August 14, 2024

The Honorable Elizabeth K. Lee
Presiding Judge, Superior Court of California, County of San Mateo
Department 17, Courtroom 2K
400 County Center
Redwood City, CA 94063

RE: Complaint Regarding San Mateo Judicial Officers
The Superior Court of California, County of San Mateo

Dear Presiding Judge Lee:

We write regarding a concerning pattern of judicial misconduct that has undermined the fairness of arraignment hearings in San Mateo County.

The evidence we present suggests that on many occasions, judicial officers have violated legal and ethical rules by jailing poor defendants without first considering their ability to pay financial conditions of pretrial release. In addition, it is the court's duty to ensure that the accused receives diligent advocacy and we are concerned by the possibility that judicial officers have appointed counsel to represent indigent individuals that may not have provided effective legal representation at arraignment.

We ask you to conduct an expedited investigation into the misconduct alleged here and how the Superior Court can better protect people's legal and Constitutional rights at arraignment hearings.[1] We respectfully request that you:

1. Review transcripts and court records for the cases contained within this complaint;

2. Review the transcript of any detention decision of anyone *currently* incarcerated pretrial;

3. Review the transcript of any arraignment hearing where the judicial officer appointed the same attorney to represent multiple co-defendants in the same case and determine whether there was a conflict of interest and whether each accused person knowingly and intelligently waived any potential conflict on the record;

4. Create a spreadsheet with all cases where an accused person was detained in apparent violation of their constitutional rights and release the list publicly, sending copies to the District Attorney's Office, the Private Defender Program, any other involved defense counsel, and the accused;

5. Remove any judicial officer who violated the law from handling further arraignments or pretrial release hearings;

[1] This complaint is not based on personal knowledge of the judicial officers, Private Defender Program attorneys, or other matters at issue. Our opinion is based on a review of transcripts, court-watching notes, reports, and other sources cited herein, incorporated by reference.

6. Issue instructions and training to all judicial officers in the county regarding the law that binds bail decisions;

7. Ensure that every accused person who appears for an arraignment hearing has had a substantive, private meeting with their new attorney and that the attorney has had ample time to review the Complaint and discovery in the case and perform any other related work prior to the arraignment hearing;[2] and

8. Advise us by August 23, 2024 of the status of the Superior Court's investigation and what actions the court has taken to ensure that the rights of the accused are protected at arraignment hearings in San Mateo County.[3]

I. Executive Summary

Arraignment is one of the most critical hearings in every criminal case. It is when the accused receives formal notice of the prosecution's charges,[4] enters a plea,[5] and seeks release into the community pending trial while presumed innocent.[6] At the arraignment hearing, the accused is entitled to counsel: someone who will "act[] as a diligent, conscientious advocate."[7]

The reality for those arraigned in San Mateo County is often quite different. People awaiting arraignment are crowded into a "holding dock," separated from the rest of the courtroom where the judges, lawyers, and public sit by a transparent wall of glass. When the incarcerated person's case is called, they come forward to a small, six-inch slit in the glass panel. It is difficult to communicate; they often press their ears against the slit and ask for things to be repeated, unable to hear the crucial decisions being made about their release. They often press their faces in between the glass panels in an effort to speak to their attorneys on the other side.

Even worse, judicial officers overseeing these hearings have violated the constitutional safeguards protecting the accused on numerous occasions, meaning that some indigent people in San Mateo have been illegally detained pretrial. Making matters worse, to represent the accused, courts have appointed private attorneys who have at times failed to properly

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[2] When arraignment hearings are rushed, discovery is not provided far enough in advance, or there is insufficient time or privacy for a comprehensive meeting between the lawyer and client, it can become impossible for the defense lawyer, no matter how talented and dedicated, to effectively represent their client at the arraignment hearing. Prior to the arraignment hearing, effective lawyering also often includes talking to the client's family, caretaker, employer, and/or landlord to collect essential information that may assist the court in deciding to release their client.

[3] As there are several signatories to this complaint, we ask that all communication be directed by email to Victoria Sarait Escorza (sarait@siliconvalleydebug.org), Silicon Valley De-Bug/ San Mateo County Participatory Defense Hub.

[4] *See Garcia v. Superior Court*, 47 Cal.App.5th 631, 647 (2020) (citing CAL. PENAL CODE § 988 (West 2024)).

[5] *Id*.

[6] *In re Humphrey*, 11 Cal.5th 135 (2021).

[7] *People v. McKenzie*, 34 Cal.3d 616, 626 (1983), *abrogated on other grounds by People v. Crayton*, 28 Cal.4th 346 (2002). *See also, e.g.*, *Williams v. Superior Court*, 46 Cal.App.4th 320, 326 (1996) (citing CAL. PENAL CODE § 987(a) (West 2024)).

advocate for their clients. Several judges even admitted to outside consultants that a contingent of attorneys from the agency lacked knowledge of court rules and processes. While we do not know the specific consequences for the accused individuals named in this complaint who may have been illegally detained, pretrial detention often carries horrific consequences, such as family separation, housing and/or job loss, the inability to prepare a defense and more. Pretrial detention can be deadly: five people have died while awaiting trial in the custody of San Mateo's jails since just January 2023.[8]

A. Courts Have Repeatedly Violated the Right to Affordable Bail.

In 2021, the California Supreme Court issued its decision in *In re Humphrey*,[9] requiring that courts consider the financial resources of the accused and set affordable bail unless:[10]

> (1) "[T]he court has made an individualized determination that . . . the arrestee has the financial ability to pay, but nonetheless failed to pay, the amount of bail the court finds reasonably necessary to protect compelling government interests"; or
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> (2) "[T]he court has made an individualized determination that . . . detention is necessary to protect victim or public safety, or ensure the defendant's appearance, and there is clear and convincing evidence that no less restrictive alternative will reasonably protect those interests"[11]

Under *Humphrey*, "conditioning freedom solely on whether an arrestee can afford bail is unconstitutional."[12]

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[8] *Deaths in Custody*, SAN MATEO CTY. SHERIFF'S OFF., https://tinyurl.com/yy66k8nv (last visited May 28, 2024). In the last two years, media has reported six people's deaths. Michelle Iracheta, *Inmate Dies at Maguire Correctional Facility*, ALMANAC (Mar. 19, 2024, 9:14 AM), https://tinyurl.com/bdd25535 https://tinyurl.com/bdd25535; *Inmate Dies Sunday in San Mateo County Jail Detox Unit*, CBS NEWS BAY AREA (Jan. 14, 2024, 8:54 PM), https://tinyurl.com/2r85eh87; Thomas Hughes, *San Mateo County Coroner Identifies Two Inmates Found Dead at Maguire Jail*, PALO ALTO ONLINE (Oct. 27, 2023, 8:23 AM), https://tinyurl.com/5d4mskvf; Sue Dremann, *Another Inmate Dies at San Mateo County's Maguire Correctional Facility*, ALAMANAC (Oct. 20, 2023, 5:24 PM), https://tinyurl.com/4y9cpmmj; Austin Turner, *San Mateo County Inmate Found Dead in Jail Cell*, MERCURY NEWS (Oct. 21, 2023, 10:07 AM), https://tinyurl.com/y8jx52hf; Olivia Wynkoop, *Person Dies Shortly After Taken Into Custody by Deputy Sheriffs*, RWC Pulse (Mar. 25, 2024, 1:39 AM), https://tinyurl.com/3ctm6awr (according to news reports, Ms. Sulapas had a medical emergency at the jail and passed away at a nearby hospital three hours later); Michelle Iracheta, *Identity Released for Incarcerated Man Found Dead at Maguire Correctional Facility*, RWC Pulse (Mar. 25, 2024, 1:47 AM), https://tinyurl.com/ms2h48dt. We do not address, and are not familiar with, the arraignment proceedings in the decedents' cases.

[9] *Humphrey*, 11 Cal.5th 135.

[10] *Humphrey*, 11 Cal.5th at 156.

[11] *Humphrey*, 11 Cal.5th at 156.

[12] *Id.* at 143; *Urquidi v. City of Los Angeles*, No. 22-STCP-04044, slip op. at *54 (Cal. Super. Ct. May 16, 2023) ("The plaintiffs have shown that . . . enforcing the secured money bail schedules against poor people who are detained in jail solely for the reason of their poverty is a clear, pervasive, and serious constitutional violation.").

But far too often, San Mateo courts have proceeded as if *Humphrey* was never decided.

Statistics alone suggest some level of noncompliance with *Humphrey* in San Mateo County—San Mateo County judges are setting a *higher* median bail following the landmark decision[13] and setting cash bail more often than another neighboring county.[14]

We present you with 26 transcripts[15] from 2022-2024 revealing that Commissioners Ernst A. Halperin, Cristina Mazzei, and Hugo Borja set money bail without properly considering the accused's ability to pay money bail and/or less restrictive means to ensure their appearance in court or public safety, a clear violation of *In re Humphrey*.[16]

In each of the 26 transcribed hearings, a judicial officer stated their intention to impose financial conditions of pretrial release without (1) making a finding on the record as to whether the accused could afford to pay the financial condition, or (2) making a finding based on clear and convincing evidence that detention was necessary to reasonably assure public safety or the accused's future appearance in court and that no less restrictive alternative would reasonably protect those interests.[17] *Humphrey* forbids this practice.[18] In some cases, judicial officers explained their decision by citing the county's bail schedule. That is an unconstitutional use of the bail schedule under *Humphrey*.[19]

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[13] Stephanie Campos-Bui et al., *Largely Unchanged: The Limits of In re Humphrey's Impact on Pretrial Incarceration in California.* (June 2024), https://tinyurl.com/4m48aesx.

[14] Exhibit A, Letter from Silicon Valley De-Bug to the San Mateo County Board of Supervisors (June 2023, at Exhibit Pages 001—003 [hereinafter Ex. A]. Silicon Valley De-Bug, a community advocacy organization and signatory to this letter, found that "[in] multiple courtwatch studies…judges set cash bail in Santa Clara County 50-60% of the time, while judges in San Mateo County set cash bail 80-90% of the time."

[15] Exhibit B, Bail Hearing Transcripts, at Exhibit Pages 004—179 [hereinafter Ex. B].

[16] *Humphrey*, 11 Cal.5th 135.

[17] A court's mere musings about public safety or flight risk concerns do not constitute a legally valid, even if implied, finding under *Humphrey*. Courts are required to make an individualized and explicit determination that detention is necessary to protect public safety or assure an accused's return to court, and that there is clear and convincing evidence that no less restrictive alternative will reasonably protect those interests. *Humphrey*, 11 Cal.5th at 156 *See also Yedinak v. Sup. Ct. of Riverside Cty.*, 92 Cal.App.5th 876, 887 (Cal. Ct. App. June 23, 2023) ("[W]ithout a clear statement of the judge's findings and reasoning, we cannot ascertain on appeal whether the pretrial detention order safeguards the state and federal principles of equal protection and due process that, according to *Humphrey*, must be honored in practice, not just in principle. What is required is a statement that articulates the judge's evaluative process, set out with sufficient specificity to permit meaningful review.").

[18] The court's violations of *Humphrey* may not be limited to the arraignment hearing context; for example, we are aware of a transcript from a bail hearing occurring after arraignment where the court set money bail without making the proper finding regarding the accused's ability to pay. Exhibit C, Transcript of Record, People v. Manuel Avila, 23-NF-009194-A (Feb. 8, 2024), at Exhibit Pages 180-186 [hereinafter Ex. C]. The Presiding Judge should therefore inquire into the practices of *all judicial officers* under her jurisdiction.

[19] Pretrial release cannot depend "on the accused's ability to post the sum provided in a county's uniform bail schedule." *Humphrey*, 11 Cal.5th at 143. Moreover, the felony bail schedule for San Mateo County explains, in a section titled "General Instructions," that the purpose of the schedule is "to set bail for the release of person[s] arrested on felony charges without warrant for the alleged commission of any bailable offense," but that, "[a]fter a defendant's first appearance in court, the

In one hearing, for example, Commissioner Halperin set John Oxenford's bail at $15,000 over the objection of defense counsel, and even though the prosecutor agreed to Mr. Oxenford's release.[20] Commissioner Halperin refused to modify his order even after learning from defense counsel that Mr. Oxenford could not afford $15,000, and failed to offer any explanation as to why this money-based detention was necessary to ensure community safety and Mr. Oxenford's return to court. Commissioner Halperin thus detained Mr. Oxenford in plain violation of his state and federal constitutional rights.

In addition to these transcribed hearings, court watchers from Stanford University observed five judicial officers[21] in San Mateo County issuing bail orders in apparent violation of the law in 2023.[22] In a single month, the court watchers, students who were passionate about the lack of equity and fairness in the criminal legal system, documented 36 instances of possible misconduct in the courtrooms of the same three commissioners, as well as Judges Rachel Holt and Sean P. Dabel. As part of its investigation, the court should obtain and review the transcripts of these matters.

The Superior Court should also investigate whether judicial officers have retaliated against defense lawyers after they vigorously advocated for their clients' pretrial release. A recent study raised the specter of retaliation by San Mateo judicial officers against defendants whose lawyers argue for bail reductions. A June 2024 report issued jointly by UCLA and UC Berkeley law schools quoted a private attorney in San Mateo as noting, "If there is bail set I never argue to reduce bail anymore because the judges will punish you by setting no bail."[23] Sadly, San Mateo would not be alone in this regard—the same study revealed that "[m]any defense attorneys [statewide] stated that any mention of *Humphrey* immediately leads judges to set a no bail hold"[24] and nearly 40 percent of defense attorneys surveyed reported that judges do not consider *Humphrey* at all.[25]

B. The Court Must Ensure the Accused Receive Diligent Advocacy.

Judicial misconduct can be enabled and exacerbated by poor defense lawyering, especially when the accused's attorney is unable or unwilling to effectively push back and defend the Constitutional rights of their client.

Knowingly appointing ineffective attorneys to represent indigent defendants is also, in and of itself, judicial misconduct. The California Supreme Court has made clear that the judge

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amount of bail will lie within the sound discretion of the judicial officer before whom the defendant appeared, and may be greater or less than the amount set forth in this schedule." Felony Bail Schedule, Superior Court of the County of San Mateo, at 1 (May 2023), https://tinyurl.com/37axzd7f.

[20] Ex. B at 019-027.

[21] We use the term "judicial officers" throughout this letter because some of those who rule over arraignment hearings are judges, while others are commissioners.

[22] Exhibit D, Statements of Stanford Court Watchers, Exhibit Pages 187-195 [hereinafter Ex. D].

[23] Campos-Bui et al., at 26.

[24] Campos-Bui et al., at 25.

[25] Campos-Bui et al., at 23.

has a duty to ensure that the accused receives diligent advocacy[26] and the court cannot appoint defense lawyers whom they know to be incompetent[27] or conflicted.[28] "If the right to counsel . . . is to serve its purpose," the U.S. Supreme Court has emphasized, "judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts."[29] The accused "cannot be left to the mercies of incompetent counsel."[30]

Evidence suggests that in at least some cases, the defense lawyer did not review the discovery before the arraignment hearing, making effective representation impossible. The Superior Court must ensure that every accused person who appears for an arraignment hearing has had a substantive meeting with their new attorney and that the attorney has had ample time to review the Complaint and discovery in the case. Defense counsel must also be provided any sufficient time to prepare for the arraignment hearing, which can include tasks such as calling the client's family, employer, or landlord.

We are also concerned that the San Mateo County indigent defense program has failed to meet the needs of all of its clients at arraignment. San Mateo's Private Defender Program (PDP) system is itself an anomaly, as every other California county with a population over 400,000 uses a Public Defender system.[31] Unlike a public defender system, where the attorneys receive salaries regardless of case length or outcome, PDP employs contract attorneys who are paid a flat fee for handling an arraignment calendar—i.e., every person's case for arraignment on a particular day.[32]

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[26] *McKenzie*, 34 Cal.3d at 626–27 ("[T]he trial judge has the responsibility for safeguarding both the rights of the accused and the interest of the public in the administration of criminal justice.") (citing CRIM. J. STANDARDS: SPECIAL FUNCTIONS OF THE TRIAL JUDGE § 6-1.1 (AM. BAR ASS'N 2000)).
[27] *McMann v. Richardson*, 397 U.S. 759, 771 (1970) ("defendants cannot be left to the mercies of incompetent counsel"); *Powell v. Alabama*, 287 U.S. 45, 71 (1932) ("[T]he failure of the trial court to make an effective appointment of counsel was likewise a denial of due process. . . . [I]t is the duty of the court, whether requested or not, to assign counsel . . . [,] and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.").
[28] *Holloway v. Arkansas*, 435 U.S. 475, 484 (1978) ("[T]rial counsel, by the pretrial motions of August 13 and September 4 and by his accompanying representations, made as an officer of the court, focused explicitly on the probable risk of a conflict of interest. The judge then failed either to appoint separate counsel or to take adequate steps to ascertain whether the risk was too remote to warrant separate counsel. We hold that the failure, in the face of the representations made by counsel weeks before trial and again before the jury was empaneled, deprived petitioners of the guarantee of assistance of counsel.").
[29] *McMann*, 397 U.S. at 771; *Powell*, 287 U.S. at 61 ("[H]ow can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that in the proceedings before the court the accused shall be dealt with justly and fairly."). *See also* William W. Schwarzer, *Dealing With Incompetent Defense Counsel – Trial Judge's Role*, 93 HARV. L. REV. 633, 638 (1980) ("Inasmuch as the administration of justice is the judge's ultimate responsibility, he cannot be indifferent to events which diminish the quality of justice in his court.").
[30] *McMann*, 397 U.S. at 771.
[31] OFF. OF THE STATE PUB. DEF., CALIFORNIA'S 58 PUBLIC DEFENSE SYSTEMS (2023), https://tinyurl.com/3wwbct43.
[32] Exhibit E, San Mateo Cty. Bar Assoc. Priv. Def. Program, Attorney Fee Schedule (July 1, 2023), Exhibit Pages 196—218, at 202 [hereinafter Ex. E]. The schedule provides an additional $100 for each extra hour.

The PDP fee schedule gives defense lawyers bonus pay for each arraignment case "closed on calendar,"[33] presumably including a guilty plea at arraignment—that is, without any chance to interview or cross-examine witnesses, investigate the evidence, or even thoroughly review the police report or comprehensively discuss the allegations with their client. The PDP's fee schedule has been criticized by sources as varied as a prominent legal scholar writing on indigent defense systems nationwide[34] to a county-retained consulting firm, whose 2022 report determined that PDP's many flat fees "may adversely impact case outcomes."[35]

As we detail below, evidence suggests that some PDP contract attorneys appointed to handle the arraignment calendar have at times failed to make competent arguments for pretrial release[36] or even raise the issue of their client's right to affordable bail under *Humphrey*.[37] One contract attorney told his client to "shut up" during court[38] and argued against the release of his own client, who had missed a court date during COVID, telling the judge, "I guess my client likes jail."[39] Several judges admitted to outside consultants that a contingent of PDP attorneys lacked "knowledge of court and evidence rules and processes."[40]

In at least two instances, judicial officers have appointed a single PDP lawyer to represent multiple co-defendants at the arraignment hearing in the same case. In one matter, Commissioner Mazzei appointed a single PDP attorney to represent two co-defendants charged with check fraud;[41] in another, Commissioner Halperin appointed a different PDP attorney to represent both co-defendants in a case that presented an obvious potential conflict of interest on its face: two people were charged with possessing a single gun.[42]

Although courts appointing counsel "for indigent defendants [] must assume the burden of assuring that its appointment does not result in denial of effective counsel because of some possible conflict," in neither case did the court discuss the conflict of interest beyond requiring the two be arraigned separately, and made no inquiry into whether there had been a knowing and intelligent waiver of their right to conflict-free counsel.[43]

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[33] Ex. E at Exhibit Page 202.
[34] Eve Brensike Primus, *The Problematic Structure of Indigent Defense Delivery*, 122 MICH. L. REV. 207, 235-37 (2023) (discussing structural problems with San Mateo County's indigent defense program).
[35] Exhibit F, Harvey M. Rose Assoc., Evaluation of the County of San Mateo's Private Defender Program: Submitted to the County of San Mateo (Jan. 7, 2022), Exhibit Pages 219-343, at 298-99; 307 [hereinafter Ex. F].
[36] Ex. A at 001.
[37] See, e.g., some of the transcripts attached.
[38] San Mateo County Board of Supervisors Meeting, *Testimony by Zach Kirk* (June 13, 2023).
[39] *Id*.
[40] Ex. F at 275.
[41] *People v. Christine Pacini*, Case No. 22-SF-4395B and *People v. Billy Smith*, Case No. 22-SF-4395A. Ex. B at 134-136; 144-148.
[42] *People v. Kennisha Monique Gregory*, Case No. 22-NF-015576-B and *People v. Joseph Bernard Gary, Jr.*, Case No. 22-NF-015576-A. Ex. B at 066-079.
[43] *People v. Mroczko*, 35 Cal. 3d 86, 109 (1983) (citations omitted) (overruled on other grounds by *People v. Doolin,* 45 Cal. 4th 390 (2009); *see also Id.* at 111 ("When a trial court knows or reasonably

In the firearms case, foreseeably, the lawyer went on to argue that one of the defendants should be released because "there's one firearm, two defendants" and *he* "was not the one in possession of the firearm," potentially implicating her other client.[44] This may not be an isolated event, as we understand that until recently, it was commonplace for a single PDP lawyer to handle the entire arraignment calendar. The Superior Court should investigate the circumstances of these two cases, as well as any other matter where the court chose to appoint the same attorney to represent co-defendants in the same case.

We have no doubt that there are individual hearings and cases in which Private Defender attorneys brings the skill, effort and experience necessary to adequately advocate for their client. Indeed, some of the constitutional violations we present from the attached transcripts were made particularly clear by defense advocacy. Moreover, the Private Defender Program recently advised the San Mateo County Board of Supervisors that there have been improvements of late.[45] While we hope significant changes have been made, the court has an obligation to be vigilant and protect the accused's right to effective counsel, especially in light of the recent Harvey Rose report (attached here as Exhibit F) and PDP's fee schedule and structure. At a minimum, courts have a duty not to knowingly appoint ineffective and/or conflicted counsel and to ensure they are not appointing attorneys to cases that present a conflict of interest. And, in any case in which the court cannot ensure constitutionally-effective defense representation, the court should not detain anyone pretrial.

C. Requested Investigation and Remedies

We ask that the Superior Court take the following steps to ensure that every person in San Mateo County receives a fair and legally-compliant arraignment and bail hearing.

First, pursuant to your obligations under Rule of Court 10.603(a)[46] and Code of Judicial Ethics, Canon 3(C)(4),[47] we ask that you conduct an expedited investigation into this evidence regarding cases handled by Commissioner Ernst A. Halperin, Commissioner Cristina Mazzei, Commissioner Hugo Borja, Judge Rachel Holt, and Judge Sean P. Dabel, the five judicial officers who presided over hearings either contained within the transcripts or the cases observed by court watchers.[48] Your investigation should include a review of the court transcripts and records for each of the matters raised herein.

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should know that a particular conflict exists, it must inquire of defendants to obtain a valid waiver.") (internal citations omitted).

[44] Ex B at 075.

[45] San Mateo County Board of Supervisors Meeting, *Testimony by Lisa Maguire* (May 7, 2024).

[46] "The presiding judge is responsible . . . for leading the court . . . in a manner that promotes access to justice for all members of the public." 2024 Cal. Rules of Court, Rule 10.603(a), https://tinyurl.com/yc6wvmw9.

[47] "A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to ensure . . . the proper performance of their . . . judicial responsibilities." CAL. CODE OF JUD. ETHICS, Canon 3(C)(4) (CAL. 2018).

[48] Prompt review of a complaint is always required: "To the extent reasonably possible, the court *must* complete action on each complaint within 90 days after the complaint is submitted." 2024 Cal. Rules of Court, Rule 10.703(d) (emphasis added), https://tinyurl.com/5n8nkfan. *See also* Decision and Order Imposing Public Admonishment, *In re Schnider*, Commission on Judicial Performance (Aug. 31, 2009), https://tinyurl.com/59vd7sat ("Judge Schnider violated California Rules of Court, rule 10.703,

While the investigation is underway, the Superior Court should reassign Commissioners Ernst A. Halperin, Cristina Mazzei, and Hugo Borja—the three judicial officers who presided over the hearings documented in the attached transcripts—and ensure they do not preside over any arraignment or other bail hearing until the investigation is complete.[49] For Judges Holt and Dabel, we call for the court to investigate the cases observed by court watchers to determine whether bail was improperly set.

Second, the Superior Court should review the decision to detain anyone currently incarcerated pretrial.

Third, the Superior Court should review the transcripts of all arraignment hearings where the court appointed the same attorney to represent multiple co-defendants in the same case. The court's investigation should determine whether there was an actual or potential conflict of interest and whether each accused person knowingly and intelligently waived the potential conflict on the record.

Fourth, the court should compile a list of all cases where an accused person was detained in apparent violation of their constitutional rights and release the list publicly, sending copies to us, as well as the District Attorney's Office, the Private Defender Program, any other involved defense counsel, and the accused;

Fifth, the Superior Court should remove any judicial officer who violated the law from handling further arraignments or bail hearings and refer the matter to the Commission on Judicial Performance;

Sixth, the Superior Court should advise all judicial officers in San Mateo County that the *Humphrey* decision is legally binding California Supreme Court precedent; lower courts must adhere to it at every arraignment hearing and bail decision. To the extent additional training is necessary for any judicial officer, such training should be provided promptly.

Seventh, the Superior Court should ensure that every accused person who appears for an arraignment hearing has had a substantive, private meeting with their new attorney and that the attorney has had ample time to review the Complaint and discovery in the case and perform any other related work prior to the arraignment hearing.

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by failing to promptly respond to at least three complaints about Commissioner Dobb's delay, as was required of him as her supervising judge.").

[49] "The presiding judge has ultimate authority to make judicial assignments." 2024 Cal. Rules of Court, Rule 10.603(c)(1), https://tinyurl.com/yc6wvmw9. "The presiding judge is responsible . . . for leading the court . . . in a manner that promotes access to justice for all members of the public."). 10.603(a). "A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to ensure . . . the proper performance of their . . . judicial responsibilities." CAL. CODE OF JUD. ETHICS, Canon 3(C)(4)). "Whenever a judge has reliable information that another judge has violated any provision of the Code of Judicial Ethics, that judge shall take appropriate corrective action." Canon 3(D)(1). "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity . . . of the judiciary." Canon 2(A). "An independent, impartial, and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct." Canon 1.

Eighth, we ask that the Superior Court advise us of the status of its investigation and what actions the court has taken to ensure that the rights of the accused are protected at arraignment hearings in San Mateo County by August 23, 2024.

II. San Mateo Judicial Officers Know That Pretrial Jailing Inflicts Profound Harm on the Accused, Their Families, and the Community at Large

When San Mateo's judicial officers decide whether to release the accused before trial, they do so with the knowledge that pretrial jailing can have devastating consequences for the accused and their families. As the California Supreme Court recognized in *Humphrey*, "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. . . . The disadvantages to remaining incarcerated pending resolution of criminal charges are immense and profound."[50] Pretrial jailing can mean eviction, family separation, unemployment, inadequate medical care, physical assault, or—as has happened at least six times in the last two years—death.[51]

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[50] *Humphrey*, 11 Cal.5th at 142, 147. "Deprivation of liberty pending trial is harsh and oppressive, subjects defendants to economic and psychological hardship, interferes with their ability to defend themselves, and, in many instances, deprives their family of support." CRIM. J. SECTION STANDARD: PRETRIAL RELEASE, Standard 10-1.1 (AM. BAR ASSOC'N), https://tinyurl.com/msk3yhsb (last visited May 26, 2024).

[51] *See* sources cited *supra* note 6. *See also*, Letter from Disability Rts. Cal.'s Mental Health PG & Prison Law Off. to San Mateo County (Jan. 30, 2023), https://tinyurl.com/57334nx6 ("finding probable cause that the jail system is engaging [in] abuse and/or neglect of people with disabilities based on their treatment of people in solitary confinement"); Michelle Iracheta, *Local Groups Pushing Sheriff Oversight Calls Recent Deaths at Maguire Jail Into Question*, RWC PULSE (Mar. 25, 2024, 1:57 AM), https://tinyurl.com/2rrnyew6 ("After two people died either while in custody or after being in the custody of correctional officers at Maguire Correctional Facility, a local grassroots organization . . . is calling those deaths into question."); Samantha Michaels, *Jail Is a Terrible Place to Have a Period. One Woman Is on a Crusade to Make It Better*, MOTHER JONES (Feb. 21, 2019), https://tinyurl.com/mumfvdcn ("On the long list of worst places to deal with a period, jail hovers at the top. Christine Kolba found that out last February while detained for a drug charge in the San Mateo County jail. . . . The free pads from the facility didn't stick properly to the papery underwear she'd been issued. And she didn't have the $6.99 that the box of tampons would cost her at the commissary, the jail's version of a corner store. When Kolba met her attorney . . . one day to talk about her case, she broke into tears as menstrual blood ran down her leg."); Sue Dremann, *San Mateo County Pays Woodside Equestrian $750k Settlement in Wrongful Arrest Suit*, ALMANAC (Dec. 5, 2022, 3:32 PM), https://tinyurl.com/4sc82a7t ("Staff at the [San Mateo] jail also failed to respond to her symptoms and violated jail policy regarding basic medical evaluations."); James Anderson, *Solitary Confinement Punishes Vulnerable People Inside a San Mateo County Jail*, Solitary Watch (Oct. 12, 2024), https://tinyurl.com/35d46f3a ("a complainant, formerly detained in [Maguire Correctional Facility], claimed to have been assaulted by staff and denied medical care and food…[he] recalled being placed in a "sobering cell" where an officer, per the claim, put the incarcerated person's "face into fecal matter and urine" in a putatively COVID-19 contaminated area. Later, the complainant was placed in "a dirty cell and denied cleaning materials and left with a molded, soiled and mildewed mattress" that resulted in a staph infection.").

Pretrial jailing can negatively affect the outcome of the underlying criminal case by interfering with a client's ability to work with counsel and prepare a defense.[52] In many cases, the result is a period of pretrial detention that exceeds the sentence the defendant would have received for the charged crime, a longer sentence upon conviction, or a wrongful conviction.[53]

Indeed, there is overwhelming evidence that pretrial jailing coerces people into pleading guilty to crimes they did not commit.[54] The American Bar Association's Plea Bargain Task Force released a 2023 report acknowledging that "pretrial detention may coerce a defendant, including an innocent one, into pleading guilty" and people detained pretrial "are more likely to plead guilty and to do so earlier in their case than those awaiting trial from home."[55] In a survey of defense attorneys, over 89% reported having represented a client who pleaded guilty while maintaining their innocence.[56] In 2017, the Innocence Project noted that in nearly 11% of the nation's DNA exoneration cases, innocent people entered guilty pleas.[57] More broadly, 802 people of the National Registry of Exonerations' 3,519 documented exonerations entered a guilty plea to a crime for which they were later exonerated.[58]

The harm of pretrial jailing also radiates beyond the individual person jailed. For those with incarcerated loved ones, each day brings the threat of emotional and financial devastation. Children are forcibly separated from their parents and placed in foster care simply because a court has removed their sole custodial parent from the household.[59] And, while families must pay for the costs of phone calls, jail visits, and commissary bills, they lose financial support from their incarcerated loved one, often leading to utility shutoffs and

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[52] *In re Humphrey*, 11 Cal.5th at 147; *Urquidi*, No. 22-STCP-04044, at *34–35, 38–39 (citing declarations from local public defenders and summarizing the testimony and research of Dr. Paul Heaton); Johanna Lacoe et al., *The Effect of Pre-Arraignment Legal Representation on Criminal Case Outcomes*, 3, 7 (Nat'l Bureau of Econ. Rsch., Working Paper No. 31289, 2023).

[53] *Urquidi*, No. 22-STCP-04044, at *38–39 (summarizing the testimony and research of Dr. Paul Heaton).

[54] *Id*. at *34–35, 38–39 (citing declarations from local public defenders and summarizing the testimony and research of Dr. Paul Heaton).

[55] AM. BAR ASSOC'N, 2023 PLEA BARGAIN TASK FORCE REPORT 20 (2023), https://tinyurl.com/yznxc5vt, citing Vanessa A. Edkins and Lucian E. Dervan, *Freedom Now or a Future Later: Pitting the Lasting Implications of Collateral Consequences against Pretrial Detention in Decisions to Plead Guilty*, 24 PSYCH, PUB POL'Y, & L. 204 (2018).

[56] Rebecca K. Helm et al., *Limitations on the Ability to Negotiate Justice: Attorney Perspectives on Guilt, Innocence, and Legal Advice in the Current Plea System*, 24 PSYCH., CRIME, & L. 24, 915, 934 (2018). Nearly 45 percent of the attorneys involved in the study reported that they had advised a client to take a guilty plea despite believing that the client was innocent. *Id.*

[57] *Innocence Project and Members of Innocence Network Launch Guilty Plea Campaign,* INNOCENCE PROJECT (Jan. 23, 2017), https://tinyurl.com/3a5tyrdr.

[58] *Exonerations by State and Total by Year,* NAT'L REGISTRY OF EXONERATIONS, https://tinyurl.com/3f23us93 (last visited May 25, 2024). Under the "Additional Aspects" category, select "present" to the right of the aspect "Guilty Plea," then total up the number of responsive individuals for each category of crime.

[59] H.R. WATCH & ACLU, YOU MISS SO MUCH WHEN YOU'RE GONE": THE LASTING HARMS OF JAILING MOTHERS BEFORE TRIAL IN OKLAHOMA 28-29 (2018), https://tinyurl.com/mrywefzr.

evictions.[60] These impacts disrupt children's schooling and emotional well-being for years to come.[61]

For the community, pretrial jailing is a destabilizing force—it drains public resources and undermines public safety. As courts have explained, individuals are *more* likely to commit crimes after suffering pretrial detention.[62] It also forces the state "to bear the cost of housing and feeding those arrestees who could properly be released."[63] Just six California counties, for example, "spent $37.5 million over a two-year period jailing people who were never charged or who had charges dropped or dismissed."[64]

All this is to say nothing of the harms that ensue when a person awaiting trial *can* scrape together enough money to buy their freedom. The median money bail in California was calculated to be five times higher than the national median in 2017.[65] But because most people jailed pretrial do not have tens of thousands of dollars to spare, they must instead sign predatory contracts with commercial bail bond companies, which typically charge a 10% fee and sometimes require families to offer their cars or homes as collateral.[66] This fee is nonrefundable, meaning it is not returned even if a person makes all of their court appearances, the prosecutor declines to file charges, or the case is later dismissed. The commercial bail bond industry extracts hundreds of millions of dollars every year from Black and Latino communities in California.[67]

III. Judicial Officers Know, or Should Know, that the Law Requires Them to Consider Whether Money Bail Is Necessary and Whether the Accused Can Afford to Pay It

San Mateo judicial officers know, or should know, that pretrial jailing is supposed to be rare. "[I]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[68] As the California Supreme Court explained in *Humphrey*, the due process and equal protection clauses of the state and federal constitutions permit pretrial jailing in only two circumstances:

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[60] *Id*. at 93.
[61] Tiffany Bergin et al., *The Initial Collateral Consequences of Pretrial Detention,* NYC CRIM. J. AGENCY (Sept. 27, 2022), https://tinyurl.com/5as77khs; GINA CLAYTON ET. AL, BECAUSE SHE'S POWERFUL: THE POLITICAL ISOLATION AND RESISTANCE OF WOMEN WITH INCARCERATED LOVED ONES, 11–12 (2018), https://tinyurl.com/yckyduzj.
[62] *Humphrey*, 11 Cal.5th at 147("[T]ime in jail awaiting trial may be associated with a higher likelihood of reoffending."). *See also Urquidi*, No. 22-STCP-04044, at *8 ("the evidence demonstrates that secured money bail, as now utilized in Los Angeles County, is itself 'criminogenic'—that is, secured money bail *causes* more crime than would be the case were the money bail schedules no longer enforced").
[63] *Humphrey*, 11 Cal.5th at 147.
[64] *Id*.
[65] H.R. WATCH, NOT IN IT FOR JUSTICE: HOW CALIFORNIA'S PRETRIAL DETENTION AND BAIL SYSTEM UNFAIRLY PUNISHES POOR PEOPLE, 33–34 (Apr. 11, 2017), https://tinyurl.com/5n998jvb.
[66] UCLA SCH. OF L. CRIM. JUST. REFORM CLINIC, THE DEVIL IN THE DETAILS: BAIL BOND CONTRACTS IN CALIFORNIA (May 2017), https://tinyurl.com/2a3fj3ur.
[67] ISAAC BRYAN ET. AL., THE PRICE OF FREEDOM: BAIL IN THE CITY OF LOS ANGELES (May 2018), https://tinyurl.com/mr2d5ncm.
[68] *Humphrey,* 11 Cal.5th at 155 (quoting *U.S. v. Salerno*, 481 U.S. 739, 755 (1987)).

(1) "[T]he court has made an individualized determination that . . . the arrestee has the financial ability to pay, but nonetheless failed to pay, the amount of bail the court finds reasonably necessary to protect compelling government interests"; or

(2) "[T]he court has made an individual determination that . . . detention is necessary to protect victim or public safety, or ensure the defendant's appearance, and there is clear and convincing evidence that no less restrictive alternative will reasonably vindicate those interests."[69]

In either circumstance, the weighty decision to jail someone before trial must "depend on a careful, individualized determination of the need to protect public safety."[70] It cannot depend on the accused's "ability to post the sum provided in a county's uniform bail schedule."[71]

The court must also "set forth the reasons for its decision on the record and . . . include them in the court's minutes."[72] As *Humphrey* explained, "[s]uch findings facilitate review of the detention order, guard against careless or rote decision-making, and promote public confidence in the judicial process."[73]

While hard to believe, it is possible that some San Mateo judicial officers are not aware of the importance of these legal rules. A recent public record request revealed that most judicial officers who preside, or have presided, over arraignment hearings in San Mateo, including Commissioners Hugo Borja, Ernst Halperin, and Cristina Mazzei, had not completed *any* legal training related to pretrial release and detention.[74] As of October 10, 2023, of the 16 judicial officers who we believe have recently presided over arraignment hearings,[75] the court's records listed completed relevant training for just four—including Judge Dabel but not Judge Holt.[76] Of those four, only three attended training sessions conducted after March 25, 2021, when the California Supreme Court published its decision in

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[69] *Id.* 11 Cal 5th at 156
[70] *Id*. at 142.
[71] *Id*.
[72] *Id*. at 155; *Yedinak v. Sup. Ct. of Riverside Cty.*, 92 Cal.App.5th 876, 887 (June 23, 2023) ("[W]ithout a clear statement of the judge's findings and reasoning, we cannot ascertain on appeal whether the pretrial detention order safeguards the state and federal principles of equal protection and due process that, according to *Humphrey*, must be honored in practice, not just in principle. What is required is a statement that articulates the judge's evaluative process, set out with sufficient specificity to permit meaningful review."); *In re Brown*, 76 Cal.App.5th at 308–09.
[73] *Humphrey*, 11 Cal.5th at 155–56; *In re Podesto*, 15 Cal.3d 921,937–38 (1976); *In re Brown*, 76 Cal.App.5th at 308–09; *In re Christie*, 92 Cal.App.4th 1105, 1109–10 (2001).
[74] The San Mateo County Superior Court provided judicial education records on October 10, 2023 for the following judicial officers: Hon. Donald J. Ayoob, Hon. Hugo Borja, Hon. Sarah P. Burdick, Hon. Chinhayi C. Cadet, Hon. Sean P. Dabel, Hon. Kevin E. Dunleavy, Hon. Stephanie Garratt, Hon. Ernst A. Halperin, Hon. Rachel E. Holt, Hon. Jeffrey B. Jackson, Hon. Susan M. Jakubowski, Hon. Amarra A. Lee, Hon. Cristina Mazzei, Hon. Renee C. Reyna, and Hon. Michael K. Wendler. The court indicated that there were no responsive records for Commissioner Padilla. Exhibit G, San Mateo Cty. Sup. Ct., Judicial Officers' Records, Exhibit Pages 344—358 [hereinafter Ex. G].
[75] *Id*.
[76] *Id*.

Humphrey, and only Judge Michael Wendler completed training that included *Humphrey* in its title.[77]

But ignorance is no excuse. Any competent judicial officer should be familiar with *Humphrey*. The decision was highly publicized, and its core holdings are relevant to the daily practice of judges presiding over arraignment hearings, particularly if they are relying on money bail.

IV. Transcripts of Pretrial Release Decisions Contain Evidence that San Mateo Judges Have Repeatedly Broken the Law.

Transcripts of bail decisions by San Mateo judicial officers reveal multiple constitutional violations.[78] In the 26 cases noted and attached here, the judge or commissioner imposed secured money bail without properly considering the accused's ability to pay or making the findings required by law. This indifference to poverty and public safety is precisely what the California Supreme Court condemned in *Humphrey*.

Cases Where Financial Condition of Release Was Ordered Absent a Proper *Humphrey* Finding

Judicial Officer	Cases
Commissioner Ernst Halperin	11
Commissioner Cristina Mazzei	13
Commissioner Hugo Borja	2

Notably, each time a judicial officer willfully sets money bail in violation of the Constitution, there may also be a violation of the federal criminal code: "Whoever, under color of [law], willfully subjects any person . . . to the deprivation of any rights . . . secured or protected by the Constitution or laws of the United States, . . . shall be fined . . . or imprisoned . . ."[79] The U.S. Court of Appeals for the Ninth Circuit has explained that "willfully" means

[77] Judge Dabel completed "Bail and Own Recognizance Release Procedures Primer" on December 1, 2021. Judge Garratt completed "Pretrial Release Policy and Practice" on January 26, 2023. Judge Jakubowski completed "Pretrial Release: An Overview of Risk Assessment Tools" on July 14, 2020. Judge Wendler completed "Humphrey: Setting Bail in 2022" on June 1, 2022. Ex. G at Exhibit Pages 344-358.

[78] The sheer number of the *Humphrey* violations documented in just these transcripts is stunning. We freely acknowledge that the cited transcripts surely constitute a minority of each judge's total bail decisions during this time period and we do not claim that these transcripts represent a fair cross-section of judge's decisions. It should also be noted that it can be extraordinarily difficult to obtain transcripts of bail decisions in San Mateo County. The nonprofit organization Civil Rights Corps requested transcripts of the April 21, 22, and 23, 2022 arraignment calendars on April 25, 2022. After four months of waiting, two of the three court reporters called and flatly refused to prepare the transcripts. A third never responded. Even after a letter was sent to the Presiding Judge, the two court reporters who had responded did not agree to prepare the transcripts until November 2022. One refused to provide a date by which the transcripts could be expected. The other ultimately prepared and sent the transcript in August 2023. Over two years later, the third court reporter has still never responded to the request for transcripts.

[79] 18 U.S.C. § 242.

"to act in open defiance *or reckless disregard* of a constitutional requirement that has been made specific and definite."[80]

a. Commissioner Ernst A. Halperin

On a single day in October 2022, Commissioner Halperin seemingly violated the rights of at least five people. First, in *People v. Lopez Baltazar*, Case No. 22-SM-011141-A,[81] Commissioner Halperin announced that he was "going to set bail in the amount of $10,000"—the amount provided in the bail schedule. When defense counsel objected, explaining that "Mr. Baltazar cannot afford $10,000.00 bail," the following exchange occurred:

> COURT: To move off the bail schedule, I need to have a hearing in open court to make findings to justify it. I don't have enough information to make that. I'm setting 10,000 for now.
>
> DEFENSE: But, Your Honor, it's the People's burden, not the defendant with regards to bail; and at this time, Mr. Lopez Baltazar cannot afford $10,000.00; and according to *Humphrey* . . . he is entitled to affordable bail. He cannot afford $10,000.00. The Court just gave him bail on another case of $7,500, so considering that the Court is willing to give Mr. Lopez Baltazar bail, then the only question is whether or not it's affordable bail; and it's not, so I would ask the Court to reduce the bail.
>
> . . .
>
> COURT: Okay. I'm keeping bail at $10,000.[82]

Commissioner Halperin did not consider Mr. Lopez Baltazar's ability to pay or make any findings in support of his de facto detention order. The court also set cash bail on Mr. Lopez Balatazar's two other matters.

Second, in *People v. Santini*, Case No. 21-NM009840-A,[83] Commissioner Halperin announced that he was "setting bail at $2500.00." Defense counsel objected, explaining that Ms. Santini was "not employed" and "cannot afford $2500.00."[84] Without questioning the factual premise of defense counsel's argument—that Ms. Santini couldn't afford $2,500.00—Commissioner Halperin seemed to accept that she could not afford the bail, but overruled the objection and set bail anyway: "Understood. I made my decision [and] we are moving on, counsel."[85] Though Commissioner Halperin referenced public safety, the court did not consider Ms. Santini's ability to pay or less restrictive alternatives to this apparent de facto detention order.[86] The court also set cash bail in Ms. Santini's other matter.

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[80] *U.S. v. Reese*, 2 F.3d 870, 881 (9th Cir. 1993) (quoting *Screws v. U.S.*, 65 S.Ct. 1031, 1037 (1945)).
[81] Ex. B at 004.
[82] Ex. B at 015.
[83] Ex. B at 038.
[84] Ex. B at 042.
[85] Ex. B at 042.
[86] Ex. B at 042.

Third, in *People v. Oxenford*, Case No. 22-NM-009203-A,[87] Commissioner Halperin set bail "at $15,000.00," even though the prosecutor did not request money bail or seek Mr. Oxenford's detention.[88] "Given his lack of [criminal] history," the prosecutor explained, "I'm not going to object to his release."[89] Commissioner Halperin set money bail anyway, explaining that he "[didn't] have enough information to do anything different than set the bail that was [already] required by [a different] judge [on the arrest warrant]."[90] Defense counsel objected, explaining that Mr. Oxenford "[couldn't] afford $15,000.00."[91] "I understand that," Commissioner Halperin responded, but "I made a decision. I'm setting bail at $15,000."[92] Before ordering Mr. Oxenford's incarceration by setting an unaffordable financial condition of release, Commissioner Halperin did not consider whether his detention was necessary to further any public interest, and Commissioner Halperin appeared to accept the premise of defense counsel's argument—that Mr. Oxenford *could not* afford to pay $15,000— and set bail anyway. The court also set cash bail on Mr. Oxenford's other matter, described as a "misdemeanor possession."

Fourth, in *People v. Bochchamale*, Case No. 22-SF-012958-A,[93] the prosecutor advised Commissioner Halperin that "bail per schedule [was] $50,000," and Commissioner Halperin complied, setting bail in that amount. When defense counsel asked Commissioner Halperin to "set bail at 10,000," explaining that Mr. Bochchamale was "not able to afford $50,000.00," the following exchange occurred:

> COURT: I understand that, but I don't have anything here on a *Humphrey's* [sic] motion. I don't have anything other than this [pre-trial services] report. This is without prejudice to him making a *Humphrey's* [sic] motion.
>
> DEFENSE: But, Your Honor, he is entitled pursuant to statute to have his bail heard at arraignment; and given the fact that he cannot afford $50,000.00, I think pursuant to *Humphrey* . . . that Mr. Bochchamale is entitled to have his bail reduced to $10,000.
>
> COURT: Understood. I understand your argument, counsel. What I'm saying is under *Humphrey* it's his burden to establish the inability; and so I don't think we're prepared to do that at this point . . . .
>
> DEFENSE: But, Your Honor, the Court has appointed the [private defender]. The Court has a signed declaration [of indigence], and I don't believe there's any other information that the Court needs.

[87] Ex. B at 019.
[88] Ex. B at 021—23.
[89] Ex. B at 021.
[90] Ex. B at 023.
[91] Ex. B at 023—024.
[92] Ex. B at 023—025.
[93] Ex. B at 046.

COURT: Understood. I understand your argument; but I made my decision, counsel. So it's going to be $50,000.00 without prejudice to making a bail motion.[94]

Commissioner Halperin did not consider Mr. Bochchamale's ability to pay and failed to make the requisite findings in support of the de facto detention order. The court also set cash bail on Mr. Bochchamale's other misdemeanor case.

Finally, in *People v. Fernandez*, Case No. 22-SF-012367-B,[95] Commissioner Halperin ignored the pre-trial services recommendation to release Mr. Fernandez on his own recognizance and set unaffordable money bail. "[K]eeping in mind pretrial services court report," Commissioner Halperin announced, "I'm nonetheless going to set bail at $25,000.00."[96] Commissioner Halperin also overruled defense counsel's objection to that decision:

DEFENSE: Mr. Fernandez has indicated he's not currently employed, which I think the Court has a signed declaration before it.

COURT: I do.

DEFENSE: He's indicated he cannot afford $25,000.00 bail, so I would ask that he be released on his own recognizance pursuant to *Humphrey* . . . .

COURT: All right. Understood. I noted it but that request is denied. . . . Bail is set at $25,000 without prejudice to making a bail motion. . . . Formal bail motion is set on a preliminary hearing calendar.

DEFENSE: So the only thing is it's the People's burden not mine, and defendant is entitled to bail at arraignment per California law.

COURT: Understood, counsel. . . . [W]hat I'm saying is that actually is the defendant's burden to prove inability to pay the posted bail amount; and we're not prepared to do that right now. Counsel can set up a *Humphrey's* [sic] motion on the prelim calendar.

DEFENSE: . . . Is this a policy of this court that a *Humphrey* hearing has to be done before bail is considered?

COURT: What I'm saying is I set an amount of bail that I think is appropriate under the circumstances. I understand you have an argument that he can't afford it, but you have to put a properly noticed *Humphrey's* [sic] motion on the preliminary hearing calendar. . . . I'm not going to hold a *Humphrey's* [sic] hearing when I don't think there's going to be complete information at the hearing right now. . . . We set them on the

[94] Ex. B at 050—51.
[95] Ex. B at 029.
[96] Ex. B at 042.

preliminary hearing calendar. You can make the motion on the preliminary hearing calendar.

DEFENSE: But, Your Honor, *Humphrey* is a detention…

COURT: I made my decision.

DEFENSE: This is not a detention hearing.

COURT: Ma'am, I've made my decision, okay. Once it's submitted, I've made my decision.[97]

Here, again, Commissioner Halperin did not inquire into Mr. Fernandez's inability to pay and failed to make any findings in support of the de facto detention order.

Case	Date	Financial condition of release	Made a proper finding regarding ability to pay or detention?
People v. Lopez Baltazar	10/21/22	$10,000	No
People v. Santini	10/21/22	$2,500	No
People v. Oxenford	10/21/22	$15,000	No
People v. Bochchamale	10/21/22	$50,000	No
People v. Fernandez	10/21/22	$25,000	No
People v. Garcia	12/27/22	$25,000	No
People v. Cruz	12/27/22	$40,000	No
People v. Gregory	12/27/22	$95,000	No
People v. Gary	12/27/22	$35,000	No
People v. CruzSuazo (two cases)	11/8/22	$40,000 $10,000	No
People v. ArguetaBaldizon	12/17/22	$55,000	No

During the following months, in November and December 2022, it appears that Commissioner Halperin violated the rights of at least six additional people.[98]

[97] Ex. B at 035-36.
[98] Ex. B at 054-093.

For example, in *People v. Gregory*, the pretrial services report apparently recommended the release of Ms. Gregory and the prosecution made no argument in opposition, but Commissioner Halperin stated, "I'm not going to follow the recommendation of the pretrial services report" and set "scheduled bail" at $95,000.[99] When defense counsel explained that Ms. Gregory could not afford that amount and that the prosecution had not presented evidence to find that she was a threat to society, Commissioner Halperin asked the prosecutor for "the facts." Defense counsel objected to such a recitation on due process grounds because no police report had been provided to the defense.[100] The court told the defense attorney, "You can't have it both ways. We're either going to hear the facts or I'm setting the bail at $95,000 without prejudice"[101] and bail remained at that amount without any discussion of the factual allegations underlying the charge.[102]

This transcript is very troubling.[103] Rather than following the law, which requires Commissioner Halperin to make an individualized determination that detention is necessary and no less restrictive alternative would reasonably address public safety or flight risk before setting unaffordable bail, Commissioner Halperin simply set money bail. When defense counsel objected, Commissioner Halperin asked for facts from the prosecutor. When defense counsel raised the due process violation inherent in the prosecution using the police report to argue for detention without providing the defense a copy, Commissioner Halperin said that the accused "can't have it both ways," that is, defense counsel must choose between allowing the court to set unaffordable bail and allowing the prosecution to read allegations from the police report into the record without the defense having any opportunity to cogently respond—at which point the court may still set unaffordable bail.

Similarly, in *People v. Arguetabaldizon*,[104] Commissioner Halperin set bail "at $55,000"—the amount apparently provided in the bail schedule. As Commissioner Halperin explained, "I calculate the bail to be—two victims, not same transaction—$55,000."[105] Defense counsel objected, explaining that Mr. Arguetabaldizon "cannot afford $55,000," but Commissioner Halperin refused to consider Mr. Arguetabaldizon's ability to pay when setting the financial condition of release.

b. Commissioner Cristina Mazzei

In January 2024, Commissioner Mazzei set money bail in two misdemeanor matters in violation of *Humphrey*.

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[99] Ex. B at 068.
[100] Ex. B at 069.
[101] *Id*.
[102] *Id*.
[103] The court appointed the same attorney to represent both Ms. Gregory and her co-defendant, Mr. Gary, as discussed in section VI, below. In *People v. Gary*, Mr. Gary informed the court that he was working as a part-time in-home care provider earning $18.75 per hour and his attorney represented that he could afford to post a $20,000 bail. Commissioner Halperin nonetheless set bail at the schedule amount of $35,000: "But I'm not reducing the bail below $35,000 on a charge of felon in possession. I understand the argument that he's not physically the one [with the gun], but that's the charge. I'm not setting bail below schedule with a loaded handgun." Ex. B at 072-078.
[104] Ex. B at 087.
[105] Ex. B at 089.

In *People v. Latosha Smith*,[106] Ms. Smith's appointed counsel advised the court that she earned about $1,200 a month, but the court set bail at $10,000. Defense counsel objected "under *Humphrey*," but the court merely noted the seriousness of the charge (a misdemeanor child endangerment charge, for which it appears Ms. Smith was ultimately convicted of only disturbing the peace). This violated *Humphrey* because court did not inquire into Ms. Smith's ability to pay the $10,000 bond and made no findings that she could afford to pay that amount, or alternatively, by clear and convincing evidence that no less restrictive alternative to Ms. Smith's detention would reasonably protect public safety or assure her return to court.

Similarly, Commissioner Mazzei skipped over the required findings and imposed money bail in *People v. Pimentelsaucedo*.[107] In that case, the appointed defense lawyer asked for release on the accused's own recognizance. When the court indicated a desire to set bail at $25,000, defense counsel objected and noted that the accused's job in the construction industry allowed him to afford, at most, a $5,000 bond. The court, without questioning counsel's comment or making any finding about the accused's ability to pay, set bail at $10,000. The record does not reflect a finding by Commissioner Mazzei that Mr. Pimentelsaucedo could afford that amount of bail, or, in the alternative, that clear and convincing evidence persuaded the court that no less restrictive alternative would reasonably protect public safety or assure his return to court.

This was not the first time that Commissioner Mazzei set money bail in violation of *Humphrey*. Indeed, on a single day in April 2022, Commissioner Mazzei repeatedly imposed financial conditions of pretrial release without considering the accused's ability to pay. In one case, *People v. Lesley*, Case No. 22-SM-4846A,[108] defense counsel asked Commissioner Mazzei to release Mr. Lesley on his own recognizance, emphasizing Pretrial Services' recommendation to grant release and arguing "that the [prosecution's] concerns [regarding Mr. Lesley's prior DUIs] could be addressed by making a condition of OR the SCRAM device, no driving, things along those lines . . . that would I think address any of the public safety concerns."[109] Without considering whether Mr. Lesley's detention was necessary to further any public interest, and without considering Mr. Lesley's ability to pay, Commissioner Mazzei rejected defense counsel's argument and imposed a financial condition of release: "I will set bail in the amount of $5,000."[110]

In another case in which Pretrial Services recommended release, *People v. Pacini*, Case No. 22-SF-4395B,[111] defense counsel asked Commissioner Mazzei to follow that recommendation and release Ms. Pacini on her own recognizance. Commissioner Mazzei declined, citing Ms. Pacini's prior failures to appear and "numerous theft arrests and convictions on her record."[112] Without considering whether Ms. Pacini's detention was necessary to further any public interest, and without considering Ms. Pacini's ability to pay,

[106] Ex. B at 100.
[107] Ex. B at 094.
[108] Ex. B at 121.
[109] Ex. B at 122—23.
[110] Ex. B at 123.
[111] Ex. B at 144.
[112] Ex. B at 146.

Commissioner Mazzei "set bail in the amount of $10,000."[113] There was not clear and convincing evidence, nor a finding to that effect, that no less restrictive alternative would reasonably protect the interests of public safety and the accused's return to court.

In a third case in which Pretrial Services recommended release, *People v. Hidalgo*,[114] Case No. NF-4854A, defense counsel asked Commissioner Mazzei to release Christian Hidalgo on his own recognizance, emphasizing the recommendation of Pretrial Services and the absence of any prior failures to appear. Commissioner Mazzei "set bail in the amount of $10,000," finding that Mr. Hidalgo "is a risk to public safety."[115] She did not consider whether that financial condition of release was the least restrictive means of protecting public safety and she did not consider whether Mr. Hidalgo could afford to pay $10,000.

The cases of Mr. Hidalgo, Ms. Pacini, and Mr. Lesley are not outliers. As indicated below, on that April 2022 day on which she oversaw the arraignment calendar, Commissioner Mazzei imposed financial conditions of release without properly conducting the *Humphrey* analysis at least 13 times[116]:

Case	**Date**	**Financial condition of release**	**Made a proper finding regarding ability to pay or detention?**
People v. L. Smith	1/19/24	$10,000	No
People v. Pimentalsaucedo	1/19/24	$10,000	No
People v. Gordon	4/20/22	$10,000	No
People v. Lesley	4/20/22	$5,000	No
People v. Smith	4/20/22	$10,000	No
People v. Gonzales	4/20/22	$400,000	No
People v. Pacini	4/20/22	$10,000	No
People v. Berry	4/20/22	$5,000	No
People v. Harris	4/20/22	$12,500	No
People v. Hidalgo	4/20/22	$10,000	No

[113] Ex. B at 147.
[114] Ex. B at 153.
[115] Ex. B at 154.
[116] Ex. B at 107—168.

People v. Phan	4/20/22	$2,500	No
People v. Randall	4/20/22	$10,000	No
People v. Smith	4/20/22	$20,000	No

c. Commissioner Hugo Borja

On a single day in October 2022, Commissioner Borja seemingly violated the rights of at least two people. First, in *People v. Delgado*, Case No. 22-SF-012283A,[117] defense counsel asked Commissioner Borja to release Mr. Delgado on his own recognizance, emphasizing that Mr. Delgado had "no prior record whatsoever" and that Pretrial Services recommended release.[118] Commissioner Borja imposed a financial condition of release without inquiring whether the accused had the means to pay: "[Y]our client is a danger to the public. Bail is set at $25,000."[119] Commissioner Borja did not address defense counsel's arguments that less restrictive alternatives would adequately protect the public.

Next, in *People v. Chamalequel*, Case Nos. 22-SM-009745-A, 22-SM-010503-A, and 22-SM-012270-A,[120] defense counsel asked Commissioner Borja to release Mr. Chamalequel under the supervision of Pretrial Services, but Commissioner Borja rejected that request: "He's not going to be released. He's got . . . six failures to appear. He also has a warrant from Santa Clara County for $15,000. He's not going to show up."[121] "Pretrial [Services] has determined they can supervise him adequately," defense counsel responded. "[O]therwise, they wouldn't have recommended it." Without considering whether Mr. Chamalequel's detention was necessary to further any public interest, or finding by clear and convincing evidence that no less restrictive alternative to detention could reasonably protect that interest, Commissioner Borja announced that "[b]ail is set at $1,000." Commissioner Borja ignored defense counsel's argument that Mr. Chamalequel "doesn't have the ability to pay that."[122]

V. Arraignment Court Watchers Have Observed San Mateo Judges Set Bail In Dozens of Other Cases Absent Any Finding About the Accused's Ability to Pay.

To better understand bail decision-making in San Mateo County, court watchers from Stanford University attended proceedings in the courtrooms of Commissioner Ernst A. Halperin, Commissioner Cristina Mazzei, Commissioner Hugo Borja, Judge Rachel Holt, and Judge Sean P. Dabel in May 2023. The court watchers were all undergraduate students at Stanford University who were passionate about the lack of equity and fairness in the criminal legal system.

[117] Ex. B at 169.
[118] Ex. B at 170.
[119] Ex. B at 172.
[120] Ex. B at 175.
[121] Ex. B at 177.
[122] Ex. B at 177.

In a single month, the court watchers documented 36 cases in which San Mateo judicial officers imposed financial conditions of release without making a finding about the accused's ability to pay or finding that detention was necessary to advance a compelling governmental interest.[123] As these were court observations by lay people, rather than official transcripts, the Superior Court should order and review court transcripts of these matters to determine whether judicial officers committed misconduct.

Judicial Officer	Name of Accused	Date	Case Number	Court set financial condition of release	Court made a finding about ability to pay
Commissioner Borja	Jibril Aziz Ingersoll	5/12/2023	22-SM-013777-A, 23-SM-007941-A	Yes	No
Commissioner Borja	Cristian Farid Cortez Perez	5/12/2023	21-SM-000227-A	Yes	No
Commissioner Borja	Armando Fuentes Sanchez	5/12/2023	23-NM-007956-A	Yes	No
Commissioner Borja	Justin Blake Tognetti	5/12/2023	22-NM-004680-A, 22-NM-006058-A, 23-NF-007953-A	Yes	No
Commissioner Borja	Hector A Martinez	5/12/2023	23-NM-007949-A	Yes	No
Commissioner Borja	Reuben Fabian Gillespie	5/12/2023	20-NM-008956-A, 22-NF-012645-A, 22-NM-001083-A, 22-NM-008185-A, 23-NF-005668-A	Yes	No
Commissioner Borja	Kenya Monique Johnson	5/26/2023	23-NM-002335-A, 23-NM-008325-A	Yes	No
Commissioner Borja	Alex Li	5/26/2023	23-SF-008799-A	Yes	No
Commissioner Borja	Maurice Gregory Sr Hastings	5/26/2023	23-SF-008829-A	Yes	No
Commissioner Borja	Jorge Germain Molina	5/26/2023	23-SF-008223-A	Yes	No
Commissioner Halperin	Charlie Strauli	5/5/2023	23-SF-007164-A	Yes	No
Commissioner Halperin	Sean Ian Butleroconnor	5/5/2023	22-NF-002891-A	Yes	No

[123] Ex. D at 187-195. Along with Exhibit D, the chart here summarizes cases observed where judges set bail making a finding regarding the accused's ability to pay money bail. Note: this list, which is not a complete list of all matters observed, is based on court observations by lay people, not transcripts, but for all the matters in the chart here, criminal cases against the individuals referenced appeared on court calendars on the date indicated.

Commissioner Halperin	CarmenChu Gonzalez Caballero	5/5/2023	22-NM-008156-A, 22-NM-015532-A, 23-NM-000506-A, 23-NM-000924-A, 23-NM-003952-A, 23-NM-005002-A	Yes	No
Commissioner Halperin	Jeffrey King	5/5/2023	23-NM-007456-A	Yes	No
Commissioner Halperin	Armando Carlos Fuentessanchez	5/5/2023	23-NM-007438-A	Yes	No
Commissioner Halperin	Sam Hoang Nguyen	5/5/2023	23-NF-007334-A	Yes	No
Commissioner Halperin	Laura Yvette Ramos	5/5/2023	23-SM-007424-A	Yes	No
Commissioner Mazzei	Jose R Gonzalez Ramirez	5/16/2023	23-SF-008132-A	Yes	No
Commissioner Mazzei	Damani Ayan Spears	5/16/2023	23-SF-008176-A	Yes	No
Commissioner Mazzei	Shane Michael Rivera	5/16/2023	23-SM-008125-A	Yes	No
Commissioner Mazzei	David Chavarria Sr Gusman	5/16/2023	23-SF-001780-A/ 22-NM-006277-A	Yes	No
Commissioner Mazzei	Joshua Peter Trayer	5/16/2023	23-SF-008116-A	Yes	No
Commissioner Mazzei	Ben Leroy Whited	5/16/2023	23-SF-008182-A	Yes	No
Commissioner Mazzei	Finauga Tolo Finauga	5/16/2023	22-NM-007490-A, 22-SF-008635-A	Yes	No
Commissioner Mazzei	Kimlimg Yim	5/16/2023	23-NM-008155-A	Yes	No
Commissioner Mazzei	Jeremy Kenyon Page	5/16/2023	22-NM-009437-A	Yes	No
Judge Dabel	Barbara Ellen Bossier	5/17/2023	22-SM-008804-A	Yes	No
Judge Dabel	Julio Alberto Cabrera Quevedo	5/17/2023	21-SM-003387-A	Yes	No
Judge Dabel	Tahlea Johnson	5/17/2023	21-SM-013530-A, 23-SM-006246-A	Yes	No
Judge Dabel	Johnnie Renea McDonald	5/17/2023	22-SM-012654-A, 22-SM-007658-A	Yes	No
Judge Dabel	Byron Anderson Perezvelasquez	5/17/2023	23-NF-007798-A	Yes	No

Judge Dabel	Florentino Sanchez Stevens	5/17/2023	23-SF-008268-A	Yes	No
Judge Dabel	Alexandra Correa	5/17/2023	20-NM-012940-A, 20-NM-013556-A, 21-SF-008617-B, 22-NM-003537-A, 22-NM-003539-A, 23-NF-001194-A, 23-NM-002157-A	Yes	No
Judge Holt	Veronica Elizabeth Machado	5/2/2023	21-SM-013821-A / 23-SF-007171-A	Yes	No
Judge Holt	Gerald James Salazar	5/2/2023	23-SF-007168-A	Yes	No
Judge Holt	Eduardo Andres Morajara	5/2/2023	22-SF-014344-A	Yes	No

VI. The Court Must Ensure Constitutionally-Effective Representation for All Accused Persons at Arraignment.

In a criminal case, the accused must receive representation that "meet[s] the standard of representation to be expected of a reasonably competent attorney acting as a diligent, conscientious advocate."[124] As the California Supreme Court has explained, this constitutional requirement "implies a duty of the trial judge to assure . . . that [the] defendant receives such diligent advocacy."[125] In other words, judges cannot appoint defense lawyers whom they know to be incompetent,[126] conflicted,[127] or both. "If the right to counsel . . . is to serve its purpose," the U.S. Supreme Court has emphasized, "judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in

[124] *People v. McKenzie*, 34 Cal.3d 616, 626 (1983).
[125] *McKenzie*, 34 Cal.3d at 626–27 ("[T]he trial judge has the responsibility for safeguarding both the rights of the accused and the interest of the public in the administration of criminal justice.") (citing ABA Standards for Criminal Justice – Special Functions of the Trial Judge, Standard 6-1.1).
[126] *McMann*, 397 U.S. at 771 ("defendants cannot be left to the mercies of incompetent counsel"); *Powell,* 287 U.S. at 71 ("[T]he failure of the trial court to make an effective appointment of counsel was likewise a denial of due process. . . . [I]t is the duty of the court, whether requested or not, to assign counsel . . . [,] and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.").
[127] *Holloway v. Arkansas*, 435 U.S. 475, 484 (1978) ("[T]rial counsel, by the pretrial motions of August 13 and September 4 and by his accompanying representations, made as an officer of the court, focused explicitly on the probable risk of a conflict of interest. The judge then failed either to appoint separate counsel or to take adequate steps to ascertain whether the risk was too remote to warrant separate counsel. We hold that the failure, in the face of the representations made by counsel weeks before trial and again before the jury was empaneled, deprived petitioners of the guarantee of assistance of counsel.").

their courts."[128] The accused "cannot be left to the mercies of incompetent counsel."[129] That is precisely what appears to happen far too often in San Mateo County.

The court is fundamentally responsible for creating conditions that allow effective defense lawyering. Transcripts suggest that on multiple occasions, the defense counsel had not been provided the police reports and/or had not been provided sufficient time to meet with the client, making vigorous representation impossible.[130] While we are aware that there has been an effort by the Private Defender Program to coordinate with the Sheriff's Department to ensure that their clients are available to meet their attorneys, we do not know whether the court is consistently protecting every client's opportunity to meet with their attorney before the hearing.

At a minimum, it is incumbent upon the Superior Court to ensure that for every accused person who appears in court for arraignment, their counsel has received the Complaint and discovery with sufficient time to read them and has had ample time for a thorough, private meeting with their client. Defense counsel must also be provided additional time to prepare for the arraignment hearing, which can include tasks such as calling the client's family, caretaker, employer, or landlord.

a. Concerning Lack of Advocacy

According to Silicon Valley De-Bug's 2023 letter to the Board of Commissioners, a significant number of PDP lawyers appointed by the court to represent indigent people at arraignment fail to make competent arguments for pretrial release.[131] "There are two attorneys out of a pool of 8-10 who will mention ability to pay for a few cases out of 30 on a given day. . . . They cite the form for court-appointed counsel . . . , but do not present evidence of their clients' financial condition beyond this, and judges do not solicit information on a defendants' ability to pay."[132] During one of Commissioner Mazzei's arraignment calendars in April 2022, for example, the PDP lawyer did not present a single argument related to his clients' inability to pay, even though Commissioner Mazzei imposed financial conditions of release in seemingly every case.[133] The same lawyer told one client, in front of the judge, on the record, that during a past court appearance he had "talked [himself] into bail and out of an OR that the Judge was inclined to grant."[134]

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[128] *McMann,* 397 U.S. at 771; *Powell,* 287 U.S. at 61 ("[H]ow can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that in the proceedings before the court the accused shall be dealt with justly and fairly."); *see also* William W. Schwarzer, *Dealing With Incompetent Defense Counsel – Trial Judge's Role*, 93 Harv. L. Rev. 633, 638–39 (1980) ("Inasmuch as the administration of justice is the judge's ultimate responsibility, he cannot be indifferent to events which diminish the quality of justice in his court.").
[129] *McMann*, 397 U.S. at 771.
[130] "It is not fair that the People can do a recitation of hearsay [from the police report] when I don't even have the report . . . None of the reports have been on [the tablet] . . . This is an ongoing issue. I don't get the reports early. I don't get to talk to the clients. It's a due process violation." Ex. B at 024. "I haven't been provided with a copy of the police reports." Ex. B at 049.
[131] Ex. A at 001.
[132] SILICON VALLEY DE-BUG, DISCORD AND INACTION 6, https://tinyurl.com/mr2jtnuu.
[133] Ex. B at 107—167.
[134] Ex. B at 125.

Judicial officers have also presumably witnessed arraignment contract attorneys acting adversely to their clients' interests, including outright hostility to their own client. One attorney told his clients to "shut up" during court[135] and argued *against* the release of his own client, who had missed a court date during COVID, telling the judge, "I guess my client likes jail."[136] This conduct falls woefully short of a defense lawyer's duty to their client.[137]

That some Private Defender Panel attorneys have provided deficient representation should come as no surprise. Several judges even admitted to outside consultants that a contingent of PDP attorneys lacked "knowledge of court and evidence rules and processes."[138]

b. Financial Conflicts of Interest

In appointing PDP attorneys to represent indigent accused people at arraignment, judicial officers are also appointing attorneys who have a potential financial conflict of interest with their own clients. Unlike a public defender system, where attorneys are paid the same regardless of whether their clients plead guilty or go to trial, the Private Defender Program's fee schedule[139] incentivizes pleas rather than litigation. Even at the arraignment hearing, the fee schedule rewards defenders who move as quickly as possible through the calendar rather than providing a robust defense for each client.

The National Legal Aid & Defender Association specifically addresses financial conflicts of interest in its Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services. Guideline III-13 provides:

> The contract should avoid creating conflicts of interest between Contractor or individual defense attorney and clients. Specifically . . . (b) contracts should not, by their provisions or because of low fees or compensation to attorneys, induce an attorney to waive a client's rights for reasons not related to the client's best interest.[140]

Multiple observers have concluded that San Mateo County's Private Defender Program (PDP) fails to avoid these conflicts. On the misdemeanor arraignment calendar, for example, PDP lawyers receive just $175 to handle an entire arraignment calendar (if two hours or less).[141] But PDP lawyers receive an additional $100 for each arraignment case "closed on calendar."[142] In other words, PDP lawyers seemingly earn a *bonus for each guilty plea at arraignment*—that is, without any chance to interview witnesses, investigate the evidence, cross-examine witnesses, or even thoroughly review the police report or

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[135] San Mateo County Board of Supervisors Meeting, *Testimony by Zach Kirk* (June 13, 2023).
[136] *Id*.
[137] *See, e.g.*, CRIM. J. STANDARDS: DEF. FUNCTION, Standard 4-1.2 (AM. BAR ASSOC'N, 4th ed. 2017) ("The primary duties that defense counsel owe to their clients . . . are to serve as their clients' counselor and advocate with courage and devotion; to ensure that constitutional and other legal rights of their clients are protected; and to render effective, high-quality legal representation with integrity.").
[138] Ex. F at 275.
[139] *See* Ex. E at 196—218.
[140] Nat'l Legal Aid & Def. Assoc., *Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services (Black Letter)*, https://tinyurl.com/mr488j3t (last visited May 26, 2024).
[141] Ex. E at 339. The schedule provides an additional $100 for each extra hour.
[142] Ex. E at 339.

comprehensively discuss the allegations with their client. While $100 is not an exorbitant amount, if a lawyer pleads out just two clients at arraignment that alone is more financially rewarding than the entirety of the lawyer's time spent on the remainder of the arraignment calendar. There may already be pressure in criminal courts for defendants to plead guilty at arraignment: it reduces the workload of the court, the prosecutor, and the defense lawyer and a credit-for-time-served resolution guarantees the accused's freedom.[143] Any additional incentive is perverse in the extreme: the defense lawyer gets paid additional money to turn the person they just met into a conviction. This guilty-plea bonus creates a strong financial incentive for PDP lawyers to encourage their clients to enter guilty pleas at the arraignment hearing, even when it is not in their best interest to do so.[144]

Even without the case-closure-bonus, a flat calendar-fee (with minimal payments for calendars over two hours) incentivizes attorneys to move through the calendar as quickly as possible, rather than to spend the necessary time preparing and arguing a robust bail motion at arraignment. In a 2022 analysis of indigent defense nationally, University of Michigan Law School Professor Eve Brensike Primus described the flat-fee effect—and even cited PDP's hybrid flat-fee and hourly payment structure for misdemeanor trials as an example. As Professor Brensike Primus explained, "[s]ome jurisdictions have created hybrid assigned-counsel/contract systems that use a combination of flat-fee payments and hourly payments with the goal of providing some incentive to take cases to trial."[145] Professor Brensike Primus specifically pointed out that the "San Mateo County Private Defender Program . . . pays counsel a flat fee for each misdemeanor case, but if counsel goes to trial, attorneys will earn an hourly rate."[146] "Unfortunately," Professor Brensike Primus continues, "the hourly pay is not high enough to shift attorneys' incentives. A private defender working in San Mateo will make more money pleading out a half dozen cases in one day than they can make if they are in trial before the judge all day."[147]

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[143] *See, e.g.*, Ex. A at 001 ("For as long as we have worked in the County, families have told us of persistent communication issues with attorneys that management does not solve, attorneys that refuse to meet with clients until the morning of hearings with life-altering consequences, pressuring clients to take guilty pleas before reviewing the evidence, and the persistent feeling from the most vulnerable that many panel attorneys could care less about the outcome in their case.")

[144] Pleas of guilty to criminal charges at first appearance or arraignment hearings are disfavored. *See* CRIM. J. STANDARDS: DEF. FUNCTION, Standard 4-6.1(b) (AM. BAR ASSOC'N, 4th ed. 2017) ("In every criminal matter, defense counsel . . . should not recommend to a client acceptance of a disposition offer unless and until appropriate investigation and study of the matter has been completed. . . . Defense counsel should advise against a guilty plea at the first appearance, unless, after discussion with the client, a speedy disposition is clearly in the client's best interest.").

[145] Eve Brensike Primus, *The Problematic Structure of Indigent Defense Delivery*, 122 MICH. L. REV. 207, 236.

[146] *Id.* at 236—37.

[147] *Id*. at 237. While we are not experts on the PDP fee schedule, the financial conflict identified by Brensike Primus appears to continue under the Private Defender Program's 2023 fee schedule. The misdemeanor case fee (for "general non DV charges") is $275, and attorneys receive an additional $150 per hour for jury trials or $135 per hour for bench trials. Under this arrangement, an attorney would seemingly make $1,650 for pleading out six clients charged with misdemeanor offenses, which is less than the $1,475 they would make by spending an entire business day spending significantly more time and effort defending a client in a misdemeanor jury trial. *See* Ex. E at 1–4.

In 2022, consulting firm Harvey Rose Associates published a detailed review of the Private Defender Program and reached a similar conclusion, finding that PDP's many flat fees "may adversely impact case outcomes"[148] and "case representation quality."[149]

c. Representing Both Co-Defendants Without Waivers

In at least two instances, judicial officers knowingly appointed a single PDP lawyer to represent multiple co-defendants in the same case at the arraignment hearing. In one matter, Commissioner Mazzei appointed a single PDP attorney to represent two co-defendants charged with check fraud;[150] in another, Commissioner Halperin appointed a different PDP attorney to represent both co-defendants in a case that presented an obvious potential conflict of interest on its face: two people were charged with possessing a single gun.[151]

Courts appointing counsel for indigent defendants "must assume the burden of assuring that its appointment does not result in denial of effective counsel because of some possible conflict."[152] An attorney has the duty of undivided loyalty to every client and must, "at every peril" to the attorney, "preserve the secrets" of every client.[153]

Every time one attorney attempts to represent multiple defendants the court is on glaringly obvious notice of the potential for any one of the myriad types of conflict of interest that frequently arise.[154] As the U.S. Supreme Court noted, "[A] possible conflict inheres in almost every instance of multiple representation . . ."[155] For example, the attorney's clients may have inconsistent defenses or may receive disparate but joint plea bargain offers. The attorney may be prevented from using confidential information from one client that would help the other client due to the duty of confidentiality, or the attorney may want to use information that helps one client but cannot because it violates the duty of undivided loyalty to the other client.[156] While these conflicts may arise more commonly at later stages of a case, these potential conflicts can certainly arise at the arraignment hearing. Whenever a trial court

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[148] Ex. F at 298.
[149] Ex. F at 299.
[150] *People v. Christine Pacini*, Case No. 22-SF-4395B and *People v. Billy Smith*, Case No. 22-SF-4395A. Ex. B at 134-136; 144-148.
[151] *People v. Kennisha Monique Gregory*, Case No. 22-NF-015576-B and *People v. Joseph Bernard Gary, Jr.*, Case No. 22-NF-015576-A. Ex. B at 066-079.
[152] *People v. Mroczko*, 35 Cal. 3d 86, 109 (1983) (citations omitted) (overruled on other grounds by *People v. Doolin,* 45 Cal. 4th 390 (2009) (internal citations omitted).
[153] Bus. & Prof. C. §6068.
[154] Every time a single lawyer attempts to represent more than one client in the same criminal case, the American Bar Association's Standards for the Defense Function require informed written consent on the record "with appropriate inquiries by counsel and the court," and even then, such joint representation should only occur where necessary to ensure counsel for preliminary matters such as initial hearings or applications of bail. CRIM. J. STANDARDS: DEF. FUNCTION, Standard 4-1.7 (AM. BAR ASSOC'N, 4th ed. 2017)
[155] *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980).
[156] The duty of undivided loyalty to a client prohibits an attorney from representing another client with interests directly adverse to that client without that client's informed written consent. Rule of Professional Conduct 1.7.

knows or reasonably should know that a particular conflict exists, it *must* inquire of defendants to obtain a valid waiver.[157]

The firearms case presented an all but certain conflict of interest on its face: two people were charged with possessing a single gun.[158] Foreseeably, the lawyer went on to argue that one of the defendants should be released because he "was not the one in possession of the firearm," apparently implicating her other client.[159]

In both matters, the court did not discuss the conflict of interest beyond requiring the two be arraigned separately, and made no inquiry into whether there had been a knowing and intelligent waiver of their right to conflict-free counsel. Indeed, since their cases were called sequentially (rather than together), it was not clear from the transcript that both co-defendants were present in the courtroom at the same time to be aware that they received representation from the same attorney.

These may not be isolated events, as we understand that until recently, it was commonplace for a single PDP lawyer to handle the entire arraignment calendar. The Superior Court must investigate the circumstances of these four cases and any other matter where the court chose to appoint the same attorney to represent co-defendants in the same case.

d. Superior Court's Obligation

We direct the Superior Court's attention to the issue of the Private Defender Program and defense advocacy because we view this as primarily a systemic issue, rather than one that can be resolved by focusing on any individual attorney's actions.

As noted above, the court must also ensure the conditions that enable defense advocacy, including that every defense lawyer is provided the Complaint, discovery and ample time to meet with their new client and review the information. The Superior Court is ultimately responsible for ensuring that the accused's statutory and Constitutional rights are protected at the arraignment hearing, one of the most important hearings in a criminal case.

VII. The Presiding Judge Should Conduct an Expedited Investigation Into These Judicial Officers' Alleged Misconduct and Take Immediate Action to Prevent Further Harm While the Investigation Is Underway.

San Mateo judicial officers' repeated violations of the law pose a serious threat to the constitutional guarantee of equal justice under law.[160] We respectfully urge you to conduct an

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[157] *Mroczko*, 35 Cal. 3d at 111.
[158] *People v. Kennisha Monique Gregory*, Case No. 22-NF-015576-B and *People v. Joseph Bernard Gary, Jr.*, Case No. 22-NF-015576-A. Ex. B at 066-079.
[159] Ex B at 75.
[160] As a general matter, "[t]he purpose of [disciplinary] proceedings is . . . to protect the judicial system and those subject to the awesome power that judges wield." *Dodds v. Comm'n on Jud. Performance*, 906 P.2d 1260, 1271 (Cal. 1995) (quoting *Furey v. Comm'n on Jud. Performance*, 743 P.2d 919, 931 (Cal. 1987).

expedited investigation into these serious allegations[161] and to reassign Commissioners Halperin, Mazzei, and Borja—the three judicial officers in the attached transcripts—while the investigation is underway.[162]

Investigating judicial officers' conduct falls under the presiding judge's jurisdiction. The Code of Judicial Ethics specifies that a "judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to ensure . . . the proper performance of their . . . judicial responsibilities" and that when any judge "has reliable information that another judge has violated any provision of the Code of Judicial Ethics, that judge shall take appropriate corrective action."[163] The presiding judge must notify the Commission on Judicial Performance whenever a judge substantially fails to perform judicial duties.[164]

For subordinate judicial officers, the California Rules of Court further provide that "[a] complaint about the conduct of a subordinate judicial officer . . . must be submitted to the presiding judge."[165] The presiding judge is responsible for disciplining the subordinate judicial officer "by written reprimand, suspension, or termination for conduct that, if alleged

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[161] Prompt review of a complaint is always required: "To the extent reasonably possible, the court *must* complete action on each complaint within 90 days after the complaint is submitted." 2024 Cal. Rules of Court, Rule 10.703(d) (emphasis added), https://tinyurl.com/5n8nkfan. *See also* Decision and Order Imposing Public Admonishment, *In re Schnider*, Commission on Judicial Performance (Aug. 31, 2009), https://tinyurl.com/59vd7sat ("Judge Schnider violated California Rules of Court, rule 10.703, by failing to promptly respond to at least three complaints about Commissioner Dobb's delay, as was required of him as her supervising judge.").

[162] "The presiding judge has ultimate authority to make judicial assignments." 2024 Cal. Rules of Court, Rule 10.603(c)(1), https://tinyurl.com/yc6wvmw9. "The presiding judge is responsible . . . for leading the court . . . in a manner that promotes access to justice for all members of the public."). 10.603(a). "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity . . . of the judiciary." Canon 2(A). "An independent, impartial, and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct." Canon 1. *See also* Decision and Order Imposing Public Admonishment, *In re Schnider*, Decision and Order Imposing Public Admonishment, *In re Schnider*, Commission on Judicial Performance (Aug. 31, 2009), https://tinyurl.com/59vd7sat ("Judge Schnider violated California Rules of Court, rule 10.703, by failing to promptly respond to at least three complaints about Commissioner Dobb's delay, as was required of him as her supervising judge. . . Judge Schnider's conduct violated . . . canon 3D(1) . . . ; canon 2A . . . ; and canon 1 . . . .").

[163] "A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to ensure . . . the proper performance of their . . . judicial responsibilities." CAL. CODE OF JUD. ETHICS, Canon 3(C)(4). "Whenever a judge has reliable information that another judge has violated any provision of the Code of Judicial Ethics, that judge shall take appropriate corrective action." CAL. CODE OF JUD. ETHICS, Canon 3(D)(1).

[164] 2024 Cal. Rules of Court, Rule 10.603(c)(4)(a).

[165] 2024 Cal. Rules of Court, Rule 10.703(f)(1) ("Anyone who is an officer of the state judicial system and who performs judicial functions including, but not limited to, a subordinate judicial officer . . . is a judge within the meaning of [the] code."); CAL. CODE OF JUD. ETHICS, Terminology (A commissioner is a "subordinate judicial officer.").

against a judge, would be within the jurisdiction of the [Commission on Judicial Performance]."[166]

The transcripts attached to this complaint provide strong evidence that certain judicial officers have violated the constitutional rights of the largely impoverished people who appear before them. San Mateo County judicial officers engaged in each category of alleged misconduct—willful misconduct, conduct prejudicial to the administration of justice, and a persistent failure or inability to perform their judicial duties should not sit on the bench.

a. There is Evidence that Judicial Officers Engaged in Willful Misconduct and Conduct Prejudicial to the Administration of Justice (Cal. Const. art. VI, § 18(d)(2), and the California Code of Judicial Ethics, Canons 1, 2A, 3B(2)).

The enclosed transcripts suggest that San Mateo County judicial officers engaged in willful misconduct and the lesser-included offense of conduct prejudicial to the administration of justice. "The more serious charge," the California Supreme Court has explained, "should be reserved for unjudicial conduct which a judge acting in his judicial capacity commits in bad faith, while the lesser charge should be applied to conduct which a judge undertakes in good faith but nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office."[167]

The evidence supplied here satisfies each element of the more serious charge. It is, if unrefuted, "1) unjudicial conduct, 2) committed in bad faith, 3) by a judge acting in [their] judicial capacity."[168] Whether a judge's conduct is "unjudicial" is determined with reference to the California Code of Judicial Ethics.[169] The Code establishes canons of judicial conduct that require integrity and competence.[170] "Integrity" requires "compl[iance] with the law."[171]

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[166] 2024 Cal. Rules of Court, Rule 10.703(j)(1). The Commission's jurisdiction extends to behavior "that constitutes willful misconduct in office, persistent failure or inability to perform the judge's duties, . . . or conduct prejudicial to the administration of justice that brings the judicial office into disrepute." CAL. CONST. art. VI, §18(d)(2).

[167] *Geiler v. Comm'n on Jud. Qualifications*, 10 Cal.3d 270, 283–84 & n.11 (1973) ("[O]ur characterization of one ground for imposing discipline as more or less serious than the other does not imply that in a given case we would regard the ultimate sanction of removal as unjustified solely for conduct prejudicial to the administration of justice which brings the judicial office into disrepute.").

[168] *Dodds*, 12 Cal. 4th at 172.

[169] *Id. Dodds* refers to the California Code of Judicial Conduct rather than to the Code of Judicial Ethics, but the former was supplanted by the latter in 1996—the year after the court's issued its opinion in *Dodds*—in accordance with the creation of § 18 of the California Constitution. *See* Code of Judicial Ethics, Preface.

[170] *See* CAL. CODE OF JUD. ETHICS, Canon 1 (integrity); *Id.* at Canon 3 (competence).

[171] *Id.* at Canon 1, Advisory Committee Commentary. To be sure, "[a] judicial decision . . . later determined to be incorrect legally is not itself a violation of [the] code," *id.*, but a pattern of jailing people in willful defiance of binding legal precedent is another matter. *See Oberholzer v. Comm'n on Jud. Performance*, 20 Cal.4th 371, 375 (Cal. 1999) ("[W]e conclude that the Commission has authority to [impose discipline] based upon a perceived legal error, if such error clearly and convincingly reflects bad faith, bias, abuse of authority, disregard for fundamental rights, intentional disregard of the law, or any purpose other than the faithful discharge of judicial duty."); *In re Whitney*, 14 Cal.4th 1, 2–3 (1996) (1996) ("The commission found that Judge Whitney, while conducting the . . . in-custody misdemeanor arraignment calendar . . . , abdicated his responsibility to protect the statutory and

Competence "requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary to perform a judge's responsibilities of judicial office."[172] The Code also forbids both "impropriety" and "the appearance of impropriety."[173] There is an "appearance of impropriety" whenever "a person aware of the facts might reasonably entertain a doubt that the judge would be able to act with integrity . . . [or] competence."[174]

The enclosed transcripts show the judicial officers are not in "compl[iance] with the law."[175] They either knowingly violated the law or were so lacking in legal knowledge that they did not understand it, though familiarity with the highly publicized California Supreme Court *Humphrey* decision is to be expected for any judge or commissioner presiding over bail hearings, particularly if they are relying on money bail.[176] Given the evidence of judicial officers' repeated, flagrant violations of the law, "a person aware of the facts might reasonably entertain a doubt that [they are] able to act with integrity [and] competence."[177]

Second, the evidence attached to this complaint suggests that the judicial officers' conduct is in "bad faith." Bad faith is intentional conduct that the judge knows *or should have known* was beyond their lawful power.[178] The judicial officers knew or should have known that they were violating the core holding of *Humphrey* when they repeatedly imposed money bail without considering whether it was necessary or whether the accused could afford to pay.

Finally, the judicial officers were acting in their "judicial capacity" because they were on the bench, performing a judicial function.[179]

b. The Evidence Suggests that Commissioners Halperin and Mazzei Exhibited a Persistent Failure or Inability to Perform Their Judicial Duties (Cal. Const. Art. VI, § 18(d)(2), California Code of Judicial Ethics, Canon 3(B)(2)).

The enclosed transcripts establish that Commissioners Halperin and Mazzei—who violated *Humphrey* repeatedly in the transcripts attached—exhibited a persistent failure or inability to perform their judicial duties. A judge's "persistent failure or inability to perform

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constitutional rights of defendants. . . . After reviewing the record, we are satisfied these findings are supported by the evidence. The record shows Judge Whitney, *as a matter of routine practice in the conduct of the in-custody misdemeanor arraignment calendar*, failed to exercise his judicial discretion to consider release of defendants on their own recognizance . . . .") (emphasis added); CAL. CODE OF JUD. ETHICS, Preamble ("Whether disciplinary action is appropriate, and the degree of discipline to be imposed, requires . . . consideration of such factors as the seriousness of the transgression, *if there is a pattern of improper activity*, and the effect of the improper activity on others.") (emphasis added).

[172] CAL. CODE OF JUD. ETHICS, Canon 3B(2), Advisory Committee Commentary.

[173] *Id.* at Canon 2.

[174] *Id.* at Canon 2, Advisory Committee Commentary.

[175] *Id.* at Canon 1, Advisory Committee Commentary.

[176] Canon 3B(2), Advisory Committee Commentary. *Humphrey* is clear that pretrial release cannot depend "on the accused's ability to post the sum provided in a county's uniform bail schedule" (*In re Humphrey*, 11 Cal.5th at 143.

[177] CAL. CODE OF JUD. ETHICS, Canon 2, Advisory Committee Commentary.

[178] *Dodds*, 12 Cal. 4th at 172-73 (citing *Spruance v. Comm'n on Jud. Qualifications*, 13 Cal.3d 778, 795-96 (1975) (en banc).

[179] *Id.* at 172.

[judicial] duties" is a distinct ground for discipline.[180] As with prejudicial misconduct, there is no requirement of bad faith or intent.[181] The California Supreme Court has explained that "[p]ersistent nonperformance of duties entails a pattern of legal or administrative omissions or inadequacies in the performance of a judge's duties."[182]

The enclosed transcripts reveal these judicial officers' repeated failure to perform their duty to hold bail hearings that satisfy the Constitution. Although *Humphrey* plainly requires judges to consider whether money bail is necessary and whether the accused can afford to pay it, judicial officers jailed people without considering their ability to pay or whether detention was necessary in some public interest and clear and convincing evidence proved that no less-restrictive means would work. Their pattern of violating clearly established California Supreme Court precedent must be investigated and they must be held to account.

Given the two transcripts involving Commissioner Borja, and the observations of five judicial officers by court watchers, the Superior Court should promptly investigate whether other judicial officers also demonstrated a persistent failure or inability to comply with the law.

[180] CAL. CONST. art. VI, § 18(d)(2).
[181] *See Mardikian v. Commission on Judicial Performance* (1985) 40 Cal.3d 473, 482, 220 Cal.Rptr. 833, 709 P.2d 852); *Doan v. Comm'n on Jud. Performance*, 11 Cal. 4th 294, 312, 902 P.2d 272, 278 (1995), as modified (Nov. 6, 1995).
[182] *Doan v. Comm'n on Jud. Performance*, 11 Cal.4th 294, 312 (1995).

Conclusion

We ask that you to promptly investigate this evidence of actionable misconduct by judicial officers in San Mateo County. A judicial officer commits actionable misconduct when their bad faith or legal error reflects a disregard for fundamental rights.[183] The California Supreme Court has affirmed the propriety of discipline when a judge's misconduct amounted to an "abdicat[ion of] his responsibility to protect the statutory and constitutional rights of defendants."[184] Here, the submitted evidence demonstrates that this was not an aberration limited to one hearing, but a repeated practice across many arraignment hearings in San Mateo courts.

Based on this evidence, we respectfully request that take the following actions:

1. Review transcripts and court records for the cases contained within this complaint;

2. Review the transcript of any detention decision of anyone *currently* incarcerated pretrial;

3. Review the transcript of any arraignment hearing where the judicial officer appointed the same attorney to represent multiple co-defendants in the same case and determine whether there was a conflict of interest and whether each accused person knowingly and intelligently waived any potential conflict on the record;

4. Compile a list of all cases where an accused person was detained in apparent violation of their constitutional rights and release the list publicly, sending copies to the District Attorney's Office, the Private Defender Program, any other involved defense counsel, and the accused;

5. Remove any judicial officer who violated the law from handling further arraignments or pretrial release hearings;

6. Issue instructions and training to all judicial officers in the county regarding the law that binds bail decisions;

7. Ensure that every accused person who appears for an arraignment hearing has had a substantive, private meeting with their new attorney and that the attorney has had ample time to review the Complaint and discovery in the case and perform any other related work prior to the arraignment hearing; and

8. Advise us by August 23, 2024 of the status of the Superior Court's investigation and what actions the court has taken to ensure that the rights of the accused are protected at arraignment hearings in San Mateo County.

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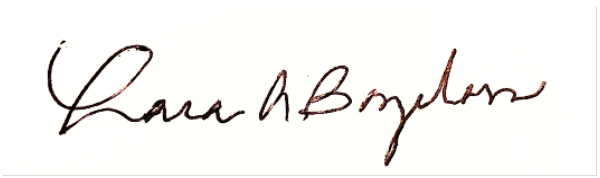
[183] *Oberholzer*, 20 Cal. 4th at 375 ("[W]e conclude that the Commission has authority to issue advisory letters, that such letters are a form of discipline, . . . and that such letters may be based upon a perceived legal error, if such error clearly and convincingly reflects bad faith, bias, abuse of authority, disregard for fundamental rights, intentional disregard of the law, or any purpose other than the faithful discharge of judicial duty.").

[184] *Whitney*, 14 Cal.4th 1, 2–3 (1996).

When defendants' rights are violated in this way, it causes profound harm not only to them but also to their families, and the community at large. For that reason, we also ask that the Court conduct a broad inquiry with the tools it deems appropriate into its bail practices to determine whether additional violations have occurred and are still occurring and identify any other San Mateo judicial officers who have issued rulings that did not comply with *Humphrey*.

Your urgent intervention is needed. We request a response by August 23, 2024.

Sincerely,



Lara Bazelon
Professor of Law, University of San Francisco School of Law

Lourdes Best
Silicon Valley De-Bug/ San Mateo County Participatory Defense Hub

Charisse Domingo
Silicon Valley De-Bug/ San Mateo County Participatory Defense Hub

Victoria Sarait Escorza
Silicon Valley De-Bug/ San Mateo County Participatory Defense Hub

Ana Ramirez Zarate
Silicon Valley De-Bug/ San Mateo County Participatory Defense Hub

Jamilah Rosales Webb
Silicon Valley De-Bug/ San Mateo County Participatory Defense Hub

Raj Jayadev
Silicon Valley De-Bug Coordinator

Zachary Kirk
Silicon Valley De-Bug Participatory Defense Organizer