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IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

IN RE JOHN HARRIS, JR., Petitioner, On Habeas Corpus.	Case No.: _____ Court of Appeal No.: A162891 San Mateo Superior Court No.: 21-NF-002568-A

PETITION FOR REVIEW IN THE CALIFORNIA SUPREME COURT

After Opinion Filed in the Court of Appeal
First Appellate District
From Petition for Writ of Habeas Corpus
From Detention Order by Superior Court of San Mateo County
Honorable Amarra A. Lee, Superior Court Judge

Marsanne Weese (SBN 232167)
Rose Mishaan (SBN 267565)
Law Offices of Marsanne Weese
255 Kansas Street, Suite 340
San Francisco, CA 94103
Tel: (415) 565-9600
Fax: (415) 565-9601
Email: marsanne@marsannelaw.com

Attorneys for Petitioner by Appointment of the Court

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INTRODUCTION

TO THE HONORABLE TANI CANTIL-SAKAUYE, AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Petitioner John Harris, Jr. petitions this Court for review following the Court of Appeal, First Appellate District's published opinion, filed November 29, 2021. (Exh. A, 11/29/21 Opinion [hereinafter "Opinion."])

In March of 2021, petitioner was charged with two serious felonies for an alleged incident that happened in 1989. Petitioner has no felony criminal record, outside the charges in this case. Despite the alleged conduct having occurred over three decades ago and the lack of significant criminal conduct during the intervening years, petitioner was ordered detained without bail and filed a Petition for Writ of Habeas Corpus in the Court of Appeal, First Appellate District.

In a published decision, the Court of Appeal conditionally vacated the order denying bail and remanded for the trial court to determine "whether clear and convincing evidence would support a conclusion that no less restrictive alternatives to detention could reasonably protect the government's interests in

pretrial detention." (Opinion at p. 27.) In reaching this conclusion, the Court of Appeal found that the clear and convincing evidence standard required in *In re Humphrey* (2021) 11 Cal.5th 135, may be satisfied by the prosecution's presentation of "proffered evidence" even when, as in this case, such "proffered evidence" is not corroborated by discovery produced to the defense. In so holding, the Court of Appeal misapplied *United States v. Salerno* (1987) 481 U.S. 739 and *People v. Naidu* (2018) 20 Cal.App.5th 300, and contradicts this Court's holding in *In re White* (2020) 9 Cal.5th 455.

ISSUES PRESENTED

1. May the prosecution's proffer of evidence, not fully supported by discovery produced to the defense, satisfy the clear and convincing standard established in *In re Humphrey* (2021) 11 Cal.5th 135, so as to allow a criminal defendant to be detained without bail pending trial?

2. Is a habeas petitioner entitled to the fair market value of attorney's fees and costs for a successful habeas petition involving a trial court's systemic failure to comply with established law?

NECESSITY OF REVIEW

In *In re Humphrey* (2021) 11 Cal.5th 135, this Court set forth the procedures and standards necessary for a criminal defendant to be lawfully detained pretrial. Trial courts have been inconsistent in implementing this rule of constitutional law and the *Humphrey* procedures. The San Mateo County Superior Court, in particular, has systematically refused to follow this Court's ruling in *Humphrey*. The instant case presents one such example.

This case involves an order of pretrial detention and whether that order complies with our state and federal Constitutions and *Humphrey*, *supra*, 11 Cal.5th at p. 135. Petitioner contends that the Court of Appeal erred in finding that petitioner's detention hearing complied with federal and state guarantees of due process, particularly regarding the prosecution's use of proffered evidence, not provided under penalty of perjury and not corroborated by produced discovery, to establish petitioner posed an undue risk to public safety to justify pretrial detention without bail.

In this matter, petitioner, was ordered detained after a

hearing in which the trial court found he posed an undue risk to public safety. The trial court's finding was based on the alleged facts of the charged offenses, occurring more than three decades ago in 1989, a summary of subsequent investigative interviews of petitioner's former partners put forth in in the prosecution's response brief, and an unsworn statement from the complaining witness. No further information or evidence was presented.

A grant of review by this Court is necessary to settle an important question of law regarding the procedures required before pretrial detention can be ordered, in light of this Court's ruling in *Humphrey, supra,* 11 Cal.5th at p. 135. This case presents a recurring issue and, without firm guidance from this Court, there will likely be inconsistent application by the state's trial courts. As noted in the original habeas petition, this is a recurring and systemic problem in San Mateo County Superior Court. Petitioner noted 18 cases, besides his own, where the trial court ordered the defendant detained, either through a formal order or by maintaining bail at an unaffordable amount. This state of affairs threatens to undermine the intent and rule of *Humphrey*, allowing the "unusual circumstances" of pretrial

detention, meant to be the exception rather than the rule, to become the norm. (*Humphrey, supra*, 11 Cal.5th at p. 143.)

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Petitioner was arraigned on a felony complaint on March 25, 2021, charging him with one count of attempted murder (Pen. Code, §§ 664/187, subd. (a)), with special allegations of being armed during the commission of a felony (Pen. Code, § 12022, subd. (d)) and great bodily injury (Pen. Code, § 1203.075), and one count of aggravated mayhem (Pen. Code, § 205), with a special allegation he was armed during the commission of a felony (Pen. Code, § 12022, subd. (d).) The alleged offenses occurred on March 4, 1989. Petitioner's bail was set at $5 million. Pretrial services submitted two reports on February 26, 2021 and March 8, 2021, recommending that petitioner be "monitored on enhanced recognizance," and stated that petitioner "appears to be an appropriate candidate for an own recognizance release with enhanced monitoring." (Petition for Writ of Habeas Corpus [hereinafter "Petition"] Exhs. B and C, pp. 5-8, 12-15.)

On April 16, 2021, petitioner moved the court to reduce bail

to an affordable amount or release him on his own recognizance with appropriate conditions. (Petition Exh. F, pp. 21-49.) The prosecution filed an opposition to petitioner's motion on April 19, 2021. (Petition Exh. G, p. 51.) In its opposition, the prosecution detailed the alleged facts of the case. (Petition Exh. G, pp. 52-54.) The opposition also included facts allegedly gathered during a subsequent investigation, including that petitioner has a scarf fetish and acted on this fetish through consensual sex acts with various women in the years since the alleged offense. (Petition Exh. G, pp. 54-57.) No declaration was filed with the prosecution's opposition supporting the alleged facts. (Petition Exh. G, pp. 51-78.)

A bail hearing was held on April 20, 2021. Petitioner argued he is indigent, has been incarcerated since his arrest on February 21, 2021, has lost his employment, and cannot afford the $5 million bail. (Petition Exh. I, pp. 85-86.) Petitioner further argued that to impose a no-bail pretrial detention, the prosecution must provide evidence to the court of risk of flight or risk to public safety. (Petition Exh. I, p. 86.) The prosecution presented no evidence to the court that would meet the required

standard of clear and convincing evidence. The sole evidence presented to the court was a series of photographs of injuries to the complaining witness taken shortly after the alleged incident in 1989. (Petition Exhs. G & I, pp. 65-77, 86-87.)

Petitioner argued that, while serious, the alleged offenses occurred 32 years prior. (Petition Exh. I, pp. 87-88.) Since then, there has been no communication with the complaining witness and no evidence that petitioner has been violent. (Petition Exh. I, p. 88.) Lastly, petitioner argued that nonfinancial conditions of release, such as GPS monitoring or check-ins with pretrial services, would be sufficient to address any concerns regarding safety risk. (Petition Exh. I, p. 89.)

In response, the prosecution argued bail should either be kept at $5 million or be denied entirely. (Petition Exh. I, p. 90.) The prosecution noted that a denial of bail "achieves the same purpose as bail being set in the amount of $5 million." (Petition Exh. I, p. 90.) The prosecution stated that the charges must be accepted as true and therefore the prosecution had no burden to present evidence. (Petition Exh. I, pp. 90-91.) The prosecution also argued that petitioner's sexual fetish involving scarves, that

he enacted with various consenting sexual partners, was somehow indicative of his dangerousness. (Petition Exh. I, p. 93.) The prosecution argued that "[t]he same type of crimes and offenses can very easily be committed at any other time," and therefore pretrial detention is appropriate. (Petition Exh. I, p. 94.)

The complaining witness, who was not identified and remains confidential, made an unsworn statement, asserting she feared petitioner and urged the court not to release him. (Petition Exh. I, pp. 95-96.) Petitioner was not afforded an opportunity to cross-examine her. (Petition. Exh. I, pp. 95-96.)

In response, petitioner argued there has been no contact or attempted contact between petitioner and the complaining witness or the perpetrator and the complaining witness in the many years since the alleged offense occurred. (Petition Exh. I, p. 97.) Petitioner also noted that part of the importance of the evidentiary standard includes that "there is a right to cross-examine." (Petition Exh. I, p. 97.) Petitioner pointed out the prosecution's misrepresentations to the court:

> Prosecution is not presenting any evidence regarding this. She is presenting

> argument. What she doesn't tell the court is this confidential victim actually identified two other people as the perpetrators near the time of this incident. Both —one of them was actually arrested for rape and had an M.O. similar to the rape that occurred to her . . .

(Petition Exh. I, p. 97.)

Petitioner also emphasized that the prosecution was presenting claims as true, despite evidence supporting those claims not having been provided to the defense, and was omitting material facts that undermined the prosecution's theory that petitioner was responsible for the alleged offenses. (Petition Exh. I, p. 97.) Petitioner noted that the purported evidence of petitioner's alleged scarf fetish was based on consensual, nonviolent conduct with various sexual partners. (Petition Exh. I, p. 98.) Petitioner further noted there has not been a single allegation of violence or sexual assault levied against petitioner in the over thirty years since this alleged incident. (Petition Exh. I, pp. 98-99.)

Petitioner proposed a series of nonfinancial conditions that the court could impose to address any safety concerns, such as limiting or prohibiting internet use, limiting his ability to be

around women without someone else present, requiring GPS monitoring, prohibiting contact with the confidential victim, checking in with pretrial services, among other things. (Petition Exh. I, p. 99.) Petitioner also argued that *Humphrey* does not allow for a proffer to meet the clear and convincing evidentiary standard, particularly as the prosecution was relying on information not previously provided to the defense and has omitted relevant facts. (Petition Exh. I, p. 100.)

The trial court ruled that the prosecution was permitted to show evidence of dangerousness via proffer, and there was clear and convincing evidence of a substantial likelihood that petitioner's release would result in great bodily harm to others. (Petition Exh. I, pp. 102-103.) The trial court relied on the proffered evidence against petitioner regarding the charged offenses, the allegations of petitioner's scarf fetish and "the angry aggressive behavior of the defendant." (Petition Exh. I, pp. 103-104.) The trial court also found that petitioner posed a flight risk based on "the fact that the defendant has been evading arrest according to the people for at least the last 32 years," and that the alleged conduct involved in his 1991 petty theft offense

including "conduct that is very similar to what the people described as happening to the alleged complaining witness with the charge offense." (Petition Exh. I, p. 104.) The court did not discuss whether nonfinancial conditions of release would address such safety or flight concerns. (Petition Exh. I.)

Petitioner filed a Petition for Writ of Habeas Corpus with the Court of Appeal, First Appellate District, on June 21, 2021. On June 23, 2021, the court ordered an informal response from the San Mateo County District Attorney. That response was filed on June 30, 2021. On July 12, 2021, the court issued an order to show cause directing the prosecution to file a return and petitioner to file a traverse. The return was filed on July 22, 2021 and the traverse was filed on August 9, 2021. On August 18, 2021, the court requested additional briefing and specifically asked the Attorney General to file a brief due to the "significant" issues presented. The Attorney General's amicus curiae brief was filed on August 27, 2021. Petitioner's supplemental traverse was filed on September 21, 2021. The prosecution filed a reply on September 27, 2021. On November 19, 2021 the case was argued before the court and submitted. On November 29, 2021, the

Court of Appeal issued its published opinion. (Exh. A.)

I. THE SUPREME COURT OF CALIFORNIA MAY GRANT REVIEW OF A COURT OF APPEAL DECISION AFTER A TIMELY PETITION FOR REVIEW.

The Supreme Court may order review of a Court of Appeal decision when necessary to secure uniformity of decision or to settle an important question of law. (Cal. Rules of Court, rule 8.500, subd. (b)(1).) A petition for review must be served and filed within 10 days after the Court of Appeal decision is final in that court. (Cal. Rules of Court, rule 8.500, subd. (e)(1).)

Here, the Court of Appeal opinion was filed on November 29, 2021 and became final on December 29, 2021. Thus, appellant's Petition for Review by this Court is timely and appropriate. Further, as is argued below, review is necessary to settle important questions of law.

II. THE COURT OF APPEAL ERRED IN FINDING THAT PETITIONER'S DETENTION HEARING COMPLIED WITH DUE PROCESS.

Due process, as the United States Supreme Court has explained, "is not a technical conception with a fixed content unrelated to time, place, and circumstances," but rather, "is flexible and calls for such procedural protections as the particular

situation demands." (*Mathews v. Eldridge* (1976) 424 U.S. 319, 334-335.) According to *Mathews*, courts must conduct a three-factor analysis to determine if a due process violation has occurred: (1) consider the private interest affected; (2) consider the risk of an erroneous deprivation of such interest through the procedures used; and (3) the government's interest, including the burden that additional or substitute procedural requirements would entail. (*Id*. at p. 335.)

It is well-settled that the private interest "to be free from involuntary confinement by [one's] own government without due process of law" is "the most elemental of liberty interests" and "the fundamental right of a citizen." (*People v. Litmon* (2008) 162 Cal.App.4th 383, 399.) As this Court stated in *Humphrey*, pretrial detention should depend on the insufficiency of less restrictive conditions to protect public safety, including "the integrity of the criminal proceedings." (*Humphrey, supra*, 11 Cal.5th at p. 143.) "Allowing the government to detain and arrest without such procedural protections would violate state and federal principles of equal protection and due process that must be honored in practice, not just in principle." (*Ibid.)*

A. In Finding No Due Process Violation, the Court of Appeal Misapplied *United States v. Salerno.*

Here, the court of appeal found that petitioner's detention hearing did not violate due process. In so finding the court misapplied *United States v. Salerno* (1987) 481 U.S. 739. In *Salerno*, the United States Supreme Court found the federal Bail Reform Act, which specifies the procedures to be used when the government seeks to detain a defendant pretrial, to comply with the federal due process guarantees. (*Id.* at p. 741.) However, the Court of Appeal disregarded that *Salerno* evaluated the constitutionality of the entire federal statute, not simply the use of proffer. (*Id.* at pp. 741-752.)

Salerno was essentially a case of statutory interpretation—whether the federal Bail Reform Act, as a whole, complied with the federal guarantee of due process. In that case, the Supreme Court found that under that statute, the arrestee is entitled to a list of procedural safeguards. (*Salerno, supra*, 481 U.S. at pp. 751-752.) In federal court, before a defendant may be ordered detained, there must be a "full-blown adversarial hearing" (*Id.* at p. 750), at which the defendant must be "afforded an opportunity

to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise." (18 U.S.C. § 3142, subd. (f)(2)(B).) Fundamental to the Court's holding was that the federal statute provided for a rigorous protection to ensure "the accuracy of [the] determination" that the arrestee poses a likelihood of future dangerousness. (*Salerno, supra,* 481 U.S. at p. 751.)

California does not have a comparable statute requiring a similar set of procedural safeguards to ensure that information provided at detention hearings is reliable and that the proceedings are fundamentally fair. However, other jurisdictions with similarly robust protections against pretrial detention support petitioner's argument that informal proffer is not sufficient to meet the clear and convincing standard in pre-trial detention hearings. In *Simpson v. Owens* (2004) 207 Ariz. 261, 264, the Arizona Supreme Court considered whether a "full and adversarial bail hearing" was necessary before the defendant could be detained without bail under the state's Constitution. At the defendant's initial appearance, the prosecutor requested that bail be denied. (*Ibid.*) No evidence was presented, but the

prosecutor proffered several pieces of information to show that "the proof is evident or the presumption great," and that the defendant was a flight risk. (*Ibid.*) After a lengthy discussion of the burden and standard of proof required for a no-bail detention, the court held that:

> [T]he court should admit only such evidence as is material to the question [of whether the proof is evident or presumption great that the accused committed one of the constitutionally-enumerated crimes]. The accused is entitled to counsel. The parties must have the right to examine/cross-examine the witnesses and to review in advance those witnesses' prior statements that are written. The court must make a determination on the record whether there is evident proof or great presumption that the accused committed one of the statutory charges, including the facts it finds and the analysis it employs.

(*Id.* at pp. 275-276.)

Similarly, in Utah, the state's Supreme Court held that in bail hearings in capital cases, the accused must be given adequate notice to prepare for the hearing; the accused may bring his own evidence and witnesses; and the accused may cross-examine the prosecution's witnesses. (*State v. Kastanis* (Utah 1993) 848 P.2d 673, 676.) The *Kastanis* court further held that

reliance on the preliminary hearing transcript at a bail hearing was error, as "a defendant usually does not present any evidence" at a preliminary hearing and in fact the defendant did not present evidence. (*Ibid*.) Other jurisdictions have adopted similarly strict evidentiary procedures. (See, e.g., *Massey v. Mullen* (1976) 117 R.I. 272, 275-276, holding that a *Miranda*-deficient confession, or otherwise "constitutionally-infirm evidence" was inadmissible at bail hearings.) In other words, these jurisdictions require full adversarial hearings before pretrial detention can be imposed.

B. California Precedent Requires More Than Mere Proffer to Establish Clear and Convincing Evidence.

The Court of Appeal stated that petitioner claims that "only evidence that would be admissible at a formal trial can support pretrial detention." (Exh. A, p. 9.) However, this is incorrect. Rather, petitioner argues that the evidence required for pretrial detention should follow already established law as to what constitutes clear and convincing evidence. For example, state courts have consistently required proper evidence where substantial rights are implicated, and clear and convincing proof

is required. (See, e.g., *Conservatorship of Wendland* (2001) 26 Cal.4th 519, 528-529 [live testimony presented in a proceeding to determine whether a conservator for a severely disabled conservatee could withhold life-saving treatment]; *Butte Fire Cases* (2018) 24 Cal.App.5th 1150, 1155-1156 [in an action for punitive damages, requiring proof by clear and convincing evidence of malice, the defendants presented evidence at a hearing on a motion for summary adjudication]; *In re Angelia P.* (1981) 28 Cal.3d 908 [full evidentiary hearing held before the termination of parental rights]; *Yost v. Forestiere* (2020) 51 Cal.App.5th 509 [while civil harassment restraining order hearings take a "less formal approach to the admission of evidence," evidence is still required, whether by live testimony, affidavit, or deposition]; *Conservatorship of Valerie N.* (1985) 40 Cal.3d 143, 147-150 [full evidentiary hearing, including live testimony, held regarding conservators' request for court order authorizing sterilization of conservatee]; *Bee v. Smith* (1970) 6 Cal.App.3d 521, 523-525 [action to impose constructive trust required evidentiary hearing, including testimony.]) The same must be required when a defendant's liberty is at stake.

By allowing "proffer"—in this case, not formal proffer but rather a recitation by the prosecution of alleged facts not supported by any evidence—the Court of Appeal departs from this line of cases, particularly when the most fundamental right our society recognizes, the right to liberty, is at stake. Here, the lack of procedural safeguards was particularly egregious: the trial court relied on the prosecutor's unsworn recitation of facts taken from unknown documents. Petitioner received no notice of those alleged statements before he received the prosecution's brief. He therefore did not have an opportunity to investigate the claims made, was not provided discovery of the statements themselves or even police reports of the statements, had no meaningful opportunity to properly respond to this new information and had no opportunity to cross-examine these women or even the investigators who interviewed them. It was simply information that the prosecution presented to the court without any offer as to the information's accuracy or reliability.

There were similar shortcomings regarding the alleged facts of the charged crimes. At his hearing, petitioner noted the lack of discovery regarding the DNA evidence supposedly linking

him to the alleged offenses. (Petition Exh. I, pp. 97-98.) Petitioner was further precluded from cross-examining the complaining witness, who did appear in court. Considering that the sole bases for the court's detention order were the alleged facts of the charged crimes and petitioner's alleged sexual conduct in the years since, the lack of sufficient safeguards to ensure that petitioner was rightfully detained is notable. (Exh. A, pp. 16-19.)

C. The Court of Appeal's Holding Misapplies *People v. Naidu* and Lessens Protections for Pretrial Detainees.

The court also considered *People v. Naidu* (2018) 20 Cal.App.5th 300, and sought to distinguish its holding from the case at bar. In *Naidu*, the petitioners faced charges relating to the alleged fraudulent use of a contractor's license, as well as administrative proceedings to suspend or revoke their business licenses. (*Id*. at p. 305.) The trial court released the petitioners on their own recognizance but ordered their licenses suspended as a condition of release. (*Id*. at pp. 305-306.) The appellate court agreed that the license suspensions violated the petitioners' rights to due process. (*Id*. at p. 306.) The court noted prior case

law which required that such a suspension as a condition of bail "must be based on evidence showing an immediate risk to the public." (*Id*. at p. 310, quoting *Gray v. Superior Court* (2005) 125 Cal.App.4th 629, 640.)

The *Naidu* court was quite clear: "the due process clauses, both state and federal, require some *presentation of evidence* on the element of danger to the public." (*Naidu, supra*, 20 Cal.App.5th at p. 313, *emphasis added*.) In finding that that requirement was not satisfied in *Naidu*, the court noted that no witnesses testified at the bail hearing and that "statements by counsel are not evidence." (*Ibid*.) The court held: "that declining to require *actual evidence* of petitioners' dangerousness before ordering their business licenses suspended exposed them to a significant risk of erroneous deprivation despite the fact that they had a substantial private interest at stake." (*Id*. at p. 314, *emphasis added*.)

Here, the Court of Appeal dismissed *Naidu's* relevance by stating that "*Naidu* did not involve a section 12(b) offense, and there is no indication that the trial court there was prepared to require pretrial detention in the absence of a license suspension

condition." (Exh. A, p. 14.) The court argued that petitioner failed to analyze "whether the competing interests in a due process analysis regarding a decision to suspend a business license as a condition of release on bail (or O.R. release) are comparable to the interests involved in a pretrial detention decision under section 12(b)—particularly the state's interests—including administrative and fiscal burdens." (Exh. A, p. 14.) In doing so, the court essentially sought to create two due process standards—one for 12(b) offenses and one for other matters. The court then even went so far as to find the suspension of a professional license to be a greater violation of liberty than actual pretrial incarceration: "detention orders—which are interim rulings—can be undone relatively quickly upon a showing of changed circumstances. [Citation omitted.] It is not clear, however, whether a professional license suspension is easily reversed and whether reversal of a suspension can cure other reputational business interests at play." (Exh. A, p. 15.)

In so doing, the court effectively stated that matters where liberty is at stake actually require *less* protection than matters involving the use of a professional license. This reading of *Naidu*

is inconsistent with this Court's holding in *Humphrey* as well as the ample case law from both federal and state courts that freedom from involuntary confinement without due process is "the most elemental of liberty interests" and "the fundamental right of a citizen." (*Litmon, supra,* 162 Cal.App.4th at p. 399.) Therefore, this Court should grant review to address what evidence the court may consider before pretrial detention can be ordered.

D. The Procedure Deemed Constitutional By The Court of Appeal Conflicts With This Court's Ruling In *In Re White*.

Further, the procedure that this Court used in *In re White* (2020) 9 Cal.5th 455 conflicts with the procedure deemed acceptable in the case at bar. While the court may consider "the seriousness of the offense charged" in determining bail (Pen. Code, § 1275, subd. (a)(1)), article I, section 12 of the state constitution allows pretrial detention for certain offenses only when "the facts are evident or the presumption great." (Cal. Const., art. I, § 12.) Courts have defined this clause as requiring "evidence that would be sufficient to sustain a hypothetical verdict of guilt on appeal." (*White*, *supra*, 9 Cal.5th at p. 463.) In

White, the California Supreme Court stated:

> Whether that evidentiary threshold has been met is a question a reviewing court considers in the same manner the trial court does: by assessing whether the record, viewed in the light most favorable to the prosecution, contains enough evidence of *reasonable, credible, and solid value* to sustain a guilty verdict on one or more of the qualifying crimes.

(*Ibid, emphasis added*.)

Requiring this level of proof not only serves to make it less likely that innocent defendants are incarcerated pretrial, but also may serve to push back against the tendency of prosecutors to "overcharge" a case with the intent of incapacitating a defendant with higher bail or using the defendant's custody status as leverage in securing a conviction.

In *White*, the trial court relied on the preliminary hearing transcript for the facts of the case, which primarily consisted of the testimony of the minor victim, the defendant's statement, and law enforcement testimony. (*White, supra,* 9 Cal.5th at p. 459.) The permitted evidence was based on an adversarial hearing where the defendant was able to cross-examine the witness, address any 5th Amendment or constitutional issues, benefit from

the protections of the evidence code, review of discovery to assist in his defense, and be represented by counsel.

In *White*, the defendants' bail motion was filed and heard after arraignment on the information—therefore, after the defendants had already been held over for trial after a preliminary hearing. (*White, supra,* 9 Cal.5th at p. 461.) The high court reviewed the lower court's ruling under an abuse of discretion standard and noted that the type of evidence relied upon for issuing a detention order was "after hearing sworn testimony from the victim herself and an audio recording of White's interviews with the investigating detectives – and after White had the opportunity to cross-examine witnesses and offer evidence." (*Id*. at p. 470.) *White's* holding is clear:

> To deny bail under article I, section 12(b), a court must satisfy itself that the record contains not only evidence of a qualifying offense sufficient to sustain a hypothetical verdict of guilt on appeal, but also clear and convincing evidence establishing a substantial likelihood that the defendant's release would result in great bodily harm to others. In reviewing a denial of bail, an appellate court must determine, too, whether the record contains substantial evidence of a qualifying offense – and, if so, whether any reasonable fact finder could have found, by clear and convincing

> evidence, a substantial likelihood that the defendant's release would result in great bodily harm to one or more members of the public. Where both elements are satisfied and a trial court has exercised its discretion to deny bail, the reviewing court then considers whether that denial was an abuse of discretion.

(*Id*. at p. 471.)

In *White*, the court found this standard was met "based on the evidence presented at the adversarial hearing." (*White, supra,* 9 Cal.5th at p. 471.) Here, in contrast, the bail hearing occurred before the preliminary hearing was held. The trial court relied on informal proffers by the prosecution regarding the circumstances of the charged offenses, an unsworn statement by the complaining witness who was not subject to cross-examination, and the prosecution's summary of a series of interviews with the defendant's former ex-wives and ex-girlfriends. Therefore, the information available to the trial court was not "evidence of a reasonable, credible, and solid value" such as that available in *White*.

As such, there was not clear and convincing evidence that "the facts are evident or the presumption great" or that there was a "substantial likelihood that [petitioner's] release would result in

great bodily harm to others." (Cal. Const., art. I, § 12, subd. (b).) This is precisely what the Utah and Arizona courts have required, and what petitioner is requesting here—that petitioner not be ordered detained pretrial in the absence of a full adversarial hearing with sufficient procedural protections to ensure that the hearing is fair and that the information the court is relying on is accurate.

Without clear procedures for what information the court can consider, there was not clear and convincing evidence that petitioner posed a public safety risk, as defined under section 12, and therefore the court's decision was an abuse of discretion. Petitioner therefore requests that this Court grant review.

III. THE COURT OF APPEAL IMPROPERLY DENIED PETITIONER'S REQUEST FOR ATTORNEY'S FEES AND COSTS.

The Court of Appeal declined petitioner's request for attorney's fees pursuant to 1021.5 of the Code of Civil Procedure. In so denying, the court quoted *In re Head* (1986) 42 Cal.3d 223, 228: "A decision which has as its primary effect the vindication of the litigant's personal rights is not one which brings into play the attorney fees provisions of section 1021.5." (Exh. A, p. 27.) The

court is incorrect, as the procedural due process protections that petitioner is requesting affect all defendants who are detained without bail or with an unaffordable amount of bail. In addition, imposition of attorney fees in this case would deter trial courts from consistently detaining arrestees without affording them the procedural due process protections guaranteed by the state and federal constitution.

In assessing whether section 1021.5 is applicable, the Court should consider whether (1) the action "has resulted in the enforcement of an important right affecting thepublic interest," (2) has conferred a significant benefit on the public or large class of people, and (3) the necessity and financial burden of private enforcement are such as to make the award appropriate. (*Olney vs. Municipal Court* (1982) 133 Cal.App.3d 455,463.) Attorney's fees may be awarded in petition for writ of habeas corpus actions, because it is the nature of the relief sought, not the action in which it is brought, that determines the right to seek attorney's fees under section 1021.5. (*Head*, *supra*, 42 Cal.3d at pp. 226, 231.)

In addition, the "private attorney general doctrine" as

codified in section 1021.5 "is designed to encourage private enforcement of important public rights and to ensure that aggrieved citizens access to the judicial process where statutory or constitutional rights have been violated." (*Ryan v. California Interscholastic Federation* (2001) 94 Cal.App.4th 1033, 1044, citing to *Olney v. Municipal Court* (1982) 133 Cal.App.3d 455, 463.) The *Ryan* court expanded further:

> Regarding the nature of the public right, it must be important and cannot involve trivial or peripheral public policies. The significance of the benefit conferred is determined from a realist assessment of all the relevant surrounding circumstances. As to the necessity and financial burden of private enforcement, an award is appropriate where the cost of the legal victory transcends the claimant's personal interest: in order words, where the burden of pursuing litigation is out of the proportion of the plaintiff's individual stake in the matter.

(*Ryan, supra*, 133 Cal.App. at p. 1044, citing *Olney, supra*, 133 Cal.App.3d at pp. 463-464.)

For example, in *Rhyne v. Municipal Court* (1980) 113 Cal.App.3d 807, 812, the court found that the facts "disclose a gross, consistent pattern of denial of the most fundamental constitutional rights to persons appearing" before a judge

presiding over the misdemeanor arraignment calendar in San Diego County. In that case, the judge terminated a practice of public defense counsel providing pre-arraignment services to defendants. (*Id*. at p. 813.) As a result, the court found that defendants were not adequately advised of their constitutional rights, did not properly waive their constitutional rights, were not properly advised of the consequences of pleas, were coerced into entering guilty pleas, pleaded guilty without any factual basis for the plea, were sentenced according to uniform court policy rather than an individualized consideration of the circumstances, and entered pleas pursuant to plea deals without the benefit of counsel. (*Id*. at p. 814.) The court found the award of attorney's fees under section 1021.5 to the petitioner appropriate, as the factors in section 1021.5 had been met. (*Id*. at p. 824.)

Here, the factors in Code of Civil Procedure 1021.5 factors are met. The right to liberty is not only important, but one of the founding principles of our state and federal constitutions. The enforcement of the right to liberty is clearly in the public interest to ensure that members of the

community are not unlawfully and arbitrarily detained.

Second, this action, if successful, would confer a benefit on a large class of persons—incarcerated criminal defendants—to ensure that their right to liberty is protected both procedurally and substantially. Petitioner's personal interest in being released from custody is simply incidental to the broader violation of the constitutional right to liberty held by all within his class. Had he not undertaken this litigation, the common interest of the incarcerated defendants throughout California would be confined without the procedural due process protections petitioner is requesting. Indeed, the Court of Appeal acknowledged the importance of the issue presented by petitioner's case in its Order dated August 18, 2021, requesting additional briefing and an amicus brief by the Attorney General: "The court views the issues presented in this matter as significant and believes it would benefit from the special expertise possessed by the Attorney General."

Lastly, an award of attorney fees is appropriate where it is established that the trial court has systematically failed to follow the law. Petitioner has cited a number of cases where the

trial court denied bail and failed to indicate the basis for the detention in the minute order, as required by *Humphrey*. (Petition, pp. 16-17.) Section 1021.5 is the appropriate vehicle to deal with such systematic violations of fundamental rights. Given the trial court's systematic failure to follow *Humphrey* and willingness to deny a pretrial arrestee his freedom without the appropriate procedural protections, awarding the fair market value of attorney fees and costs is necessary to deter further violations. Moreover, the private enforcement of filing a writ of habeas corpus is time consuming and costly. Therefore, petitioner is entitled to attorney fees and costs: (1) the action "has resulted in the enforcement of an important right affecting the public interest," (2) has conferred a significant benefit on the public or large class of people, and (3) the necessity and financial burden of private enforcement are such as to make the award appropriate.

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CONCLUSION

For the reasons given, petitioner respectfully urges this Court to grant review to resolve these important questions of law related to the scope of pretrial detention.

Dated: January 10, 2022

Respectfully Submitted,

MARSANNE WEESE
Attorney for Petitioner

WORD COUNT CERTIFICATE

I, Marsanne Weese, declare and certify under penalty of perjury that I am an attorney licensed to practice law in the State of California (SBN 232167.) I certify that the brief contains 6,652 words, according to the word count produced by the Microsoft Word program used to produce this document, and that the brief uses a Century Schoolbook size 13 font.

Dated: January 10, 2022

MARSANNE WEESE
Attorney for Petitioner

EXHIBIT A

Court of Appeal, First Appellate District
Charles D. Johnson, Clerk/Executive Officer
Electronically FILED on 11/29/2021 by X. Ramos, Deputy Clerk

Filed 11/29/21

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re JOHN HARRIS JR., on Habeas Corpus.	A162891 (San Mateo County Super. Ct. No. 21-NF-002568-A)

Petitioner John Harris Jr. filed this petition for writ of habeas corpus challenging the trial court's decision denying him bail. He argues that (1) the court failed to comply with various standards articulated in *In re Humphrey* (2021) 11 Cal.5th 135 (*Humphrey*); (2) insufficient evidence supported the denial of bail under the standards articulated in *Humphrey* and article I, section 12, subdivision (b) of the California Constitution; and (3) the court abused its discretion in denying bail. He also requests attorney fees and costs pursuant to Code of Civil Procedure section 1021.5. We conclude a remand is necessary because the court erred in failing to set out reasons on the record why less restrictive alternatives to detention could not reasonably protect the government's interests in public or victim safety, and in failing to include those reasons in the minutes.

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner, now in his mid-fifties, is implicated as the perpetrator of a violent rape that occurred in March 1989. The underlying facts are detailed below.

The victim woke up in her apartment with scarves tied around her ankles. The perpetrator had scarves tied around his own forehead and mouth, and he tied bandanas tightly around the victim's eyes and neck. The perpetrator raped the victim, after which he strangled her and sawed and slashed at her neck with a serrated knife. As the perpetrator struggled with the victim he threatened to cut out her eye and tried to stab her repeatedly in the back but was unsuccessful due to the bluntness of the knife. The victim pleaded with the perpetrator to leave, saying that she would count to 100 before calling the police, but defendant responded that he could not trust her not to call police. She then told him he could unplug the phone to slow her down. Ultimately, the victim managed to convince him to leave. The perpetrator left several scarves behind at the crime scene, including one with a floral design and border. The perpetrator's deoxyribonucleic acid (DNA)—obtained from one of the scarves at the crime scene and a vaginal swab from the victim—was found to match petitioner's.

In February 2021, the People filed a complaint charging petitioner with attempted willful, deliberate, and premeditated murder (Pen. Code, §§ 664, subd. (a), 187, subd. (a), 189)[1], and aggravated mayhem (§ 205). As to both counts, the People alleged petitioner used a deadly or dangerous weapon, a knife. As to the attempted murder count alone, the People alleged petitioner inflicted great bodily injury.

The same day the complaint was filed, the trial court appointed counsel and set bail at $5 million. Bail was set despite the fact the probation department submitted a "pretrial services court report" indicating that

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

petitioner appeared to be an appropriate candidate for release on his own recognizance with enhanced monitoring.[2]

On April 16, 2021, petitioner filed a bail motion. Relying on *Humphrey*, *supra*, 11 Cal.5th 135, petitioner argued he should be released on his own recognizance because he is indigent, and there is no indication he is a flight or safety risk. Petitioner also contended he was not a risk to public safety because the alleged crimes occurred over 32 years ago; he had not threatened or tried to contact the victim since the alleged crime; and he had a limited criminal history in the interim years. Moreover, he noted, he had community ties and the pretrial services court report indicated he should be released with nonfinancial conditions. Petitioner's attorney filed a declaration in support of the motion stating, on information and belief, that petitioner is indigent and unable to afford bail, as set.

The People opposed the motion and made the following proffers of evidence. In addition to the aforementioned circumstances underlying the offenses, which were recounted by the victim, the doctor who treated the victim after the incident observed that the laceration to her throat was four to five inches long and four to six millimeters deep. Had the cut been " 'a hair more' " it would have severed the victim's jugular and likely caused her death.

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[2] According to the report, petitioner could not be interviewed due to Covid-19 restrictions but petitioner received a favorable pretrial assessment score based on a calculation of eight factors, i.e., whether he: (1) was on active community criminal justice supervision; (2) had been charged with "felony drug, theft or fraud"; (3) had pending charges; (4) had a criminal history; (5) had two or more failures to appear; (6) had two or more violent convictions; (7) was unemployed at the time of arrest; and (8) had a history of drug abuse. Of these factors, petitioner responded affirmatively only to having a criminal history, and so he scored 2 out of a potential 14 points.

Furthermore, one of petitioner's ex-wives told a prosecution investigator that petitioner kept a collection of scarves in their garage, and that he told her he used them "for tying arms and legs on the posts." One ex-girlfriend told an investigator that petitioner liked to tie her up with scarves and blindfold her, and that their role-playing during sex included his pretending to be a rapist breaking into her home. She said this type of behavior occurred two to three times a month over the course of their 10-year relationship.

Another ex-girlfriend—who met petitioner in September 2019—reported that when they started dating he told her of his sexual fetish associated with scarves and asked her to buy scarves with a border and floral pattern in the middle. Once when she purchased a scarf, he said it was the wrong kind and told her to buy the "correct one." Petitioner then used the scarves to tie her to the bed and gag her, and he requested that she send him photos of herself bound to the bed with scarves.

Another woman who married petitioner in mid-2020 reported that within their first year of marriage, petitioner was drunk and told her that a " 'girl crawled into my bed naked and you're not going to lay in my bed naked and not give me any. So she tried to say I raped her.' " She also reported that petitioner placed a scarf over her mouth and eyes on several occasions. Yet another woman who met petitioner on an online dating website in late 2020 received several scarves from him in the mail; although she was uninterested in him, she kept one scarf that had a floral design with a border.

The People noted that although petitioner's criminal history consisted of relatively minor convictions—one in 1998 for misdemeanor driving without a license (Veh. Code, § 12500, subd. (a)), and another in 1991 for misdemeanor theft (§ 484)—the theft conviction involved petitioner snatching

a scarf from the neck of a female stranger and then running away. Petitioner claimed he grabbed the scarf to satisfy his anger and frustration because he was having emotional and personal problems.

Based on the above proffers, the People argued petitioner posed a danger to the alleged crime victim and public safety if released, as well as a flight risk since he is facing life terms. Emphasizing the gravity of the charged offenses and petitioner's ongoing scarf fetish, the People argued there were no nonfinancial conditions of release that could protect the victim or ensure petitioner's presence at trial. Consequently, the People urged the trial court to retain bail in the $5 million amount set or, in the alternative, deny bail pursuant to article I, section 12, of the California Constitution (hereafter section 12).

On April 20, 2021, the trial court held a hearing on the bail motion. Through counsel, petitioner argued he could not afford bail as set and asked for release on his own recognizance with various nonfinancial conditions, e.g., a no contact order with the victim, limitation of his use of dating websites, and Global Positioning System (GPS) tracking. Petitioner also argued that bail could not be denied because the People's mere "proffers" of evidence were insufficient to meet the "clear and convincing evidence" standard. The People disagreed, countering that proffers of evidence are sufficient to support a bail determination and that, per *Humphrey*, the court had to assume the truth of the charges. The victim appeared during the hearing and expressed great fear for her safety and the safety of those close to her should petitioner be released.

Ultimately, the trial court denied petitioner bail under section 12. The court found that *Humphrey* did not require live testimony and concluded: (1) the charged felony offenses involved acts of violence on another person;

and (2) based on the People's proffer, there is clear and convincing evidence of a substantial likelihood that petitioner's release would result in great bodily harm to others.

DISCUSSION

"Habeas corpus is an appropriate vehicle by which to raise questions concerning the legality of bail grants or deprivations. [Citations.] In evaluating petitioner's contentions, this court may grant relief without an evidentiary hearing if the return admits allegations in the petition that, if true, justify relief. [Citations.] On the other hand, we may deny the petition, without an evidentiary hearing, if we are persuaded the contentions in the petition are without merit." (*In re McSherry* (2003) 112 Cal.App.4th 856, 859–860.)

We proceed by "applying the substantial evidence test to pure questions of fact and de novo review to questions of law. [Citation.] '[W]hen the application of law to fact is predominantly legal, such as when it implicates constitutional rights and the exercise of judgment about the values underlying legal principles, [the appellate] court's review is de novo.' " (*In re Taylor* (2015) 60 Cal.4th 1019, 1035; *In re Collins* (2001) 86 Cal.App.4th 1176, 1181.)

A. General Legal Standards

The court in this case denied bail under section 12(b), which provides a constitutionally based exception to the general rule that a defendant charged with a noncapital offense is entitled to bail. (*In re White* (2020) 9 Cal.5th 455, 462 (*White*).) Section 12(b) provides: "A person shall be released on bail by sufficient sureties, except for: [¶] . . . [¶] (b) Felony offenses involving acts of violence on another person, or felony sexual assault offenses on another person, when the facts are evident or the presumption great and the court

finds based upon clear and convincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others."

In *Humphrey*, *supra*, 11 Cal.5th 135, the California Supreme Court "sketch[ed] the general framework governing bail determinations." (*Id.* at p. 152.) There, the petitioner had been charged with first degree residential robbery and burglary, infliction of injury on an elder adult, and misdemeanor theft from an elder adult. (*Id.* at pp. 143–144.) At his arraignment, the petitioner requested release on his own recognizance, citing his advanced age, his community ties, and his unemployment and financial condition. (*Id.* at p. 144.) Without inquiring into the petitioner's ability to pay, the trial court ultimately set bail at sums the petitioner could not afford. (*Id.* at p. 148.) The Court of Appeal reversed the trial court's bail order and remanded for a new hearing with consideration of the petitioner's ability to post bail and consideration of less restrictive alternatives in the event he could not afford bail. (*Id.* at p. 156.) The Supreme Court affirmed. As relevant here, *Humphrey* held: "An arrestee may not be held in custody pending trial unless the 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 vindicate those interests." (*Id.* at pp. 139–140.) Put another way, "detention is impermissible unless no less restrictive conditions of release can adequately vindicate the state's compelling interests." (*Id.* at pp. 151–152.)

Petitioner argues that before denying bail, the trial court was required under *Humphrey* to find clear and convincing evidence that no nonfinancial condition—i.e., no less restrictive alternative than detention—would protect the state's interests in victim or public safety or ensuring his appearance, and

that the court erroneously failed to do so. Neither the San Mateo County District Attorney, appearing as respondent, nor the Attorney General, appearing as amicus curiae, disputes this. To the contrary, both acknowledge the court was required to make a finding on this point.

We likewise agree. Although *Humphrey* involved a claim of excessive bail and not a denial of bail under section 12(b) as here, the generality with which *Humphrey* laid out the foregoing requirement—without resolving whether section 12 and section 28, subdivision (f)(3) of article I of the California Constitution "can or should be reconciled"[3] (*Humphrey*, at p. 155,

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[3] In brief, the facts underlying this unresolved issue are as follows. In 1982, the voters enacted Proposition 4, which amended section 12 regarding bail. (*People v. Barrow* (1991) 233 Cal.App.3d 721, 722.) The same year, the voters also passed Proposition 8, which contained competing provisions regarding bail. (*People v. Standish* (2006) 38 Cal.4th 858, 877.) Specifically, "Proposition 8 proposed to repeal . . . section 12 and substitute article I, section 28, subdivision (e). The proposed subdivision was entitled 'Public Safety Bail.' " (*Standish*, at p. 874; Ballot Pamp., Primary Elec. (June 8, 1982) text of Prop. 8, §§ 2–3, p. 33.) The California Supreme Court subsequently held that "the amendments to . . . section 12 proposed by Proposition 4 took effect, and that the provisions of article I, section 28, subdivision (e) proposed by Proposition 8 did not take effect" because Proposition 4 garnered more votes than Proposition 8. (*Standish*, at p. 875, 877–878; *In re York* (1995) 9 Cal.4th 1133, 1140, fn. 4, citing Cal. Const., art. II, § 10, subd. (b).) Then, in 2008, voters passed Proposition 9, which enacted as article I, section 28, subdivision (f)(3), provisions nearly identical to Proposition 8's Public Safety Bail provisions. (Compare Voter Information Guide, Gen. Elec. (Nov. 4, 2008) text of Prop. 9, § 4.1, p. 130, with Ballot Pamp., Primary Elec. (June 8, 1982) text of Prop. 8, § 3, p. 33.) Proposition 9, however, did not propose to repeal section 12. (Voter Information Guide, Gen. Elec. (Nov. 4, 2008) text of Prop. 9.)

Here "we need not decide what role, if any, [article I, section 28, subdivision (f)(3)] has in the decision to deny bail under article I, section 12(b)" because, as in the *White* decision, the trial court below relied on section 12 and any "concerns about victim safety would only reinforce the trial court's decision to deny bail." (*White*, *supra*, 9 Cal.5th at p. 470.)

fn. 7)—reasonably indicates the Supreme Court's contemplation that its holding applies to all orders for pretrial detention under section 12(b). (See *Humphrey*, at pp. 152, 154, 156.)

B. Application of the Standards

Having identified the legal standards applicable to the trial court's decision to deny bail, we proceed to examine petitioner's arguments about how such standards may be satisfied, and whether they were satisfied here.

1. Proffered Evidence

Petitioner first claims the applicable clear and convincing evidence standard cannot be met based on proffers of evidence. Citing the statutory definitions of "evidence," "preliminary fact," and "proffered evidence," (Evid. Code, §§ 140, 400, 401, respectively), petitioner contends section 12 and *Humphrey* require that the People present "actual evidence" to support a bail denial. In other words, only evidence that would be admissible at a formal trial can support pretrial detention. Petitioner also suggests that pretrial detention based on proffered evidence violates due process. We are not persuaded.

Evidence Code section 140 generally defines the term " '[e]vidence' " as "testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact." Evidence Code section 400 defines " 'preliminary fact' " as "a fact upon the existence or nonexistence of which depends the admissibility or inadmissibility of evidence." Evidence Code section 401 defines " 'proffered evidence' " as "*evidence*, the admissibility or inadmissibility of which is dependent upon the existence or nonexistence of a preliminary fact." (Italics added.) Nothing in these statutes indicates that the word "evidence"—as used in section 12—denotes only evidence that is admissible at a formal trial. Notably, section 12

itself makes no mention of a requirement that evidence be presented in accord with all the formal rules of evidence for admissibility at a trial.[4]

Significantly, in the analogous context of the federal Bail Reform Act (18 U.S.C. § 3141 et seq.), a proffer of evidence that does not meet the rules for admissibility at trial can satisfy the clear and convincing evidence standard, and federal decisions hold or otherwise recognize that proceeding by proffer does not violate due process. As relevant here, the federal act provides: "The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the [pretrial detention] hearing. The facts the judicial officer uses to support a finding . . . that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence." (18 U.S.C. § 3142(f).) The United States Supreme Court has upheld the facial validity of the act's detention procedures (*United States v. Salerno* (1987) 481 U.S. 739, 746–747, 751–752 (*Salerno*)), and other federal decisions have specifically upheld the propriety and validity of permitting the government to proceed by proffer (e.g., *United States v. Smith* (D.C. Cir. 1996) 79 F.3d 1208, 1210; *United States v. Gaviria* (11th Cir. 1987) 828 F.2d 667, 669; *United States v. Cardenas* (9th Cir. 1986) 784 F.2d 937, 938; *United States v. Delker* (3d. Cir. 1985) 757 F.2d 1390, 1395–1396; *United States v. Acevedo-Ramos* (1st Cir. 1985) 755 F.2d 203, 207–208.)

In rejecting the contention that the procedures of the Bail Reform Act violate due process, *Salerno* explained: "Detainees have a right to counsel at the detention hearing. [Citation.] They may testify in their own behalf,

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[4] Petitioner's seeming reliance on *Humphrey* is also unavailing. The question of whether proffered evidence can support a denial of bail was neither presented nor discussed in *Humphrey*.

present information by proffer or otherwise, and cross-examine witnesses who appear at the hearing. [Citation.] The judicial officer charged with the responsibility of determining the appropriateness of detention is guided by statutorily enumerated factors, which include the nature and the circumstances of the charges, the weight of the evidence, the history and characteristics of the putative offender, and the danger to the community. [Citation.] The Government must prove its case by clear and convincing evidence. [Citation.] Finally, the judicial officer must include written findings of fact and a written statement of reasons for a decision to detain. [Citation.] The Act's review provisions . . . provide for immediate appellate review of the detention decision. [¶] We think these *extensive* safeguards suffice to repel a facial challenge." (*Salerno*, *supra*, 481 U.S. at pp. 751–752, italics added.)

Salerno and the foregoing federal cases would seem to foreclose a federal constitutional due process challenge to the sufficiency of proffers in bail hearings, at least where, as here, procedural safeguards are provided similar to those provided in the federal context. In line with the procedural safeguards discussed in *Salerno*, here petitioner had counsel at his bail hearing. Additionally, there is no indication in the record that the trial court disallowed defendant from testifying or presenting evidence (by proffer or otherwise); to the contrary, the court allowed defense counsel to present information by way of her own statements and representations, such as about petitioner's indigency, employment, appearance history, and performance on probation. The trial court was guided by similarly enumerated factors, and the burden of proof was by clear and convincing evidence. (See Cal. Const., art. I, § 12; Pen. Code, § 1275, subd. (a); *Humphrey*, *supra*, 11 Cal.5th at p. 152.) The court was obligated to provide a statement of reasons for the

detention, included in writing in the court's minutes (*Humphrey*, at pp. 155–156; see part B.3(b), *post*), and the decision was subject to immediate review (§§ 1270.2, 1490). Accordingly, we cannot agree with petitioner's suggestion that reliance on proffers of evidence categorically renders a bail decision invalid under federal due process principles.[5]

Moreover, petitioner provides no legal authority or argument supporting the notion that a state due process analysis would yield a different result.[6] The language of the federal and state due process guarantees are "virtually identical," and so California courts look "to the United States Supreme Court's precedents for guidance in interpreting the contours of our own due process clause and have treated the state clause's prescriptions as substantially overlapping those of the federal Constitution." (*Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 212.) "With a minor modification, we have adopted the *Mathews* [*v. Eldridge* (1976) 424 U.S. 319] balancing test as the default framework for analyzing challenges to the sufficiency of proceedings under our own due process clause. The first three factors—the private interest affected, the risk of erroneous deprivation, and the government's interest—are the same.

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[5] As indicated, *Salerno* referred to the procedural safeguards in the Bail Reform Act as "extensive." (*Salerno*, *supra*, 481 U.S. at p. 752.) Given the lack of adequate briefing on this issue, we do not consider or decide whether and which of those federal safeguards may be necessary to defeat a due process challenge. Nor do we suggest that all such safeguards are required to repel a due process challenge.

[6] Petitioner attempts to distinguish *Salerno* on the ground that the federal Bail Reform Act specifically allows for the use of proffers at bail proceedings, but fails to explain why the source of the practice of using proffers is relevant. Petitioner also points out that section 12 requires clear and convincing evidence, but the same is true in the federal act. (18 U.S.C. § 3142(f); *Salerno*, *supra*, 481 U.S. at p. 750.)

[Citations.] In addition, we may also consider a fourth factor, ' "the dignitary interest in informing individuals of the nature, grounds, and consequences of the action and in enabling them to present their side of the story before a responsible government official." ' " (*Ibid.*) "[C]ogent reasons must exist before a state court in construing a provision of the state Constitution will depart from the construction placed by the Supreme Court of the United States on a similar provision in the federal Constitution." (*Gabrielli v. Knickerbocker* (1938) 12 Cal.2d 85, 89; see, e.g., *Mohilef v. Janovici* (1996) 51 Cal.App.4th 267, 285, fn. 16.) Petitioner offers no such cogent reasons here, and we perceive no legal or logical reason why state due process principles require such a departure in this context.

Contrary to petitioner's contention, *Naidu v. Superior Court* (2018) 20 Cal.App.5th 300 (*Naidu*) does not compel a different result. There, the petitioners were criminally charged with fraudulent use of a contractor's license and released on their own recognizance (O.R.), but the trial court ordered a suspension of their licenses from the California Contractors State License Board (Board) as a condition of O.R. release. (*Naidu*, at p. 305.) Analyzing the petitioners' challenge to that condition using due process balancing inquiries, *Naidu* concluded both federal and state due process clauses required that "*at least some evidence* of danger to the public support an order suspending a business license as part of a bail order." (*Id.* at pp. 305, 311–313, italics added.) *Naidu* then concluded no such evidence was presented, indicating the Board "submitted very little that might even be construed as evidence that the public would be in danger if petitioners retained use of their business license." (*Ibid.*) As *Naidu* recounted, the Board's legal brief asserted that the petitioners exhibited a profound lack of judgment, a flagrant disrespect for the health and safety of others, and a

violation of trust accorded to contractors, but the court concluded such statements by counsel were not evidence sufficient to support license suspension. (*Ibid.*) The court observed the only "admissible" evidence presented in support of the Board's assertion was a declaration of counsel that amounted to "no more" than a restatement of the Board's litigation position and "its belief that it would be beneficial if the trial court suspended petitioners' license." (*Ibid.*) But this "[did] not constitute evidence that petitioners pose[d] such a danger to the public that suspending their business licenses was necessary." (*Ibid.*)

True, *Naidu* expressly spoke of the need for "actual evidence regarding the danger petitioners allegedly pose to the public" before a court can order suspension of a business license as part of a bail order (*Naidu*, *supra*, 20 Cal.App.5th at p. 312.) But *Naidu* did not involve a section 12(b) offense, and there is no indication the trial court there was prepared to require pretrial detention in the absence of a license suspension condition. Moreover, *Naidu* did not address the federal case law upholding the federal constitutional validity of relying on proffers in the pretrial detention context; nor did it consider whether due process principles would preclude pretrial detention based on a reliable proffer of evidence.

In discussing *Naidu*, petitioner does not analyze whether the competing interests in a due process analysis regarding a decision to suspend a business license as a condition of release on bail (or O.R. release) are comparable to the interests involved in a pretrial detention decision under section 12(b)—particularly the state's interests—including administrative and fiscal burdens. For example, he does not address whether cases involving the potential suspension of a business license as a condition of pretrial release are as common as those wherein pretrial detention decisions

implicate substantial harm to public or victim safety, or whether the burdens of categorically requiring admissible evidence would be the same or similar when license suspensions are not at issue. Indeed, we note such burdens would fall not just on the People, but also on criminal defendants and defense attorneys when presenting information at a bail hearing. Moreover, detention orders—which are interim rulings—can be undone relatively quickly upon a showing of changed circumstances. (*In re Alberto* (2002) 102 Cal.App.4th 421, 426–427, 430–431; cf. §§ 1273, 1289.) It is not clear, however, whether a professional license suspension is easily reversed and whether reversal of a suspension can cure other reputational business interests at play. As it is not our role to make arguments for petitioner or to consider arguments not raised or meaningfully addressed below or in the habeas corpus petition, we decline to do so.[7] (*In re Seaton* (2004) 34 Cal.4th 193, 200; see *People v. Duvall* (1995) 9 Cal.4th 464, 475.)

Finally, petitioner contended at oral argument that pursuant to Evidence Code section 300, evidence presented at any bail or pretrial detention hearing must comply with all the formal rules for admissibility of evidence at a trial. Petitioner, however, neither previously raised nor properly briefed this statute-based issue. Petitioner does not, for example, address the proper interpretation of Evidence Code section 300 or any bail-related statutes (e.g., Pen. Code, § 1319[8]). Nor does petitioner address case

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[7] Petitioner—who is represented by counsel—is required to present arguments under specific headings and to support arguments with authority when possible. (Cal. Rules of Court, rules 8.204(a)(1)(B) & 8.384(a)(1)–(2).)

[8] Section 1319 provides in relevant part that in cases where a defendant is charged with a violent felony as described in section 667.5, subdivision (c), the trial court "shall consider" the following in determining whether or not to grant release of the defendant: "(1) The existence of any outstanding felony warrants on the defendant. [¶] (2) Any other information presented in the

law that allows use of technically inadmissible evidence at hearings that implicate other liberty interests, such as sentencing and probation violation hearings. (See, e.g., *People v. O'Connell* (2003) 107 Cal.App.4th 1062, 1066 [" 'As long as hearsay testimony bears a substantial degree of trustworthiness it may legitimately be used at a probation revocation proceeding.' "]; *People v. Lamb* (1999) 76 Cal.App.4th 664, 683 ["A sentencing judge may consider responsible unsworn or out-of-court statements concerning the convicted person's life and characteristics."].) Ultimately, given the untimeliness of petitioner's argument and lack of briefing (Cal. Rules of Court, rules 8.204(a)(1)(B) & 8.384(a)(1)–(2)), we decline to address the argument. (*People v. Crow* (1993) 6 Cal.4th 952, 960, fn. 7.)

In sum, we conclude, as a general matter, that proffers of evidence may satisfy section 12(b)'s clear and convincing evidence standard without offending federal or state due process principles. In so concluding, we emphasize that it remains within the discretion of the trial court to decide whether particular instances of proffered evidence may be insufficient, and whether to insist on the production of live testimony or other evidence in compliance with more stringent procedural requirements. (Cf. *United States v. Delker*, *supra*, 757 F.2d at p. 1395; *United States v. Acevedo-Ramos*, *supra*, 755 F.2d at pp. 206–208.)

2. Application of Section 12(b)

In reviewing the trial court's decision to deny bail under section 12(b), we assess two elements: (1) "whether the record contains substantial

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report prepared pursuant to Section 1318.1. The fact that the court has not received the report required by Section 1318.1, at the time of the hearing to decide whether to release the defendant on his or her own recognizance, shall not preclude that release. [¶] (3) *Any other information presented by the prosecuting attorney*." (Italics added.)

evidence of a qualifying offense" and if so, then (2) "whether any reasonable fact finder could have found, by clear and convincing evidence, a substantial likelihood that the defendant's release would result in great bodily harm to one or more members of the public." (*White*, *supra*, 9 Cal.5th at p. 471.) If both elements are satisfied, we evaluate whether the trial court's denial was an abuse of discretion. (*Ibid.*) "An abuse of discretion occurs when the trial court, for example, is unaware of its discretion, fails to consider a relevant factor that deserves significant weight, gives significant weight to an irrelevant or impermissible factor, or makes a decision so arbitrary or irrational that no reasonable person could agree with it." (*Id.* at p. 470.)

First, does the record contain substantial evidence of a qualifying offense? The answer is yes. Petitioner does not dispute that he was charged with one or more qualifying felonies involving acts of violence and sexual assault or that "the facts are evident or the presumption great" as required by section 12(b). Indeed, had petitioner challenged the trial court's finding on this point, we would easily reject it based on the qualifying nature of the charges and the substantial evidence tending to show his guilt as the perpetrator, including the DNA evidence and the evidence of petitioner's idiosyncratic scarf fetish, as well as the specific design of the scarves he used, i.e., floral with a border.

Second, could any reasonable fact finder have found, by clear and convincing evidence, a substantial likelihood that the defendant's release would result in great bodily harm to one or more members of the public? Again, the answer is yes.

Petitioner was charged with attempted willful, deliberate, and premeditated murder and aggravated mayhem, and it was alleged that he personally used a deadly weapon—a knife—to inflict great bodily injury on

the victim. Both of the charged crimes are "serious" and "violent" felonies (§ 1192.7, subd. (c)(2), (7), (9), (23); § 667.5, subd. (c)(2), (7), (8), (12)) that carry the severe sentence of life in prison, albeit with the possibility of parole (§§ 205, 664, subd. (a)), and the court was required to assume the truth of these charges (*Humphrey*, *supra*, 11 Cal.5th at p. 153).

Significantly, the People's proffer of evidence concerning the circumstances of the underlying offenses was extensive and detailed and included the following. Petitioner bound and raped the victim, then tried to kill her. He tried to stab her in the back several times but was unsuccessful only because the knife was dull. He strangled her, and he sawed at her neck to within a hair's breadth of her jugular. Within about two years of the 1989 offenses, petitioner was convicted of theft after he targeted a female stranger and grabbed a scarf tied around her neck "to satisfy his anger and frustration" because he "had been having emotional and personal problems." And as recounted earlier, multiple women romantically or otherwise involved with petitioner between 1997 and late 2020 provided statements to prosecution investigators showing that petitioner continues to act on a sexual fetish involving scarves and binding. While the proffered evidence indicated these women were willing partners, it also showed that petitioner consistently sought to exert sexual control over women involving fantasized violence and non-consent.

Based on the record, we conclude a reasonable fact finder could have found clear and convincing evidence that petitioner's release on bail would pose a substantial likelihood of great bodily harm to others. The proffered evidence amply supports the conclusion that petitioner is an extremely dangerous person. Petitioner is charged with grave offenses, the circumstances of which show he is capable of tremendous violence. His

relationships with women after 1989 and through at least 2019 indicate he continues to be compelled by sexually aggressive impulses. And for most of his life, petitioner has escaped detection and accountability for the vicious crimes he committed in 1989. Indeed, during the offense, defendant indicated he was trying to kill the victim to ensure he would escape undetected. Now, in his mid-fifties, he is facing what will potentially be confinement in prison until the end of his life. While the probation department's pretrial risk assessment suggested petitioner was an appropriate candidate for release on his own recognizance with enhanced monitoring, the trial court was neither bound to follow that recommendation nor constrained to forgo its own individualized consideration of factors for making a bail determination.[9] (*Humphrey*, *supra*, 11 Cal.5th at p. 152.)

Petitioner contends the trial court's risk-of-harm finding is unsupported or unreasonable given the number of years that elapsed between the alleged 1989 offenses and the present and the absence of any allegation that he committed any criminally violent act in the interim. We cannot agree. The trial court was not compelled to find that petitioner's past violent behavior was an unusual one-off situation unlikely to recur, or to accept his benign self-presentation. (See *White*, *supra*, 9 Cal.5th at pp. 468–469 [upholding pretrial detention under section 12(b) where charged crimes were more recent but involved factual allegations far less egregious than those here].) Here, the court's decision finds substantial support in the record and was plainly within the bounds of reason. No abuse of discretion appears.

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[9] Again, that risk assessment was completed simply by considering the eight factors noted in footnote 2, *ante*, without interviewing petitioner, or mentioning the circumstances underlying his offense.

Relying on reports reflecting pretrial release data in other jurisdictions, petitioner next appears to contend that as a statistical matter, it is unlikely he will reoffend if released. We are not persuaded. Setting aside the questionable relevance of such data to our review on appeal, giving weight to petitioner's statistical reports seems at odds with *Humphrey*'s holding that bail decisions require "an individualized consideration of the relevant factors" (11 Cal.5th at p. 152) and "careful consideration of the individual arrestee's circumstances." (*Id.* at p. 156.)

Petitioner further argues that the trial court detained him based solely on the charges in the complaint and that the court created an additional non-constitutionally based "category of offenses ineligible for pretrial release . . . by judicial fiat." We cannot agree. The record plainly demonstrates the court based its decision on the proffered evidence, as well as the charges enumerated in the complaint.

3. Application of the Humphrey Requirements

As discussed, *Humphrey* determined that principles of due process require the trial court to find, by clear and convincing evidence, that no less restrictive condition than detention can reasonably protect the interests in public or victim safety, and the arrestee's appearance in court. (*Humphrey*, *supra*, 11 Cal.5th at p. 154.) Petitioner argues the court "failed to address this prong of *Humphrey's* analysis entirely."

Although the record does not reflect an express trial court finding on this point, respondent cites portions of the record where the court acknowledged that petitioner lacked financial resources to make bail and where the parties discussed nonmonetary alternatives. Accordingly, respondent contends the court did, in fact, consider less restrictive

nonmonetary alternatives to detention and implicitly made the required finding.

We are in limited agreement with respondent that, as a jurisprudential matter, such a finding could be implicit and inferred from the record. Ordinarily, trial court judgments and orders are presumed correct. (*Jameson v. Desta* (2018) 5 Cal.5th 594, 608–609; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Ambiguities in the record are resolved in favor of affirmance (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 631), and an appellate court ordinarily presumes "the [trial] court knows and applies the correct statutory and case law." (*People v. Coddington* (2000) 23 Cal.4th 529, 644, overruled on other grounds by *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) Where, as here, nonfinancial conditions of release were discussed directly before the court's denial of the bail motion, one would have to assume the worst to conclude the court ignored both the issue and the law in making its decision.

Nonetheless, even though the general presumptions in favor of a judgment or order might otherwise support a finding made sub silentio, *Humphrey* specifically requires, as a matter of procedural due process, that a court entering a pretrial detention order set forth "the reasons for its decision on the record and to include them in the court's minutes." (*Humphrey*, *supra*, 11 Cal.5th at p. 155.) Thus, the reasons supporting a denial of bail cannot be implied.

In this regard, *Humphrey* explains that the requirement of explicit articulation will "facilitate review of the detention order, guard against careless or rote decisionmaking, and promote public confidence in the judicial process." (*Humphrey*, *supra*, 11 Cal.5th at pp. 155–156.) And generally, an adequate statement of reasons is one that furthers these purposes and

"apprise[s] [the reviewing court] of the analytical process by which the trial court arrived at its conclusions." (*In re Pipinos* (1982) 33 Cal.3d 189, 198, 202 (*Pipinos*); see *Kent v. United States* (1966) 383 U.S. 541, 561 (*Kent*) ["Meaningful review requires that the reviewing court should review. It should not be remitted to assumptions."].) Thus, trial courts choosing to deny bail must separately state and identify their reasons for finding that less restrictive alternatives to detention could not reasonably protect the interests in public or victim safety or ensuring the defendant's appearance.

Here, the trial court found, by clear and convincing evidence, a substantial likelihood that petitioner's release would result in great bodily harm to others, and it identified its reasons supporting that finding. But the court did not actually address any less restrictive alternatives to pretrial detention and did not articulate its analytical process as to why such alternatives could not reasonably protect the government's interests. And while overlapping reasons may exist for making the applicable findings under section 12(b) and *Humphrey*, the court's failure to articulate its evaluative process requires that we speculate as to why the court believed that no nonfinancial conditions could reasonably protect the interests in public or victim safety. As such, the record here does not permit meaningful appellate review.[10] (*In re Podesto* (1976) 15 Cal.3d 921, 937 ["meaningful judicial

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[10] We do not suggest that a trial court's statement must be formal or that there are "magic words" that a court must recite. (*Kent*, *supra*, 383 U.S. at p. 561 [statement of reasons need not be formal nor necessarily include "conventional findings of fact"]; *In re Podesto*, *supra*, 15 Cal.3d at p. 938 [statement of reasons in support of an order denying a motion for bail on appeal "need not include conventional findings of fact"].) But the statement should "clearly articulate the court's evaluative process" and "set forth the basis for the order with sufficient specificity to permit meaningful review." (*Pipinos*, *supra*, 33 Cal.3d at p. 205; *Kent*, *supra*, at p. 561.)

review is often impossible unless the reviewing court is apprised of the reasons behind a given decision"].)

We now address the consequence of this shortcoming. In *Pipinos*, *supra*, 33 Cal.3d 189, the trial court's failure to adequately articulate its reasons for denying bail on appeal ultimately resulted in reversal because the trial court's conclusory comments were insufficient to enable meaningful review of the defendant's abuse of discretion contention. (*Id.* at pp. 203–205.) Yet, there are other cases indicating the failure to provide an adequate statement of reasons does not necessarily require reversal but is subject to a harmless error analysis. (*C.S. v. Superior Court* (2018) 29 Cal.App.5th 1009, 1036; see *People v. Scott* (1994) 9 Cal.4th 331, 355 (*Scott*).) Error of this type may be harmless in cases where there is " 'overwhelming evidence' " supporting the court's decision. (*C.S.*, at p. 1036.) This may be so even if the failure to make a statement of reasons amounts to an error of constitutional dimensions. (E.g., *People v. Chi Ko Wong* (1976) 18 Cal.3d 698, 722–723 [applying harmless error analysis to affirm order denying juvenile court retention that was supported by overwhelming evidence]; see generally Cal. Const., art. VI, § 13; Pen. Code, § 1404.)

Given the record before us, we need not resolve this apparent tension in the case law. Here, the parties discussed nonfinancial conditions, but the discussion was not extensive. In short, defense counsel argued that any concern about flight could be addressed if the court were to order GPS tracking or other conditions for release as set out in the pretrial release report. The prosecutor responded that no less restrictive conditions could protect the community, and that electronic home monitoring would not protect women whom petitioner might meet online or out and about. Defense counsel then countered that any concern about petitioner dating or being on

dating websites could be addressed if the court were to limit or monitor his internet usage; order GPS monitoring; issue no contact orders as to the victim; or impose other conditions suggested by pretrial services. The parties made similar arguments in their motion and opposition papers, but beyond this, the record reflects no other discussion and no evaluation by the court about nonmonetary or other conditions.

In sum, the record does not permit meaningful appellate review, and we cannot say there was overwhelming evidence supporting a conclusion that less restrictive alternatives to detention could not reasonably protect the interests in public or victim safety. (See *C.S.*, *supra*, 29 Cal.App.5th at p. 1036.) As such, we will remand this matter to the trial court for further findings. We express no opinion as to the result the court should reach on remand.

(a) Forfeiture

Before concluding, we address two further issues—the first being whether claimed error concerning the inadequacy of a statement of reasons can be forfeited. We examine this issue because the record does not show that petitioner objected to the adequacy of the trial court's statement of reasons at the bail hearing.

The Attorney General, as amicus curiae, takes the position that error concerning the omission or inadequacy of a statement of reasons regarding less restrictive alternatives to detention is "exhausted" because petitioner argued below that such alternatives could protect the government's interests, and failure to lodge a timely objection does not result in forfeiture.

We tend to agree that a petitioner who urges the availability of less restrictive alternatives to detention exhausts his or her superior court remedies as to that issue, and generally will be entitled to review of that

issue. And implicitly, such a petitioner also requests that the court provide an adequate statement of reasons to allow for meaningful judicial review. (*In re Podesto*, *supra*, 15 Cal.3d at p. 937.)

But we do not foreclose the possibility of a situation where a claim concerning inadequacy of a statement of reasons can be forfeited. " ' "No procedural principle is more familiar to this Court than that a constitutional right," or a right of any other sort, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." ' " (*People v. Saunders* (1993) 5 Cal.4th 580, 590.) In *Scott*, *supra*, 9 Cal.4th 331, for example, the court explained that the doctrine of waiver (or forfeiture, as it is now commonly referred to) applied "to claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices." (*Scott*, at p. 353.) This was "fair and reasonable given the nature of the sentencing decisions at issue and the procedural backdrop against which they are made," such as that "[t]he parties have ample opportunity to influence the court's sentencing choices" insofar as "[b]oth sides often know before the hearing what sentence is likely to be imposed and the reasons therefor. Such information is contained in the probation report, which is required in every felony case and generally provided to the court and parties before sentencing." (*Id.* at pp. 348–351.)

If the doctrine of forfeiture can apply to a court's failure to properly articulate its discretionary sentencing decisions, a fortiori it can apply to decisions to deny bail. Of course, depending on the timing of the bail hearing, a defendant may not have any idea what to expect in terms of the court's decision and what might support it. Thus, in many cases, it may not be "fair or reasonable" to apply the doctrine of forfeiture.

In this case, the bail hearing took place before the preliminary examination, and nothing in the record indicates the parties were "clearly apprised" of what the bail decision would be and the reasons for it in advance of the hearing. Indeed, the pretrial services court report recommended release on various conditions, and even the prosecutor asked for no-bail *as an alternative* to the imposition of a $5 million bail condition. Under these circumstances, we decline to deem petitioner's claim about the inadequacy of the statement of reasons forfeited.

(b) Reasons in the Minutes

The second subsidiary issue we address is petitioner's argument that the trial court failed to comply with *Humphrey's* mandate that courts include the reasons for denying bail in the minutes. As stated, *Humphrey* requires, as a matter of procedural due process, that courts entering an order resulting in pretrial detention "set forth the reasons for its decision on the record and . . . *include them in the court's minutes.*" (*Humphrey*, *supra*, 11 Cal.5th at p. 155, italics added.)

Nothing in the record indicates this issue was ever brought to the trial court's attention, though as the Attorney General notes in his amicus brief, *People v. Bonnetta* (2009) 46 Cal.4th 143 suggests the failure to object should not result in forfeiture in this context because a minute order is entered only after the hearing and errors in the minutes are not ones the parties can easily detect or ensure are avoided. (*Bonnetta*, at p. 152 [addressing failure to comply with statutory requirement for inclusion of a statement of reasons in court minutes in context of discretionary dismissals under section 1385].) In any case, we need not decide applicability of the forfeiture doctrine here or whether the issue should be considered "exhausted" because a remand is necessary to allow the trial court to state the reasons why nonfinancial or

other less restrictive alternatives to detention could not reasonably protect the interests in public or victim safety. We will simply direct trial court correction of this error as well.

4. Attorney Fees and Costs

Finally, we decline petitioner's request for attorney fees and costs pursuant to Code of Civil Procedure section 1021.5. (*In re Head* (1986) 42 Cal.3d 223, 228 ["A decision which has as its primary effect the vindication of the litigant's personal rights is not one which brings into play the attorney fees provisions of section 1021.5."].)

DISPOSITION

The order denying bail is conditionally vacated. We remand the matter for further findings as to whether clear and convincing evidence would support a conclusion that no less restrictive alternatives to detention could reasonably protect the government's interests in pretrial detention. (*Humphrey*, *supra*, 11 Cal.5th at pp. 154–155.) The trial court shall provide an adequate statement of reasons and a corrected minute order, in accordance with the views expressed herein. For the sake of efficiency, the court may, but need not, vacate its prior order denying bail and hold a new bail hearing in order to take new evidence or any other action it deems necessary.

We decline petitioner's other requests for relief, including his request for release on his own recognizance with appropriate conditions or with an affordable amount of bail, and his request for attorney fees.

Fujisaki, J.

WE CONCUR:

Tucher, P. J.

Rodriguez, J.

A162891/*In re John Harris Jr.*

In re John Harris Jr.
(A162891)

Trial Court: San Mateo County

Trial Judge: Hon. Amarra A. Lee

Attorneys: Law Offices of Marsanne Weese, Marsanne Weese and Rose Mishaan, under appointment by the First District Court of Appeal, for Petitioner.

Stephen M. Wagstaffe, District Attorney, Alpana Samant, Deputy District Attorney, for Respondent.

Rob Bonta, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Jeffrey M. Laurence, Senior Assistant Attorney General, Katie L. Stowe, Deputy Attorney General, for Attorney General Rob Bonta as Amicus Curiae upon the request of the Court of Appeal.

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
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S272632

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On January 10, 2022, I served a true copy of the attached:

TRAVERSE TO RETURN TO PETITION FOR WRIT OF HABEAS CORPUS

on each of the following by electronic service:

Clerkof the Superior Court of San Mateo County
The Honorable Amarra A. Lee
dept19@sanmateocourt.org

Nicole Sato, Deputy District Attorney of San Mateo County
nsato@smcgov.org

Executed in San Francisco, California on January 10, 2022.

MARSANNE WEESE

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 1/10/2022 by Regine Ho, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

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STATE OF CALIFORNIA
Supreme Court of California

Case Name: **In re John Harris, Jr.**
Case Number: **TEMP-E106357J**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

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Signature

Mishaan, Rose (267565)
Last Name, First Name (PNum)

Law Offices of Marsanne Weese
Law Firm