In the Supreme Court of the State of California

In re

KENNETH HUMPHREY,

On Habeas Corpus.

Case No. S247278

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

SUPPLEMENTAL BRIEF REGARDING SENATE BILL 10

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INTRODUCTION

This Court has directed the parties to file supplemental briefing addressing the following question: What effect, if any, does Senate Bill No. 10 (2017-2018 Reg. Sess.) have on the resolution of the issues presented by the case?

Initially, this Court limited review in this case to the following issues:

1. Did the Court of Appeal err in holding that principles of constitutional due process and equal protection require consideration of a criminal defendant's ability to pay in setting or reviewing the amount of monetary bail?

2. In setting the amount of monetary bail, may a trial court consider public and victim safety? Must it do so?

3. Under what circumstances does the California Constitution permit bail to be denied in noncapital cases? Included in 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.

Senate Bill 10, as written, has the potential to render the first issue—the constitutionally required considerations before a court may set or reduce the amount of monetary bail—moot because the bill repeals the use of monetary bail in California. Further, Senate Bill 10 may serve to eliminate the equal protection problem inherent in California's monetary bail statutes. Senate Bill 10, however, cannot have any effect on any issues involving California's Constitution because statutory enactments like Senate Bill 10 cannot repeal or amend our Constitution.

ARGUMENT

I. INTRODUCTION: SENATE BILL 10

Senate Bill 10 repeals the use of monetary bail and prohibits courts from imposing financial conditions of release. (Legis. Counsel's Dig., Sen. Bill No. 10 (2017-2018 Reg. Sess.), pp. 1-2 (Legis. Counsel's Dig.).) In place of a monetary bail system, Senate Bill 10 creates the framework for a pretrial risk assessment process, wherein arrested persons are assessed for safety and flight risks. (Legis. Counsel's Dig., *supra*, pp. 1–2; Sen. Bill No. 10 (2017-2018 Reg. Sess.) § 4, pp. 4–11 (Sen. Bill No. 10).) Based on this assessment, an arrested person may be: 1) released on his or her own recognizance; 2) released with the least restrictive nonmonetary conditions that will reasonably assure public safety or the defendant's appearance in court; or 3) preventatively detained before trial. (Legis. Counsel's Dig., *supra*, p. 2; Sen. Bill No. 10, *supra*, § 4, pp. 4–16.)

An order of preventative pretrial detention can only be issued if the court determines "that no conditions of pretrial supervision will reasonably assure the appearance of the defendant in court or reasonably assure public

safety." (Legis. Counsel's Dig., *supra,* p. 2; Sen. Bill No. 10, *supra*, § 4, p. 12.) Senate Bill 10 provides for notice, the right to counsel, and a standard of clear and convincing evidence. (Legis. Counsel's Dig., *supra,* pp. 2–3; Sen. Bill No. 10, *supra*, pp. 12–14.) Ultimately, Senate Bill 10 seeks

> to permit preventative detention of pretrial defendants only in a manner that is consistent with the United States Constitution, as interpreted by the United States Supreme Court, and only to the extent permitted by the California Constitution as interpreted by the California courts of review.

(Sen. Bill No. 10, *supra*, § 1; see also Sen. Bill No. 10, *supra*, § 4, p. 14 [a court may order detention only if permitted "under the United States Constitution and under the California Constitution."].)

II. SENATE BILL 10 HAS THE POTENTIAL TO RENDER THE FIRST QUESTION POSED BY THIS COURT—THE CONSIDERATIONS NECESSARY BEFORE A COURT MAY SET AN AMOUNT OF MONETARY BAIL—MOOT BECAUSE THE BILL REPEALS THE USE OF MONETARY BAIL

Senate Bill 10, slated to go into effect on October 1, 2019, repeals the use of monetary bail in California. The first issue identified by this Court is premised on a monetary bail system as it currently exists in California. By repealing monetary bail, Senate Bill 10 therefore has the potential to render the first issue moot when the provisions of the bill go into effect. Though the first issue may become moot, this Court, of course, may still address issues of broad public interest. (*Garcia v. Superior Court* (2007) 42 Cal.4th 63, 69, fn. 4; *In re Sheena K.* (2007) 40 Cal.4th 875, 879; *In re William M.* (1970) 3 Cal.3d 16, 23; see also *In re Stevens* (2004) 119 Cal.App.4th 1228, 1232 [review of moot issue appropriate if great public interest].)

III. SENATE BILL 10 WILL ELIMINATE THE EQUAL PROTECTION PROBLEM INHERENT IN CALIFORNIA'S STATUTORY BAIL PROVISIONS, WHICH PROVIDE THAT PUBLIC AND VICTIM SAFETY ARE THE PRIMARY CONSIDERATIONS IN SETTING MONETARY BAIL

By repealing the monetary bail system in California, Senate Bill 10 will also eliminate the equal protection problem inherent in California's monetary bail statutes once it becomes effective. Currently, California's statutory bail provisions mandate that public and victim safety are to be the primary considerations in setting monetary bail. (Pen. Code § 1275, subd. (a)(1).) There lies a disconnect, however, between the compelling and legitimate government interest of protecting public safety and the amount of monetary bail set. Monetary bail cannot prevent future criminal conduct because the amount of bail set cannot be forfeited should the defendant commit a new offense. More importantly, there is no logical connection between the amount of monetary bail set and the safety risk posed by the defendant. A wealthy yet dangerous defendant may be released because he has the means to post bond, while an indigent defendant who poses no danger to public safety remains incarcerated. Once effective, Senate Bill 10 will eliminate this equal protection problem.

IV. SENATE BILL 10 CANNOT HAVE ANY EFFECT ON ISSUES INVOLVING THE INTERPRETATION OF THE CALIFORNIA CONSTITUTION

The California Constitution stands as the supreme law of our state and cannot be amended or affected by the enactment of any statutory provision. (See, e.g., *Sands v. Morongo Unified School Dist.* (1991) 53 Cal.3d 863, 902-903 (conc. opn. of Lucas, C.J.) [California Constitution supreme law of state]; Cal. Const., art. II, § 8 [initiative bestows power upon electorate to amend the California Constitution]; Cal. Const., art. XVIII, §§ 1, 4

[amendments to the Constitution must be submitted to the electorate for approval]; see also *Strauss v. Horton* (2009) 46 Cal.4th 364, 462 [constitution cannot be altered by ordinary statute, referencing Iowa Constitution].) And, it is this Court alone that "bears the ultimate judicial responsibility" for interpreting our state Constitution. (*Com. to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 261-262; see also *Raven v. Deukmejian* (1990) 53 Cal.3d 336, 353-354; *Allen v. Superior Court* (1976) 18 Cal.3d 520, 525.) Accordingly, Senate Bill 10, as enacted by the Legislature and signed by the Governor, cannot have any effect on issues involving the interpretation of the California Constitution, which includes the third question posed by this Court: what constitutional provision or provisions govern preventative detention in noncapital cases? Senate Bill 10, though, does offer an alternative interpretation of those narrowly limited circumstances wherein the safety and flight risks justify preventative pretrial detention under section 28, either as harmonized with section 12 or standing alone.

CONCLUSION

Because Senate Bill 10 eliminates the use of monetary bail and any financial conditions of release, the bill has the potential to affect those issues premised on the existence of a monetary bail system. Otherwise, Senate Bill 10 cannot affect any issue involving the interpretation of California's Constitution.

Dated: October 10, 2018

Respectfully submitted,

GEORGE GASCÓN
District Attorney
County of San Francisco

By: ALLISON G. MACBETH
Assistant District Attorney

CERTIFICATE OF COMPLIANCE

I certify that the attached **SUPPLEMENTAL BRIEF REGARDING SENATE BILL 10** uses a 13-point Times New Roman font and contains 1,239 words. (Cal. Rules of Court, rule 8.520(c)(1).)

Dated: October 10, 2018

ALLISON G. MACBETH
Assistant District Attorney

DECLARATION OF SERVICE

I, Allison G. Macbeth, state:

That I am a citizen of the United States, over eighteen years of age, an employee of the City and County of San Francisco, and not a party to the within action; that my business address is 850 Bryant Street, Rm. 322, San Francisco, California 94103. I am familiar with the business practice at the San Francisco District Attorney's Office (SFDA) for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the SFDA is deposited in the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic system, FileAndServeXpress electronic system, or electronic mail. Participants who are registered with either TrueFiling or FileAndServeXpress will be served through electronic mail at the email addresses listed below. Participants who are not registered with either TrueFiling or FileAndServeXpress will receive hard copies through the mail via the United States Postal Service.

That on October 10, 2018, I electronically served the **SUPPLEMENTAL BRIEF REGARDING SENATE BILL 10** by transmitting a true copy of through TrueFiling, FileAndServeXpress, or through electronic mail. Because one or more of the participants have not registered with the Court's system or are unable to receive electronic correspondence, on October 10, 2018, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the San Francisco District Attorney's Office at 850 Bryant Street, Room 322, San Francisco, California 94103, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed October 10, 2018, at San Francisco, California.

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