

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re GERALD KOWALCZYK,

On Habeas Corpus.

Case No. S277910

Court of Appeal No. A162977

San Mateo Sup. Ct. Case No.
21-SF-003700-A

**AMICUS CURIAE BRIEF OF THE OFFICE OF THE
STATE PUBLIC DEFENDER IN SUPPORT OF
PETITIONER GERALD KOWALCZYK**

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INTEREST OF AMICUS

The Office of the State Public Defender (OSPD) is a state agency with dual goals. First, OSPD represents indigent persons in their appeals from criminal convictions in capital and non-capital cases. In that capacity, OSPD has a longstanding interest in the fair and uniform administration of California criminal law and in the protection of the constitutional and statutory rights of those who have been accused and convicted of crimes. OSPD is statutorily “authorized to appear as a friend of the court[.]” (Gov. Code, § 15423.)

Second, OSPD’s mandate was expanded in 2020 to include providing training and technical assistance to attorneys representing the indigent and by engaging in other efforts “for the purpose of improving the quality of indigent defense.” (Gov. Code, § 15420, subd. (b).) To implement this new mandate OSPD established the Indigent Defense Improvement Division (IDID), which provides free training and legal resources to indigent defense counsel across California. IDID has taken an active role in California’s discussion of best practices for early representation. IDID also provides attorney trainings on bail and pretrial detention.

In light of IDID’s mission to protect the rights and safeguard the liberty of all Californians by working collaboratively with the indigent defense community and their partners to enhance support, training, and capacity, OSPD submits this amicus brief in support of the petitioner.

INTRODUCTION

This court's landmark decision in *In re Humphrey* (2021) 11 Cal.5th 135 (*Humphrey*), recognized that fundamental principles of equal protection and due process prohibit the arbitrary setting of unaffordable bail. *Humphrey* also laid out a clear and understandable framework by which trial courts must consider a person's ability to pay, including when and how a court could set bail at an amount that would result in a person's pretrial detention due to unaffordability. Some California jurisdictions have embraced the *Humphrey* decision and meaningfully incorporated the holding as part of trial courts' assessment of appropriate pretrial release and public safety considerations. However, many jurisdictions have maintained the status quo, leaving the population of pretrial detainees unchanged. The purpose of this brief is to assess some of the real-world data to help demonstrate how jurisdictions which have engaged with bail reform and meaningfully reduced pretrial detention have nonetheless protected public safety.

Respondent frames the issue in this case as a choice to give effect to "the factors endorsed by the electorate in Propositions 4, 8 and 9: public safety, victim safety, the seriousness of the offense charged, and flight risk" and the alternative of an unconstrained "mandate of release." (Answer Brief on the Merits (ABOM) at 39.) However, examples within California prove that respondent's proffered binary choice between pretrial release and public/victim safety is a fallacy. Indeed, jurisdictions within California are utilizing empirical data and scientific research to explore and implement methods to release more individuals pretrial while

ensuring that their communities are not harmed by these releases. Two such jurisdictions are highlighted in this amicus brief: San Francisco County’s Pretrial Diversion Project (SF Pretrial) and Santa Clara County’s Pre-Arrest Representation and Review (PARR) program.

This brief also details the report on bail and pretrial release issued by the Judicial Council of California. In 2019, with funding from the Legislature, the Judicial Council launched a state-wide pilot program that focused on helping selected superior courts reform bail practices and increase pretrial release. According to the findings in this report, releases increased while the rate of rearrests and rebookings, the most common metric by which to gauge public safety, decreased.¹ “The results strongly support the expansion of conditional pretrial release.”² As the report concludes, “[u]nderstanding and honoring this constitutional right [to affordable bail] of all our citizens also helps keep Californians safer.”³

¹ Pretrial Detention Reform Workgroup, *Pretrial Detention Reform: Recommendations of the Chief Justice* (Oct. 2017), p. 57 <<https://www.courts.ca.gov/documents/PDRReport-20171023.pdf>> (as of November 3, 2023).

² Alldredge, Couzens, and Ellsworth, *Opinion: As judges, we’ve made thousands of bail decisions. Here’s the truth about detention and public safety*, Los Angeles Times (Sept. 2, 2023) <<https://www.latimes.com/opinion/story/2023-09-02/california-bail-reform-safety-judges>> (as of November 3, 2023).

³ *Ibid.*

Finally, this brief highlights that other states have also successfully tackled bail reform and pretrial detention decisions in a fashion similar to that mandated by *Humphrey*. The approach of two such states are delineated in this brief: that of Kentucky and New Jersey. Both states have approached pretrial detention and unaffordable bail as an exception and not the rule, and have been doing so for sufficient periods of time to have measurable results. Neither has experienced a drastic increase in crime. To the contrary, crime in these jurisdictions has steadily decreased. Kentucky, in particular, has been experimenting with pretrial release for over five decades, with each new iteration releasing more and more individuals pretrial. What Kentucky and New Jersey are doing is working.

Despite these successful examples, all too commonly in California, jurisdictions have paid only lip service to *Humphrey*'s mandate in their pretrial detention considerations and bail decisionmaking. In their report entitled "Coming Up Short: The Unrealized Promise of *In re Humphrey*", students, faculty, and staff at the University of California Los Angeles School of Law Bail Practicum and the Berkeley Law Policy Advocacy Clinic discovered that in the eighteen months after *Humphrey* was decided, there was no evidence that the decision resulted in a net decrease of pretrial jail populations, a decrease in bail amounts, or a decrease in the average length of pretrial detention in California.⁴

⁴ Virani et al., Univ. of Cal. Los Angeles School of Law Bail Practicum, Univ. of Cal. Berkeley Law Policy Advocacy Clinic, *Coming up Short: The Unrealized Promise of In re Humphrey* (Oct.

Respondent claims that under its interpretation of the relevant constitutional provisions “liberty would remain the norm and detention the exception.” (ABOM at 39.) However, a review of available data, correspondence, policies, news articles, and a statewide survey of legal practitioners shows that jurisdictions are largely maintaining the status quo and ignoring *Humphrey's* mandate to meaningfully consider affordable bail.⁵ The majority of trial judges across the state continue to handle bail and pretrial detention in the same fashion as before *Humphrey*, namely relying on county-wide bail schedules that neither take into account any specific factors related to a person charged nor address any particular threats to public or victim safety in an individual case.

Into this patchwork of compliant and hostile jurisdictions, *In re Kowalczyk* (2020) 85 Cal.App.5th 667 (*Kowalczyk*) emerged. By failing to condemn the setting of unaffordable bail in an entirely unexceptional case – a low-level fraud involving no threat of violence – the *Kowalczyk* court effectively encourages trial courts to undermine this Court’s mandate to meaningfully consider affordable bail. Instead of reinforcing *Humphrey's* rationale and upholding the presumption that affordable bail or other alternatives will normally suffice, the *Kowalczyk* court has carved out a legal path back to the pre-*Humphrey* status quo. Moreover, by creating a legal framework that, on its face, permits courts to deny affordable bail in run-of-the-

2022) Executive Summary, p. 3 <<https://www.law.berkeley.edu/wp-content/uploads/2022/10/Coming-Up-Short-Report-2022-WEB.pdf>> (as of November 3, 2023).

⁵ *Ibid.*

mill cases such as this one, the decision undercuts the measurable results from jurisdictions that embraced *Humphrey*.

Both the *Kowalczyk* opinion and respondent implicitly limit bail analysis to a decision between unconditional release and detention. But they ignore the myriad ways release methods can simultaneously protect both a person's constitutional right to affordable bail and the voter's wishes in enacting Proposition 9, including to protect public safety. These techniques are neither novel nor unwieldy and can be implemented in some form in all counties in California. In short, in assessing the legal question at hand, this Court should remember that the options for trial courts are not binary; detention through unaffordable bail for the indigent or mass community victimization.

I.
**COUNTIES WITHIN CALIFORNIA HAVE SUCCESSFULLY
PURSUED BAIL AND PRETRIAL RELEASE REFORM,
RELEASING MORE INDIVIDUALS WITHOUT
INCREASING THE THREAT TO PUBLIC SAFETY**

A. San Francisco

San Francisco County has a long history of innovative efforts in pretrial release. In 1964, the San Francisco Bar Association established the Own Recognizance Project (OR Project) to address pretrial release through the combined efforts of the bar association, courts, district attorney, public defender, probation department, and sheriff. Because of its efficacy, the OR Project – initially designed to operate as a two-year pilot program – remains operative to this day.

The OR Project ultimately merged with the San Francisco Pretrial Diversion Project (SF Pretrial).⁶ SF Pretrial is a non-profit organization that provides community programs to prevent unnecessary incarceration and promote public safety, while focusing on the personal needs and goals of its clients.⁷ As an alternative to posting money bail, SF Pretrial clients can be referred to one of the organization's three non-monetary release programs. These programs represent a continuum of intensive intervention, supervision, and treatment based upon the client's individual background and needs. All three release programs provide individualized treatment plans, incremental and achievable goals, and proportionate levels of monitoring.⁸

Individuals with felony and misdemeanor cases meriting the lowest level of supervision and treatment are referred to the OR Program. In the OR Program, SF Pretrial staff prepare essential case materials which are provided to the court to support judicial determinations regarding pretrial release. If the court ultimately releases the individual, staff oversee monitoring and supervision for

⁶ San Francisco Pretrial Diversion Project, *History of SF Pretrial* (2023) <<https://sfpretrial.org/our-history/>> (as of November 3, 2023).

⁷ Dept. of Policy and Evaluation, Annual Impact Report (2021) San Francisco Pretrial Diversion Project, p. 3 <<https://sfpretrial.org/wp-content/uploads/2022/03/ANNUAL-IMPACT-REPORT-4.pdf>> (as of November 3, 2023).

⁸ Dept. of Policy and Evaluation, Annual Impact Report (2020) San Francisco Pretrial Diversion Project, p. 24 <<https://sfpretrial.org/wp-content/uploads/2020/12/Annual-Report-v10-Dec-21.pdf>> (as of November 3, 2023).

two types of non-financial pretrial release: (1) No Active Supervision (OR-NAS) where clients receive court reminder calls; or (2) Minimum Supervision (OR-MS) where, in addition to court reminder calls, clients check in with SF Pretrial staff two times per week.⁹

Individuals with felony and misdemeanor cases that require greater supervision are referred to the Assertive Case Management (ACM) program. The ACM program provides clients with more intensive and structured supervision, with more frequent in-person contacts. SF Pretrial staff also build treatment plans and make referrals to community programs on behalf of these clients. Those referrals often involve connecting ACM program participants with services for substance use, behavioral health, education, or employment.¹⁰

SF Pretrial's most intensive non-monetary pretrial release program is the In-Custody Referral (ICR) program. It is reserved for clients who have more serious charges or a substantial history of legal misconduct.¹¹ Program participants are typically placed directly from custody to an in-patient or out-patient treatment

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.* Per an October 30, 2023 conversation with Matt Mill, Director of Policy & Evaluation for the San Francisco Pretrial Diversion Project, there are no charge-based exclusions for any of the release programs. Clients with more serious charges, including strike offenses, often receive programming through ICR because the judicial officers making release determinations have more assurances of public safety when there is supportive programming upon release.

program. To coordinate this process, SF Pretrial staff conduct assessment interviews and make release or detention recommendations to the court. Further, if the individual is granted release by the court, SF Pretrial provides the court with information on which community programs have placement available and makes recommendations regarding other appropriate terms of release to impose. This process gives the courts greater assurances that ICR program participants will receive timely and commensurate treatment responses.¹²

SF Pretrial's release programs have been successful when viewed from a public safety standpoint. The calculated public safety rate – i.e. the percentage of people released into the community through one of SF Pretrial's release programs who are not arraigned on a new misdemeanor or felony charge or a new probation or parole violation while participating in the release program – is high across all three of SF Pretrial's release programs.¹³

By example, for the first half of calendar year 2023, there were 1,629 participants in the OR program with a safety rate of at least 92 percent. There were 1,046 participants in the ACM program with a safety rate of at least 93 percent. Finally, there were 1,237

¹² Dept. of Policy and Evaluation, Annual Impact Report (2020) San Francisco Pretrial Diversion Project, *supra*, at p. 24.

¹³ Dept. of Policy and Evaluation, Annual Impact Report (2021) San Francisco Pretrial Diversion Project, *supra*, at p. 20. One of the more data driven ways to gauge public safety and the effect of pretrial release on public safety is to look at rates of re-offense among the released population. It is for this reason that studies on public safety after release as well as this amicus brief focus on recidivism rates among this population.

participants in the ICR program with a safety rate of at least 87 percent.¹⁴ This last figure is especially noteworthy, as the ICR program is reserved for individuals with serious criminal charges and/or a lengthy criminal history. Even so, of the 1,237 ICR program participants, only 13 percent, or approximately 160 people, were charged with a new case or a probation or parole violation while released pretrial, while over 1,070 people remained crime free.¹⁵

B. Santa Clara

In 2019, inspired in part by the work done in San Francisco County, the County of Santa Clara launched its Pre-Arrest Representation and Review (PARR) program. This program provides eligible, low-income individuals with legal representation between the date of their booking into jail and the date of their arraignment.¹⁶ Pre-arrest legal representation of this kind is not the norm for indigent defense in California. “Typically, public defenders meet with clients for the first time at their arraignment

¹⁴ *Ibid.*

¹⁵ Upon request, SF Pretrial provided their latest data via email, which is now captured semi-annually and based on a calendar year. SF Pretrial provided data for the first half of 2023. They also included the semi-annual data captured for 2022. In the second half of 2022, the OR program had a safety rate of 91-94%. The AMC and ICR programs had safety rates of 94% and 90% respectively.

¹⁶ Lacoë et al., National Bureau of Economic Research, *The Effect of Pre-Arrest Legal Representation on Criminal Case Outcomes* (May 2023) p. 5
<https://www.nber.org/system/files/working_papers/w31289/w31289.pdf> (as of November 3, 2023).

hearing which must occurred within 48 hours from booking.”¹⁷ What Santa Clara sought to do with their PARR program was to, inter alia, reduce the jail population by diverting eligible incarcerated individuals to alternatives to jail and respond positively and proactively to legislative and judicial changes that are moving the state away from a cash bail system.¹⁸

During its pilot phase in 2020, the PARR program consisted of two attorneys, one paralegal, one social worker, and one investigator. Today, PARR has funding for seven attorneys, two paralegals, one social worker, and two investigators.¹⁹ PARR has always focused predominately on clients facing felony-level offenses. By design, PARR-eligible cases involve more serious offenses and “65 percent involve a person offense (e.g., assault).”²⁰ Individuals who receive PARR services have been arrested on more serious felony crimes, a majority of which involve harm to an alleged victim, thus triggering serious concerns regarding public safety.

¹⁷ *Id.* at p. 4.

¹⁸ County of Santa Clara Bd. of Supervisors Management Audit Div., Management Audit of the County of Santa Clara Public Defender Office (Jan. 11, 2022) p. 53 <<https://board.sccgov.org/sites/g/files/exjcpb936/files/document/Management%20Audit%20of%20the%20Public%20Defender%20Office.pdf>> (as of November 3, 2023).

¹⁹ These figures come from a discussion with the supervising attorney of the PARR program, Aug. 2023.

²⁰ Lacoé et al., National Bureau of Economic Research, The Effect of Pre-Arrest Legal Representation on Criminal Case Outcomes, *supra*, at p. 9.

The first task for the PARR team is early investigation of the client’s case and contacting character witnesses so more information can be provided at arraignment concerning the supervision determination. This early investigation provides judges with as much context and client information as possible when the judge is deciding whether to release an incarcerated individual pending trial.²¹ The pre-arraignment work done by the PARR team is instrumental in allowing a judge to meaningfully assess the risk an individual poses to the community.²² The PARR team can also identify and address an individual’s need for community-based services, linking clients to a range of services depending on their needs and the nature of their case.²³ For instance, the PARR team can refer a client to mental health services, social workers, anger management counseling, substance abuse counseling, live-in rehabilitation, and alternative housing. These services allow these clients to be released from custody with a “safety net”, ensuring both that the client is supported and that the community is protected.

Data collected and analyzed between January and March 2020 shows that “PARR recipients were up to 36 percentage points more likely to see their cases dismissed by the County of Santa Clara District Attorney’s Office, and were likewise up to 26.8

²¹ County of Santa Clara Bd. of Supervisors Management Audit Div., Management Audit of the County of Santa Clara Public Defender Office, *supra*, at p. 54.

²² *Ibid.*

²³ Lacoé et al., National Bureau of Economic Research, The Effect of Pre-Arrest Legal Representation on Criminal Case Outcomes, *supra*, at p. 7, fn. 5.

percentage points less likely to be convicted.”²⁴ These differences most likely stem from fewer plea deals.²⁵ A person detained pretrial on unaffordable bail can feel pressure to take any plea deal that allows them to be released, even deals that are ill advised. When the pressure of unaffordable bail is removed from consideration, through pretrial tools such as those implemented by the program PARR, the impulse to take any plea deal is nearly eliminated, and individuals have a chance to have their cases fully and adequately evaluated by both their defense attorneys and the prosecuting agency.

Typically, at the time of arraignment, very little is known about the circumstances leading up to the charged offenses. Initial allegations may at times be inaccurate or exaggerated, and this can lead to cases being overcharged. However, a judge at arraignment making a determination regarding a person’s pretrial release is normally reliant on oral representations from law enforcement officers, attorneys, pretrial services staff, and/or the accused person. The PARR program demonstrates that these early portrayals of a case can be inaccurate. PARR-eligible clients were predominantly arrested on serious felony charges, and yet a significant number had their cases outright dismissed by the prosecutor or were otherwise less likely to be convicted as initially charged. Under a typical arraignment scenario, where an indigent defendant meets their attorney for the first time moments before the arraignment begins,

²⁴ *Id.* at p.16.

²⁵ *Ibid.*

the information available to the court is often incomplete and insufficient to overcome the public safety concerns inherent in allegations of serious felony offenses. Judges, through no fault of their own, sometimes make incorrect calls when balancing an accused person's right to pretrial release against public safety concerns at a typical arraignment for serious felonies. Individuals therefore remain in custody even on cases that ultimately could be dismissed or are otherwise unlikely to result in a conviction as charged.

One recent study has shown that individuals participating in community-based programs such as those utilized in both San Francisco and Santa Clara are less likely to be arrested on new criminal charges and less likely to be arrested on a new felony offense during the pretrial period.²⁶ According to this study, individuals randomly assigned to a group that received assistance from community-based programs were arrested for a new offense at a rate roughly forty percent lower than the control group.²⁷ Additionally, they were both eleven percent less likely to be convicted of anything and fourteen percent less likely to be convicted of a felony at the time of case disposition.²⁸ This study illustrates the strong potential for pretrial release with non-financial conditions to

²⁶ Davidson et al., *Managing Pretrial Misconduct: An Experimental Evaluation of HOPE Pretrial* (Jan. 2019) <https://gspp.berkeley.edu/assets/uploads/research/pdf/HOPE_final_evaluation_January_2019.pdf> (as of November 3, 2023).

²⁷ *Id.* at pp. 6 and 13.

²⁸ *Id.* at pp. 7 and 14.

both ensure an indigent person's freedom during the pendency of their case and uphold public safety. This requires jurisdictions to take seriously the task of providing support for pre-trial offenders instead of reflexively relying on detention as the only possible solution.

It is worth noting that the County of Santa Clara's PARR program achieved a sizeable impact with a very small team and at relatively low cost (even without factoring in the cost-savings of reduced pretrial populations in costly detention programs).

The program shifted the point of contact between public defenders and their clients up by a few days, and in those days, they connected clients with support services, conducted investigations to strengthen the defense, and advocated for release. These initiatives had sizeable impacts on release and case outcomes for low-income individuals who typically are not afforded the same type of speedy defense. This change to the timing and format of public defender's services could help alleviate persistent gaps in the criminal justice system experiences and outcomes between individuals who can afford private representation and those who cannot.²⁹

Other counties in California can replicate this program, and there is every reason to believe results can be duplicated. But creating a legal regime in which trial courts can continue with the status quo – relying solely on pretrial detention through unaffordable bail in the name of protecting public safety – will stymie the spread of such innovative solutions. Pretrial detention is

²⁹ Lacoë et al., National Bureau of Economic Research, *The Effect of Pre-Arrest Legal Representation on Criminal Case Outcomes*, *supra*, p. 18.

not a binary situation – detention vs. public safety. With small yet meaningful changes, judges can receive better information upon which to make detention considerations, and individuals can be released back into their communities with protections and assurances that will ensure return to court without harm to public safety.

C. Judicial Council of California Pretrial Pilot Program

In 2016, the Judicial Council of California took a deliberate step towards understanding the geography of and potential for bail reform and increased pretrial release in our state by creating the Pretrial Detention Reform Workgroup (Workgroup). The following year, the Workgroup submitted a report that exposed the structural flaws in California’s bail system. The Workgroup found that “California’s current bail system unnecessarily compromises victim and public safety because it bases a person’s liberty on financial resources rather than the likelihood of future criminal behavior and exacerbates socioeconomic disparities and racial bias.”³⁰ A year after the publication of the Workgroup’s report, another report found that pretrial detention led to a 13 percent increase in likelihood of conviction, explained predominantly by incarcerated individuals who pled guilty but who would have otherwise been acquitted or had their charges dropped.³¹ As a result of the findings of the

³⁰ Pretrial Detention Reform Workgroup, Judicial Council of California, *Pretrial Detention Reform: Recommendations of the Chief Justice*, *supra*, at p. 57.

³¹ Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes* (Nov. 2018) 34 J. L. Econ. & Org. 511,

Workgroup’s report and additional data, the Budget Act of 2019 included an allocation of \$75 million to the Judicial Council to fund efforts for a multi-year program in trial courts related to pretrial decision making.³² The goal of the Pretrial Pilot Program was “increasing the safe and efficient prearrest and pretrial release of individuals booked into jail.”³³ The final data suggests an overall positive impact of the pilot program, with results in line with the other states and programs highlighted in this brief.

The Pretrial Pilot Program operated in sixteen trial-level courts across the state.³⁴ Each court was required to implement a risk assessment tool, and work collaboratively with the county’s probation department.³⁵ Some courts used their funding to expand the hours in which pretrial review would be done, increasing to seven days a week or implementing a night court.³⁶ Fourteen of the sixteen courts in the pilot began using a court date reminder system, a least restrictive intervention and non-financial condition

512-513 <<https://doi.org/10.1093/jleo/ewy019>> (as of November 3, 2023).

³² Judicial Council of Cal., Pretrial Pilot Program: Final Report to the Legislature (July 25, 2023) <https://www.courts.ca.gov/documents/Pretrial-Pilot-Program_Final-Report.pdf> (as of November 3, 2023).

³³ *Id.* at p. 1.

³⁴ *Id.* at p. 4, fn. 3. The 16 courts were: Alameda, Calaveras, Kings, Los Angeles, Modoc, Napa, Nevada-Sierra, Sacramento, San Joaquin, San Mateo, Santa Barbara, Sonoma, Tulare, Tuolumne, Ventura, and Yuba.

³⁵ *Id.* at pp. 7-8.

³⁶ *Id.* at p. 12.

of release proven to assist in increasing court appearance rates.³⁷ Some courts provided their clients with travel vouchers or transportation services.³⁸ Some courts contracted with community-based organization to provide mental health services, substance use treatment services, anger management classes, parenting classes, and employment readiness services.³⁹

The Judicial Council’s report highlighted outcomes specifically in the percentages of individuals released through the pilot, as well as any rearrests, rebookings, and failures to appear among the released population.⁴⁰ There was an increase in pretrial release of individuals facing felony charges of 8.8 percent, and an increase of 5.7 percent of individuals facing misdemeanor charges .⁴¹ Of this population, there was a 6.8 percent decrease in failures to appear among individuals facing misdemeanor charges, and a 2.5 percent increase among those facing felony charges.⁴²⁴³ The Judicial Council

³⁷ *Ibid.*

³⁸ *Id.* at p. 13.

³⁹ *Ibid.*

⁴⁰ Per an October 30, 2023, conversation with the primary researcher Sal Pipert (formerly Sal Lempert), the study uses the term “rearrest” to depict data from the California Department of Justice, and the term “rebooking” to depict data from the county level. Both terms refer to arrests and bookings on new charges.

⁴¹ Judicial Council of Cal., Pretrial Pilot Program: Final Report to the Legislature, *supra*, at p. 23.

⁴² *Ibid.*

⁴³ Per an October 30, 2023 conversation with the primary researcher Sal Pipert (formerly Sal Lempert), these figures were reached by comparing pre-pilot program to data collected during the pilot program. The start date of the pilot programs were staggered

noted that failure to appear rates can be greatly improved by (1) shortening case disposition time and (2) implementing a court reminder system, which all but two of the pilot counties had done by the end of the pilot program.⁴⁴ Finally, within the released population, rearrest and rebooking rates fell across both categories, with a 5.8 percent decrease in rearrest or rebooking among individuals charged with misdemeanors, and a 2.4 percent decrease among individuals charged with felonies.⁴⁵

The study suggests that, under the pilot program, there was an increase in failures to appear. But, of course, failure to appear is not itself a direct threat to public safety. The study showed that there was a decrease in rearrest or rebooking. So some individuals charged with felonies did not make all of their court appearances, but they were also not rearrested for new criminal offenses or violations of conditions of release. In terms of understanding the impact of public safety, this data suggests there was no increased harm to the public notwithstanding increased pretrial and prearraignment release of individuals charged with felony offenses.

between August 2019 and June 2020. Additionally, the pilot program only included data from completed cases. Therefore, the data related to failures to appear represents individuals who missed a court date but returned to court at some point during the pilot and had their case completed.

⁴⁴ Judicial Council of Cal., Pretrial Pilot Program: Final Report to the Legislature, *supra*, at p. 23.

⁴⁵ *Ibid.*

II. OTHER STATES WITH SIMILAR CONSTITUTIONAL MANDATES ARE HONORING DEFENDANTS' RIGHTS TO RELEASE AND CRIME IS NOT INCREASING

A. Kentucky

Kentucky has a long history of honoring a pretrial presumption of release with limited financial conditions. Their continual improvements in this area have had little or no negative effect on recidivism among released persons. The Kentucky Constitution provides that all charged persons are considered bailable, with the exception of those accused of capital crimes where “proof is evident or the presumption is great” that the defendant is guilty.⁴⁶ When financial conditions are set in Kentucky, judges must consider the person’s ability to pay as one factor in setting an amount for the bail.⁴⁷ Lastly, and perhaps most significantly, Kentucky judges have been prohibited since 1971 from setting bail in an amount calculated to effectively deny freedom pending trial.⁴⁸

⁴⁶ Ky. Const. § 16.

⁴⁷ Ky. Rev. Stat. Ann. § 431.525(1)(e).

⁴⁸ *Long v. Hamilton* (Ky.Ct.App. 1971) 467 S.W.2d 139, 142. [“We are not unmindful that some defendants, at liberty on bail pending trial of charges, commit other crimes and engage in conduct which focuses attention upon the fact that the charges remain untried. We think that there is an undercurrent of public dissatisfaction at this state of affairs. Nevertheless, the constitutional guarantees to bail remain unaltered. Any attempt to impose excessive bail as a means to deny freedom pending trial of charges amounts to a punishment of the prisoner for charges upon which he has not been convicted and of which he may be entirely innocent. Such a procedure strikes a blow at the liberty of every citizen.”].

Five years later in 1976, Kentucky's experimentation with pretrial release decision models continued when it prohibited the use of private bail bonds and instead instituted a presumption in favor of non-financial conditions, albeit still retaining the power for a court to accept bail, or a percentage of bail, directly from the incarcerated person.⁴⁹ Ultimately, the state moved towards a standardized risk assessment model in 2011, which applied equally to all crimes regardless of severity.⁵⁰ In the following decade, the state implemented administrative release programs wherein own recognizance release with non-financial conditions was automatic for certain offenses and was effectuated not by judge, but instead by pretrial officers employed by the court system.⁵¹ The success of this program resulted in a permanent state-wide order implementing the administrative release program in 2017.⁵²

Throughout this period of experimentation, Kentucky has successfully protected public safety while increasing the use of

⁴⁹ H.B. 254 (Ky. 1976) Reg. Sess., § 1; Ky. Rev. Stat. Ann. §§ 431.510 & 431.520.

⁵⁰ Ky. Rev. Stat. Ann. §§ 431.066(2)-(4).

⁵¹ Ky. Supreme Ct., Administrative Orders, Amended Order 2015-24 (2015) <<https://kycourts.gov/Courts/Supreme-Court/Supreme%20Court%20Orders/201524.PDF>> (as of November 6, 2023).

⁵² Ky. Supreme Ct., Administrative Orders, Order 2017-01 <<https://kycourts.gov/Courts/Supreme-Court/Supreme%20Court%20Orders/201701.pdf>> (as of November 6, 2023); Ky. Supreme Ct., Administrative Orders, Order 2017-19 <<https://kycourts.gov/Courts/Supreme-Court/Supreme%20Court%20Orders/201719.PDF>> (as of November 6, 2023).

automatic release mechanisms. While relying on an automatic form of release for low-level charges and maintaining a total release rate of over 73 percent across all forms of crimes, the percentage of released persons with new arrests within the following calendar quarter was only six percent during the Pre-COVID 2019 baseline analysis conducted by the Kentucky Administrative Office of the Courts (“AOC”).⁵³ Kentucky’s success is attributed in part to the Pretrial Services Branch of the AOC and the extent of their aid in providing non-financial conditions that help ensure return to court and compliance with release conditions. These non-financial conditions include providing text notifications, emails, and/or phone calls to all persons released by their programs—a service which data consistently shows improves condition compliance rates.⁵⁴

⁵³ Kentucky Administrative Office of the Courts, Kentucky Court of Justice Response to COVID-19, Presentation to Interim Joint Committee on Judiciary, Kentucky General Assembly (Aug. 20, 2020) <<https://apps.legislature.ky.gov/CommitteeDocuments/8/12824/Aug%2020%202020%20Pretrial%20COVID%20Rearrest%20Data%20AOC.pdf>> (as of November 6, 2023).

⁵⁴ Hatton, UNC School of Government Criminal Justice Innovation Lab, Research on the Effectiveness of Pretrial Court Date Reminder Systems (2020) <<https://cjl.sog.unc.edu/wp-content/uploads/sites/19452/2020/03/Court-Date-Notifications-Briefing-Paper.pdf>> (as of November 6, 2023); Chohlas-Wood et al., Automated Reminders Reduce Incarceration for Missed Court Dates: Evidence from a Text Message Experiment (Oct. 12, 2023) <<https://arxiv.org/abs/2306.12389>> (as of November 6, 2023); Kentucky Administrative Office of the Courts, *Pretrial Services* (2022) <<https://kycourts.gov/Court-Programs/Pretrial-Services/Pages/default.aspx>> (as of November 6, 2023).

In addition to services for those automatically released for certain offenses, Pretrial Services also accepts referrals by courts to supervise individuals recommended for an enhanced form of monitored conditional release. Under this program, a supervised person complies with a scaled system of monitoring that can run the gamut from occasional check-ins to home detention.⁵⁵ Through this statewide agency, a consistent approach to applying and enforcing non-financial conditions ensures high safety rates largely without financial conditions.

The durability of this success survived the COVID-19 pandemic and its corresponding pressure to release additional incarcerated persons. On April 14, 2020, the Kentucky Supreme Court expanded the automatic administrative release program to include a much broader classification of offenses, excluding only sexual offenses, violent offenses, and offenses carrying a minimum sentence of 5 year or greater.⁵⁶ Over the course of the following year, this schedule was revised and extended a number of times, but it kept the core expansiveness of the automatic release mandate.⁵⁷

⁵⁵ Ky. Rev. Stat. Ann. §§ 431.520(4)-(8), 431.066(4), 431.067. Additional data available at, Kentucky Administrative Office of the Courts, *Pretrial Services*, *supra*, <<https://kycourts.gov/Court-Programs/Pretrial-Services/Pages/default.aspx>> (as of November 6, 2023).

⁵⁶ Ky. Supreme Ct., Administrative Orders, Order 2020-25 <<https://kycourts.gov/Courts/Supreme-Court/Supreme%20Court%20Orders/202025.pdf>> (as of November 6, 2023).

⁵⁷ Ky. Supreme Ct., Administrative Orders, Order 2020-25, *supra*; Amended Order 2020-27 <<https://kycourts.gov/Courts/Supreme->

Despite this increase in types of allegations eligible for automatic administrative release, the measurable safety rate decreased only slightly - from 94 to 93 percent - as a percentage of total persons released during the calendar quarter which followed implementation of the expanded eligibility.⁵⁸ Moreover, the absolute number of persons receiving a new arrest dropped dramatically, from 2137 to 1455.⁵⁹

In short, Kentucky successfully maintained a low level of rearrests while expanding the category of persons automatically released because it combined release with effective non-financial conditions. Moreover, Kentucky has seen dramatic decreases in property crime and a modest decrease in violent crime since it adopted its risk-assessment model in 2011. According to the FBI's

[Court/Supreme%20Court%20Orders/202027.pdf](https://kycourts.gov/Courts/Supreme-Court/Supreme%20Court%20Orders/202027.pdf)> (as of November 6, 2023); Amended Order 2020-45
<<https://kycourts.gov/Courts/Supreme-Court/Supreme%20Court%20Orders/202045.pdf>> (as of November 6, 2023); Amended Order 2021-29
<<https://kycourts.gov/Courts/Supreme-Court/Supreme%20Court%20Orders/202129.pdf>> (as of November 6, 2023).

⁵⁸ Kentucky Administrative Office of the Courts, Kentucky Court of Justice Response to COVID-19, Presentation to Interim Joint Committee on Judiciary, Kentucky General Assembly, *supra*, <<https://apps.legislature.ky.gov/CommitteeDocuments/8/12824/Aug%2020%202020%20Pretrial%20COVID%20Rearrest%20Data%20AOC.pdf>> (as of November 6, 2023).

⁵⁹ *Ibid.*

uniform crime reports, in every year for a decade after 2011, nonviolent property crime fell in Kentucky.⁶⁰

There are admittedly some notable differences between Kentucky and California when it comes to the overall state of pretrial release. Kentucky, a smaller state both in term of geography and population, utilizes a statewide validated risk assessment and a consistent, state-wide pretrial services monitoring agency. Nevertheless, Kentucky's success in expanding the population eligible for administrative release while maintaining public safety demonstrates that such programs can and do work. It also contradicts respondent's assertion in this case that voter concern over public safety is not honored by giving section 12 its literal meaning because doing so may create a broad program of automatic release for those charged with non-serious felonies. (ABOM at p. 39.) This blanket assertion appears to be contrary to data, or at least the data compiled in Kentucky.

B. New Jersey

The State of New Jersey, like Kentucky, has reformed to a presumption of release for all but the most serious offenses. As the result of legislation and a voter approved constitutional amendment, on January 1, 2017, New Jersey moved away from a cash bail

⁶⁰ Property crime rates (per 100,000 people) fell steadily from 2,905 in 2011 to 1,832 in 2021 while violent crime both rose and fell during this period, ultimately slipping from 387 in 2011 to 380 in 2022. Federal Bureau of Investigation, Crime Data Explorer (2022) <<https://cde.ucr.cjis.gov/LATEST/webapp/#/pages/explorer/crime/crime-trend>> (as of November 6, 2023).

system. Today, rather than rely on a monetary bail schedule, judges use validated risk assessments and have additional measures that encourage people to return to court through alternatives to detention. As part of the risk assessment, courts consider the accused's age, whether the current offense is violent, type of pending charge, prior convictions and prior failures to appear in court.⁶¹ Charges that involve murder or expose a person to a term of life imprisonment carry a presumption of detention. (N.J. Stat. Ann § 2A:162-18b.) A presumption of release applies in other circumstances. (N.J. Stat. Ann §§ 2A:162-20f, 2A:162-19g.) A judge can only keep an individual detained upon a finding that no combination of monetary or non-monetary release conditions would reasonably assure the defendant's appearance in court, protect public safety, and ensure that the defendant will not obstruct the criminal justice process. (N.J. Stat. Ann § 2A:162-18a(1).)

New Jersey utilizes several non-monetary release conditions. Courts compel released individuals to return for future court appearances by requiring phone calls or in-person appearances at various intervals, and home detention with or without electronic monitoring.⁶² Home detention is itself flexible. It can include strict

⁶¹ New Jersey Courts, *Public Safety Assessment: New Jersey Risk Factor Definitions* (Dec. 2018) <<https://www.njcourts.gov/sites/default/files/psariskfactor.pdf>> (as of November 6, 2023).

⁶² New Jersey Courts, *Pretrial Release Recommendation Decision Making Framework (DMF)* (Aug. 2, 2022) <<https://www.njcourts.gov/sites/default/files/decmakframwork.pdf>> (as of November 6, 2023).

home detention, where the person is only allowed to go to legal appointments, or home detention with limited and predetermined exceptions such as allowing the person to go to work, school, and appointments.⁶³ The courts also check on people using random video calls to ensure compliance with conditions of release.⁶⁴

With this focus on non-monetary restrictions and less restrictive alternatives to detention, New Jersey has not experienced a rise in crime. The pretrial jail population decreased more than 20 percent between 2015 and 2022, in no small part due to a shift in focus to alternatives to detention. Today, New Jersey's pretrial population remains 2.5 percent lower than it was before the bail reform law's implementation in 2017. According to data obtained after the 2017 bail reform, nearly all defendants appear in court for their court dates in New Jersey - 91 percent in 2019 and 97 percent in 2020.⁶⁵ Perhaps most importantly, according to FBI uniform crime report statistics, New Jersey saw decreases in both

⁶³ New Jersey Courts, Administrative Office of the Courts, Directive No. 27-21 (Nov. 30, 2021), pg. 2. <<https://www.njcourts.gov/sites/default/files/notices/2021/11/n211209a.pdf>> (as of November 6, 2023).

⁶⁴ *Id.* at p. 4.

⁶⁵ Arnold Ventures, New Jersey Bail Reform Fact Sheet: Bail Reform in New Jersey is a national model of success that promotes safety and accountability (Mar. 1, 2023) <<https://craftmediabucket.s3.amazonaws.com/uploads/AV-New-Jersey-Bail-Reform-Fact-Sheet.pdf>> (as of November 6, 2023).

violent and non-violent crime for four consecutive years following the bail reform amendment.⁶⁶

Though New Jersey has only had bail reform for a few years, the early data suggests that increased pretrial release has not led to more individuals failing to come to court or harm to public safety.

III. OTHER HARM CAUSED BY PRETRIAL DETENTION SHOULD NOT BE IGNORED

In assessing whether pretrial release can simultaneously serve both the interest in the right to affordable bail and that of assuring public safety under the relevant constitutional provisions, the efficacy of the various programs discussed herein cannot be viewed in isolation. Relying more heavily on pretrial detention through unaffordable bail, as a mechanism to attempt to achieve public safety carries substantial costs. Imprisoning individuals during the pendency of their criminal case has both financial costs borne by the local government and collateral costs (both financial and human) inflicted on the largely indigent populations detained through unaffordable bail. Detention frequently harms children and elderly dependents in need of care and employers who depend on potential detainees' labor and who also provide a critical link to their successful integration into society. Finally, detention has devastating impacts on a range of familial and social relationships

⁶⁶ Federal Bureau of Investigation, Crime Data Explorer, *supra*, <<https://cde.ucr.cjis.gov/LATEST/webapp/#/pages/explorer/crime/crime-trend>> (as of November 6, 2023).

critical to ensuring that people accused of crimes continue to lead productive lives.

While detailing the myriad harms caused by unnecessary pretrial detention is outside the scope of this brief, it should not be outside the consideration of this Court. Every program discussed herein has some financial cost to the community, and no program of nonfinancial conditions and community-based services will ever be able to completely eliminate all threats to public safety in every instance. But the alternative of using detention through unaffordable bail for individuals with unexceptional cases and unexceptional criminal histories has its own financial costs and poses its own future public safety concerns. When individuals are detained pretrial, they risk losing and often do lose their employment, housing, custody of their children, support systems, government benefits, educational opportunities, and family connections. These deprivations are difficult to quantify, but there is little question that they have their own negative impacts on public safety, especially for the vast majority of individuals who will return to their communities after completing custodial time.

The programs discussed in this brief highlight what is possible if the constitutional right to affordable bail and the mandate of *Humphrey* are placed at the forefront of pretrial detention considerations. San Francisco County, Santa Clara County, Kentucky and New Jersey all experimented with nonfinancial conditions of release, and the data suggests that these experiments have been successful. Both this Court and those trial level courts that have been reluctant to change past practice in light

of *Humphrey* can look towards these programs as alternatives to a carceral model that is often unnecessary except in exceptional cases defined by the constitution. Doing so will still ensure that public safety remains a prevailing consideration for pretrial release. These programs can and should be replicated across California so that “liberty [will] remain the norm and detention the exception.” (ABOM at p. 39.)

CONCLUSION

For the reasons stated above, OSPD asks this Court to overturn the judgment of the Court of Appeal and to hold that orders resulting in pretrial detention are limited to the circumstances articulated in article I, section 12 of the California Constitution.

DATED: November 8, 2023

Respectfully submitted,

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I, Teresa DeAmicis, have conducted a word count of this brief using our office's computer software. On the basis of the computer-generated word count, I certify that this brief is 6,870 words in length, excluding the tables and this certificate.

Dated: November 8, 2023

Respectfully submitted,

/s/

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DECLARATION OF SERVICE

Case Name: *In re Gerald Kowalczyk*
Case Number: **Supreme Court Case No. S277910**
San Mateo County Superior
Court No. 21SF003700A
1DCA, Div. 3 Case No. A162977

I, **Christopher Gonzalez**, declare as follows: I am over the age of 18, and not party to this cause. I am employed in the County of Sacramento. My business address is 770 L Street, Suite 1000, Sacramento, California 95814. I served a true copy of the following document:

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THE STATE PUBLIC DEFENDER TO FILE
AMICUS CURIAE BRIEF IN SUPPORT OF
PETITIONER GERALD KOWALCZYK**

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Judge of the Superior Court of
San Mateo County
Department 3
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on **November 8, 2023**, at Sacramento County, CA.

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Gonzalez

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CHRISTOPHER GONZALEZ

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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H.C.**

Case Number: **S277910**

Lower Court Case Number: **A162977**

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Date

/s/Christopher Gonzalez

Signature

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