County of San Bernardino
Office of the District Attorney
MICHAEL A. RAMOS, District Attorney

March 8, 2018

Supreme Court of California
350 McAllister Street
Room 1295
San Francisco, CA, 94102-4797

Re: *In re Humphrey* (Jan. 25, 2017, A152056) ___ Cal.App.5th ___; S247278
Depublication Request (Cal. Rules of Court, rule 8.1125)
Request for Review on Court's Own Motion (Cal. Rules of Court, rule 8.512(c))

To the Honorable Tani Gorre Cantil-Sakauye, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of California:

The District Attorneys of the Counties of San Bernardino and Ventura (District Attorneys) respectfully request that the Court depublish and review *In re Humphrey* (Jan. 25, 2017, A152056) ___ Cal.App.5th ___ (*Humphrey*), a recent opinion (filed 1/25/18) of the First District Court of Appeal, Division Two. *Humphrey* upends long-established, constitutionally-grounded methods for setting the amount of bail in criminal cases, and will sow chaos in the courts.

The Court of Appeal acknowledges that its ruling in *Humphrey* could present practical problems. (*Supra*, at p. 45.[1]) It also recognizes the scope of those problems; the court concedes, "It will be hard, perhaps impossible, for judicial officers to fully rectify the bail process without greater resources than our trial courts now possess." (*Id.* at p. 46.) It further admits, "Judges may, in the end, be compelled to reduce the services courts provide..." (*Ibid.*)

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1 Citations to *Humphrey* use the pagination of the slip opinion.

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This Court should act, to protect the public and the courts from *Humphrey*. The Court should depublish it, and grant review on the Court's own motion. (Cal. Rules of Court, rule 8.512(c).)

Our Interest

The undersigned are the District Attorneys of San Bernardino and Ventura Counties. Our offices have the primary responsibility to prosecute criminal offenses in our counties. (Gov. Code, § 26500.) Every day, across the state, bail amounts are fixed in hundreds to thousands of cases.[2]

District Attorneys have an interest in ensuring that the courts apply the bail laws in the way that our state constitution requires: protecting victims and the public, considering the seriousness of the offenses charged and defendants' criminal records, and ensuring that defendants appear in court. (Art I., § 12; § 28, subd. (f), par. (3).) District Attorneys also have an interest in the smooth and efficient functioning of the courts.

Humphrey Will Cause Chaos in the Courts by Upsetting Existing Procedures for Fixing the Amount of Bail

The People of the State of California have used their initiative power to amend the bail provisions of the California Constitution several times, most recently in 2008 with the passage of Proposition 9, the Victims' Bill of Rights Act of 2008: Marsy's Law. The People have made their priorities clear: public and victim safety must be paramount. (Cal. Const., art. I, § 28, subd. (f), par. (3).) When fixing bail, a court must consider the protection of the public, safety of the victim, seriousness of the offense

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2 In fiscal year 2015-2016, there were 200,200 felony filings statewide, and 841,716 misdemeanor filings. (Jud. Council of Cal., 2017 Court Statistics Report (2017) p. 98.)

charged, previous criminal record of the defendant, and the probability of the defendant making future court appearances. (Cal. Const., art. I, § 28, subd. (f), par. (3); § 12.)

To carry out the People's will, the Legislature devised procedures governing bail. (Pen. Code, §§ 1268-1320.5.) The Legislature directed the courts to consider the same factors found in our constitution. (Pen. Code, § 1275, subd. (a)(1).) Consistent with the constitutional requirement that the seriousness of the offense be considered when fixing bail, the Legislature directed the courts to adopt bail schedules. (Pen. Code, § 1269b.) When defendants are charged with serious or violent felonies, courts may only reduce bail below the amount on the bail schedule after making findings of unusual circumstances. (Pen. Code, § 1275, subd. (c).)

Humphrey disrupts the comprehensive system that the Legislature created for noncapital cases. It holds that trial courts must consider a defendant's ability to pay and alternatives to money bail, and make findings regarding both. (*Humphrey, supra,* at p. 16.) It holds that a court may not order pretrial detention unless the defendant has the financial ability to pay the amount of bail set, or that no less restrictive conditions of release would be sufficient to protect the victim and community and ensure a defendant's appearance. (*Id.* at p. 17.) It requires "clear and convincing evidence" to set bail higher than a particular defendant can afford. (*Id.* at p. 31.)

Although *Humphrey* avows that it does not condemn the trial court's consultation of bail schedules (*supra,* at p. 39), in effect it does precisely that. It declares that bail schedules are "the antithesis of the individualized inquiry required before a court can order pretrial detention." (*Id.* at p. 37.) But such schedules are mandated by the Legislature, and comport with the constitutional command that courts consider the seriousness of the offenses charged when setting bail. Each Superior Court creates its own bail schedule, responsive to local needs. (Pen. Code, § 1269b, subd. (c).) The schedules are quite helpful to courts, providing an efficient,

impartial way to set initial bail, yet permitting departures from the schedule as appropriate. (See Pen. Code, §§ 1269c; 1270.1; 1275, subd. (c); 1289.) *Humphrey* disrupts the orderly setting of bail using the statutorily-mandated schedules, requiring instead a laborious inquiry into what amount is "necessary to secure the defendant's appearance..." (At p. 40.)

Humphrey eviscerates the chapter of the Penal Code dedicated to bail. Confusion in the trial courts is inevitable, if judges can no longer follow the procedures laid out in the bail statutes, and instead must engage in the sorts of fact-finding hearings that *Humphrey* demands. The Court of Appeal acknowledges that this could be so burdensome as to result in a reduction of the services that the courts provide. (*Humphrey*, *supra*, at p. 46.)

***Humphrey* Was Wrongly Decided**

The problems that *Humphrey* will create are unnecessary. The Court of Appeal's opinion errs in numerous areas.[3]

A. ***Humphrey Rests Upon Two Fallacies***

Humphrey is based on two flawed, incorrect premises. First, *Humphrey* assumes that the very act of setting bail is an implied finding that a defendant is suitable for pretrial release. (At p. 41.) Second, *Humphrey* equates bail that a particular defendant cannot pay with a no-bail order. (At p. 35.)

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[3] The Court of Appeal did not have the benefit of vigorous adversarial proceedings. Although the Attorney General opposed Humphrey's petition for writ of habeas corpus in the informal response (*Humphrey*, *supra*, at p. 4), the Attorney General reversed course in the return, conceding the ability-to-pay issue (*id.* at pp. 4-5). At oral argument, the Attorney General advanced new arguments for denying the petition, which the Court of Appeal declined to consider due to their tardiness. (*Id.* at pp. 43-44.)

The California Constitution recognizes a right to bail, except in limited circumstances. (Art. I, § 12.) Article I, section 12 does not mention "suitability for release;" to the contrary, it permits bail to be set even when the charges are serious, when a defendant has a significant prior criminal record, and when a defendant has incentive to flee. Such factors, plus the paramount concern for public and victim safety, are to be considered when setting the *amount* of bail. (Art. I, § 12; § 28, subd. (f), par. (3).) The state Constitution contemplates that the many factors that affect release fall upon a continuum and allows bail amounts consistent with that, rather than the simplistic suitable/not suitable binary choice that *Humphrey* presumes.

Both the state and federal Constitutions prohibit "excessive" bail amounts. (Cal. Const., Art. I, §§ 12, 28; U.S. Const., 8th Amend.) It is long-established in this state that bail can only be excessive if it is disproportionate to the offense. (*Ex parte Duncan* (1879) 53 Cal. 410, 411; quoting *Ex parte Ryan* (1872) 44 Cal. 555, 558.) It is also long-established that inability to pay bail does *not* make it excessive. (*Ex parte Ruef* (1908) 7 Cal.App. 750, 752; accord *White v. United States* (8th Cir. 1964) 330 F.2d 811, 814.) But the petitioner in *Humphrey* did not claim that his bail was excessive, and the issue was not considered. (*Humphrey, supra,* at pp. 3-4, fn. 2.) Rather, the Court of Appeal deems bail that a particular defendant cannot afford as being the equivalent of a no-bail order. (*Id.* at p. 35.) But as previously noted, the California Constitution draws a distinction between a no-bail order and bail fixed at a high amount (Art. I, § 12); the latter is permitted, so long as it is not excessive. The two orders are not the same.

B. ***Humphrey Imposes the Wrong Standard of Proof***

After erroneously equating high bail with a no-bail order, *Humphrey* then holds that the "clear and convincing evidence" standard that must be met before denying bail in noncapital cases should also apply before setting high bail. (*Supra,* at pp. 13, 31, 42-43, 45.) *Humphrey* finds support for that standard in the federal Bail Reform

Act of 1984 ("Bail Act") and in case law related to the pretrial liberty interest. (*Id.* at pp. 26-27, 31.) In particular, *Humphrey* relies on *United States v. Salerno* (1987) 418 U.S. 739 (*Salerno*), which analyzed the Bail Act. (*Humphrey, supra*, at pp. 16, 23, 25-28, 41.)

Yet *Humphrey* fails to appreciate the limited scope of *Salerno*. The High Court found that the Bail Act's procedural protections "far exceed" what is necessary to detain a defendant prior to trial. (*Salerno, supra*, 481 U.S. 739, 752.) For that standard, *Salerno* turned to *Gerstein v. Pugh* (1975) 420 U.S. 103 (*Gerstein*). (*Salerno, supra*, at p. 752.)

Gerstein observed that the standards and procedures for arrest and detention arise in the Fourth Amendment. (*Supra*, 420 U.S. 103, 111.) Like the standard for arrest, the standard for pretrial detention is probable cause to believe that the defendant committed an offense. (*Id.* at pp. 111-112 [arrest], pp. 113-114 [pretrial confinement].) *Humphrey* quotes *Gerstein's* acknowledgements of the possible detrimental effects of pretrial confinement (*Humphrey, supra*, at p. 25), but fails to recognize the standard for pretrial detention that *Gerstein* applied: probable cause, not clear and convincing evidence.

C. ***Bail Is Constitutional; It Is Provided for in the State and Federal Constitutions***

The animating principle of *Humphrey* is a criticism of monetary bail itself: a concern that defendants with wealth will be able to post bail, while those without wealth will not. *Humphrey* cites numerous studies, journal articles, and other material to make that point. But such policy arguments are the domain of the Legislature, not the courts. (*Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 71-72.) This Court has rejected claims that disparities in the ability to post bail makes the bail process itself unconstitutionally discriminatory. (*In re York* (1995) 9 Cal.4th 1133, 1152.)

While the particulars of California's present system of bail may be subject to debate, the constitutionality of bail itself not in question. The Constitutions of both California and the United States explicitly contemplate bail.

***Humphrey* Conflicts with Other Law**

Humphrey directs trial courts to disregard the commands of the California Constitution and the procedures established in the Penal Code. It is also inconsistent with the prior pronouncements of this Court, the High Court, and its sister appellate courts. It conflicts with *In re York*, *supra*, 9 Cal.4th 1133, 1152, where this Court explained that disparities of wealth do not make bail discriminatory. It clashes with another recent case, *In re Webb* (Jan. 31, 2018, D072981) ___ Cal.App.5th ___, which held that "[n]o court has inherent authority to ignore or violate the statutory bail scheme." (At p. 16 of the slip opinion.) *Humphrey* commands trial courts to do precisely that.

Humphrey also leaves some parts of California bail law unaddressed. It never discusses the long-standing requirement that a court setting bail must assume that the charges are true. (*Ex parte Duncan*, *supra*, 53 Cal. 410, 411; *Ex parte Horiuchi* (1930) 105 Cal.App. 714, 715.) Rather, *Humphrey* focuses on the presumption of innocence in criminal cases. (*Supra*, at pp. 20, 24, 26, 46.) Yet that presumption "has no application to a determination of the rights of a pretrial detainee during confinement before the trial has even begun." (*In re York*, *supra*, 9 Cal.4th 1133, 1148; quoting *Bell v. Wolfish* (1979) 441 U.S. 520, 533.)

Humphrey holds up the federal Bail Act as a model, and characterizes it as a non-money-bail system. (*Supra*, at pp. 25, 28.) But federal criminal procedure is vastly different from California's, and the types of cases prosecuted in federal court vary as well. While the federal bail system is undoubtedly different from California's, federal law permits money bail as a condition of release. (18 U.S.C. § 3142(c)(1)(B)(xi), (xii);

see e.g. *United States v. Noriega-Sarabia* (9th Cir. 1997) 116 F.3d 417 [bail forfeiture case].) *Humphrey* also fails to recognize that in the federal system, the majority of defendants remain detained.[4]

Conclusion

Humphrey violates the dictates of the California Constitution and torpedoes the bail provisions of the Penal Code. It conflicts with the past opinions of this Court and its sister courts of appeal. It poses great risk to the operation of the courts, as the Court of Appeal admits. (*Humphrey, supra*, at p. 46.)

This Court must act. *Humphrey* should be depublished. The Court should also grant review on its own motion, to bring additional clarity to this area of law.

Respectfully submitted,

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4 In 2010, 64% of federal defendants were detained for their entire case, 12% were detained for part of their case, and 24% were never detained. (Bureau of Justice Statistics, U.S. Dept. of Justice, Pretrial Detention and Misconduct in Federal District Courts, 1995-2010 (Feb. 2013), p. 2.)

OFFICE OF THE DISTRICT ATTORNEY
COUNTY OF SAN BERNARDINO
PROOF OF SERVICE BY U.S. MAIL

STATE OF CALIFORNIA
} ss.
COUNTY OF SAN BERNARDINO

In re Humphrey
S247278, A152056

Brent J. Schultze says:

That I am a citizen of the United States and employed in San Bernardino County, over eighteen years of age and not a party to the within action; that my business address is 303 W. Third Street, Fifth Floor, San Bernardino, CA, 92415-0511.

That I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business.

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***IN RE HUMPHREY*—REQUEST FOR DEPUBLICATION AND REVIEW ON COURT'S OWN MOTION**

on interested parties by depositing a copy thereof, enclosed in a sealed envelope for collection and mailing on that date following ordinary business practice at 303 W. Third Street, San Bernardino, CA, 92415, addressed as follows:

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First District
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I certify under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at San Bernardino, California, on March 12, 2018.

/s/ Brent J. Schultze

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **HUMPHREY (KENNETH) ON H.C.**
Case Number: **S247278**
Lower Court Case Number: **A152056**

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Date

/s/Michael Ramos

Signature

Ramos, Michael (141025)

Last Name, First Name (PNum)

San Bernardino District Attorney

Law Firm