IN THE SUPREME COURT OF CALIFORNIA

In re KENNETH HUMPHREY On Habeas Corpus	)	S247278 Ct.App. 1/2 A152056 County of San Francisco Super. Ct. No. 17007715

APPLICATION OF
THE CALIFORNIA PUBLIC DEFENDERS ASSOCIATION
AND
TODD W. HOWETH, PUBLIC DEFENDER OF VENTURA COUNTY,
TO APPEAR AS AMICI CURIAE
ON BEHALF OF KENNETH HUMPHREY,
AND AMICI BRIEF

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TO: THE HONORABLE CHIEF JUSTICE TANI G. CANTIL-SAKAUYE AND TO THE ASSOCIATE JUSTAICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

California Public Defenders Association ("CPDA") and Todd W. Howeth, the Public Defender for the County of Ventura ("the Public Defender") respectfully request permission to file a brief in support of KENNETH HUMPHREY. This application summarizes the nature and history of your amici and our interest in the issues presented in this case and demonstrates that our brief will assist the court in the analysis and consideration of the legal and public policy issues presented.

A STATEMENT OF OUR INTEREST

A. CPDA is the largest and most influential association of criminal defense attorneys and public defenders in the State of California. Our collective experience regarding the law and our appellate advocacy on criminal justice issues puts us in a unique position to assist the court in this case.

CPDA, the state's largest nonprofit organization of criminal defense practitioners, has been dedicated to promoting the legal rights of Californians in our state's criminal and juvenile justice systems. CPDA is a leader in continuing legal education for California defense attorneys and is an approved provider of Minimum Continuing Legal Education and Criminal Law Specialization Education. CPDA is one of only two organizations deemed by the Legislature to be an "automatically" approved legal education provider. (Bus. & Prof. Code, §6070, subd. (b).)

California courts have granted CPDA leave to appear as amicus curiae in some 70 cases. (See, e.g., *Facebook, Inc. v. Superior Court* (*Hunter et al*) (2018) 4 Cal.5th 1245 [Stored Communications Act does not bar production of "public" posts]; *Facebook, Inc. v. Superior Court* (*Touchstone*) (S245203, fully briefed) [review of order granting FB's motion to quash; *San Diego County v. Commission on State Mandates* (S239907, fully briefed) [did Proposition 83's amendments to the SVPA constitute a "change in the law," so as to render most expenses necessarily incurred by local government no longer reimbursable by the State?]; *People v. Adelmann* (S237602) [construing Penal Code section 1170.18 in conjunction with Penal Code section 1203.9]; *People v. Romanowski* (2017) 2 Cal.5th 903 [conviction for grand theft under Penal Code section 484e is eligible for section 1170.18 relief]; *People v. Gonzales* (2017) 2 Cal.5th 858 [entering a bank with the intent to cash a forged check is shoplifting, not burglary]; *People v. Mosley* (2015) 60 Cal.4th 1044 [discretionary sex offender registration isn't "punishment" within the meaning of the Sixth Amendment]; *People v. Beltran* (2013) 56 Cal.4th 935 [heat of passion

does not require provocation that would cause the average person to kill]; *Maldonado v. Superior Court* (2012) 53 Cal.4th 1112 [Penal Code section 1054.3, subdivision (b)(1), permitting a compelled mental examination of a criminal defendant who has placed his mental state at issue, does not violate the Fifth Amendment]; *Barnett v. Superior Court* (2010) 50 Cal.4th 890 [post-trial discovery]; *Galindo v. Superior Court* (2010) 50 Cal.4th 1 [pre-prelim discovery]; *People v. Lenix* (2008) 44 Cal.4th 602 [comparative juror analysis for first time on appeal]; *People v. Nelson* (2008) 43 Cal.4th 1242 [DNA evidence in a cold-hit case]; *Chambers v. Superior Court* (2007) 42 Cal.4th 673 [*Pitchess* procedures]; *People v. Sanders* (2003) 31 Cal.4th 318 [search could not be a reasonable "parole search" without knowledge of the suspect's parole status]; *Manduley v. Superior Court* (2002) 27 Cal.4th 537 [no separation of powers violation by the direct filing of juvenile cases in the criminal court].)

CPDA has also served as amicus curiae to the United States Supreme Court. (See, e.g., *California v. Trombetta* (1984) 467 U.S. 479 [duty to preserve evidence is limited to evidence that might be expected to play a significant role in the suspect's defense]; *Monge v. California* (1998) 524 U.S. 721 [double jeopardy clause does not bar retrial of a prior conviction allegation after an appellate finding of evidentiary insufficiency].)

In addition to its amicus work, CPDA is heavily involved in legislative solutions to statewide criminal justice and juvenile law problems. Our lobbyists attend key state Senate and Assembly committee meetings weekly, and members of our association routinely testify in the Legislature regarding proposed bills relevant to criminal

justice and to juvenile law. Additionally, CPDA has sponsored legislation and has taken a position on thousands of bills which, if adopted, would impact our members and their clients.

CPDA has both a general and specific interest in the subject matter of this litation. CPDA's members reperesent the vast majority of individuals charged with criminal offenses in California's courts.

In light of this collective experience, CPDA is in a position to offer, as amicus, a unique practitioner's perspective of the issue presented in this case. We are the ones who are ethically and constitutionally tasked with protecting the rights of the indigent criminally-accused in our state courts.

B. The Ventura County Public Defender's office is established pursuant to Government Code sections 27700-27712 to provide quality legal representation to indigent persons in the courts of Ventura County. Historically, the Public Defender is well-versed on all issues relating to California's criminal justice system and often provides amicus services to the California courts on issues of statewide significance.

Todd W. Howeth is the Public Defender of Ventura County. Each year, the Public Defender provides a defense in nearly 16,000 new misdemeanor cases and over 3,500 new felonies. All of these cases involve indigent clients who struggle to post money bail. Our collective trial and appellate experience well-equips us to assist this court on the issues presented in this case.

The Public Defender of Ventura has been permitted to appear as amicus in our state Supreme Court since 1969. In 2005, that court also allowed the public defender to present oral argument as an amicus in *People v. Salazar* (2005) 35 Cal.4th 1031.

The Public Defender takes an active presence in our courts of review as a party, an attorney for a party, or in the role of amicus. (See, e.g., *Erwin v. Appellate Dept.* (1983) 146 Cal.App.3d 715 [Public Defender as petitioner].) The author of this brief has worked for the Ventura County Public Defender (VCPD) for 18 years and is the Senior Deputy responsible for our appellate practice and training.

In light of the foregoing, the VCPD well understands the potential impact of the Court of Appeal's published decision on criminal justice in California and is well-positioned to provide the court with its real-life perspective.

Dated: October 8, 2018

Michael C. McMahon, SBN 71909
State Bar Certified Specialist - Criminal Law
State Bar Certified Specialist - Appellate Law
For *The California Public Defenders Association* and
The Public Defender of Ventura County,
Applicants for amici curiae status
on behalf of KENNETH HUMPHREY

IN THE SUPREME COURT OF CALIFORNIA

In re KENNETH HUMPHREY, On Habeas Corpus	S247278 Ct.App. 1/2 A152056 County of San Francisco Super. Ct. No. 17007715

CPDA AND VCPD AMICI BRIEF ON BEHALF OF KENNETH HUMPHREY

INTRODUCTION

On September 12, 2018, the court directed the parties to file supplemental briefing regarding what effect, if any, does Senate Bill No. 10 (2017-2018 Reg. Sess.) have on the resolution of the issues presented by this case. SB 10 is also known as the California Bail Reform Act of 2017.

As one of at least nine non-governmental organizations lobbying for bail reform, your amici shared high expectations as we followed SB 10 through the legislative process. However, as the end drew near, the bill was quickly amended almost beyond recognition. CPDA was forced to abandon its position of "SUPPORT" and became "NEUTRAL" on the bill. On balance, your amici concluded that the elimination of the bail-bond industry – and by extension their significant influence over progressive criminal justice reform efforts

both in the counties and in Sacramento – is a huge accomplishment. We remain hopeful that once we have rid the system of this for-profit, predatory industry we will have a much greater chance at success in making the critical reforms needed to achieve true pretrial justice for all. In short, we saw this bill, with all its flaws, as a better starting point for the further reform than the Money Bail system now in place.

In hindsight, your amici probably could have played an even more aggressive role in abolishing California's dependence on Money Bail. Few were in a better position to observe its corrosive effects on both the will and the ability to defend against criminal charges. Investigating and preparing cases for trial takes time. All too often, those who cannot secure release from detention before trial cannot afford the time it takes for proper trial preparation. They are forced to admit guilt just to be released from jail.

At this juncture, we remain guardedly optimistic. We did not "OPPOSE" SB 10 because we viewed it has a necessary first step in the right direction.

That said, we are well aware of the more strident criticism coming from our ally, HUMAN RIGHTS WATCH. As they see it, "The new SB 10 is simply not bail reform; it replaces one harmful system with another. In fact, it will make many of the problems we revealed even worse." (Letter of August 14, 2018, to Assembly Member Nazarian.) We hope their dire prediction is wrong.

Just six days later, the AMERICAN CIVIL LIBERTIES UNION voiced their formal opposition: "As much as we would welcome an end to the predatory lending practices of the for-profit bail industry, SB 10 cannot promise a system with a substantial reduction in pretrial

detention. Neither can SB 10 provide sufficient due process nor adequately protect against racial biases and disparities that permeate our justice system." (Joint Statement by the three Executive Directors of the California ACLU affiliates.)

Any pretrial detention must be narrowly tailored to further the legitimate state interests it seeks to protect. For this reason, our constitutions are not neutral. As the system becomes more constitutional, the number of persons detained prior to trial must inevitably decrease. A more fair system is also a system where more persons are released before trial.

I.

Money Bail inflicts great financial damage on the counties by diverting resources that would otherwise be spent to retain counsel or to fund ancillary defense services.

Pretrial detainees often have access to some resources but not enough to post money bail, retain counsel, and to pay for ancillary defense services such as a private investigator, expert witnesses and consultants, etc. It has been the collective experience of your amici that such limited funds are invariable spent to bail out. This shifts other defense costs to the counties. These publicly-borne costs are substantial.

The right to counsel of a person charged with a crime is guaranteed by both the federal and state constitutions. (U.S. Const., amend. VI; Cal. Const., art. I, § 15; and *Gideon v. Wainwright* (1963) 372 U.S. 335.) To meet the constitutional standard the defendant must also be provided effective legal assistance in the preparation and trial

of the case. Equal protection demands are satisfied by permitting the trial court, in its discretion, to appoint additional counsel at public expense if the complex circumstances in a particular case appear to require such an appointment. (*Keenan v. Superior Court* (1982) 31 Cal.3d 424.) Similarly, the due process right of effective counsel includes the right to ancillary services necessary in the preparation of a defense and, in California, this right is codified in Penal Code section 987.2, which provides that counsel appointed for an indigent defendant shall not only be compensated by a reasonable fee but also shall be reimbursed for his or her necessary expenses. (*Corenevsky v. Superior Court* (1984) 36 Cal.3d 307.)

Money bail is not merely a private contract between a pretrial detainee and a surety company. Precious public resources can be repurposed in new system that abolishes money bail.

II.

The Due Process and Equal Protection concerns triggered by pretrial incarceration are not adequately resolved by any reform which doesn't *reduce* rather than *increase* the percentage of persons detained.

"In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." (*United States v. Salerno* (1987) 481 U.S. 739, 755 [pretrial detention provision of The Bail Reform Act of 1984 is not facially unconstitutional].) In the instant case, the Court of Appeal correctly concluded that the liberty interest denied by pretrial incarceration requires the protections of the Due Process and Equal Protection Clauses of the state and federal

constitutions. The court of appeal attempts to prevent unconstitutional pretrial custody by requiring that a court "setting money bail, consider the defendant's ability to pay and refrain from setting an amount so beyond the defendant's means as to result in detention." (Slip opn. at p. 31.)

Your amici contend that these liberty interests are not protected by any judicial or legislative reforms which operate to increase rather than reduce pretrial incarceration. When it comes to pretrial incarceration, "*Misery does not love company*," and the constitutional protections are not furthered by a reform that needlessly incarcerates a greater percentage of defendants than were incarcerated under the previous, unconstitutional system it replaced.

Amici submits that this is an extremely important point. Equal protection and due process cannot be afforded, for example, by a reform that mandates that all defendants be incarcerated before trial. The constitutional principles require more than equal procedures and treatment for all persons affected. The principles require a contextual balancing of the private and governmental interests at stake.

In the context of due process, *Mathews v. Eldridge* (1976) 424 U.S. 319 (*Mathews*) compels this conclusion. Applying the *Mathews* factors to pretrial incarceration requires us to consider: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional procedural safeguards; and (3) the Government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail.

The private interest at stake is personal liberty, a fundamental right. The risk of erroneous or unnecessary deprivations of pretrial liberty are increased by any reform that increases the percentage of defendants detained before trial. Lastly, the government's interests are not served by any reform that increases its fiscal and administrative burdens.

III.

Pretrial incarceration is an enormous problem for California which is unresolved by the enactment of SB 10.

Sometimes the Judicial Branch is confronted by a case or controversy that seems, in the first instance, best suited for a Legislative solution. (See, for example, *In re Marriage Cases* (2008) 43 Cal.4th 757, 808 at fn. 27, discussing the potential wisdom of deferring to legislatures how best to provide equal treatment to same-sex couples.) Indeed, The Chief Justice's Pretrial Detention Reform Workgroup appears to have been intended, in part, to stimulate legislative solutions.

And so great hope accompanied the introduction of SB 10. Flashing forward to August 28, 2018, when the bill was approved by the Governor, the issue of pretrial incarceration was as divisive as ever.

The ranks of public defenders and California criminal defense attorneys in CPDA reflect these divisions. Some continued to embrace SB 10 throughout the many amendments, while others endorsed a stance of "neutral" or "oppose." (As we have said, CPDA ultimately became "neutral.") Many wondered whether SB 10, in its final form, was consistent with the recommendations of the Workgroup

released in October of 2017. (Pretrial Detention Reform, RECOMMENDATIONS TO THE CHIEF JUSTICE: http://www.courts.ca.gov/documents/PDRReport-20171023.pdf [RECOMMENDATIONS].)

But let there be no mistake about it. Those who promoted pretrial detention reform sought to reduce "unnecessary detentions" and the number of persons incarcerated before trial. (RECOMMENDATIONS, at p. 48.) Many now question whether SB 10 will accomplish that original goal. The numbers matter.

IV.

The prospect that each of the 58 counties will be creating their own separate but equal pretrial services fuels our concerns that equal protection problems will persist.

The rationale for California's criminal justice realignment is that local counties know best regarding their own set of risks and needs. It seems that those drafting the last-minute amendments to SB 10 shared that perspective. SB 10 contains a similar amount of decentralization for such a core issue. (Although the bill authorizes multi-county collaboration, we expect that authorization to be unused in all but the smallest of counties.) Counties are not even obligated to use the same risk assessment instrument.

Because equal protection inequities were at the heart of the court of appeal's concerns about the Money Bail system, the decentralization of SB 10 is, itself, a potential source of ongoing constitutional violations.

Because this decentralization is coupled with virtually unlimited judicial discretion, SB 10 could be a recipe for constitutional disaster. It is not unrealistic to conclude that greater numbers of persons will be detained pre-arraignment under the new regime than the constitutionally deficient system it replaced. This is unacceptable.

Conclusion

Your amici appreciate that the issues presented by SB 10 are not fully ripe. That said, in any meaningful discussion of pretrial detention, it is here and cannot now be ignored. It has now become the "elephant in the room." Your amici remain committed to reducing the scope of pretrial detention and making the process more fair. The judgment of the Court of Appeal should be affirmed.

DATED: October 8, 2018

Respectfully submitted,

TODD W. HOWETH, Public Defender

By: 

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CERTIFICATE OF WORD COUNT

I do hereby certify that by utilizing the word count feature of MSWord, Century Schoolbook #13 font, there are 4094 words in this document, excluding Declaration of Service.

October 8, 2018

Jeane Renick
Legal Mgmt. Asst. III

DECLARATION OF *ELECTRONIC* SERVICE AND SERVICE BY U.S. MAIL

Case Name: **In re Kenneth Humphrey, on Habeas Corpus**
Case No. **S247278 (from Ct. App. 1/2 A152056, County of San Francisco, Super. Ct. #17007715)**

On October 9, 2018, I, Jeane Renick, declare: I am over the age of 18 years and not a party to the within action or proceeding. I am employed in the Office of the Ventura County Public Defender at 800 South Victoria Avenue, Ventura, California 93009. I am familiar with the practice of this office for collecting and processing electronic and physical correspondence. On this date, I *electronically served* the attached **Application of the California Public Defenders Assoc. and Todd W. Howeth, Public Defender of Ventura County, to appear as amici curiae on behalf of Kenneth Humphrey, and Amici Brief** via the court's TrueFiling system, or *as otherwise indicated,* **AND/OR** by placing in the U. S. Mail, a full, true, and correct copy thereof in an envelope addressed to the persons named below at addresses set out below, in the ordinary course of business:

Via email:
1) Alec Karakatasanis, Civil Rights Corps @ alec@civilrightscorps.org;
2) Katherine Hubbard, Civil Rights Corps @ katherine@civilrightscorps.org;
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10) Gregory Totten, DA Ventura @ appellateDA@ventura.org;

Each of the following via U.S. Mail:
11) George Gascon, DA San Francisco, 850 Bryant St., #305, S.F., CA 94103;
12) Mark Zahner, CA Dist. Atty. Assoc., 8921 11th St., #300, Sacramento, CA 95814;
13) Jeffrey Adachi, Public Defender, 2431 Fillmore St., S.F., CA 94115;
14) Michael Ramos, San Bernardino Co. DA, 412 Hospitality Ln., 1st Flr., San Bernardino, CA 92415-0042;

15) Crime Victims United of CA, 130 Maple St., #300, Auburn, CA 95603;
16) Golden State Bail Agents Assoc., 1230 M Street, Fresno, CA 93721;
17) Micaela Davis, ACLU of N. Calif., 39 Drumm St., S.F., CA 94111;
18) Hon. Joseph Quinn, Judge, 850 Bryant St., Rm. 101, S.F., CA 94103;
19) Hon. Brendan Conroy, Judge, 850 Bryant St., Rm 101, S.F., CA 94103;
20) Clerk, 1st Dist. Court of Appeal, 350 McAllister St., S.F., CA 94102;

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on the above date at San Buenaventura, California.

TODD W. HOWETH, Public Defender

By 

Jeane Renick
Legal Mgmt. Asst. III