

**In the Supreme Court of
the State of California**

In Re

KENNETH HUMPHREY

On Habeas Corpus

Case No. S247278

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

**Application to file Brief of Amicus Curiae by CRIME
VICTIMS UNITED CHARITABLE FOUNDATION in
Support of the PEOPLE OF THE STATE OF
CALIFORNIA**

and

**Proposed Amicus Curiae Brief of CRIME VICTIMS
UNITED CHARITABLE FOUNDATION in Support of
the PEOPLE OF THE STATE OF CALIFORNIA**

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This Court should reverse or depublish the opinion of the Court of Appeal for the First Appellate District of California. Amici herein respectfully request an opportunity to explain why.

Crime Victims United Charitable Foundation (CVUCF) provides direct assistance and support to victims of crime and their families. We also support nationwide efforts of law enforcement in their efforts to work with children and youth to prevent and deter future crime, and thus future crime victims. CVUCF's supporters include crime victims and their families, victims' advocates, law enforcement organizations. Our organization is determined to help reverse the trend of violence in our society and help heal the personal and societal wounds caused by violent crimes. CVUCF is a non-profit 501(c)(3) public benefit corporation.

Applicant CVUCF contends that the opinion filed by the First Appellate District failed to balance the rights and safety of crime victims. Indeed, the trial court reached the correct public safety decision: This defendant's ability (or inability) to post bail, based on the facts of this case, is a straw man argument. And that substantial public safety evidence exists in the record from the trial court, that would have permitted Judge Quinn to order the detention of Mr. Humphrey while he awaited trial, even if the defendant could have posted sufficient sureties.

California Rule of Court (CRC) 8.520(f) provides that within 30

days after the last appellant's reply brief is filed or could have been filed under CRC 8.520, any person or entity may serve and file an application for permission to file an amicus curiae brief. Appellant's reply brief was filed on September 7, 2018. October 7, 2018 is a Sunday so the deadline is extended to the next court day. October 8, 2018 is a court holiday. Therefore, this application is timely if filed by Tuesday, October 9, 2018.

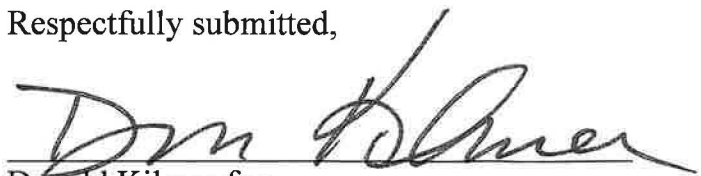
In compliance with CRC 8.520(f)(4)(A), counsel for amici certify: No party or counsel for a party in this action either authored the proposed amicus brief in whole or in part, or made any monetary contribution intended to fund the preparation or submission of this brief.

In compliance with CRC 8.520(f)(4)(B), counsel for amici certify: Other than the amicus curiae and its members, the following persons or entities made monetary contributions intended to fund the preparation or submission of the brief: Golden State Bail Agents Association. This association is not a publicly traded corporation.

As allowed by CRC 8.520(f)(5), the proposed brief is combined with this application.

Respectfully submitted,

October 9, 2018

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

Donald Kilmer for:
Crime Victims United Charitable Foundation

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TABLE OF CONTENTS

Table of Authorities	ii
Introduction	1
Statement of Case / Statement of Facts.....	3
Statement of the Law with Analysis	6
Argument.....	10
I. The Court of Appeal Overreached by Taking up Constitutional Issues of Due Process and Equal Protection Based on Wealth Classification, When Existing Statutory/Constitutional Interpretation was Sufficient to Hold Mr. Humphrey in Preventive Detention While He Awaited Trial.....	10
II. All Courts are Directed by the California Constitution to Consider Public and Victim Safety in Setting Bail.	14
III. The California Constitution Permits a Court to Deny Pretrial Release in Non-Capital Cases.....	16
IV. Senate Bill No. 10 (2017-2018 Reg. Sess.) Moots this Case. .	18
Conclusion.....	20
Certificate of Word Count.....	21

TABLE OF AUTHORITIES

Cases

<i>In re Humphrey</i> (2018) 19 Cal.App.5th 1006	5, 12
<i>In re Nordin</i> (1983) 143 Cal.App.3d 538.....	7
<i>In re Page</i> (1927) 82 Cal.App. 576.....	7
<i>People v. Chandler</i> (2014) 60 Cal. 4th 508	11
<i>People v. Cole</i> (2004) 33 Cal.4th 1158	9
<i>People v. Engram</i> (2010) 50 Cal. 4th 1131.....	11
<i>People v. Garcia</i> (2017) 2 Cal. 5th 792	19
<i>People v. Hardy</i> (1992) 2 Cal. 4th 86	13
<i>People v. Johnson</i> (1980) 26 Cal. 3d 557.	5
<i>People v. Wilson</i> (1963) 60 Cal. 2d 139	9
<i>U.S. v. Marion</i> (1971) 404 U.S. 307	9
<i>United States v. Salerno</i> (1987) 481 U.S. 739	12, 18
<i>Womack v. San Francisco Community College District</i> (2007) 147 Cal.App.4th 854.....	5

Statutes

Evidence Code § 452	13
Evidence Code § 452.5	13
Evidence Code § 459	13
Penal Code § 136.2	7
Penal Code § 1271	6
Penal Code § 1275	13, 14, 18
Penal Code § 1382	9

Treatises

<u>California Judges Benchguide 55 – Bail and Own-Recognizance Release</u> [Revised 2013].....	6
---	---

Constitutional Provisions

California Constitution Art. I, Sec.12	6, 7, 14, 16, 18
California Constitution Art. I, Sec. 15	9
California Constitution Art. I, Sec. 28	7, 14, 17, 18
California Constitution Art. I, Sec. 29	9
California Constitution Art. III, Sec. 3.....	20

Legislation

Senate Bill No. 10 (2017-2018 Reg. Sess.).....	9, 10, 14, 19
--	---------------

INTRODUCTION

In its sua sponte grant of review, this Court limited the issues to be briefed by the parties as follows:

- 1.) Did the Court of Appeal err in holding that principles of constitutional due process and equal protection require consideration of a criminal defendant's ability to pay in setting or reviewing the amount of monetary bail?
- 2.) In setting the amount of monetary bail, may a trial court consider public safety and victim safety? Must it do so?
- 3.) Under what circumstances does the California Constitution permit bail to be denied in noncapital cases? Included is the question of what constitutional provision governs the denial of bail in noncapital cases – Article I, Section 12, subdivisions (b) and (c), or Article I, Section 28, subdivision (f)(3), of the California Constitution – or in the alternative, whether these provisions may be reconciled.

On September 12, 2018, the Court directed the parties to file supplemental briefs addressing a fourth issue:

- 4.) What effect, if any, does Senate Bill No. 10 (2017-2018 Reg. Sess.) have on the resolution of the issues presented by this case?

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Amici argue herein that the answer to Question #4 is dispositive. Though flawed for reasons beyond the scope of this case or this brief, SB-10 purports to “eliminate money bail” in lieu of a system of evidentiary presumptions and risk assessment tools to insure a defendant’s appearance at trial and address public safety.

The short answer to Question #1 – There was sufficient evidence in the record for the pretrial detention of Mr. Humphrey, even if he could afford bail, which means the trial court did not commit prejudicial error.

The short answer to Question #2 – There was sufficient evidence in the trial court record to support a finding that Judge Quinn did weigh public and victim safety, as required by the California Constitution and the Penal Code. Furthermore, Judge Quinn’s evidentiary findings were not reviewable by the Court of Appeal on this issue. And finally, even though the California Attorney General’s Office neglected to adequately address this issue, the Court of Appeal’s summary treatment of the public (and victim) safety was error.

The short answer to Question #3 – Given the developments that gave rise to Question #4, and the points raised herein in Questions #1 and #2, the arguments advanced by amici below – Constitutional Avoidance and Separation of Powers – are even more persuasive on Question #3, that this Court should defer to the legislative and/or constitutional amendment processes.

STATEMENT OF THE CASE / STATEMENT OF FACTS

Amici adopt the statement of facts set forth in the San Francisco

District Attorney's Opening Brief, set forth here verbatim¹ for convenience.

The initial complaint charged Respondent [Humphrey] with first degree residential robbery (pen. Code § 211), first degree residential burglary (Pen. Code § 459), inflicting an injury on an elder or dependent adult, other than great bodily injury (Pen. Code § 368, subd. (c)), and theft from an elder or dependent adult (pen. Code § 368, subd. (d)).

On April 23, 2017, at approximately 5:43 p.m., the victim-an elderly 79-year-old man who required the use of a walker-returned to his apartment. After the victim opened the door to his apartment, Respondent [Humphrey] followed the victim inside and demanded money. Respondent then told the victim to get on the bed, while threatening to put a pillowcase over the victim's head. When the victim told Respondent that he had no money, Respondent grabbed the victim's cell phone and threw it onto the floor. The victim then complied with Respondent's commands and handed Defendant \$2 from his wallet. Respondent stole an additional \$5 along with some cologne and fled.

At Respondent's [Humphrey's] arraignment, the trial court issued a criminal protective order for the victim and set Respondent's bail at \$600,000 at the prosecutor's request and based on the bail schedule. The trial court noted that although Respondent's prior convictions were old, Respondent had a lengthy criminal history. Considering the seriousness of the offense and the vulnerability of the victim, the trial court denied Respondent's request to be released on his own recognizance.

At a subsequent bail hearing, the trial court noted that Respondent's [Humphrey's] current offense was similar to his prior offenses and described Respondent's acts here as "basically a home invasion[.]" After commending Respondent's willingness to participate in treatment and finding that Respondent had strong ties to the community, the trial court reduced Respondent's bail to \$350,000.

The Court of Appeal granted Respondent's [Humphrey's] subsequent petition for writ of habeas corpus, holding that equal protection and due process require courts to inquire into a defendant's ability to pay and assess the available non-monetary alternatives before setting monetary bail. This Court granted review on its own motion and designated the District Attorney of the City and County of San Francisco as Petitioner.

¹ To avoid confusion between shifting labels (petitioner in the Court of Appeal, respondent in the Supreme Court), Mr. Humphrey's name in brackets will be inserted where appropriate in the remainder of this brief.

The Information filed by the San Francisco District Attorney's office on July 26, 2017 (the operative information for the bail hearing at issue), alleged in Count 1 (Penal Code § 211 – First Degree Residential Robbery) that Mr. Humphrey committed that crime upon a person who was 65 years of age or older, making the allegation a Crime Against the Elderly, i.e., a particularly vulnerable victim. Penal Code § 667.9(a). This vulnerable victim allegation was repeated in Count 2 (Penal Code § 459 – First Degree Burglary-Residential), along with an additional special allegation that this count was being charged as a violent felony under Penal Code § 667.5(c)(21). Count 3 alleged a misdemeanor violation of Penal Code § 386(c) – Inflicting Injury on Elder and Dependent Adult. Count 4 alleged a misdemeanor violation of Penal Code § 386(d) – Theft, Embezzlement, Forgery, or Fraud on an Elder or Dependent Adult.

The July 26, 2017 Information also alleged under Penal Code § 1203(3)(4) that Mr. Humphrey was ineligible for probation based in prior convictions. The Information also alleged that the prior convictions are classified as serious or violent felonies under Penal Code §§ 667(d), 667(e), 1170.12(b), and 1170.12(c).

In addition to the allegations in the Information, on May 31, 2017, the Honorable Victor Hwang issued a Criminal Protective Order – Other Than Domestic Violence. Penal Code § 136.2, 646.9(k), and 136.2(i)(1). The Judicial Council Form CR-161 protective order against Mr. Humphrey was comprehensive. Except for electronic monitoring and irrelevant

peaceful contact exceptions, most of the boxes on Judicial Council form CR-161 were checked. This order included prohibitions that Mr. Humphrey be restrained from dissuading the victim, harming the victim, and a requirement that he stay away from the victim. The findings of fact (implied or express) necessary for the trial court to issue this protective order are reviewed under the substantial evidence rule. *People v. Johnson* (1980) 26 Cal. 3d 557. The same standard applies when the trial court's findings are reviewed by way of a writ in the reviewing court. *Womack v. San Francisco Community College District* (2007) 147 Cal.App.4th 854.

Supplementing all of this, amici direct this Court's attention to the statement of facts set out by the Court of Appeal. "While reviewing the surveillance video with front desk clerks, the officers were informed that the African-American person in the video was petitioner [Humphrey], who lived in an apartment on the third floor of the building. The officers went to petitioner's [Humphrey's] apartment and arrested him without incident." (emphasis added) *In Re Humphrey* (2018) 19 Cal.App.5th 1006, 1017.

Finally, as this brief was being finalized, a docket search of the San Francisco Superior Court was performed. Mr. Humphrey's case is set for a pre-trial conference at 9:00 a.m., on October 31, 2018 in Department 23. It is also set for hearing (trial?) at 9:00 a.m. on November 14, 2018 in Department 22.

Statement of the Law with Analysis

The California Judges Benchguide 55 – Bail and Own-Recognizance Release [Revised 2013], provides the clearest and most straightforward understanding of the law at the time of Mr. Humphrey's pretrial detention hearing.

Step #1 of the process, for conducting a Hearing on a Motion for Release on Bail (Felony Case) [§55.2] is to determine if the defendant is entitled to release under any circumstances. So far, this case has been framed as if the amount of bail and Mr. Humphrey's apparent inability to pay was the only barrier to his pretrial release. But, even if Mr. Humphrey was an eccentric millionaire (and changing only that fact) the trial court could have, on this record, held Mr. Humphrey without bail on the grounds he was too dangerous to the community and/or a threat to the victim.

While a defendant who is charged with a noncapital offense may be admitted to bail before conviction as a matter of right (Penal Code §1271); the California Constitution Art I, §12 sets two limits on this right.

One of those limitations is if the defendant is charged with a violent felony when the facts are evident or the presumption great and the court finds, based on clear and convincing evidence, that there is a substantial likelihood the person's release would result in great bodily harm to others. California Constitution Art I, §12(b).

The other limitation on "bail as a matter of right" for a defendant charged with a felony, is when the facts are evident or the presumption

great and the court finds, based on clear and convincing evidence, that the person has threatened another with great bodily injury and that there is a substantial likelihood that the defendant will carry out the threat if released. California Constitution Art I, §12(c). Art. I, § 28(f)(3) is in accord.

The phrase “when the facts are evident or the presumption great” has been defined as follows: “It is not necessary that the evidence should be so convincing as to justify a verdict against the accused, but it is sufficient if it points to him and induces the belief that he may have committed the offense charged.” *In re Page* (1927) 82 Cal.App. 576, 578, 255 P 887. In determining whether there is a “substantial likelihood” that the defendant will cause great bodily injury to another if released, the magistrate or judge must review the specific circumstances on a case-by-case basis. *In re Nordin* (1983) 143 Cal.App.3d 538, 543, 192 CR 38.

As noted above, the trial court issued a protective order under Penal Code § 136.2(a)(1) which reads:

Upon a good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur, a court with jurisdiction over the criminal matter may issue orders including but not limited to, the following:

- (A) An order issued pursuant to Section 6320 of the Family Code.
- (B) An order that a defendant shall not violate any provision of Section 136.1.
- (C) An order that a person before the court other than a defendant, including, but not limited to, a subpoenaed witness or other person entering the courtroom of the court, shall not violate any provisions of Section 136.1.
- (D) An order that a person described in this section shall have no communication whatsoever with a specified witness or a victim, except through an attorney under reasonable restrictions that the court may impose.

(E) An order calling for a hearing to determine if an order as described in subparagraphs (A) to (D), inclusive, should be issued.

(F) (i) An order that a particular law enforcement agency within the jurisdiction of the court provide protection for a [...]

(G) (i) An order protecting a victim or witness of violent crime from all contact by the defendant, or contact, with the intent to annoy, harass, threaten, or commit acts of violence, by the defendant. The court or its designee shall transmit orders made under this paragraph to law enforcement personnel [...]

(ii) (I) If a court does not issue an order pursuant to clause (i) in a case in which the defendant is charged with a crime involving domestic violence [...]

(ia) The defendant shall not own, possess, purchase, receive, or attempt to purchase or receive, a firearm while the protective order is in effect.

(ib) The defendant shall relinquish any firearms that he or she owns or possesses pursuant to Section 527.9 of the Code of Civil Procedure.

(II) Every person who owns, possesses, purchases, or receives, or attempts to purchase or receive, a firearm while this protective order is in effect is punishable pursuant to Section 29825.

(iii) An order issued, modified, extended, or terminated by a court pursuant to this subparagraph shall be issued on forms adopted by the Judicial Council of California [...]

(iv) A protective order issued under this subparagraph may require the defendant to be placed on electronic monitoring if the local government, with the concurrence of the county sheriff or the chief probation officer with jurisdiction, adopts a policy to authorize electronic monitoring of defendants and specifies the agency with jurisdiction for this purpose. If the court determines that the defendant has the ability to pay for the monitoring program, the court shall order the defendant to pay for the monitoring. If the court determines that the defendant does not have the ability to pay for the electronic monitoring, the court may order electronic monitoring to be paid for by the local government that adopted the policy to authorize electronic monitoring. The duration of electronic monitoring shall not exceed one year from the date the order is issued. At no time shall the electronic monitoring be in place if the protective order is not in place.

Amici herein contend that at Step #1 of the process (whether release is appropriate at all) can rest on all of the findings made by the trial court, including those findings that were made when the trial court issued the protective order under Penal Code § 136.2.

Furthermore, the risk assessment classifications of Senate Bill No. 10 (2017-2018 Reg. Sess.) would likely place Mr. Humphrey in the High-Risk Assessment category. Even under SB-10's amendments to the Penal Code, Mr. Humphrey would probably find himself having to overcome a presumption that he is ineligible for pretrial release on this record, because he had prior convictions for serious or violent felonies. See proposed² Penal Code §§ 1320.10(e)(1), 1320.11(b)(1), 1320.18, 1320.10, 1320.20, 1320.21, 1320.22, 1320.23.

Finally, it should not escape this Court's notice that there appears to be selective outrage when it comes to the violations of Mr. Humphrey's (and The People of California's) Constitutional rights. What happened to Mr. Humphrey's Sixth Amendment right to a speedy trial under the U.S. Constitution. *U.S. v. Marion* (1971) 404 U.S. 307. Or his parallel rights under California Constitution, Art. 1, § 15; and California statutory law, Penal Code § 1382 *et seq.* Of course, Mr. Humphrey can waive his right to a speedy trial. Penal Code § 1382(a)(2)(B), (a)(3)(B), see also *People v. Wilson* (1963) 60 Cal. 2d 139.

But then presumably, Mr. Humphrey would have to demonstrate good cause for any delay if and when the People of California invoked their right to a speedy trial under California Constitution, Art. I, § 29. See also: *People v. Cole* (2004) 33 Cal. 4th 1158, 1188. Why didn't this happen?

² SB-10 is set to take effect October 1, 2019, approximately one year from when this brief is being filed.

As noted above the police were in possession of a video tape identifying the defendant as the person who committed these violent acts against this vulnerable victim. Furthermore, there is no indication on this record that Mr. Humphrey was incompetent to stand trial. What possible justification is offered by either the defense or the People's representative for failing to move this case forward at a constitutionally appropriate pace? Is it possible that too many people were caught up in the excitement of nudging bail reform along through judicial branch activism in derogation of the legislative process and/or constitutional amendment process?

This question may be as moot as the underlying case given the legislature's attempt to address bail reform through Senate Bill No. 10 (2017-2018 Reg. Sess.).

ARGUMENT

- I. The Court of Appeal Overreached by Taking up Constitutional Issues of Due Process and Equal Protection Based on Wealth Classification, When Existing Statutory/Constitutional Interpretation was Sufficient to Hold Mr. Humphrey in Preventive Detention While He Awaited Trial.

Under the doctrine of Constitutional Avoidance, the Court of Appeal was required to review the State's existing pretrial release regime, applying the specific facts of this case. If it had done so, it would have found sufficient evidence that Mr. Humphrey was a danger to the community.

Recently this Court applied the avoidance doctrine to the constitutionally complex issue of First Amendment rights when a defendant

is charged with making verbal threats under Penal Code § 422. *People v. Chandler* (2014) 60 Cal.4th 508, 176 Cal.Rptr.3d 548. The opinion discusses the importance of protecting fundamental rights (speech) while fulfilling the government's duty of public safety and noting that the trial court had in fact committed error through erroneous jury instructions about when speech can be criminalized. This Court went on to resolve the matter by interpreting the relevant statute "'if reasonably possible, in a manner that avoids [a] serious constitutional question.'" *People v. Engram* (2010) 50 Cal. 4th 1131, 1161, 116 Cal.Rptr.3d 762." *Chandler*, at 524.

The *Chandler* Court then went on to review the record of the trial court to find that there was – indeed – sufficient evidence to uphold the conviction obtained in the trial court. The analogy to this case is striking.

The Court of Appeal in this case jumped the gun by looking at the compelling government interest of having defendants appear for trial coupled with public/victim safety, and they balanced that against a defendant's fundamental right (bail) when wealth classifications appear to burden that defendant's due process and equal protection rights. Indeed, the issue is so important, the California legislature has been debating bail reform for several years, culminating in Senate Bill No. 10 (2018 Legislative Session), passed on August 20/21, 2018 and signed by the Governor on August 28, 2018.

The error by the Court of Appeal arose from its failure to closely scrutinize the trial court record of this case to see if it was possible to

interpret the relevant (bail) statute in a manner that avoided the complex constitutional question. Indeed, the Court of Appeal might be forgiven for this lapse as it was noted in the opinion that the Attorney General failed to advance any theory that Mr. Humphrey's pretrial detention was based on public/victim safety in its briefs; and only addressed the public safety issue for the first time at oral argument. *In Re Humphrey* (2018) 19 Cal.App.5th 1006, 1047. The Court of Appeal declined to address this compelling issue raised so late in the proceedings. *Id.*, at 1047.

Amici contend that the Court of Appeal had an independent duty, under the Constitutional Avoidance doctrine, to reach beyond the Attorney General's incompetence and avoid the complex constitutional issue; especially when there were easily identifiable facts for pretrial detention, regardless of the bail amount or Mr. Humphrey's ability to pay.

In *United States v. Salerno* (1987) 481 U.S. 739, 107 S. Ct. 2095, the Supreme Court rejected arguments that the Eighth Amendment right to bail was offended when the government detained especially dangerous defendants without bail to protect the community from danger. The primary dispute in *Salerno* was whether the government may do both: set bail and insist on pretrial detention based on a public safety justification. The U.S. Supreme Court answered that question in the affirmative. California's bail regime mirrors the Eighth Amendment.

As noted above in the Statement of Facts and Statement of Law with Analysis, the operative pleading filed against Mr. Humphrey alleged that he

he had a violent past with various convictions for serious and violent felonies. These prior violent felonies were just like the crimes he stood charged with in July of 2017, this time against a particularly vulnerable victim. Presumably, and without apparent objection by the Defendant, the Court took judicial notice of those prior convictions when making both its pretrial release decision and when issuing the protective order for the safety of the victim. *See*, Evid. Code §§ 452(d), 452.5. Even if the record fails to reflect that the trial court took judicial notice of Humphrey's criminal history, the Court of Appeal itself could have done so, and so can this Court. *See*, Evid. Code § 459; *People v. Hardy* (1992) 2 Cal. 4th 86, 134. (Supreme Court took judicial notice of lawsuit filed by a criminal defendant against his attorney, for purpose of ruling on defendant's conflict of interest claims, even though matter noticed was not presented to trial court.)

California's Constitutional provisions for bail, set forth in Art. I, Section 12 and 28 are codified in Penal Code § 1275(a)'s requirements that:

(1) In setting, reducing, or denying bail, a judge or magistrate shall take into consideration the protection of the public, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at trial or at a hearing of the case. The public safety shall be the primary consideration. In setting bail, a judge or magistrate may consider factors such as the information included in a report prepared in accordance with Section 1318.1.

(2) In considering the seriousness of the offense charged, a judge or magistrate shall include consideration of the alleged injury to the victim, and alleged threats to the victim or a witness to the crime charged, the alleged use of a firearm or other deadly weapon in the commission of the crime charged, and the alleged use or possession of controlled substances by the defendant.

In other words, the trial court record should have been enough for the Court of Appeal to conclude that Mr. Humphrey's pretrial detention was supported by sufficient evidence, without delving into the complex constitutional issues of wealth classification and equal protection. The petition for the writ of habeas corpus should have been denied by the Court of Appeal, as Mr. Humphrey was being lawfully detained.

II. All Courts are Directed by the California Constitution to Consider Public and Victim Safety in Setting Bail.

The California Constitution in Art. I, Sections 12 and 28 direct all Courts in this State to take into consideration the protection of the public, previous criminal convictions, seriousness of the charge, injury to the victim, and threats to the victim when making a pretrial release decision. The statutory codifications of those requirements are set forth in the Penal Code. Section 1275(a), could not be a clearer command on this point.

Even the recently enacted Senate Bill No. 10 (2017-2018 Reg. Sess.) places all its eggs in the basket of public safety in lieu of the tried and true system of surety (money) bail. This new statutory scheme, set to take effect October 1, 2019, mandates presumptive release for most non-violent misdemeanors. Penal Code § 1320.8. If the arrestee does not qualify for presumptive release, the case is referred for "Risk Assessment." Penal Code § 1320.9. There are three "Risk Assessment" categories: Low, Medium, and High. Penal Code § 1320.7(k).

Prior to arraignment, Low-Risk Defendants and some Medium-Risk Defendants are entitled to presumptive release without a court hearing. Penal Code §§ 1320.10, 1320.11. If a defendant is classified as High-Risk, then pre-arraignment release is impossible. Penal Code § 1320.10(e)(1), 1320.11(b)(1).

At arraignment the Court is required to consider factors set forth in Penal Code § 1320.15 and the People (presumably through the District Attorney's or Attorney General's Office) must affirmatively file a motion to request an order holding the defendant in "preventative detention" pending trial. Penal Code § 1320.17.

The "preventative detention" hearing is governed by Penal Code §§ 1320.18, 1320.19, 1320.20, 1320.21, 1320.22, and 1320. Most of the requirements set forth in these code sections mirror existing law about bail hearings. Penal Code § 1320.20(a) creates a rebuttable presumption that no condition or combination of conditions of pretrial release will assure public safety if:

1. The current crime is a violent felony as defined in subdivision (c) of Section 667.5, or was a felony offense committed with violence against a person, threatened violence, or with a likelihood of serious bodily injury, or one in which the defendant was personally armed with or personally used a deadly weapon or firearm in the commission of the crime, or was one in which he or she personally inflicted great bodily injury in the commission of the crime; or

2. The defendant has been assessed high-risk and any one of the following findings are made:

- a. The defendant was convicted of a serious felony as defined in subdivision (c) of Section 1192.7 or a violent felony as

defined in subdivision (c) of Section 667.5, within the past 5 years.

b. The defendant committed the current crime while pending sentencing for a crime described in paragraph (1) of subdivision (a).

c. The defendant has intimidated, dissuaded, or threatened retaliation against a witness or victim of the current crime.

d. At the time of arrest, the defendant was on any form of post-conviction supervision other than informal probation or court supervision.

In other words, even under the “new and improved” regime of pretrial release under Senate Bill No. 10, which forbids surety bail, it is highly likely -- taking the public’s and the victim’s safety into account, and based on the substantial evidence of prior violent felony convictions -- that Mr. Humphrey could have been held in preventative detention, even if he was an eccentric millionaire and could afford the six-figure bond requirement.

As noted above, the Attorney General failed to raise the mandatory public/victim safety arguments in the Court of Appeal. This ineffective assistance of counsel by the government’s lawyers should not prejudice their client, the People of the State of California.

III. The California Constitution Permits a Court to Deny Pretrial Release in Non-Capital Cases.

California Constitution Art. I, Section 12 states:

A person shall be released on bail by sufficient sureties, except for:

(a) Capital crimes when the facts are evident or the presumption great;

(b) Felony offenses involving acts of violence on another person, or felony sexual assault offenses on another person, when the facts are evident or the presumption great and the court finds based upon clear and convincing

evidence that there is a substantial likelihood the person's release would result in great bodily harm to others; or

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

Excessive bail may not be required. In fixing the amount of bail, the court shall take into consideration the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case.

A person may be released on his or her own recognizance in the court's discretion.

California Constitution Art. I, Section 28 (f)(3) states:

Public Safety Bail. A person may be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great. Excessive bail may not be required. In 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 considerations.

A person may be released on his or her own recognizance in the court's discretion, subject to the same factors considered in setting bail.

Before any person arrested for a serious felony may be released on bail, a hearing may be held before the magistrate or judge, and the prosecuting attorney and the victim shall be given notice and reasonable opportunity to be heard on the matter.

When a judge or magistrate grants or denies bail or release on a person's own recognizance, the reasons for that decision shall be stated in the record and included in the court's minutes.

Neither of these sections of the California Constitution are ambiguous on the points necessary to resolve this case, i.e., that defendants charged with non-capital violent felonies can be denied pretrial release, regardless of the bail schedule or relative wealth. The statutory codification

at Penal Code § 1275 is not ambiguous on this point either. None of these constitutional and/or statutory provisions conflict with each other, or the Eighth Amendment to the United States Constitution. As noted above, the U.S. Supreme Court in *United States v. Salerno* (1987) 481 U.S. 739, 107 S. Ct. 2095, found that the Eighth Amendment “right to bail” was not offended when the government detained especially dangerous defendants without bail to protect the community from danger.

IV. Senate Bill No. 10 (2017-2018 Reg. Sess.) Moots this Case.

As noted above, Mr. Humphrey’s case is set for pretrial conference on October 31, 2018, with hearing/trial set for November 14, 2018. This writ review is unlikely to be resolved within that timeframe. If the trial proceeds as planned, the determination of Mr. Humphrey’s guilt or innocence of the charged offenses will moot the pretrial release issues of this case as to his individual circumstances.

Also, as argued above, Mr. Humphrey could have been held without bail, based on the substantial evidence of his violent history, current charges, and vulnerability of the victim, even if Humphrey could have afforded to post a bond. *See*, California Constitution, Art. I, §§ 12 and 28, and California Penal Code § 1275. This renders the decision of the Court of Appeals wholly academic on the complex constitutional issues, regardless of the merit of that court’s legal scholarship.

Which gets us to the question of whether this Court should invoke

any applicable exception to the rule of mootness based on the doctrines of “capable of repetition” and/or “great public concern.” As noted above, the issues presented by this case are of obvious “great public concern.” The legislature deemed it necessary to completely overhaul the state’s pretrial release regime via Senate Bill No. 10 (2017-2018 Reg. Sess.) and the Governor signed the bill into law that goes into effect on October 1, 2019. This is approximately one year from now. What to do about the cases between now and then?

A more recent case interpreting the doctrine of Constitutional Avoidance provides the answer. In *People v. Garcia* (2017) 2 Cal.5th 792, 216 Cal.Rptr.3d 75, this Court applied the avoidance doctrine when balancing public safety and the Fifth Amendment right against self-incrimination. In its decision to construe the statutory scheme at issue in a way that did not implicate constitutional infirmities, the opinion noted:

[...] The theory underlying the canon rests not only on a preference for avoiding the unnecessary resolution of constitutional questions, but also on the presumption that the Legislature (whose members have sworn to uphold the Constitution) did not “intend [] to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.” (*DeBartolo Corp.*, at p. 575; see *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 509 [53 Cal. Rptr. 2d 789, 917 P.2d 628].) The basis for that presumption is especially strong in this case. Not only did the high court's Murphy decision predate the enactment of Chelsea's Law [...].” (underline added).

People v. Garcia, (2017) 2 Cal.5th 792, 804, 216 Cal.Rptr.3d 75, 83, 391 P.3d 1153, 1160.

Presumably, the California Legislature was aware of the decision by the Court of Appeal and this Court’s sua sponte grant of review (with the

attendant consequence of rendering that opinion uncitable while review was pending) when they passed Senate Bill No. 10 (2017-2018 Reg. Sess.). Yet the legislature did not enact this bill as emergency legislation. They chose to have it take effect on October 1, 2019.

This Court would be wise to defer to the co-equal branches of the legislature and executive -- and assume that the currently existing pre-trial release system is constitutionally adequate until the new regime takes effect. California Constitution, Art. III Sec. 3.

CONCLUSION

On May 23, 2018, this Court granted review on its own motion. This effectively depublished the decision of the Court of Appeal, even if the Supreme Court later dismisses the petition. California Rules of Court 8.528(b)(3). On August 22, 2018, this Court denied Mr. Humphrey's request to restore the precedential effect of *In Re Humphrey* (2018) 19 Cal.App.5th 1006.

Under any number of theories, the status of *In Re Humphrey* (2018) 19 Cal.App.5th 1006 should remain a legal nullity.

Respectfully submitted,

October 9, 2018

A handwritten signature in dark ink, appearing to read "Don Kilmer", written over a horizontal line.

Donald Kilmer for:

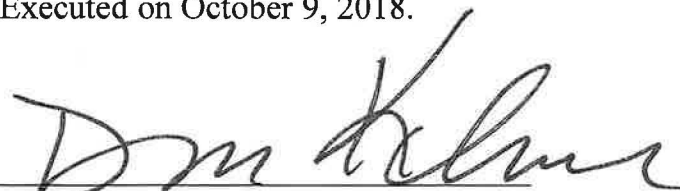
Crime Victims United Charitable Foundation

CERTIFICATE OF WORD COUNT

I, Donald Kilmer, certify that I have relied on the word count of the computer program used to prepare the brief and that this application and amicus curiae brief contains 5,944 words, including footnotes and excluding the Table of Contents and Table of Authorities.

Word Count		?	×
Statistics:			
Pages	22		
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on October 9, 2018.


Donald Kilmer

PROOF OF SERVICE

I am a citizen of the United States and employed in the County of Santa Clara, State of California; I am over the age of 18 years and not a party to the within entitled action; my business address is 1645 Willow Street, Suite 150, San Jose, CA 95125. On October 9, 2018, I served:

**APPLICATION TO FILE BRIEF OF AMICUS CURIAE CRIME
VICTIMS UNITED CHARITABLE FOUNDATION IN SUPPORT
OF THE PEOPLE OF THE STATE OF CALIFORNIA AND
PROPOSED AMICUS CURIAE BRIEF**

on the parties identified on the attached service list following our ordinary business practices by enclosing a true copy thereof in a sealed envelope with a preprinted address label for pickup by United Parcel Service and delivery by overnight courier service. I am familiar with this business's practice for collecting and processing correspondence for United Parcel Service courier service. On the same day that correspondence is placed for collection and courier service, it is picked up in the ordinary course of business by United Parcel Service.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that I am employed in the office of a member of the Bar of this Court at whose direction the service was made. Executed on October 9, 2018, at San Jose, Santa Clara County, California.


Donald Kilmer

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