IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

IN RE KENNETH HUMPHREY,
on Habeas Corpus.

No. S247278

On review from the decision of the Court of Appeal,
First Appellate District, Division Two, Case No. A152056,
granting habeas corpus relief regarding
San Francisco County Superior Court, Case No. 17007715,
The Honorable Joseph M. Quinn, Judge

APPLICATION FOR PERMISSION TO FILE AND BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF NON-TITLE RESPONDENT

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APPLICATION FOR PERMISSION TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF NON-TITLE RESPONDENT

To the Honorable Chief Justice of the Supreme Court of the State of California:

The Criminal Justice Legal Foundation (CJLF) respectfully applies for permission to file a brief amicus curiae in support of Non-Title Respondent, the City and County of San Francisco, pursuant to rule 8.520(f) of the California Rules of Court.[1]

Applicant's Interest

CJLF is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance

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1. No party or counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae CJLF made a monetary contribution to its preparation or submission.

with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In the present case, the Court of Appeal has ordered a drastic and ill-considered change in California's system of pretrial release, contrary to both of the California Constitution's provisions on bail. This decision is contrary to the interests of victims of crime that CJLF was formed to protect.

Need for Further Argument

Amicus is familiar with the arguments presented on both sides of this issue and believe that further argument is necessary.

The brief is submitted with this application and ready for immediate filing. The attached brief brings to the attention of the court additional authorities and argument relevant to the question presented.

October 9, 2018

Respectfully Submitted,

KYMBERLEE C. STAPLETON

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

State Constitution

State Statutes

Bills and Initiatives

Secondary Authorities

IN THE SUPREME COURT

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BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF NON-TITLE RESPONDENT

SUMMARY OF FACTS AND CASE

In May 2017, 79-year-old Elmer J. reported a robbery to the police. He stated that he was followed into his fourth floor San Francisco apartment by 63-year-old Kenneth Humphrey, and Humphrey threatened him and robbed him. (*In re Humphrey* (2018) 19 Cal.App.5th 1006, 1016-1017.) Building surveillance video identified Humphrey as the assailant and also a resident of Elmer's apartment building. (*Ibid*.) Humphrey was arrested and charged with first-degree residential robbery, first-degree residential burglary, inflicting non-great bodily injury on an elder or dependent adult, and theft from an elder or dependent adult. (*Id*. at p. 1017.) He was also charged with three prior strikes. (*Id*. at p. 1020.)

Humphrey's request for release on his own recognizance ("OR") without financial conditions was denied at his arraignment. Humphrey's criminal history is lengthy and the trial court noted that even though his previous convictions were "older in nature," the seriousness of the crime, the vulnerability of the victim, and the recommendation against OR release from pretrial

service's Public Safety Assessment Report guided the judge's decision to deny OR release.

Bail was set at $600,000 pursuant to the county bail schedule. At a subsequent bail hearing, he again sought OR release, or alternatively, a reduction in the bail amount. Because Humphrey's current offenses were similar to the offenses he had committed in the past ("basically a home invasion"), the trial court again denied OR release reasoning that the "continuity is troubling." (*Id*. at p. 1021.) However, because Humphrey has strong ties to the community and was willing to participate in a substance abuse treatment program, the trial court reduced his bail to $350,000.

Humphrey filed a petition for a writ of habeas corpus in the Court of Appeal. The court granted relief in favor of Humphrey holding that he is entitled to a new bail hearing in which an inquiry must be made on his ability to pay money bail. If it is determined he is unable to pay money bail, non-monetary alternatives must be addressed.

This Court granted review on its own motion on May 23, 2018.

SUMMARY OF ARGUMENT

Over 30 years ago, California voters demanded that victim and public safety must be the primary considerations examined by a court when making bail decisions. With few exceptions, pretrial release on bail is a right in California. Noncapital felonies, both violent and non-violent, were added to the list of excepted offenses by Proposition 4. The denial of bail is a matter of judicial discretion, which is guided by both the evidentiary requirements of article I, section 12 and the enumerated considerations of article I, section 28, subdivision (f)(3).

Once it is determined that a defendant is eligible for pretrial release, a court must determine what type of pretrial release is appropriate under the circumstances—money bail or release on OR. Both options again require a court to examine the threat posted to public and victim safety if the defendant

is released. Release on OR is a discretionary alternative to money bail that considers a defendant's ability to pay. If a judge concludes that OR release is appropriate, a defendant can be released pretrial regardless of wealth status.

Senate Bill 10 is recent California legislation that eliminates money bail and replaces it with "risk assessments" and other non-monetary conditions of release. The Bill has no application to the resolution of the issues in this case because it is not yet in effect, and, if California voters so decide, it may never take effect.

ARGUMENT

When this Court granted review, it limited the issues to

> "(1) . . . [whether] 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 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, this Court requested supplemental briefing on "[w]hat effect, if any, does Senate Bill No. 10 (2017-2018 Reg. Sess.)[2] have on the resolution of the issues presented by this case."

This brief will address the original three issues in reverse order. Trial courts are tasked to resolve matters of bail and pretrial release daily. Addressing the question of when bail can be denied in noncapital cases first

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2. Cited below as "SB 10."

opens the door to follow up questions regarding what factors a court must consider when setting monetary bail, and whether the ability to pay factors into the analysis. SB 10's relevance to the present case will be addressed last.

The first question a court must address when confronted with an individual accused of committing a criminal offense is bail eligibility. In other words, whether pretrial release is an option. If the answer is no, the individual must remain detained. If the answer is yes, the inquiry turns to the types of pretrial release available to the accused under the circumstances of the case. Under current California law, both of these questions require analyzing issues of public and victim safety.

I. Both article I, section 12, subdivisions (b) and (c), and article I, section 28, subdivision (f)(3) govern the denial of bail in noncapital cases.

Historically in California, all persons accused of committing noncapital crimes were "bailable" before conviction. (Cal. Const. of 1849, art. I, § 7; *People v. Tinder* (1862) 19 Cal. 539, 541-42; Witkin, Cal. Criminal Procedure (1st ed. 1963) § 149, p. 142.) Article I, section 7 of the first California Constitution provided: "[A]ll persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption is great."[3] Because the United States Constitution only prohibited "excessive bail" (and thus no actual right to bail), the drafters of the California Constitution specifically added former section 7 to the constitution "to make clear that

3. In 1682, Pennsylvania's newly adopted constitution provided that, "all prisoners shall be Bailable by Sufficient Sureties, unless for capital Offenses, where proof is evident or the presumption great." Pennsylvania's provision became the model for nearly all state constitutions adopted after 1776. (Schnacke, Jones, & Brooker, The History of Bail and Pretrial Release, Pretrial Justice Institute (2010), pp. 4-5.)

unlike the federal rule, all except the one class of defendants were bailable."[4] (*In re Underwood* (1973) 9 Cal.3d 345, 350, and fn. 6; see also *In re Law* (1973) 10 Cal.3d 21, 25 (absolute right to bail in all but a narrow class of cases).) This broad proclamation, however, had its limits.

For many years, California courts restrained a defendant's "absolute" right to bail in noncapital felony cases by imposing their own judicially created "public safety" exception. (*Underwood*, 9 Cal.3d at p. 348, citing *Bean v. County of Los Angeles* (1967) 252 Cal.App.2d 754; see also *In re Henley* (1912) 18 Cal.App. 1, 6; Witkin, *supra*, § 151, pp. 143-144.) This unwritten exception was challenged in *Underwood*. In that case, the trial court denied bail to a defendant charged with multiple counts relating to the manufacturing, possession, and attempted detonation of a "live" pipe bomb, which were all noncapital offenses. The trial court denied bail on public safety grounds, reasoning that "[t]he time has come where we must restrain violence and death as much as possible. It is necessary to resolve it by denying bail to those who can or are able to perpetrate murders and violence and crimes of that nature . . . ." (9 Cal.3d at p. 347.)

On appeal, this Court reversed and expressly rejected the state's argument that an implied public safety exception existed within California's constitutional and statutory framework governing the general right to bail. (*Id*. at p. 349.) This Court held that the right to pretrial release on bail is the rule for noncapital offenses "[i]rrespective of the villainy of the accused or the heinousness of his offense . . . ." (*Id*. at p. 350, fn. 7, quoting *In re Keddy* (1951) 105 Cal.App.2d 215, 219-220.) This Court further held that the sole purpose of California's bail system was to assure the defendant's appearance in court to stand trial for the charged offenses. (*Id.* at p. 348.) In so holding, however, this court was careful to note that "[i]f the constitutional guarantees

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4. Former section 7 was redesignated as section 6 in the California Constitution of 1879.

are wrong, let the people change them—not judges or legislators." (*Id*. at p. 350, quoting *Keddy*, 105 Cal.App.2d at p. 220.)

The people took heed of this court's advice and in 1982, California voters overwhelmingly demanded that public safety be the primary factor considered by a judge when deciding whether the criminally accused may be released from custody pretrial. Both Proposition 4 and 8 were drafted in direct response to *Underwood*, and both were placed on the June 1982 primary election ballot. (Ballot Pamp., Primary Elec. (Jun. 8, 1982) analysis of Prop. 4 by the Legislative Analyst, p. 16 ("1982 Voter Guide"); *id*., argument in favor of Prop. 4, p. 18; *id*., analysis of Prop. 8 by the Legislative Analyst, pp. 32, 54.)

A. Evolution of Bail Rights in California.

As it currently stands, article I, section 12 of the California Constitution provides:

> "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." (Cal. Const., art. I, § 12.)

Article I, section 12 was originally added to the California Constitution by Proposition 7 in November 1974. Proposition 7 was a legislative constitutional amendment entitled "Declaration of Rights" that substantially revised article I upon recommendations of the California Constitutional Revision Commission. (Ballot Pamp., Gen. Elec. (Nov. 5, 1974) analysis of Prop. 7 by the Legislative Analyst, p. 26 ("1974 Voter Guide"); *id*., argument in favor of Prop. 7, p. 28.) In that election, Proposition 7 repealed former article I, section 6 as it had existed since 1879.[5] The measure split up the provisions of former section 6, revised the portion of it relating to bail, moved it to article I, section 12, and added to it a provision permitting pretrial release on an accused's own recognizance ("OR"). (See Proposition 7 of 1974, sections Tenth, Twenty-second, and Thirty-third, 1974 Voter Guide at pp. 27, 71.) The commission proposed adding the OR clause to recognize "the 'well-established practice of releasing persons accused of crimes on their own recognizance.' " (*People v. Standish* (2006) 38 Cal.4th 858, 890 (conc. & dis. opn. of Chin, J.), quoting Cal. Const. Revision Com., Proposed Revision (1971) p. 19.) Proposition 7 kept an accused's absolute right to bail in noncapital cases and further gave the courts the discretion to grant or deny OR release without limitation. (*Id*. at pp. 890-891.)

In June 1982, Proposition 4, also a legislative constitutional amendment, amended article I, section 12 so as to "broaden the circumstances under which the courts *may deny bail*." (1982 Voter Guide, analysis of Prop. 4 by Legislative Analyst, p. 16, italics added.) In the same election, Proposition 8, entitled the "Victims' Bill of Rights" sought to "strengthen procedural and substantive safeguards for victims in our criminal justice system." (*Brosnahan*

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5. Section 6 in the 1879 Constitution was former section 7 from the 1849 Constitution. (See, *supra*, footnote 4.)

v. Brown (1982) 32 Cal.3d 236, 247.) Proposition 8 added article I, section 28 to the California Constitution, which encompassed multiple rights for crime victims that

> "were aimed at achieving more severe punishment for, and more effective deterrence of, criminal acts, protecting the public from the premature release into society of criminal offenders, providing safety from crime to a particularly vulnerable group of victims, namely school pupils and staff, and assuring restitution for the victims of criminal acts." (*Ibid*.)

Most notably for purposes of this case, Proposition 8 added a provision entitled "Public Safety Bail." The initiative proposed to repeal article I, section 12 in its entirety and substitute article I, section 28, subdivision (e) as the sole constitutional provision governing bail. (1982 Voter Guide, text of proposed law, p. 33; *Standish*, 38 Cal.4th at p. 874.)

The electorate passed both Proposition 4 and 8. However, Proposition 4 received more yes votes than Proposition 8, which eventually led to litigation over which of the two initiatives relating to bail and pretrial release governed. In *Standish*, this court compared the two measures section by section and held that they were in direct conflict in at least three ways: (1) Proposition 8 sought to repeal article I, section 12, whereas Proposition 4 sought to amend it; (2) Proposition 8 sought to rescind the court's discretion to grant OR release for serious felonies, whereas Proposition 4 left the decision within the court's discretion; and (3) Proposition 8 rendered pretrial release on bail discretionary and extended the restrictions imposed on bail to OR release, whereas Proposition 4 continued to make all offenders "bailable" subject to certain express exceptions. (38 Cal.4th at p. 877.) Because Proposition 4 received more yes votes, the provisions of article I, section 12 took effect, and the provisions of article I, section 28, subdivision (e) as proposed by Proposition 8 did not. (*Id*. at pp. 877-878; see also *Brosnahan*, 32 Cal.3d at p. 255.)

Because the bail provision of former article I, section 28, subdivision (e) was the only provision that directly conflicted with article I, section 12, it did not go into effect, but the remainder of article I, section 28 did go into effect.

(*People v. Barrow* (1991) 233 Cal.App.3d 721, 723; see also *Brosnahan*, 32 Cal.3d at p. 255.)

In 2008, California voters sought to build upon and expand the article I, section 28 rights given to crime victims when they passed Proposition 9, 2008 Cal. Stat. A-298. Proposition 9, known as the "Victims' Bill of Rights Act of 2008: Marsy's Law," significantly amended article I, section 28 and in so doing, renumbered and amended the "Public Safety Bail" provision of Proposition 8 that *Standish* declared invalid:[6]

> "~~(c)~~ (3) 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 ~~consideration~~ *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. ~~However, no person charged with the commission of any serious felony shall be released on his or her own recognizance.~~
>
> 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 on the record and included in the court's minutes." (2008 Cal. Stat. at p. A-303.)

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6. As discussed *supra*, *Standish* found that the bail provisions of article I, section 12 and article I, section 28, subdivision (e) were in direct conflict in three specific ways.

Whether the article I, section 28, subdivision (f)(3) "Public Safety Bail" provisions of Proposition 9 are reconcilable with the bail provisions of article I, section 12 has not been addressed by this court. However, the conflicts that *Standish* identified between article I, section 12 (Propostion 4) and article I, section 28, subdivision (e) (Proposition 8) were rectified by the drafters of Proposition 9.

Proposition 9 made two significant changes to existing article I, section 28, subdivision (e). First, unlike Proposition 8, Proposition 9 did not seek to repeal article I, section 12. In fact, there is no mention of section 12 anywhere in the measure or in the literature accompanying the measure. Second, Proposition 9 deleted the language that prohibited the OR release of people accused of committing serious felonies. Thus, the only remaining "conflict" as recognized by *Standish* potentially remains in the first sentence of both provisions: Section 12 states that "[a] person *shall* be released on bail . . . ," whereas section 28, subdivision (f)(3) states "[a] person *may* be released on bail . . . ." (Italics added.)[7]

If the first sentences are read in isolation, they appear to remain in conflict with each other. Section 12 mandates bail, whereas section 28, subdivision (f)(3) makes bail discretionary. As *Standish* noted while interpreting a bail statute, "shall" is ordinarily deemed mandatory and "may" is deemed permissive. (38 Cal.4th at p. 869.) However, when those two sentences are read within the context of both bail provisions as a whole, and within the context of the case law, plus the electorate's intent in enacting both measures in subsequent elections, it appears that article I, section 28, subdivision (f)(3)

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7. The other conflict *Standish* identified within the third conflict relates to the factors a court must consider when making OR release decisions. But, as will be discussed, *infra*, OR release is discretionary under both provisions and these factors help guide a judge's decision. (See *In re York* (1995) 9 Cal.4th 1133, 1144) (court has authority to consider the danger to public safety when making OR release decisions).)

complements, rather than frustrates, article I, section 12, and they both provide authority for a court to deny pretrial release on bail.

B. Bail Eligibility.

This Court asked under what circumstances does the California Constitution permit bail to be denied in noncapital cases. As previously discussed, the general rule is that pretrial release on bail is a right in California. Capital crimes were the sole exception to the general rule and remain an exception today.[8] (*Tinder*, 19 Cal. at p. 542.) In 1862, *Tinder* held that capital offenses were expressly exempt from the absolute right to pretrial release on bail thus rendering release decisions a matter of judicial discretion. Thus, in capital cases, if the "facts are evident or the presumption is great," pretrial release on bail can be denied. (Pen. Code, § 1270.5; *Clark v. Superior Court* (1992) 11 Cal.App.4th 455, 458.) The "facts are evident" or "presumption is great" standards limit the bailable nature of a charged, but unproven, offense. (*In re Podesto* (1976) 15 Cal.3d 921, 931.)

In 1982, the electorate overwhelmingly decided that judges should also be able to deny release on bail to people accused of noncapital felony offenses. "Release on felony offenses is prohibited where: (1) Acts of violence on another person are involved and court finds substantial likelihood the person's release would result in great bodily harm to others. (2) The person has threatened another with great bodily harm and court finds substantial likelihood the person would carry out the threat." (1982 Voter Guide, Official Title and Summary of Prop. 4 prepared by Atty. Gen., p. 16.)

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8. As noted, Proposition 9 is better known as the "Victims' Bill of Rights Act of 2008: Marsy's Law." Marsy Nicholas was murdered by her former boyfriend. Despite being charged with first-degree murder, Marsy's killer was released on bail soon after her murder without any notice to Marsy's family. (Proposition 9, § 2, ¶ 7, 2008 Cal. Stat. at p. A-299.)

California voters expanded the list of exempt offenses to include noncapital felony offenses when certain additional requirements are met.[9] As a result, pretrial release on bail for these noncapital crimes also a matter of judicial discretion. "It is not the intention of the law to punish an accused person by imprisoning him in advance of his trial." (*Ex parte Duncan* (1879) 54 Cal. 75, 77.) However, preventative detention of dangerous individuals pretrial without bail "is a legitimate regulatory goal." (*United States v. Salerno* (1987) 481 U.S. 739, 747.)

With respect to noncapital felonies, in addition to mandating that "the facts are evident or the presumption great," article I, section 12, subdivision (b) requires clear and convincing evidence that the charged offenses involved "acts of violence" or "felony sexual assault" on another person and "a substantial likelihood the person's release would result in great bodily harm to others." Article I, section 12, subdivision (c) requires clear and convincing evidence that the accused "has threatened another with great bodily harm and that there is a substantial likelihood that the person would carry out the threat if released." These two exceptions and the evidence required to prove both are additional limitations that substantially narrow the number of noncapital felony defendants for whom pretrial release on bail can be denied.

" 'Clear and convincing evidence' requires a finding of high probability. [Citation.] The evidence must be so clear as to leave no substantial doubt; sufficiently strong to command the unhesitating assent of every reasonable mind." (*In re Nordin* (1983) 143 Cal.App.3d 538, 543, quoting *Sheehan v. Sullivan* (1899) 126 Cal. 189, 193, internal quotation marks omitted.) The specific circumstances must be reviewed on a case-by-case basis and the judge must make explicit findings on the record. (*Ibid*.)

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9. Article I, section 12 was slightly amended by Proposition 189 in 1994 to add felony sexual assault offenses to the list of crimes excepted from the right to bail. (Supp. Ballot Pamp., Gen Elec. (Nov. 8, 1994) Prop. 189, Official Title and Summary prepared by Atty. Gen., p. 6.)

The driving force behind Proposition 4's addition of subsections (b) and (c) to article I, section 12 was to protect and promote public safety. The argument in favor of Proposition 4 in the voter information materials stated:

> "Present law does not allow judges in making bail decisions to consider public safety or the likelihood that one who is accused of a felony will commit violent acts while out on bail awaiting trial. Proposition 4 will change this law and provide the judges with a necessary legal tool to protect the public from repeat violent offenders." (1982 Voter Guide, argument in favor of Prop. 4, p. 18.)

Proposition 8 and Proposition 4 shared the same overall goal which was to protect public and victim safety. Proposition 8 ran into trouble when it included a provision that sought to repeal article I, section 12. The attempted repeal, among other reasons, rendered the two Propositions in direct conflict, which led to the demise of Proposition 8's bail provisions.

The inclusion of Proposition 9 on the 2008 general election ballot revived the defunct public safety bail provision. Both article I, section 12 (Proposition 4), and article I, section 28, subdivision (f)(3) (Proposition 9) require consideration of (1) seriousness of the offense charged, (2) the previous criminal record of the defendant, and (3) the probability of his or her appearing at the trial or hearing of the case.

Article I, section 12 details the three types of offenses that are excepted from an accused's right to bail. With regard to noncapital felonies, section 12 mandates the type and strength of the evidence that must be presented to the court to justify why bail should be denied. (See *Clark*, 11 Cal.App.4th at p. 458.) If the evidence is clear and convincing that it would be dangerous to the victim and public if the accused were to be released, bail can be denied. Article I, section 28 provides victims with the constitutional right "[t]o be reasonably protected from the defendant" and "[t]o be heard . . . at any proceeding . . . involving a post-arrest release decision . . . ." (Cal. Const., art. I, § 28, subds. (b)(2), (b)(8).) To effectuate these rights, article I, section 28, subdivision (f)(3) mandates that all pretrial release decisions (grant or denial)

must primarily focus on the danger an accused poses to the victim and the public. Victims are given the right to notice, appear, and speak at the hearings in which pretrial release is being considered. Article I, section 28 gave victims a voice. They now have the right to appear in court and explain why the defendant's release would compromise the safety of themselves or others. If the court finds that the evidence is not clear and convincing, then "[a] person shall be released on bail by sufficient sureties . . . ." (Cal. Const., art. I, § 12.)

The denial of bail lies entirely within the discretion of the court. When exercising that discretion, both section 12 and section 28, subdivision (f)(3) mandate that the court's focus be on victim and public safety. A court's discretionary authority to deny pretrial release on bail is not taken lightly and is exercised with great caution and restraint. In fact, between 2000 and 2009, only about 5% of California's criminally accused were denied pretrial release on bail. (Tafoya, *Pretrial Detention and Jail Capacity in California*, Public Policy Institute of California (July 2015), fn. 14.)

Article I, section 12, subdivisions (b) and (c) lay out the excepted noncapital offenses. Section 12, as enacted by Proposition 4, was in effect when Proposition 9 was presented to the electorate in 2008. "Both the Legislature and the electorate by the initiative process are deemed to be aware of laws in effect at the time they enact new laws and are conclusively presumed to have enacted the new laws in light of existing laws having direct bearing upon them." (*Williams v. County of San Joaquin* (1990) 225 Cal.App.3d 1326, 1332, citing *Viking Pools, Inc. v. Maloney* (1989) 48 Cal.3d 602, 609.) Thus, both article I, section 12 and article I, section 28, subdivision (f)(3) govern the denial of bail in noncapital cases. Reading them together in this manner promotes, rather than frustrates, the purpose and intent of the electorate in the past and currently.

II. Trial courts must consider issues of public and victim safety when setting monetary bail.

If a defendant can be "admitted to bail," *i.e.*, pretrial release is not precluded, California currently authorizes four different methods of pretrial release, only one of which has a monetary requirement. (1) money bail; (2) OR; (3) OR under supervision; and (4) pretrial diversion. At a defendant's first court appearance, a judge will decide if defendant should be released on OR (with or without supervision) or on money bail.[10] (Pen. Code, §§ 1270, 1271, 1275, 1318; *York*, 9 Cal.4th at p. 1141.)

California's Penal Code governs the day-to-day administration of bail practices and pretrial release. It incorporates the provisions of the California Constitution and sets forth detailed standards and procedures to help guide the exercise of the court's pretrial release authority and decisions.

A. Money Bail and the "Presumption of Innocence."

If an arrest is made without a warrant, the amount of money bail is initially set at a defendant's first court appearance in accordance with a uniform countywide bail schedule. (Pen. Code, § 1269b, subd. (b).) More serious crimes have a higher set bail amount and the amounts tend to vary from county to county. (Karnow, *Setting Bail for Public Safety* (2008) 13 Berkeley J. Crim. L. 1, 14, fn. 71.) For some offenses, the scheduled bail amount can be increased at the request of a peace officer if there is reasonable cause to believe the set amount is insufficient to ensure the defendant's appearance at trial or to protect a victim or the victim's family. (Pen. Code, § 1269c, subd.

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10. "[P]retrial diversion refers to the procedure of postponing prosecution of an offense filed as a misdemeanor either temporarily or permanently at any point in the judicial process from the point at which the accused is charged until adjudication." (Pen. Code, § 1001.1.) "If the divertee has performed satisfactorily during the period of diversion, the criminal charges shall be dismissed at the end of the period of diversion." (Pen. Code, § 1001.7.) This brief will not address pretrial diversion because it is not applicable to the facts of this case.

(c).) A defendant may also ask the court to reduce the scheduled bail amount or to grant release on OR. (*Ibid*.) For certain serious or violent felonies, a hearing must be held in open court before a judge can release a defendant on a bail amount that is greater or lower than the scheduled amount or grant release on OR. (Pen. Code, § 1270.1.)

At that hearing, the court must consider evidence of the defendant's past court appearances, the maximum potential sentence that may be imposed, and the danger to others if the defendant is released. (Pen. Code, § 1270.1, subd. (c).) Penal Code section 1275 incorporates the article I, section 12 and article I, section 28, subdivision (f)(3) factors a court must consider when making monetary bail decisions. Like article I, section 28, subdivision (f)(3), Penal Code section 1275, subdivision (a)(1) requires public safety to be the primary consideration in making bail decisions. Like article I, section 12, Penal Code section 1275, subdivision (a)(2) requires a court to examine the alleged injury to the victim and threats to the victim or witnesses to the charged crime in its evaluation of the "seriousness of the offense charged" factor.

At Humphrey's first court appearance, the trial court consulted San Francisco County's bail schedule and set bail at $600,000. At a later hearing, the court reduced that amount to $350,000. The Court of Appeal found that the trial court's

> "unquestioning reliance upon the bail schedule without consideration of a defendant's ability to pay, as well as other individualized factors bearing upon his or her dangerousness and/or risk of flight, runs afoul of the requirements of due process for a decision that may result in pretrial detention." (*Humphrey*, 19 Cal.App.5th at p. 1044.)

The Court of Appeal further found that the trial court's reduction in bail was futile because Humphrey has no ability to pay the lowered amount and therefore the court "reached the anomalous result of finding petitioner suitable for release on bail but, in effect, ordering him detained . . . ." (*Id*. at p. 1045.)

The Court of Appeal contends that once it is determined that pretrial detention is not necessary and a defendant should be admitted to bail, the inquiry must turn from public and victim safety to what amount is necessary to ensure a defendant's appearance at future court hearings. (*Id*. at p. 1044.) To rely wholly on bail schedules "amounts to a virtual presumption of incarceration" for "poor persons arrested for felonies . . . ." (*Ibid*.)

Under current law, in setting the amount of bail, a court must consider the protection of the public, the safety of the victim, the seriousness of the offense, and the probability of defendant's appearance at trial. (Cal. Const., art. I, § 12; Cal. Const., art. I, § 28, subd. (f)(3); Pen. Code, § 1275, subd. (a)(1).) The Court of Appeal bases much of its discussion on an arrestee being "presumptively innocent" and to detain him or her pretrial based on a lack of available financial resources to post bail unconstitutionally infringes upon his or her liberty interests. (*Humphrey*, 19 Cal.App.5th at pp. 1025, 1033, 1049.) The court's reference to an arrestee's presumptive innocence is misplaced.

> "Without question, the presumption of innocence plays an important role in our criminal justice system. 'The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.' [Citation.] *But it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun*." (*In re York* (1995) 9 Cal.4th 1133, 1148, quoting *Bell v. Wolfish* (1979) 441 U.S. 520, 533, italics added by *York*.)

"[A] trial court may presume the validity of the criminal charges against the defendant at this initial step in the criminal proceedings." (*United States v. Scott* (9th Cir. 2006) 450 F.3d 863, 890 (dis. opn. of Callahan, J., to denial of rehg. en banc).)

Thus, prior to trial, when a court is considering the constitutional and statutory criteria for setting the amount of bail after charges are filed, the court "must assume his guilt, though when he shall be tried it may be made to appear

that he is wholly innocent of all the charges." (*Ex parte Duncan* (1879) 53 Cal. 410, 411; *Ex parte Reuf* (1908) 7 Cal.App. 750, 752 ("court must assume that the defendant is guilty of the offense with which he is charged"); *In re Horouchi* (1930) 105 Cal.App. 714, 715 ("[f]or the purpose of fixing the amount of bail this court will assume the guilt of the accused"); see also *Ex parte Ryan* (1872) 44 Cal. 555, 558 (a court is "bound to assume his guilt for the purpose of this proceeding").)

Thus, the Court of Appeal erroneously premised its entire opinion on defendant being "presumptively innocent" prior to trial. As this Court's authority dictates, the proper starting point when fixing the amount of bail is actually to presume the charges are true—*i.e.*, that the defendant did commit the charged crime(s). The viewpoint from which a court starts significantly alters the analysis that follows. If an arrestee is considered presumptively innocent, then any bail amount is going to be considered disproportionate or excessive if that presumptively innocent person cannot afford to post bail and therefore remains detained pretrial.[11] (See *York*, 9 Cal.4th at p. 1148.) Whereas if the court, in fixing the amount of bail, starts from the position of presumptive guilt, which is more consistent with the statutorily mandated bail schedules, then it can increase or decrease the amount based upon the evidence provided to the court to rebut the presumption "whenever substantial justice would thereby be promoted." (*Ex parte Ryan*, 44 Cal. at p. 557.)

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11. "Undoubtedly the extent of the pecuniary ability of a prisoner to furnish bail is a circumstance among other circumstances to be considered in fixing the amount in which it is to be required, but it is not in itself controlling. If it were, then the fact that the prisoner had no means of his own, and no friends who were able or willing to become sureties for him, even in the smallest sum, would constitute a case of excessive bail, and would entitle him to go at large upon his own recognizance." (*Duncan*, 54 Cal. at p. 78.)

B. Factors and Conditions.

Here the court decreased the scheduled bail amount of $600,000 to $350,000 because of the defendant's strong ties to the community and his willingness to participate in a substance treatment program. Prior to 1982, the sole purpose of setting bail was to ensure the defendant's appearance at trial. *Underwood* and cases before it were operating under the presumption that a defendant is guilty, not innocent, while awaiting trial. If it was a capital offense, and the presumption of guilt was great or the facts of the crime were evident, pretrial release on bail could be denied altogether. (*Tinder*, 19 Cal. at p. 543; *Ex parte Walpole* (1890) 85 Cal. 362, 364-365.) In all other cases, a defendant was still presumed guilty and the only question was how much bail to set to ensure the accused will appear in court to answer the charges against him or her. After 1982, the notion that a defendant is presumptively guilty was perhaps relegated into the background because the questions of victim and public safety became the main focus. Despite the shifted focus, the presumption that the accused is initially considered guilty pretrial remains the law.

Undoubtedly, courts have a difficult task in setting cash bail that permits release yet also ensures the safety of the victim and public. (Karnow, 13 Berkeley J. Crim. L., at pp. 1-2.) Here, the Court of Appeal recognized that the government's interests involved in the pretrial bail context are ensuring the accused's presence at future court proceedings and public and victim safety. (*Humphrey*, 19 Cal.App.5th at p. 1028.) With respect to these interests, the Court of Appeal stated that "[w]hen money bail is imposed to prevent flight, the connection between the condition attached to the defendant's release and the governmental interest at stake is obvious: If the defendant fails to appear, the bail is forfeited." (*Id*. at pp. 1028-1029.) The Court of Appeal further stated that "[m]oney bail, however, has no logical connection to protection of the public, as bail is not forfeited upon commission of additional crimes." (*Id*. at p. 1029.)

The only method of ensuring public and victim safety is to preventatively detain a defendant until a jury of his or her peers renders a verdict of guilty or not guilty. However, as discussed, in California "liberty is the norm" and preventative detention is only applicable to a small number of cases. Money bail in and of itself serves a single purpose – to provide incentive for the accused to appear at all future court hearings. This is true whether the defendant pays the full amount of bail in cash himself or relies on a surety bond for financial assistance. If the defendant absconds, the monetary penalty is significant.

The Court of Appeal's opinion failed to recognize that a defendant's release from custody on money bail comes with strings attached. The court must impose on the defendant the following conditions of release on bail absent a showing of good cause not to:

> "(1) The defendant shall not initiate contact in person, by telephone, or any other means with the alleged victims.
>
> (2) The defendant shall not knowingly go within 100 yards of the alleged victims, their residence, or place of employment.
>
> (3) The defendant shall not possess any firearms or other deadly or dangerous weapons.
>
> (4) The defendant shall *obey all laws*.
>
> (5) The defendant, upon request at the time of his or her appearance in court, shall provide the court with an address where he or she is residing or will reside, a business address and telephone number if employed, and a residence telephone number if the defendant's residence has a telephone.
>
> A showing by declaration that *any of these conditions are violated shall*, unless good cause is shown, *result in the issuance of a no-bail warrant*." (Pen. Code, § 646.93, subd. (c), italics added.)

These conditions of release are intended to protect the public and victim while the defendant is out of custody awaiting trial. Judges also have the authority to impose additional release conditions relating to public and victim safety that correlate with the charged offense. (See, *e.g.*, *In re McSherry* (2003) 112 Cal.App.4th 856, 862-863; see also Karnow, 13 Berkeley J. Crim. L., at pp. 11-13.)

The inability to predict whether a defendant released pretrial on money bail is going to abide by the conditions of release is unsettling.

> " 'Prediction of the likelihood of certain conduct necessarily involves a margin of error, but is an established component of our pretrial release system. Trial judges have been engaged in predicting the likelihood of flight for all defendants, capital and noncapital, and have predicted the likelihood of recidivism for capital offenses since the Judiciary Act of 1789.' " (*In re Nordin* (1983) 143 Cal.App.3d 538, 546, quoting *United States v. Edwards* (D.C. App. 1981) 430 A.2d 1321, 1342.)

If a defendant violates any of the conditions of release, a "no-bail warrant" will be issued and he or she will be returned to custody with new criminal charges added. If the defendant absconds, he or she loses money. If the defendant commits a new crime or otherwise violates the conditions of release, he or she loses freedom.

In this scenario, money is not forfeited, but freedom is. The nonfinancial conditions attached to release on bail have a direct connection to the government's interest in protecting public and victim safety. The combination of setting money bail with conditions satisfy constitutional and statutory mandates.

III. Release on OR is an alternative to money bail that considers a defendant's ability to pay.

In regard to money bail, the California Constitution simply states that "[e]xcessive bail may not be required." (Cal. Const., art. I, § 12; Cal. Const., art. I, § 28, subd. (f)(3).) "It is well settled, even in cases involving bail after

indictment and before conviction, that bail is not to be deemed excessive merely because the person under indictment cannot give the bail required of him." (*In re Application of Burnette* (1939) 35 Cal.App.2d 358, 360-361.) However, "a defendant charged with a bailable offense who seeks pretrial release from custody typically has two options: post bail and obtain release, or seek the privilege of OR release." (*In re York* (1995) 9 Cal.4th 1133, 1141.)

Own recognizance ("OR") release and release on bail are "alternative and complementary systems" that encompass procedures that are "separate and distinct." (*Williams v. County of San Joaquin* (1990) 225 Cal.App.3d 1326, 1330-1331, quoting *Van Atta v. Scott* (1980) 27 Cal.3d 424, 452.) Criminal defendants do not have a right to release on OR. (See *Van Atta v. Scott* (1980) 27 Cal.3d 424, 452.) Rather, it is always a matter of judicial discretion. (*Ibid*.)

The OR clause was added to the California Constitution in 1974 by Proposition 7 upon the recommendation of the California Constitutional Revision Commission as a " 'desired alternative to the bail system, which frequently works an injustice on those who cannot afford to post a bail bond.' " (*Standish*, 38 Cal.4th at p. 890, italics omitted.) The Commission further stated that the " 'recommendation will bring constitutional language more in line with actual practices in the release of criminal defendants and more consistent with contemporary concepts of social equity and fundamental justice for all persons, regardless of their economic status.' " (*Id*. at pp. 890-891, quoting Cal. Const. Revision Com., Proposed Revision (1971) p. 19; see also 1974 Voter Guide, analysis of Prop. 7 by Legislative Analyst, p. 26.)

Thus, OR is a discretionary alternative to cash bail. In cases involving certain serious felonies, a hearing must be held in open court before a defendant can be released OR. (Pen. Code, § 1270.1.) At this hearing, the court is to consider "the potential danger to other persons, including threats that have been made by the detained persons and any past acts of violence. *The court shall also consider* any evidence offered by the detained person regarding his or her ties to the community and *his or her ability to post bond*."

(Pen. Code, § 1270.1, subd. (c).) If a judge concludes that release on OR is appropriate under the circumstances of the case, a defendant can be released pretrial regardless of financial status. In so doing, a court can impose reasonable conditions designed to prevent and deter further crime. (Pen. Code, § 1318, subd. (a).) In *York*, this Court stated that

> "in view of the inability of certain defendants to post bail, the Legislature clearly had a rational basis for concluding that public safety would be enhanced if such defendants, when afforded the leniency of a bail-free release, were required to comply with those reasonable conditions that a court or magistrate, in his or her discretion, believed to be necessary in order to deter further criminal conduct." (9 Cal.4th at p. 1152.)

In this case, a Public Safety Assessment Report ("PAS") created by pretrial services and submitted to the court recommended that Humphrey not be released. The trial court denied Humphrey's request for OR release because it had "public safety concerns." (*Humphrey*, 19 Cal.App.5th at p. 1021.) Humphrey had three prior strikes against him when he committed this crime. Although "older in nature," they were similar to the current charges which the court found "troubling." (*Ibid*.) Thus, defendant was denied OR release because the trial court found he was a "flight risk" and would be a danger to public safety. (*Ibid*.) Such decision was completely within the discretion of the trial court.

The Court of Appeal's opinion directs a new bail hearing in which Humphrey is to be given the opportunity to present evidence of his financial resources, and the court must consider his ability to pay and other non-monetary alternatives. However, the trial court already has considered the OR release as a non-monetary alternative to money bail and found that his potential danger to the public was reason to deny the request. Rehashing the same evidence again is a waste of judicial resources.

IV. SB 10 has no effect on the resolution of the issues in this case.

SB 10 was signed into law on August 20, 2018, but it is not slated to take effect until October 1, 2019. (Sen. Bill No. 10 (2017-2018 Reg. Sess.) § 4, new Pen. Code, § 1320.34.) If the new law takes effect late next year, it will repeal the entire "Chapter 1 Bail" (Pen. Code, §§ 1268-1320) and replace it with "Chapter 1.5 Pretrial Custody Status." Most notably, the new law eliminates money bail and replaces it with "risk assessments" and non-monetary conditions of release. (See SB 10, Legislative Counsel Digest.)

This Court asked what effect, if any, does SB 10 have on the resolution of the issues presented by this case. The short answer is that it has no effect because SB 10 is still nearly a year away from becoming law. The effective date of SB 10 could be pushed back even further if its opponents are successful in its efforts to stop it from becoming law.

Soon after SB 10 was signed into law, Californians Against the Reckless Bail Scheme ("Coalition") filed a referendum against its implementation (www.stopsb10.org). If the Coalition successfully collects the requisite number of signatures from registered California voters by November 26, 2018, SB 10 would be placed on the November 2020 general election ballot and would be stayed until voters can decide if it should become law.[12] (Cal. Const., art. II, § 10, subd. (a).)

Thus, SB 10's applicability to the resolution of the issues in this case is not yet ripe for judicial review. "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.' " (*Texas v. United States* (1998) 523 U.S. 296, 300, quoting *Thomas v. Union Carbide Agricultural Products Co.* (1985) 473 U.S. 568, 581, quoting 13A Wright, Miller, & Cooper, Federal Practice and Procedure (1984) § 3532, p. 112.) Because SB 10 is not yet effective, and it

12. The measure will be placed on the November 2020 general election unless a special election is called. (Cal. Const., art. II, § 9, subd. (c).)

may never become effective, this court need not address how it effects the resolution of the issues in this case.

Consideration of SB 10 would also contradict the "fundamental and longstanding principle of judicial restraint [that] requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." (*People v. Navarro* (2007) 40 Cal.4th 668, 675, internal quotation marks omitted.) SB 10 raises serious constitutional doubts. The California Constitution creates a three-tier system of complete denial of release, money bail, or OR. It vests the judge or magistrate with discretion to choose between bail and OR. SB 10 purports, by ordinary statute, to change the three-tier system to two and eliminate a judicial discretion vested by the California Constitution. Whether the Legislature possesses such a power is a question to be decided in a case where it cannot be avoided. That case will not arise for another year, if ever.

V. The relief ordered by the Court of Appeal is contrary to the California Constitution.

Under current law, victim and public safety are the two main considerations that a court must consider when making the decision to detain or release an arrested person pretrial. Those two considerations prescribe whether bail can be denied for both capital and noncapital felony offenses, whether the amount of monetary bail, if allowed, can be increased or decreased, and whether a person can be released on their OR.

California voters demanded that victim and public safety take top priority in all of these decisions. Here, the trial court found that Humphrey was ineligible for OR release because of his "danger to public safety" and a "flight risk." The Court of Appeal held that Humphrey is entitled to a new bail hearing in which inquiry must be made on his ability to pay money bail, and if he is unable to pay, then non-monetary alternatives must be addressed. If the trial court is required to comply with the Court of Appeal's directive on

remand, then because of Humphrey's lack of financial resources, any amount would be considered "excessive." To release him on an amount that he could afford would essentially permit his release on OR, which is contrary to the electorate's intent and to the findings made by the trial court in denying his request for OR in the first instance.

CONCLUSION

The judgment of the Court of Appeal for the First Appellate District, Division Two, should be reversed.

October 9, 2018

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court,
Rule 8.520, subd. (c)(1)

I, Kymberlee C. Stapleton, hereby certify that the attached brief amicus curiae contains 8,399 words, as indicated by the computer program used to prepare the brief, WordPerfect.

Date: October 9, 2018

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DECLARATION OF SERVICE BY U.S. MAIL

The undersigned declares under penalty of perjury that the following is true and correct: I am over eighteen years of age, not a party to the within cause, and employed by the Criminal Justice Legal Foundation, with offices at 2131 L Street, Sacramento, California 95816. On the date below I served the attached document by depositing true copies of it enclosed in sealed envelopes with postage fully prepaid, in the United States mail in the County of Sacramento, California, addressed as follows:

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