IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT CASE NO. S247278

IN RE KENNETH HUMPHREY

On Habeas Corpus,

AFTER A DECISION BY THE COURT OF APPEAL
FIRST APPELLATE DISTRICT
APPELLATE COURT CASE NO. A152056

ON APPEAL FROM SAN FRANCISCO COUNTY SUPERIOR COURT
HONORABLE JOSEPH M. QUINN • CASE NO. 17007715

APPLICATION FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF OF AMERICAN BAR ASSOCIATION IN SUPPORT OF RESPONDENT AND AFFIRMANCE

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

Pursuant to California Rule of Court 8.520(f), the American Bar Association (the "ABA") respectfully requests permission to file the attached amicus brief in support of Respondent Kenneth Humphrey and in support of affirmance.

The ABA is one of the largest voluntary professional membership organizations and the leading organization of legal professionals in the United States. It is comprised of more than 400,000 members that come from all fifty States, the District of Columbia, and the United States territories, and include prosecutors, public defenders, and private defense counsel. The ABA is familiar with the content of the parties' briefs on the merits of this action.[1]

The ABA's proposed brief presents arguments that materially add to and complement the parties' briefing on the merits, without repeating those arguments. Since its founding in 1878, the ABA has worked to protect the rights secured by the Constitution, including the rights under the Due Process and Equal Protection Clauses, of those accused of crimes. In particular, the ABA Standards for Criminal

[1] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No member of the Judicial Division Council participated in the adoption or endorsement of the positions in this brief, nor was the brief circulated to any member of the Judicial Division Council before filing.

Justice (the "Criminal Justice Standards") are a comprehensive set of principles articulating the ABA's recommendations for fair and effective systems of criminal justice, and reflect the legal profession's conclusions on the requirements for the proper administration of justice and fairness in the criminal justice system. The ABA submits this brief to assist the Court in examining the constitutional requirements that must be satisfied before a defendant, presumed innocent and awaiting trial, may be detained.

Pursuant to California Rule of Court 8.520(f)(4), the undersigned counsel have fully authored the brief, with no counsel for a party authoring this brief in whole or part. Likewise, no person other than the amicus curiae, its members, and its counsel made any monetary contribution to the preparation and submission of this brief, with no counsel or party making a monetary contribution to fund the preparation or submission of this brief. The ABA itself has no interest in or connection with any of the parties in this case. The parties have consented to the filing of this brief.

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For all of the foregoing reasons, the ABA respectfully requests that the Court grant the ABA's application and accept the enclosed brief for filing and consideration.

Dated: October 9, 2018

Respectfully Submitted,

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I. STATEMENT OF INTERESTS OF *AMICUS CURAE* AND SUMMARY OF ARGUMENT

The American Bar Association (the "ABA") is one of the largest voluntary professional membership organizations and the leading organization of legal professionals in the United States. Its more than 400,000 members come from all fifty States, the District of Columbia, and the United States territories, and include prosecutors, public defenders, and private defense counsel. Its membership includes attorneys in law firms, corporations, nonprofit organizations, and local, state, and federal governments. Members also include judges, legislators, law professors, law students, and non-lawyer associates in related fields.[2]

Since its founding in 1878, the ABA has worked to protect the rights secured by the Constitution, including the rights under the Due Process and Equal Protection Clauses, of those accused of crimes. The ABA Standards for Criminal Justice (the "Criminal Justice Standards") are a comprehensive set of principles articulating the ABA's recommendations for fair and effective systems of criminal justice, and reflect the legal profession's conclusions on the requirements for the proper administration of justice and fairness in the criminal justice system.[3] Now in their third edition, the Criminal Justice Standards

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[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No member of the Judicial Division Council participated in the adoption or endorsement of the positions in this brief, nor was the brief circulated to any member of the Judicial Division Council before filing.

[3] The Criminal Justice Standards are available at: https://www.americanbar.org/groups/criminal_justice/standards.html; *see also* Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 Crim. Just. 10, 14-

were developed and revised by the ABA Criminal Justice Section, working through broadly representative task forces made up of prosecutors, defense lawyers, judges, academics, and members of the public, and then approved by the ABA House of Delegates, the ABA's policymaking body.

Courts have frequently looked to the Standards for guidance about the appropriate balance between individual rights and public safety in the field of criminal justice. *See, e.g., Padilla v. Kentucky*, 559 U.S. 356, 367 (2010); *Strickland v. Washington*, 466 U.S. 668, 688-89 (1984); *Frank v. Blackburn*, 646 F.2d 873, 880 (5th Cir. 1980), *modified*, 646 F.2d 902 (5th Cir. 1981); *Hardin v. Estelle*, 365 F. Supp. 39, 46 (W.D. Tex.) *judgment aff'd*, 484 F.2d 944 (5th Cir. 1973); *Moore v. Quarterman*, No. CV H-08-2309, 2009 WL 10654176, at *7 (S.D. Tex. June 25, 2009). In fact, the Standards have been either quoted or cited in more than 120 U.S. Supreme Court opinions, 700 federal circuit court opinions, 2,400 state supreme court opinions, and 2,100 law journal articles. Pretrial Justice Institute, *Guidelines for Analyzing State and Local Pretrial Laws*, II-ii (2017).

The Criminal Justice Standards on Pretrial Release memorialize exhaustive study by the ABA about systems of pretrial release and detention that will secure the rights of the accused to a fair trial and the effective assistance of counsel, protect the community, and ensure that persons accused of crimes appear for court dates. As discussed below, those Standards reflect the ABA's conclusion that "[d]eprivation of liberty pending trial is harsh and oppressive." *See ABA Standards for*

15 (Winter 2009). Pertinent provisions of the Standards are set forth in an Attachment to this brief.

Criminal Justice: Pretrial Release (3d ed. 2007) (the "ABA Standards" or "Standards"), 10-1.1.

Accordingly, "the judicial officer should assign the least restrictive condition(s) of release that will reasonably ensure a defendant's attendance at court proceedings and protect the community, victims, witnesses or any other persons." *Id.*, 10-1.2. Even though there may be rare circumstances in which monetary conditions of release are necessary to ensure a defendant's appearance, bail requirements that fail to consider a defendant's individual financial circumstances should be abolished. Such bail systems seriously impair the rights of the accused, and provide little if any benefit to the public. In addition, they often result in the systemic jailing of release-eligible defendants simply because these defendants are unable to pay.

The ABA submits this brief to assist the Court in examining the constitutional requirements that must be satisfied before a defendant, presumed innocent and awaiting trial, may be detained. While the procedures here that resulted in Mr. Humphrey's pretrial detention have been recently modified by California' passing of Senate Bill No. ("SB") 10, the California Money Bail Reform Act of 2017, the constitutional parameters at issue apply to any procedure determining a defendant's access to pretrial release. These constitutional requirements will not only guide the application of the current system, but of any future system adopted, like the one embodied in the recently passed SB 10.

Under our system of justice, every individual's right to liberty, and to an effective defense against criminal charges, should be protected by a rigorous review of the individual financial circumstances in a transparent process. The ABA Standards address how jurisdictions

can protect the constitutional rights of the accused while advancing their legitimate criminal justice interests.[4]

II. THE ABA'S CRIMINAL JUSTICE STANDARDS REJECT BAIL SYSTEMS THAT FAIL TO CONSIDER ADEQUATELY A DEFENDANT'S ABILITY TO PAY AND THAT RESULT IN UNNECESSARY PRETRIAL DETENTION

The ABA has examined money bail systems again and again against the backdrop of the Equal Protection and Due Process Clauses. In so doing, it has consistently advocated for limiting the circumstances under which pretrial detention may be authorized and have rejected money-bail systems that fail to consider adequately a defendant's ability to pay. It has done so because such systems can be inherently discriminatory, damaging to the accused's rights, unnecessary to ensure justice and public safety, and often contrary to the constitutional principles embraced by the ABA Standards. Accordingly, the ABA has promoted alternatives to money-bail and pretrial detention, and endorsed only those bail systems that adequately consider pretrial detainees' individual financial circumstances.

The ABA Standards are the result of research and analysis by the ABA over the last fifty years. The First Edition of the ABA's Criminal Justice Standards (the "First Edition") adopted by the House of Delegates in 1968 following years of research, articulated the ABA's position that a person's liberty and ability to defend against criminal

[4] Undersigned counsel have fully authored the brief, with no counsel for a party authoring this brief in whole or part. Likewise, no person other than the amicus curiae, its members, and its counsel made any monetary contribution to the preparation and submission of this brief, with no counsel or party making a monetary contribution to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

charges should not be determined by that person's financial resources. The ABA sharpened its criticism of pretrial detention and money-bail in the Second Edition of its Pretrial Release Standards, adopted in 1979. *See* American Bar Association, *ABA Standards for Criminal Justice, Pretrial Release* (2d ed. 1979), ch. 10 (the "Second Edition"). An additional two decades of study and experience confirmed the ABA's conclusion that money-bail systems serve no legitimate public safety purpose, needlessly harm pretrial defendants, and impose unnecessary public costs. That additional study and experience led to the Third Edition of the ABA's Criminal Justice Standards, adopted in 2007 and currently in force. The Standards counsel that jurisdictions should impose monetary release conditions only after considering defendants' individual financial circumstances, and ensure that defendants' finances never prevent their release.

A. The Current ABA Standards

The ABA Standards emphasize: "The law favors the release of defendants pending adjudication of charges. Deprivation of liberty pending trial is harsh and oppressive, subjects defendants to economic and psychological hardship, interferes with their ability to defend themselves, and, in many instances, deprives their families of support. These standards limit the circumstances under which preventative detention may be authorized[.]" *See* American Bar Association, *ABA Standards for Criminal Justice: Pretrial Release* (3d ed. 2007). Accordingly, the ABA Standards provide very specific guidelines for how to implement bail reform.

First, the ABA Standards state that there should be a presumption of pretrial release and that the use of money-bail should

be very limited. Importantly, the Standards urge jurisdictions to adopt procedures designed to promote the release of defendants on their own recognizance—effectively a promise to appear in court—or, when necessary, on an unsecured bond. *Id*. at 10-1.4(a) & (c), 10-5.1(a). If release on personal recognizance would pose a "substantial risk" that a person will not show up for a court proceeding, endanger others' safety, or imperil the judicial system's "integrity" (through, for example intimidation of a witness), the ABA Standards still promote release, subject to the "least restrictive" condition or conditions that will "reasonably ensure" the person's later reappearance and deter the person from imperiling others or undermining the judicial process' integrity. *Id*. at 10-5.1(a)-(b), 10-5.2(a). The Standards encourage jurisdictions to impose conditions of release other than secured monetary bonds for two reasons: because financial release conditions substantially undermine the Fourteenth Amendment's guarantees, and because the ABA's extensive research shows that, particularly when the defendant has community ties, non-financial release conditions such as supervised release or simple court-date reminders are equally effective. The Standards also recognize that consideration of non-financial release conditions is critical because of the disproportionate burden money-bail imposes on indigent defendants. *Id*. at 10-5.3(d).

Second, the ABA Standards make secured money-bail a last resort when setting pretrial release conditions, not the first. The Standards permit the imposition of "[f]inancial conditions other than unsecured bond . . . only when no other less restrictive condition of

release will reasonably ensure the defendant's appearance in court."[5] And they counsel that because a defendant's ability to pay has no rational connection to whether the defendant poses a danger to the community, monetary release conditions should be used only to ensure reappearance, not "to respond to concerns for public safety." *See id*. at 10-1.4(d).[6] No release-eligible defendant should remain incarcerated simply because they cannot buy this freedom.

Third, the bail system must account for an individual's ability to pay. *Id*. at 10-5.3(a). Consistent with the demands of due process, the Standards urge that "financial conditions should be the result of an individualized decision taking into account the special circumstances of each defendant, the defendant's ability to meet the financial conditions, and the defendant's flight risk." *Id*. (emphasis added).

Simply put, the Standards unequivocally state that "[t]he judicial officer should not impose a financial condition of release that results in the pretrial detention of a defendant solely due to the defendant's inability to pay." *Id*. at 10-1.4(e). The ABA takes this position because, without such an ability-to-pay determination, a money-bail system "undermin[es] basic concepts of equal justice" and means that "those who can afford a bondsman go free," And those who cannot, do not.

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[5] *Id.* at 10-5.3(a); *see also id*. at 10-5.3(d) (providing that judicial officer imposing financial conditions should first consider an unsecured bond).

[6] The ABA Standards also recognize pretrial release conditions should be only be imposed as necessary to serve their legitimate purposes of ensuring defendants' reappearance and protecting the public; pretrial release conditions should never be imposed to punish or frighten the defendant, or to placate the public's opinion. *Id.* at 10-5.3(c).

Id. at pp. 111-12 (*quoting* Daniel J. Freed & Patricia Wald, *Bail in the United States* 21 (1964)).

B. Adopted ABA Resolution 112C

Since the publication of its Standards, the ABA has continued to analyze research on money bail and to rely on that information to refine its position on money bail systems. In 2017, the ABA House of Delegates adopted a Resolution urging local jurisdictions to implement procedures that favor pretrial release and prevent the pretrial detention of those who cannot to meet financial conditions of release. American Bar Association House of Delegates, *Resolution 112C (Aug. 14, 2017)* (adopted). The Resolution was accompanied by a detailed report prepared by experts in the field, addressing the state of the bail system since the ABA's adoption of the Standards in 2002. *See* American Bar Association, *Proposed Resolution and Report* (Aug. 2017) ("Report") http://www.americanbar.org/content/dam/aba/directories/policy/2017_am_112C.docx.

The Report confirms that financial release conditions are not only rarely necessary, but that they have "adverse, and sometimes profoundly harmful, effects of which there was no knowledge fourteen years ago." *Id*., Report at III. The Report also recognizes that release conditions other than money-bail are often as effective, if not more so, than money bail in "reasonably ensur[ing] the defendant's appearance in court.'" *Id*.

III. CALIFORNIA'S CURRENT BAIL SYSTEM ILLUSTRATES THE CONSTITUTIONAL PROBLEMS WITH MONEY-BAIL[7]

The ABA Standards are built on the basic constitutional premise that individuals should not be incarcerated solely based on their inability to purchase their freedom. Faithful application of the Standards—including individualized risk and financial assessments, the imposition of only the least restrictive release conditions, and a general presumption in favor of pretrial release—should ensure that defendants' constitutional rights are protected.

In *Bearden v. Georgia*, 461 U.S. 660 (1983), the United States Supreme Court acknowledged that imprisoning an indigent defendant for his or her inability to pay a fine would violate the Equal Protection Clause of the Fourteenth Amendment. In so doing, the Court emphasized that depriving a person of "conditional freedom simply because, through no fault of his own, he cannot pay…would be contrary to the fundamental fairness required by the Fourteenth Amendment." *Id.* at 672-73. Consistent with this basic principle, the United States

[7] On August 28, 2018, Governor Jerry Brown signed SB 10. Taking effect on October 1, 2019, SB 10 repeals existing laws regarding money-bail and instead requires all persons arrested and detained for a felony or certain misdemeanors to undergo a pretrial risk assessment whereby arrestees are categorized as "low," "medium," or "high-risk" based on their perceived risk to public safety and risk of failure to appear. Persons deemed to be "low risk" are released with the least restrictive nonmonetary conditions possible. Cal. Penal Code §1320.10(b). "Medium-risk" persons are released or further detained in accordance with the standards set forth in a local rule adopted by the court. *Id.* §1320.10(c). Persons assessed as "high-risk," as well as certain other categories of persons, would remain in custody until their arraignment. *Id.* §1320.10(e)(1)-(13). The constitutional parameters discussed in this brief are integral not just to the determinations that led to Mr. Humphrey's detention, but also to these and other discretionary pretrial detention determinations.

Supreme Court has rejected a number of other government policies and practices in a wide range of contexts for "punishing a person for his poverty." *Id.* at 671 (revocation of probation for inability to pay fine); *see also*, *Tate v. Short*, 401 U.S. 395, 398 (1971) (incarceration for inability to pay traffic fines); *Williams v. Illinois*, 399 U.S. 235, 240-41 (1970) (incarceration beyond statutory maximum due to inability to pay fine); *Smith v. Bennett*, 365 U.S. 708, 711 (1961) (inability to pay fee to file petition for writ of habeas corpus); *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (holding trials must not depend on the amount of money a person is able to pay).

The Court has held that before overriding a defendant's "strong interest in liberty," jurisdictions must recognize the "importance and fundamental nature" of the right to pretrial release and carefully consider whether the government has advanced "sufficiently weighty" interests to the contrary. *United States v. Salerno*, 481 U.S. 739, 750-51 (1987). Money-bail systems that fail to account for defendants' ability to pay and that continue to incarcerate release-eligible persons based on their inability to buy their freedom do not meet this standard. *Id*.

In addition to treating defendants differently and arbitrarily depending on their financial status, money-bail systems violate the fundamental constitutional right to due process. "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Salerno*, 481 U.S. at 755. Wealth-based bail schemes violate the bedrock constitutional principle that, prior to being deprived of liberty or property, persons must have notice and a meaningful opportunity to be heard. *See Fuentes v. Shevin*, 407 U.S.

67, 80 (1972). Rigorous procedural requirements must be followed before a person can be jailed for non-payment: in any proceeding where ability to pay is at issue, an individual must receive notice that ability to pay may be a critical question in the proceedings, and an opportunity to present their financial information; and the court must make an express finding that the person has the ability to pay. *See Turner v. Rogers*, 564 U.S. 431, 446-48 (2011).

Moreover, the amount of monetary bail must be revisited whenever any release-eligible defendant remains in jail following a bail determination because he or she cannot pay. The purpose of bail is to enable a defendant's release. If the amount set does not result in that person's release, the setting of bail has not served its purpose. Procedural safeguards such as these are especially important in the context of pretrial detention, where the presumption of innocence is at its peak, and where every person granted bail is, by definition, eligible for release. Bail systems like California's system as applied in this case, which penalize persons who cannot pay bail with pretrial detention, do not and cannot satisfy these procedural due process requirements.

Due process also prohibits the government from limiting certain fundamental liberty interests—no matter how much process is provided—"unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993). In *Salerno*, the Court held that a pretrial detention system that applied to those "arrested for a specific category of extremely serious offenses" who "Congress specifically found [were] far more likely to be responsible for dangerous acts in the community after arrest" was

narrowly tailored to serve such a compelling state interest. *Salerno,* 481 U.S. at 750. Critically, however, the Court explained that the pretrial detention system there required the government to demonstrate "probable cause" that the arrestee committed the charged crime and to convince a neutral decision-maker, following a "full-blown adversary hearing," and a finding "that *no* conditions of release can reasonably assure the safety of the community or any person[s]." *See id*. (emphasis added).

California's pretrial detention scheme as applied to Kenneth Humphrey was not "narrowly tailored" and did not meet the "full-blown adversary hearing" requirements of *Salerno*. Conditioning a person's release on their ability to buy it does nothing to further community safety. Quite the opposite, unwarranted pretrial detention often undermines public safety, as the empirical research demonstrates.

IV. MONEY-BAIL RESULTS IN EXCESSIVE, UNJUSTIFIABLE PRETRIAL DETENTION, WHICH HARMS CRIMINAL DEFENDANTS AND DOES NOT SERVE THE FAIR AND PROPER ADMINISTRATION OF JUSTICE

Extensive research shows that money-bail adversely affects criminal defendants and undermines the fairness, effectiveness, and credibility of our criminal justice system. In addition to depriving release-eligible persons of their liberty because of their inability to buy it, money-bail often impairs pretrial detainees' ability to mount a defense to the charges against them and destabilizes their lives and those of their families.

First, money-bail systematically places defendants in pretrial detention for no reason other than their inability to pay. In theory, money-bail exists to facilitate a defendant's release; any defendant for whom bail is set is, by definition, eligible for release. Yet for many defendants, there is no option other than to wait in jail. Defendants and their families are frequently unable to afford a fixed monetary bond or a nonrefundable 10% or 20% commercial surety fee.

Data shows that many defendants are unable to meet even relatively small bond amounts. In New York City, for example, only 26% of criminal defendants made bail set at less than $500 at arraignment, and only 7% made bail set at $5,000 (the median amount for a felony). Mary T. Phillips, *New York City Criminal Justice Agency, Inc.*, *A Decade of Bail Research in New York City*, 51 tbl. 7 (Aug. 2012). Even for those defendants who are ultimately able to secure the necessary resources, the process of doing so may take days or weeks.[8] And in many cases a commercial surety is not even an option; many bail bondsmen will not offer small bonds—meaning that, ironically, indigent defendants who are charged with the least serious offenses may be more likely to stay in jail because of their inability to make bail. *See* Brian Montopoli, *Is the U.S. Bail System Unfair?*, CBS News (Feb. 8, 2013).

[8] In rural areas, long distances and limited staff further increase the likelihood of prolonged detention before a defendant's first appearance before a judicial officer. It is therefore particularly important to find alternatives to money-bail systems in those jurisdictions. *See* Stephanie Vetter & John Clark, National Association of Counties, *The Delivery of Pretrial Justice in Rural Areas: A Guide for Rural County Officials* (2012). The ABA's Criminal Justice Standards state that "the defendant should in no instance be held by police longer than 24 hours without appearing before a judicial officer," ABA Standard 10-4.1, but in many areas of the country, suspects are held for much longer times.

Second, the consequences of pretrial detention are profound: even a few days in jail can disrupt a defendant's life, leading to long-term negative consequences. For indigent defendants, even short periods of confinement can wreak havoc on an already precarious financial situation. Pretrial detainees cannot work or earn income while incarcerated and may lose their jobs while waiting for a hearing, making it even more difficult to make bail. *See Moving Beyond Money: A Primer on Bail Reform*, Criminal Justice Policy Program at Harvard Law School 7 (Oct. 2016) ("Moving Beyond Money"); *Barker v. Wingo*, 407 U.S. 514, 532-33 (1972). Detainees who cannot make bail and live in shelters may lose housing for missing curfews or for prolonged absences. *See* Nick Pinto, *The Bail Trap,* N.Y. Times (Aug. 13, 2015); Dobbie, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 American Economic Review 202 (2018). Given indigent defendants' already diminished level of economic security and often shaky social safety nets, pretrial detention may trigger a debilitating downward spiral, even if they are ultimately acquitted. And those negative consequences are not limited to just the detainees: Children may be left unsupervised, and elderly or sick relatives may have no one else to take care of them as a result of a detainee not being able to make bail.

Detention does not just disrupt a defendant's life and hamper his or her ability to provide for the family. Incarcerated persons are also more likely to be sexually victimized, contract infectious diseases, and be exposed to unsafe and unsanitary living conditions, undermining their continued health and welfare. *See* Allen J. Beck et al., Bureau of

Justice Statistics, U.S. Dep't of Justice, *Sexual Victimization in Prisons and Jails Reported by Inmates*, 2011-12, at 9 (2013); *Moving Beyond Money*, at 6. Alarmingly, pretrial detainees also commit four-fifths of jail suicides, a risk that is highest during the first seven days of incarceration, when detainees are experiencing the initial "shock of confinement." Margaret Noonan et al., U.S. Dep't of Justice, *Mortality in Local Jails and State Prisons*, 2000-2013—Statistical Tables 3, 10, 12 (2015); *The "Shock of Confinement": The Grim Reality of Suicide in Jail*, NPR: All Things Considered (July 27, 2015).

Third, needless pretrial detention undermines the criminal justice system and frustrates detainees' legal rights. Pretrial detention impairs detainees' ability to prepare their case, including their "ability to gather evidence, contact witnesses, or otherwise prepare [a] defense." *Barker*, 407 U.S. at 533. For more than fifty years, researchers have found that pretrial detention leads to worse case outcomes for indigent defendants. *See generally,* Anne Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U. L. Rev. 641 (1964). Contemporary research too bears this out. Pretrial detainees are more likely to be convicted, more likely to receive jail or prison sentences, and, when convicted, more likely to receive a longer prison or jail sentence. Phillips, *supra,* at 115-21; Christopher T. Lowenkamp *et al*., Arnold Found, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes* (Nov. 2013). These consequences are particularly perverse because they may weigh heaviest on the lowest-risk defendants: one study found that low-risk defendants detained for the entire pretrial period are more than five times more likely to be sentenced to jail compared to low-risk defendants released at some

point before trial, and nearly four times more likely to be sentenced to prison—with sentences that, on average, are nearly three times longer. *See* Lowenkamp, *Investigating the Impact*, *supra*, at 11.

Pretrial confinement contributes directly to these disparities. In part, pretrial detainees' adverse outcomes occur because their confinement prevents them from demonstrating their ability to comply with the law and contribute to society, including through employment, schooling, rehabilitation, and family obligations. Phillips, *supra*, at 118. Furthermore, the prospect of prolonged pretrial detention may encourage guilty pleas from defendants who are innocent or have potential defenses to the charges. *Moving Beyond Money*, *supra*, at 7. In many cases, the anticipated length of pretrial detention may exceed the length of an actual post-conviction sentence. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2492 (2004) (noting that defendants charged with misdemeanors or lesser felonies are more likely to be incarcerated before than after conviction). For some minor crimes, post-conviction incarceration may not even be an option. *Id.* Thus, when given the choice between immediate release and trial after prolonged detention, many defendants, including innocent defendants, reasonably decide to plead guilty. Robert C. Boruchowitz *et al.*, Nat'l Ass'n of Criminal Defense Lawyers, *Minor Crimes, Massive Waste*, 32-33 (Apr. 2009).

These consequences—all of which in the case of indigent defendants hinge primarily on an individual's ability to pay—are inconsistent with a constitutional system of pretrial detention. But they are the inevitable—and impermissible—consequences of a system like the one in this case.

V. CONCLUSION

The judgment of the Court of Appeal invalidating California's money-bail system should be affirmed.

Dated: October 9, 2018

Respectfully Submitted,

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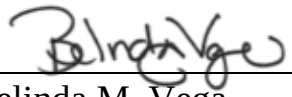

Belinda M. Vega
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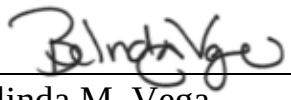
CERTIFICATE OF WORD COUNT

(California Rule of Court 8.504(d)(1))

The text of this brief consists of 4,311 words exclusive of those portions of the brief specified in California Rule of Court 8.504(d)(3), as counted by the Microsoft Word processing program used to prepare the brief.

Dated: October 9, 2018



Belinda M. Vega

ATTACHMENT A

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ABA STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE
(EXCERPTS)

Standard 10-1.1 Purposes of the pretrial release decision

The purposes of the pretrial release decision include providing due process to those accused of crime, maintaining the integrity of the judicial process by securing defendants for trial, and protecting victims, witnesses and the community from threat, danger or interference. The judge or judicial officer decides whether to release a defendant on personal recognizance or unsecured appearance bond, release a defendant on a condition or combination of conditions, temporarily detain a defendant, or detain a defendant according to procedures outlined in these Standards. The law favors the release of defendants pending adjudication of charges. Deprivation of liberty pending trial is harsh and oppressive, subjects defendants to economic and psychological hardship, interferes with their ability to defend themselves, and, in many instances, deprives their families of support. These Standards limit the circumstances under which pretrial detention may be authorized and provide procedural safeguards to govern pretrial detention proceedings.

Standard 10-1.2. Release under least restrictive conditions; diversion and other alternative release options

In deciding pretrial release, the judicial officer should assign the least restrictive condition(s) of release that will reasonably ensure a defendant's attendance at court proceedings and protect the community, victims, witnesses or any other person. Such conditions may include participation in drug treatment, diversion programs or other pre-adjudication alternatives. The court should have a wide array of programs or options available to promote pretrial release on conditions that ensure appearance and protect the safety of the community, victims and witnesses pending trial and should have the

capacity to develop release options appropriate to the risks and special needs posed by defendants, if released to the community. When no conditions of release are sufficient to accomplish the aims of pretrial release, defendants may be detained through specific procedures.

Standard 10-1.4. Conditions of release

(a) Consistent with these Standards, each jurisdiction should adopt procedures designed to promote the release of defendants on their own recognizance or, when necessary, unsecured bond. Additional conditions should be imposed on release only when the need is demonstrated by the facts of the individual case reasonably to ensure appearance at court proceedings, to protect the community, victims, witnesses or any other person and to maintain the integrity of the judicial process. Whenever possible, methods for providing the appropriate judicial officer with reliable information relevant to the release decision should be developed, preferably through a pretrial services agency or function, as described in Standard 10-1.9.

(b) When release on personal recognizance is not appropriate reasonably to ensure the defendant's appearance at court and to prevent the commission of criminal offenses that threaten the safety of the community or any person, constitutionally permissible non-financial conditions of release should be employed consistent with Standard 10-5.2.

(c) Release on financial conditions should be used only when no other conditions will ensure appearance. When financial conditions are imposed, the court should first consider releasing the defendant on an unsecured bond. If unsecured bond is not deemed a sufficient condition of release, and the court still seeks to impose monetary conditions, bail should be set at the lowest level necessary to ensure the defendant's appearance and with regard to a defendant's financial ability to post bond.

(d) Financial conditions should not be employed to respond to concerns for public safety.

(e) The judicial officer should not impose a financial condition of release that results in the pretrial detention of a defendant solely due to the defendant's inability to pay.

(f) Consistent with the processes provided in these Standards, compensated sureties should be abolished. When financial bail is imposed, the defendant should be released on the deposit of cash or securities with the court of not more than ten percent of the amount of the bail, to be returned at the conclusion of the case.

Standard 10-1.7. Consideration of the nature of the charge in determining release options

Although the charge itself may be a predicate to pretrial detention proceedings, the judicial officer should exercise care not to give inordinate weight to the nature of the present charge in evaluating factors for the pretrial release decision except when, coupled with other specified factors, the charge itself may cause the initiation of a pretrial detention hearing pursuant to the provisions of Standard 10-5.9.

Standard 10-5.3. Release on financial conditions

(a) Financial conditions other than unsecured bond should be imposed only when no other less restrictive condition of release will reasonably ensure the defendant's appearance in court. The judicial officer should not impose a financial condition that results in the pretrial detention of the defendant solely due to an inability to pay.

(b) Financial conditions of release should not be set to prevent future criminal conduct during the pretrial period or to protect the safety of the community or any person.

(c) Financial conditions should not be set to punish or frighten the defendant or to placate public opinion.

(d) On finding that a financial condition of release should be set, the judicial officer should require the first of the following alternatives thought sufficient to provide reasonable assurance of the defendant's reappearance:

(i) the execution of an unsecured bond in an amount specified by the judicial officer, either signed by other persons or not;

(ii) the execution of an unsecured bond in an amount specified by the judicial officer, accompanied by the deposit of cash or securities equal to ten percent of the face amount of the bond. The full deposit should be returned at the conclusion of the proceedings, provided the defendant has not defaulted in the performance of the conditions of the bond; or

(iii) the execution of a bond secured by the deposit of the full amount in cash or other property or by the obligation of qualified, uncompensated sureties.

(e) Financial conditions should be the result of an individualized decision taking into account the special circumstances of each defendant, the defendant's ability to meet the financial conditions and the defendant's flight risk, and should never be set by reference to a predetermined schedule of amounts fixed according to the nature of the charge.

(f) Financial conditions should be distinguished from the practice of allowing a defendant charged with a traffic or other minor offense to post a sum of money to be forfeited in lieu of any court

appearance. This is in the nature of a stipulated fine and, where permitted, may be employed according to a predetermined schedule.

(g) In appropriate circumstances when the judicial officer is satisfied that such an arrangement will ensure the appearance of the defendant,

RESOLUTION 112(C)

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

AUGUST 14-15, 2017

RESOLUTION

RESOLVED, That the American Bar Association urges federal, state, local, territorial, and tribal governments to adopt policies and procedures that:

1. favor release of defendants upon their own recognizance or unsecured bond;
2. require that a court determine that release on cash bail or secured bond is necessary to assure the defendant's appearance and no other conditions will suffice for that purpose before requiring such bail or bond;
3. prohibit a judicial officer from imposing a financial condition of release that results in the pretrial detention of a defendant solely due to the defendant's inability to pay;
4. permit a court to order a defendant to be held without bail where public safety warrants pretrial detention and no conditions of pretrial release suffice, and require that the court state on the record the reasons for detention; and
5. bar the use of "bail schedules" that consider only the nature of the charged offense, and require instead that courts make bail and release determinations based upon individualized, evidence-based assessments that use objective verifiable release criteria that do not have a discriminatory or disparate impact based on race, ethnicity, religion, socio-economic status, disability, sexual orientation, or gender identification.

CERTIFICATE OF SERVICE

Case: *In Re Kenneth Humphrey*, on Habeas Corpus
Case No.: S247278

I, Jan Contreras, am employed in the City of Los Angeles, Los Angeles County, California. I am over the age of eighteen (18) years and am not a party to the within action. My business address is 2049 Century Park East, Suite 2300, Los Angeles, California 90067.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. In accordance with that practice, correspondence placed in the internal mail collection system is deposited in the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic system. Participants who are registered with TrueFiling will be served electronically. Participants who are not registered will receive hard copies through the mail via the United States Postal Service.

On October 9, 2018, I electronically served the attached **APPLICATION FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF OF AMERICAN BAR ASSOCIATION IN SUPPORT OF RESPONDENT AND AFFIRMANCE; BRIEF FOR AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT AND AFFIRMANCE**, on the interested parties in this action by transmitting a true copy through this Court's TrueFiling system. Because one or more of the participants has not registered with the Court's system or are unable to receive electronic correspondence, on August 8, 2018, I placed a true copy thereof in a sealed envelope in the internal mail collection system of Venable LLP at 2049 Century Park East, Suite 2300, Los Angeles, California 90067, addressed as follows:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. This declaration was executed on October 9, 2018, at Los Angeles, California.

Jan Contreras

SERVICE LIST

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