

COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In Re

KENNETH HUMPHREY,

On

Habeas Corpus.

No. S247278

SUPREME COURT
FILED

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Deputy

First Appellate District, Two, Case No. A152056
San Francisco Superior Court, Case No. 17007715
The Honorable Joseph M. Quinn, Judge

**APPLICATION FOR PERMISSION TO FILE
AMICUS CURIAE BRIEF**

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**APPLICATION FOR PERMISSION TO FILE
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TO THE HONORABLE CHIEF JUSTICE TANI G. CANTIL-SAKAUYE,
AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME
COURT OF THE STATE OF CALIFORNIA:

The San Diego County District Attorney respectfully asks permission to file the attached amicus curiae brief, pursuant to rule 8.520, subdivision (f), of the California Rules of Court. No party nor counsel for a party in this appeal authored in whole or in part the proposed amicus curiae brief, nor made any monetary contribution to fund the preparation or submission of the proposed amicus curiae brief. Furthermore, no person or entity, other than amicus and her counsel, has contributed – monetarily or otherwise – to the preparation or submission of the attached amicus curiae brief.

**IDENTITY OF AMICUS CURIAE
AND STATEMENT OF INTEREST**

The San Diego County District Attorney represents the People of the State of California residing within the County of San Diego. The District Attorney is very familiar with the issues presently before the court.

Counsel for amicus has reviewed the opening brief and the answer brief on the merits as submitted by the parties in this case and asks leave of the court to file this amicus curiae brief for a limited purpose: First, amicus disagrees that considering the seriousness of the offense or public and victim safety in setting an amount of bail violates equal protection principles. Second, if this court agrees with the Court of Appeal and decides that due process and equal protection principles require consideration of a criminal defendant's ability to pay in setting or reviewing monetary bail, criminal law practitioners need guidance on how to

proceed with setting monetary bail in a post-*Humphrey*¹ landscape. As we explain in the attached amicus brief, California's current criminal law practices and the federal bail system provide answers. Finally, amicus addresses the effect of SB10 on the issues presented in this case.

For the foregoing reasons, the District Attorney of San Diego County respectfully requests the court accept the accompanying brief for filing in this case.

Dated: October 10, 2018

Respectfully Submitted,

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¹ *In re Humphrey* (2018) 19 Cal.App.5th 1006, 1025 (*Humphrey*).

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AMICUS CURIAE BRIEF

INTRODUCTION

In this case, the Court of Appeal held that without additional procedural safeguards California's monetary bail system violated due process and equal protection principles. The court held that before setting monetary bail a court must consider a defendant's ability to pay bail and whether less restrictive nonmonetary alternatives to release would serve the purpose of bail, so as to ensure a defendant is not being imprisoned solely because of his or her inability to pay. (*In re Humphrey* (2018) 19 Cal.App.5th 1006, 1025 (*Humphrey*)). In addition, the court held that if a court sets bail in an amount a defendant is unable to pay, resulting in a de facto detention, the trial court must comport with due process requirements for a valid detention order. (*Ibid.*)

Petitioner (San Francisco District Attorney) concedes that the Court of Appeal was correct in holding principles of due process and equal protection require a court to take into consideration a defendant's ability to pay. Petitioner further argues that to the extent the California Constitution, article 1, sections 12 and 28 allow a court to consider the seriousness of the offense or public and victim safety in setting the amount of bail, those aspects violate equal protection principles.

Amicus disagrees. Taking into consideration the seriousness of the offense or public and victim safety when setting monetary bail is not only valid but required under the California Constitution. The only constitutional limitation in setting money bail is that it not be excessive. Excessive bail is an amount above that which is required to assure a defendant's future court appearances. That does not automatically equate to affordability to make bail by the defendant. Therefore, if a trial court considers the defendant's ability to pay—along with the public and victim safety—and sets bail at an

amount higher than the defendant can practically afford, no constitutional violation occurs, and *Humphrey* is wrong in its contrary holding.

Moreover, while this case was pending, the Governor approved legislation, Senate Bill number 10 (SB10), which eliminates California's monetary bail system. The new risk-based pretrial system is not set to commence until October 2019. Thus, despite the approval of SB10, because of the delay in its application, criminal practitioners still need guidance on how to proceed in a post-*Humphrey* landscape. Amicus proposes potential solutions to the bail dilemma based on California's current criminal law practice and the law related to the federal bail system.

I.

CONSIDERATION OF MANY FACTORS INCLUDING SERIOUSNESS OF THE OFFENSE, PUBLIC SAFETY, AND A DEFENDANT'S ABILITY TO PAY IN SETTING BAIL IS CONSTITUTIONAL; THE ONLY CONSTITUTIONAL LIMITATION ON MONETARY BAIL IS THAT IT NOT BE EXCESSIVE

Petitioner concludes, “[T]o the extent that sections [sic] 12 and section 28 allow a court to consider the seriousness of the offense or public and victim safety in setting the amount of bail, those aspects violate equal protection under our system.” (Opening Brief on Merits [OBM] at p. 26.) Petitioner reaches this conclusion after analyzing the failings of Penal Code section 1305, specifically that because bail is forfeited only for failures to appear in court and not for the commission of new crime, this lack of forfeiture fails to deter new crime and therefore public safety is not served by money bail. (OBM at pp. 21-23.)

After analyzing Penal Code sections 1275 and 1305, and California Constitution, article 1, sections 12 and 28, amicus reaches a different conclusion, one that does not require invalidation of California's Constitution – an act which should not be taken lightly. In coming to this

conclusion, amicus asserts that article 1, sections 12 and 28 pose no equal protection violation.

Petitioner's analytical framework requires this court accept that since Penal Code section 1305 does not require forfeiture of bail when new crimes are committed then the Constitution is wrong to require public safety be a paramount bail consideration, because there is no connection between public safety and bail forfeiture. In other words, the petitioner's argument is essentially that the statute (Penal Code section 1305) trumps the Constitution (sections 12 and 28); if Penal Code section 1305's lack of bail forfeiture for new crimes is the primary rule, then ipso facto the contrary Constitutional provisions must be invalid because the purpose, intent, and direction of California Constitution, article 1, sections 12 and 28 fail to reconcile with the application of Penal Code section 1305.

To the contrary: if a constitutional provision and a statute conflict, the constitution trumps the statute. (See *City of San Diego v. Shapiro* (2014) 228 Cal.App.4th 756, 788; see also *In re Marriage of Steiner and Hosseini* (2004) 117 Cal.App.4th 519, 527 [“The California Constitution trumps any conflicting provision of the Family Code.”].) If the statute and the Constitution cannot be reconciled, it is the statute that must go, not the Constitution. Under the doctrine of constitutional supremacy, “it is well established that ‘a statute cannot trump the Constitution.’ ” (*City of San Diego v. Shapiro, supra*, 228 Cal.App.4th at p. 788.) Thus, California Constitution, article 1, sections 12 and 28 cannot be invalidated simply because Penal Code section 1305 does not provide for forfeiture of bail when new crimes are committed. The trial court may and should still consider public safety when setting bail, but that consideration of public safety should be tempered by a defendant's ability to pay, as discussed *infra*.

The will of the Legislature and electorate should not be casually swept aside. They have repeatedly required that public safety be the primary consideration in the setting of bail, as evident in their amendments to the bail provisions of the Penal Code and Constitution. “It has long been acknowledged that our state Constitution is the highest expression of the will of the people acting in their sovereign capacity as to matters of state law. When the Constitution speaks plainly on a particular matter, it must be given effect as the paramount law of the state.” (*Playboy Enterprises, Inc. v. Superior Court* (1984) 154 Cal.App.3d 14, 28.) Even petitioner recognizes that “the electorate and California Legislature have recognized these compelling interests by requiring courts to consider public and victim safety in setting the amount of monetary bail. (Cal. Const., art. I, § 28, subd. (f)(3); Pen. Code § 1275, subd. (a)(1); see also Cal. Const., art. I, § 12 [seriousness of the offense in fixing amount of bail].)” (OBM at p. 23.)

Once the Constitution and statutes have been reconciled so that the seriousness of the offense and public safety must be part of the bail consideration pursuant to the California Constitution, the *Humphrey* case becomes significant and is instructive. To ensure bail is not excessive under the constitution, the court must also consider a defendant’s ability to pay as one of many factors. The Constitution allows for this. It specifically requires that “Excessive bail may not be required. In fixing the amount of bail, the court shall take into consideration the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case.” (Cal. Const., art. I, § 12.) Article I, section 28 further provides “In setting, reducing or denying bail, . . . public safety and the safety of the victim shall be the primary considerations.” (Cal. Const., art. I, § 28, subd. (f)(3).) Thus, the court must consider what amount of bail should be set to ensure a defendant’s future court appearances, protect public safety, and that is also

not excessive. However, consideration of a defendant's ability to pay is just that, a consideration. The set bail amount is not dependent upon a defendant's ability to pay it but, rather, defendant's ability to pay is only one factor for the court to consider in determining what amount of bail should be set so as not be excessive, in violation of the constitution. And, after consideration of all the factors, to the extent a trial court sets bail in an amount higher than the defendant can practically afford, no constitutional violation occurs, and *Humphrey* is wrong in its contrary holding.

Further, trial courts should consider what combination of money bail and non-monetary conditions of bail would be sufficient to meet the dual purpose of bail, that is protecting the public and ensuring a defendant's future court appearances. Monetary bail and non-monetary conditions are not mutually exclusive. Rather, imposed together they ensure public safety and the return of a defendant to court, and such a practice is not prohibited by statute nor the Constitution. In fact, the happy marriage of the two bail requirements (money bail and bail conditions) allows this court to ensure the constitutional requirement that public safety be a primary consideration but also address a defendant's right to non-excessive bail. Nothing prohibits this court from requiring the trial court to consider a defendant's ability to pay as one consideration among many in the equation of money bail plus imposing non-monetary conditions to ensure public safety. Indeed, to protect the public as mandated by the California Constitution and Penal Code, trial courts exercising their jurisdiction to set bail in felony cases must have the ability to set a monetary bail amount *and* the inherent authority to impose reasonable bail conditions related to public safety. The recognition of such authority is consistent with the legislative intent behind the bail system: public safety is of paramount importance. And, is in accord with sound public policy.

Moreover, in light of the amendments to the Constitution and Penal Code section 1275 mandating courts to consider public safety as the primary concern during bail setting, Penal Code section 1305 is arguably invalid under our Constitution as its failure to require bail forfeiture in cases of new crimes committed does not reflect the Constitution's mandate that public safety be paramount in bail issues. Although it is clear that the California Constitution has changed as it pertains to public safety and bail, Penal Code section 1305 has failed to catch up. Should the court wish to go one step further, it has the ability to reform Penal Code section 1305 to reflect the changes to the Constitution. As recognized by this court in *Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 626, "numerous decisions of the United States Supreme Court and lower federal courts and sister states, and numerous decisions of this court, amply support the propriety of judicial reformation—including "rewriting"—of statutes to preserve constitutionality when (i) doing so closely effectuates policy judgments clearly articulated by the enacting body, and (ii) the enacting body would have preferred such a reformed version of the statute over the invalid and unenforceable statute." (See also *California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 274 [appellate courts we have the power to reform a statute so as to effectuate the Legislature's intent where the statute would otherwise be invalid]; *Ventas Finance I, LLC v. Franchise Tax Bd.* (2008) 165 Cal.App.4th 1207, 1224 [a court may reform or rewrite a statute to preserve it against invalidation.]; *In re Marriage of Burkle* (2006) 135 Cal.App.4th 1045, 1068 [same]; *Ceridian Corp. v. Franchise Tax Bd.* (2000) 85 Cal.App.4th 875, 889 [same].) Reforming Penal Code section 1305 to include a bail forfeiture provision for new crimes would reconcile that section with the constitutional mandate that public safety be the primary concern in bail issues.

Even if Penal Code section 1305 has not been reformed to require forfeiture of bail when new crimes are committed, money bail still has a deterrent effect on crime. First, money bail serves to deter criminal defendants from committing crimes in other jurisdictions, risking incarceration in those jurisdictions. Because, if a criminal defendant commits a crime in a second jurisdiction and is incarcerated so that he/she fails to appear in the jurisdiction of the first crime, then his/her money bail is forfeited. The requirement of money bail ensures a criminal defendant has “skin in the game,” and thus will be more likely to return to court and stay law abiding in other jurisdictions.

Finally, money bail also serves to deter future crime in the current jurisdiction and thus, protects public and victim safety because there are indeed increased consequences when a new crime is committed while released on bail. When a defendant appears at arraignment for a subsequent case while released on bail, the commission of a new offense while out on bail will be factored into the setting of bail in the new case. (Pen. Code, § 1275, subd. (a)(1).) The commission of a new crime while out on bail demonstrates a defendant’s unwillingness and/or inability to comply with the dictate that he/she violate no laws while out on bail, evidences a higher public safety risk, and exposes the defendant to a consecutive two-year enhancement, pursuant to Penal Code section 12022.1, subdivision (b). Thus, while Penal Code section 1305 may not deter a defendant from committing new crimes in the same jurisdiction while released on bail, Penal Code sections 1275 and 12022.1 do. Trial courts should have the ability to set both money bail and non-monetary conditions of bail to satisfy the constitutional requirements that non-excessive bail be set which protects public and victim safety.

II.

CRIMINAL LAW PRACTITIONERS NEED GUIDANCE IN A POST-*HUMPHREY* LANDSCAPE

If this court agrees with the Court of Appeal, despite the approval of SB10, the courts across California still need guidance from this court to determine how to handle bail issues before SB10 is effective. Many questions remain unanswered. May defendants and law enforcement officers continue to rely on the scheduled bail amounts before arraignment? May a trial court continue to rely on the bail schedule at arraignment? If a defendant demands a *Humphrey* hearing to have bail set in an amount he or she can afford when does that hearing take place? What is the burden of proof as relates to a defendant's ability to pay? May the defendant request a subsequent *Humphrey* hearing? These are a handful of the unanswered questions in a post-*Humphrey* landscape. To ensure uniformity and fairness across the state and amongst the 58 counties, amicus requests guidance from this court.

A. **Reliance on the Bail Schedule Remains Proper Through Arraignment**

Article I, section 12 of the California Constitution provides that defendants "shall be released on bail by sufficient sureties," with limited exceptions. (Cal. Const., art. I, § 12.) Section 28 of article I of the California Constitution further expands on the exceptions under which bail may be denied. (Cal. Const., art. I, § 28, subd. (f)(3), italics added.)

In addition to that constitutional framework, the California Penal Code in title 10, contains a number of statutory provisions that govern the setting of bail. Among the statutes governing bail is section 1269b of the Penal Code. That section requires "the superior court judges in each county to prepare, adopt, and annually revise a uniform countywide schedule of bail for all bailable felony offenses and for all misdemeanor and infraction

offenses . . .” (Pen. Code, § 1269b, subd. (c).) “Utilization of a master bond schedule provides speedy and convenient release for those who have no difficulty in meetings [sic] its requirements.” (*Pugh v. Rainwater* (1978) 572 F.2d 1053, 1057.)

In *Humphrey*, the Court of Appeal also recognized the utility of a bail schedule. The court stated “[t]he bail schedule also serves useful functions in providing a means for individuals arrested without a warrant to obtain immediate release without waiting to appear before a judge (§ 1269b), as well as a starting point for the setting of bail by a judge issuing an arrest warrant or for a court setting bail provisionally *in order to allow assessment of a defendant’s financial resources and less restrictive alternative conditions* by the pretrial services agency, or if a defendant does not oppose pretrial detention.” (*Humphrey, supra*, 19 Cal.App.5th at pp. 1043-1044, italics added.)

Accordingly, post-*Humphrey* it should be beyond dispute that defendants may still post bail pursuant to the scheduled amount before arraignment to obtain release, law enforcement officers may continue to seek the scheduled bail amount when requesting an arrest warrant, and judges may continue to use the scheduled amount as a starting point in setting bail at arraignment. Of course, at arraignment, as statutorily authorized, the amount of bail “shall be fixed by the judge at the time of appearance.” (Pen. Code, § 1269b, subd. (b).) And, at arraignment, a trial court may still authorize release on one’s own recognizance in cases where a defendant was otherwise bailable or impose a “no bail” order consistent with the constitution. (Pen. Code, § 1270, subd. (a); Cal. Const., art. I, §§ 12 & 28.) Thus, post-*Humphrey*, it is evident that a trial court will not offend the principles of due process and equal protection in using the bail schedule to provisionally set bail at arraignment “in order to allow

assessment of a defendant's financial resources and less restrictive alternative conditions." (*Humphrey, supra*, 19 Cal.App.5th at p. 1044.)

B. Arraignment Post-*Humphrey*

"The purpose of an arraignment . . . is to inform the accused of the charge against him and to give him fairly the opportunity to plead to it." (*In re Mitchell* (1961) 56 Cal.2d 667, 670.) At arraignment, the trial court is also required to advise each defendant without counsel of the right to counsel and the right to have appointed counsel if indigent." (Pen. Code, § 987, subd. (a).) Finally, "the determination of probable cause" pursuant to *Gerstein v. Pugh* (1975) 420 U.S. 103, is to be made a matter of record at the time of arraignment as to defendants arrested without an arrest warrant. (*In re Waters* (1975) 15 Cal.3d 738, 750.) If a defendant is in custody, arraignment must be within 48 hours of arrest. (Pen. Code, § 825.)

An arraignment is a defendant's first court appearance. Penal Code section 1269b, subdivision (b) provides, "If a defendant has appeared before a judge of the court on the charge contained in the complaint, indictment, or information, the bail shall be in the amount fixed by the judge at the time of the appearance." (Pen. Code, § 1269b, subd. (b).)

Accordingly, at arraignment, the court also determines whether to remand a defendant released on bail and out of custody, and when a defendant is in custody, whether to release the defendant on their own recognizance, the amount of bail to be posted, or whether to hold the defendant on "no bail" pursuant to article 1, sections 12 and 28 of the California Constitution.

Under article I, section 12, subdivisions (b) and (c), a defendant may be detained in the following noncapital cases:

- (b) Felony offenses involving acts of violence on another person, or felony sexual assault offenses on another person, when the facts are evident and 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; or

(c) Felony offenses when the facts are evident and the presumption great and the court finds based on clear and convincing evidence that the person has threatened another with great bodily harm and that there is a substantial likelihood that the person would carry out the threat if released.

(Cal. Const., art. I, § 12, subds. (b) & (c).)

In the County of San Diego, when prosecutors ask for no bail at arraignment, the practice is for the court to decide the issues of whether the "facts are evident and the presumption great" and whether there is "clear and convincing evidence" based upon the proffers of facts presented by counsel. Witnesses are not called to testify.

Post-*Humphrey*, it is apparent that the above procedures related to arraignment remain unaltered. At the same time, post-*Humphrey* it is contemplated that a post-arraignment hearing will take place. At that hearing, the court will consider whether the monetary bail amount imposed was proper after assessing the defendant's ability to pay and whether less restrictive alternative conditions may be imposed to serve the purposes of bail. (*Humphrey, supra*, 19 Cal.App.5th at p. 1044.) In addition, if a court determines that the defendant is "unable to afford the amount of money bail it finds necessary to ensure future court appearances, it may set bail at that amount only upon a determination by clear and convincing evidence that no less restrictive alternative will satisfy that purpose." (*Id.* at p. 1048.) However, no additional guidance was given to criminal law practitioners. Amicus proposes the following guidelines for a *Humphrey* hearing.

C. *Humphrey* hearings

A *Humphrey* hearing to determine a defendant's financial ability to post bail and to determine whether less restrictive alternatives may ensure

their appearance at future court appearances, should be conducted within five days of arraignment, if requested by the defendant. At a *Humphrey* hearing, if a court determines that bail should be set in an amount the defendant is unable to afford, the court would also be able to make the determination that there is “clear and convincing evidence that no less restrictive alternatives” will ensure the defendant’s appearance.

Penal Code section 1270.2 provides for an automatic bail review “[w]hen a person is detained in custody on a criminal charge prior to conviction for want of bail” That hearing must be held within five days of the original hearing.” (Pen. Code, § 1270.2.) Thus, a *Humphrey* hearing requesting a change in bail because of the defendant’s ability to pay the set bail amount or because less restrictive conditions will ensure defendant’s future court appearances, within five days of arraignment is consistent with the already mandated automatic bail review hearing set forth in Penal Code section 1270.2.

Related issues are what evidence the court may consider at that hearing and who has the burden of proof. Federal authority provides guidance in this regard. Under the federal Bail Reform Act of 1984, when the government seeks to detain a defendant, a detention hearing must be held within three to five days. (18 U.S.C. 3142, subd. (f)(2).) Further, federal detention hearings are considered informal proceedings that are not governed by the rules of evidence. (*U.S. v. Duncan* (N.D.N.Y. 1995) 897 F.Supp. 688, 690.) The government may proceed by proffer. (*U.S. v. Smith* (D.C. Cir. 1996) 79 F.3d 1208, 1210.) The government is not required “to produce its witnesses against [a defendant].” (*Ibid.*) And, the government’s burden is to establish by clear and convincing evidence that no conditions of release will reasonably assure the safety of the community. (*U.S. v. Rodriguez* (S.D.Fla. 1995) 897 F.Supp. 1461, 1463.) The standard is different when the issue is whether any conditions of release will

reasonably assure the defendant's attendance at trial; the government need only prove that there are no such conditions by a preponderance of the evidence. (*U.S. v. Tedder* (N.D.N.Y. 1995) 903 F.Supp. 344, 345.) The above standards have withstood constitutional challenges. (*U.S. v. Smith, supra*, 79 F.3d at p. 1210 [process for a detention hearing pursuant to the Federal Bail Reform Act comports with due process and does not violate a defendant's right to confront witnesses]; *U.S. v. Accetturo* (3d Cir. 1986) 783 F.2d 382, 388 [bail reform act is constitutional].)

Similarly, at a *Humphrey* hearing which would be akin to a federal detention hearing, the issues to be resolved should be based upon offers of proof, statements made by the victim, input from the victim, reliable hearsay, and other relevant evidence. Witnesses should not be required.

With regard to defendant's ability to pay, the burden to produce evidence should be on the defendant. *Van Atta v. Scott* (1980) 27 Cal.3d 424 is instructive. In that case, this court was confronted with who had the burden of proof as to the factors a court must take into consideration in determining whether a defendant should be released on their own recognizance. In reaching its decision, this court noted that "[t]he burden of producing evidence is the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue." (*Id.* at p. 437.) This court next concluded that as to a defendant's community ties, the defendant should have the burden of proof since it was the defendant not the prosecution who was the best source for this information, and the defendant has a substantial incentive in providing the information. (*Ibid.*)

The same is true in the context of the defendant's ability to pay a set bail amount. First, it is the defendant not the prosecution who is the best source for the information. Second, the defendant has an incentive to provide the information. Thus, the burden of proof should be on defendant

to establish his financial ability to pay or not pay the set bail amount. And, the burden should be preponderance of the evidence. (Evid. Code, § 115.)

Further, in order to establish his or her financial ability to pay, a defendant should be required to file a financial statement under penalty of perjury. The same is required before appointment of counsel in order to assist the court in determining whether a defendant is able to employ counsel. (Pen. Code, § 987, subd. (c).) The form used in the County of San Diego is attached as Exhibit 1. In fact, the form used to determine whether counsel should be appointed could also be used to determine ability to bail by adding a clause to the final paragraph informing the defendant that the form could be so used. Such a process makes sense. It would not require the defendant to provide additional financial information, and the form encourages a defendant to be truthful, knowing there is a potential penalty of a perjury prosecution.

Additionally, in determining a defendant's ability to pay, a trial court should inquire into a number of factors. "Ability to pay" as used for appointment of counsel is defined as "the overall capability of the defendant," in that context, to reimburse attorney fees. (Pen. Code, § 987.8, subd. (g)(2).) In making a determination under Penal Code section 987.8, subdivision (g)(2), courts consider a number of factors including but not limited to the defendant's present financial position, his or her resources and assets, and the income of any spouse. (*Ibid.*; *People v. Whisenand* (1995) 37 Cal.App.4th 1383, 1392.) In fact, the form used in the County of San Diego inquires into all of those areas.

And, at a *Humphrey* hearing, if this court agrees with the Court of Appeal in this case, and a trial court determines that monetary bail must be set in an amount the defendant is unable to pay, the prosecution will bear the burden of proving by "clear and convincing evidence that no less

restrictive alternatives” will ensure the defendant’s future court appearances. (*Humphrey, supra*, 19 Cal.App.5th at p. 1048.)

Of course, another issue left unresolved, is what happens if the defendant is still not satisfied with the result following his or her *Humphrey* hearing? May the defendant continue to raise the issue? If so, when? Is there a limit on the number of times the issue may be raised?

Amicus would suggest that subsequent hearings for a reduction in bail only be permitted in accordance with Penal Code section 1289. Penal Code section 1289 permits a defendant who has been admitted to bail “upon good cause” to seek a reduction in the amount of bail. (Pen. Code, § 1289.) Good cause “must be founded on changed circumstances relating to the defendant or the proceedings.” (*In re Annis* (2005) 127 Cal.App.4th 1190, 1195.)

In sum, the monetary bail system reviewed in *Humphrey* will continue to be the law until at least October 2019. From now until a new non-monetary system commences, criminal law practioners need guidance on how to proceed in imposing monetary bail post-*Humphrey*. Amicus asks that this court provide the guidance outlined here.

III.

IF THE RISK-BASED PRETRIAL SYSTEM SET FORTH IN SB10 COMMENCES AND REPLACES THE CURRENT MONETARY BAIL SYSTEM IT MOOTS TWO OF THE THREE ISSUES PRESENTED IN *HUMPHREY*, BUT THE ISSUES STILL NEED RESOLUTION WHILE MONETARY BAIL IS THE LAW

A. SB10

On August 28, 2018, the California Legislature approved, and the Governor signed SB10. The bill is titled, “Pretrial release or detention: pretrial services.” SB10 eliminates California’s current monetary bail

system and replaces it with a risk-based pretrial system, commencing October 1, 2019. (Pen. Code, § 1320.6.)

Accordingly, the current statutory law related to bail set forth in title 10, chapter 1 of the Penal Code remains the law “until October 1, 2019, and as of that date is repealed.” (Pen. Code, § 1320.6.) At the same time, SB10 has been approved, albeit the risk-based pretrial system will not commence until October 1, 2019.

Under the new pretrial system, criminal defendants charged with misdemeanors, with certain exceptions, will be booked and released. (Pen. Code, § 1320.8.) Defendants charged with felonies will be assessed using a “validated risk assessment tool.” Those defendants that are assessed as low or medium risk¹, will be released on their own recognizance or supervised recognizance prior to arraignment, with the least restrictive *nonmonetary* conditions that will reasonably assure public safety and the defendant’s return to court. (Legis. Counsel’s Dig., Sen. Bill No. 10 (2017-2018 Reg. Sess.) Stats. 2018, pp. 1-2.) Felony defendants classified as high risk may be detained. (Pen. Code, § 1320.13.) And, under the new system the court is prohibited “from imposing a financial condition” or requiring a defendant “to pay for any nonmonetary condition.” (Legis. Counsel’s Dig., Sen. Bill No. 10 (2017-2018 Reg. Sess.) Stats. 2018; Pen. Code, § 1320.13, subd. (e)(2).)

B. The Future of SB10 Remains Unclear

Although SB10 was approved by the Legislature and the Governor on August 28, 2018, the risk-based pretrial system is not set to commence until October 1, 2019.

¹ Penal Code section 1320.7 enacted as part of SB10 defines low and medium risk.

On August 28, 2018, the same day the Governor signed SB10, bail bond companies, through counsel, submitted a proposed statewide referendum of SB10. The bond companies have until November 26, 2018, to collect 365,880 valid signatures of registered voters to place the referendum on the November 2020 ballot. (Egelko, *Bail Bond Companies Gathering Signatures for Referendum to Keep Them in Business* (Sept. 11, 2018) San Francisco Chronicle <https://sfchronicle.com/new/article/Bail-bond-companies-seek-to-block-new-law-that-13221653.php?utm_campaign=email-premium&utm_source=CMS%20Sharing%20Button&utm_medium=social> (as of Oct. 1, 2018).)

If enough signatures are gathered and the referendum is placed on the November 2020 ballot, the risk-based pretrial system will not commence as anticipated in October 2019. Instead, SB10 would be held in abeyance pending the outcome of the statewide vote in November 2020 and the current monetary bail system would remain the law. (Cal. Const., art. II, § 10, subd. (a); *Yesson v. San Francisco Municipal Transportation Agency* (2014) 224 Cal.App.4th 108, 116 [“the effective date of the ordinance shall be suspended”].)

It would then be up to the electorate to approve or reject the new risk-based pretrial system in November 2020. If voters approve the risk-based system it would then be implemented, again, after the vote in November 2020. (Cal. Const., art. II, § 10, subd. (a) [a referendum approved by a majority of votes cast thereon takes effect on the fifth day after the Secretary of State files the statement of the vote for the election at which the measure is voted on, but the measure may provide that it becomes operative after its effective date].) If the voters reject the risk-based pretrial system in November 2020, California’s current monetary bail

system would continue to remain in effect. Thus, there is still need for this court to decide the *Humphrey* matter and provide guidance to the state.

C. If the Risk-Based Pretrial System Commences, SB10 Moots Two of the Three Issues Presented in *Humphrey*

1. If the Risk-Based Pretrial System Set Forth in SB10 Commences and Replaces the Current Monetary Bail System, the Issue of Whether a Defendant’s Ability to Pay Must be Considered When *Setting Monetary Bail* Becomes Moot

If the risk-based pretrial system set forth in SB10 commences in October 2019, the current monetary bail system will be eliminated. The court will be prohibited from imposing any financial condition on a defendant to obtain pretrial release. (Legis. Counsel’s Dig., Sen. Bill No. 10 (2017-2018 Reg. Sess.) Stats. 2018, pp. 1-2.) Thus, the first issue presented: whether due process and equal protection principles require consideration of a criminal defendant’s ability to pay *in setting or reviewing monetary bail*, will be moot because the court will no longer be authorized to set monetary bail, nor may it require payment for any nonmonetary condition of release. (See Legis. Counsel’s Dig., Sen. Bill No. 10 (2017-2018 Reg. Sess.) Stats. 2018, pp. 1-2; Pen. Code, § 1320.13, subd. (e)(2).)

However, as set forth above, the earliest the new risk-based pretrial system would commence is in October 2019. From now until the new system commences, criminal law practitioners need guidance on the issue of whether in setting or reviewing bail a defendant’s ability to pay must be considered.

2. If the Risk-Based Pretrial System Commences and Replaces the Current Monetary Bail System, the Issue of Whether a Court Must Consider Public and Victim Safety When *Setting Monetary Bail* Is Mooted

The second issue this court asked the parties to brief was whether “in setting the amount of *monetary bail*, may a trial court consider public and

victim safety? Must it do so?” Like the first issue, this issue is also mooted once the risk-based pretrial system set forth in SB10 commences. Again, this is because, under the new system, monetary bail is eliminated and thus, courts will no longer be setting monetary bail amounts as conditions of release. In fact, courts are prohibited from imposing financial conditions or requiring payment for a nonmonetary condition.

But, again, since the monetary bail system will still be imposed until the risk-based pretrial system commences, criminal law practitioners need resolution of the issue.

3. SB10 Had No Effect on the Resolution of the Third Issue Before this Court and The Issue Must Be Resolved

The third issue before this court is: Under what circumstances does the California Constitution permit bail to be denied in non-capital cases? Specifically, this court posed the question of what constitutional provision governs the denial of bail, article I, section 12, or article I, section 28, or in the alternative, whether the provisions can be reconciled. The court has now asked what effect, if any, SB10 has on the resolution of that issue. The simple answer is SB10 has no effect on the third issue. SB10 does not resolve the issue, it has no effect on the constitutional provisions.

However, the preventative detentions permitted in SB10 are only authorized to the extent they are consistent with the United States and California Constitution. Thus, what pretrial detentions are authorized in non-capital cases under the current monetary bail system and when the risk-based pretrial system goes into effect, remains a significant issue that must be resolved.

CONCLUSION

If this court agrees with the Court of Appeal, that ability to pay must be taken into consideration, it is only one of several considerations that a trial court must take into account when setting monetary bail, along with


other factors set forth in the California Constitution such as the seriousness of the offense and public and victim safety. This court should hold that the only constitutional limitation in setting money bail is that it not be excessive.

Further, despite the approval of SB10, because of the delay in its application, criminal law practitioners still need guidance on how to proceed in a post-*Humphrey* landscape. Amicus proposes potential solutions and seeks guidance from this court to promote uniformity and fairness across the state.

Dated: October 10, 2018

Respectfully Submitted,

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CERTIFICATE OF WORD COUNT

I certify that this **AMICUS CURIAE BRIEF**, including footnotes, and excluding tables and this certificate, contains 5,950 words according to the computer program used to prepare it.

A handwritten signature in black ink, appearing to read "Marissa Bejarano", written over a horizontal line.

MARISSA BEJARANO
Deputy District Attorney

EXHIBIT 1



SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

FINANCIAL DECLARATION

PLEASE PRINT/LETRA DE MOLDE

Case No./No. del Caso _____

Last Name/Apellido Paterno _____ First/Nombre _____ MI/Inicial _____
Address/Dirección _____ Home Phone/No. de Teléfono _____
City/Ciudad _____ State/Estado _____ Zip Code/Código Postal _____
Soc. Sec. No./No. de Seguro Social _____ Date of Birth/Fecha de Nacimiento _____
Immigration No./No. de Mica _____ No. of Dependents/No. de Dependientes _____
Driver's License No./No. de Licencia de Manejo _____ State/Estado _____
Nearest Relative not Living with You/Pariente Cercano que No Resida con Usted _____
Relationship/Parentesco _____ Phone No./No. de Teléfono _____
Address/Dirección _____ City/Ciudad _____ State/Estado _____ Zip Code/Código Postal _____

INCOME/INGRESO MENSUAL

Employer/Empleo-Patrón _____ Phone No./No. de Teléfono _____
Address/Dirección _____ City/Ciudad _____ State/Estado _____
Occupation/Oficio _____ Time on Job/Tiempo en el Empleo _____
Net Pay/Pago Neto \$ _____ [] Monthly/Mensual [] Bi-weekly/Quincenal [] Weekly/Semanal
Spouse's Net Pay/Pago Neto de Espos(a) \$ _____ [] Monthly/Mensual [] Bi-weekly/Quincenal [] Weekly/Semanal
Other Income/Otra Fuente de Ingreso \$ _____ Source/Fuente _____
Total Monthly Income/Ingreso Mensual \$ _____
Bank Name/Nombre de Banco _____ Account No./No. de Cuenta _____
Branch/Sucursal _____ City/Ciudad _____ State/Estado _____

MONTHLY EXPENSES/EGRESO MENSUAL

ASSETS/BIENES

Mortgage/Hipoteca \$ _____ Cash on Hand/Dinero en Efectivo \$ _____
Rent/Renta \$ _____ Savings Acct./Cta. de Ahorros \$ _____
Food/Comida \$ _____ Checking Acct./Cta. de Cheques \$ _____
Clothing/Ropa \$ _____ Credit Union/Agencias Financieras \$ _____
Utilities/Agua, Luz, y Gas \$ _____ Home/Casa Propia \$ _____
Cable TV/Cable \$ _____ Other Real Estate/Bienes Raices \$ _____
Medical/Dental/Médico/Dentista \$ _____ Automobiles/Automóviles \$ _____
Child Care/Guardería \$ _____ Make/Marca: _____ Yr./Año: _____ Lic.# _____
Auto Payment/Pago de Automóvil \$ _____ Make/Marca: _____ Yr./Año: _____ Lic.# _____
Auto Fuel/Gasolina \$ _____ Stocks/Bonds/Inversiones \$ _____
Auto Insurance/Seguro de Automóvil \$ _____ Credit Cards/Tarjetas de Crédito \$ _____
Other Bills/Otras Deudas \$ _____ Visa _____ MC _____ AmEx _____ Discover _____
Total Income _____
Total Expenses \$ _____
Net Income TOTAL \$ _____ TOTAL \$ _____

This statement of financial circumstances will be used to determine your ability to pay (1) a portion or all of the costs of legal assistance, (2) for the ignition interlock device or payment plan deferring the cost of the device, or (3) restitution, fines, or fees imposed by the court. If, after a hearing at the conclusion of the criminal proceedings, the court determines that you are able to pay costs of legal assistance, the court will order you to pay all or part of such costs. Such an order will have the same force and effect as a judgment in a civil action and will be subject to execution. This information, including your Social Security number, may be used as an aid in identification should it become necessary to pursue collection of any unpaid fine or court ordered cost, including using it in the tax intercept program by which the amount owing would be offset against any tax refund due.

Esta declaración financiera, se usará para determinar su solvencia, para determinar la cantidad que puede pagar (1) todo o parte del costo del asesoramiento legal (2) el aparato interlock del encendido del carro o plan de pagos diferidos del costo del aparato, o (3) restitución, multas, o costos que impuso el juez. Si al terminar las audiencias de su caso penal el juez determina que tiene los medios para pagar el asesoramiento legal, el juez ordenará que pague todo o una parte de estos costos. Esta orden tendrá la misma fuerza y efecto que tiene un fallo civil y quedará sujeto a su ejecución. Esta información, incluyendo su número de seguro social, se podrá usar como método de identificación si fuera necesario cobrar el saldo de la multa o cantidad ordenada por el juez, incluyendo el uso del programa de intercepción de impuestos y por lo tanto la cantidad se deducirá del cualquier reembolso de impuestos que le corresponde.

I hereby authorize the court or their duly appointed officer to contact my bank or any of my creditors and receive financial information regarding any of my accounts. Por medio de la presente doy mi autorización al Actuario del Tribunal o a su oficial debidamente nombrado para que se comunique con mi banco o cualquiera de mis acreedores y reciba información financiera relacionada con mis cuentas.

I DECLARE UNDER PENALTY OF PERJURY THAT THE ABOVE STATEMENT IS TRUE TO THE BEST OF MY KNOWLEDGE.

Executed on _____ at _____ Signature _____

DECLARO BAJO PENA DE PERJURIO QUE LO ANTEDICHO ES VERDADERO Y CORRECTO A MI MAYOR SABER Y ENTENDER.

Firmado el día de _____ en _____ Firma _____

PRE-SCREENING RECOMMENDATION:

Appointment of Counsel with Review at Conclusion of Proceedings _____ Near Indigent Panel _____ Retain Own Counsel _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In Re KENNETH HUMPHREY, On Habeas Corpus.	For Court Use Only
	Supreme Court No. S247278 1 ST DCA Div. Two Case No. A152056 San Francisco Sup. Ct. No. 17007715

PROOF OF SERVICE

I, the undersigned, declare as follows:

I am employed in the County of San Diego, over eighteen years of age and not a party to the within action. My business address is 330 West Broadway, Suite 860, San Diego, CA 92101.

On October 10, 2018, a member of our office served a copy of the within **APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF AND EXHIBIT 1** to the interested parties in the within action by placing a true copy thereof enclosed in a sealed envelope, with postage fully prepaid, in the United States Mail, addressed as follows:

Alec Karakatsanis Civil Rights Corps 910 17th Street NW Suite 500 Washington, DC 20006	Jeffrey Gordon Adachi Public Defenders Office 2431 Fillmore St San Francisco, CA 94115
Chesa Boudin Office of the Public Defender 555 Seventh Street San Francisco, CA 94103	Katherine Claire Hubbard Civil Rights Corps 910 17th Street NW, Suite 200 Washington, DC 20006
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Dale Christopher Miller Law Office of Dale Miller Post Office Box 786 Santa Rosa, CA 95402	San Francisco Superior Court Civic Center Courthouse 400 Mcallister Street Rm. 103, Window 28 San Francisco, CA 94102-4514

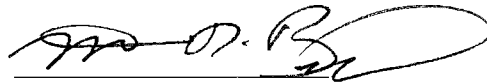
I electronically served the same referenced above document to the following entities:

ATTORNEY GENERAL'S OFFICE: AGSD.DAService@doj.ca.gov
 APPELLATE DEFENDERS, INC: eservice-criminal@adi-sandiego.com

I also served the following parties electronically via www.truefiling.com:

COURT OF APPEAL, FIRST APPELLATE DISTRICT:
First.District@jud.ca.gov

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on October 10, 2018 at 330 West Broadway, San Diego, CA 92101.

A handwritten signature in black ink, appearing to read "M. D. Balagtas", written over a horizontal line.

Marites D. Balagtas