IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re Gerald Kowalczyk, Petitioner, on Habeas Corpus.	Case No.: S277910

First Appellate District, Case No. A162977
San Mateo Sup. Court No. 21-SF-003700-A
The Honorable Susan Greenberg, Superior Court Judge
The Honorable Elizabeth K. Lee, Superior Court Judge
The Honorable Jeffrey R. Finigan, Superior Court Judge

APPLICATION TO FILE BRIEF AND BRIEF OF AMICUS CURIAE SILICON VALLEY DE-BUG IN SUPPORT OF PETITIONER

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Silicon Valley De-Bug

APPLICATION

Pursuant to California Rule of Court 8.520(f), Berkeley's Criminal Law & Justice Center respectfully applies for permission to file the attached *amicus curiae* brief on behalf of Silicon Valley De-Bug in support of Petitioner Gerald Kowalczyk.

This application is timely made within 30 days of the filing of the reply brief on the merits. No party or counsel for any party in the pending appeal authored the proposed amicus brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief, and no other person or entity made a monetary contribution intended to fund the preparation or submission of the brief, other than the amicus curiae, their members, or their counsel.

I. INTERESTS OF AMICUS CURIAE

Silicon Valley De-Bug is a community-based organization that aims to amplify the voices of disadvantaged communities and reshape the landscape of power in the criminal justice system. Founded in 2001, De-Bug's core initiatives have focused on organizing campaigns around criminal justice reform, economic justice, and bail reform. At the heart of these efforts is their widely recognized "participatory defense" model, which brings impacted communities into a typically isolating court process. Families and individuals directly impacted by the court system lead De-Bug in paving an accessible avenue for affected communities to engage with legal institutions.

Raj Jayadev, founder and director of Silicon Valley De-Bug, spearheads the implementation of participatory defense methods through the Albert Cobarrubias Justice Project. Extending beyond its local roots in the Bay Area, De-Bug coordinates a National Participatory Defense Network with over 30 hubs across the nation. This interconnected network has collectively saved nearly 16,000 years of potential sentencing time won through cases or reduced terms. In 2018, Raj Jayadev received the prestigious MacArthur Fellowship for pioneering a model that empowers individuals facing incarceration, along with their families and communities, to actively participate in their own defense. This success underscores De-Bug's profound commitment to reshaping lives and dismantling inequitable structures within the court system.

II. THE NEED FOR FURTHER BRIEFING

Since the *In re Humphrey* decision in 2021 (11 Cal.5th 135), De-Bug has expanded its work to identify trends in bail determinations across various Bay Area counties. De-Bug submits this brief to assist the Court in its consideration of the constitutional issues California's pretrial detention system presents. Through empirical data and personal accounts that illustrate discrepancies in the day-to-day application of the standards set forth in *Humphrey*, De-Bug seeks to enhance the Court's understanding of the current bail system.

III. CONCLUSION

For the foregoing reasons, the proposed *amicus curiae* respectfully requests that the Court accept the accompanying brief for filing on this case.

Dated: November 8, 2023

Respectfully submitted,

By /s/ Chesa Boudin

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ISSUES PRESENTED

The issues on which the Court granted review are: (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?

INTERESTS OF AMICUS CURIAE

As an organization deeply engaged in participatory defense work, Silicon Valley De-Bug serves a diverse array of communities, including directly impacted families and individuals facing criminal charges. De-Bug has held a longstanding interest in bail reform and pretrial detention reform, actively campaigning to promote competence and accountability within pretrial services. Through participatory defense initiatives, the organization has developed a community-driven approach to legal advocacy that involves impacted families in the outcomes of their cases and the cases of their loved ones. Accordingly, the population De-Bug serves is intrinsically tied to this case. The stakes for these communities could not be higher when individuals and families face the extraordinary harms of pretrial detention and, all too often, the unaffordable cost of trying to purchase freedom. Ramifications of unfavorable bail determinations have far-reaching consequences, not only for those facing charges but also for their entire communities.

De-Bug is comprised of community anchors and professionals dedicated to safeguarding the rights of indigent individuals who the court system has impacted.

Through De-Bug's participatory defense work, its members have witnessed first-hand how bail determinations can significantly impact access to resources, employment opportunities, and family cohesion. Thus, De-Bug has a profound understanding of the potential impact this case will have on affected communities. De-Bug is well positioned to assist in broadening the Court's understanding about the complexities inextricably linked to unaffordable cash bail. The attached brief aims to offer a distinct perspective: it includes empirical data and real-life accounts that shed light upon the post-*Humphrey* realities individuals face in the courtroom.[1]

ARGUMENT

I. INTRODUCTION

This Court in *Humphrey* acknowledged that the constitutional mandate that pretrial detention be rare was not carried out in practice because of rampant unlawful wealth-based detention. (*In re Humphrey* (2021) 11 Cal.5th 135, 142 (*Humphrey*).) To curb that unlawful practice, this Court announced some limiting principles under the federal constitution restricting a trial court's ability to order someone detained pretrial. In fact, article I section 12, California's constitution goes beyond the federal constitution and restricts judges' discretion to order people detained pretrial to the narrow categories serious cases detailed in section 12. Voters have twice upheld and reaffirmed these limitations and pretrial detention. (*See People v. Standish* (2006) 38 Cal.4th 858, 874

[1] No party's counsel authored this brief in whole or in part. No person, other than amici curiae's counsel, funded the preparation or submission of this brief.

(summarizing relevant proposition history).) The Court of Appeal opinion on review does away with these longstanding state-constitutional limitations, opting instead to allow trial courts to set unaffordable cash bail to detain people who are ineligible for detention under section 12. Because courts would still be required to make the federal constitutional findings detailed in *Humphrey*, the Court of Appeal suggests that pretrial detention would remain the "rare" and "carefully limited exception" to the "norm" of pretrial liberty. (*In re Kowalczyk* (2022) 85 Cal.App.5th 667, 692.)

The primary purpose of this amicus brief is to present the Court with a multi-county examination of bail determinations post-*Humphrey* which makes clear the legal and factual errors of the opinion on review. What court watchers in multiple counties observed and detailed in a published report is that the world of constitutional norms this Court envisioned in *Humphrey,* and which the Court of Appeal gestured toward, has not come to be. Instead, trial courts flagrantly violate not only the limitations of section 12 but also this Court's clear mandates in *Humphrey*. To protect the intent of the state constitutional framers, enact the will of the voters, and ensure this Court's promise in *Humphrey*—that pretrial detention is rare and carefully limited—this Court should affirm that section 12 controls pretrial detention and that courts cannot bypass it simply by setting unaffordable bail. (*Humphrey*, 11 Cal.5th at 155.)

Amicus further hopes this brief will 1) elucidate the application (or lack thereof) to established detention standards in Bay Area trial courts, 2) identify recurring justifications cited for detention, if any, 3) assess distribution between release and

detention orders, and 4) evaluate the extent to which individualized considerations, particularly of an individual's ability to pay, are afforded at arraignment. The findings presented in this brief underscore a pressing need for the Court's intervention in addressing the discrepancy between the constitutional requirements for setting bail and the actual practices occurring in trial courts every day. Observations documented in Santa Clara, San Mateo, and Alameda counties reveal a systemic failure to adhere to the legal standards and procedures set forth in *Humphrey*. The following evidence-based assessment demonstrates that trial courts continue to cling to monetary bail and routinely fail to consider individual circumstances or less restrictive alternatives before jailing defendants simply because of their inability to pay. Beyond this, judges consistently detain defendants whose charges do not fall under article I, section 12, and fail to make the findings that section requires—or, in many cases, articulate any legal standard at all—prior to ordering detention.

This arbitrary approach to pretrial detention not only erodes the bedrock of fairness, effectiveness, and credibility within the criminal justice system but also perpetuates cycles of instability by sowing financial burdens into the lives of families and communities. Individual pretrial liberty must be safeguarded through a transparent process consistent with the *Humphrey* ruling and article I, section 12 of the California Constitution.

II. COMMUNITY MEMBERS OBSERVE AND DOCUMENT ARRAIGNMENT COURT PROCEEDINGS IN THREE COUNTIES

Silicon Valley De-Bug has been closely monitoring court trends for nearly a decade. The Community Release Project team, which assists those facing charges in navigating the court system and reentry process, particularly for individuals without the family and community support required for successful pretrial release, currently leads these monitoring efforts. For De-Bug's recent report, *Bail and Detention Decisions One Year After Humphrey*, Participatory Defense Hub members gathered data in Santa Clara, San Mateo, and Alameda counties' felony arraignment courts.

Trained observers were tasked with recording basic identifying information about cases during arraignment by listening for bail determination and the reasons cited, such as failure to appear (FTA) or criminal history, as well as the legal standard the court invoked. Each hub conducted and recorded observations on a handout for a consecutive week to account for inconsistent flows of bail determinations. In instances where identifying information or data related to the bail determination was missing, hub members used public portals and daily calendars to supplement relevant information. Cases lacking crucial identifying information, key bail determination details, or other pertinent data were excluded from the data set and are not reflected in this brief.

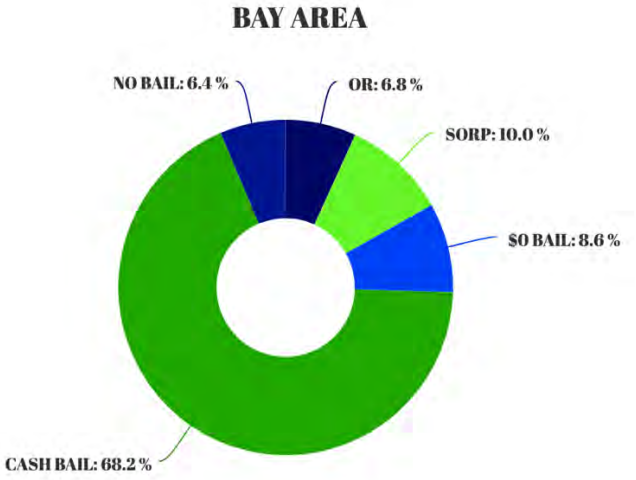
Circumstances of observations in each county are as follows: San Mateo County Participatory Defense conducted in-person observations from February 22 to February 28, 2022. Alameda County defense hub members conducted observations over virtual public access lines from February 23 to March 31, 2022, during which time the county's

courtrooms remained closed to the public, despite efforts from the hub to facilitate court access for family support. Finally, Santa Clara hub members observed court proceedings in-person with a team of two or three individuals from February 7 to February 10, 2022. In 2023, De-Bug members conducted regular follow-up observations in Santa Clara County and San Mateo to comprehensively monitor judicial decisions.

III. CURRENT BAIL PRACTICES FALL SHORT OF CONSTITUTIONAL STANDARDS

A. Judges Continue to Rely on Cash Bail Over Available Nonfinancial Conditions of Release[2]

What did the judge order?



Across all three counties observed in the Bay Area, judges set money bail as the condition for release in 68.2 percent of cases.[3] In Alameda and San Mateo counties,

[2] Throughout this brief, Own Recognizance (release without cash bail or nonmonetary conditions) is abbreviated "OR" and Supervised Own Recognizance Program (release on nonmonetary conditions without cash bail) is abbreviated "SORP".

[3] Of course, in some cases judges set money bail *and* non-monetary conditions as well. The non-monetary conditions are generally moot in those cases where the money bail

judges set money bail in the vast majority of cases, culminating in 72.7 percent and 79.3 percent of all orders, respectively. In Santa Clara County, cash bail accounted for 31.8 percent of all orders. Despite Santa Clara's lower relative percentage, in all three counties, release without cash bail or nonmonetary conditions, abbreviated as "OR" or "SORP," still accounted for less than a quarter of all orders. This significant percentage of cases illustrates that judges are continuing to over-rely on money bail despite the availability of nonfinancial conditions of release.

There is a clear variance in bail practices among San Mateo, Alameda, and Santa Clara counties. In San Mateo, for example, observers documented the trial court's significant reliance on cash bail: 79.3 percent of presumptively innocent defendants were ordered to pay cash bail to secure their pretrial freedom. San Mateo County judges' frequent invocation of cash bail is especially alarming in the face of the county's increasing bail schedule. San Mateo County previously had an "Emergency Bail Schedule" with an established minimum cash bail amount of $250 for misdemeanors and most felonies.[4] On March 14, 2022, San Mateo County effectively revoked the emergency bail schedule.[5] This quadrupled the minimum schedule cash bail amount from $250 to $1,000. Such a drastic increase raises concerns about affordability, particularly

amount is unaffordable and thus effectuates a detention order. For purposes of the data gathered and reported here, any amount of monetary bail was counted as cash bail.

[4] *See* San Mateo County Emergency Bail Schedule (Oct. 29. 2021) https://www.sanmateo.courts.ca.gov/system/files/102921a.pdf.

[5] *See* Order Revoking Emergency Bail Schedule (Mar. 14, 2022) https://www.sanmateo.courts.ca.gov/system/files/2022_revoked_emergency_bail_schedule_order.pdf.

for the significant number of defendants who were previously unable to pay even the $250 scheduled bail amount.

For example, De-Bug observers documented the case of Shir Eitan. (San Mateo Superior Court No. 22-NM-004021-A.) Eitan was a 63-year-old transient woman who had never been convicted of a felony and was confined in a San Mateo County jail cell because the court required an unaffordable financial condition of release. (*In re Shir Eitan* (April 5, 2022) A164892.) Unemployed and lacking any financial support, Eitan's poverty rendered her unable to afford even di minimis cash bail. (*Id*.) Her past criminal history—primarily misdemeanor offenses for public intoxication in violation of Penal Code section 647(f)—stemmed directly from years of being unhoused and struggling with untreated or undertreated substance use disorders. (*Id.*)

De-Bug's trained observers were watching when Eitan was, again, in a San Mateo County courtroom, charged with public intoxication. Given that she was transient and could not afford any amount of cash bail, the court-appointed private defender asked that she be released without any financial conditions. (*Id.*) Eitan was not charged with an enumerated offense and was ineligible for pretrial detention under article I section 12 of the California Constitution, yet the judge detained her pending trial after finding that, due to her pattern of public intoxication, she was a danger to the community and herself. (*Id.*) Though counsel informed the court that she had no source of income and could not afford to pay any amount of cash bail, the judge set bail at $1,000. (*Id.*) Eitan remained in custody for nine days after her arrest because she was unable to pay the $1,000 bail, and,

at her very next court date, accepted a plea deal in exchange for her release. (*Id.*) This case is not isolated but rather emblematic of a recurring issue in San Mateo and other counties: the pretrial detention of presumptively innocent people accused of low-level and nonviolent offenses solely because of their inability to pay.

Alameda judges set cash bail and released defendants at comparable rates to San Mateo judges but were more likely to set No Bail. Like San Mateo, Alameda recently dramatically increased the low end of the bail schedule. At the beginning of the COVID-19 pandemic, Alameda County had similarly implemented an Emergency Rule Adopting Temporary Emergency Bail Schedule, effective April 08, 2020,[6] as the Judicial Council.[7] Two years later, on April 29, 2022, Alameda County repealed the emergency bail schedule and implemented a new bail schedule.[8] The new schedule sets bail for violation of unscheduled misdemeanors at $10,000 for wobbler offenses, $5,000 for offenses carrying a one-year maximum sentence, and $2,500 for offenses with a six-month maximum sentence.[9]

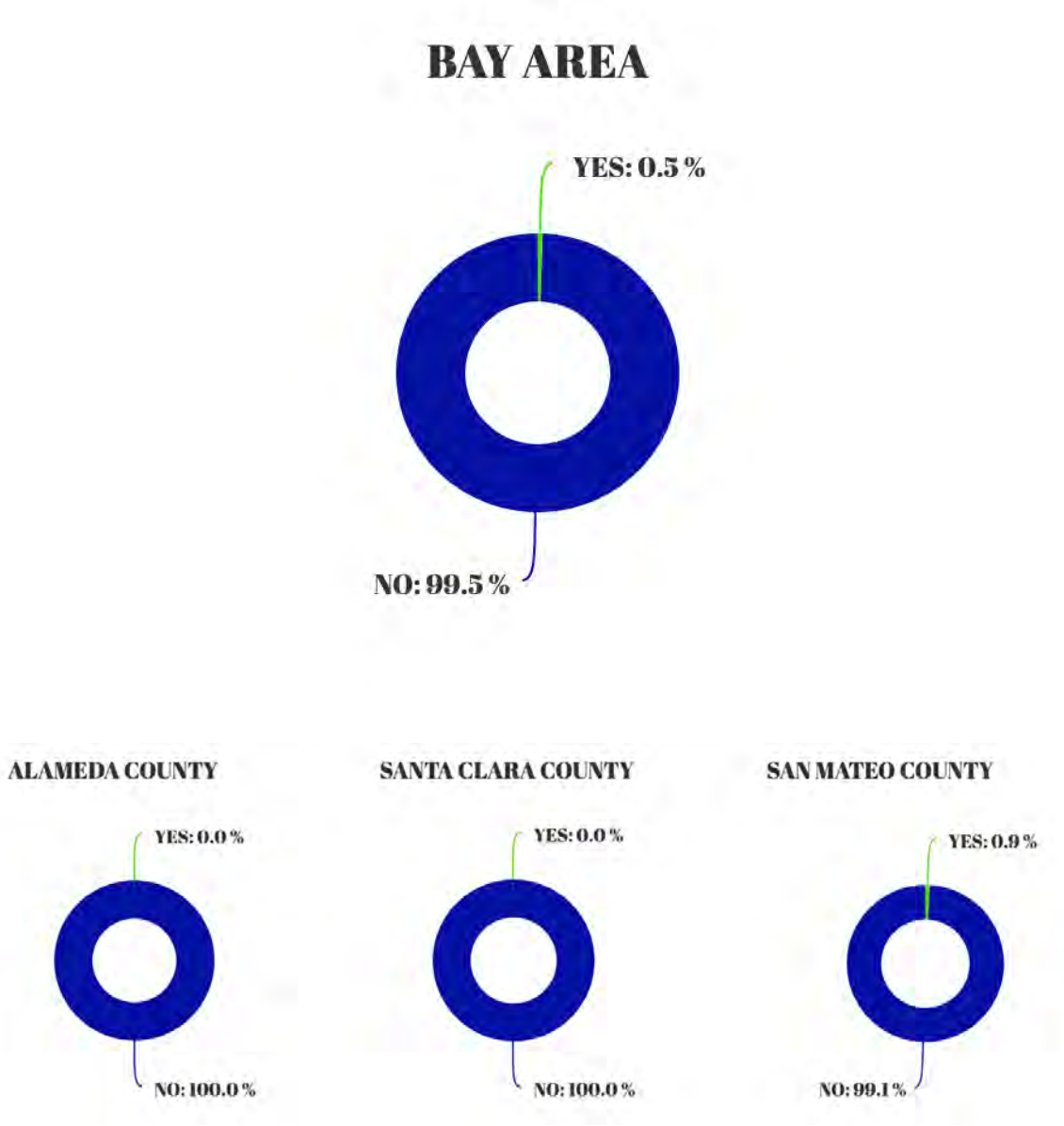
[6] *See* Alameda County Rule 4.115 – Emergency Rule Adopting Temporary Emergency Bail Schedule https://www.alameda.courts.ca.gov/system/files/emergency-rule-4115.pdf.
[7] *See* Judicial Council Emergency Rule 4 (adopted April 6, 2020, repealed June 20, 2020) https://www.courts.ca.gov/documents/2020-06-10-rules-effective-2020-06-20.pdf.
[8] *See* Alameda County Press Release (Apr. 29, 2022) https://www.alameda.courts.ca.gov/system/files/apr-29-2022-press-release-re-local-rule-changes-and-new-web-site-final.pdf.
[9] Alameda County 2022 Misdemeanor and Felony Bail Schedule https://www.alameda.courts.ca.gov/sites/default/files/alameda/default/2022-04/Bail%20Schedule%20effective%20April%2030%202022%20-%20FINAL.pdf.

Santa Clara County's use of the COVID emergency $0 Bail schedule, which was in place from April 13, 2020, until July 31, 2022,[10] significantly impacted the pretrial process for financially disadvantaged and working-class individuals. Because of Santa Clara's $0 bail schedule, 63.7 percent of those arraigned in that county during the observation period were released without having to pay for their freedom, while those charged with identical offenses in San Mateo and Alameda were routinely subjected to cash bail orders. As described *infra* part IV, pretrial release on nonmonetary conditions helps avoid a downward spiral of irreparable harm in the lives and defendants and their families, and removes the coercive pressure to plead guilty in exchange for release that accompanies pretrial detention.

B. Judges Continue to Set Cash Bail Without Individualized Consideration of Ability to Pay

In cases where judges set cash bail, did they first consider a defendants' ability to pay?

[10] Order Applying Statewide Emergency Bail Schedule (Apr. 10, 2022) https://www.scscourt.org/general_info/news_media/newspdfs/PR%20Statewide%20Emergency%20Bail%20Schedule%20April%2010.pdf; *see also* 2022 Criminal Bail Schedule https://www.scscourt.org/general_info/news_media/newspdfs/PR_Bail_Schedule_July2022.pdf.



In *Humphrey*, this Court definitively established that both the federal and California constitutions require judges to consider a defendant's ability to pay before setting cash bail. (11 Cal.5th at 152.) However, in a sample size of three counties and nearly 250 cases, there was only one instance of a court inquiring into or mentioning a person's ability to pay, revealing a widespread failure to comply with the constitution as set forth in *Humphrey*. In this one observed case where the court mentioned ability to pay,

Victoria Delosangeles was arraigned in San Mateo County on several charges stemming from her alleged stealing a vehicle and driving without a valid license. (San Mateo Superior Court No. 22-SF-002380-A.) The District Attorney requested $25,000 while the appointed defense attorney asked for SORP without money bail. (*Id.*) The judge then sought information regarding Delosangeles' ability to pay. (*Id.*) Despite Delosangeles explicitly stating that she could only afford up to $1,000, the judge opted to impose $2,000. (*Id.*) Detained because of an unattainable financial burden, Delosangeles was unable to secure her release, compelling her to pursue a plea deal to secure her freedom.

Despite their clear legal obligation to do so, judges appear reluctant to inquire into or consider a defendant's ability to pay bail. Judges, particularly those sitting in counties whose defense bar does not have a strong culture of pretrial release advocacy, may feel it is the responsibility of defense attorneys to bring up this information, and that failure on the part of a defense attorney to raise ability to pay waives the issue. For example, observers documented that San Mateo judges never consider the ability of a defendant to afford bail unless a defense attorney explicitly prompts them to do so. But San Mateo attorneys only raise ability to pay at arraignment on rare occasions and did so only once during the observation period for the De-Bug report. In fact, San Mateo hub members (who have regularly observed these court proceedings since May of 2018) report that out of the ten attorneys known to regularly handle arraignments, only two have ever been observed mentioning their client's ability to pay, advocating for cash bail to be set within their clients' ability to pay, or asking the court to set nonfinancial conditions of release in

lieu of cash bail.[11] As a result, ability to pay is virtually never raised in San Mateo County arraignment court.

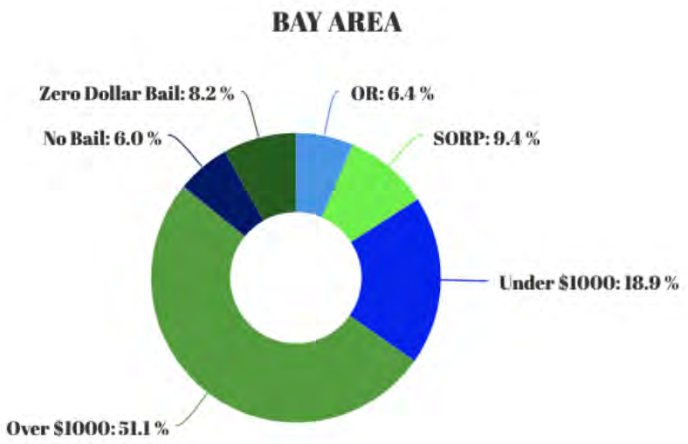
The defense bar's failure to raise ability to pay does not absolve the courts of the responsibility to inquire into and consider ability to pay cash bail: as this Court explicitly held in *Humphrey*, "the court *must* consider the arrestee's ability to pay." (11 Cal.5th at 143 (*emphasis added*).) This places the onus for inquiring into the ability to pay squarely on the shoulders of the judges choosing to set money bail. Nor can ineffective defense counsel account for the same pattern in Santa Clara and Alameda counties. De-Bug's court watching program has noted that Santa Clara County and Alameda County both have well established public defender programs whose lawyers make robust ability to pay arguments at arraignment as a matter of course. Courts in those counties nevertheless also fail to consider ability to pay before setting bail. Thus, the data De-Bug court watchers collected does not reflect widespread ineffective assistance of counsel, but widespread disregard from the *bench* of the constitutional rights of those who come before them. Due process obliges the court to ensure that presumptively innocent people are not detained solely because of their poverty, and it cannot do so without first taking into consideration a person's ability to pay.

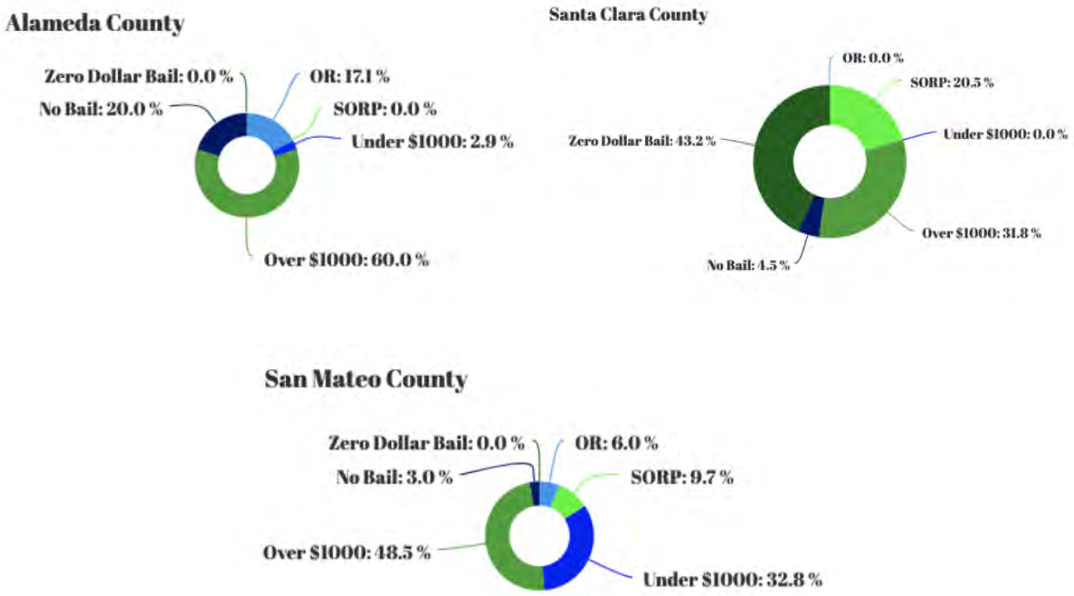
[11] Notwithstanding the court's *sua sponte* responsibility to consider ability to pay (*Humphrey*, 11 Cal.5th at 143) it is worth considering whether a panel of court appointed attorneys who systematically fail to raise a critical aspect of a fundamental constitutional right at the outset of cases are providing ineffective assistance of counsel. To the extent judges want to pass the responsibility to raise ability to pay to defense counsel, the court also has an obligation to appoint effective counsel. (*See, e.g., McMann v. Richardson* (1970) 397 U.S. 759, 771 n.14 ("[I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel").)

"The common practice of conditioning freedom solely on whether an arrestee can afford bail is unconstitutional." (*Humphrey*, 11 Cal.5th at 143.) Judges violate the constitution when they require money bail without weighing less restrictive alternatives along with an individual's financial conditions. Contrary to the constitutional protections in the text of the federal and state constitution and as interpreted by this Court in *Humphrey*, Silicon Valley De-Bug's court watching data reveal that individualized consideration is extended to only a small fraction of defendants.

C. Judges Continue to Set Unaffordable Cash Bail, Conditioning Liberty on an Unattainable Financial Hurdle

Among those who were required to pay cash bail, what proportion had bail amounts set over $1,000?





Many of the people in the communities De-Bug serves cannot afford any amount of cash bail. De-Bug's experience suggests that, of those who can afford some amount of cash bail, $1,000 cash bail represents the upper limit of what could reasonably be deemed "affordable" for the "average person." Statewide and nationwide empirical evidence corroborates this. Human Rights Watch analyzed six California counties in detail regarding bail requirements, and found that 70-80 percent of arrestees could not, or did not, pay bail.[12] The report also found a clear correlation between the poverty rate and the unsentenced pretrial detention rate at the county level in California.[13] Of all the human beings sitting in California county jails on any given day, 63 percent have not been

[12] Human Rights Watch, "Not in it for Justice" – How California's Pretrial Detention and Bail System Unfairly Punishes Poor People (April 2017) https://www.hrw.org/report/2017/04/11/not-it-justice/how-californias-pretrial-detention-and-bail-system-unfairly.

[13] *Id.*

sentenced, but are serving time simply because they cannot afford to pay bail.[14] California is not unique in this regard. For example, in New York, 40 percent of defendants were unable to afford bail amounts that were $500 or less.[15] On the national level, 32 percent of Americans would not be able to cover an emergency expense of $400 or more at any given time.[16] Nationwide, more than 60 percent of people in jail are detained pretrial, and over 30 percent of them remained in jail because they could not afford to post money bail.[17]

Despite the daily experience of countless Californians faced with the crushing burden of unconstitutional money bail, the San Mateo District Attorney's Answer argues that allowing courts to set unaffordable money bail is better for pretrial detainees than requiring them to issue transparent detention orders. (Answer Br. at 41, 58.) The logic is that unattainable money bail may, at some future point, become attainable. (*Id.*) While this may be technically true in some small number of cases where bail is set just above a defendant's ability to pay,[18] it ignores two critical points.

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[14] *Id.*
[15] U.S. Commission on Civil Rights, The Civil Rights Implication of Cash Bail, 1, 44 (Jan. 2022) https://www.usccr.gov/reports/2021/civil-rights-implications-cash-bail.
[16] The Federal Reserve, *Economic Well-Being of U.S. Households (SHED)*, available at https://www.federalreserve.gov/publications/2022-economic-well-being-of-us-households-in-2021-dealing-with-unexpected-expenses.htm.
[17] U.S. Commission on Civil Rights, The Civil Rights Implication of Cash Bail, 1, 45 (Jan. 2022) https://www.usccr.gov/reports/2021/civil-rights-implications-cash-bail.
[18] Even when money bail is or becomes affordable, it still has long-lasting and harmful impacts not only on individual defendants, but on entire communities, primarily on women of color. As the San Francisco Treasurer found in a detailed report, nonrefundable fees paid to for-profit corporations hit low-income neighborhoods and

First, unattainable money bail rarely becomes attainable, nor is it intended to become attainable. Rather, De-Bug's observations across counties make clear that judges use unattainable money bail as a proxy for detention orders but without making any of the findings the law requires for a detention order. Second, the San Mateo District Attorney's argument ignores the harsh lived experiences of those detained on unaffordable bail. The casual assumption about individuals "waiting for Friday's paycheck to make bail that was unaffordable on Tuesday," (*Id.* at 58), is grossly disconnected from the reality of severe and often irreparable harm unaffordable bail inflicts on tens of thousands of Californians every year, many of whom are unhoused or unemployed at the time of their pretrial detention. Indeed, even short-term wealth-based detention can cause irreparable harm: loss of life, loss of child custody, severe medical harm, loss of housing, loss of employment, and of course severe prejudice to any legal defense or assertion of rights. (*In re Humphrey* (2018) 19 Cal. App. 5th 1006, 1032, n.13 aff'dd, 11 Cal. 5th 135 (2021). *See also ODonnell v. Harris Cnty., Texas*, 251 F. Supp. 3d 1052, 1157–58 (S.D. Tex. 2017), aff'd as modified, 882 F.3d 528 (5th Cir. 2018), and aff'd as modified sub nom. *ODonnell v. Harris Cnty.*, 892 F.3d 147 (5th Cir. 2018)

communities of color the hardest hit. The report further found that "bail creates a two-tiered system of justice. People with wealth can purchase their freedom, while people without wealth stay behind bars." (*Do the Math: Money Bail Doesn't Add up for San Francisco*, San Francisco Treasurer Financial Justice Project, (June 2017) https://test-sfttx.pantheonsite.io/sites/default/files/2019-09/2017.6.27%20Bail%20Report%20FINAL_2.pdf).

(summarizing numerous forms of irreparable harm stemming from even short periods of pretrial detention on unaffordable money bail).)

Further, pretrial detention can result in lowering detainees' prospects in the formal labor market years after the bail hearing, whereas pretrial release was found to increase the probability of employment by almost 27 percent and the probability of having any formal sector income increased by 18 percent.[19] A George Mason University study found that 30 percent of released pretrial defendants noted losing their job as a consequence of incarceration, even though close to half of those defendants were only incarcerated for 1-3 days.[20] Of those pretrial defendants who were parents or guardians of a child, 40 percent noted that the living situation of their children changed as a result of their incarceration.[21] *Humphrey* also addresses the harms of pretrial detention, noting "[y]et those incarcerated pending trial — who have not yet been convicted of a charged crime — unquestionably suffer a "direct 'grievous loss' of freedom in addition to other potential injuries." (11 Cal. 5th 135 at 142.) Thus, the San Mateo DA's argument fails to consider the real world, long-term detrimental impact of even short periods of detention

[19] U.S. Commission on Civil Rights, The Civil Rights Implication of Cash Bail, 1, 46 (Jan. 2022) https://www.usccr.gov/reports/2021/civil-rights-implications-cash-bail.
[20] Catherine S. Kimbrell and David B. Wilson, *Money Bond Process Experiences and Perceptions,* GEORGE MASON UNIVERSITY DEPARTMENT OF CRIMINOLOGY, LAW, AND SOCIETY (September 2016) https://www.prisonpolicy.org/scans/Money_Bond_Process_Experiences_and_Perceptions_2016.pdf.
[21] *Id.*

on unaffordable money bail, not only on the accused, but also on their families and communities.

The San Mateo District Attorney also fails to address how courts are actually implementing bail requirements, and why it is ineffective at incentivizing court appearance. Because courts are setting cash bail without first ensuring the amount set is affordable, most community members are unable to afford it. This makes cash bail operate essentially as a de facto detention order instead of an incentive—calculated in relation to someone's overall wealth—to ensure they return to court. Even those defendants who are ultimately able to secure their release on cash bail are typically unable to pay the full amount of bail and instead pay a non-refundable fee to a bail bondsman.[22] This defeats the purpose of any incentive that cash bail could theoretically create because defendants are never returned the 10 percent fee they pay the bail bondsmen, regardless of whether they return to court. Moreover, the system creates little incentive for bail agents to assure their clients' court appearances because it is rare for bail bond agents to pay forfeitures.[23]

The *Kowalczyk* opinion suggests that courts are intentionally and carefully calculating the exact right amount of money bail that's necessary to ensure someone's return to court through an incentive structure, even if that amount sometimes happens to be unaffordable. (85 Cal. App. 5th 667 at 692.) The District Attorney's response similarly

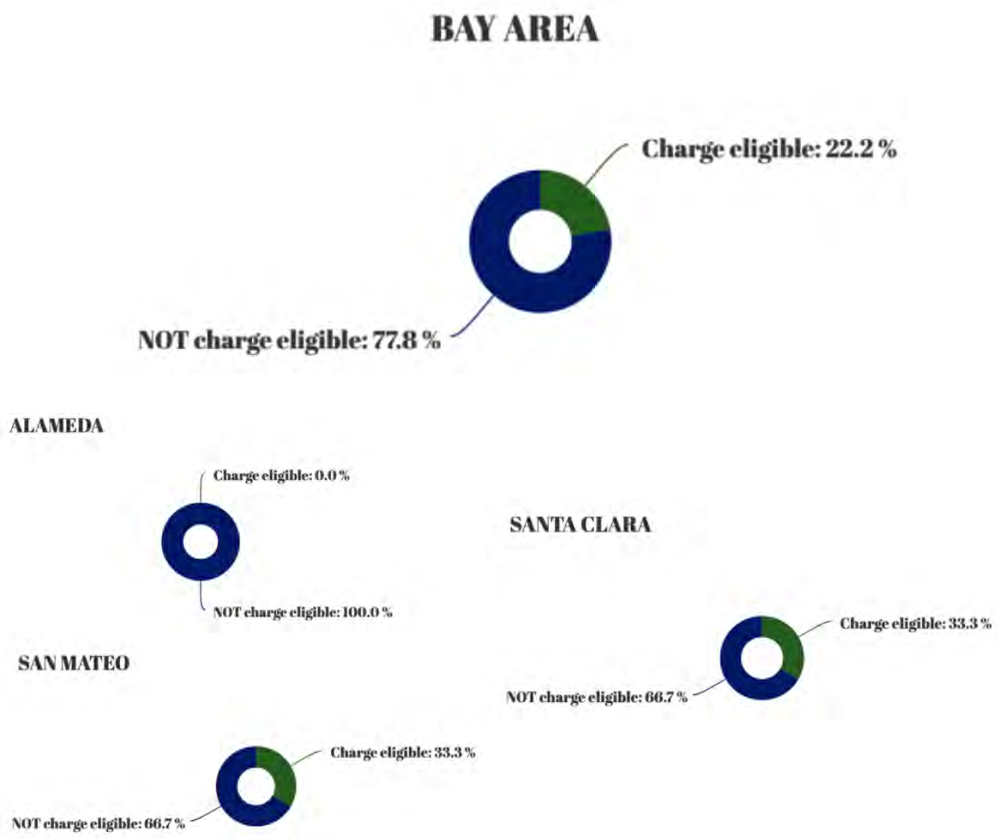
[22] Pretrial Detention Reform Workgroup, *Pretrial Detention Reform: Recommendations to the Chief Justice*, 29 (Oct. 2017) https://www.courts.ca.gov/documents/PDRReport-20171023.pdf.
[23] *Id.* at 37.

suggests that these accurate bail amounts can become affordable even if they do not seem so originally. However, the realities of the actual financial status of community members and the implementation of bail bond requirements prove that the conclusions from both the *Kowalczyk* court and the District Attorney do not align with what is actually happening on the ground.

D. Judges Routinely Order People Detained Pretrial Who Are Not Eligible for Detention Under Article I, Section 12

Of cases in which defendants were detained on cash bail without consideration of ability to pay or ordered detained without bail, what proportion were charge-eligible for detention under provision of article I, section 12 of the California Constitution?

Of those charge-eligible cases, in how many did the court make the necessary findings to support pretrial detention under article I, section 12 of the California Constitution?



Silicon Valley De-Bug's observations demonstrate that an overwhelming majority of people detained pretrial are ineligible for detention under article I, section 12 of the California Constitution. (Cal. Const., art I, §12.) Court observations in hundreds of cases demonstrate that 90.8 percent of people detained pretrial are not charge eligible[24] for detention. Article I, section 12 findings[25] are made in only 22.2 percent of cases.

[24] Meaning they were not charged with an offense eligible for detention based on the plain language of article I, section 12.

[25] For data gathering purposes, hub members considered findings under article I, section 12 to have been made if the judge found (1) that "the proof of guilt was evident, or the presumption great" or that "the record contains evidence of a qualifying offense sufficient to sustain a hypothetical verdict of guilt on appeal" and (2) "clear and convincing

For example, in another case, Chereika Trammell (Santa Clara Superior Court No. C2204760) was detained pretrial in a Santa Clara County jail because the court expressly declined to make findings required under article I, section 12, while intentionally setting bail at an unaffordable amount.[26] Trammell was charged with one felony count of assault with a firearm in violation of Penal Code section 245(a)(2); one felony count of criminal threats in violation of Penal Code section 422(a); one felony count of carrying an unregistered firearm in violation of Penal Code section 25850(a) and one misdemeanor count of exhibiting a firearm in violation of Penal Code section 417(a)(2). (*In re Chereika Trammell* (May 23, 2022) H050053.) Prior to her arrest, Trammell had narrowly escaped being raped, leading her to carry a firearm for protection. (*Id.*)

During the arraignment, the court determined that Trammell was indigent and appointed a public defender. (*Id.*) Defense counsel requested release without financial conditions, raising her lack of criminal history, academic background, and the fact that she had been carrying the gun for protection. (*Id.*) Explicitly refusing to make the requisite findings for a detention order under article I, section 12, the court set bail at $1,000,000–over sixteen times schedule bail for Trammell's charges. (*In re Chereika Trammell* (May 23, 2022) H050053, PE 47:21-23.) Unable to afford the $1,000,000

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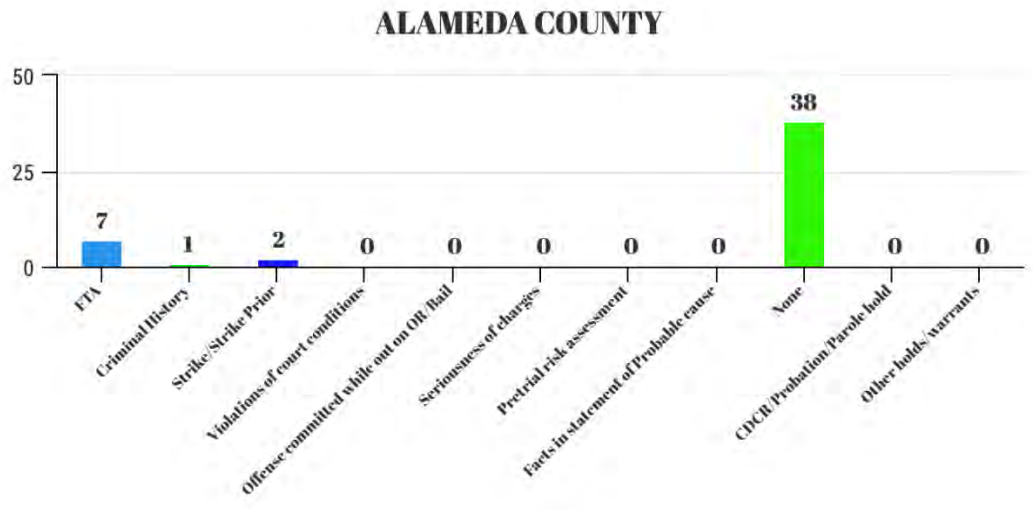
evidence that the person's release on bail pose[s] a substantial likelihood of great bodily harm" to others. (*See In re White* (2020) 9 Cal.5th 455, 471 (discussing the findings necessary to support pretrial detention under Article I, section 12).)

[26] "I am not prepared to make the finding under article I section 12, but I have a very strong concern about community safety . . . So what I'm going to do in this case is set bail at—in an amount that I don't believe that [the defendant] will be able to—will be able to come up with." (*In re Chereika Trammell* (May 23, 2022) H050053, PE 59:1-8.)

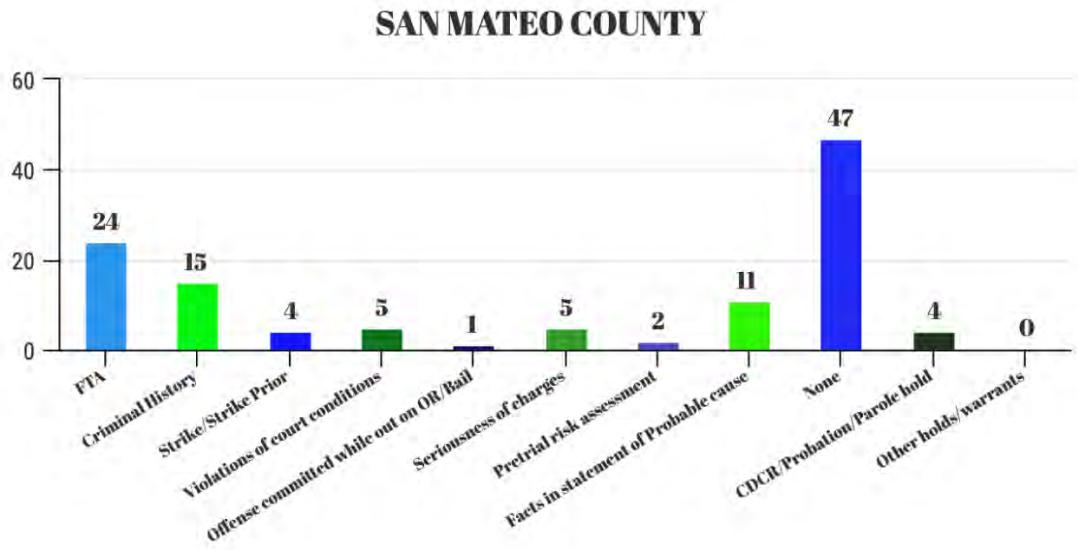
secured financial condition of release, Trammell remained incarcerated after her arrest. (*Id.*) The imposition of an exorbitant $1,000,000 bail cannot be the least restrictive alternative to pretrial detention. In countless cases like Trammell's, the imposition of unaffordable bail functions as a detention order even where the court has failed to comply with its constitutional obligations.

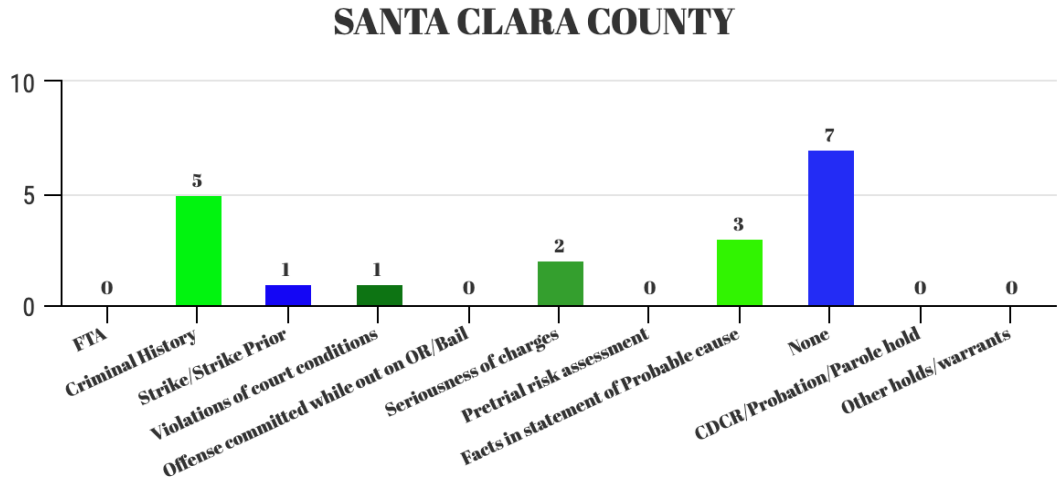
E. Judges Routinely Fail to Provide Any Record of the Reasoning Behind Their Detention Orders

Of cases in which defendants were detained on cash bail without consideration of ability to pay or ordered detained without bail, what reason did the judge cite as the basis of that order?[27]



[27] As used here, "FTA" is "failure to appear." De-Bug has never once seen a judge make findings that past FTAs were willful.



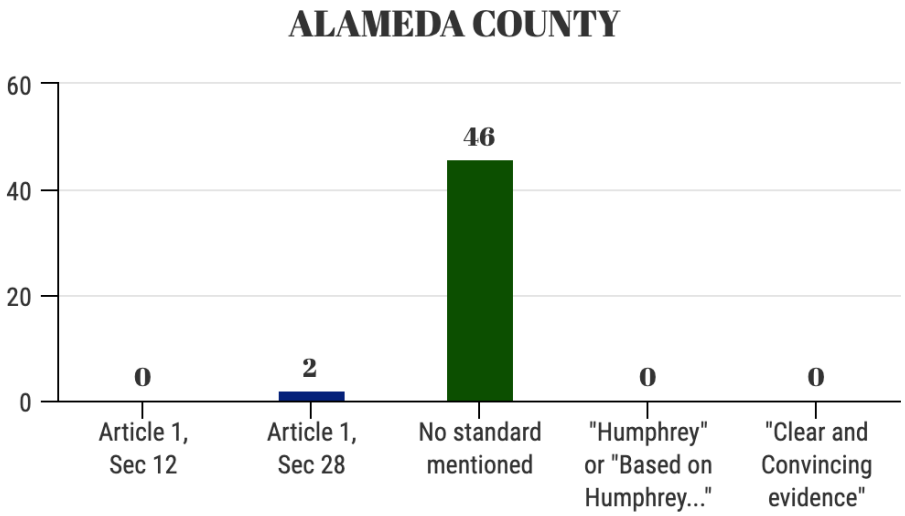


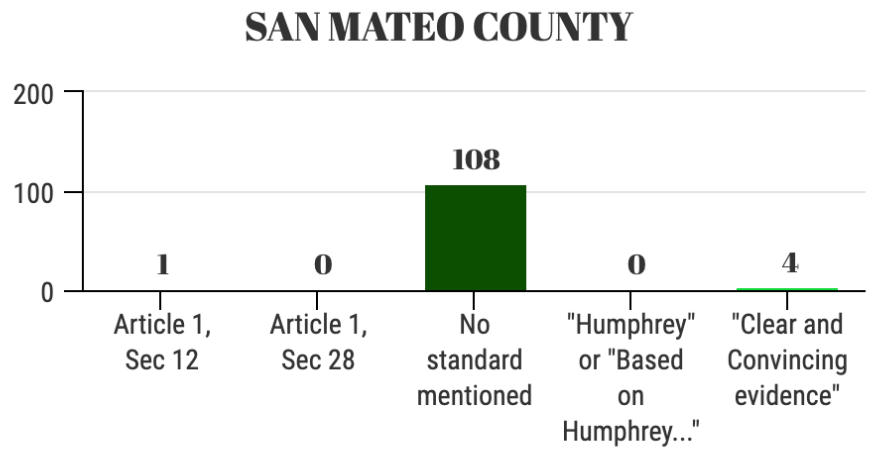
Judges failed to provide an individualized reason for their orders setting cash bail over $1,000 or denying bail in over 46 percent of observed cases. “None” indicates that the judge did not articulate any specific reason during court proceedings for their orders. The other reasons categorized in the above visualization are the most cited justifications for detention. The following cases De-Bug observed illustrate this problematic trend.

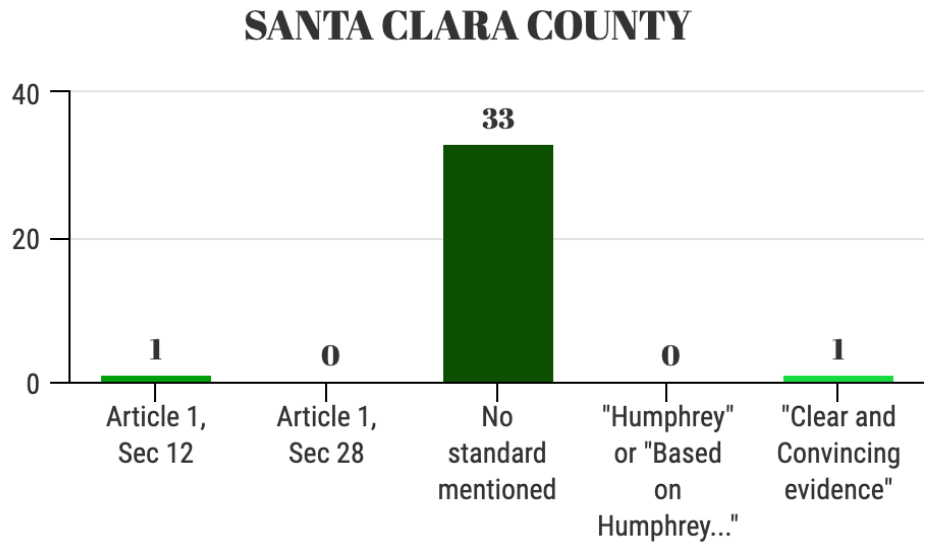
For example, a judge set bail at $2,500 despite defense counsel informing the court that his client, Danielle Santini, was not employed and could not afford to secure that amount. (San Mateo Superior Court No. 22-NM009840-A.) Disregarding counsel's objections, the judge failed to consider Santini's ability to pay or make the requisite findings in support of this de facto detention. (*Id.*) When the imposition of unaffordable bail results in the detention of presumptively innocent people, the constitution requires the court to base decisions in a careful, reasoned, and consistent approach. However, the cases De-Bug observed indicate a profound departure from these constitutional requirements.

F. Judges Routinely Impose Detention Orders Without Invoking Any Legal Standard

Of cases in which defendants were detained on cash bail without consideration of ability to pay or ordered detained without bail, what legal standard did the judge invoke to justify the detention?







Humphrey held that in order to detain an arrestee, a court must first find by clear and convincing evidence that no condition short of detention could reasonably protect the state's interests regarding the safety of the public or the victim. (11 Cal.5th at 154.) When trial courts refuse to make findings under the "clear and convincing evidence" standard,

they are choosing to flagrantly ignore this Court. In over 95 percent of cases observed, judges failed to cite any legal standard justifying an order that would keep the defendant in custody. This prevailing trend, evident across all three counties observed, highlights a concerning lack of respect for established law. While the parties argue in the merits briefs about which constitutional provision determines the universe of detention-eligible cases and other nuances of this Court's prior opinions, the daily reality in arraignment courts appears lawless. That is, judges' determinations are consistently rendered without any legal findings or reference to any legal standard at all. Instead, all too often, judges resort to vague references to "public safety risk" and "flight risk" to justify their determinations—though, as discussed in section III.E, *supra,* even this is rare.

For example, Joel McQueen, who suffers from congestive heart failure, was detained without access to his required medications. (San Mateo Superior Court Nos. 21-SF-003793-A & 20-NF-013244-A.) Despite presenting a valid medical excuse for missing his court date, the judge showed indifference to his health condition. (*Id.*) McQueen expressed his need for medication because of his heart condition, describing symptoms of swelling and water retention. (*Id.*) Nonetheless, the judge proceeded to set bail at $35,000 without clearly articulating any legal standard; both cases were eventually dismissed. (*Id.*) Similarly, during Jon Oxenford's arraignment, the prosecutor did not request money bail or seek his detention given his lack of criminal history. (San Mateo Superior Court No. 22-NM-009203-A.) Yet, the judge set an unaffordable financial

condition of release at $15,000 without considering his ability to pay or whether Oxenford's detention was necessary to further any public interest. (*Id.*)

G. Arraignment Judges' Disregard for *Humphrey* Requires Urgent Intervention

While the landmark *Humphrey* decision entrenched an individualized consideration of "ability to pay" into pretrial procedure,[28] Silicon Valley De-Bug's observations reveal a deeply troubling absence of such assessments in practice. There is a perplexing gap between defendants' clearly established constitutional right to have their ability to pay considered and the trial courts' refusal to follow this constitutional ruling. All the more troubling is that *Humphrey* was published barely two years ago, and trial courts are already flaunting its mandates. Every day, in every county court-watchers observed, trial courts deprived presumptively innocent individuals of liberty without making the findings this Court has explicitly directed them to make. (11 Cal.5th at 152-56.) These pervasive, lawless practices demand urgent attention from this Court.

These day-to-day observations of De-Bug's hubs over the past years reveal the arbitrary nature of judicial decisions in post-*Humphrey* bail determinations. Notably, in San Mateo County, court-watchers have observed judges apply widely divergent interpretations of *Humphrey*. One approach of effectuating pretrial detention is to set

[28] "What we hold is that where a financial condition is nonetheless necessary, the 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." (*Humphrey*, 11 Cal.5th at 143 (internal quotations omitted).)

clearly unaffordable money bail, for example, $10 million bail.[29] A different approach, meanwhile, asserts increased discretion in detaining with no bail under *Humphrey*. This approach often uses the threat of a no-bail detention as a cudgel to dissuade defense attorneys from advocating that cash bail be reduced to an affordable amount.

The case of James Michael Brown illustrates this coercive tactic. (San Mateo Superior Court No. 21-NM-012398-A.) Brown was being arraigned on four charges, the most serious of which was receiving stolen property with a value exceeding $950 in violation of Penal Code section 496(a), a felony. (*Id.)* When the appointed defense attorney argued that the imposition of unaffordable cash bail violated *Humphrey*, the judge threatened to deny bail in response. Even to trained legal observers, judges appear to craft their own unwritten processes based on totally inconsistent interpretations of *Humphrey*. Indeed, neither of the observed trends in judicial decisions comply with *Humphrey*. Using unaffordable bail without consideration of ability to pay and without making findings necessary to effectuate a detention order, or ordering detention in cases that are not detention eligible violate *Humphrey*.

Adherence to the constitutional requirements outlined in *Humphrey* requires a judge's accurate application of the legal standards, including making an individualized inquiry and findings into the defendant's (in)ability to pay. However, the data demonstrates that such inquiries and findings almost never occur in practice. Therefore, it

[29] The San Mateo DA's argument might be that this defendant could have won the lottery and then been able to afford $10 million, but fundamental constitutional rights cannot hinge on winning the lottery.

is incumbent on this Court to establish a coherent framework that can stamp out the scourge of arbitrary and capricious deprivation of the fundamental right to liberty. Consistent with this Court's ruling in *Humphrey*, trial courts must consider the ability to pay as part of the custody determination process in a manner that does not hinge on whims of the judge.

Often, expectations for brevity in arraignment hearings limit the time given for individualized consideration during bail determinations. In this sense, judges are faced with the choice of either expediting the court process without affording due process, or possibly setting the court behind its predetermined pace by affording each defendant their right to an individualized assessment of ability to pay, the risk they pose of flight or threatening public safety, and the potential efficacy of less restrictive alternatives to pretrial incarceration. All too often, courts choose expediency.

One possible remedy is to reduce the number of defendants whose custodial status a judge must review before being released. In Santa Clara County, the favorable outcomes resulting from implementation of $0 bail and De-Bug's community release project demonstrate the benefits of empowering defendants to fight their cases outside the confines of detention. However, lack of uniformity and accountability from the top threaten to perpetuate these trends of detention, bound not by law but by judges' subjective and varied approaches. The Court's guidance and intervention are critical in paving the way for fair and just bail determinations in alignment with constitutional principles.

Compounding the pretrial detention crisis for indigent people trial courts' inconsistent application of *Humphrey* causes is an abiding confusion about the role of section 12. De-Bug's study shows that, of all the people courts ordered detained—either on unaffordable bail or without bail—98 percent had charges that fell outside the bounds of section 12, either because the person was not charged with a "qualifying offense" or because the court declined to make the findings *White* requires in cases in which the offense qualified. (9 Cal.5th at 471.) It is clear that after *Humphrey* reserved the question of which circumstances are eligible for pretrial detention (whether section 12 governs or has been silently repealed), many courts have simply continued to order pretrial detention without addressing eligibility for detention under the state constitution at all. Others have claimed unfettered ability to detain people under article I, section 28(f)(3). (Cal. Const., art. I, § 28.) Still others have agreed that section 12 controls but treat it as nothing more than a technicality that can be evaded by issuing a de facto detention order using money bail rather than an explicit order of pretrial detention. A superior court judge in Santa Clara County, for example, detained numerous people on intentionally unaffordable cash bail after explicitly finding that they did not meet the standards for detention under section 12. (*See, e.g.*, *In re Chereika Trammell* (May 23, 2022) H050053 (petitioner Chereika Trammell was detained on an intentionally unaffordable $1,000,000 bail in a case where the court explicitly declined to make the findings required for an order of pretrial detention under article I section 12; *In re Elias DeLosSantos* (May 23, 2022) H050058 (same).) The court explained that it believed *Humphrey required* it to set intentionally unaffordable cash bail when it found someone did not meet the standards for

an explicit order of detention under section 12 and *White*, but nonetheless believed it was necessary to detain them. (*Id*.) The Court of Appeal's decision here would rubber-stamp this practice.

California's Constitution provides explicit and detailed provisions that permit the pretrial detention of people charged with certain serious cases that involve violence, sexual assault, and specific threats to harm others when there is strong evidence of the person's guilt. But as De-Bug's court watching shows, many people are being detained under circumstances that not only lack basic legal rigor and consistency, but also fail to comply with some of the State's most important values that are enshrined in its Constitution.

By recognizing as unconstitutional the long-standing practice of detaining arrestees pretrial using unaffordable bail, this Court in *Humphrey* ushered in a new framework to promote equity and transparency in pretrial detention decisions and limit the use of pretrial detention to circumstances where it is necessary and lawful. Since that decision, trial courts have failed to implement this Court's mandates. The *Kowalczyk* opinion only exacerbates that confusion, particularly given that it conflicts with other authority on this issue. (*See In re Brown* (2022) 76 Cal.App.5th 296.) At its core, *Humphrey* is a case about ensuring fairness and transparency in how pretrial detention decisions are made. In contrast, the lower court's opinion in this case violates not only the language but the spirit of *Humphrey* in authorizing an expanded pretrial detention regime beyond section 12. This Court should reject this attempt to undermine fundamental rights of millions of Californians.

This Court must ensure that the due process and equal protection principles articulated in *Humphrey* are respected in practice and that pretrial detention is imposed only sparingly, fairly, and in compliance with our constitution.

CONCLUSION

For the foregoing reasons, we urge the Court to affirm the Court of Appeal's holding that article I, section 12, subdivisions (b) and (c) govern the denial of bail in noncapital cases and to reverse the holding that superior courts may set pretrial bail above an arrestee's ability to pay.

Dated: November 8, 2023

Respectfully submitted,

By /s/ Chesa Boudin

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CERTIFICATE OF COMPLIANCE

(California Rules of Court, rule 8.520(c)(1))

I certify that the attached Amicus Curiae Brief of Silicon Valley De-Bug uses a 13-point Times New Roman font and contains 8,329 words as counted by the Microsoft Word program used to generate this brief.

Dated: November 8, 2023 Respectfully submitted,

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