Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically RECEIVED on 4/8/2022 at 11:01:27 PM

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 4/8/2022 by Florentino Jimenez, Deputy Clerk

IN THE SUPREME COURT OF CALIFORNIA

IN RE JOHN HARRIS, JR., On Habeas Corpus.	Case No.: S272632

OPENING BRIEF ON THE MERITS

Court of Appeal Case No. A162891
San Mateo Superior Court Case No. 21-NF-002568A
The 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

TABLE OF CONTENTS

TABLE OF CONTENTS 2
TABLE OF AUTHORITIES 4
ISSUES ON REVIEW 6
INTRODUCTION 7
FACTUAL AND PROCEDURAL HISTORY 9
ARGUMENT 13
I. THE PROSECUTION FAILED TO MEET THE HIGH EVIDENTIARY STANDARDS REQUIRED BY SECTION 12 FOR PRETRIAL DETENTION. 13
A. "The Facts Are Evident or the Presumption Great" Standard Requires Evidence of Reasonable, Credible, and Solid Value. 14
B. The Requirement of Clear and Convincing Evidence of Substantial Likelihood of Great Bodily Harm Requires Proof of an Identified and Articulable Threat. 17
C. Proffer Is Insufficient to Meet These Evidentiary Standards. . 20
II. THE USE OF PROFFER DID NOT PROVIDE SUFFICENT SAFEGUARDS AGAINST VIOLATING PETITIONER'S STATE AND FEDERAL DUE PROCESS RIGHTS AT HIS DETENTION HEARING. 24
A. State and Federal Due Process Analysis Requires a Balancing of Interests. 25
B. Due Process Requires Procedural Safeguards to Ensure that Pretrial Arrestees Are Not Erroneously Deprived of Liberty. . 28
1. The Use of Proffer Raises a Substantial Risk of Erroneous Deprivation of Liberty. 29
2. The Right to Cross-Examination Is a Necessary Procedural Safeguard at Detention Hearings. 34
3. Notice and a Timely Hearing are Necessary Procedural Safeguards for Detention Hearings and Required Under California's Due Process Framework. 36
4. Timely Discovery Is Necessary Before a Detention Hearing. 37

5. A Necessary Safeguard After a Detention Order Is Expedited Appellate Review. 38

6. The Necessity of Procedural Safeguards. 39

III. THE REMEDY OF REMAND FASHIONED BY THE COURT OF APPEAL IS INSUFFICIENT TO ADDRESS THE HARM PETITIONER HAS SUFFERED 40

CONCLUSION 42

WORD COUNT CERTIFICATE 44

TABLE OF AUTHORITIES

CASES

Bandy v. United States (1960) 81 S.Ct. 197 27
Birt v. Superior Court (1988) 34 Cal.App.3d 934 18
Brady v. Maryland (1963) 373 U.S. 83 37
Cafeteria & Restaurant Workers Union v. McElroy (1961) 367 U.S. 886 . 26
Cal. Shoppers, Inc. v. Royal Globe Ins. Co. (1985) 175 Cal.App.3d 1 18
Conservatorship of O.B. (2020) 9 Cal.5th 989 23
Gray v. Superior Court (2005) 125 Cal.App.4th 629 ..... 32, 36, 39
In re Angelia P. (1981) 28 Cal.3d 908 17
In re Avignone (2018) 26 Cal.App.5th 195 13
In re Brown (2022) 76 Cal.App.5th 296 25
In re Harris (2021) 71 Cal.App.5th 1085 ..... passim
In re Humphrey (2021) 11 Cal.5th 135 ..... passim
In re Podesto (1976) 15 Cal.3d 921 18
In re Weiner (1995) 32 Cal.App.4th 441 13
In re White (2018) 21 Cal.App.5th 18 17
In re White (2020) 9 Cal.5th 455 ..... passim
Jauregi v. Superior Court (1999) 72 Cal.App.4th 931 21
Keeler v. Superior Court (1970) 2 Cal.3d 619 20
Mathews v. Eldridge (1976) 424 U.S. 319 ..... 25, 26, 27, 28
Menifee v. Superior Court (2020) 57 Cal.App.5th 343 35
Morrissey v. Brewer (1972) 408 U.S. 471 ..... 25, 26
People v. Gutierrez (2013) 214 Cal.App.4th 343 37
People v. Litmon (2008) 162 Cal.App.4th 383 ..... 27, 33, 41
People v. Morris (1988) 46 Cal.3d 1 18
People v. Naidu (2018) 20 Cal.App.5th 300 ..... 31, 32, 33
People v. Ramirez (1979) 25 Cal.3d 260 ..... 26, 27, 28, 36
People v. Reynolds (1984) 152 Cal.App.3d 42 34
People v. Superior Court (Vasquez) (2018) 27 Cal.App.5th 36 40
Schraer v. Berkeley Property Owners' Assn. (1989) 207 Cal.App.3d 719 . 23
Sharp v. Hoffman (1889) 79 Cal. 404 34
Silicon Valley Taxpayers' Assn., Inc v. Santa Clara County Open Space Authority (2008) 44 Cal.4th 431 20
Stanton v. Superior Court (1987) 193 Cal.App.3d 265 37
United States v. Fernandez-Alfonso (9th Cir. 1987) 813 F.2d 1571 39
United States v. Salerno (1987) 481 U.S. 739 ..... passim
Yost v. Forestiere (2020) 51 Cal.App.5th 509 22
Zadvydas v. Davis (2001) 533 U.S. 678 24

STATUTES

18 U.S.C. § 3145 38
Evid. Code, §140 20
Evid. Code, § 300 21
Evid. Code, § 400 22
Evid. Code, § 401 ..... 22, 30
Evid. Code, § 402 22
Pen. Code, § 187 9
Pen. Code, § 205 9
Pen. Code, § 664 9
Pen. Code, § 859b 31, 37, 42
Pen. Code, § 1203.075 9
Pen. Code, § 1274 37
Pen. Code, § 12022 9
Prob. Code, § 1827 23

OTHER AUTHORITIES

3 Witkin, California Evidence (3d ed.1986) § 1873 34
5 Wigmore, Evidence (3d ed.1940) § 1367 34
Cal. Law Revision Com. com., Deering's Ann. Evid. Code foll. § 140 21
Cal. Law Revision Com. com., Deering's Ann. Evid. Code foll. § 401 22
CALCRIM 222 21

RULES

Cal. Rules of Court, rule 8.500(c)(2) 9

CONSTITUTIONAL PROVISIONS

Cal. Const., art. I, § 12 ..... passim
Cal. Const., art. I, § 28 ..... 16, 34, 35

IN THE SUPREME COURT OF CALIFORNIA

IN RE JOHN HARRIS, JR., On Habeas Corpus.	Case No.: S272632

OPENING BRIEF ON THE MERITS

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

Petitioner, John Harris, Jr., respectfully submits this Opening Brief on the Merits following review ordered on petitioner's motion.

ISSUES ON REVIEW

In the Order of review, the Court limited the issues to be briefed and argued as follows:

What evidence may a trial court consider at a bail hearing when evaluating whether the facts are evident or the presumption great with respect to a qualifying charged offense, and whether there is a substantial likelihood the person's release would result in great bodily harm to others? (Cal. Const., art. I, § 12, subd. (b).)

INTRODUCTION

Petitioner has a constitutional right to release on reasonable bail unless and until the prosecution demonstrates to the court, with credible evidence, tested by the adversarial process, that the "facts are evident or the presumption great" and that granting bail would result in a "substantial likelihood of great bodily harm to others." In this case, the prosecution presented no such evidence, and it is impermissible for petitioner to be detained without bail based on mere assertions of counsel.

A trial court has three options when an arrestee is brought before it: own recognizance release, release on affordable bail, or detention without bail pursuant to article I, section 12 of the California Constitution (hereinafter "Section 12.") If the court detains the arrestee pursuant to Section 12, a high evidentiary burden must be met and procedural safeguards are required to ensure that an arrestee's state and federal due process rights are not violated.

This case concerns only those "limited exceptions" where detention without bail is sought under Section 12. (*United States v. Salerno* (1987) 481 U.S. 739, 755.) In those "narrow circumstances," the California Constitution and this Court have set forth some procedural framework and substantive standards necessary for a criminal defendant to be lawfully detained pretrial. (Cal. Const., art. I, § 12; *In re Humphrey* (2021) 11

Cal.5th 135, 143; *In re White* (2020) 9 Cal.5th 455, 470-471.) This Court is presented with the issue of what evidence a trial court may consider in determining whether those standards have been met.

Petitioner contends that the Court of Appeal erred in finding that his detention hearing complied with federal and state guarantees of due process and the standards of Section 12, as the bail hearing that transformed into a detention hearing lacked procedural safeguards. In particular, the court erred in finding the prosecution's use of untested, unsworn statements, which the trial court called a "proffer," was constitutional and sufficient to meet Section 12's evidentiary standards.

The core component of due process is *fairness*—if the government seeks to deprive someone presumed innocent under the law of so fundamental a right as liberty, the procedures used to secure that deprivation must be fair. Petitioner's detention hearing did not afford him the necessary procedural safeguards to be fair. His detention hearing 1) lacked evidence, 2) was not timely noticed, 3) lacked discovery, including but not limited to exculpatory evidence, 4) denied him the right of cross-examination, 5) did not provide for an expediated appellate process, and 6) did not provide for a sufficient remedy. Petitioner was permitted to have counsel and present evidence. However, given the lack of procedural safeguards, including the use of unreliable, untested, unsworn statements of

the prosecutor, the proceedings used to deny petitioner his liberty were not fair. Where a violation of due process results in the prolonged unlawful detention of an arrestee, the appropriate remedy is dismissal or release.

FACTUAL AND PROCEDURAL HISTORY[1]

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.

The prosecution alleged that petitioner broke into a woman's home, tied her up, raped her, and cut her throat. Several scarves were left at the scene. After 32 years, testing on DNA from the crime scene allegedly linked petitioner with the crime.

Petitioner's bail was set at $5 million at arraignment, despite a pretrial services report recommending that petitioner be released on his own recognizance with enhanced monitoring. On April 16, 2021, petitioner

[1] Petitioner draws the relevant facts and procedural history from the Court of Appeal opinion. (Cal. Rules of Court, rule 8.500(c)(2).) Since this case presents issues of law rather than fact, petitioner herein provides an abbreviated factual summary.

moved the trial court to reduce bail to an affordable amount or release him on his own recognizance with appropriate conditions.

The prosecution filed an opposition in which they detailed the alleged facts of the case and included information 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 more than three decades since the alleged offense. One of petitioner's ex-wives stated that petitioner kept a collection of scarves and told her that he used them for tying arms and legs. She told petitioner she was not into bondage and that type of sexual activity did not occur during their relationship. (Petition for Writ of Habeas Corpus [hereinafter "Petition"], Exh. G, p. 55.) One ex-girlfriend described consensual role-playing during sex in which petitioner would tie her up and enact rape fantasies. Another ex-girlfriend also described consensual sexual encounters where petitioner would tie her to the bed and use scarves to gag her. Another of petitioner's ex-wives stated that petitioner occasionally placed a scarf over her mouth and eyes but that he was not that into bondage. (Petition, Exh. G, p. 56.) Finally, a woman who briefly dated petitioner reported that petitioner told her that he liked to be tied up during sex, although she never pursued a sexual relationship with him. (Petition, Exh. G, p. 57.) The prosecution also presented facts of petitioner's 1991 petty theft conviction in which he

pulled a scarf off a woman's neck and ran away. Petitioner has no other criminal history.

The trial court held a bail hearing on April 20, 2021. Petitioner argued that he was indigent and could not afford the $5 million bail. During the bail hearing, the prosecution argued that petitioner should be detained without bail. Petitioner argued that to impose a no-bail pretrial detention, the prosecution must provide evidence of risk of flight or risk to public safety.

The prosecution presented no evidence, but rather relied on the unsworn statements in their written opposition and to the court. Petitioner objected to the untested, unsworn statements, which the trial court called a proffer. He also objected that he had not received exculpatory discovery, such as information that two other people were identified as the rapist shortly after the crime, including one who had been arrested for rape and who demonstrated a modus operandi similar to that displayed in the charged crime.

Petitioner further argued that he was missing discovery regarding the DNA evidence because the discovery received indicated that both petitioner and another person were implicated by DNA testing, and that he was missing exculpatory evidence related to another suspect who left a note on the victim's car saying "gotcha." (Petition, Exh. I, pp. 97-98, 100.)

Petitioner was also not provided the photographs that were presented to the court prior to the hearing and the reports summarizing the statements of petitioner's ex-girlfriends and ex-wives were provided to the defense the day before the hearing. (Petition, Exh. I, p 100.)

The victim, who was not identified and remains confidential, made an unsworn statement, asserting that 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.) While the prosecution initially requested that petitioner's bail remain at $5 million, during the hearing, the prosecutor requested that petitioner be detained without bail instead. (Petition, Exh. I, p. 90.) At the conclusion of the hearing, the trial court ordered petitioner detained without bail.

Petitioner filed a Petition for Writ of Habeas Corpus with the Court of Appeal, First Appellate District, on June 21, 2021. After briefing and oral argument, the Court of Appeal issued its published opinion on November 29, 2021. (*In re Harris* (2021) 71 Cal.App.5th 1085.) The Court of Appeal held "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." (*Id*. at p. 1101.) However, the court remanded the matter for the trial court to determine whether any less restrictive alternatives to detention would suffice to

protect the government's interests. Petitioner filed a Petition for Review with this Court, which was granted on March 9, 2022.

ARGUMENT

It is elemental that "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." (*Salerno, supra,* 481 U.S. at p. 755.) Pretrial detention is not preferred and should only be imposed under certain limited circumstances. (*In re Avignone* (2018) 26 Cal.App.5th 195, 203, quoting *In re Weiner* (1995) 32 Cal.App.4th 441, 444; *Salerno, supra,* 481 U.S. at pp. 749, 755.)

When an arrestee appears before the trial court, the court should release him on his own recognize or affordable bail, except in limited circumstances when detention without bail is appropriate. (*Humphrey, supra,* 11 Cal.5th at p. 143.) In those limited circumstances where pretrial detention is sought, the prosecution must first meet the evidentiary burdens of Section 12 and then comply with due process. Here, neither standard was met.

I. THE PROSECUTION FAILED TO MEET THE HIGH EVIDENTIARY STANDARDS REQUIRED BY SECTION 12 FOR PRETRIAL DETENTION.

Pretrial detention in non-capital violent felony cases should only be imposed where "the facts are evident or the presumption great" *and* there is clear and convincing evidence of a "substantial likelihood" of "great bodily

harm to others." (Cal. Const., art. I, § 12, subd. (b).)

Additionally, *Humphrey* requires that the trial court first find "by clear and convincing evidence that no condition short of detention could suffice and then ensure the detention otherwise complies with statutory and constitutional requirements," including due process. (*Humphrey, supra*, 11 Cal.5th at p. 143.) The issue then becomes, what evidence is sufficient to meet these constitutional standards?

A. "The Facts Are Evident or the Presumption Great" Standard Requires Evidence of Reasonable, Credible, and Solid Value.

This Court has defined Section 12's language that "the facts are evident or the presumption great" as requiring "evidence that would be sufficient to sustain a hypothetical verdict of guilt on appeal." (*White, supra,* 9 Cal.5th at p. 463.) As *White* noted:

> 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.

(*Id.* at p. 463*, 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. (See *Id.* at p. 471.)

In *White*, that evidentiary standard was met by evidence presented at the preliminary hearing, which consisted of "sworn testimony from the victim herself and an audio recording of White's interviews with the investigating detectives – and … White had the opportunity to cross-examine witnesses and offer evidence." (*White, supra,* 9 Cal.5th at pp. 459, 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 . . . 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.

(*White, supra,* 9 Cal.5th at p. 471, *emphasis added*.)

Thus, a non-evidentiary hearing with limited procedural safeguards is simply not sufficient to meet this standard.

While dicta in *Humphrey* noted that the trial court should "assume the truth of the criminal charges" for the purposes of determining bail

(*Humphrey, supra*, 11 Cal.5th at pp. 152-153), this is not a substitute for meeting the evidentiary burden of Section 12. Indeed, that statement was made in reference to article 1, section 28 of the California Constitution bail considerations, not Section 12 detention hearings. There is nothing in *Humphrey* that authorizes a trial court to sidestep the rigorous evidentiary requirements of section 12. Rather, the opposite is true. *Humphrey* emphasizes the requirement that any pretrial detention comport with procedural protections and federal and state principles of due process. (*Id*. at p. 143.)

This body of law makes clear that, in order to meet the Section 12 burden, evidence that is "reasonable, credible, and solid" is required. Here, the unsworn, untested statements presented to the trial court were speculative. The trial court defined these statements as proffer. As discussed in Section II, subsection C., proffered evidence is, by definition, speculative as to what the evidence would ultimately show and untested because the arrestee is unable to cross-examine the witness on the statements or obtain exculpatory statements from the witness. Thus, the prosecution failed to meet this evidentiary burden and, as such, the trial court's detention order was unlawful.

B. The Requirement of Clear and Convincing Evidence of Substantial Likelihood of Great Bodily Harm Requires Proof of an Identified and Articulable Threat.

In a Section 12 detention hearing, the prosecution must show by clear and convincing evidence that there is a substantial likelihood that great bodily harm would occur if the arrestee was released. "Clear and convincing evidence requires a specific type of showing – one demonstrating a '"high probability"' that the fact or charge is true." (*White, supra,* 9 Cal.5th at p. 467.) It requires that the evidence be "so clear as to leave no substantial doubt," or "sufficiently strong to command the unhesitating assent of every reasonable mind." (*In re Angelia P.* (1981) 28 Cal.3d 908, 919.)

As noted by the *White* Court of Appeal decision affirmed by this Court:

> This standard requires more than a mere possibility, and it cannot be based on speculation about the general risk to public safety if a defendant is released. Great bodily harm to others must be a substantial likelihood. While the term "cannot . . . be reduced to a rigid formula susceptible to mechanical application" [citation omitted], we observe that the standard requires more than simply a violent history. The trial court must be convinced that future violence amounting to great bodily injury is substantially *likely* if the defendant were released on bail.

(*In re White* (2018) 21 Cal.App.5th 18, 28, *emphasis in original*.)

In short, this standard requires a high threshold of evidence, not

speculation.

It is the duty of the reviewing court "to discard – as unreasonable – inferences which derive their substance from guesswork, speculation, or conjecture [citations omitted]." (*Birt v. Superior Court* (1988) 34 Cal.App.3d 934, 938.) A reasonable inference "may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence." (*People v. Morris* (1988) 46 Cal.3d 1, 21, quoting *California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 45.)

Thus, as noted in *Salerno*, quoted with approval in *Humphrey*, the government must prove by clear and convincing evidence that "an arrestee presents an identified and articulable threat to an individual or the community," before preventive detention can be ordered. (*Humphrey, supra*, 11 Cal.5th at p. 153, quoting *Salerno, supra*, 481 U.S. at p. 751.) Moreover, "courts should be somewhat cautious in basing a denial of bail on the alleged dangerous propensities of the defendant." (*In re Podesto* (1976) 15 Cal.3d 921, 936.)

Here, the court relied on unreliable, untested statements by the prosecution in detaining petitioner. These statements included allegations that petitioner had a scarf fetish. The Court of Appeal believed consensual

acts involving scarves, "showed that petitioner consistently sought to exert sexual control over women involving fantasized violence and nonconsent." (*Harris, supra*, 71 Cal.App.5th at p. 1103.) The fact that the appellate court was willing to make such a speculative, sexist, and unsupported assumption demonstrates the issue with allowing such unreliable information at a detention hearing.

According to the prosecution's opposition, petitioner's wife of eight years declined to participate in any use of scarves or bondage during sex and petitioner respected that choice. (Petition, Exh. G, p.55.) Another ex-wife stated that petitioner was not into bondage. (Petition, Exh. G, p.56.) One ex-girlfriend expressed that it was actually petitioner who liked to be tied up. (Petition, Exh. G, p.57.) These are the untested, unsworn statements of the women that the *Harris* court believes were allegedly victimized through either consensual sex acts or petitioner's respect for their refusal to engage in such sex acts. They were not made available to provide context or further details to the trial court that would significantly impact the weight of the information presented. Based on these unreliable hearsay statements the appellate court then filled in the missing information with its own assumptions about what occurred. Such speculation is insufficient to meet the exacting standard of clear and convincing evidence. Therefore, the appellate court's decision was incorrect and should be

reversed.

C. Proffer Is Insufficient to Meet These Evidentiary Standards.

Proffer is, by nature, speculative. It is an interpretation of what counsel thinks evidence might show. The *Harris* court states that Section 12 does not define evidence as "evidence admissible at trial." (*Harris, supra*, 71 Cal.App.5th at p. 1097.) However, the meaning of the term "evidence" in Section 12 is not ambiguous and the plain meaning must govern. (See *Silicon Valley Taxpayers' Assn., Inc v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 444-445.) To the extent that there is ambiguity in the language, the rule of lenity applies:

> It is the policy of this state to construe a penal statute as favorably to the defendant as its language and the circumstances of its application may reasonably permit; just as in the case of a question of fact, the defendant is entitled to the benefit of every reasonable doubt as to the true interpretation of words or the construction of language used in a statute.

(*Keeler v. Superior Court* (1970) 2 Cal.3d 619.)

So, any ambiguity in the term "evidence" should be construed in the manner most favorable to petitioner. Section 12 does not specifically state "proffered evidence." Therefore, the definition of evidence pursuant to Evidence Code section 140 should be followed. (See Evid. Code, § 300.)

Evidence Code section 140 defines "evidence" as "testimony,

writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact." The Law Revision Commission Comments to that section explain that the term refers to admissible evidence or otherwise inadmissible evidence that is received by the court without objection. (Cal. Law Revision Com. com., Deering's Ann. Evid. Code foll. § 140.) The definition does not include "proffer," or a summary of asserted facts presented by counsel. This definition is confirmed by the Judicial Council's California Criminal Jury Instructions, stating that "[n]othing that the attorneys say is evidence." (CALCRIM 222.)

It is in this context that this Court should consider Evidence Code section 300. That provision states that, "[e]xcept as otherwise provided by statute, [the Evidence Code] applies in every action before the Supreme Court or a court of appeal or superior court . . ." except for grand jury proceedings. (Evid. Code, § 300.) In *Jauregi v. Superior Court* (1999) 72 Cal.App.4th 931, 939, the court found that, based on Evidence Code section 300, hearsay was not admissible to prove standing in forfeiture proceedings. The court held that where the law was silent as to "the nature of the evidence that may be admitted," section 300 must control. (*Ibid*.) The rules of evidence should also apply at a detention hearing.

Proffered evidence is a procedure to determine if evidence is

admissible. It is defined as "evidence, the admissibility or inadmissibility of which is dependent upon the existence or nonexistence of a preliminary fact." (Evid. Code, § 401.) A "'preliminary fact' means a fact upon the existence or nonexistence of which depends the admissibility or inadmissibility of evidence." (Evid. Code, § 400.) As the Law Revision Commission noted, "'[p]roffered evidence' includes such matters as the testimony to be elicited from a witness who is claimed to be disqualified, testimony or tangible evidence claimed to be privileged, and any other evidence to which objection is made." (Cal. Law Revision Com. com., Deering's Ann. Evid. Code foll. § 401.) Section 402 provides the procedure for adjudicating the existence or nonexistence of a disputed preliminary fact. These statutes collectively define the procedures used to determine whether evidence is admissible or inadmissible.

Lastly, in other California contexts in which substantial rights are implicated, evidence, not proffer, is required to meet the clear and convincing standard. For example, civil harassment restraining orders require a finding by clear and convincing evidence. In *Yost v. Forestiere* (2020) 51 Cal.App.5th 509, 521, the court noted that 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. In *Schraer v. Berkeley Property Owners' Assn.* (1989) 207

Cal.App.3d 719, 731, the court found a violation of due process where the trial court "based its decision entirely on written declarations, newspaper articles, and the arguments of counsel," rather than permit the introduction of oral testimony.

Similarly, in contested conservatorship proceedings, the conservatee is entitled to an evidentiary hearing. (Prob. Code, § 1827; see *Conservatorship of O.B*. (2020) 9 Cal.5th 989, 1001-1002.) Therefore, proffered information should not be allowed where an individual's liberty is at stake.

Here, California has recognized the need to protect arrestees like petitioner from undue pretrial detention. The state constitution sets a high standard that must be met before detention can be ordered. This standard requires that evidence used to support detention be of reasonable, credible, and solid value sufficient to sustain a guilty verdict on the charged crimes. The prosecution did not prove that "the facts are evident or the presumption great" regarding the alleged crimes because the information presented at petitioner's detention hearing consisted of unreliable and untested hearsay statements by the prosecutor and unsworn statements by the victim. The inability to cross-examine witnesses undermines the credibility and reliability of the information presented.

The state constitution also requires that the prosecution prove a "substantial likelihood of great bodily harm" by clear and convincing evidence. No evidence was presented against petitioner to meet this standard. Rather, the prosecution chose to proceed by summarizing investigative reports of witness statements, which contained multiple layers of hearsay, and referred to this summary as a proffer. Therefore, the proffered evidence failed to meet either standard and the appellate court erred in finding otherwise.

II. THE USE OF PROFFER DID NOT PROVIDE SUFFICENT SAFEGUARDS AGAINST VIOLATING PETITIONER'S STATE AND FEDERAL DUE PROCESS RIGHTS AT HIS DETENTION HEARING.

"Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." (*Zadvydas v. Davis* (2001) 533 U.S. 678, 690.) As this Court recently noted, allowing for pretrial detention without procedural safeguards "would violate state and federal principles of equal protection and due process that must be honored in practice, not just in principle." (*Humphrey, supra,* 11 Cal.5th at p. 143.) However, exactly what procedural safeguards are necessary to comply with these constitutional guarantees at detention hearings remains unsettled.

In the federal context, the Supreme Court found that procedural safeguards provided for by the Federal Bail Reform Act were sufficient. In

Salerno, the high Court noted that the defendant is entitled to "a full-blown adversary hearing," the presence of counsel, the ability to testify and present witnesses, cross-examine witnesses and to expedited appellate review. (*Salerno, supra,* 481 U.S. at pp. 743, 751.)

Unlike in federal court, California detentions are not governed by statute. *Humphrey* established the broad constitutional framework that applies, but "declined to address in detail the constitutional requirements for such a no-bail order." (*In re Brown* (2022) 76 Cal.App.5th 296, 308.) The procedures used in petitioner's hearing, including the reliance on statements by the prosecution, lack of discovery, lack of notice, and lack of opportunity for petitioner to test the evidence or cross-examine the complaining witness, violated petitioner's rights to due process under both the state and federal standards.

A. State and Federal Due Process Analysis Requires a Balancing of Interests.

"Once it is determined that due process applies, the question remains what process is due." (*Morrissey v. Brewer* (1972) 408 U.S. 471, 481.) Due process "is flexible and calls for such procedural protections as the particular situation demands." (*Mathews v. Eldridge* (1976) 424 U.S. 319, 334, quoting *Morrissey, supra*, 408 U.S. at p. 481.) What due process requires depends on the circumstances, including the nature of the deprivation and the government interests at stake. (*Morrissey, supra*, 408

U.S. at p. 481, quoting *Cafeteria & Restaurant Workers Union v. McElroy* (1961) 367 U.S. 886, 895.) The *Mathews* court laid out a three-pronged analysis for evaluating due process claims:

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: *First*, the private interest that will be affected by the official action; *second*, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and *finally*, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

(*Mathews, supra,* 424 U.S. at pp. 334-335, *emphasis added*.)

California due process mandates an even more expansive approach. In *People v. Ramirez* (1979) 25 Cal.3d 260, 267, this Court noted where federal due process interpretation comes up short: "The federal approach [] undervalues the important due process interest in recognizing the dignity and worth of the individual by treating him as an equal, fully participating and responsible member of society." The *Ramirez* court held "that application of the [due process clauses of the California Constitution] must be determined in the context of the individual's due process liberty interest in freedom from arbitrary adjudicative procedures."

Ramirez's analytical approach mirrors *Mathews*, except that it

includes an additional prong: consider 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 governmental official." (*Ramirez, supra,* 25 Cal.3d at p. 267.) The *Ramirez* court noted that the principal value fostered by procedural safeguards "is that of *promoting accuracy and reliability in governmental decision-making*." (*Id*. at p. 275, *emphasis added*.)

The first prong of the *Mathews/Ramirez* analysis is not in dispute here. 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.) Indeed, it is not merely the deprivation itself that is of concern.

> The wrong done by denying release is not limited to the denial of freedom alone. That denial may have other consequences. In case of reversal, he will have served all or part of a sentence under an erroneous judgment. Imprisoned, a man may have no opportunity to investigate his case, to cooperate with his counsel, to earn the money that is still necessary for the fullest use of his right to appeal.

(*Bandy v. United States* (1960) 81 S.Ct. 197, 198.)

The *Humphrey* court also detailed the "immense and profound" harms caused by unnecessary pretrial detention: impaired ability to prepare a

defense, heightened risk of losing a home, job, or custody of a child, correlation with a higher likelihood of reoffending, as well as the substantial cost to the state for housing and feeding arrestees. (*Humphrey, supra*, 11 Cal.5th at p. 147.) Given the gravity of petitioner's right to pretrial liberty, the government's interests in detaining him must be exceedingly high and the procedural safeguards employed to do so must be expansive.

B. Due Process Requires Procedural Safeguards to Ensure that Pretrial Arrestees Are Not Erroneously Deprived of Liberty.

The second prong of the *Mathews/Ramirez* analysis and the third prong of *Mathews*/fourth prong of *Ramirez* must be evaluated together, as they involve the balancing of procedural safeguards. The second prong looks at the risk of erroneous deprivation through the procedures used. The third prong of *Mathews*/fourth prong of *Ramirez* requires that this must be balanced against the government's interests, including the burdens of implementing such safeguards. Regarding the second prong, without clear statutory guidelines or procedural safeguards, the court may rely on clearly unreliable and untested information in depriving an arrestee of his fundamental right to liberty, raising a substantial risk of erroneous deprivation.

Here, petitioner's detention hearing lacked several vital procedural

safeguards that would ensure that the evidence before the court was of reasonable, credible, and solid value. Further, the burdens of imposing such safeguards are relatively minor and still protect the government's interest in ensuring public safety. In order for this Court to determine if the use of "proffer" violated due process, the Court must consider the detention hearing's procedures as a whole. While petitioner was provided certain safeguards, such as the right to counsel, the right to present evidence, and the right to testify, he was denied discovery, notice, the ability to cross-examine, and an expedited appellate review, thus violating his rights to due process.

1. The Use of Proffer Raises a Substantial Risk of Erroneous Deprivation of Liberty.

The use of proffer at detention hearings raises the risk of erroneous deprivation of liberty, as proffer is speculative and unreliable. Relying on proffer, a trial court may base a detention order on information that is not accurate. Detention hearings requiring sworn testimony, allowing for cross-examination, requiring notice and discovery so an arrestee has a meaningful opportunity to investigate the prosecution's claims and present contrary evidence, all serve to mitigate the risk of erroneous deprivation of liberty.

Further, the government has no legitimate interest in erroneously detaining an arrestee who does not pose a public safety risk as defined by

Section 12. Unnecessarily detaining pretrial arrestees imposes financial and societal costs on the state. Rather, the government has an interest in limiting pretrial detention to those individuals who truly pose a substantial likelihood of great bodily harm.

Here, the prosecution relied exclusively on their own summaries, which they referred to as "proffer," of the charged crimes and petitioner's sexual preferences in the three decades since the charged crimes occurred. This was not proffer, as its admissibility does not depend on the existence of a preliminary fact. (Evid. Code, § 401.) This was an effort by the prosecution to enter into the record harmful and untested information which increased the risk of an erroneous deprivation of petitioner's liberty.

Moreover, the prosecution failed to include necessary context and exculpatory information, such as the fact that other individuals were identified as suspects shortly after the crime occurred and that DNA analysis turned up another possible suspect. (Petition, Exh. I, pp. 97-98.) As noted above, the prosecution summarized unsworn statements of petitioner's former sexual partners describing consensual sexual encounters. That unverified, untested and unreliable information was presented to the court as three levels of hearsay. The omissions by the prosecution and the multiple levels of hearsay undermine the credibility of the information that the trial court relied on.

Additionally, requiring live witnesses to prove the facts of the case is not so onerous when considered in light of the fact that in any felony case, the defendant is entitled to a preliminary hearing within 10 days of arraignment, at which time the prosecution must be prepared to present admissible evidence sufficient to establish probable cause. (Pen. Code, § 859b.) By the time charges are filed and a detention hearing is held, the prosecution should be well prepared to defend their charging decision with evidence like in a preliminary hearing, particularly given that no-bail detention should only be sought in a small number of cases. Also, the court could establish procedures for determining which facts are actually in dispute through a meet and confer process to limit the amount of evidence necessary to be presented, similar to procedures utilized in preliminary hearings and motions to suppress.

Lastly, the courts have stated that relying on counsel's statements at bail hearings exposes arrestees to significant risk of erroneous deprivation. In *Naidu*, the petitioners faced charges relating to the alleged fraudulent use of a contractor's license. (*People v. Naidu* (2018) 20 Cal.App.5th 300, 305.) At the bail hearing, petitioners were released on their own recognizance but had their professional licenses suspended as a condition of release. (*Id*. at pp. 305-306.) On appeal, that condition of release was found to have violated petitioners' due process rights. (*Id*. at p. 306.) The

court reasoned that 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 found that there must be "presentation of evidence" at the bail hearing and that "statements by counsel are not evidence." (*Naidu, supra*, 20 Cal.App.5th at p. 313, *emphasis added*.) The court stated "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*.) The *Harris* court dismissed *Naidu's* relevance by stating that "*Naidu* did not involve a section 12(b) offense." (*Harris, supra,* 71 Cal.App.5th at p. 1100.) The appellate court claimed 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." (*Ibid*.) 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." (*Harris, supra,* 71 Cal.App.5th at p. 1100.) In making this argument, appellate 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.) Multiple courts have held that certain bail conditions short of detention, such as the temporary suspension of a professional license, require a properly noticed evidentiary hearing where the defendant retains his right to confront the evidence and witnesses against him. Logic dictates that *at least* those safeguards must also accompany an attempt to deprive a defendant of his pretrial liberty. Therefore, the appellate court erred in finding that the use of counsel's statements as a substitute for evidence complied with due process.

2. The Right to Cross-Examination Is a Necessary Procedural Safeguard at Detention Hearings.

Related to the requirement that reliable evidence be presented is the requirement that a defendant be allowed to cross-examine witnesses. This would significantly guard against the risk of erroneous deprivation. Cross-examination has been described as "the greatest legal engine ever invented for the discovery of truth." (*People v. Reynolds* (1984) 152 Cal.App.3d 42, 46 quoting 5 Wigmore, Evidence (3d ed.1940) § 1367, p. 29.) The purpose of cross-examination is "to test the credibility, knowledge and recollection of the witness" (*Sharp v. Hoffman* (1889) 79 Cal. 404, 408) and "to elicit additional evidence." (3 Witkin, California Evidence (3d ed.1986) § 1873, p. 1827.) In finding that the order of pretrial detention was proper in *White*, the court relied on the fact that the defendant had been provided an opportunity to cross-examine the witnesses against him at the preliminary hearing. (*White, supra*, 9 Cal.5th at p. 470.)

Here, the victim was allowed to address the court under article I, section 28(b) of the California Constitution, also known as Marsy's law. She was not sworn and petitioner was denied the ability to cross-examine her. However, nothing in section 28(b) prohibits cross-examination of a victim who chooses to address the court. Section 28(b)(8) gives a victim the right "[t]o be heard, upon request, at any proceeding . . ." Section 28(f)(3) requires that a victim be given notice "and reasonable opportunity

to be heard on the matter" before a defendant in a serious felony case may be released on bail.

Neither of these provisions, nor anything else in section 28 prohibits cross-examination of anyone—victim or otherwise—who chooses to address the court on a matter effecting a defendant's constitutional rights. To hold otherwise would violate a defendant's right to due process and confrontation. (See *Menifee v. Superior Court* (2020) 57 Cal.App.5th 343, 356-358, holding that the right to confrontation applies to proceedings before jury trial.) By denying petitioner the opportunity to cross-examine the victim and the individuals referenced in the prosecution's summaries, the trial court denied the ability to test the credibility, knowledge, and recollection of the witnesses and was unable to elicit exculpatory evidence.

Further, requiring evidence rather than statements of counsel to support a detention order imposes a minimal burden on the government. Here, the victim was present and available for cross-examination. In preliminary hearings, which require a lower burden of proof than clear and convincing evidence, defendants have a right to cross-examination. Therefore, petitioner should have been afforded the opportunity to cross-examine and confront witnesses.

//

3. Notice and a Timely Hearing are Necessary Procedural Safeguards for Detention Hearings and Required Under California's Due Process Framework.

The additional prong of the *Ramirez* due process analysis explicitly references the importance of notice and hearing: "identification of the dictates of due process generally requires consideration of . . . 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 governmental official." (*Ramirez*, *supra*, 25 Cal.3d at p. 269.) The benefit of notice is evident: it allows an arrestee to properly prepare for the hearing, conduct legal research and investigation, prepare witnesses, and argue against detention. (See *Gray, supra*, 125 Cal.App.4th at p. 638.) Further, notice is a simple safeguard that does not impose an undue burden on the prosecution or the courts.

Here, after petitioner filed his motion to reduce bail, the prosecution requested that bail remain set at $5 million. During the hearing, the prosecution changed that request to one for a no-bail detention. Once that request for a no-bail detention was made, it changed the nature of the hearing and the relevant evidentiary standards. Petitioner had been given no prior notice that that would occur. In essence, petitioner was punished for exercising his due process rights under *Humphrey* in requesting reasonable bail.

Under Penal Code section 1274, two days' notice is required for any change in bail request. The same should apply to requests for detention. The defendant may request additional time to prepare, up to 10 days, mirroring the time frame for preliminary hearing. As with a preliminary hearing that is not timely held within 10 days where the defendant has not waived that time, the defendant should be entitled to release if his detention is not held within that 10-day limit. (See Pen. Code, § 859b, subd. (b).) By failing to provide notice that his detention was sought, the prosecution violated petitioner's due process rights.

4. Timely Discovery Is Necessary Before a Detention Hearing.

Like notice, timely discovery is necessary to prevent erroneous deprivation of liberty. Without discovery, petitioner is denied a meaningful opportunity to confront witnesses, present a defense, and to effective assistance of counsel. Moreover, the burden on the prosecution is no greater than that already imposed by current discovery requirements. The prosecution is obligated to disclose all exculpatory evidence, including evidence related to the credibility of a witness, before a preliminary hearing and discovery must be provided before a preliminary hearing, which a defendant is entitled to within 10 days. (*Brady v. Maryland* (1963) 373 U.S. 83; *Stanton v. Superior Court* (1987) 193 Cal.App.3d 265; *People v. Gutierrez* (2013) 214 Cal.App.4th 343.)

Here, petitioner was not provided with discovery related to the information presented by the prosecution. Specifically, the prosecution had not provided discovery related to the DNA evidence, the complete statements of witnesses, photographs, and the fact that multiple other suspects were identified. (Petition, Exh. I, pp. 96-97.) The prosecution's failure to discover the information presented at the detention hearing and exculpatory evidence, deprived petitioner of his right to due process.

5. A Necessary Safeguard After a Detention Order Is Expedited Appellate Review.

In finding that the Federal Bail Reform Act complied with federal guarantees of due process, the Supreme Court considered the procedural safeguards provided by the statue. (*Salerno, supra*, 481 U.S. at pp. 742, 752.) One such safeguard is the provision for expedited appellate review. (*Id*. at p. 743.) The Federal Bail Reform Act states that: "If a person is ordered detained . . . the person may file, with the court having original jurisdiction over the offense, a motion for revocation or amendment of the order. The motion shall be determined promptly." (18 U.S.C. § 3145, subd. (b).) The law further provides that an appeal from a detention order "shall be determined promptly." (18 U.S.C. § 3145, subd. (c).) One court held that a delay of 30 days due to "court inadvertence" in reviewing an order of detention violated the statute and entitled the defendant to release with appropriate conditions. (*United States v. Fernandez-Alfonso* (9th Cir.

1987) 813 F.2d 1571, 1572-1573.) California has no such expedited review process for persons ordered detained under section 12.

Without providing for such review, erroneous detention orders, such as the one here, may remain in place for months or longer while an arrestee petitions appellate courts through the writ process. Here, petitioner has remained in custody for a year after the unlawful detention order was imposed. As such, he has been denied due process.

6. The Necessity of Procedural Safeguards.

To ensure a fair hearing and minimize the risk of erroneous deprivation, these procedural safeguards are necessary and reliance on statements of counsel as a substitute for evidence must be prohibited. In *Gray*, the court found that the suspension of the petitioner's medical license while his criminal case was pending violated due process. (*Gray, supra,* 125 Cal.App.4th at p. 641.) The defendant's medical license was suspended as a condition of bail on the basis that he was a danger to public safety if allowed to practice. The appellate court vacated the condition of bail because of insufficient safeguards at petitioner's bail hearing. The court stated that the trial court "significantly impaired Gray's freedom to pursue a private occupation without giving him *notice*, an effective opportunity to *confront* the charges or witnesses against him, or a *full hearing . . .*" (*Ibid, emphasis added*.)

Here, given the lack of notice, lack of discovery, and lack of confrontation afforded to petitioner, as well as the unreliable nature of the information relayed to the court, the risk of erroneous deprivation of petitioner's right to liberty was extraordinarily high. Considering that the burdens of imposing such safeguards are relatively low, the trial court's failure to require these safeguards violated petitioner's due process rights.

III. THE REMEDY OF REMAND FASHIONED BY THE COURT OF APPEAL IS INSUFFICIENT TO ADDRESS THE HARM PETITIONER HAS SUFFERED.

In *Harris*, the Court of Appeal remanded the matter for the trial court to supplement the record and amend the minute order. (*Harris, supra*, 71 Cal.App.5th at p. 1109.) The remedy of remand is insufficient here. Petitioner has been detained without bail since his hearing on April 20, 2021, based on insufficient evidence and in violation of his rights to due process. As a result of this unlawful detention, he has suffered grievous loss and his ability to assist his counsel in defending against the charges facing him has been hampered.

Courts have held that dismissal is an appropriate remedy for detention in violation of due process. In *People v. Superior Court (Vasquez)* (2018) 27 Cal.App.5th 36, the court determined that the only appropriate remedy for the deprivation of the petitioner's right to due process in delaying his sexually violent predator (hereinafter "SVP") trial

that resulted in his years-long incarceration was dismissal of the SVP petition. The court in *People v. Litmon* (2008) 162 Cal.App.4th 383, 406, reached the same conclusion, holding:

> Under our country's long-standing jurisprudence, a person has a right to liberty that a government may not abridge without due process. If the constitutional right to procedural due process is not to be an empty concept in the context of involuntary SVP commitment proceedings, it cannot be dispensed with so easily. The court should have granted appellant's [] motion to dismiss the consolidated petitions.

While the proceedings petitioner is facing are criminal in nature and not SVP commitment proceedings, the same reasoning applies. As the Supreme Court noted in *White*:

> Pretrial detention determinations are more similar to detention determinations under the SVPA and NGI commitment schemes than to determinations concerning the diligence of prosecutorial efforts to secure attendance of an absent witness in a criminal case . . . Pretrial detention decisions that pivot on an arrestee's likelihood of future harm call on trial courts to play a similar role . . .

(*White, supra*, 9 Cal.5th at p. 466.)

Therefore, when due process is violated resulting in extended incarceration, dismissal of the proceedings should be the remedy. In the alternative, this Court should order immediate release, as is the remedy provided for when there is a delay in holding a preliminary hearing beyond 10 days where the

defendant has not waived that time. (See Pen. Code, § 859b, subd. (b).) In order to fulfill the constitutional guarantees afforded every arrestee in California, this Court must ensure that due process protections at detention hearings do not become a right without a remedy.

CONCLUSION

Proffered evidence was not sufficient to support petitioner's detention order, as it was unreliable and denied petitioner several constitutional protections. It failed to meet the evidentiary standards of Section 12 and denied him due process. For detention to be imposed, petitioner is entitled to a full evidentiary hearing consisting of a 1) right to counsel, 2) notice of a timely hearing, 3) discovery provided in a timely manner, 4) right to cross-examination, 5) right to present evidence, 6) right to a speedy appellate review, and 7) an effective remedy for violation. Without these protections, the risk of erroneous deprivation of the fundamental right to pretrial liberty is exceedingly high. Further, the burden of a full evidentiary hearing with procedural safeguards is minimal when balanced against this risk. Given that these procedural safeguards were not provided for petitioner, this Court should reverse the lower court's decision holding that proffered evidence is sufficient to meet the standards of Section 12 and the state and federal due process rights.

Dated: April 8, 2022

Respectfully Submitted,

MARSANNE WEESE
Attorney for Petitioner

ROSE MISHAAN
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 8,319 words, according to the word count produced by the Microsoft Word program used to produce this document, not including the Table of Contents and Table of Authorities and that the brief uses a Times New Roman size 13 font.

Dated: April 8, 2022

MARSANNE WEESE
Attorney for Petitioner

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 4/8/2022 by Florentino Jimenez, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **HARRIS (JOHN) ON H.C.**
Case Number: **S272632**
Lower Court Case Number: **A162891**

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

2. My email address used to e-serve: **rose.mishaan@gmail.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	opening brief on the merits.FINAL

Service Recipients:

Person Served	Email Address	Type	Date / Time
Attorney Attorney General - San Francisco Office Rene A. Chacon, Deputy Attorney General	sfagdocketing@doj.ca.gov	e-Serve	4/8/2022 11:01:27 PM
Katie Stowe Office of the Attorney General	katiestowe@doj.ca.gov	e-Serve	4/8/2022 11:01:27 PM
Marsanne Weese Law Offices of Marsanne Weese 232167	marsanne@marsannelaw.com	e-Serve	4/8/2022 11:01:27 PM
Nicole Sato	nsato@smcgov.org	e-Serve	4/8/2022 11:01:27 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

4/8/2022
Date

/s/Rose Mishaan
Signature

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

Law Offices of Marsanne Weese

Law Firm