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In The Supreme Court Of The State of California

In re KENNETH HUMPHREY,

On Habeas Corpus.

After a Decision of the Court of Appeal, First Appellate District, Division Two, Case No. A152056
(San Francisco County Superior Court Case No. 17007715, Honorable Joseph M. Quinn, Judge)

APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE HUMAN RIGHTS WATCH IN SUPPORT OF RESPONDENT HUMPHREY; BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT HUMPHREY

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TABLE OF CONTENTS

Page

APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE HUMAN RIGHTS WATCH 6

BRIEF OF AMICUS CURIAE HUMAN RIGHTS WATCH 9

INTRODUCTION 9

ARGUMENT 11

I. CALIFORNIA'S BAIL SYSTEM SYSTEMATICALLY IMPRISONS PEOPLE FOR BEING POOR 11

A. The System Incarcerates Hundreds of Thousands of Individuals Who Are Not Guilty. 12

B. The System Coerces Guilty Pleas. 14

C. Taxpayers Bear The Heavy Cost Of California's Bail System 17

D. The System Burdens Individuals With Debt 19

II. RISK ASSESSMENT TOOLS ARE NOT THE ANSWER 20

III. DUE PROCESS AND EQUAL PROTECTION REQUIRE INDIVIDUALIZED DETERMINATIONS BEFORE IMPRISONING PEOPLE. 25

A. Setting Money Bail Without Considering A Person's Ability To Pay Violates Due Process And Equal Protection. 25

B. Risk Assessment Tools Are Not Substitutes For Constitutionally Required Individualized Determinations. 28

IV. THE ONLY CIRCUMSTANCE WHERE BAIL SHOULD BE DENIED IS FOLLOWING AN INDIVIDUALIZED EVIDENCE-BASED HEARING THAT SATISFIES ARTICLE I, SECTION 12 OF THE CONSTITUTION. 30

A. Decisions To Imprison Pretrial Must Be Based On Facts and Risks Specific To Each Defendant. 30

B. The Benefits Of Requiring Individualized, Evidence-Based Hearings 33

CONCLUSION 34

TABLE OF AUTHORITIES

Page(s)

Cases

Bearden v. Georgia (1983)
461 U.S. 660 26

Griffin v. Illinois (1956)
351 U.S. 12 25

Hernandez v. Sessions (9th Cir. 2017)
872 F.3d 976 26

In re Antazo (1970)
3 Cal.3d 100 26

In re Humphrey (2018)
19 Cal.App.5th 1006 .... 27, 29, 31

In re York (1995)
9 Cal.4th 1133 27

Lewis v. Superior Court (2017)
3 Cal.5th 561 27

Pugh v. Rainwater (5th Cir. 1978)
572 F.2d 1053 26

Stack v. Boyle (1951)
342 U.S. 1 .... 28, 29, 30

Sullivan v. County of Los Angeles (1974)
12 Cal.3d 710 27

Tate v. Short (1971)
401 U.S. 395 26

United States v. Salerno (1987)
481 U.S. 739 31

Constitutional Provisions

Cal. Const., art. I, § 12 .... 30, 31

Other Authorities

Angwin et. al,
Machine Bias, ProPublica (May 23, 2016) 21, 23, 24

Brooklyn Community Bail Fund,
The Problem (last accessed October 4, 2018) 15

Human Rights Watch,
"Not in it for Justice:"
How California's Pretrial Detention and Bail System
Unfairly Punishes Poor People (April 2017) .... passim

Human Rights Watch, *Q&A: Profile Based Risk Assessment for US Pretrial Incarceration, Release Decisions* (June 1, 2018) 25

APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE HUMAN RIGHTS WATCH

Pursuant to California Rule of Court 8.520(f), Amicus Curiae Human Rights Watch respectfully request leave to file the brief accompanying this application.

Human Rights Watch is a non-profit, independent organization and the largest international human rights organization based in the United States. Since 1978, Human Rights Watch has investigated and exposed human rights violations and challenged governments to protect the human rights of citizens and noncitizens alike. Human Rights Watch investigates allegations of human rights violations in 90 countries around the world, including in the United States, by interviewing witnesses, gathering and analyzing information from a variety of sources, and issuing detailed reports. Where human rights violations have been found, Human Rights Watch advocates for the enforcement of those rights with governments and international organizations and in the court of public opinion.

Relevant to the issues presently before this Court, Human Rights Watch investigated pretrial detention and the bail system in California by conducting over 150 interviews and analyzing statistical data from several sources. The findings are compiled into a report that provides a comprehensive perspective of the real-world impacts of pretrial detention. (*See* Human Rights Watch, "Not in it for Justice:" How California's Pretrial Detention and Bail System

Unfairly Punishes Poor People (April 2017) [hereafter "Not in it For Justice"].)[1]

The Human Rights Watch report found that California's bail system, by setting bail without regard to an individual's ability to pay, systematically detains innocent people, coerces guilty pleas, and arbitrarily punishes the non-wealthy.

Human Rights Watch seeks to file this brief to provide an accurate and comprehensive picture of California's dysfunctional system, which is necessary for the Court's analysis of due process and equal protection. This brief will also assist the Court in providing guidance on individualized procedures that comply with due process and equal protection requirements.

No party or counsel for any party authored this brief in whole or in part. No party or counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief.

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[1] *Available at* https://www.hrw.org/sites/default/files/report_pdf/usbail0417_web_0.pdf

Dated: October 8, 2018

Respectfully submitted,

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BRIEF OF AMICUS CURIAE HUMAN RIGHTS WATCH

INTRODUCTION

It is beyond dispute that the California and federal constitutions do not allow the state to keep people in jail for being poor. In practice, however, California's bail system does exactly that. California fails to safeguard the right to liberty because of its money bail system, a system which substitutes deference to pre-determined bail schedules for the individualized determinations required by due process and equal protection.

The story of Daniel Soto illustrates the system's failings.[2] In November 2015, 18-year-old Daniel went out with his friends. A man accosted him outside of a restaurant, leading to a fight in which the man stabbed Daniel. Cut and bleeding, Daniel staggered up to a police officer, who called an ambulance and arrested him. The man with the knife had gotten to the officer first, and Daniel was booked with a felony assault charge.

Eight days later, Daniel was taken to court, where he pled "not guilty" to the felony assault charge. (*Id.*) The judge set bail at

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[2] This story is taken from "Not in it for Justice," *supra*, at p. 1, which uses pseudonyms for the individuals interviewed and their family members to respect their privacy, minimize the impact of revealing an encounter with the criminal system, including arrest or conviction, and to protect those who are vulnerable.

$30,000. Daniel's mother, Maria, a single mother who worked as a stenographer, made enough to pay rent and bills for herself and her two sons, but had no savings and no property to sell or use as collateral. No bail bondsmen would give her a payment plan she could afford.

Daniel, now out of the hospital and in jail, could not sleep due to the pain from his injury and the hard jail bed. (*Id.*) He was assigned a top bunk and struggled to climb up to it. Maria felt horrible, knowing her son was hurting, locked up in jail, and there was nothing she could do to help him. "It was terrible. He's my son. I wasn't eating. I wasn't sleeping. I just worried about him." Daniel asked his mother to bail him out, but understood she could not come up with the money. " I just had to ride it out," Daniel said.

Daniel missed school and slipped behind in his studies. (*Id.*) On Thanksgiving, Maria and the rest of the family ate their meal without him.

Over six weeks after his arrest, Daniel had his preliminary hearing — the first opportunity in court for the judge to hear proof of the crime. (*Id.*) The judge dismissed the case, saying there was no evidence he committed a crime. Daniel was able to go home, but he had lost a semester of school and six weeks of his life to jail for a crime he did not commit, all because his family did not have money to pay for his freedom. If the judge had not set bail at $30,000, Daniel would likely have not spent over six weeks in jail and lost a semester of school for a crime he never committed.

As discussed below, Daniel's story is emblematic of systemic flaws in California's bail system that tramples the rights of the millions of people who are ground through the gears of California's criminal justice system. Daniel's story, and the stories of countless others he stands in for, compel this Court to prohibit the state from keeping people in jail without an individualized, evidence-based determination that their detention serves a compelling need. And, if a person is kept in prison on condition of paying monetary bail, due process and equal protection demand that such an individualized determination include an assessment of the ability to pay.

ARGUMENT

I. CALIFORNIA'S BAIL SYSTEM SYSTEMATICALLY IMPRISONS PEOPLE FOR BEING POOR.

Daniel's story is far from unusual in California's bail system. California's system of money bail keeps poor people accused of crimes in jail and coerces them to plead guilty, including many who are innocent of any crime. In California, the amount of money an individual has often determines whether they can fight an allegation to assert their innocence. By arbitrarily setting bail that accused people cannot afford, the system punishes individuals without proving their guilt. A large number of these individuals, like Daniel, will never be found guilty of any crime.

Indeed, California incarcerates hundreds of thousands of individuals without proof they committed any crime. They immediately suffer social consequences as punishment. The

presumption of innocence is an illusion for those who cannot afford to pay the high bail amount imposed in California.

A. The System Incarcerates Hundreds of Thousands of Individuals Who Are Not Guilty.

Between 2011 and 2015, police in California made almost 1.5 million felony arrests. ("Not in it for Justice," *supra*, at p. 3.) Of those, nearly one in three—close to half-a-million people—were arrested and jailed, but never found guilty of any crime. Over a quarter-of-a million Californians sat in jail for up to five days or had to pay bail bond fees, having been accused of felonies for which evidence was so lacking prosecutors could not bring a case. Others had cases filed that were eventually dismissed or resulted in acquittal at trial. These half-a-million individuals spent time in jail at taxpayer's expense, missing work, not picking their children up at school, not caring for elderly parents, missing classes, and subject to violence and miserable conditions, because they could not post bail or suffered financial hardship paying non-refundable bail bond fees. Many were punished for crimes they did not commit, not because they were too dangerous to release, but because they were poor and could not come up with money to pay for their release.

Data analyzed by Human Rights Watch from Alameda County illustrates these effects: close to 12,000 individuals were held for an average of 3.1 days with no complaint filed. (*Id.* at p. 46.) In many instances, these people lost their jobs or had to drop out of school; they suffered the misery and consequences of being locked

up. Others, who were charged, felt pressure to plead guilty just to get out of jail, regardless of their actual guilt.

Table 1: Alameda County bookings by time held and release type, 2014-2015[3]			
Release Type	**Number of Bookings**	**Mean days**	**Median days**
Bail	12,166	2.9	1
No charges filed	11,909	3.1	2
Sentenced release (including time served/probation	6,973	33.9	13
Own recognizance	3,848	14.9	4
Dismissed	3,353	27.8	12

To make matters worse, California's median bail amount is five times higher than the rest of the country (*id.* at p. 5.), creating a system which results in the poor remaining in custody for offenses for which they may never be convicted but allowing the rich to go free no matter how dangerous they may be. Thus, rather than being an incentive for an accused to show up for court, the California money bail system punishes defendants who cannot post bail,

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[3] Source: Human Rights Watch analysis of Alameda County jail data.

convincing many who might otherwise fight charges to plead guilty. This system heavily disadvantages the poor and reinforces broader racial inequities in the judicial system as those locked up pretrial are overwhelmingly poor, working class, and from racial and ethnic minorities. As an example, in San Francisco, where Respondent Humphrey was detained, the rate at which black individuals are booked into jail is nine times higher than white individuals. (*Id.* at p. 2.)

The California system of money bail allows many defendants with financial resources to post bond, bail out and go about their lives while they await trial, even when facing more serious charges. In fact, for individuals involved in organized crime, and high ranking gang members, bail money is just another business cost. The system ensures that wealthy individuals are released from custody regardless of the severity of the offense. For a poor defendant facing the California system of money bail, the consequences can be brutal. The system subjects the poor to unfair treatment, arbitrary detention, wealth discrimination, and other violations of their basic human rights.

B. The System Coerces Guilty Pleas.

Being detained on bail has real consequences for indigent defendants, and a guilty plea is sometimes the only option to get them out of jail and back to work and their families regardless of whether the accused individual is guilty or not. For these defendants who cannot post bail, there are only two options: (1)

plead guilty and give up their constitutional right to fight the charge, or (2) stay in jail to fight the charge and risk losing their jobs and ability to support their families, lose access to housing and benefits or fall short on payments.

Presented with these options, many defendants eventually plead guilty because they cannot afford to stay in jail waiting for a trial. In many cases, the accused is presented with a plea deal that gets them out of jail quicker than the time they would spend waiting for trial. For example, on a felony charge, the minimum amount of time to get to trial is about 90 days. ("Not in it for Justice," *supra*, at p. 52.) An accused offered a jail sentence of 60 days in exchange for a guilty plea is faced with the choice of accepting a criminal conviction (and all its consequences) regardless of actual guilt, or spending 30 more days in jail just to have a trial. In many cases, prosecutors offer "time served" sentences, meaning a guilty plea will get the accused out of jail the same day. According to the Brooklyn Community Bail Fund, an incarcerated individual will plead guilty to a misdemeanor 90% of the time while that number falls to less than 40% if they are able to post bail. (Brooklyn Community Bail Fund, The Problem (last accessed October 4, 2018).)[4] Prosecutors understand this dynamic, and, as a result,

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[4] *Available at* https://brooklynbailfund.org/the-problem

request pretrial detention, regardless of public safety. This gives prosecutors leverage to resolve cases faster and on their terms, but distorts justice by coercing guilty pleas.

Data analyzed by Human Rights Watch demonstrates that in six representative counties in California, between about 70 percent and 90 percent of individuals facing misdemeanor or non-serious felony charges pled guilty and were released before their first possible trial date. ("Not in it for Justice," *supra*, at p. 56.) In Sacramento County, approximately 80 percent plead guilty for time served. The prospect of pretrial detention has become a powerful tool that prosecutors use to pressure an accused individual who cannot post bail into foregoing their right to trial and pleading guilty. Prosecutors understand that people who are out of custody tend to fight their cases longer, file more motions, prepare their defenses more effectively, and have a better chance of winning or getting a reduced charge. These individuals can meet with their lawyers in a more relaxed setting, help investigate their cases, go to work or school or participate in programs that will improve their standing in court. On the other hand, people in custody want to escape the crushing boredom, physical discomfort, violence and disease to get back to their families, and their jobs. Therefore, as prosecutors aim to get convictions as efficiently as possible, pretrial incarceration gives them considerable leverage to pressure guilty pleas. Judges, burdened with heavy court calendars, impose unattainable bail, understanding well the power of pretrial

incarceration to get people to quickly plead guilty. The use of such a technique embraces the logic of efficiency, but tramples fundamental rights and results in unjust outcomes that damage the credibility of our courts.

In many situations, the consequences go far beyond unwarranted guilty pleas. People who are unable to post bond lose their jobs, miss important family events, are exposed to violence from guards and other incarcerated people, and in some tragic cases, commit suicide. The impact extends to their families with children who are missing their parents, households that are missing their breadwinners, and families who must support these individuals who have lost their jobs in the process and are now much harder to employ.

C. Taxpayers Bear The Heavy Cost Of California's Bail System.

The cost to taxpayers of this pretrial punishment is also staggering. In six counties in California examined by Human Rights Watch, the total cost of jailing people whom prosecutors never charged or had charges dropped or dismissed was $37.5 million over two years. ("Not in it for Justice," *supra*, at p. 43.) On average, each day a person is held in custody cost $113.87. The table below illustrates the cost in each of these six counties.

Cost estimates for bookings held until dismissal or released with cases not filed, 2014-2015[5]						
County	**Number of bookings**	**Median days held**	**Mean days held**	**Total person-days held (actual)**	**Total 2014-2015 cost at $113.87 per day**	**Proportion of average monthly CA unsentenced population**
Alameda	15,262	3	9	130,173	$14,822,799.51	4.9%
Fresno	6,505	2	5	33,930	$3,863,609.10	4.0%
Orange	3,292	2	2	7,952	$905,494.24	6.8%
Sacramento	6,029	3	8	49,083	$5,589,081.21	4.5%
San Bernardino	1,723	10	48	79,524	$9,055,397.88	8.6%
San Francisco	5,584	3	5	28,671	$3,264,766.77	2.1%
Total	38,395			329,333	$37,501,148.71	30.9%

These are funds that could be redirected to make investments in education including increasing access to high-quality preschool, providing greater educational opportunity for students seeking higher education, and for those individuals who are incarcerated, providing access to high-quality correctional education. These funds could provide a more positive and potentially more effective

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[5] Sources: Human Rights Watch analysis of county jail data. The proportion of state-wide unsentenced population uses the average monthly proportion over the two years and is from Human Rights Watch analysis of California Board of State and Community Corrections Data. The per day cost estimate is from the Public Policy Institute of California.

approach to both reducing crime and increasing opportunity among at-risk youth, particularly if redirected funds are focused on high-poverty schools.

D. The System Burdens Individuals With Debt.

Individuals who are unable to pay bail remain in jail regardless of guilt or innocence and miss the advantages to fighting their cases that pretrial freedom bestows. Many others incur significant debt to pay the bail imposed in California often borrowing money from neighbors, friends, and family.

For example, in 2011, Kevin Ocampo's cousin's ex-wife accused his cousin of serious acts of domestic violence, which led to his arrest and prosecution for felony charges in Alameda County. ("Not in it for Justice," *supra*, at p. 76.) The initial bail was $250,000 but was raised to $325,000 by the court. Kevin believed in his cousin's innocence and borrowed from friends and family, took out a home equity loan, and borrowed from his family's 401k retirement. The case dragged on for years. The investigation revealed that the ex-wife had previously filed false accusations against another boyfriend, and had threatened to accuse Kevin's cousin of spousal battery if he filed for divorce. The prosecutor eventually offered the cousin a misdemeanor plea, but he refused. The case finally went to trial in January 2014. During the trial, the ex-wife's story and the case fell apart. The jury returned a "not guilty" verdict. Kevin, however, still owed payments to the bail bondsman and had incurred significant debt to keep his cousin from

being another victim. Considering California's poverty rate, which is higher than the overall rate for the rest of the country, Kevin's story is likely to be repeated over and over if courts make bail decisions without considering individual risk and the ability to pay.

II. RISK ASSESSMENT TOOLS ARE NOT THE ANSWER.

A growing trend in judicial reform is the use of profile-based risk assessment tools to inform pretrial release and incarceration decisions. Risk assessment tools apply statistical methods to aggregate data about a wide population through a mathematical formula or algorithm in an attempt to estimate the statistical likelihood that a given defendant will get re-arrested or miss a court date. In other words, recommendations to incarcerate are based not on the individual, but on the actions of others. In a highly simplified example, if 10 out of 100 people who have two misdemeanor convictions and three traffic violations missed a court date or got arrested again, assuming those were the only variables considered, then the tool would estimate a 10 percent risk that such an individual would miss a court date or get arrested again if released pending trial.

Proponents of profile-based risk assessment tools claim that the tools remove inequalities in pretrial release and incarceration decisions because the tools are based on objective factors and not on wealth. They also claim that the tools can help ensure that the defendants that need to be detained pretrial are kept in jail, while allowing others to be released back into society. ("Not in it for

Justice," *supra*, at pp. 87-92.) However, risk assessment tools fail to live up to their proponents' claims.

Indeed, in 2014, then U.S. Attorney General Eric Holder expressed concerns that risk assessment tools may "inadvertently undermine our efforts to ensure ***individualized and equal justice***" and "may ***exacerbate unwarranted and unjust disparities*** that are already far too common in our criminal justice system and our society." (Angwin et. al, *Machine Bias*, ProPublica (May 23, 2016)[6] [emphasis added].) Both of his concerns are justified.

First, using profile-based risk assessment tools are the opposite of reaching individualized determinations—they estimate risk of one person's likelihood to engage in pretrial misconduct based on past behavior of others, without adequately considering the person's individual circumstances. The collected data is binary. The person either has or has not failed to appear for a court hearing. There is no distinction between a person that misses a routine court hearing because of a sick child versus the person who flees the country to avoid prosecution. Similarly, the tools that consider criminal records do not account for the circumstances of the crimes themselves. Some merely score for a "felony conviction," without

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[6] *Available at* https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing.

distinguishing between a low-level felony and a more serious one. Without a more contextualized analysis, the "risk factors" do not accurately inform the decision maker of the individual's circumstances, risks, and needs.

The story of Edwin Molina provides a good example of how this binary scoring could result in an unfair and inaccurate risk assessment. Mr. Molina was arrested for misdemeanor spousal battery and posted bail after several days in jail. ("Not in it for Justice," *supra*, at p. 82.) The bondsman provided him with a slip of paper with his court date, time, and location. Mr. Molina appeared at that time and place, but the paper had stated the wrong courthouse. By the time he figured out the mistake, he had missed his hearing and a warrant was issued. Luckily, he was able to get to the correct courthouse in time to explain the mistake to the judge and have the warrant recalled. But the failure to appear remained on his record. Using a non-individualized, non-contextual risk assessment would score Mr. Molina's failure to appear the same as the failure to appear by Max Factor heir Andrew Luster, who famously fled the country during a break in his Ventura Country rape trial. (*Id.* at p. 94 & fn.324.)

Second, while the intent of profile-based risk assessment tools is to eliminate subjectivity and bias, in practice, the tools reinforce existing biases that are pervasive in the judicial system and in society. (*Id.* at pp. 97-99.) The tools use data that reflects racial biases—such as socioeconomic factors and racial disparities in

previous arrests and convictions—which then necessarily generate racially-biased results.

A prominent 2016 study conducted by ProPublica demonstrated how the use of risk assessment tools resulted in inaccurate and unjust risk predictions. After analyzing the data generated by the COMPAS tool for over 7,000 people in Broward County, Florida, in 2013 and 2014, ProPublica presented several instances where black individuals, with similar "risk" factors as certain white individuals, were rated a medium or high risk, while the white counterparts were rated a low risk; but then it was the low risk white individuals that went on to commit additional crimes. (Angwin, *supra.*)

As just one example, compare these two defendants and their risk assessments. Brisha Borden was charged with petty theft when she was 18 years old for momentarily riding away with a small child's bicycle, valued at around $80. (*Id.*) She had four juvenile misdemeanors on her record. Vernon Prater was also charged with petty theft for shoplifting $86.35 worth of merchandise from Home Depot. At age 41, he was a more "seasoned" criminal, having already served five years in prison for armed robbery and attempted armed robbery. Ironically, the COMPAS tool rated Ms. Borden, who is black, a high risk and Mr. Prater, who is white, a low risk. This ended up being complete opposite of the actual risk. Two years later, Ms. Borden had not been charged with any new crimes, while

Prater was serving an eight-year sentence for breaking and entering and stealing electronics valued at thousands of dollars.

Looking at the collective data, ProPublica found that black individuals were *twice as likely* as white individuals to be scored at a *high risk,* but *not* commit additional crimes; conversely, 47.7% of white individuals were rated *low risk* but *did* in fact go on to commit additional crimes, as compared with only 28% of black individuals rated low risk. (*Id.*)

The tools do not actually estimate risk of re-offending, but risk of re-arrest, a risk greatly influenced by policing and other societal biases. They do not measure flight risk, but risk of missing a court appearance, a risk greatly increased by poverty, homelessness, mental illness and other societal disadvantages.

Other notable flaws with profile-based risk assessment tools are that they (1) are not transparent, making it difficult to evaluate or challenge the results, (2) are barely, if at all, better than a coin toss in predicting the likelihood of pretrial misconduct and, perhaps most troubling, (3) are arbitrary and adjustable, since whoever controls the scoring can raise or lower the incarceration rate by making the high risk category larger or smaller. (Human Rights

Watch, *Q&A: Profile Based Risk Assessment for US Pretrial Incarceration, Release Decisions* (June 1, 2018).)[7]

Because risk assessment tools do not accurately predict risk, have arbitrary scoring systems and exacerbate the criminal justice system's structural racial bias, they are not the answer to the problems with California's bail system.

III. DUE PROCESS AND EQUAL PROTECTION REQUIRE INDIVIDUALIZED DETERMINATIONS BEFORE IMPRISONING PEOPLE.

This Court asked whether the Court of Appeal erred in holding that due process and equal protection require consideration of a criminal defendant's ability to pay in setting or reviewing the amount of monetary bail. Petitioner and Respondent both agree the Court of Appeal correctly held such considerations are necessary. (Pet. Br. at 8; Resp. Br. at 8.) Human Rights Watch concurs with Court of Appeal and both parties.

A. Setting Money Bail Without Considering A Person's Ability To Pay Violates Due Process And Equal Protection.

"There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." (*Griffin v. Illinois* (1956) 351 U.S. 12, 19.) The U.S. Supreme Court has thus long held that a state cannot "impos[e] a fine as a sentence and then

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[7] *Available at* https://www.hrw.org/news/2018/06/01/q-profile-based-risk-assessment-us-pretrial-incarceration-release-decisions.

automatically conver[t] it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full." (*Bearden v. Georgia* (1983) 461 U.S. 660, 667 [quoting *Tate v. Short* (1971) 401 U.S. 395, 399].) Applying these principles in the pretrial bail context, the Fifth Circuit has ruled that "pretrial confinement for inability to post money bail would constitute imposition of an excessive restraint." (*Pugh v. Rainwater* (5th Cir. 1978) 572 F.2d 1053, 1058.)

The commonsense rational of these decisions is that, when the government imposes money bail as condition of release, "the government has no way of determining whether detention of individuals who do not post a bond in the assessed amount is sufficiently related to achieving the government's purpose, unless it first considers their 'financial resources' and whether 'adequate alternative methods' of satisfying the government's interests are available." (*Hernandez v. Sessions* (9th Cir. 2017) 872 F.3d 976, 992.) Moreover, "[d]ue process and equal protection principles converge in the Court's analysis in these cases." (*Bearden, supra,* 461 U.S. at 665.) Thus, monetary bail without consideration of a defendant's ability to pay violates both of these fundamental rights.

California law is consistent with the federal cases. As this Court has explained, because of "the fundamental principle ... that justice must be administered to all persons equally" (*In re Antazo* (1970) 3 Cal.3d 100, 109), and because "[p]roper use of imprisonment as a coercive mechanism presupposes ability to pay" (*Id.* at 114), it is

improper to jail an indigent person for failing to pay a fine. (*See also* Petitioner's Br. at 16-17 [collecting cases].) The Court of Appeal here was therefore correct in holding that "[a] determination of ability to pay is critical in the bail context to guard against improper detention based only on financial resources." (*In re Humphrey, supra,* 19 Cal.App.5th at 1036.)

In re York (1995) 9 Cal.4th 1133, is not to the contrary. There a statute gave individuals charged with felony drug offenses the choice of remaining in custody, posting bail, or agreeing to submit to warrantless drug testing. (*Id.* at 1138.) This Court held the statute did not create an impermissible wealth-based classification by effectively allowing wealthy, but not indigent, individuals to avoid prison without submitting to warrantless drug testing. (*Id.* at 1153.) Whatever the merits of the policy upheld in *York*, it is readily apparent that an individual's "overriding interest in avoiding unjustified incarceration" is far stronger than an individual's right to privacy in their medical or illicit drugs use history. (*Sullivan v. County of Los Angeles* (1974) 12 Cal.3d 710, 719; *cf. Lewis v. Superior Court* (2017) 3 Cal.5th 561, 573 [holding state medical board did not violate a fundamental right by obtaining patients' prescription records].) Nothing in *York* supports a practice that keeps the non-wealthy in prison while allowing otherwise similarly situated wealthy individuals to go free.

As Human Rights Watch's investigation demonstrates, California's system of setting monetary bail without considering the

defendant's ability to pay repeatedly and systematically results in individuals being imprisoned solely because of their poverty, without serving any legitimate state interest. That system therefore plainly violates the rights to equal protection and due process under the California and federal constitution.

B. Risk Assessment Tools Are Not Substitutes For Constitutionally Required Individualized Determinations.

Laboring under heavy caseloads and tight budgets, many courts have turned to risk assessment tools to guide their bail determinations. These tools, however, are inadequate to satisfy the demands of due process and equal protection for individualized determinations because they make their decisions based on the actions of people who are not before the court, rather than on the actions of the individual seeking pretrial release.

The Court of Appeal's discussion of *Stack v. Boyle* (1951) 342 U.S. 1, illustrates the underlying principle well:

> The 12 petitioners in Stack were charged with conspiring to violate the Smith Act, which made it a criminal offense to advocate the violent overthrow of the government or to organize or be a member of any group devoted to such advocacy. [citations]. After bail was fixed in the uniform amount of $50,000 for each petitioner, they moved to reduce the amount as excessive, submitting statements regarding their individual circumstances and financial resources, none of which was controverted by the government. [citations].
>
> The only evidence presented by the government was a showing that four persons previously convicted under the Smith Act in a federal court

> in another state had forfeited bail. Noting that petitioners were exposed to imprisonment for no more than five years and a fine of not more than $10,000, and that the government did not deny bail had been fixed in a sum much higher than that usually imposed for offenses with like penalties, the court questioned the government's failure to make any factual showing justifying the unusually high amount of bail uniformly fixed for each of the four petitioners.

(*In re Humphrey, supra,* 19 Cal.App.5th at 1041 [discussing *Stack, supra,* 342 U.S. at 3-5].) The Supreme Court found the government's method of setting bail improper because "the fixing of bail for any individual defendant must be based upon the standards relevant to the purpose of assuring the presence of *that defendant.*" (*In re Humphrey, supra,* 19 Cal.App.5th at 1041 [quoting *Stack, supra,* 342 U.S. at 5].)

Although risk assessment tools use datasets containing more than four prior offenders and overlay that data with complex mathematical formulas that lend an air of objectivity, at bottom, they suffer the same fundamental flaw of the government's method in *Stack.* They assume that, because someone sharing a set of characteristics with the defendant before the court skipped bail, the defendant will also skip bail. Indeed, as discussed in Section II, *supra,* risk assessment tools are poor predictors of actual risk and, as currently formulated, feed a vicious cycle of racial bias in the criminal justice system. Because "[e]ach defendant stands before the bar of justice as individual," using risk assessment tools to imprison people based on shared characteristics with strangers to

them falls well short of what is required by the Constitution. (*Stack, supra*, 342 U.S. at 5 [Jackson, J., concurring].)

IV. THE ONLY CIRCUMSTANCE WHERE BAIL SHOULD BE DENIED IS FOLLOWING AN INDIVIDUALIZED EVIDENCE-BASED HEARING THAT SATISFIES ARTICLE I, SECTION 12 OF THE CONSTITUTION.

This Court asked under what circumstances the California Constitution permits bail to be denied in noncapital cases. This question in inextricably intertwined with the question of whether a court must assess a defendant's ability to pay in setting or reviewing bail. As discussed above in Section III, due process and equal protection require that bail decisions be based on individualized determination of an accused defendant's danger to the public or risk of fleeing the jurisdiction to avoid prosecution. That principle requiring individualized assessments extends to all aspects of any process that keeps people convicted of no crime in prison. Thus, the only circumstance where bail should be denied is after an individualized, evidence-based hearing.

A. Decisions To Imprison Pretrial Must Be Based On Facts and Risks Specific To Each Defendant.

To protect public safety and satisfy due process rights, courts must conduct individualized hearings to determine the pretrial risk of a defendant based on the specific context of ***that defendant*** and that alleged crime—this would help prevent the dangerous, but wealthy, defendant from paying bail and fleeing the jurisdiction, while also curbing the overuse of de facto pretrial detention for those who do not have the ability to pay the bail amount.

The Court of Appeal determined that:

> Failure to consider a defendant's ability to pay before setting money bail is ***one aspect*** of the ***fundamental requirement*** that decisions that may result in pretrial detention must be based on factors related to the ***individual defendant's circumstances***.

(*In re Humphrey*, *supra*, 19 Cal.App.5th at 1041 [emphasis added].) As the Supreme Court has cautioned, "[i]n our society liberty is the norm, and detention prior to trial or without trial is the ***carefully limited exception***." (*United States v. Salerno* (1987) 481 U.S. 739, 755 [emphasis added].)

The California Constitution, moreover, explicitly demands that pretrial freedom is the rule, and does not permit incarceration unless the facts of a particular case warrant it. Article I, section 12 provides that "[a] person ***shall be released*** on bail by sufficient sureties," subject to certain exceptions. (Cal. Const., art. I, § 12 [emphasis added].) Those exceptions are limited to just three categories of crimes: capital crimes, felony violence or sexual assault, and felonies where there is a substantial likelihood the accused will carry out a threat of great bodily harm. (*Id.*) Moreover, each of the exceptions requires individualized evidence that, at minimum, "the facts are evident or the presumption great." (*Id.*)

The core of the individualized, evidence-based approach is a "full blown adversary hearing." (*Salerno*, *supra*, 481 U.S. at 750.) The first step is that the accused should be given the right to counsel immediately upon arrest so that the accused and his or her counsel

can gather information and prepare for a timely hearing through privileged, confidential discussions. This early case development should improve overall representation and mitigate the proven disadvantage of being in custody has on future results of criminal cases.

The district attorney would likewise have to do early case preparation and would be compelled to prioritize requests to set or deny bail only for defendants that they believe are high risk and/or should be detained pretrial for public safety. The district attorney should have to affirmatively request a timely bail hearing for these defendants and provide notice of the evidence against the defendant.

The hearing itself should include a presentation and assessment of the defendant's specific mitigating circumstances, the sufficiency of the evidence of a crime to justify setting or denying bail, and, if money bail is set, an inquiry into the defendant's ability to pay the bail and other factors that inform what amount of bail would deter pretrial misconduct. To set bail or otherwise detain, there must be proof of an actual and specific danger or risk of flight (not merely risk of missing a court date). While the evidence presented to show that the defendant committed the crime would not need to be dispositive, it should be subject to the right to cross examination and rules of evidence, and it must be sufficient to show sufficient cause to justify setting or denying bail. This would also

give both sides a realistic assessment of the strengths and weaknesses of the case for settlement discussions.

If the evidence supports denying bail, the judge should be required to quickly issue an order with findings of fact that can be challenged by the defendant and independently reviewed by another court. Judges should not be able to take away a person's liberty without this transparency and the ability to challenge the decision.

These measures would give meaning to the presumption of innocence, which is effectively disregarded in the California's current pretrial detention and bail system.

B. The Benefits Of Requiring Individualized, Evidence-Based Hearings.

In addition to satisfying requirements of due process and equal protection, requiring individualized, evidence-based hearings when deciding whether to deny bail or in setting the amount of bail would have numerous benefits, including at least the following.

First, public safety would be prioritized by focusing on and detaining defendants who are actually high risk based on an evaluation of those individuals' circumstances and risk factors.

Second, and similarly, the overuse of imprisonment by prosecutors to gain an advantage or coerce guilty pleas would be reduced. Where prosecutors can only take away liberty through an exhaustive, evidence-based hearing, they would have to be more selective and evaluate which defendants pose a real threat and

invest their limited time and resources in proving their case for pretrial detention against those individuals.

Third, fewer low-risk defendants would be incarcerated pretrial, thereby decreasing the harm and disruption such incarceration causes the defendants and their families.

Fourth, the income- and race-based discrimination of the current money bail system would be mitigated. Following an evidence-based hearing, bail should not be set too high for low-income defendants to pay, nor should the cycle of race-based discrimination based on statistical data of others be perpetuated.

Finally, taxpayer costs should be reduced by cutting jail costs for defendants that are low-risk or that will never be charged with a crime because of the prosecution's lack of evidence.

CONCLUSION

For these reasons, this Court should hold that no person can be kept in prison, unless a court finds after a full, fair, and individualized hearing that confinement serves a compelling governing interest. If the court conditions release on payment of bail, that individualized hearing must take into consideration ability to pay to comply with equal protection and due process.

Dated: October 8, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Amicus Curiae Brief uses a 13-point Book Antiqua font and, relying on the word count of the computer program used to prepare the brief, contains 6,010 words.

Dated: October 8, 2018

Respectfully submitted,

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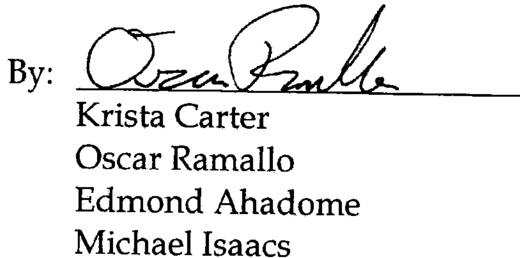
By: 

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PROOF OF SERVICE

I am over eighteen years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 777 S. Figueroa Street, Los Angeles, CA 90017.

On October 8, 2018, I served the following document(s):

APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE HUMAN RIGHTS WATCH IN SUPPORT OF RESPONDENT HUMPHREY; BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT HUMPHREY

☑ I served the document(s) on the following person(s):

See attached list.

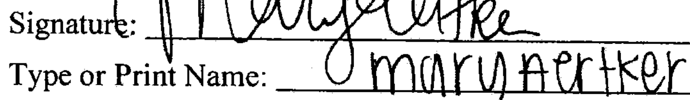
☑ The names, addresses, and other applicable information about the persons served is included in the attached Service List.

The documents were served by the following means:

☑ **By Overnight Delivery/Express Mail**. I enclosed the documents and an unsigned copy of this declaration in a sealed envelope or package designated by addressed to the persons at the address(es) listed in Item 3, with **delivery fees** prepaid or provided for. I placed the sealed envelope or package for collection and delivery, following our ordinary business practices. I am readily familiar with this business' practice for collecting and processing correspondence for express delivery. On the same day the correspondence is collected for delivery, it is placed for collection in the ordinary course of business in a box regularly maintained by **FedEx** or delivered to a courier or driver authorized by **FedEx** to receive documents.

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

Dated: 10/8/18



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