

August 4, 2020

Hon. Tani G. Cantil-Sakauye, Chief Justice of California
Supreme Court of the State of California
350 McAllister Street
San Francisco, California 94102-4797

Re: *In re Humphrey*, Case No. S247278—Request to make Court of Appeal decision binding pending review

To The Honorable Chief Justice of California and Associate Justices:

This case concerns the federal and state constitutional standards that govern pretrial release. Just over two years ago (shortly after this Court granted review in this case), respondent Kenneth Humphrey asked the Court to make the Court of Appeal's decision binding, pending this Court's review, to ensure that presumptively innocent arrestees would not be unconstitutionally detained. The Court denied that request without explanation. Based on developments since that request, Mr. Humphrey respectfully renews it. Counsel for respondent have conferred with counsel for petitioner Attorney General, who report that the Attorney General will file a response to this motion.

Background

On January 25, 2018, the Court of Appeal issued its decision in this case, articulating the federal constitutional requirements for pretrial detention. (In granting review, this Court then added a question regarding the applicable state constitutional requirements for pretrial

detention.) In particular, the court held that, under longstanding U.S. Supreme Court precedent, the Due Process and Equal Protection Clauses prohibit pretrial detention unless a court finds that such detention is necessary to serve a compelling government interest. *In re Humphrey*, 19 Cal. App. 5th 1006, 1026 (2018). Accordingly, before requiring secured money bail as a condition of pretrial release, a court must inquire into the defendant's ability to pay, in order to determine whether such a condition is a de facto order of pretrial detention. *Id.* at 1036. If the financial condition would result in pretrial detention (or if the court intends to issue a transparent order of detention), the court must make findings concerning whether conditions of release short of detention could reasonably serve the government's interests in public safety and preventing flight from prosecution. *Id.* at 1037. And such findings must be made on the record by clear and convincing evidence after an adversarial hearing with counsel and the opportunity to be heard. *Id.* at 1037-1038.

The original petitioner in this Court, the San Francisco District Attorney, agreed with the Court of Appeal's federal constitutional holdings. The Attorney General (who was recently substituted as the petitioner) likewise agrees. In this Court, for example, the Attorney General's principal brief states (p.13) that "[a] person's inability to meet a

financial condition is a permissible basis for detention only if ‘alternate measures are not adequate to meet the State’s interests’” (quoting *Bearden v. Georgia*, 461 U.S. 660, 672 (1983)). The Nevada Supreme Court, meanwhile, has recently reached the same conclusions as the Court of Appeal. See *Valdez-Jimenez v. Eighth Judicial District Court in & for County of Clark*, 460 P.3d 976, 988 (Nev. 2020).

Prior to the Court of Appeal’s decision, tens of thousands of Californians were detained in jail cells pretrial each day solely because they were poor and thus could not pay the upfront-cash bail that a court required as a condition of pretrial release. This pretrial detention was almost universally accomplished without any substantive finding that detention served any government interest, and without the minimum procedural safeguards that the Fourteenth Amendment requires to ensure the accuracy of such a finding.

Circumstances Warranting The Requested Relief

Humphrey recognizes that his prior request to make the Court of Appeal’s decision binding advanced many of the foregoing arguments. But two additional years of experience confirm the widespread problem of courts depriving presumptively innocent people of their right to pretrial liberty because the Court of Appeal’s decision is not binding. In particular, courts are routinely failing to determine arrested individuals’

ability to pay and are issuing orders of release on financial conditions that detain arrested individuals without any determination that pretrial detention is necessary to serve a government interest. While *Humphrey* may still be cited as persuasive authority under Rule 8.1115(e)(1)—and although this Court rightly declined to depublish the Court of Appeal’s opinion—trial courts across the state are now taking widely divergent approaches to bail hearings. Some follow *Humphrey*’s core holding, but many others have used this Court’s grant of review as a basis to return to the practice of requiring secured financial conditions of release without any inquiry into or findings concerning an arrestee’s ability to pay and less restrictive conditions of release. See Declaration of Carson White ¶4 (“[J]udges routinely explicitly reject my requests that they consider and make findings concerning less restrictive alternatives before ordering a defendant incarcerated pretrial because the person cannot pay unaffordable bail.”); Declaration of Charles M. Denton ¶4 (“None of the felony attorneys [in the Alameda County Public Defender’s office] could recall a single case over the past six months in which a judge inquired about or openly considered the defendant’s ability to pay before setting bail.”).

To take a few specific examples from Santa Clara County: During the COVID-19 outbreak, a woman with a high-risk pregnancy was forced

to give birth in pretrial custody and then separated from her newborn daughter within 48 hours because she could not pay a financial condition of pretrial release that had been required without any finding that her pretrial detention served any government interest. White Declaration ¶7. Another man who was factually innocent pled guilty just to be released from pretrial detention based on an unattainable financial condition imposed without any of the constitutionally required findings; while he was in jail, he could not work, his family lost their apartment, and his three children under age 10 were forced into a homeless shelter. The Court later permitted him to withdraw his guilty plea, and the case was dismissed for insufficient evidence. *Id.* ¶6.

Moreover, although the harm caused by pretrial detention is always profound, because it takes the individual away from her family, friends, job, home, medical care, and community, the COVID-19 pandemic means that such detention also frequently imposes a serious threat to the health and even lives of those detained—as well as staff at the jails. Humphrey respectfully submits that these unprecedented circumstances warrant reconsideration of the Court’s prior denial.

Indeed, a few months ago, the Judicial Council—recognizing the unprecedented threat to health and live that COVID-19 poses—imposed a statewide \$0 bail requirement for many non-violent charges. California

Rules of Court Emergency rule 4. Emergency Bail Schedule (Apr. 6, 2020). But in June, prior to the resurgence of the virus, the Council revoked that emergency \$0 schedule. California Courts Newsroom, News Release, *Judicial Council, Chief Justice End Some Emergency Measures as California and Courts Expand Reopening* (June 10, 2020).¹ That revocation, combined with current bail practices in many courts, is certain to result in the detention of those who are unable to pay—without any finding that this detention serves public safety—in the midst of a pandemic that is causing widespread loss of life in jails and prisons. See Elliott Almond, *San Quentin: Protesters demand action as coronavirus outbreak continues at prison; another inmate dies Sunday from COVID-19*, Mercury News (August 2, 2020) (21 prisoners in San Quentin have died of COVID-19 in less than two months).²

Respondent therefore again requests that this Court issue an order, under Rule of Court 8.1115(e)(3), that the Court of Appeal’s decision in the case—with which, as noted, petitioner has stated his agreement—is binding authority pending this Court’s review. Such an order will ensure that anyone detained prior to trial during this pandemic will, at the very

¹ <https://newsroom.courts.ca.gov/news/judicial-council-chief-justice-end-some-emergency-measures-as-california-and-courts-expand-reopening>.

² <https://www.mercurynews.com/2020/08/02/san-quentin-protestors-demand-action-as-prison-outbreak-continues/>.

least, have received a formal adversarial bail hearing and a judicial finding that their detention is necessary to serve a government interest.

Importantly, the order Humphrey requests would have no impact on the *state* constitutional question that this Court added when it granted review. That question—on which the parties here disagree—essentially asks when pretrial detention is permitted under the more protective provisions of the state constitution. The Court of Appeal expressly declined to address that question, *see Humphrey*, 19 Cal. App. 5th at 1047, and hence the relief requested here would not extend to that issue. The relief would instead be limited to the federal constitutional holding on which petitioner and respondent agree.

Respectfully submitted,

/s/ Katherine Hubbard

KATHERINE HUBBARD, SBN 302729
Counsel for respondent Kenneth
Humphrey

SUPREME COURT OF CALIFORNIA

In Re

KENNETH HUMPHREY,

On Habeas Corpus

Case No: S247278

First Appellate District No: A152056

County of San Francisco Superior Court Case No:
177007715

DECLARATION OF CARSON WHITE

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I, Carson White, declare under penalty of perjury, as follows:

1. I am a graduate of Stanford Law School and an attorney licensed to practice before the State of California. I work at the Santa Clara County Office of the Public Defender.
2. Since June 2019, my work responsibilities have resided exclusively in the Pre-Arrest Representation and Review unit, and I specialize specifically in federal and California constitutional law and statutory law and ongoing legal developments surrounding bail, detention and release. Over the past year, I have appeared at and observed scores of arraignments and release hearings across all Santa Clara County Superior Court case-management departments.
3. It is daily practice in Santa Clara County for judges to order defendants incarcerated pretrial on unaffordable schedule bail without considering a defendant's ability to pay. I have never heard a judge make a finding on the record about whether a person has the ability to pay a financial condition of bail, even after being presented with evidence of the person's financial circumstances. I have only once heard a judge inquire into a defendant's ability to pay scheduled bail.
4. The indigent people I represent are commonly detained pretrial for no other reason than that they cannot afford their financial conditions of bail, though there are a plethora of less restrictive alternatives to incarceration that would protect the public safety and ensure their return to court. In my observation, judges routinely explicitly reject my requests that they consider and make findings concerning less restrictive alternatives before ordering a defendant incarcerated pretrial because the person cannot pay unaffordable bail.

5. Santa Clara County's jails are experiencing an active outbreak of COVID-19, which means that pretrial detention carries a possible death sentence for those who cannot purchase their release. Even before the COVID-19 pandemic, the consequences of unnecessary pretrial detention were devastating. I have seen that pretrial detention often leads to traumatizing family separation of parents from children, the loss of housing and employment, and coercive plea bargaining.
6. For example, I represented a factually innocent man who pled guilty to a "strike" offense in order to get out of custody and care for his children after being incarcerated prior to trial solely because he could not pay. Because he had been unable to work while incarcerated pretrial, his family lost their apartment and his three children, all under the age of 10, were forced into a homeless shelter. After he had served enough time in custody pretrial to "credit out," he was allowed to withdraw his plea and his case was dismissed for insufficient evidence.
7. Another woman I represented spent most of her high-risk pregnancy in custody pretrial on unaffordable bail without any finding that this detention served any government interest. While incarcerated, she was transported to a hospital and induced into labor. Less than 48 hours after giving birth, she was separated from her newborn daughter and returned to pretrial custody because she could not pay. She has since been diagnosed with depression.
8. I represented an elderly man who had been approved for, and awaiting placement in, Section 8 subsidized housing for over a decade. Just weeks after he had finally received housing and was regularly sleeping indoors for the first time in his adult life, he was taken into custody for a months-old offense. Because he was unable to afford his bail, his apartment was left unoccupied for over a month, and he lost his housing. There was no finding that this detention was necessary to serve any government interest.
9. I represented a mother whose four-year-old daughter suffered night terrors during the months she was incarcerated pretrial on unaffordable bail without any finding that it served any government interest. She was told by the child's father that her daughter showed symptoms of trauma and believed her mother had voluntarily abandoned her.
10. According to the Director of Santa Clara County's Office of Pretrial Services, though there are thousands of people incarcerated in Santa Clara on cash bail, only about 25 people post bail each month. Of those, he says, 99% "post" bail through a bail bonds company.

11. I have watched families plunge into debt; mortgage or sell their family homes; drain retirement savings; forfeit the money they had set aside to pay that year's taxes; or sell their family's only car, all their furniture and family heirlooms in order to pay a bail bond company's fee. In one case, my client's terminally ill grandmother took a third job as a night janitor—which meant she was working 16-hour days, 7 days a week—in an effort to save enough money to pay a bail bond company's fee so that she could get her loved one out of pretrial detention in a case in which no judge made any determination that the detention was necessary to serve any government interest.

Signed July 20, 2020 in Santa Clara County

A handwritten signature in black ink, appearing to read 'CW', written over a horizontal line.

Carson White

**SUPREME COURT OF
CALIFORNIA**

In Re

KENNETH HUMPHREY,

On Habeas Corpus

Case No: S247278

First Appellate District No: A152056
County of San Francisco Superior Court
Case No: 177007715

DECLARATION OF CHARLES M.
DENTON

DECLARATION OF CHARLES M. DENTON

I, Charles M. Denton, declare:

1. I am an attorney duly licensed to practice law in the State of California. All facts set forth below are personally known to me to be true, except those which are set forth upon information and belief, and, as to those facts, which are based upon court records and police reports, I am informed and believe, and thereupon allege, that they are true.
2. I have been employed by the Alameda County Public Defender's office since 1983. I am currently the head of the office's Law and Motion and Training Unit.
3. The week of July 17, 2020, I took a poll of the felony trial attorneys at our main office about bail practice in Alameda County over the past six months. Among other things, I asked them whether the judges in our county are 1) considering the defendant's ability to pay when they set bail, and/or and are 2) making on the record determinations about why detention of the defendant is necessary when a bail reduction or own recognizance release is denied.
4. The consensus was unanimous. None of the felony attorneys could recall a single case over the past six months in which a judge inquired about or openly considered the defendant's ability to pay before setting bail. Nor could anyone remember a case in which the court gave reasons for denying a request for a bail reduction or own recognizance release.

5. The Santa Rita jail is currently experiencing rapid active outbreak of the COVID-19 virus. According to the Alameda County Sheriff's Department, the number of infections leaped from six to 103 between Wednesday July 15th and Saturday July 18th. As of July 19, 2020, they also had ten staff/contractors who have recently tested positive.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 20th day of July, 2019.

A handwritten signature in blue ink, appearing to read "Charles M. Denton".

Charles M. Denton
Attorney at Law

STATE OF CALIFORNIA
Supreme Court of California**PROOF OF SERVICE**STATE OF CALIFORNIA
Supreme Court of CaliforniaCase Name: **HUMPHREY (KENNETH) ON H.C.**Case Number: **S247278**Lower Court Case Number: **A152056**

1. At the time of service I was at least 18 years of age and not a party to this legal action.
2. My email address used to e-serve: **chris.gauger@sfgov.org**
3. I served by email a copy of the following document(s) indicated below:

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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.

8/4/2020

Date

/s/Christopher Gauger

Signature

Gauger, Christopher (104451)

Last Name, First Name (PNum)

San Francisco Public Defender

Law Firm