance with the constitutional requirements of *Humphrey*, even in the absence of unusual circumstances otherwise required by section 1275, subdivision (c).[4]

4. Verification of proper notice

Prior to setting bail, the court should verify proper notice has been given when required. There are several circumstances where counsel and/or the victim must be given notice of a bail proceeding:

- Where the defendant is charged with a serious felony (Cal. Const., art. I, § 18(f)(3): "Before any person arrested for a serious felony may be released on bail, a hearing may be held before the magistrate or judge, and the prosecuting attorney and the victim shall be given notice and reasonable opportunity to be heard on the matter.") A prior request for notice by the victim or prosecutor is not required.

- Where the victim has requested notice and/or an opportunity to be heard. (Cal. Const., art. I, § 28(b)(8); § 646.93, subd. (b).)

- Written 2-days' notice before bail may be set either higher or lower than schedule if defendant is charged with a serious or violent felony (except residential burglary), witness intimidation (§ 136.1), spousal rape (§ 262), corporal injury to spouse (§ 273.5), criminal threats (§ 422), stalking (§ 646.9), battery with traumatic condition (§ 273.5), spousal battery (§ 243, subd. (e)(1)), or violation of a domestic violence protective order (§ 273.6). (§§ 1270.1, subd. (a)-(b); 1319, subd. (a).)

[4] See discussion, *infra*, where the amount of bail the defendant can afford is insufficient to protect the interests of the state.

- Defendant is charged with a violent felony with a prior failure to appear on a felony matter. (§ 1319, subd. (b).)

If proper notice has not been given, the court should not continue with the bail hearing, but should order a short continuance of not more than five days while notice is given. (See section 1270.2.) Provisional bail should be set pending the full bail hearing held after proper notice is given. Generally, the bail amount set should not be less than schedule or less than any amount previously set by a judge on a warrant or after a request for a bail enhancement under section 1269c.

The prosecutor must "make all reasonable efforts" to notify the victim of a bail hearing. (§ 646.93, subd. (b).)

5. *Humphrey* likely is not applicable to prearraignment procedures

Humphrey addresses the setting of bail at arraignment. There is nothing in *Humphrey* that suggests the court must determine the defendant's ability to pay when setting bail for the issuance of a warrant, performing on-call magistrate functions under section 1269c, or setting conditions of release as part of a prearraignment release program. Most of these procedures are conducted ex parte without the direct involvement of or appearance by the defendant – there simply is no reasonable opportunity to obtain the necessary information to make the ability to pay determination. Furthermore, bail setting that departs from the scheduled amount without a prior hearing in open court violates section 1270.1 as to its designated crimes.

6. *Humphrey* is not directly applicable to post-conviction holds

Nothing in *Humphrey* suggests it applies to persons on post-conviction holds based on a violation of probation, mandatory supervision, PRCS, or parole. The constitutional right to bail applies only prior to trial. There is no right to bail because of a restraint imposed after the finality of a judgment of conviction. (*In re Law* (1973) 10 Cal.3d 21, 25-26.) However, much of the procedure outlined in *Humphrey* has been included in section 1203.25 applicable to persons arrested on probation violations. (See discussion of section 1203.25, *infra*.)

C. Determining risk posed by the defendant

In setting or denying bail, the court must determine the public safety and/or flight risk posed by the defendant and consider the factors listed in article I, section 28(f)(3), of the California Constitution and sections 1270.1 and 1275:

1. The protection of the public and the danger if the defendant is released; safety of the public shall be the primary consideration.

2. The seriousness of the offense charged, including consideration of 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, the alleged use or possession of controlled substances by the defendant, and the potential sentence.

3. In considering domestic violence cases, the court should consider current or past violations of restraining or protective orders, evidence of lethality (*e.g*., strangulation), safety of victim's children or any other person, threats made by defendant to the victim, past violence against a partner, and evidence presented by the prosecutor pursuant to section 273.75, subdivision (a).

4. The previous criminal record of the defendant.

5. The probability of the defendant appearing at trial or at a hearing of the case, including the rate of past appearances.

6. In considering offenses charged under the Health and Safety Code, the court must consider: (1) the alleged amounts of controlled substances involved in the commission of the offense, and (2) whether the defendant is currently released on bail for an alleged violation of the Health and Safety Code.

The factors to be considered by the court in making an individualized assessment of the defendant's risk as identified by the Supreme Court in *Humphrey* include:

- Protection of the public and the victim
- The seriousness of the charged offense
- The arrestee's previous criminal record
- The arrestee's history of compliance with court orders
- The likelihood that the arrestee will appear at future court proceedings

(*Humphrey*, *supra*, 11 Cal.5th at p. 152.)

A court's determination of risk "should focus . . . on risks to public or victim safety or to the integrity of the judicial process that are reasonably likely to occur." (*Humphrey*, *supra*, 11 Cal.5th at p. 154.)

Proffers of proof: *In re Harris* (2021) 71 Cal.App.5th 1085 (*Harris*) (granted review)[5], rejected the defense argument that the prosecution was required to produce actual admissible evidence in establishing the basis for pretrial detention; rather, the court allowed the parties to proceed by proffers of proof. "[W]e conclude, as a general matter, that proffers of evidence may satisfy section 12(b)'s clear and convincing evidence standard without offending federal or state due process principles. In so concluding, we emphasize that it remains within the discretion of the trial court to decide whether particular instances of proffered evidence may be insufficient, and whether to insist on the production of live testimony or other evidence in compliance with more stringent procedural requirements. [Citations.]" (*Harris*, *supra*, 71 Cal.App.5th at p. 1101; granted review.)

Risk assessments: The court likely may consider information generated by a validated actuarial risk assessment tool. The use of such a tool was not addressed in *Humphrey* nor any other California appellate decision to date.[7]

Harris rejected consideration of release data reports from other jurisdictions: "Relying on reports reflecting pretrial release data in other jurisdictions, petitioner . . . appears to contend that as a statistical matter, it is unlikely he will reoffend if released. We are not persuaded. Setting aside the questionable relevance of such data to our review on appeal, giving weight to petitioner's statistical reports seems at odds with *Humphrey*'s holding that bail decisions require 'an individualized consideration of the relevant factors [Citation] and 'careful consideration of the individual arrestee's circumstances.' [Citation.]" (*Harris*, *supra*, 71 Cal.App.5th at pp. 1103-1104, review granted.) "Statistical reports from other jurisdictions" seem materially distinguishable from validated risk assessments based on data specific to the defendant's circumstances.

Truth of the charges: The court is to assume the truth of the criminal charges. (*Humphrey*, *supra*, 11 Cal.5th at p.153; see also *Harris*, *supra*, 71 Cal.App.5th at p. 1102, review granted.)

D. Provisional setting of bail and conditions of release

Unless a court has an active pre-trial release program, setting of bail and conditions of release is normally part of the arraignment process and, if possible, should be accomplished at that time. It may be proper and necessary to set bail provisionally to allow a reasonable opportunity to

[5] In granting review, the Supreme Court limited briefing and argument to "what evidence may a trial court consider at a bail hearing when evaluating whether the facts are evident or the presumption great with respect to a qualifying charged offense and whether there is a substantial likelihood the person's release would result in great bodily harm to others? (Cal. Const. art. I, § 12, subd. (b).)" Pending review, the court allowed the Court of Appeal's decision to be cited "not only for its persuasive value, but also for the limited purpose of establishing the existence of a conflict in authority that would in turn allow trial courts to exercise discretion under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456, to choose between sides of any such conflict." (*In re Harris*, S272632, order granting review, March 9, 2022.)

[7] The Virginia Pretrial Risk Assessment Instrument was used by the trial court in *In re Kowalczyk* (2022) 85 Cal.App.5th 667, 651 (granted review); its use was made without review by the appellate court.

assess the defendant's safety and flight risk, the defendant's financial resources, and the availability of less restrictive alternative conditions of release. (See, *e.g.*, *In re Humphrey* (2018) 19 Cal.App.5th 1006, 1044 (granted review) [[Use of a bail schedule may serve] "as a starting point for . . . a court setting bail provisionally in order to allow time for assessment of a defendant's financial resources and less restrictive alternative conditions by the pretrial services agency"].) It is suggested that if a continuance of the bail determination is needed for any reason, that it not be longer than the five days authorized by section 1270.2. A defendant unable to post bail may request "an automatic review" of the amount set by the court at a hearing held not later than five days after the original bail setting. (§ 1270.2; *Humphrey*, *supra*, 11 Cal.5th at p. 155, fn. 8.)

E. Setting conditions of release

The court has authority to impose reasonable conditions of release related to the protection of the public and to assure future court appearances. (*In re Webb* (2019) 7 Cal.5th 270, 278.) The conditions should be the least restrictive needed to address these interests. In accordance with *Humphrey*, such conditions may include, but are not limited to:

- Electronic monitoring
- Regular check-ins with a pretrial case manager
- Community housing or shelter
- Drug and alcohol treatment

(*Humphrey*, *supra*, 11 Cal.5th at p. 154.)

In addition, the court may wish to consider the following restrictions:

- Search and seizure waiver
- Drug testing
- Stay away/no contact orders

Cost of conditions of release

Humphrey did not determine who should pay for the costs incurred in connection with release conditions imposed by the court. It is unlikely the court may require the payment of such costs by the defendant in the absence of specific statutory authority. (See Gov. Code, § 70633, subd. (b) ["No fee shall be charged by the clerk for services rendered in any criminal action unless otherwise specifically authorized by law . . . .]; *People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 738 [". . . the superior court lacks inherent authority to require the parties to pay the cost of court operations in a criminal action or proceeding, in the absence of an express statutory provision to the contrary."].) Moreover, Senate Bill No. 129 (Stats. 2021, ch. 69), the Budget Act of 2021, has allocated ongoing funding to trial courts and probation departments for pretrial services.

Furthermore, even if permissible, any charge must only be according to the defendant's ability to pay. Imposing the burden to pay for a condition of release beyond the defendant's ability to pay likely is contrary to *Humphrey* because release then is effectively determined by the defendant's financial status, something expressly prohibited by the constitution. (See *Humphrey*, *supra*, 11 Cal.5th at p. 143.)

F. Setting of monetary bail

If after an individualized consideration of the relevant factors the court concludes nonfinancial conditions of release are insufficient to protect the public and the victim and/or assure future court appearances, the court may consider the use of monetary bail. If the court determines the defendant is appropriate for release, but concludes monetary bail is reasonably necessary to preserve the state's interests, the court may set bail but "must consider the individual arrestee's ability to pay, along with the seriousness of the charged offense and the arrestee's criminal record, and – unless there is a valid basis for detention – set bail at a level the arrestee can reasonably afford." (*Humphrey*, *supra*, 11 Cal.5th at p. 154.) (See discussion of setting bail beyond the defendant's ability to pay, *infra*.)

Although not discussed in *Humphrey*, likely the consideration of the amount of bail the defendant can afford includes the ability of the defendant to obtain a corporate bond with payment or partial payment of the bond premium.

1. Determining ability to pay

Humphrey did not discuss the factors to be considered in determining the defendant's ability to pay. In determining ability to pay, the court may take guidance from section 987.8, subdivision (g)(2), for reimbursement of counsel costs in a criminal case: " 'Ability to pay' means the overall capability of the defendant to reimburse the costs, or a portion of the costs, of the legal assistance provided to him or her, and shall include, but not be limited to, all of the following: [¶] (A) The defendant's present financial position. [¶] (B) The defendant's reasonably discernable future financial position. In no event shall the court consider a period of more than six months from the date of the hearing for purposes of determining the defendant's reasonably discernable financial position.... [¶] (C) The likelihood that the defendant shall be able to obtain employment within a six-month period from the date of the hearing. [¶] (D) Any other factor or factors which may bear upon the defendant's financial capability to reimburse the county for the costs of the legal assistance provided to the defendant."

Determining ability to pay may be aided by the use of Judicial Council form CR-115.

2. Burden of proof

Humphrey did not assign a burden of proof to the determination of the ability to pay. The court, however, has the duty to inquire into the defendant's financial circumstances and to determine whether restrictions less than detention will reasonably meet the interests of the state.

3. Setting monetary bail according to schedule; findings by the court

The Supreme Court in *Humphrey* did not discuss the appropriate use of bail schedules. The court of appeal decision in *Humphrey* strongly criticized the use of bail schedules, primarily because they set bail for specified crimes without consideration of the individual circumstances of a defendant, including the defendant's ability to pay the amount set. Nevertheless, the opinion acknowledged that bail schedules remain a valid tool in certain circumstances. Bail schedules may properly be used:

(1) To determine the relative seriousness of the current crime and the defendant's criminal record, relevant to the determination of the defendant's dangerousness;

(2) To permit persons to obtain release prior to court involvement by the posting of the scheduled bail;

(3) As a starting point in the determination of the proper bail to be set when the court issues a warrant;

(4) As a starting point "for a court setting bail provisionally in order to allow time for assessment of a defendant's financial resources and less restrictive alternative conditions by the pretrial services agency;" and

(5) To set bail when the defendant does not oppose detention.

(*In re Humphrey* (2018) 19 Cal.App.5th 1006, 1043-1044, review granted.)

It does not appear any of the foregoing uses conflict with the Supreme Court's decision in *Humphrey*.[9]

If the crime is listed in section 1270.1, such as a serious or violent felony, and the court sets bail either higher or lower than specified in the bail schedule, the court must state the reasons for the decision on the record. (§ 1270.1, subd. (d).) If the court is adjusting the amount of bail based on ability to pay as required by *Humphrey*, such a reason should be included in the court's statement.

[9] The use of bail schedules has been held unconstitutional by a federal district court; see discussion in Section VI, *infra*.

G. Ordering preventive detention

"In unusual circumstances, the need to protect community safety may conflict with the arrestee's fundamental right to pretrial liberty—a right that also generally protects an arrestee from being subject to a monetary condition of release the arrestee can't satisfy—to such an extent that no option other than refusing pretrial release can reasonably vindicate the state's compelling interests. In order to detain an arrestee under those circumstances, a court must first find by clear and convincing evidence that no condition short of detention could suffice and then ensure the detention otherwise complies with statutory and constitutional requirements. [Citation.] [¶] Detention in these narrow circumstances doesn't depend on the arrestee's financial condition. Rather, it depends on the insufficiency of less restrictive conditions to vindicate compelling government interests: the safety of the victim and the public more generally or the integrity of the criminal proceedings. Allowing the government to detain an arrestee without such procedural protections would violate state and federal principles of equal protection and due process that must be honored in practice, not just in principle." (*Humphrey*, *supra*, 11 Cal.5th at p. 143.)

"In those cases where the arrestee poses little or no risk of flight or harm to others, the court may offer OR release with appropriate conditions. [Citation.] Where the record reflects the risk of flight or a risk to public or victim safety, the court should consider whether nonfinancial conditions of release may reasonably protect the public and the victim or reasonably assure the arrestee's presence at trial. If the court concludes that money bail is reasonably necessary, then the court must consider the individual arrestee's ability to pay, along with the seriousness of the charged offense and the arrestee's criminal record, and — unless there is a valid basis for detention — set bail at a level the arrestee can reasonably afford. *And if a court concludes that public or victim safety, or the arrestee's appearance in court, cannot be reasonably assured if the arrestee is released, it may detain the arrestee only if it first finds, by clear and convincing evidence, that no nonfinancial condition of release can reasonably protect those interests*." (*Humphrey*, *supra*, 11 Cal.5th at p. 154, italics added.)

"An arrestee may not be held in custody pending trial unless the court has made an individualized determination that (1) the arrestee has the financial ability to pay, but nonetheless failed to pay, the amount of bail the court finds reasonably necessary to protect compelling government interests; or (2) detention is necessary to protect victim or public safety, or ensure the defendant's appearance, and there is clear and convincing evidence that no less restrictive alternative will reasonably vindicate those interests. [Citation.] Pretrial detention on victim and public safety grounds, subject to specific and reliable constitutional constraints, is a key element of our criminal justice system. Conditioning such detention on the arrestee's financial resources, without ever assessing whether a defendant can meet those conditions or whether the state's interests could be met by less restrictive alternatives, is not." (*Humphrey*, *supra*, 11 Cal.5th at p. 156.)

1. Detention where amount defendant can pay is insufficient to meet the state's interests

Appellate courts are not in agreement as to the action a trial court may take when the amount of bail a defendant can afford to pay is insufficient to meet the state's interest in protecting the public or assuring the defendant's future appearance in court. The issue is addressed in *Brown* and *In re Kowalczyk* (2022) 85 Cal.App.5th 667(*Kowalczyk*)[10]. *Kowalczyk* has been granted review by the Supreme Court.[11]

Brown observes: "[U]nder *Humphrey*, if the court properly determines nonfinancial conditions are insufficient to protect the state's interests, but that imposing a money bail condition (alone or in combination with nonfinancial conditions) would adequately protect the public and the victims and ensure the arrestee's presence in court, the court must consider the individual arrestee's ability to pay and 'set bail at a level the arrestee can reasonably afford.' [Citation.] *If money bail set at that level is not sufficient to protect the state's compelling interests, then the trial court's only option is to order pretrial detention, assuming the evidentiary record is sufficient to support the findings necessary to justify such an order*." (*Brown*, *supra*, 76 Cal.App.5th at p. 308, italics added.) Accordingly, if after the court makes an individualized determination of the risk factors identified by *Humphrey* and the defendant's ability to pay, the court determines the defendant is only able to pay for monetary bail in an amount insufficient to protect the state's interests, *Brown* holds the court may detain the defendant after making the findings required by *Humphrey*, if supported by the record.

2. Setting bail in amount defendant cannot afford

Under *Brown*, the court may not intentionally set bail out of the reach of the defendant's ability to pay to accomplish preventive detention: "It may well be, as the district attorney argues, that 'there was no alternative to cash bail' and 'nothing short of detention can suffice' in this case. The Supreme Court in *Humphrey* recognized such cases exist. [Citation.] Although it declined to address in detail the constitutional requirements for such a no-bail order, the

[10] *Kowalczyk* also addresses the relationship between California Constitution, article I, section 12, and article I, section 28(f)(3). See discussion, *infra*.

[11] In its order granting review, the Supreme Court limited the issues to: "(1) Which constitutional provision governs the denial of bail in noncapital cases - article I, section 12, subdivisions (b) and (c), or article I, section 28, subdivision (f)(3), of the California Constitution - or, in the alternative, can these provisions be reconciled? (2) May a superior court ever set pretrial bail above an arrestee's ability to pay?" Pending review, the opinion may be cited for its persuasive value and "for the limited purpose of establishing the existence of a conflict in authority that would in turn allow trial courts to exercise discretion under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456, 20 Cal.Rptr. 321, 369 P.2d 937, to choose between sides of any such conflict."

fundamental constitutional principles the Court enunciated clearly mean that setting bail at an amount the court knows cannot be met, as here, is not the appropriate response in those situations. Rather, *the trial court must be explicit that it is ordering pretrial detention and base its order on findings that 'detention is necessary to protect victim or public safety, or ensure the defendant's appearance, and there is clear and convincing evidence that no less restrictive alternative will reasonably vindicate those interests.'* [Citation.]" (*Brown*, *supra*, 76 Cal.App.5th at p. 308, italics added.) "[I]f the court finds by clear and convincing evidence that there are no less restrictive means to [protect the public and the victim and ensure future court appearances], then it may enter a no-bail order. The court's findings and reasons for any such order must be stated on the record and included in a written order. [Citation.]" (*Brown*, *supra*, 76 Cal.App.5th at p. 309.)

Applying the approach suggested by *Brown*, in setting *any* amount of bail, the court has effectively determined the defendant is suitable for release and bail must be set in an amount the defendant can reasonably afford; otherwise, the defendant should be detained under the standards set by *Humphrey*. If the circumstances are appropriate for detention, the order should be "no bail."

Kowalczyk interprets *Humphrey* differently: "Although the Humphrey court made clear that a trial court must consider a defendant's ability to pay in making a bail determination, Humphrey did not suggest that a court is precluded from setting bail at an amount beyond a defendant's means when necessitated by the circumstances presented. To the contrary, Humphrey explicitly recognized that '[i]n unusual circumstances, the need to protect community safety may conflict with the arrestee's fundamental right to pretrial liberty—a right that also generally protects an arrestee from being subject to a monetary condition of release the arrestee can't satisfy—to such an extent that no option other than refusing pretrial release can reasonably vindicate the state's compelling interests. In order to detain an arrestee under those circumstances, a court must first find by clear and convincing evidence that no condition short of detention could suffice and then ensure the detention otherwise complies with statutory and constitutional requirements. [Citation.] [¶] *Detention in these narrow circumstances doesn't depend on the arrestee's financial condition. Rather, it depends on the insufficiency of less restrictive conditions to vindicate compelling government interests: the safety of the victim and the public more generally or the integrity of the criminal proceedings*. Allowing the government to detain an arrestee without such procedural protections would violate state and federal principles of equal protection and due process that must be honored in practice, not just in principle.' [Citation, italics added by *Kowalczyk.*] [¶] Reasonably read, the foregoing passage in Humphrey meaningfully restricts, but does not purport to eliminate, the traditional power of a court to set bail at an amount that may prove unaffordable, so long as the court—after undertaking an individualized

consideration of all relevant factors including the defendant's ability to pay—makes the necessary findings to support a detention. That is, the court must find clear and convincing evidence that no other conditions of release, including affordable bail, can reasonably protect the state's interests in assuring public and victim safety and the arrestee's appearance in court. [Citation.]" (*Kowalczyk*, *supra*, 85 Cal.App.5th at pp. 664-665; granted review.)[13]

As observed by *Kowalczyk*: "Thus, when a court sets bail at an amount higher than a person can likely afford after finding clear and convincing evidence that no conditions short of detention can vindicate these compelling state interests, it cannot be said that the court 'effectively detain[ed]' the person ' *solely* because" ' the person ' "lacked the resources" to post bail.' [Citation], italics added [by *Kowalczyk*].) Though the person's inability to post the court-ordered bail amount necessarily results in the person's detention, the person's financial condition is not the determinate cause of detention. Rather, the determinate cause of the detention is the court's finding that no other conditions short of detention are sufficient to vindicate the state's interests. (See United States v. Fidler (9th Cir. 2005) 419 F.3d 1026, 1028 ['de facto detention' when defendant is unable to comply with a financial condition does not violate the federal Bail Reform Act if the record shows 'the detention is not based solely on the defendant's inability to meet the financial condition, but rather on the district court's determination that the amount of the bond is necessary to reasonably assure the defendant's attendance at trial or the safety of the community']; [citation].)" (*Kowalczyk*, *supra*, 85 Cal.App.5th at p. 665; granted review.)

In concluding, *Kowalczyk* commented: "Finally, we reiterate the fundamental principle that 'liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.' [Citation.] While section 12 does not prohibit courts from fixing bail at an amount a defendant likely cannot meet, it will be the rare case where such a monetary condition is truly necessary to sufficiently protect the state's compelling interests in public and victim safety and in ensuring appearances in court." (*Kowalczyk*, *supra*, 85 Cal.App.5th at pp. 666-667; granted review.)

[13] The Court of Appeal in *In re Humphrey* (2018) 19 Cal.App.5th 1006 (review granted), reached a similar conclusion. The appellate court suggested the trial court, in certain circumstances, may set bail higher than the defendant can afford: "If the court concludes that an amount of bail the defendant is unable to pay is required to ensure his or her future court appearances, it may impose that amount only upon a determination by clear and convincing evidence that no less restrictive alternative will satisfy that purpose." (*Ibid*., at p. 1037.) The concept of intentionally setting bail beyond the defendant's ability to pay was not addressed by the Supreme Court in its *Humphrey* decision.

3. Making findings and entering them in the minutes

If the court concludes detention of the defendant is required, the reasons for the court's decision must be set forth on the record and entered in the minutes. "A court's procedures for entering an order resulting in pretrial detention must also comport with other traditional notions of due process to ensure that when necessary, the arrestee is detained 'in a fair manner.' [Citations.] *Among those fair procedures is the court's obligation to set forth the reasons for its decision on the record and to include them in the court's minutes.* [Citation.] Such findings facilitate review of the detention order, guard against careless or rote decision-making, and promote public confidence in the judicial process. [Citations.]" (*Humphrey*, *supra*, 11 Cal.5th at p. 155, italics added.)

The failure to make and record appropriate findings is grounds for reversal of the detention order. The court's statement should include the justification for the detention and address why lesser forms of restraint would not satisfy the interests of the state. *Brown* discussed the failure of the trial court to establish an appropriate record. "Here, there was no evidence proffered in the trial court to support the contention that harm to the public was reasonably likely to occur if Brown were released. The trial court failed to address any of the specific nonfinancial conditions proposed by Brown or to indicate, even in general, why nonfinancial conditions of release (such as a stay away or no contact order, home detention, electronic monitoring or surrender of Brown's Class A driver's license) would be insufficient to protect the victims or the public or obviate the risk of flight. On this record we cannot conclude there was sufficient evidence to support a finding by clear and convincing evidence that less restrictive alternatives to detention could not reasonably protect the public or victim safety." (*Brown*, *supra*, 76 Cal.App.5th at p. 307.)

In re Harris (2021) 71 Cal.App.5th 1085 (*Harris*) (granted review), also addressed the consequences of a court's failure to establish a proper record for detention. *Harris* first rejected the argument that the correctness of the court's decision could be implied from a silent record. "[E]ven though the general presumptions in favor of a judgment or order might otherwise support a finding made *sub silentio*, *Humphrey* specifically requires, as a matter of procedural due process, that a court entering a pretrial detention order set forth 'the reasons for its decision on the record and to include them in the court's minutes.' [Citation.] Thus, the reasons supporting a denial of bail cannot be implied." (*Harris*, *supra*, 71 Cal.App.5th at pp. 1104-1105, review granted.)

Harris then addressed the lack of findings with respect to lesser forms of restraint. "Here, the trial court found, by clear and convincing evidence, a substantial likelihood that petitioner's release would result in great bodily harm to others, and it identified its reasons supporting that finding. *But the court did*

not actually address any less restrictive alternatives to pretrial detention and did not articulate its analytical process as to why such alternatives could not reasonably protect the government's interests. And while overlapping reasons may exist for making the applicable findings under section 12(b) and *Humphrey*, the court's failure to articulate its evaluative process requires that we speculate as to why the court believed that no nonfinancial conditions could reasonably protect the interests in public or victim safety. As such, the record here does not permit meaningful appellate review. ([Citation] ['meaningful judicial review is often impossible unless the reviewing court is apprised of the reasons behind a given decision'].)" (*Harris*, *supra*, 71 Cal.App.5th at p. 1105, italics added; footnote omitted; granted review.)

H. Appellate review of custody status

The court's decision on the custody status of the defendant is reviewable on appeal under the abuse of discretion standard. " '[W]e review a trial court's ultimate decision to deny bail for abuse of discretion. [Citations.] Under this standard, a trial court's factual findings are reviewed for substantial evidence, and its conclusions of law are reviewed de novo. [Citation.] An abuse of discretion occurs when the trial court, for example, is unaware of its discretion, fails to consider a relevant factor that deserves significant weight, gives significant weight to an irrelevant or impermissible factor, or makes a decision so arbitrary or irrational that no reasonable person could agree with it.' [Citation.] We apply the same abuse of discretion standard to review the superior court's decision to increase or reduce bail. [Citations.]" (*Brown*, *supra*, 76 Cal.App.5th at p. 302.) Generally in accord with *Brown* on use of the abuse of discretion standard are *In re Harris* (2021) 71 Cal.App.5th 1085, 1101-1102 (granted review), and *In re O'Connor* (2022) 87 Cal.App.5th 90, 103. *Brown* is based on a petition for writ of mandate; *Harris* and *O'Connor* are based on a petition for writ of habeas corpus.

IV. PREVENTIVE DETENTION: PROVISIONS OF THE CALIFORNIA CONSTITUTION

Humphrey did not discuss the interplay between California Constitution, article I, sections 12 and 28(f)(3). In its order of remand, the Supreme Court directed the court in *Kowalczyk* to take up the issue.

Article I, section 12 specifies, in relevant part: "A person shall be released on bail by sufficient sureties, except for: [¶] (a) Capital crimes ...; [¶] (b) Felony offenses involving acts of violence on another person, or felony sexual assault offenses on another person ... and the court finds ... that there is a substantial likelihood the person's release would result in great bodily harm to others; or [¶] (c) Felony offenses ... and 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." Section 12 further provides: "Excessive bail may not be required. In fixing the amount of bail, the court shall take into consideration 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. [¶] A person may be released on his or her own recognizance in the court's discretion."

Article I, section 28(f)(3), specifies in full: "Public Safety Bail. 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. [¶] A person may be released on his or her own recognizance in the court's discretion, subject to the same factors considered in setting bail. [¶] Before any person arrested for a serious felony may be released on bail, a hearing may be held before the magistrate or judge, and the prosecuting attorney and the victim shall be given notice and reasonable opportunity to be heard on the matter. [¶] When a judge or magistrate grants or denies bail or release on a person's own recognizance, the reasons for that decision shall be stated in the record and included in the court's minutes."

Humphrey makes clear that pretrial detention must conform to existing constitutional and statutory requirements. "Even when a bail determination complies with the [stated] prerequisites, the court must still consider whether the deprivation of liberty caused by an order of pretrial detention is consistent with state statutory and constitutional law specifically addressing bail — a question not resolved here —and with due process." (*Humphrey*, *supra*, 11 Cal.5th at p. 155.) Accordingly, pretrial detention of the defendant must be authorized under at least one of the following provisions of the California constitution.

A. Whether crime is listed in article I, section 12 - authorizing denial of bail

Article I, section 12 specifies "[a] person shall be released on bail by sufficient sureties, except for:"

1. Capital crimes where "the facts are evident or the presumption great" that the defendant committed the offense. (Cal. Const., art. I, § 12(a).) "The facts are evident or the presumption great" requires "evidence that would be sufficient to sustain a hypothetical verdict of guilt on appeal." (*In re White* (2020) 9 Cal.5th 455, 463 (*White*).)

2. Felony offenses involving acts of violence on another person or felony sexual assault, where "the facts are evident or the presumption great" that the defendant committed the offense and the court finds by clear and convincing evidence that there is a substantial likelihood defendant's release would result in great bodily injury to others. (Cal. Const., art. I, § 12(b).) A finding of "substantial likelihood" is subject to review under a substantial evidence standard. (*White*, *supra*, 9 Cal.5th at p. 467.) "Clear and convincing evidence" means a showing that there is a "high probability" that the fact or charge is true. (*Ibid*.)

"To deny bail under article I, section 12(b), a court must satisfy itself that the record contains not only evidence of a qualifying offense sufficient to sustain a hypothetical verdict of guilt on appeal, but also clear and convincing evidence establishing a substantial likelihood that the defendant's release would result in great bodily harm to others. In reviewing a denial of bail, an appellate court must determine, too, whether the record contains substantial evidence of a qualifying offense—and, if so, whether any reasonable fact finder could have found, by clear and convincing evidence, a substantial likelihood that the defendant's release would result in great bodily harm to one or more members of the public. Where both elements are satisfied and a trial court has exercised its discretion to deny bail, the reviewing court then considers whether that denial was an abuse of discretion." (White, supra, 9 Cal.5th at p. 471.)

In re O'Connor (2022) 87 Cal.App.5th 90 (*O'Connor*), upheld the trial court's denial of bail under section 12(b) based on multiple felony charges of child endangerment even though the defendant did not personally inflict injury on the victims, but set up circumstances where the abuse occurred. "Applying the dictionary definitions, the ordinary meaning of the phrase 'felony offenses involving an act of violence on another person' in section 12(b) may be understood to include felony offenses committed by a direct participant in the act of using physical force to injure another person. However, the phrase 'felony offenses involving an act of violence on another person' may also include an indirect participant—one whose felony offense is 'related closely' to an act of violence that injured another person." (*O'Connor*, *supra*, 90 Cal.App.5th at p. 105.)

O'Connor approved the use of a declaration of facts by the district attorney's investigator as sufficient to establish the level of proof necessary for a hypothetical guilty verdict. "Section 12 does not specify that the evidence submitted with respect to a qualifying offense must be admissible at trial, and it has been held that 'proffers of evidence may satisfy section 12(b)'s clear and convincing evidence standard without offending federal or state due process principles.' [Citation.] Accordingly, we find that the statement of facts and declaration submitted by the district attorney's investigator, from which we have drawn the facts underlying O'Connor's 12 qualifying offenses of child endangerment, constitute a proffer of evidence that is 'enough evidence of reasonable, credible, and solid value to sustain a guilty verdict on one or more of the qualifying crimes. [Citation.]' [Citation.]" (*O'Connor*, *supra*, 90 Cal.App.5th at pp. 106-107, footnote omitted.)

O'Connor found substantial evidence supported the trial court's finding of a substantial likelihood that the defendant's release would result in great bodily injury to members of the public. The appellate court reviewed the factual circumstances of the charged offenses and the defendant's "repeated and frequent deceptive and manipulative conduct" during the crimes and after arrest. (*O'Connor*, *supra*, 90 Cal.App.5th at p. 108.)

3. Felony offenses where "the facts are evident or the presumption great" that the defendant committed the offense and court finds by clear and convincing evidence that the defendant threatened another with great bodily injury and there is a substantial likelihood the defendant would carry out the threat if released. (Cal. Const., art. I, § 12(c).)

4. Even if the defendant meets the requirements noted above, the court, in its discretion, may grant bail or release the defendant on their O.R. (*White*, *supra*, 9 Cal.5th at p. 469.)

B. Whether the defendant is a danger to the public or victim under article I, section 28(f)(3)

A finding under the factors listed in section 28(f)(3), together with a consideration of section 12 and the factors listed in sections 1270.1 and 1275, may permit the court to enter an order holding a person without bail if the court also finds "the facts are evident or the presumption great" that the defendant committed the qualified offense and by clear and convincing evidence that no lesser condition or combination of conditions of restraint will reasonably assure the safety of the public or the victim, and/or the appearance of the defendant in court. (See *Kowalczyk*, *supra*, 85 Cal.App.5th 667; granted review.)

"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 consideration*." (Cal. Const., art. I, § 28(f)(3), italics added.)

"[A]n order of detention requires an interest that 'is sufficiently weighty' in the given case – and courts should likewise bear in mind that [*United States v. Salerno* (1987) 481 U.S. 739,] upheld a scheme whose scope was 'narrowly focuse[d] on a particularly acute problem.'" (*Humphrey*, *supra*, 11 Cal.5th at p. 155.) Pretrial detention should be limited to the most serious of crimes. (*Ibid*.)

C. Whether the defendant is a flight risk under article I, section 28(f)(3)

Humphrey did not discuss the ability to detain based solely on flight risk, without consideration of dangerousness. However, the opinion repeatedly referenced public safety *or* flight risk in discussion preventive detention. Where there was an opportunity, the court applied the same standards to both types of risk. (See, e.g., *Humphrey*, *supra*, 11 Cal.5th at p. 153.) Accordingly, it is reasonable to assume the court will not impose a *lesser* standard for detention based solely on flight risk. Courts generally distinguish between the risk a defendant poses of intentional flight and factors, such as transportation issues, homelessness, or unemployment, that may result in a temporary failure to appear.

D. Application of *Humphrey* to release decisions under the California Constitution

Although *Humphrey* declined to consider the relationship between its opinion and article I, sections 12 and 28(f)(3), of the California Constitution, *In re Harris* (2021) 71 Cal.App.5th 1085 (Harris)(review granted), concluded the decision applied to decisions governed by article I, section 12. "Although *Humphrey* involved a claim of excessive bail and not a denial of bail under section 12(b) as here, the generality with which *Humphrey* laid out the foregoing requirement—without resolving whether section 12 and section 28, subdivision (f)(3) of article I of the California Constitution 'can or should be reconciled' [citation]—reasonably indicates the Supreme Court's contemplation that its holding applies to all orders for pretrial detention under section 12(b). [Citation.]" (*Harris*, *supra*, 71 Cal.App.5th at page 1096; footnote omitted; granted review.)

Based on the directive from the Supreme Court, *Kowalczyk* considered the application of sections 12 and 28(f)(3), to the setting of bail after *Humphrey*. The court reached the following conclusions: "[W]e conclude that the bail provisions of article I, section 28, subdivision (f)(3) can be reconciled with those of article I, section 12 (hereafter section 12 and section 28(f)(3)) and that both sections govern bail determinations in noncapital cases. This means that section 12 's general right to bail in noncapital cases remains intact, while full effect must be given to section 28(f)(3)'s mandate that the rights of crime victims be respected in all bail and OR release determinations. In so concluding, we reject any suggestion that section 12 guarantees an unqualified right to pretrial release or that it necessarily requires courts to set bail at an amount a defendant can afford." (*Kowalczyk*, *supra*, 85 Cal.App.5th at p. 651; granted review.)

1. Section 28(f)(3), is fully operative

   The court rejected petitioner's contention that because of the interplay between Propositions 8 and 9, the provisions of section 28(f)(3), enacted by Proposition 9 must be deemed inoperative. Because the entirety of the bail provisions of Proposition 9 were included in the ballot materials, the affirmative vote of the enactors necessarily included the provisions of section 28(f)(3). (*Kowalczyk*, *supra*, 85 Cal.App.5th at pp. 657-658; granted review.)

2. The provisions of article I, section 12, and article I, section 28(f)(3), may be reconciled and each given full effect

   The court first addressed the use of the permissive term "may" in subdivision (f)(3). "Given that section 12 was fully operative when Proposition 9 was presented to the voters and approved, the most natural reading of section 28(f)(3)'s phrase '[a] person *may* be released on bail by sufficient sureties' is that the phrase is a declarative statement of existing law. (Italics added [by *Kowalczyk*].) That is, the phrase acknowledges that a person may or may not be released on bail, consistent with the dictates in section 12 that a person is generally entitled to bail release in noncapital cases

except under the circumstances articulated in section 12(b) and (c), or . . . when a person may not be able to post bail as set." (*Kowalczyk*, *supra*, 85 Cal.App.5th at p. 660; granted review.)

The court further observed: "[The] victim safety provisions do not conflict with section 12 or otherwise impede its operation; *they simply mandate additional considerations in bail and OR determinations in noncapital cases*. Accordingly, construing the first sentence of section 28(f)(3) as declarative of the general right to bail allows for complete reconciliation of section 28(f)(3) and section 12." (*Kowalczyk*, *supra*, 85 Cal.App.5th at p. 660, italics added; granted review.) "Sections 28(f)(3) and 12 are easily reconciled by giving a natural reading to the first sentence of section 28(f)(3) and understanding its meaning as a declarative statement of existing law. Such construction respects the longstanding constitutional right to bail as embodied in section 12, while also fully effectuating Proposition 9's constitutionally mandated considerations of public and victim safety in all bail and OR release determinations. Consequently, there appears no basis for finding a repeal by implication." (*Kowalczyk*, *supra*, 85 Cal.App.5th at p. 661; granted review.) "In sum, we interpret the first sentence of section 28(f)(3) as a declarative statement recognizing that bail may or may not be denied under existing law. Under this construction, section 12 's general right to bail remains intact, while full effect is accorded to section 28(f)(3)'s mandate that the rights of crime victims be respected in bail and OR release determinations." (*Kowalczyk*, *supra*, 85 Cal.App.5th at p. 662; granted review.)

3. Article I, section 12 does not guarantee an absolute right to pretrial release or require the court to set bail at an amount the defendant can afford

"The phrase 'released on bail by sufficient sureties' as used in both sections 12 and 28(f)(3) generally refers to the state of being released from custody after the posting of some sufficient security such as 'cash, property, or (more often) a commercial bail bond—which is forfeited if the arrestee later fails to appear in court. [Citation.]" (*Kowalczyk*, *supra*, 85 Cal.App.5th at p. 662; granted review.) "Although we have found no California case expressly interpreting the phrase 'sufficient sureties,' the phrase must be construed in conjunction with section 12 's requirement that trial courts fix the amount of bail upon consideration of '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.' When viewed as a whole, and with reference to section 28(f)(3)'s additional considerations of public and victim safety, the most natural reading of section 12 is that a person has a right to be released upon the posting of a sufficient security which a court, in its discretion, determines is adequate to accomplish the purposes of bail, i.e., to protect public and victim safety and to ensure a defendant's presence in court. (§§ 12; 28(b)(3), (f)(3).) This construction clearly promotes the constitutionally-based policy purposes of bail, while a contrary construction that

categorically requires release on affordable bail does not." (*Kowalczyk*, *supra*, 85 Cal.App.5th at pp. 662-663; granted review.)

V. RELATIONSHIP BETWEEN THE CONSTITUTION AND *HUMPHREY*

Kowalczyk summarized the relationship between California Constitution, article I, sections 12 and 28(f)(3), and *Humphrey* as follows:

> Section 28(f)(3) became fully operative when the voters approved Proposition 9 in 2008, and its bail provisions can be fully reconciled with those in section 12, as follows. When a defendant's case falls outside the circumstances specified in section 12, subdivisions (a) through (c), the defendant has a general right under sections 12 and 28(f)(3) to be released on bail by sufficient sureties, or to be released on OR in the court's discretion, subject to the considerations below.
>
> In fixing the amount of bail and release conditions, or in exercising its discretion to release a person on OR, courts must consider 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 the defendant appearing at the trial or hearing of the case. (§§ 12, 28(b)(3) & (f)(3).) Public safety and the safety of the victim shall be the primary considerations. (§ 28(f)(3).)
>
> "In those cases where the arrestee poses little or no risk of flight or harm to others, the court may offer OR release with appropriate conditions. [Citation.] Where the record reflects the risk of flight or a risk to public or victim safety, the court should consider whether nonfinancial conditions of release may reasonably protect the public and the victim or reasonably assure the arrestee's presence at trial. If the court concludes that money bail is reasonably necessary, then the court must consider the individual arrestee's ability to pay, along with the seriousness of the charged offense and the arrestee's criminal record, and—unless there is a valid basis for detention—set bail at a level the arrestee can reasonably afford. And if a court concludes that public or victim safety, or the arrestee's appearance in court, cannot be reasonably assured if the arrestee is released, it may detain the arrestee only if it first finds, by clear and convincing evidence, that no nonfinancial condition of release can reasonably protect those interests." [Citation.] Though excessive bail cannot be imposed, courts are not required to set bail at an amount a defendant will necessarily be able to afford. Before a court sets bail at an amount higher than a person can likely afford, it must make the aforementioned findings necessary to support a detention.
>
> Finally, we reiterate the fundamental principle that 'liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.' [Citation.] While section 12 does not prohibit courts from fixing bail at an amount a defendant likely cannot meet, it will be the rare case where such a monetary condition is truly necessary to

sufficiently protect the state's compelling interests in public and victim safety and in ensuring appearances in court.

(*Kowalczyk*, *supra*, 85 Cal.App.5th at pp. 666-667; granted review.)

VI. FEDERAL DECISION ON USE OF BAIL SCHEDULES

The petitioner in *Welchen v. Bonta* (2022) ___ F.Supp.3d ___ [2022 WL 4387794; No. 2:16-cv-00185-TLN-DB](*Welchen*), in the U.S. District Court for the Eastern District of California, challenged the use of bail schedules in setting bail prior to arraignment.

Sacramento police arrested the petitioner for second-degree burglary on January 29, 2016. When he was booked into the Sacramento County jail, bail was set at $10,000 according to schedule. The petitioner was unable to post the amount of bail; he was held in custody for six days. Petitioner contends the use of the bail schedule in this manner, which prevents an individualized consideration of the seriousness of the crime and the defendant's ability to post the bail as set, violates his due process rights. The federal district court agreed.

The court applied a "strict scrutiny" analysis, which means that the bail schedule satisfies due process only if it is "narrowly tailored" to serve a compelling state interest.

The court found the six days of detention constituted a significant deprivation of defendant's fundamental right to pretrial liberty solely due to his indigence.

"[Defendant] argues that the bail schedule fails strict scrutiny because the bail schedule does not serve the government's interests in: (1) protecting public safety because it makes no individualized assessment of risk, so people who pose a greater risk to the community are allowed to buy their freedom while people who pose less risk are confined for lack of money; (2) ensuring future appearance because the amounts on the bail schedule have no causal or rational relationship to future appearance; and (3) protecting individual constitutional rights because it unnecessarily deprives pretrial liberty." (*Welchen*, *supra*, ___ F.Supp.3d at p. ___.)

The court found the bail schedule was not narrowly tailored because:

1. It is both overinclusive and underinclusive on the issue of public safety. It is overinclusive because it confines many people who may not pose any risk simply because they cannot afford to post the scheduled bail – there is no actual assessment of risk. It is underinclusive because it allows others who pose a more serious risk to go free simply because they can afford to post the bail.

2. It is both overinclusive and underinclusive on the issue of securing future court appearance – the amount of bail does not bear any relationship to the rates of appearance of people arrested for the specified offenses and released on bail.

3. It provides no consideration of lesser restrictive alternatives. The court pointed to the lack of bail setting based on use of risk assessment instruments, but ultimately could not say whether the use of risk assessment instruments was a lesser restrictive alternative. The court also observed that other jurisdictions (and the California legislature in the context of SB 10) used less restrictive alternatives such as electronic monitoring, supervision by pre-trial services, housing programs, drug testing and treatment, and stay-away orders.

Based on the foregoing analysis, the court found "that the bail schedule violates [defendant's] substantive due process pretrial liberty rights. Because the bail schedule is not 'carefully limited' as the heightened scrutiny test . . . requires, it is 'invalid in all of its applications.'" (*Welchen*, *supra*, ___ F.Supp.3d at p. ___.) While the court found the use of the bail schedule in Sacramento was unconstitutional, it requested further briefing on the scope and nature of the appropriate injunctive relief. In other words, the court found at some level the bail schedule can't be used, but the exact parameters of the proper/improper use have yet to be determined.

The court also found that this case was not rendered moot by the California Supreme Court's decision in *Humphrey*. The court acknowledged that *Humphrey* involved the post-arraignment right to bail, while this case concerns the pre-arraignment right to bail. However, the court also stated that many of the constitutional principles were applicable in both situations.

Until the court determines the precise scope of the injunctive relief, the full implications of *Welchen* are not known. The court clearly found the current use of bail schedules in setting bail before appearing in front of a judge to be unconstitutional. But other than objecting to the lack of an individualized consideration of the bail setting, the court did not discuss what might be done to make the use of bail schedules appropriate, if at all.

VII. PREHEARING RELEASE OF PROBATIONERS

A. Introduction

Assembly Bill No. 1228 (Stats. 2021-2022, Ch. 533) (AB 1228) amended section 1203.2 and added section 1203.25 to establish the circumstances under which persons accused of a violation of probation are entitled to release from custody pending a formal hearing on the violation. The legislation makes available to persons on post-conviction probation supervision many of the procedural protections applicable to pretrial release outlined by the California Supreme Court in *In re Humphrey* (2021) 11 Cal.5th 135 (*Humphrey*). The legislation first amended section 1203.2, dealing with many forms of post-conviction supervision, to direct the court to a new statute when considering the custody status of persons on probation supervision. The legislation next enacted section 1203.25 dealing with the custody status of persons charged with a probation violation.

B. Effective Date

AB 1228 became effective on January 1, 2022. The new rules governing the custody status of probationers apply to all persons arrested on an alleged probation violation after that date. Because the custody status of an individual is continuing in nature and always subject to modification by the court, the new provisions also apply to persons being held on probation violations prior to January 1, 2022. Persons in custody who are pending a revocation of probation as of January 1, 2022, likely will be entitled to a review of their custody status based on the enactment of AB 1228.

C. AB 1228 is limited to probationers

It is clear from the plain language of AB 1228 that its provisions are limited to persons held on a probation violation. Many of the provisions of section 1203.2 apply to other forms of post-conviction supervision, including mandatory supervision, postrelease community supervision (PRCS), and parole. (§ 1203.2, subd. (a).) The statute now provides: "[W]henever a *person on probation* who is subject to this section is arrested, with or without a warrant or the filing of a petition for revocation as described in subdivision (b), the court shall consider the release of a *person on probation* from custody in accordance with Section 1203.25." (Italics added.) Section 1203.2, subdivision (a), directs the court to section 1203.25 when considering release of *probationers* arrested on an alleged violation. Section 1203.25 is replete with references to *persons on probation*, not other forms of post-conviction supervision. In short, nothing in sections 1203.2 or 1203.25 offers any suggestion the provisions of AB 1228 will apply to any persons on post-conviction supervision other than probation.[14]

It is unlikely there is any serious equal protection concern if the new provisions are inapplicable to other forms of post-conviction supervision. Persons who are placed on probation generally are considered at the low end of risk of future criminal conduct. Persons on mandatory supervision, postrelease community supervision, and parole, however, have been determined to be unsuitable for release on probation due to factors related to the underlying criminal offense or the defendant's criminal record. There appears to be a rational basis for distinguishing between persons on probation and persons under supervision where probation has been denied.

D. Procedure effective at arraignment

The new procedures are effective when the probationer has been "arrested, with or without a warrant or the filing of a petition for revocation" of probation. (§ 1203.2, subd. (a).)

[14] If the defendant is on probation for one case and another form of supervision for another case, likely the process for dealing with prehearing release will be treated separately for each form of supervision. The process resulting in the highest level of prehearing restraint likely will control.

The new procedures are applicable to the arraignment proceeding and thereafter, but prior to the formal probation violation hearing. Section 1203.25, subdivision (a), begins: "All persons released by a court *at or after the initial hearing and prior to a formal probation violation hearing* pursuant to subdivision (a) of Section 1203.2 . . . ." (Italics added.) It is clear the statute addresses release by the court at or after the initial appearance, *i.e*., the arraignment. The new procedures do not govern the discretion of the police officer, probation officer, or custody facility to make traditional release or detention decisions. However, nothing in the legislation would prohibit a court from considering the factors as part of a pretrial release program if authorized by the court.

Persons serving flash incarceration at time of arraignment

The new procedures are inapplicable to probationers who are serving a period of flash incarceration at the time of the arraignment or subsequent hearing on release. Section 1203.2, subdivision (a), only requires consideration of section 1203.25 if the person is not "otherwise serving a period of flash incarceration." Presumably, once the period of flash incarceration has been served, the person would then be eligible for the court to consider release under the provisions of section 1203.25.

E. Presumption of release prior to hearing

Section 1203.25 establishes a presumption for prehearing release of persons accused of a probation violation. The nature of the presumption will depend on whether the underlying criminal offense is a felony or misdemeanor. Section 1203.25, subdivision (a) provides: "All persons released by a court at or after the initial hearing and prior to a formal probation violation hearing pursuant to subdivision (a) of Section 1203.2 shall be released on their own recognizance unless the court finds, by clear and convincing evidence, that the particular circumstances of the case require the imposition of an order to provide reasonable protection to the public and reasonable assurance of the person's future appearance in court."

1. Misdemeanor cases

Section 1203.25, subdivision (d), provides that a defendant charged with a violation of misdemeanor probation must be released unless the person has violated a court order. As stated in subdivision (d): "The court shall not deny release for a person on probation for misdemeanor conduct before the court holds a formal probation revocation hearing, unless the person fails to comply with an order of the court, including an order to appear in court in the underlying case, in which case subdivision (a) shall apply."

Subdivision (d) directs the release of "a person on probation for misdemeanor conduct." The phrase is grammatically ambiguous. The phrase could mean that its provisions apply to persons on probation for an *underlying misdemeanor*

offense; or the statute could mean that the *violation* was new misdemeanor conduct. The context of the provision suggests the former interpretation – section 1203.25, subdivision (d), applies when the underlying criminal offense is a misdemeanor.

Unless an exception applies, subdivision (d) specifies the "court shall not deny release" for a person on misdemeanor probation. The statute allows imposition of conditions under certain circumstances. Whether it is appropriate to impose conditions of release will depend on the application of section 1203.25, subdivision (a), discussed, *infra*.
Subdivision (d) provides an exception to the presumption of release where "the person fails to comply with an order of the court, including an order to appear in court in the underlying case . . . ." Likely subdivision (d) refers to violations of orders made by the court to protect the public and assure future court appearances by the defendant. Accordingly, if the court has directed the defendant to appear and the defendant thereafter fails to appear in court, or the court has issued a criminal protective order and the defendant violates the order, the court may proceed under the provisions of section 1203.25, subdivision (a), in issuing further orders. (See discussion of additional orders, *infra*.) Likely this language is not intended to include violation of the general conditions of probation – to apply subdivision (d) in such a broad manner would have the exception completely swallowing the rule.

Likely it is the intent of the legislation that the failure to observe a court order would be based on a violation of an order entered in the case at issue, not a reference to past failures to observe orders entered in unrelated cases. Presumably every probationer will be entitled to release without conditions unless and until there is the first violation in the case.

If the court intends to preserve the ability to impose additional conditions of release or to place the defendant on a "no bail" status for violation of a court order, the court must be clear in stating the defendant's required conduct. For example, the court must order the defendant to appear at the next proceeding or at least enter an order at the beginning of the proceedings that the defendant must personally appear at all future court dates unless expressly excused by the court or counsel. A best practice would be to have the court release the defendant on a formal signed release agreement pursuant to section 1318. Such a release agreement should order the defendant to appear as directed, obey all laws and orders of the court, and not leave the state without permission of the court. The minutes should indicate the entry of the order in open court with the defendant present.

Section 1203.25 does not distinguish between formal or informal grants of probation. Nothing in the new statute suggests there is any difference between the two forms of supervision.

Order of preventive detention without a violation of a court order

It is not clear whether the court has the authority to enter an order of preventive detention (or setting "no bail") in a misdemeanor case without the defendant having first violated a court order. The plain meaning of section 1203.25, subdivision (d), is that such a violation must occur before the defendant can be detained. Such an interpretation means the court can never detain a person on a violation of misdemeanor probation at the initial arraignment on the violation.[15]

It is an open question whether the provisions of California Constitution, article I, sections 12 and 28(f)(3), apply to post-conviction release decisions. Section 28(f)(3), for example provides, in part, that "[i]n 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." If section 1203.25, subdivision (d), is applied as its plain meaning would suggest, it would preclude the court from considering the factors required by the constitution – something the Legislature may not direct given the primacy of the constitutional mandate.

The ultimate question, however, is whether the constitutional provisions governing bail have any application to post-conviction release proceedings. *In re Podesto* (1976) 15 Cal.3d 921, 929-930, for example, held the constitutional provisions on bail apply only to persons who have not yet been convicted. Does the fact that the Legislature is now imposing rules that parallel pre-conviction rules on post-conviction defendants trigger a full consideration of the factors outlined in the constitution? This issue may only be resolved after further appellate review.

2. Felony cases

Section 1203.25, subdivision (e), provides a defendant charged with a violation of felony probation must be released unless the court makes a finding by clear and convincing evidence that there are no "reasonably available" means to provide "reasonable" protection of the public and "reasonably" assure the

[15] If the violation is based on a new crime, nothing in section 1203.25 prevents the court from ordering preventive detention for the new crime, assuming the required showing is made. (See § 1203.25, subd. (g), discussed, *infra*.)

defendant will make future court appearances. As stated in subdivision (e): "The court shall not deny release for a person on probation for felony conduct before the court holds a formal probation revocation hearing unless the court finds by clear and convincing evidence that there are no means reasonably available to provide reasonable protection of the public and reasonable assurance of the person's future appearance in court." The requirement of "clear and convincing evidence" and no reasonable alternative to a denial of pre-hearing release is consistent with the *Humphrey* decision. (See, *e.g*., *Humphrey*, *supra*, 11 Cal.5th at p. 153.)

Section 1203.25, subdivision (e), clearly contemplates the possibility of preventive detention for a violation of felony probation if there is a showing, by clear and convincing evidence, there are no means reasonably available to offer reasonable protection of the public and assure the defendant's further court appearances. To make such a finding, the court will be required to consider the alternatives to custody suggested in section 1203.25, subdivision (b), discussed, *infra*, and cash bail authorized in section 1203.25, subdivision (c), discussed, *infra*.

Unlike for persons on misdemeanor probation under section 1203.25, subdivision (d), section 1203.25, subdivision (e), does not expressly direct the court to consideration of section 1203.25, subdivision (a), if further orders are necessary. Such a directive, however, is implied from the structure of the statute. Subdivision (e) provides the overarching rule for release of persons on felony probation. Subdivisions (a) and following provide the exceptions to the general rule and the procedural mechanics of implementing the new provisions. If justified by a finding of clear and convincing evidence, the court will be permitted to impose conditions of release or preventive detention for persons on felony probation as authorized by section 1203.25, subdivisions (a) and (e), and other relevant authority.

Application of California Constitution, art. I, section 28(f)(3) to determination of custody status

As noted above, it is clear that section 1203.25 permits preventive detention for a person charged with a violation of felony probation. The detention order is permitted if there is clear and convincing evidence that other means of monitoring the defendant will not be sufficient to protect the public or assure future court appearances. What is not clear is whether the provisions of California Constitution, article I, sections 12 and 28(f)(3), require consideration of additional factors in making the release decision. Section 28(f)(3), for example provides, in part, that "[i]n 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." If section 1203.25, subdivision (e), is applied as its plain meaning would suggest, it would preclude the court from considering the factors required by the constitution – something the Legislature may not direct given the primacy of the constitutional mandate.

The ultimate question, however, is whether the provisions of the constitution governing bail have any application to post-conviction release proceedings. *In re Podesto* (1976) 15 Cal.3d 921, 929-930, for example, held that the constitutional provisions on bail apply only to persons who have not yet been convicted. Does the fact that the Legislature is now imposing rules that parallel pre-conviction rules on post-conviction defendants trigger a full consideration of the factors outlined in the constitution? This issue may only be resolved after further appellate review.

F. Conditions of release

The rules governing the imposition of conditions of release on a probationer begin with section 1203.25, subdivision (a). The presumption is that persons released prior to a hearing on a misdemeanor or felony violation of probation will be released on their own recognizance. "All persons released by a court at or after the initial hearing and prior to a formal probation violation hearing pursuant to subdivision (a) of Section 1203.2 *shall be released on their own recognizance . . .* " (§ 1203.25, subd. (a), italics added.) It appears the intent of the legislation is to require release on a person's own recognizance *without any additional conditions*.[16] If the court desires additional conditions of release, the court must find "by clear and convincing evidence, that the particular circumstances of the case require the imposition of an order to provide reasonable protection to the public and reasonable assurance of the person's future appearance in court." (*Ibid*.)

1. Entry of an order by the court

If the requisite showing is made, the court may enter "an order" pursuant to section 1203.25, subdivision (a), to provide reasonable protection of the public and assure the defendant's appearance in court. The phrase "an order" is not specifically defined. Presumably it means the court may enter any order, consistent with the provisions of section 1203.25, that will reasonably meet the

[16] A floor analysis done by the Legislature summarized the legislation: "[AB 1228] specifies that persons released from custody prior to a probation violation hearing shall be released on their own recognizance unless the court finds, by clear and convincing evidence, that the particular circumstances of the case require imposition of *conditions of release* in order to provide reasonable protection of the public and reasonable assurance of the person's future appearance in court." (Assembly Floor Analysis – Concurrence in Senate Amendments, AB 1228 (Lee) As Amended September 3, 2021, page 1, italics added.)

interests of the state in protecting the public and assuring future court appearances. Such conditions might include electronic monitoring, telephonic reporting and similar conditions listed in section 1203.25, subdivision (b), discussed, *infra*. Such an order also could include preventive detention, if warranted by the circumstances of the case; preventive detention orders are also limited by the provisions of subdivision (d) for defendants on misdemeanor probation, and by subdivision (e) for defendants on felony probation.

"The court shall make an *individualized determination* of the factors that do or do not indicate that the person would be a danger to the public if released pending a formal revocation hearing. Any finding of danger to the public must be based on clear and convincing evidence." (§ 1203.25, subd. (a)(1), italics added.) The requirement of an individualized determination is in accordance with *Humphrey*. (See *Humphrey*, *supra*, 11 Cal.5th at p. 156.)

Section 1203.25, subdivision (a)(1), only requires the individualized determination of the defendant's risk to the public; no mention is made of the risk of failure to appear. Likely this is a legislative oversight. If the court is considering the risk of non-appearance, the court should make an "individualized determination" of the factors that do or do not make the defendant a flight risk.

2. The court's decision

The findings by the court on the factors related to risk to the public and risk of flight must be made by clear and convincing evidence. (§ 1203.25, subd. (a)(1) and (f).) The requirement is consistent with *Humphrey*. (See *Humphrey*, *supra*, 11 Cal.5th at p. 156.) Although it is not clear from the statute, it appears the intent of the Legislature to require findings in justification for the entry of any order imposing conditions on release. Certainly, such findings are required for an order of detention.

Evidence considered by the court

The court's decision must be based on all the evidence presented, including any probation report. (§ 1203.25, sub. (f).) Presumably the probation report could include information provided by the probation department in the petition for revocation or orally or in writing by the probation officer at arraignment on the petition.

It is likely permissible for the court to consider traditional sources of information about the defendant and the violation, including offers of proof and argument of counsel. Certainly, the defense, the prosecution, and the court desire an

efficient means of conveying relevant information to the court during the arraignment – traditionally an informal and summary proceeding.

See, *e.g.*, *In re Harris* (2021) 71 Cal.App.5th 1085 (*Harris*) (granted review), in the context of pretrial release. *Harris* rejected the defense argument that the prosecution was required to produce actual admissible evidence in establishing the basis for pretrial detention; rather, the court allowed the parties to proceed by proffers of proof. "[W]e conclude, as a general matter, that proffers of evidence may satisfy section 12(b)'s clear and convincing evidence standard without offending federal or state due process principles. In so concluding, we emphasize that it remains within the discretion of the trial court to decide whether particular instances of proffered evidence may be insufficient, and whether to insist on the production of live testimony or other evidence in compliance with more stringent procedural requirements. [Citations.]" (*Harris*, *supra*, 71 Cal.App.5th at p. 1101; granted review[17].)

Although not required by section 1203.25, either party could call live witnesses on the issue of the defendant's release.

In accordance with *Humphrey*, likely the court should assume the truth of the alleged violation of probation. (See *Humphrey*, *supra*, 11 Cal.5th at p. 153.)

"The court shall not require the use of any algorithm-based risk assessment tool in setting conditions of release." (§ 1203.25, subd. (a)(2).) While the court likely may not use a risk assessment tool in determining the type of supervision it should order, it is not clear whether the court may nevertheless use a risk assessment tool in determining the *suitability* of the defendant for release.

Determining risk[18]

In determining the circumstances of the defendant's release, the court must determine the public safety and flight risk posed by the defendant. The court likely may consider the factors listed in article I, section 28(f)(3), of the constitution and sections 1270.1 and 1275:

[17] See footnote 5, *supra*.

[18] The risk factors are taken from authorities discussing the right to pretrial release. It has long been held the California constitutional provisions regarding the right to bail apply only to persons who have not been convicted of a criminal offense. (See, *e.g., In re Podesto* (1976) 15 Cal.3d 921, 929-930.) Because AB 1228 has incorporated many of the procedural protections articulated in *Humphrey*, a decision relating to pretrial release, courts may find it appropriate to consider pre-conviction risk factors when addressing post-conviction release in the context of an alleged violation of probation.

- The protection of the public and the danger to the public if the defendant is released, or released with or without conditions; safety of the public shall be the primary consideration.

- The seriousness of the offense charged, including consideration of the alleged injury to the victim, and alleged threats to the victim or a witness to the violation charged, the alleged use of a firearm or other deadly weapon in the commission of the violation charged, the alleged use or possession of controlled substances by the defendant, and the potential sentence.

- In considering domestic violence cases, current or past violations of restraining or protective orders, evidence of lethality (e.g., strangulation), safety of victim's children or any other person, threats made by defendant to the victim, past violence against a partner, and evidence presented by the prosecutor pursuant to section 273.75, subdivision (a).

- The previous criminal record of the defendant.

- The probability of the defendant appearing at the violation hearing, including the record of past appearances.

- In considering offenses charged under the Health and Safety Code, the court should consider: (1) the alleged amounts of controlled substances involved in the commission of the offense, and (2) whether the defendant is currently released on bail for an alleged violation of the Health and Safety Code.

- The results of a validated risk assessment tool. (See discussion, *supra*, regarding prohibition against use of such instruments for determining conditions of release.)

Humphrey stated some of the factors to be considered by the court in making an individualized assessment of the defendant's risk of failure on pretrial release. These include:

- Protection of the public as well as the victim

- The seriousness of the charged offense

- The arrestee's previous criminal record

- The arrestee's history of compliance with court orders

- The likelihood that the arrestee will appear at future court proceedings

(*Humphrey*, *supra*, 11 Cal.5th at p. 152.)

A court's determination of risk "should focus . . . on risks to public or victim safety or to the integrity of the judicial process that are reasonably likely to occur." (*Humphrey*, *supra*, 11 Cal.5th at p. 154.)

Findings by the court

The court's findings must be made on the record. Subdivision (f) specifies the findings must be made "orally on the record." Undoubtedly it would not be reversible error for the court to enter its reasons in writing on the record. The court's reasons must be entered in the minutes if there is no court reporter and one of the parties requests it. (*Ibid*.) It is not clear whether entry in the minutes can be required if the proceedings are being electronically recorded.

3. Conditions of release

Section 1203.25, subdivision (b), specifies "[r]easonable conditions of release may include, but are not limited to, reporting telephonically to a probation officer[19], protective orders, a global positioning system (GPS) monitoring device or other electronic monitoring, or an alcohol use detection device." The list of supervision options in section 1203.25, subdivision (b), is expressly non-exclusive. In any event, "[t]he court shall impose the least restrictive conditions of release necessary to provide reasonable protection of the public and reasonable assurance of the person's future appearance in court." (§ 1203.25, subd. (a)(3).)

Cost of conditions of release

Subdivision (b) provides "[t]he person shall not be required to bear the expense of any conditions of release ordered by the court." The legislation does not require the court or county to provide any of the means of supervision, only that if such tools are used, regardless of the defendant's ability to pay, the government must assume the cost. The lack of specific tools of supervision may

[19] Earlier versions of AB 1228 specified telephonic reporting to a "court services officer." The change undoubtedly was made because supervision of a defendant on probation naturally falls first to the probation officer. However, if a court has a pretrial services program that will be used to monitor persons on prehearing release on a violation of probation, there is no reason why the court could not order reporting to the program.

limit the alternatives to custody available to the court. The legislation does not parse the duty to cover the costs between the court, the county, or the state.

4. Ordering bail

AB 1228 singles out "bail" for special consideration by the court. "Bail shall not be imposed unless the court finds by clear and convincing evidence that other reasonable conditions of release are not adequate to provide reasonable protection of the public and reasonable assurance of the person's future appearance in court." (§ 1203.25, subd. (c)(1).)

Cash bail

The legislation defines "bail" as "cash bail." The measure of cash bail is consistent with the considerations discussed in *Humphrey*. (See *Humphrey*, *supra*, 11 Cal.5th at p. 156.) "*'Bail' as used in this section is defined as cash bail*. A bail bond or property bond is not bail. In determining the amount of bail, the court shall make an individualized determination based on the particular circumstances of the case, and it shall consider the person's ability to pay cash bail, not a bail bond or property bond. Bail shall be set at a level the person can reasonably afford." (§ 1203.25, subd. (c)(2, italics added.)

While the amount of bail must be based on consideration of the defendant's ability to pay cash bail rather than the premium for a bail bond, nothing in AB 1228 prohibits the defendant from posting a bail bond for the amount set by the court. "The officer in charge of [a custody facility and other designated persons] may approve and accept bail in the amount fixed by . . . [the] order admitting to bail *in cash or surety bond* . . . ." (§ 1269b, subd. (a), italics added.) "Upon posting bail, the defendant or arrested person shall be discharged from custody as to the offenses on which bail is posted." (§ 1269b, subd. (g).)

Ability to pay

"Ability to pay" is not defined in the statute. Although *Humphrey* requires the court to consider the defendant's ability to pay in setting the amount of bail, the decision did not establish a definition of "ability to pay." In determining defendant's ability to pay, the court may take guidance from section 987.8, subdivision (g)(2), for reimbursement of counsel costs in criminal cases:
" 'Ability to pay' means the overall capability of the defendant to reimburse the costs, or a portion of the costs, of the legal assistance provided to him or her, and shall include, but not be limited to, all of the following: '¶] (A) The defendant's present financial position. '¶] (B) The defendant's reasonably discernable future financial position. In no event shall the court consider a period

of more than six months from the date of the hearing for purposes of determining the defendant's reasonably discernable financial position.... [¶] (C) The likelihood that the defendant shall be able to obtain employment within a six-month period from the date of the hearing. [¶] (D) Any other factor or factors which may bear upon the defendant's financial capability to reimburse the county for the costs of the legal assistance provided to the defendant."

Determining ability to pay may be aided by the use of Judicial Council form CR-115.

Burden of proof

Section 1203.25 does not assign a burden of proof to the determination of the ability to pay. The court, however, has the duty to inquire into the defendant's financial circumstances and to determine the lowest level of restrictions that will reasonably meet the interests of the state.

Authority of court when amount of bail defendant can pay is deemed insufficient to protect state's interests

It is likely that many defendants accused of a probation violation will be unable to pay bail in an amount deemed sufficient by the court to protect the public and/or assure future court appearances. The unambiguous language of section 1203.25, subdivision (c)(2), however, requires the setting of bail "at a level the person can reasonably afford." Unless the court determines the provisions of article I, sections 12 and 28(f)(3), of the California Constitution override this limitation, the court has no ability to set bail on a probation violation beyond the defendant's ability to pay. There is no ability to detain the defendant except under the narrow circumstances permitted by the statute.

G. New charges

"If a new charge is the basis for a probation violation, nothing in this section shall be construed to limit the court's authority to hold, release, limit release, or impose conditions of release for that charge as permitted by applicable law." (§ 1203.25, subd. (g).)

AB 1228 permits the court to independently consider the circumstances of release on new charges which may also be the basis of a probation violation. The rules governing the release of the defendant on the probation violation do not change because the violation happens to be the commission of a new crime. Section 1203.25 merely provides that the court will not be *constrained* by its provisions in determining the circumstances of release for the new crime.

It is at least theoretically possible for a defendant to be entitled to release on a violation of probation but be held in custody on the new crime. The court and counsel must be alert to the

possibility of this circumstance which could inadvertently deprive the defendant of custody credit on the probation violation. If the defendant is detained on the new crime but released on the violation of probation based on the new crime, the defendant may be deprived of credit in the probation case. If the defendant is otherwise being detained on the new charge, defense counsel should stipulate to at least nominal bail in the probation case to potentially assure the entitlement to presentence custody credit in both cases.

APPENDIX I: CHECKLIST FOR *HUMPHREY* BAIL ORDERS

Pretrial detention should be rare – release of the defendant should be the normal practice, with detention being the exception. (*In re Humphrey* (2021) 11 Cal.5th 135, 156.)

I. INITIAL RELEASE/DETENTION DECISION

A. **Verify proper notice of bail review** has been given the victim(s), if required. Notice must be given:

1. Def charged with serious felony; no prior request needed. (Ca. Const., art. I, § 18(f)(3).)

2. Where victim has requested notice and/or opportunity to be heard. (Cal. Const., art. I, § 28(b)(8); § 646.93, subd. (b).)

3. Written 2-days' notice where bail is to be set either higher or lower than schedule if def is charged with a serious or violent felony (except residential burglary), witness intimidation (§ 136.1), spousal rape (§ 262), corporal injury to spouse (§ 273.5), criminal threats (§ 422), stalking (§ 646.9), battery with traumatic condition (§ 273.5), spousal battery (§ 243, subd. (e)(1)), or violation of a domestic violence protective order (§ 273.6). (§§ 1270.1, subd. (a)-(b); 1319, subd. (a).)

4. Def is charged with a violent felony with a prior failure to appear on a felony matter. (§ 1319, subd. (b).)

B. **Consider ordering provisional bail** at schedule or other bail, and granting a short continuance of bail setting pending review of release options and def's financial circumstances.

C. Consider whether def is appropriate for release, with or without conditions, or should be detained. Court should consider following factors:

1. **Whether def comes within art. I, § 12** which permits denial of bail in specified circumstances:

a. **Capital crimes** where "facts are evident or the presumption great" that defendant committed the offense. (Cal. Const., art. I, § 12(a).) Whether there is "evidence that would be sufficient to sustain a hypothetical verdict of guilt on appeal." (*In re White* (2020) 9 Cal.5th 455, 463 (*White*).)

b. Felony offenses involving acts of violence on another person or felony sexual assault, where "the facts are evident or the presumption great" that defendant committed offense and the court finds by clear and convincing evidence that

there is a substantial likelihood defendant's release would result in GBI to others. (Cal. Const., art. I, § 12(b).) "Clear and convincing evidence" means a showing that there is a "high probability" that the fact or charge is true. (*Ibid*.)

c. Felony offenses where "the facts are evident or the presumption great" that defendant committed the offense and court finds by clear and convincing evidence that **defendant threatened another with GBI and there is a substantial likelihood defendant would carry out the threat if released. (Cal. Const., art. I, § 12(c).)**

d. Although def is charged with an offense where bail may be denied, the court may nevertheless release the def on bail, with or without conditions. (*White*, *supra*, 9 Cal.5th at p. 469.)

2. **Factors listed in art. I, § 28(f)(3)** in conjunction with art. I, § 12: "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 consideration."

3. Misdemeanors: Entitled to O.R. release "unless the court makes a finding on the record, in accordance with section 1275, that an own recognizance release will compromise public safety or will not reasonably assure the appearance of the defendant as required." (§ 1270(a).) Def may not be released on OR or reduced bail in DV case without hearing. (§ 1270.1(a).)

4. Additional factors listed in sections 1270.1 and 1275:

a. Seriousness of offense charged, including consideration of 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, the alleged use or possession of controlled substances by the defendant, and the potential sentence.

b. In considering domestic violence cases, the court should consider current or past violations of restraining or protective orders, evidence of lethality (e.g., strangulation), safety of victim's children or any other person, threats made by defendant to the victim, past violence against a partner, and evidence presented by the prosecutor pursuant to section 273.75(a).

c. In considering offenses charged under the Health and Safety Code, the court must consider: (1) the alleged amounts of controlled substances involved in the

commission of the offense, and (2) whether the defendant is currently released on bail for an alleged violation of the Health and Safety Code.

d. History of compliance with court orders. (*Humphrey*, *supra*, 11 Cal.5th at p. 152.)

e. A court's determination of risk "should focus . . . on risks to public or victim safety or to the integrity of the judicial process that are reasonably likely to occur." (*Humphrey*, *supra*, 11 Cal.5th at p. 154.)

5. Risk assessment score from a validated pretrial risk assessment tool.

6. The court is to assume the truth of the criminal charges. (*Humphrey*, *supra*, 11 Cal.5th at p.153.)

II. DEFENDANT IS SUITABLE FOR RELEASE, WITH OR WITHOUT CONDITIONS

A. If def suitable for release, determine if conditions are required. The court has authority to impose reasonable conditions of release. (*In re Webb* (2019) 7 Cal.5th 270, 278.)

B. Release the defendant with the least restrictive conditions necessary to adequately protect the public and the victim, and assure future court appearances. Set level of restraint (consider in following order):

1. **O.R. release without restrictions or conditions** (except standard minimum conditions such as "make all court appearances," "obey all laws," etc.).

2. **O.R. release with conditions** reasonably necessary to protect the public or the victim, and/or assure future court appearances (non-exclusive):

a. Electronic monitoring
b. Regular check-ins with pretrial case manager
c. Community housing or shelter
d. Substance abuse treatment
e. Search and seizure
f. Stay away/no contact orders
g. Any conditions reasonably necessary to protect public and victim, and assure future court appearances
h. Court may not require def to pay for costs of conditions

3. Financial condition (bail): Court may order bail amount if:

a. Nonmonetary conditions are inadequate to protect the public and the victim, or to assure future court appearances.

b. A financial condition in the amount set by the court is necessary to protect the public and the victim, and/or assure future court appearances.
c. Bail is set in an amount def can reasonably afford after individualized consideration of def's ability to pay. [See section on detention, *infra*, if def cannot pay amount ordered.]
d. A monetary condition may be imposed with or without nonmonetary conditions.
e. If the crime is listed in section 1270.1 and bail is set higher or lower than schedule, the court must state reasons on the record. (§ 1270.1(d).)

C. Additional release conditions

a. In addition to any other terms of release, the following conditions must be imposed on bail for stalking cases (§ 646.93, subd. (c)):
   - Defendant is to have no contact with victim by any means.
   - Stay away 100 yds. from victim, residence and employment.
   - Not possess any deadly weapons or firearms.
   - Obey all laws.
   - Provide the court, if requested, with contact information for residence and employment.

b. Court must consider issuing a criminal protective order on its own motion in domestic violence cases. (§ 136.2(a)(1)(G)(ii)(1).)

III. DEFENDANT IS NOT SUITABLE FOR RELEASE

"If a court concludes that public or victim safety, or the arrestee's appearance in court, cannot be reasonably assured if the arrestee is released, it may detain the arrestee only if it first finds, by clear and convincing evidence, that no nonfinancial condition of release can reasonably protect those interests." (*Humphrey*, *supra*, 11 Cal.5th at p. 154.)

"An arrestee may not be held in custody pending trial unless the court has made an individualized determination that (1) the arrestee has the financial ability to pay, but nonetheless failed to pay, the amount of bail the court finds reasonably necessary to protect compelling government interests; or (2) detention is necessary to protect victim or public safety, or ensure the defendant's appearance, and there is clear and convincing evidence that no less restrictive alternative will reasonably vindicate those interests." (*Humphrey*, *supra*, 11 Cal.5th at p. 156.)

A. If the court is detaining the def, the following findings should be made on the record **and entered in the minutes of the court**:

1. A finding that the facts are evident or the presumption great the defendant committed the charged offense.

2. If the denial of bail is based on art. I, § 12, the specific provision justifying denial of bail. If the def qualifies for "no bail" status under article I, section 12(a),(b)(or (c), further findings in paragraphs (3) and (4) below likely are not required; a prudent court may wish to state such findings as additional justification for detention.

3. The specific reasons why no condition or combination of financial and nonfinancial conditions are sufficient to protect the public or the victim, and/or assure future court appearances. The court should discuss why specific tools of pretrial supervision (such as electronic monitoring, search and seizure, etc.) will be insufficient to protect the public interests.

4. Detention is necessary to protect victim or public safety, and/or ensure the defendant's appearance, and there is clear and convincing evidence that no less restrictive alternative will reasonably vindicate those interests. The court should enter a specific finding: "The court finds by clear and convincing evidence that no condition or combination of conditions will reasonably assure the protection of the public or safety of the victim, and/or future court appearances by the defendant."

B. Set custody status

Depending on whether the court follows *Brown* or *Kowalczyk*, the court should set the def's custody status:

1. [**Based on *Brown***]: "Although the defendant is eligible for bail, after consideration of the foregoing factors, and the provisions of article I, §§ 12 and 28(f)(3) and Penal Code § 1275, the court finds defendant's [risk to the public/victim] [and] [risk of nonappearance] outweighs such eligibility and sets custody at 'NO BAIL.' "

2. [**Based on *Kowalczyk***]: "Bail is hereby set at $____. The court recognizes that the defendant may not be able to pay the bail as set by the court and that the setting may result in defendant's detention. However, the court finds by clear and convincing evidence that (1) the amount set is the amount of bail reasonably necessary to [protect the public and/or the victim] [and] [assure the defendant's future court appearance], (2) that no lesser amount or any other less restrictive alternative or combination of alternatives will reasonably meet such needs of the state, and (3) that no condition short of detention will be sufficient to protect the such needs of the state."

APPENDIX II: CHECKLIST FOR PREHEARING RELEASE ON PROBATION VIOLATIONS

I. Defendant is on probation – NOT mandatory supervision, PRCS, or parole [§ 1203.25(a)]

A. Defendant is not serving flash incarceration [§ 1203.2(a)]

II. Misdemeanor VOP

A. May not deny release [§ 1203.25(d)]
   1. **Exception**: Defendant violated court order in the case
   2. Constitutional considerations [Const. Art. I, § 28(f)(3)]
      a. Protection of public and safety of victim
      b. Seriousness of charges
      c. Previous record
      d. Probability of appearing at hearing
   3. May release on conditions if clear and convincing evidence of need to protect public or assure court appearance – see *infra* for conditions
   4. If defendant is released, use formal O.R. form [§ 1318] with any added conditions

III. Felony VOP

A. May not deny release [§ 1203.25(e)]
   1. **Exception**: clear and convincing evidence no reasonably available alternative to reasonably protect public and reasonably assure court appearances
   2. Constitutional considerations [Const. Art. I, § 28(f)(3)]
      a. Protection of public and safety of victim
      b. Seriousness of charges
      c. Previous record
      d. Probability of appearing at hearing
   3. May release on conditions if clear and convincing evidence of need to protect public or assure court appearance – see *infra* for conditions
   4. If the defendant is released, use formal O.R. form [§ 1318] with any added conditions

IV. Conditions of release

A. May impose conditions if clear and convincing evidence that conditions are needed to provide reasonable protection of public and reasonable assurance of future court appearance [§ 1203.25(a)]

B. Make individualized determination of factors indicating risk to public or flight risk [§ 1203.25(a)(1)]
   1. Findings based on all evidence and any probation report [§ 1203.25(f)]

2. Assume truth of allegations of violation [*Humphrey*, *supra*, 11 Cal.5th 135, 153]
3. Likely may not require risk assessment for setting conditions of release [possible use for determining suitability for release] [§ 1203.25(a)(2)]

C. Determining risk
   1. Consider Const. art. I, § 28(f)(3) and §§ 1270.1 and 1275
      a. Protection of public [primary consideration]
      b. Seriousness of charge – weapons, injury, threats, use of drugs, potential sentence
      c. In DV cases – violations of protective orders, lethality, safety of victim and family, threats, past violence
      d. Criminal record
      e. Probability of appearance – record of past non-appearance
      f. Validated risk assessment for suitability of release
      g. Drug offenses – quantity of drugs, whether the defendant is on bail
   2. Factors in *Humphrey*, *supra*, 11 Cal.5th at p. 152
      a. Protection of public and victim
      b. Seriousness of charge
      c. Criminal record
      d. History of compliance with court orders
      e. Likelihood of future court appearance

D. Findings by the court
   1. Orally on record – entered in minutes if no reporter and requested by party [§ 1203.25(f)]

E. Conditions of release
   1. Conditions imposed must be the least restrictive necessary to protect the public and assure the defendant's appearance [§ 1202.25(a)(3)]
   2. Reasonable conditions: telephonic reporting, GPS, SCRAM or similar conditions [§ 1203.25(b)]
   3. May not impose bail unless clear and convincing evidence that other conditions are not adequate to protect public and assure appearance [§ 1203.25(c)(1)]
      a. Must be based on individualized determination
      b. Setting must be based on ability to pay cash bail (not bail bond)
   4. May not require defendant to pay for cost of conditions of release [§ 1203.25(b)]
   5. May not use risk assessment instrument in determining conditions of release [§ 1203.25(a)(2)]

V. VOP BASED ON NEW CRIME

A. If VOP based on new crime, may set bail independently of VOP procedures [§ 1203.25(g)]

1. Review custody status and bail setting if defendant eligible for release on VOP but not on new crime