

No. S247278
(Court of Appeal No. A152056)
(San Francisco Superior Court No. 17007715)

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

In Re KENNETH HUMPHREY,
on Habeas Corpus.

APPLICATION FOR LEAVE TO FILE BRIEF OF *AMICUS
CURIAE* AND [PROPOSED] BRIEF OF CRIME SURVIVORS
FOR SAFETY AND JUSTICE IN SUPPORT OF
RESPONDENT KENNETH HUMPHREY

After a Decision by the Court of Appeal
First Appellate District, Division Two
Hon. Joseph M. Quinn

DANIEL PURCELL - # 191424
MAYA KARWANDE - # 295554
DIVYA MUSINIPALLY - # 316114
Keker, Van Nest & Peters LLP
Email: dpurcell@keker.com
mkarwande@keker.com
dmusinipally@keker.com
633 Battery Street
San Francisco, CA 94111-1809
Telephone: 415 391 5400
Facsimile: 415 397 7188

W. DAVID BALL - # 247518
Associate Professor
Santa Clara School of Law
Santa Clara University
500 El Camino Real
Santa Clara, CA 95053

Attorneys for Amicus Curiae
Crime Survivors for Safety and Justice

No. S247278
(Court of Appeal No. A152056)
(San Francisco Superior Court No. 17007715)

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

In Re KENNETH HUMPHREY,
on Habeas Corpus.

APPLICATION FOR LEAVE TO FILE BRIEF OF *AMICUS
CURIAE* AND [PROPOSED] BRIEF OF CRIME SURVIVORS
FOR SAFETY AND JUSTICE IN SUPPORT OF
RESPONDENT KENNETH HUMPHREY

After a Decision by the Court of Appeal
First Appellate District, Division Two
Hon. Joseph M. Quinn

DANIEL PURCELL - # 191424
MAYA KARWANDE - # 295554
DIVYA MUSINIPALLY - # 316114
Keker, Van Nest & Peters LLP
Email: dpurcell@keker.com
mkarwande@keker.com
dmusinipally@keker.com
633 Battery Street
San Francisco, CA 94111-1809
Telephone: 415 391 5400
Facsimile: 415 397 7188

W. DAVID BALL - # 247518
Associate Professor
Santa Clara School of Law
Santa Clara University
500 El Camino Real
Santa Clara, CA 95053

Attorneys for Amicus Curiae
Crime Survivors for Safety and Justice

I. APPLICATION

Pursuant to Rule 8.520(f) of the California Rules of Court, Crime Survivors for Safety and Justice (CSSJ) respectfully apply for permission to file the *Amicus Curiae* Brief contained herein.

II. INTERESTS OF AMICUS CURIAE

Crime Survivors for Safety and Justice is a national network for diverse crime survivors to join together and advocate for new safety priorities. CSSJ is composed of over 10,000 members, many of whom have suffered harm as either a direct crime victim or as a family member of a crime victim. In California, the CSSJ network includes a statewide Leadership Team, an online membership, and five regional chapters (Los Angeles, the San Francisco Bay Area, Sacramento, San Diego and Fresno). CSSJ recognizes the systemic impacts of over-incarceration on the public and on crime victims. CSSJ advocates for programs and policies that recognize and consider the systemic effects of carceral criminal justice policies upon public safety in order to better assist and protect the people and communities most harmed by crime and violence. Through policy advocacy and public education, CSSJ attempts to elevate the voices of those that are most harmed by crime and least helped by our current justice priorities, and to advance new public-safety priorities rooted in harm prevention, trauma recovery, and community health.

III. DISCLOSURE OF AUTHORSHIP AND MONETARY CONTRIBUTION

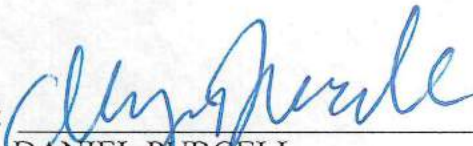
No party, or counsel for any party, in this writ petition has authored any part of the accompanying proposed *Amicus Curiae* brief. In addition, no person or entity has made any monetary contributions to fund the preparation or submission of this brief.

Respectfully submitted,

Dated: October 9, 2018

KEKER, VAN NEST & PETERS LLP

By:



DANIEL PURCELL
MAYA KARWANDE
DIVYA MUSINIPALLY

W. DAVID BALL
SANTA CLARA SCHOOL OF LAW

Attorneys for Amicus Curiae
Crime Survivors for Safety and
Justice

No. S247278
(Court of Appeal No. A152056)
(San Francisco Superior Court No. 17007715)

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

In Re KENNETH HUMPHREY,
on Habeas Corpus.

**[PROPOSED] *AMICUS CURIAE* BRIEF OF CRIME
SURVIVORS FOR SAFETY AND JUSTICE IN SUPPORT OF
RESPONDENT KENNETH HUMPHREY'S PETITION FOR
HABEAS CORPUS**

After a Decision by the Court of Appeal
First Appellate District, Division Two
Hon. Joseph M. Quinn

DANIEL PURCELL - # 191424
MAYA KARWANDE - # 295554
DIVYA MUSINIPALLY - # 316114
Keker, Van Nest & Peters LLP
Email: dpurcell@keker.com
mkarwande@keker.com
dmusinipally@keker.com
633 Battery Street
San Francisco, CA 94111-1809
Telephone: 415 391 5400
Facsimile: 415 397 7188

W. David Ball - # 247518
Santa Clara School of Law
Santa Clara University
500 El Camino Real
Santa Clara, CA 95053

Attorneys for Amicus Curiae
Crime Survivors for Safety and Justice

TABLE OF CONTENTS

I. Introduction 1

II. Background 5

III. Argument..... 10

 A. Monetary Bail Bears No Rational Relationship To Victim Or Public Safety
 And Negatively Impacts Victims..... 11

 1. Money Bail Does Not Protect Public Safety. 11

 2. Monetary Bail Harms Victims of Crimes. 13

 B. Courts Should Consider The Systemic Threats To Public Safety When
 Setting Pretrial Conditions. 14

 1. California Constitution Section 12 Prohibits Pretrial Detention
 Except In Certain Circumstances And Section 28(F)(3) Guides The
 Determination Of Release And Release Conditions..... 16

 2. Public Safety Considerations Have Not Been Narrowly Defined in
 the Pretrial Context. 18

 3. Courts Should Consider All Public Safety Risks Of Pretrial
 Detention To Public Safety When Setting Conditions Of Non-
 Monetary Release..... 21

IV. Conclusion..... 28

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Dyna-Med, Inc. v. Fair Employment & Hous. Com.</i> , 43 Cal. 3d 1379 (1987)	29
<i>In re Humphrey</i> , 19 Cal. App. 5th 1006 (2018), review granted and de-publication denied, 233 Cal. Rptr. 3d 129 (May 23, 2018).....	13, 35
<i>Lungren v. Deukmejian</i> , 45 Cal. 3d 727 (1988)	31
<i>People v. Standish</i> , 38 Cal. 4th 858 (2006)	28
<i>People v. Valencia</i> , 3 Cal. 5th 347, 357-69 (2017).....	29, 31
<i>United States v. Salerno</i> , 481 U.S. 739 (1987).....	30

Statutes

Bus. & Prof. Code, § 17510.25(f).....	30
Cal. Const. art. I, sec. 12.....	26, 27, 28
Cal. Const. art. I, § 28(b)	26, 28, 29
Cal. Const. art. I, §. 28(f)(3)	14, 29
California constitution	26
California Constitution Article I sections 12 and 28(f)(3).....	14, 25
Government. Code, § 15820.914	32
Health & Saf. Code, § 11760.5(a).....	35
Labor Code, § 7300(a)-(b)	30
Penal Code, § 17.5(3).....	33
Penal Code, § 17.5(4).....	36

Penal Code § 17.5(a)(4)	25
Penal Code § 17.5(a)(9)	25
Penal Code § 17.7(a)-(b).....	33
Penal Code, § 1001.85(a).....	36
Penal Code section 1210.1 and section 3063.1	30
Penal Code, § 1228(c)-(d).....	33
Penal Code § 1275(a)(1)	15, 28
Penal Code, § 3074	33
Penal Code § 4496.02(c).....	30
Penal Code § 4496.02(c) and § 4496.02(f)	30
Penal Code § 4496.02(f)	30, 32
Vehicle Code, § 34505.1	30

Other Authorities

Alliance for Safety and Justice, <i>Crime Survivors Speak: The First-Ever National Survey of Victims' View on Safety and Justice</i> (2014), https://allianceforsafetyandjustice.org/wp-content/uploads/documents/Crime%20Survivors%20Speak%20Report.pdf	16, 17, 18, 38
American Heritage Dictionary (4th Ed.).....	32
Anna Kelly & Mei-Ling McNamara, <i>Revealed: How US sex traffickers recruit jailed women for prostitution</i> , <i>The Guardian</i> , June 29, 2018	23
Black's Law Dictionary (10th ed. 2014).....	32
<i>Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity</i> , Prison Policy Initiative, May 28, 2014, https://www.prisonpolicy.org/reports/rates.html (accessed Oct. 8, 2018).....	19
Cal. Const. Art. XIII, sec. 36	35
Cal. Rules of Court, rule 4.410(a)(8)	25
Cal. Rules of Court 4.410(a)(8)	33
California Constitution, article I, section 28	26

California Constitution, article I, section 12.....	26
California Constitution, article I, section 28(f)(3)	14, 15, 27, 29
California Victim Compensation and Government Claims Board “Notice of Funds Available California Trauma Recovery Center Grant Fiscal Year July 1, 2013 through June 30, 2014,” https://victims.ca.gov/docs/notices/TraumaCenterGrant/TraumaCenterGrant-NoticeofFundsAvailable.pdf	37
California Victim Compensation and Government Claims Board “Notice of Funds Available California Trauma Recovery Center Grant Fiscal Year July 1, 2014 through June 30, 2015,” https://victims.ca.gov/docs/notices/TraumaCenterGrant/TraumaCenterGrant-NOFA-6-27-14.pdf	37
Californians for Safety and Justice, <i>California Crime Victims' Voices: Findings from the First-Ever Survey of California Crime Victims and Survivors</i> (2013), safeandjust.org/resources/2013-06-california-crime-victims-report	<i>passim</i>
Californians for Safety and Justice, <i>Pretrial Progress: A Survey of Pretrial Practices and Services in California</i> (Aug. 2015), https://safeandjust.org/wp-content/uploads/PretrialSurveyBrief_8.26.15v2.pdf	19
Californians for Safety and Justice, <i>Safe and Sound: Strategies to Save A Billion in Prison Costs and Build New Safety Solutions</i> (Dec. 2017)	<i>passim</i>
Californians for Safety and Justice, <i>Victims of Crime Act and the Need for Advocacy</i> (Mar. 2017), https://safeandjust.org/wp-content/uploads/CSJ-VOCA-toolkit-Mar2017-R2.pdf	18
Criminal Justice Policy Program, Harvard Law School, <i>Moving Beyond Money: A Primer on Bail Reform</i> (Oct. 2016), http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf	22
Dean G. Kilpatrick & Ron Acierno, <i>Mental Health Needs of Crime Victims: Epidemiology and Outcomes</i> , J. of Traumatic Stress, Vol. 16, No. 2, (2003).....	17
Heather Warnken, <i>Untold Stories of California Crime Victims: Research and Recommendations on Repeat Victimization and Rebuilding Lives</i> , Berkeley Law Chief Justice Earl Warren Institute on Law and Social Policy, (Apr. 2014), https://www.law.berkeley.edu/files/WI_CA_Untold_Stories_03_31_14_lo_res_Final.pdf	17

How California's Pretrial Detention and Bail System Unfairly Punishes Poor People, (Apr. 2017), https://www.hrw.org/sites/default/files/report_pdf/usbail0417_web_0.pdf	12
Human Rights Watch, "Not in it for Justice": How California's Pretrial Detention and Bail System Unfairly Punishes Poor People, (Apr. 2017), https://www.hrw.org/sites/default/files/report_pdf/usbail0417_web_0.pdf	<i>passim</i>
Jennifer Truman and Lynn Langton, "Criminal Victimization, 2014," Bureau of Justice Statistics, U.S. Department of Justice, (Aug. 2015) (National Crime Victimization Survey (NCVS)), https://www.bjs.gov/content/pub/pdf/cv14.pdf	16
Katreena Scott, et. al, <i>Intervening to Prevent Repeat Offending Among Moderate-to High-Risk Domestic Violence Offenders</i> , Int'l J. of Offender Therapy and Comparative Criminology, Vol. 59, 3 (Feb. 2015).....	24
New Oxford American Dictionary (3rd Ed.)	32
Office for Victims of Crime, U.S. Dept. of Justice, <i>Vision 21: Transforming Victim Services Final Report</i> (May 2013), https://ovc.ncjrs.gov/vision21/pdfs/Vision21_Report.pdf	18
Office of the Treasurer & Tax Collector, City and County of San Francisco, <i>Do the Math: Money Bail Does Not Add Up For San Francisco</i> (June 2017), https://sftreasurer.org/sites/default/files/2017.6.27%20Bail%20Report%20FINAL_2.pdf	19, 24, 34
The PEW Center on States, <i>State of Recidivism: The Revolving Door of America's Prisons</i> , at 10 (Apr. 2011), https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pes_assets/2011/pewstateofrecidivismpdf.pdf	11
Saneta deVuono-powell, et. al, <i>Who Pays? The True Cost of Incarceration on Families</i> , Ella Baker Center et. al. (Sept. 2015), https://ellabakercenter.org/sites/default/files/downloads/who-pays.pdf	19, 20
Danielle Sered, <i>Young Men of Color and the Other Side of Harm: Addressing Disparities in our Responses to Violence</i> , Vera Institute of Justice (Dec. 2014), https://storage.googleapis.com/vera-web-assets/downloads/Publications/young-men-of-color-and-the-other-side-of-harm-addressing-disparities-in-our-responses-to-violence/legacy_downloads/men-of-color-as-victims-of-violence-v3.pdf	18
Timothy R. Schnacke, <i>Fundamentals of Bail</i> , U.S. DOJ, National Institute of Corrections, (Aug. 2014)	14

Vera Institute of Justice, *Incarceration's Front Door: The Misuse of Jails in America*, at 5, 12-13 (Feb. 2015),
<https://www.vera.org/publications/incarcerations-front-door-the-misuse-of-jails-in-america>20, 34, 36

Webster's New College Dictionary32

I. INTRODUCTION

Amicus Crime Survivors for Safety and Justice (CSSJ) represents approximately 10,000 diverse crime survivors in California and throughout the nation. CSSJ's members include Californians who have suffered the awful consequences of crime, often repeatedly—either as a direct victim or a family member of a person directly harmed by, criminal acts. Despite being among those most harmed by criminal behavior, CSSJ's members have been largely neglected by the justice and public safety priorities and systems in place for decades. The set of policies, practices, and priorities that compose the California criminal justice system has resulted in historic rates of incarceration in California's jails and prisons while at the same time leading to one of the nation's highest rates of recidivism.¹ Although California voters and politicians have repeatedly enacted those policies in the name of “public safety,” and “victims' rights,” in practice they have made Californians as a whole, and CSSJ members in particular, far less safe. More recidivism means more crime and more suffering by those most often and repeatedly violated by criminal acts. Incarceration exacerbates cycles of crime and violence in communities already suffering from high rates of crime, increasing victimization, threatening public safety, and diverting resources from desperately needed violence prevention and trauma-recovery services. Crime victims deserve a justice system that

¹ The PEW Center on States, *State of Recidivism: The Revolving Door of America's Prisons*, at 10 (Apr. 2011), https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pes_assets/2011/pewstateofrecidivismpdf.pdf (California's rate of recidivism was 57.8%, the highest in the country).

meets their needs and materially increases their safety by prioritizing prevention, accountability, and trauma recovery.

Pretrial detention is one of the main drivers of California's excessive incarceration rate and corresponding high recidivism rate. According to Human Rights Watch, 64% of people in California jails at any given moment are being held pretrial.² A staggering number of these individuals are being held not because they have been found, through evidence-based assessment, to pose an actual public-safety threat, but rather because they cannot afford the monetary bail set for their release. Even more egregious, that same report found that from 2011 to 2015, over a quarter-million Californians were detained entirely based on accusations that ultimately did not justify even the filing of a criminal charge.³ Meanwhile, others are released, despite posing high public safety risks, solely because they can afford monetary bail and without regard to evidence-based predictors of future violence.

This case raises questions of how courts should evaluate and account for victims' rights and public safety concerns in determining whether to detain or release defendants pretrial and, if released, what conditions shall be imposed to ensure public and victim safety. CSSJ presents this brief to provide the Court with the perspective of California crime victims, a group that is often touted in discussions of public safety, but whose

² Human Rights Watch, *"Not in it for Justice": How California's Pretrial Detention and Bail System Unfairly Punishes Poor People*, at 17 (Apr. 2017), https://www.hrw.org/sites/default/files/report_pdf/usbail0417_web_0.pdf ("HRW, *Not in it for Justice*").

³ *Id.* at 42.

needs are rarely met, on issues pertinent to the Court's decision in this case. CSSJ seeks to emphasize a simple point that may have been lost in public debate on this issue: crime victims do not favor, and do not benefit from, routine pretrial detention of persons accused of crime.

CSSJ describes below how money bail harms crime victims in numerous ways. These harms bear on the second question posed by the Court, which asks whether trial courts may consider public and victim safety in setting the amount of monetary bail.⁴ The harms to crime victims created by monetary bail (and the corresponding lack of benefits) support the Court of Appeal's holding, with which CSSJ agrees, that the imposition of monetary bail bears no rational relationship to the goal of protecting victims and public safety.⁵ Crime victims do not favor, nor benefit from, the current money bail system which has resulted in excessive pretrial detention, on the one hand, while at the same time allowing the pretrial release of some defendants who pose a significant public safety threat yet are able to afford to post bail.

⁴ *In re Humphrey*, 19 Cal. App. 5th 1006, 1029 (2018), *review granted and de-publication denied*, 233 Cal. Rptr. 3d 129 (May 23, 2018) ("Money bail, however, has no logical connection to protection of the public, as bail is not forfeited upon commission of additional crimes. Money bail will protect the public only as an incidental effect of the defendant being detained due to his or her inability to pay, and this effect will not consistently serve a protective purpose, as a wealthy defendant will be released despite his or her dangerousness while an indigent defendant who poses minimal risk of harm to others will be jailed.").

⁵ Although Senate Bill 10 has ended money bail, because that legislation may be subject to a referendum, the Court's decision on this issue remains critically important.

Senate Bill 10, which Governor Brown signed into law on August 28, 2018, will eliminate monetary bail in California. Once in effect, it will remove the possibility that an accused person will be detained simply because he or she does not have sufficient funds to post bail. Although this is undoubtedly a step in the right direction, Senate Bill 10 serious concerns about the possible overuse of preventative detention under the new scheme.

For reasons similar to those discussed above, CSSJ does not support an expansion of preventive detention in lieu of the money bail system, which bears on the third question posed by the Court. CSSJ agrees with the position taken by Respondent concerning the reconciliation of sections 12 and 28(f)(3) of Article I of the California Constitution: section 12 establishes restrictions upon the state's ability to preventatively detain defendants pretrial⁶ while section 28(f)(3) enumerates the criteria that courts must consider and prioritize when determining whether to preventatively detain those section 12 allows to be detained, and in determining appropriate conditions of pretrial release for those not so detained. CSSJ urges the Court to reject Petitioner's broad reading of California Constitution section 28(f)(3)⁷, which would eviscerate and effectively repeal

⁶ Like Respondent, CSSJ treats the concept of bail, as it has historically been construed, as referring to both monetary and non-monetary conditions of release. *See e.g.* Timothy R. Schnacke, *Fundamentals of Bail*, U.S. DOJ, National Institute of Corrections, 19-35 (Aug. 2014).

⁷ CSSJ notes, but takes no position on, Respondent's argument that section 28(f)(3) is not operative. To the extent this Court deems Section 28(f)(3) operative, CSSJ respectfully provides below its analysis concerning how trial courts should interpret that provision's requirement that "public safety and the safety of the victim shall be the primary considerations" in setting bail. This analysis applies equally to the similar language in

section 12 by allowing radical expansion of the category of defendants the state may preventatively detain. Instead, trial courts should be required to make evidence-based pretrial release decisions taking into account considerations of public and victim safety that recognize the systemic effects of criminal justice policies that lead to over-incarceration and perpetuate California's shamefully, and dangerously, high rates of recidivism.

These systemic harms include overcrowding of jails, high financial costs that divert money from trauma recovery services and crime prevention, the increased risk of recidivism and resulting victimization, the creation of multi-generational cycles of violence, and the social costs of incarceration on the defendants and their communities. Those harms disproportionately impact low-income communities and communities of color and, far from protecting the most vulnerable Californians, in fact impose new harms on existing crime survivors and generate new victims. Only by taking account of the full range of harms stemming from pretrial detention can courts establish a system that best promotes accountability and most effectively prevents future crime.

II. BACKGROUND

Crime "victimization is not randomly distributed throughout the population: Some victims experience victimization regularly, others experience it occasionally, and the large remainder do not experience it at all."⁸ A 2013 survey of California victims found

Penal Code § 1275(a)(1), which provides that "public safety shall be the primary consideration in setting bail."

⁸ Californians for Safety and Justice, *California Crime Victims' Voices: Findings from the First-Ever Survey of California Crime Victims and Survivors*, at 5, 7-8 (2013),

that the most likely victims of violent crime were low-income, young, and people of color.⁹ Latinos, African Americans and Native Americans were significantly more likely than whites to have been victims of violent crime. Likewise, young people between the ages of 18 and 24 were much more likely to have been violently victimized than any other age group.¹⁰

The survey data also revealed that certain communities have been victimized more than others. Over half of crime victims had a friend, and two-thirds had a family member, who had also been victimized in the last five years. The overwhelming majority of California crime victims' (nine out of ten) quality of life is affected by crime in their

safeandjust.org/resources/2013-06-california-crime-victims-report (“CSJ, *Cal. Crime Victims’ Voices*”). See also Alliance for Safety and Justice, *Crime Survivors Speak: The First-Ever National Survey of Victims’ View on Safety and Justice*, at 7 (2014), <https://allianceforsafetyandjustice.org/wp-content/uploads/documents/Crime%20Survivors%20Speak%20Report.pdf> (“ASJ, *Nat’l Crime Survivors Speak*”).

⁹ Californians for Safety and Justice commissioned this first-ever survey of California crime victims in April 2013. The survey polled more than 2,600 Californians who were representative of California’s population with respect to race, ethnicity, age and gender. The survey was meant to address the lack of data on “who California’s crime victims are, what they need to recovery from crime, and their opinions about our state’s justice priorities.” CSJ, *Cal. Crime Victims’ Voices*, *supra*, at 4.

¹⁰ Although “[t]he number of people who acknowledged having experienced any crime in the last five years was roughly in proportion to California’s general population in terms of race, ethnicity and age,” the difference in demographics for risk of being a victim of violent crime becomes stark. See *id.* at 8. Nationally too, ASJ survey results and National Crime Victimization Survey data show that low-income communities, people of color, and young people (ages 18-24) experience the most violent crime. See ASJ, *Nat’l Crime Survivors Speak*, *supra*, at 7-8; Jennifer Truman and Lynn Langton, “Criminal Victimization, 2014,” Bureau of Justice Statistics, U.S. Department of Justice, at 6, 9 (Aug. 2015) (National Crime Victimization Survey (NCVS)), <https://www.bjs.gov/content/pub/pdf/cv14.pdf>, (in 2014, African Americans were nearly one third more likely to have been victims of violent crime than white people and young people experience crime at nearly twice the rate of any other age group).

area. Nationally, six in ten crime victims have witnessed someone else being hit or assaulted in the past ten years. Witnessing other crime, in particular violent crime, and experiencing continuous feelings of unsafety compound the impact of the initial victimization.¹¹

Perhaps worst of all, once they are victimized, a crime victim is more likely to suffer again. Indeed, the single strongest predictor of victimization is having previously been a victim of crime; two-thirds of all victims acknowledged having been victims of multiple crimes in the last five years.¹² Latinos and African Americans are more likely than whites to have been victims of three or more crimes over a five-year period.¹³

Victims of crime suffer innumerable consequences. In addition to any monetary loss or physical harm, experiencing crime tends to cause mental health consequences, such as higher levels of depression, anxiety and symptoms of Post-Traumatic Stress Disorder (PTSD). Repeated victimization only amplifies these effects.¹⁴ Unless crime

¹¹ *Id.* at 12; ASJ, *Nat'l Crime Survivors Speak*, *supra*, at 10.

¹² CSJ, *Cal. Crime Victims' Voices*, *supra*, at 8; *Nat'l Crime Survivors Speak*, *supra*, at 7 (“People who have been the victim of a violent crime are more than four times as likely to have been victimized four or more times. More than one-third (35%) of victims of a violent crime have been repeatedly victimized.”); Heather Warnken, *Untold Stories of California Crime Victims: Research and Recommendations on Repeat Victimization and Rebuilding Lives*, Berkeley Law Chief Justice Earl Warren Institute on Law and Social Policy, at 4 (Apr. 2014) https://www.law.berkeley.edu/files/WI_CA_Untold_Stories_03_31_14_lo_res_Final.pdf (“Warnken, *Untold Stories of Cal. Crime Victims*”) (“A growing body of research indicates that the strongest predictor of many forms of victimization is having previously been a victim of crime”).

¹³ CSJ, *Cal. Crime Victims' Voices*, *supra*, at 8.

¹⁴ *Id.* at 8, 12; ASJ, *Nat'l Crime Survivors Speak*, *supra*, at 9-10 (nationally, eight in ten victims experienced at least one symptom of trauma); Dean G. Kilpatrick & Ron Acerno, *Mental Health Needs of Crime Victims: Epidemiology and Outcomes*, J. of

victims receive help in dealing with this trauma, they are at an increased risk of substance-abuse, worsening mental and physical health, difficulty with school, work, and relationships, and committing violence themselves. Youthful crime victims are especially at risk of turning to criminal activity themselves when their mental-health needs are left unmet.¹⁵ Unfortunately, the same communities—low-income people of color—that most commonly experience crime, including repeat crime, are least likely to be reached, much less assisted, by California’s victim or trauma recovery services.¹⁶

Traumatic Stress, Vol. 16, No. 2, 129 (2003) (past victimization increases risk for future victimization and risk of mental health issues following new victimization).

¹⁵ CSJ, *Cal. Crime Victims’ Voices*, *supra*, at 12; ASJ, *Nat’l Crime Survivors Speak*, *supra*, at 12; Californians for Safety and Justice, *Safe and Sound: Strategies to Save A Billion in Prison Costs and Build New Safety Solutions*, at 39 (Dec. 2017) (“CSJ, *Safe and Sound*”), https://safeandjust.org/wp-content/uploads/CSJSafeSound-Dec4-online_2.pdf; Danielle Sered, *Young Men of Color and the Other Side of Harm: Addressing Disparities in our Responses to Violence*, Vera Institute of Justice, at 8 (Dec. 2014), https://storage.googleapis.com/vera-web-assets/downloads/Publications/young-men-of-color-and-the-other-side-of-harm-addressing-disparities-in-our-responses-to-violence/legacy_downloads/men-of-color-as-victims-of-violence-v3.pdf.

¹⁶ CSJ, *Cal. Crime Victims’ Voices*, *supra*, at 14-15 (majority of Californian crime victims were unaware of available victim services; younger victims and Latino and African American victims were more likely to be unaware of victims’ compensation assistance); Californians for Safety and Justice, *Victims of Crime Act and the Need for Advocacy*, at 8 (Mar. 2017), <https://safeandjust.org/wp-content/uploads/CSJ-VOCA-toolkit-Mar2017-R2.pdf> (underserved victim communities include boys and men of color, members of one or more racial or ethnic groups, and residents of rural or remote areas and “inner cities.”); Office for Victims of Crime, U.S. Dept. of Justice, *Vision 21: Transforming Victim Services Final Report*, at 18 (May 2013), https://ovc.ncjrs.gov/vision21/pdfs/Vision21_Report.pdf (services for underserved populations that also experience higher crime rates may be “unavailable, inadequate, or difficult to access).

Like the class of victims of crime, accused persons being held in pretrial detention are disproportionately low-income, young, and African-American or Latino.¹⁷ When the accused are unnecessarily detained pending trial, crime victims experience negative impacts of that incarceration in their communities which include a large number of individuals accused—including wrongly accused—of crimes. Chief among those harms is the established statistical fact that, rather than promoting public safety, unnecessary pretrial detention often leads to *more* crime, and *more* victimization, because among the low-risk accused “detained individuals who serve jail time are more likely to commit crimes than if they had been released pretrial.”¹⁸ The community, including crime

¹⁷ According to 2010 census data, the incarceration rate for whites is 450 per 100,000; 831 per 100,000 for Latinos; and 2,306 per 100,000 for African-Americans. Leah Sakala, *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity*, Prison Policy Initiative, May 28, 2014, <https://www.prisonpolicy.org/reports/rates.html> (accessed Oct. 8, 2018). “Nationally, prisoners overwhelmingly come from the poorest economic class.” HRW, *Not in it for Justice*, *supra*, at 16. “Estimates report that nearly 40% of all crimes are directly attributable to poverty and the vast majority (80%) of incarcerated individuals are low-income.” Saneta deVuono-powell, et. al, *Who Pays? The True Cost of Incarceration on Families*, Ella Baker Center et. al., at 9 (Sept. 2015), <https://ellabakercenter.org/sites/default/files/downloads/who-pays.pdf> (“Ella Baker Center, *Who Pays?*”). Pretrial detention statistics in California reveal similar disparities: African-American and Latino defendants are more likely to be detained before trial than whites in part because of an inability to afford bail. Californians for Safety and Justice, *Pretrial Progress: A Survey of Pretrial Practices and Services in California*, at 5 (Aug. 2015), https://safeandjust.org/wp-content/uploads/PretrialSurveyBrief_8.26.15v2.pdf.

¹⁸ CSJ, *Safe and Sound*, *supra*, at 26 (citing Laura and John Arnold Foundation, *Pretrial Criminal Justice Research*, at 2 (Nov. 2013); Office of the Treasurer & Tax Collector, City and County of San Francisco, *Do the Math: Money Bail Does Not Add Up For San Francisco*, at 12 (June 2017), https://sftreasurer.org/sites/default/files/2017.6.27%20Bail%20Report%20FINAL_2.pdf (“Off. of the Treasurer & Tax Collector, *Do the Math*”) (“Studies also show that defendants become more likely to reoffend the longer they are detained pretrial: with just two to three days of pre-trial detention, low-risk defendants are almost 40 percent more

victims, also absorb the financial and social tolls that the instability of pretrial detention may impose, such as lost employment, housing, transportation, medical or mental health treatment, child support or custody, and other resources.¹⁹

III. ARGUMENT

Overuse of pretrial detention, whether due to unaffordable money bail or an order from the court, harms crime victims and their communities. Amicus CSSJ first addresses how money bail bears no rational relationship to public safety and actually harms crime victims. Next, Amicus addresses the relationship between California Constitution section 12, which establishes restrictions upon the state's ability to preventively detain except in certain circumstances and section 28(f)(3), which guides the courts determination of pretrial release and release conditions. CSSJ advocates trial courts should be required to make evidence-based pretrial release decisions taking into account considerations of public and victim safety that recognize the systemic effects of criminal justice policies that lead to over-incarceration and increased victimization.

likely to commit new crimes before trial than equivalent defendants held one day or less.”).

¹⁹ CSJ, *Safe and Sound*, *supra* at 26; Vera Institute of Justice, *Incarceration's Front Door: The Misuse of Jails in America*, at 5, 12-13 (Feb. 2015), <https://www.vera.org/publications/incarcerations-front-door-the-misuse-of-jails-in-america> (“Ultimately, these consequences are corrosive and costly for everyone because no matter how disadvantaged people are when they enter jail, they are likely to emerge with their lives further destabilized and, therefore, less able to be healthy, contributing members of society.”) (“Vera, *Incarceration's Front Door*”); Ella Baker Center, *Who Pays?*, *supra*, at 7 (collateral impacts of incarceration are “felt most deeply by women, low-income familiarizes, and communities of color.”).

A. Monetary Bail Bears No Rational Relationship To Victim Or Public Safety And Negatively Impacts Victims.

Monetary bail is grounded in the mistaken notion that public safety is enhanced by incarcerating criminal suspects in county jails pending trial. In practice, monetary bail leads to the precise opposite result. First, money bail does not promote public safety because it detains individuals based on their ability to pay, not because they pose a high enough public safety risk to qualify for detention. As a result, monetary bail leads to unnecessary pretrial detention, which, as discussed, *infra*, in section B.3, imposes numerous other harms on crimes victims and the public, including over-incarceration, wasted resources that are better spent on crime prevention, increased recidivism, and social costs that affect the accused, his or her family, and the community. Second, it is often the victims of crimes—including persons who have been trafficked or coerced into prostitution and victims of domestic violence—who pay bail, either for themselves or their attackers. Rather than protecting victims, this monetary burden simply creates additional harm.

1. Money Bail Does Not Protect Public Safety.

California's system of money bail determines which accused criminals remain detained and which are released based on their ability to pay, rather than on an individualized assessment of each individual's actual threat to public safety. Under a money bail system, an individual that presents a serious public safety risk may gain release simply because he or she has the means to pay bail, whereas an individual who is

unlikely to engage in any pretrial misconduct may continue to suffer detention because he or she lacks funds to pay the set bail amount.

The money bail system operates mechanically, based on a schedule, often divorced from any systematic evaluation of whether the individual has the means to pay, and if not, whether pretrial detention is justified to protect public safety. Bail schedules fail to take into account each individual's case and crime and fail to consider whether a given individual is likely to cause harm if released. Thus, money bail is not structured to actually protect public safety. Instead it leads to unnecessary pretrial detention, which imposes negative public safety consequences on the accused, crime victims, and the community, as detailed, *infra*, in section B.3.

Monetary bail further undermines public safety by creating incentives for poor, innocent, people to plead guilty solely to escape pretrial detention. When monetary bail is set at an amount a defendant cannot afford, the defendant that wishes to assert his or her innocence faces an average of 30 days of pretrial detention to trial for a misdemeanor and 90 days for a felony. During that time-period, the accused must endure being separated from family, lost income and/or employment, interrupted medical or mental health care, and the dangerous and unhealthy conditions in jail.²⁰ On the other hand, if the defendant pleads guilty, in the vast majority of cases the defendant will be released

²⁰ Criminal Justice Policy Program, Harvard Law School, *Moving Beyond Money: A Primer on Bail Reform*, at 6 (Oct. 2016), <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf>.

before the earliest possible date he or she could have gone to trial.²¹ In some instances, this reality leads to the conviction of innocent people while the true perpetrator may be left free to commit more crimes. These types of guilty pleas serve to clear a prosecutor's docket, but they do not encourage investigation and adjudication of the crime or promote victim or public safety.²² Thus monetary bail creates a system in which an accused that cannot afford bail suffers either unnecessary pretrial detention or pleads guilty to get out of jail, law enforcement moves on, and the public safety is threatened.

2. Monetary Bail Harms Victims of Crimes.

Not only does money bail fail to protect the public safety, it can affirmatively harm victims. Victims of crimes are sometimes put in the position of paying money bail for themselves or even their attackers. In the case of human trafficking victims and people coerced into prostitution, individuals who are properly viewed as victims of powerful criminal systems are instead treated as criminals themselves and forced to pay bail to gain their own release when apprehended. If they cannot afford bail, as is often the case, they must either go into debt to obtain a bail bond or become further indebted to their traffickers or pimps to be released from detention. Thus, money bail exacerbates systems of exploitation and digs even deeper financial holes for victims of human trafficking.²³

²¹ HRW, *Not in it For Justice*, *supra*, at 52-56 (analysis based on review of six California counties: Alameda, Fresno, Orange, Sacramento, San Bernardino, and San Francisco).

²² *Id.* at 58.

²³ Anna Kelly & Mei-Ling McNamara, *Revealed: How US sex traffickers recruit jailed women for prostitution*, *The Guardian*, June 29, 2018,

Money bail is often paid by mothers, grandmothers, wives, or girlfriends of the detained individuals instead of by the individuals themselves.²⁴ In the case of a domestic violence, the victim is often fearful of or reliant on his or her attacker for household income or help raising children. In that circumstance, the victim may have no choice but to pay bail for their attacker, further entangling the victim and attacker financially, preventing the victim from taking steps to leave the attacker. Money bail can thus serve as a punishment imposed on the victims of crimes, who take on financial burdens in order to maintain household stability, rather than the perpetrators, who are released from custody, often-times despite evidence-based predictors suggesting a high likelihood that they may reoffend, with perhaps tragic consequences.²⁵

B. Courts Should Consider The Systemic Threats To Public Safety When Setting Pretrial Conditions.

Rather than a money bail system that unnecessarily and counter-productively incarcerates many, while releasing some able to afford bail yet likely to harm others, trial courts should be required to undertake an evidence-based analysis to determine whether a defendant can be released pending trial without creating a substantial likelihood that they will harm another and, if so, what conditions of release will best protect public and victim

<https://www.theguardian.com/global-development/2018/jun/29/revealed-how-us-sex-traffickers-recruit-jailed-women-for-prostitution-the-trap> (traffickers bail women out of detention and then use the bond to control them).

²⁴ Off. of the Treasurer & Tax Collector, *Do the Math*, *supra*, at 3.

²⁵ Katreena Scott, et. al, *Intervening to Prevent Repeat Offending Among Moderate-to High-Risk Domestic Violence Offenders*, *Int'l J. of Offender Therapy and Comparative Criminology*, Vol. 59, 3, at 275 (Feb. 2015) (the highest risk offenders are usually released on monetary bail).

safety. The legislature has made clear that when considering the harms to public safety of pretrial release, an evidence-based approach is best. When spending “criminal justice resources,” as pretrial detention does, the Court should employ “evidence-based practices that will achieve improved public safety.” Pen. Code § 17.5(a)(4).²⁶ Applying an analysis that relies on scientific research, testimony, and evidence of possible harms rather than a gut-instinct check of the Defendant’s risk of future criminality will result in outcomes that actually improve public safety systemically. In other words, a public safety analysis involves more than mere speculation of what harms a defendant might cause if released. Instead, trial courts should be required to consider factors which have been demonstrated to predict future violence, rates of offending, and other evidence that indicates the likelihood of offending.

As will be set forth in more detail below, trial courts also should be required to take into account the impact pretrial detention of a defendant will have upon public safety more broadly. Such an approach is consistent with California Constitution section 12, which mandates a showing of “clear and convincing evidence that there is a substantial likelihood the person’s release would result in great bodily harm to others” before an

²⁶ “Evidence-based practice” as used in section 17.5 “refers to supervision policies, procedures, programs, and practices demonstrated by scientific research to reduce recidivism among individuals under probation, parole, or post release supervision.” Pen. Code § 17.5(a)(9). Although this specific definition is too narrow for courts to apply when considering public safety in setting conditions of pretrial release, the requirement of relying on “scientific research” rather than gut instinct is transferable. *See also* Cal. Rules of Court, rule 4.410(a)(8) (“(a) General objectives of sentencing include . . . (8) Increasing public safety by reducing recidivism through community-based corrections programs and *evidence-based practices*.”) (emphasis added).

individual is preventively detained. Cal. Const. art. I, sec. 12. The same high evidentiary standard should apply to considerations of public safety, which must weigh the speculative risk of another crime to the public with the known risk that pretrial detention will impose high systemic financial and social costs.

1. California Constitution Section 12 Prohibits Pretrial Detention Except In Certain Circumstances And Section 28(F)(3) Guides The Determination Of Release And Release Conditions.

Subdivisions (b) and (c) of section 12 of Article 1 of the California Constitution provide that a court can preventatively detain defendants charged with violent acts or defendants who threatened others with great bodily harm, if the court finds “clear and convincing evidence” that there is “a substantial likelihood the defendant's release would result in great bodily harm to others.” Cal. Const. art. I, § 12. The factors the court must consider in setting the amount of bail are “the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case.” *Id.*

Section 28 of article 1 establishes and ensures enforcement of certain enumerated rights for victims of criminal acts (Cal. Const. art. I, § 28(b)(1)–(17)), one of which is the right “[t]o have the safety of the victim and the victim’s family considered in fixing the amount of bail and release conditions for the defendant.” Cal. Const. art. I, § 28(b)(3). Subdivision (f)(3) of section 28, provides that “[i]n setting, reducing or denying bail, the judge or magistrate shall take into consideration the protection of the public, the safety of the victim, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case.

Public safety and the safety of the victim shall be the primary consideration.” *Id.* § 28(f)(3). Thus, section 28(f)(3) enumerates the criteria that courts must consider and prioritize when determining whether to preventatively detain those section 12 allows to be detained, and in determining appropriate conditions of pretrial release for those not so detained.²⁷

Rather than reading “consideration of public safety” in this context as merely a synonym for the risk that if not detained pretrial, a defendant will commit new crimes, CSSJ urges the Court to hold that considering public safety must be given the meanings it has elsewhere in the penal code (and throughout other code sections): Judges ought to consider, as part of evaluating the impact upon public safety when making pretrial detention and release determinations, broader systemic and criminogenic effects of detaining, releasing and imposing particular conditions of release upon defendants awaiting trial.

No California law cabins the definition of “consideration of public safety” as referring only to a short-term risk of crime by a specific individual. Indeed, the term “consideration of public safety” is not defined by any California statutory or Constitutional provision. As set forth in more detail below, however, the term “public safety” is used in other statutes to refer specifically to prison and jail overcrowding, drug treatment, and child separation, among other concerns. Considering “public safety” for

²⁷ CSSJ understands that text of section 28(f)(3) is at issue in this case. CSSJ provides this analysis solely to guide the Court to the extent it deems section 28(f)(3) operative.

pretrial detention and release purposes, then, must be interpreted to include all the ways in which the term has been used in California statutes.

2. Public Safety Considerations Have Not Been Narrowly Defined in the Pretrial Context.

Because the above-referenced language in section 12 and section 28 referring to bail were both passed as the result of propositions in 1982 (section 12 by Proposition 4 and section 28 by Proposition 8), and because Proposition 4 received more votes, Proposition 8's contribution to Section 28 was nullified as it relates to bail. *People v. Standish*, 38 Cal. 4th 858, 875 (2006). Specifically, this Court noted that Proposition 8 sought to reverse the presumption of being admitted to bail and thus contradicted Proposition 4. Because Proposition 4 garnered more votes, this Court held that the intent of the voters was not to implement Proposition 28's bail provisions. *Id.* Subsequently, Proposition 9 (2008) amended Section 28's bail provision to include the phrase "and the safety of the victim," but, importantly, it contained no indication that it contradicted or was intended to repeal or supplant Section 12. Ballot Pamp., General Elec. (Nov. 4, 2008) text of Prop. 9, p. 130. These constitutional provisions are implemented by the penal code, with California Penal Code Section 1275 (a)(1) replicating some of the language of California Constitution article I, section 28: "Public safety shall be the primary consideration." Pen. Code § 1275 (a)(1). This section of the Penal Code does not include the phrase "and the safety of the victim." *Id.*

Public safety was not defined in any of the propositions mentioned above, though Proposition 8 isolates the threat to public safety by criminal activity (added to the

California constitution in Section 28(2)). *See* Cal. Const. art. I, § 28(b). Nothing in the specific provisions of Proposition 9, nor in any of the materials that were before the voters accompanying its text, evinces intent on the part of the voters to impose a more restrictive meaning of considering “public safety” in the pretrial detention context than the broader meaning the term has in myriad other statutes in the penal code and beyond. *See People v. Valencia*, 3 Cal. 5th 347, 357-69 (2017).

Proposition 9 (2008) added the phrase “and the safety of the victim” to phrase “public safety shall be the primary consideration,” indicating that the two concepts are not synonyms. Ballot Pamp., General Elec. (Nov. 4, 2008) text of Prop. 9, p. 130. Thus, section 28(f)(3) of the Constitution currently provides that “public safety and *the safety of the victim* shall be the primary considerations” in setting bail. Cal. Const. art. I, §. 28(f)(3) (emphasis added). Proposition 9 did not include a definition of “public safety” or “safety of the victim,” or limit the factors the Court may apply when considering it. If considerations of “public safety” encompassed the same considerations as the “safety of the victim,” then the addition of that language in the section 28(f)(3) would be superfluous. Such an approach would violate rules of statutory interpretation, which state the Court should “accord [] significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose” and that “[a] construction making some words surplusage is to be avoided.” *Valencia*, 3 Cal. 5th at 357 (quoting *Dyna-Med, Inc. v. Fair Employment & Hous. Com.*, 43 Cal. 3d 1379 (1987)).

The California penal code does not provide a single, all-encompassing definition of what it means to consider public safety. Indeed, because pretrial detention was held to

be regulatory, not punitive, in the United States Supreme Court case *United States v. Salerno*, 481 U.S. 739, 747 (1987), it is unclear whether considerations of public safety should even be limited to the penal code.²⁸ The notion that considering public safety has a precise definition is belied by the frequency with which it is cited and the wide variety of circumstances to which it is applied. Nevertheless, even within the Penal Code and throughout several decades of propositions that cite public safety concerns, it is clear that there are several areas where public safety is implicated that are relevant for the consideration of public safety in the context of pretrial detention, including, inter alia, reducing jail overcrowding (*see, e.g.*, Penal Code section 4496.02(c), referring to the “life and safety of those persons confined or employed in jail facilities.”), reserving jail beds for the most violent/serious offenders (*see e.g.* Penal Code section 4496.02(f)), treating offenders for drug addiction (Penal Code section 1210.1 and section 3063.1), and ensuring that parents are available to care for their children (Penal Code section 270).²⁹

Accordingly, consideration of the public safety should consider public safety as a whole. In this instance, then, the certainty of harm from unnecessary pretrial detention—in the form of jail overcrowding and a resulting failure to prioritize the most serious and dangerous offenders, in the form of blocking access to drug treatment, and in terms of

²⁸ For example, California statutes cite public safety concerns in regulating automated people movers (Lab. Code, § 7300(a)-(b)), tour buses (Veh. Code, § 34505.1), charitable solicitations on a roadway (Bus. & Prof. Code, § 17510.25(f)), among many others. These uses make clear that public policy considers threats to public safety in a variety of contexts that encompass a variety of risks.

²⁹ Notably, Penal Code section 4496.02(c) and sections 4496.02(f) were enacted via Proposition 86 (1988) and Proposition 36 (2000), respectively.

taking parents away from their children—must be weighed against the mere possibility that some percentage of those released (who were not subject to preventive detention under section 12) would, upon release, harm public safety, and that terms of pretrial release can be set which have some rational relationship to decreasing this risk in an amount that could be calibrated to outweigh any systemic concerns.

In summary, while it is clear that consideration of the effects upon public safety of pretrial release determinations, including setting conditions of release, can include the risks that a defendant might commit crimes if released, it is just as clear that such risks are *not* the only appropriate considerations.

3. Courts Should Consider All Public Safety Risks Of Pretrial Detention To Public Safety When Setting Conditions Of Non-Monetary Release.

Given that “public safety” is not explicitly defined in the relevant sections of the Penal Code, Courts should interpret the term using its “ordinary meaning.” *See Valencia*, Cal. 5th at 356 (“We have long recognized that the language used in a statute or constitutional provision should be given its ordinary meaning, and “[i]f the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature (in the case of a statute) or of the voters (in the case of a provision adopted by the voters).”); *Lungren v. Deukmejian*, 45 Cal. 3d 727, 735 (1988) (“Words used in a statute or constitutional provision should be given the meaning they bear in ordinary use.”).

“Public safety” is commonly understood to mean “the welfare and protection of the general public,” wherein “public” refers to the “people as a whole” or “the

community.” See Black’s Law Dictionary (10th ed. 2014).³⁰ CSSJ’s argument is not that public safety excludes the risk of pretrial offending—it clearly does—but that considering public safety must also include the numerous other risks to public safety that arise when an accused is *detained* pending trial, especially because the people and the legislature of California have explicitly deemed these risks to be public safety considerations. Pretrial detention diminishes public safety via overcrowding of jails, increased recidivism, and the diversion of resources from victim services and crime prevention to incarceration.

First, jail beds are scarce, expensive resources that should be reserved only for those who most need to occupy them. Jail capacity problems were first addressed via building more facilities, *see, e.g.*, Penal Code section 4496.02(f) (“It is essential to the public safety that construction of new [jail] facilities proceed as expeditiously as possible to relieve overcrowding and to maintain public safety and security.”); *see also* Government Code section 15820.914 (“(b) Without increased capacity, public safety throughout the state may be jeopardized by offenders who either remain in the community or are released early due to lack of jail capacity.”), but the state has, more

³⁰ The definitions of “public” and “safety” individually lend further weight to this understanding. See Webster’s New College Dictionary (defining “Public” as “(1) of, belonging to, or concerning the people as a whole; of or by the community at large” and “Safety” as “freedom from danger, injury, or damage; security”); American Heritage Dictionary (4th Ed.) (defining “Public” as “of, concerning, or affecting the community or the people” and “Safety” as “The condition of being safe; freedom from danger, risk, or injury.”); New Oxford American Dictionary (3rd Ed.) (defining “Public” as “of or concerning the people as a whole” and “Safety” as “the condition of being protected from or unlikely to cause danger, risk, or injury”).

recently, decided that capacity problems are best solved by using jail resources more wisely. *See* Pen. Code, § 17.5(3) (“Criminal justice policies that rely on building and operating more prisons to address community safety concerns are not sustainable, and will not result in improved public safety.”).

Second, policies that fail to reduce recidivism have also been identified as threats to public safety. As the California Rules of Court state, “General objectives of sentencing include . . . Increasing public safety by reducing recidivism through community-based corrections programs and evidence-based practices.” Cal. Rules of Court 4.410(a)(8). In the specific context of release on probation and parole, successful re-entry promotes public safety. *See* Pen. Code § 3074 (“It is in the interest of public safety for a county to provide for the supervision of parolees, and to provide educational, vocational, family and personal counseling necessary to assist parolees in the transition between imprisonment and discharge.”); Pen. Code § 1228(c)-(d) (“Providing sustainable funding for improved, evidence-based probation supervision practices and capacities will improve public safety outcomes among adult felons who are on probation.”). But also, more generally, the Legislature has found that “[i]mproving outcomes among offenders reentering the community after serving time in a correctional facility will promote public safety and will reduce California's prison and jail populations.” Pen. Code § 17.7(a)-(b). The same public safety risks of reintegration apply to accused persons who have been in held in pretrial detention. Seven in ten victims in California prefer directing resources toward crime prevention and health services (e.g. mental health and drug and alcohol

treatment) over confinement in prisons and jails.³¹ The individuals who experience the most crime—women, younger victims, African-American and Latino victims, lower-income victims, and victims of multiple crimes—are all especially likely hold this view.³²

Even though pretrial detainees have not been found guilty of any crime, detention nevertheless disrupts pro-social ties and leads to a greater likelihood of criminal activity and difficulties with reintegration. Evidence shows that the same increased risk of recidivism is present when an accused is detained pretrial: just three days in jail makes it more likely that low-risk accused persons will be later arrested on new charges.³³ These new crimes are more likely to be experienced by already existing victims, either directly or because they occur in these victims' communities. In addition, "[c]ommunities where rates of incarceration are high tend to experience declines in social and economic well-being as well as in public safety."³⁴ These communities, which are disproportionately low-income and African-American and/or Latino, also include the majority of crime victims.

Pretrial detention also disrupts an accused's education or work, which can lead to loss of employment and may impose financial hardship on the accused's family. Conditions in jails are likely to exacerbate any existing physical, mental health, or

³¹ CSJ, *Cal. Crime Victims' Voices*, *supra*, at 17.

³² *Id.*

³³ Off. of the Treasurer & Tax Collector, *Do the Math*, *supra*, at 12; CSJ, *Safe and Sound*, *supra*, at 26 (citing Laura and John Arnold Foundation, *Pretrial Criminal Justice Research*, at 2 (Nov. 2013)).

³⁴ Vera, *Incarceration's Front Door*, *supra*, at 17.

substance abuse issues. Pretrial detention can also result in the accused developing new physical, mental health, or substance abuse conditions, and at the very least will disrupt any treatment. The instability caused by pretrial detention further destabilizes the community, leading to increased financial and social costs that the community ultimately bears.

Indeed, in the case before us, Mr. Humphrey was accepted into a drug treatment program to treat his substance abuse problems but was unable to enroll because he remained in custody. *In re Humphrey*, 19 Cal. App. 5th at 1021. This Court should find that public safety was not the primary consideration in Mr. Humphrey's case because drug abuse is *itself* a public safety problem, as the California Legislature has clearly stated. *See* Health & Saf. Code, § 11760.5(a) ("The Legislature recognizes that alcohol and other drug abuse should be viewed and treated as a health problem, as well as a public safety problem.").

Finally, there are direct impacts on public safety when parents with dependent children are detained. Child separation from parents have been recognized as a harm to public safety and welfare. *See e.g.*, Cal. Const. art. XIII, sec. 36 ("Public Safety Services" include "Preventing child abuse, neglect, or exploitation..."); *see also* Cal. Pen. Code § 270. Parents who are detained pretrial cannot provide for their children and are separated from them, harming those children's safety. All of these factors pose public safety risks.

Third, considerations of public safety must address how resources should best be deployed. The Legislature has stressed that public safety be promoted efficiently, by

diverting resources away from custodial responses toward programming and treatment. *See, e.g.*, Pen. Code, § 1001.85(a) (“The purpose of the LEAD [Law Enforcement Assisted Diversion] program is to improve public safety and reduce recidivism by increasing the availability and use of social service resources while reducing costs to law enforcement agencies and courts stemming from repeated incarceration”); *see also* Pen. Code, § 17.5(4) (“California must reinvest its criminal justice resources to support community-based corrections programs and evidence-based practices that will achieve improved public safety returns on this state’s substantial investment in its criminal justice system.”); *see also id.* at § 17.5(7). (“Fiscal policy and correctional practices should align to promote ... justice reinvestment ... a data-driven approach ... to manage and allocate criminal justice populations more cost-effectively, generating savings that can be reinvested in evidence-based strategies that increase public safety while holding offenders accountable.”). Unnecessary pretrial detention requires the county to invest in housing, clothing, feeding, and providing medical care to low-risk individuals, many who have special mental and physical health needs.³⁵

The costs of pretrial detention are high: Each day a person is in custody costs an average of \$113.87.³⁶ Human Rights Watch found that in just six California counties (Alameda, Fresno, Orange, Sacramento, San Francisco, and San Bernardino) the total cost of jailing people never found guilty of any crime was \$37.5 million from 2014-

³⁵ CSJ, *Safe and Sound*, *supra*, at 26; HRW, *Not in it for Justice*, *supra*, at 43; Vera, *Incarceration’s Front Door*, *supra*, at 12-13.

³⁶ HRW, *Not in it for Justice*, *supra*, at 43.

2015.³⁷ In Alameda County, during this time 11,909 people were held for an average of 3.1 days with no complaint even filed. This figure represents approximately \$4 million to taxpayers plus the unknowable cost of close to 12,000 people missing three days of work, losing jobs, not caring for family, and suffering the misery of jail.³⁸

These numbers stand in stark contrast to the cost of pretrial services. For example, in Santa Clara County providing pretrial services cost just \$15-20 per day, compared to \$204 per day for jail.³⁹ These public monies used to fund pretrial detention—mostly of individuals who cannot pay bail, many of whom pose no public safety risk, and a significant number of whom are never charged or tried—would be far better spent funding programs designed to prevent crime before it happens through social services and rehabilitation or to provide direct services to victims.

During that same time-period the California Victim Compensation Board awarded only **\$4 million** in grants for trauma recovery centers.⁴⁰ These centers, which enable

³⁷ *Id.*

³⁸ *Id.* at 47.

³⁹ CSJ, *Safe and Sound*, *supra* at 27.

⁴⁰ The California Victim Compensation Board also issued approximately \$100 million in compensation to eligible victims. These payments were funded by “restitution paid by criminal offenders through fines, orders, penalty assessments and federal funds,” not state funds. For the Fiscal Year July 1, 2014 through June 30, 2015 a total of \$2 million in grants was issued and the same was true for the July 1, 2013 through June 30, 2014. See California Victim Compensation and Government Claims Board “Notice of Funds Available California Trauma Recovery Center Grant Fiscal Year July 1, 2013 through June 30, 2014,” at 4, <https://victims.ca.gov/docs/notices/TraumaCenterGrant/TraumaCenterGrant-NoticeofFundsAvailable.pdf>; California Victim Compensation and Government Claims Board “Notice of Funds Available California Trauma Recovery Center Grant Fiscal Year July 1, 2014 through June 30, 2015,” at 3,

victims easy access to physical and mental health services, would greatly benefit from the additional funds. Two-thirds of California crime victims reported experiencing anxiety, stress, difficulty with sleeping, relationships or work, yet the majority of victims were unaware of services available or found them difficult to access.⁴¹ Public money would be better spent bolstering the victim services state and local governments offer, which include assistance applying for victims' compensation programs, help with expenses associated with the crime, guidance regarding the criminal justice process, mental health services, and support groups.⁴²

IV. CONCLUSION

CSSJ urges the Court to consider the perspective of its members —California crime victims who have endured the direct and systemic consequences of crime and misplaced criminal justice priorities. For the foregoing reasons, these crime victims request that, the Court uphold the Court of Appeal holding that public safety cannot be a consideration in monetary bail. These crime victims further request that the Court interpret Section 12 as setting the outer limits of preventive detention under the constitution and 28(f)(3) as providing considerations that courts must apply when setting conditions of pretrial release. In considering “public safety,” these crime victims

<https://victims.ca.gov/docs/notices/TraumaCenterGrant/TraumaCenterGrant-NOFA-6-27-14.pdf>.

⁴¹ CSJ, *Cal. Crime Victims' Voices*, *supra*, at 12.

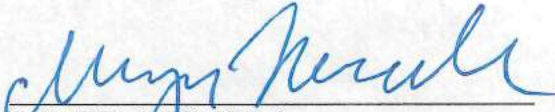
⁴² *Id.* at 14. These priorities are shared nationally. According to a survey by the Alliance for Safety and Justice, 61% of victims surveyed favor shorter prison sentences and more focus on crime prevention. ASJ, *Nat'l Crime Survivors Speak*, *supra*, at 16.

advocate for evidence-based evaluation of the systemic harms that arise from pretrial detention, rather than simply a consideration of risk as to an individual.

Respectfully submitted,

Dated: October 9, 2018

KEKER, VAN NEST & PETERS LLP

By: 
DANIEL PURCELL
MAYA KARWANDE
DIVYA MUSINIPALLY

W. DAVID BALL
SANTA CLARA SCHOOL OF LAW

Attorneys for Amicus Curiae
Crime Survivors for Safety and Justice

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court 8.504(a), 8.504(d)(1) and 8.204(c)(1), and in reliance upon the word count feature of the software used, I certify that the attached BRIEF OF *AMICUS CURIAE* CRIME SURVIVORS FOR SAFETY AND JUSTICE IN SUPPORT OF RESPONDENT KENNETH HUMPHREY contains 8,056 words excluding parts not required to be counted under Rule 8.204(c)(3).

Dated: October 9, 2018


MAYA KARWANDE

PROOF OF SERVICE

I, Susan McCabe, declare under penalty of perjury under the laws of the State of California that the following is true and correct:

I am employed in the City of San Francisco, County of San Francisco, California, in the office of a member of the bar of this court, at whose direction the service was made. I am over the age of eighteen (18) years, and not a party to or interested in the within-entitled action. I am an employee of the Kecker Van Nest & Peters, and my business address is 633 Battery Street, San Francisco, California 94111.

On October 9, 2018, I served the following document(s):

**APPLICATION FOR LEAVE TO FILE BRIEF OF *AMICUS*
CURIAE AND [PROPOSED] BRIEF OF CRIME SURVIVORS FOR
SAFETY AND JUSTICE IN SUPPORT OF RESPONDENT
KENNETH HUMPHREY**

In the Following Case:

In re Humphrey,
on Habeas Corpus.
No. S247278

on the parties stated below by the following means of service:

George Gascon
Sharon Woo
Wade K. Chow
Allison G. Macbeth
Office of San Francisco District
Attorney
850 Bryant Street, Room 322
San Francisco, CA 94103
Attorneys for Petitioner

Alec Karakatsanis
Katherine Claire Hubbard
Civil Rights Corps
910 17th Street NW, Suite 200
Washington, DC 20006
Attorneys for Respondent

Jeff Adachi
Matt Gonzalez
Christopher F. Gauger
Anita Nabha
Chesa Boudin
Office of the Public Defender
555 Seventh Street
San Francisco, CA 94103
Attorneys for Respondent

Thomas Gregory Sprankling
Wilmer Cutler Pickering Hale and
Dorr LLP
950 Page Mill Road
Palo Alto, CA 94304
Attorneys for Respondent

Seth Waxman/Daniel S. Volchok
Wilmer Cutler Pickering Hale and
Dorr LLP
1875 Pennsylvania Avenue N.W.
Washington, D.C. 20006
Attorneys for Respondent

Xavier Becerra
Katie L. Stowe
Office of the Attorney General
455 Golden Gate Avenue, Suite
11000
San Francisco, CA 94102

Hon. Brendan Conroy
Hon. Joseph M. Quinn
Superior Court of California
County of San Francisco
850 Bryant Street, Room 101
San Francisco, CA 94103

First District Court of Appeal
350 McAllister Street
San Francisco, CA 94102

X By U.S. Mail enclosing a true copy in a sealed envelope in a designated area for outgoing mail, addressed with the aforementioned addressees. I am readily familiar with the business practices of the ACLU Foundation of Northern California for collection and processing of correspondence for mailing with the United States Postal Service and correspondence so collected and processed is deposited with the United States Postal Service on the same date in the ordinary course of business.

I declare under penalty of perjury that the foregoing is true and correct.
Executed on October 9, 2018 at San Francisco, California.



Susan B. McCabe
Declarant