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SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN BERNARDINO

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, *vs.* **XXXXXXXXXXXXX,** Defendant.	**Case No.: XXXXXXXX** **PEOPLE'S OPPOSITION TO MOTION FOR "CONSTITUTIONALLY ADEQUATE" BAIL/RELEASE HEARING; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** **Date:** XXX **Time:** XXX **Dept.:** XXX

I.

PRELIMINARY STATEMENT

On _____ Defendant was arrested. On _____the District Attorney filed charges of _____ and the Defendant was arraigned. On _____, the Defendant filed the instant "Defense Request for Constitutionally Adequate Bail/Release Hearing." The People hereby oppose the procedure suggested by the Defendant's brief, which lacks statutory or constitutional support.

Specifically, the People oppose bail reduction and/or own recognizance release on the following grounds:

1. Under the principle of stare decisis, this court must follow the published authority of the higher courts, and Supreme Court decisions supersede those from the Court of Appeal. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455-456.) When there are conflicting decisions by the Courts of Appeal, the trial court may choose between them. (*Id.* at p. 456.) To the extent that *In re Humphrey* (Jan. 25, 2018, A152056) ___ Cal.App.5th ___ (*Humphrey*) can be read to ignore the California Constitution and require an additional element to the existing bail scheme, it is wrongly-decided and conflicts with the body of California bail law, including the recent case of *In re Webb* (Jan. 31, 2018, D072981) ___ Cal.App.5th ___ (*Webb*)[1] and the U.S. Supreme Court's decision in *United States v. Salerno* (1987) 481 U.S. 739 (*Salerno*). It conflicts with prior California law holding that bail is not excessive simply because a particular defendant cannot afford it. (*Ex parte Burnette* (1939) 35 Cal.App.2d 358, 360-361; *Ex parte Ruef* (1908) 7 Cal.App. 750, 752; accord, *White v. United States* (8th Cir. 1964) 330 F.2d 811, 814.) It also conflicts with long-established California law holding that the test for excessive bail is whether it is disproportionate to the *offense* committed. (*Ex parte Duncan* (1879) 53 Cal. 410, 411; quoting *Ex parte Ryan* (1872) 44 Cal. 555, 558.)
2. *Humphrey*, *supra*, at pp. 15-16 further errs because it claims that before setting bail that a particular defendant claims they cannot afford, there must be "clear and convincing" evidence of a substantial likelihood that defendant's release would lead to great bodily injury to others. That is the standard for denying bail outright in non-capital cases, not the

[1] *Webb* was published by the Fourth District Court of Appeal, Division 1, on January 31, 2018. It made minor modifications to the opinion on February 8, 2018. Like *Humphrey*, an official citation does not yet exist. The case appears on Westlaw at 2018 WL 635962 and on Lexis at 2018 Cal. App. LEXIS 106. Pinpoint citations within *Webb* refer to the slip opinion pagination.

standard for fixing bail. (Cal. Const., Art. I, § 12.) The correct standard for pretrial detention is probable cause to believe that defendant committed an offense, not clear and convincing evidence of it. (*Gerstein v. Pugh* (1975) 420 U.S. 103.) When fixing the amount of bail, the court must consider the protection of the public and any victims, the seriousness of the offense charged, the previous criminal record of the Defendant, and the probability of the defendant appearing at trial or a hearing. (Cal. Const., Art. I, §§ 12, 28; Pen. Code, § 1275, subd. (a).) When fixing bail, the charges are assumed to be true. (*Ex parte Duncan* (1879) 53 Cal. 410, 411; *Ex parte Horiuchi* (1930) 105 Cal.App. 714, 715.)

3. The Defendant has not introduced evidence – required by *Humphrey* itself – that he cannot pay the amount of bail set or that he has ties to the community sufficient to override the danger to the community and the risk of flight.

4. Even under *Humphrey*, there is no less restrictive means available to adequately protect the community from an individual who is willing to **[identify the safety risk factors within the facts of your case]**.

II.

***HUMPHREY* WAS WRONGLY-DECIDED; IT IGNORES THE BAIL SYSTEM ESTABLISHED BY THE CALIFORNIA CONSTITUTION AND THE PENAL CODE**

In dicta, *Humphrey* went well beyond the facts of the case before it. It essentially ignored the California Constitution, in an attempt to make California's bail system look more like the one established by federal statutes. *Humphrey* cited the presumption of innocence; this ignored well-established law holding that for the purpose of fixing bail, the charges are assumed to be true. (*Ex parte Duncan*, *supra*, 53 Cal. 410, 411; *Ex parte Horiuchi*, *supra*, 105 Cal.App. 714, 715.)

Humphrey did this under the guise of a Constitutional imperative. But the Supreme Court of the United States has made it clear that pretrial detention only requires probable cause. (*Gerstein v. Pugh*, *supra*, 420 U.S. 103.)

A. *Humphrey's* facts, Procedural History, and Holding

In *Humphrey*, Defendant/Petitioner[2] was a 63-year-old man who came into the apartment of a 79-year-old victim, robbed him of $7.00 and a bottle of cologne, threatened him, and threw the victim's phone on the ground. (*Humphrey*, *supra*, at p. 5.) The defendant lived in the same apartment complex as the victim. The defendant was charged with Robbery, First Degree Burglary, Elder Abuse, and Theft from an Elder. (*Id.* at pp. 5 – 6.) This was not the defendant's first time in court, but the appellate court initially only made a vague reference to the "three alleged priors," the most recent of which was in 1992.[3] (*Ibid.*)

Defendant made an argument for own recognizance release ("OR") at arraignment, which the prosecutor opposed. (*Humphrey*, *supra*, at p. 6.) The court refused to grant OR and set bail at $600,000, following San Francisco's bail schedule. (*Id.* at pp. 6 – 7.) The arraigning court cited the vulnerability of the victim and the seriousness of the offense, and granted a Criminal Protective Order compelling the defendant to stay away from the victim's floor at the apartment complex. (*Id.* at p. 7.)

The defendant brought a formal bail hearing motion pursuant to Penal Code section 1270.2. (*Humphrey*, *supra*, at p. 7.) He argued the bail was effectively "no bail" because he lacked the ability to pay, he had extensive ties to the community,

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[2] The case came before the court on a Petition for Writ of Habeas Corpus. For purposes of this discussion he will be referred to as the defendant.

[3] It appears later in the opinion by a quote from defense counsel that the case was a three strikes case. The court fails to mention that specifically in its listing of the charges.

he had arranged for a bed at a residential treatment facility for seniors, and that he had a drug problem. (*Id.* at pp. 7 – 9.) The prosecutor pointed out that under Penal Code section 1275, the court had to find unusual circumstances to deviate from the bail schedule. (*Id.* at pp. 9 – 10.) The prosecutor further pointed out that the victim was particularly vulnerable and was preyed upon by the defendant to "feed his habit." (*Id.* at p. 10.)

The trial court found unusual circumstances in the case, and lowered the bail to $350,000. (*Humphrey*, *supra*, at p. 11.) The court noted that the victim was poor and the court was not going to "provide less protection to the poor than the rich." (*Ibid.*) The court did not make a record of the defendant's inability to pay the new amount, and did not discuss the fact that he had never failed to appear previously. (*Ibid.*) The defendant then filed a Petition for a Writ of Habeas Corpus.[4] (*Id.* at p. 12.)

The Court of Appeal held that the trial court erred in fixing the amount at $350,000 without inquiring into, and making findings about, the defendant's ability to pay and without considering alternatives to detention. (*Humphrey*, *supra*, at p. 44.)

The *Humphrey* court ordered the trial court to conduct a new bail hearing at which the Defendant could "**present evidence and argument**" (emphasis added) for the court to consider financial resources as well as alternatives to money bail. (*Humphrey, supra*, at p. 44.) If the trial court were to find the defendant couldn't afford the amount of money bail the court found sufficient to

[4] The Attorney General initially argued in an informal response that Article I, section 28, subd. (f)(3) of the California Constitution set Public Safety as the "primary consideration" in setting, reducing, or denying bail, and that the lower court did not err. When an Order to Show Cause was issued, the Attorney General conceded, stating, "The Department of Justice has determined that it will not defend any application of the bail law that does not take into consideration a person's ability to pay, or alternative methods of ensuring a person's appearance at trial…" The Attorney General then made a belated, and unsuccessful, attempt to oppose at oral argument.

secure future court appearances, it had to set bail at that amount only upon a showing "by clear and convincing evidence" that no less restrictive alternatives would satisfy the purpose of securing attendance. (*Ibid.*)

B. <u>The *Humphrey* Court Impermissibly Ignored Authority and Added an Element to The Statutory Bail Scheme and Is in Conflict With Other Decisions</u>

1. This Court Must Follow the Published Decisions of a Higher Court Unless They Are Superseded by The California Supreme Court, Or They Conflict with Other Decisions by The Courts of Appeal

Under the principle of stare decisis, this court is bound by the published authority of the higher courts. (*Auto Equity Sales, Inc. v. Superior Court*, *supra*, 57 Cal.2d 450, 455-456.) Decisions of the California Supreme Court supersede those of the Courts of Appeal. (*Id.* at p. 455.) If there are conflicting decisions from the Courts of Appeal, the trial court may choose between them. (*Id.* at p. 456.)

To the extent that *Humphrey* conflicts with authority from the California Supreme Court, it must be disregarded. To the extent it conflicts with other cases from the Court of Appeal, it should not be followed. Those other cases are consistent with the California Constitution and the Penal Code; *Humphrey* is not.

2. The California Constitution, the Penal Code, and Ample Appellate Authority Establish the Factors that the Court Should Consider When Fixing the Amount of Bail

Article 1, section 12 of the California Constitution requires that bail be set in all criminal cases, with three exceptions:

(1) capital crimes;

(2) felony offenses involving acts on another person, felony sexual assault, when the court finds upon "clear and convincing evidence" that there is a

"substantial likelihood the person's release would result in great bodily injury to others" and

(3) felony offenses where the court finds "by clear and convincing evidence that the person has threatened another with great bodily harm" and "there is a substantial likelihood that the person would carry out the threat if release."

In cases that do not fall into the above categories, the Constitution also makes clear that the court, when fixing the amount of bail, shall take into consideration the "seriousness of the offense," the prior criminal record of the defendant, and the probability the defendant will appear for hearing and trial.

Section 12 makes clear that "excessive bail" may not be required. It also makes clear that there are some cases where no bail is appropriate. It does not contemplate any consideration of defendant's ability to pay the bail amount that is set.

Article 1, section 28, subdivision (f), paragraph (3) of the Constitution reiterates the factors in section 12 and states the court shall take into consideration the protection of the public, the safety of the victim, and makes clear that "[P]ublic safety and the safety of the victim shall be the primary considerations."

Penal Code sections 1268-1276.5 implement these constitutional provisions. In particular, when the offense is a serious or violent felony, the court cannot deviate from the bail schedule unless it complies with the procedural safeguards in section 1270.1 and gives the reasons for setting bail in a different amount.

For over a hundred years, it has been the law that the court is required to assume that the charges are true. (*Ex parte Duncan*, *supra*, 53 Cal. 410, 411; *Ex parte Horiuchi*, *supra*, 105 Cal.App. 714, 715; *Ex parte Ruef*, *supra*, 7 Cal.App. 750, 752.) The presumption of innocence "has no application to a determination of the rights of a pretrial detainee during confinement before the trial has even

begun." (*In re York* (1995) 9 Cal.4th 1133, 1148; quoting *Bell v. Wolfish* (1979) 441 U.S. 520, 533.)

Importantly, it is well established that bail is not excessive simply because the Defendant is unable to pay it. (*Ex parte Ruef*, *supra*, 7 Cal.App. 750, 752 ["Bail is not to be deemed excessive, however, simply because the particular person under indictment cannot give the bail required."]; accord, *United States v. Van Caester* (S.D. Fla., 1970) 319 F.Supp. 1297; *White v. United States* (8th Cir. 1964) 330 F.2d 811, 814 ["The mere financial inability of the defendant to post an amount otherwise meeting the aforesaid standard does not automatically indicate excessiveness. The purpose for bail cannot in all instances be served by only accommodating the defendant's pocketbook and his desire to be free pending possible conviction."])[5]

In *People v. Gilliam* (1974) 41 Cal.App.3d 181, 191 the Court of Appeal said:

> In California our Constitution not only provides that bail not be excessive but also that persons shall be bailable by sufficient sureties except in capital cases. [Citation.] We apprehend, therefore, that were it not for constitutional guaranty a person would not be bailable and that when he is bailable his bail shall be in accordance with such guaranty and the statutes implementing it. **Both the federal and the California Constitution countenance that bail may be required in a proper case and neither make or authorize any distinction between a person financially able to raise such bail and one who is not able to do so because of his indigence.**

(Internal citation omitted, emphasis added.)

3. The Trial Court in* Humphrey *Was Already Permitted to Consider Defendant's Ability to Post Bond; But it Was Not the Overriding Factor

Because the defendant in *Humphrey*, *supra*, was charged with serious and violent felonies, he was already permitted to argue that bail should be lowered due to his indigence. Penal Code 1270.1, subdivision (c) permits the defendant to offer

[5] The "aforesaid standard" was a bail amount that ensured the defendant showed up for court. The federal Bail Act now includes public safety.

evidence regarding his or her ties to the community and his or her ability to post bond. *Humphrey* does not address this, and instead purports to craft a constitutional rule where none is needed.

4. **Humphrey *Relied on Inapplicable Federal Statutory Law***

There is no absolute right to bail under the United States Constitution. (*Broussard v. Parish of Orleans* (5th Cir. 2003) 318 F.3d 644, 650.) Rather, there is only a prohibition on excessive bail. (*Ibid.*) In California there is a right to bail in most cases, but it flows from the state Constitution.

Humphrey analogized California's bail system to its federal statutory counterpart, (*Humphrey*, *supra*, at pp. 23 – 32), which has entirely different procedures and deals with, for the most part, vastly different crimes. Such a comparison is inapt, however. The right to have bail set in California arises in California law, not in a federal statute.

Humphrey discussed *United States v. Salerno*, *supra*, 481 U.S. 739 (*Salerno*), which related to the federal Bail Reform Act of 1984. But as *Salerno* makes clear, federal statutory law governing bail takes into account, in addition to the defendant's flight risk,

> the nature and seriousness of the charges, the substantiality of the Government's evidence against the arrestee, the arrestee's background and characteristics, and the nature and seriousness of the danger posed by the suspect's release.

(*Id.* at pp. 742-743, citing 18 U.S.C. § 3142(g).)

Salerno explained that the procedural protections found in the Bail Reform Act "far exceed" what is constitutionally necessary. (*Supra*, 481 U.S. at p. 752.) It is not necessary for California's bail system to match the federal one.

Humphrey further analogized to inapplicable U.S. Supreme Court cases that deal with the treatment of indigency for a person exposed to confinement for inability to pay fines. (*Supra*, pp. 16-20; discussing *Bearden v. Georgia* (1983) 461 U.S. 660 and the cases it cited.) Such analogizing is unnecessary. *Salerno*, *supra*,

481 U.S. at p. 752 noted that pretrial detention is governed by *Gerstein v. Pugh*, *supra*, 420 U.S. 103 (*Gerstein*), which explained that pretrial detention is governed by the Fourth Amendment, and that the standard for detention is probable cause. (At p. 111.) That standard "represents a necessary accommodation between the individual's right to liberty and the State's duty to control crime." (*Id.* at p. 112.)

5. Federal and California Bail Laws Fit into Criminal Law Systems with Significantly Different Procedures;* Humphrey *Erred When it Commingled Them

As described above, federal statutory bail law simply does not apply in California's state courts, and *Humphrey* was wrong to employ it. But there are also significant differences between state and federal procedure that further illustrate why the comparison is unhelpful.

At the core of *Humphrey's* rationale for overturning California's Constitutional and Statutory construct of bail lies its thesis that California citizens are deprived of their fundamental liberty interest without Due Process. As *Humphrey* stated from the outset, "Thousands and thousands of people languish in the jails of this state even though they are convicted of no crime." (*Humphrey*, *supra*, at p. 1.) *Humphrey* then turns to the United States Supreme Court's decisions pertaining to federal system of detention and bail as the guiding light by which California should steer itself on the proper path.[6] Due to fundamental

[6] *Humphrey* relies intensively on *United States v. Salerno*, *supra*, 481 U.S. 739 throughout the opinion, a case dealing with the federal Bail Reform Act of 1984. Other federal bail or detention cases featured in *Humphrey's* analysis include *United States v. Leathers* (D.C. Cir. 1969) 412 F.2d 169 (*Humphrey*, *supra*, at p. 3), *United States v. Mantecon-Zayas* (1st Cir. 1991) 949 F.2d 548 (*Humphrey*, *supra*, at p. 20), *Hernandez v. Sessions* (9th Cir. 2017) 872 F.3d 976 (a case concerning detainees facing removal in immigration proceedings) (*Humphrey*, *supra*, at pp. 21, 23), *Stack v. Boyle* (2004) 342 U.S. 1 (*Humphrey*, *supra*, at pp. 24, 35, 36), *Reno v. Flores* (1993) 507 U.S. 292 (an immigration detention case) (*Humphrey*, *supra*, at pp. 27, 28), and *Zadvydas v. Davis* (2001) 533 U.S. 678 (an immigration detention case) (*Humphrey*, *supra*, at p. 28).

differences between the two criminal systems, however, it quickly becomes apparent the light is really a will o' the wisp, leading the unwary astray.

Unlike the federal criminal system, California almost always provides the criminal defendant an opportunity to test the evidence against him or her at an early stage of the proceeding. Far from languishing, the defendant in our state is quickly given the chance to challenge the evidence against him or her, present evidence of his own, and is afforded the assistance of counsel in the process. Thus, following a magistrate's arraignment of an in-custody defendant on charges, he or she will remain in custody for no more than ten court days without enjoying the right to a preliminary examination on the issue of guilt. (Pen. Code, § 859b.) There the defendant has the right to counsel (having already been appointed or addressed at arraignment per Penal Code section 987, subdivision (a), and cannot be examined him- or herself without counsel, pursuant to Penal Code section 866.5), the right to be present for the examination of witnesses and to cross-examine the witnesses (Pen. Code, § 865), and the right to present some evidence (Pen. Code, § 866). The purpose of the Preliminary Examination, of course, is to determine whether there is probable cause to "believe that the defendant committed a felony." (Pen. Code, § 866, subd. (b).)

In the federal criminal arena, however, the finding of probable cause in felony cases is done by way of indictment by a grand jury. (Fed. Rules Crim. Proc., rule 7(a)(1).) The "role of the grand jury [is to] determin[e] if there is probable cause to believe that a crime has been committed . . .." (*Branzburg v. Hayes* (1972) 408 U.S. 665, 686 – 687.) Neither the defendant nor his or her attorney may be present during the presentation of the evidence to the grand jury. (Fed. Rule Crim. Proc. 6(d)(1).) Thus, a "grand jury proceeding is not an adversary proceeding in which the guilt or innocence of the accused is adjudicated." (*United States v. Calandra* (1974) 414 U.S. 338, 343.) A defendant does not have the right to cross-examine witnesses put before the grand jury. (*United States v. Salsedo* (9th Cir. 1979) 607

F.2d 318, 319.) Nor does he or she have a right to be present during the proceedings or to be called as a witness. (*Ibid.*) As a result, the setting of a criminal case for trial occurs without any process by which the defendant may test the evidence.

While many cases in the federal system initiate with the filing of the indictment returned by the grand jury, there are also cases whose inception commences with a probable cause arrest of the defendant. (Fed. Rules Crim. Proc., rules 5(b) and 4(a).) Nevertheless, the case must proceed by the way of indictment after an initial complaint. (18 U.S.C. § 3161(b).) A preliminary hearing does exist within the federal system, but its purpose is to provide for extension of the time to indict, not as a substitute for the grand jury. (18 U.S.C. § 3060(b).)[7] Consequently, if a person is arrested, detained and indicted within fourteen days of the arrest, the person will remain in custody until trial without an adversarial evidentiary hearing.

Like California, the time frame in which a person must be tried is controlled by statute. However, the mechanisms that can extend that time are quite different. For a criminal defendant in our state court, the trial must be held under most circumstances within 60 days of being arraigned on the information filed after preliminary hearing. (Pen. Code, § 1382, subd. (a)(2).) That time may, and often is, waived. (Pen. Code, § 1382, subd. (a) or (b).)

In federal court, a defendant is to be brought to trial within 70 days of the filing of an indictment for a felony case. (18 U.S.C. § 3161(c)(1).)[8] In the federal

[7] All persons charged with a felony must be indicted under rule 7 of the Federal Rules of Criminal Procedure. If no preliminary hearing is held, that indictment must come within 14 days for a person in custody. (18 U.S.C. § 3060(b)(1).) If the preliminary examination does occur within that fourteen days, the time for indictment is extended to 30 days. (18 U.S.C. § 3161(b).) These latter two statutes must be read in conjunction with one another in order to make sense of the time frames required.

[8] An information may be filed in lieu of an indictment if the defendant waives indictment. (Fed. Rules Crim. Proc., rule 7(b).)

system, however, rather than simply looking to a waiver of this right, the time for trial may be extended by finding that the passage of time under certain circumstances to be excludable time. Excludable time may consist of delays attributable to various proceedings such as competency issues, interlocutory appeal and motion resolution, (18 U.S.C. § 3161(h)(1)), the unavailability of witnesses, (18 U.S.C. § 3161(h)(3)(A)), or at the request of a party or on the motion of the trial court based on a balancing of the interests of justice, (18 U.S.C. § 3161(h)(7)). Thus, particularly in this latter instance, the statutory right to trial within a given time period is much more nebulous in the federal system than it is in California.

It is easy to see, therefore, why the federal system is quite concerned with the detention of defendants under a question of due process. A defendant there could be custody for a substantial period of time without ever having an adversarial hearing with the benefit of counsel. Here, where preliminary hearings are the norm, the opposite is true.[9] A defendant is almost always afforded the opportunity to challenge the evidence holding him or her with the assistance of an attorney within two weeks of being taken into custody. *Humphrey's* decision to analogize the California system to that found in federal courts is consequently far from a proper fit, and characterizing defendants in our system as "languishing" without due process is flatly wrong. This distinction is completely unaddressed by *Humphrey*, causing significant question of its precedential value when coupled with its avoidance of the history of California bail jurisprudence in reaching its sweeping conclusions.

6. **Humphrey *Ignored the Will of the People and the Legislature by Giving Short Shrift to the Safety of the Public***

[9] It is indeed possible for a case to proceed in California by indictment, but the cases falling under such a path are almost statistically nonexistent. Only in the cases where a defendant is indicted might there be a more significant impact of the cases addressing the federal bail and detention system.

Humphrey features extensive commentary critical of the money bail system. In dictum, *Humphrey* stated (at p. 21):

> Money bail will protect the public only as an incidental effect of the defendant being detained due to his or her inability to pay, and this effect will not consistently serve a protective purpose, as a wealthy defendant will be released despite his or her dangerousness while an indigent defendant who poses minimal risk of harm to others will be jailed.

Whatever the merits or demerits or demerits of money bail, the fact remains that references to it are present in both the state and federal constitutions. The various speeches, journal articles, and other sources critical of money bail cited by *Humphrey* do not and cannot change the fact that it is inherently constitutional.

Humphrey also attempted to side-step, in a confusing and convoluted manner, the clear statements in both the California Constitution and the Penal Code that public safety is of paramount importance. *Humphrey* gives short shrift to the requirement, found twice in our state constitution (art. I, §§ 12, 28), that the courts must consider the seriousness of the charges when fixing the amount of bail. Although *Humphrey* quotes "seriousness of the offense charged" several times, each time it is simply quoting from a statute or constitutional provision. *Humphrey* never says what to do with this constitutional command.

7. **Humphrey *Erred When It Required Clear and Convincing Evidence of Dangerousness for a Detention Order; the Standard Is Probable Cause***

As previously noted, the United States Supreme Court addressed the standard and procedure for detaining someone in *Gerstein*, *supra*, 420 U.S. 103. These standards are drawn from the Fourth Amendment. (*Id.* at p. 111.) The standard for arrest and detention is probable cause, which is facts and circumstances sufficient to warrant a prudent person believing that the suspect had committed or was committing an offense. (*Ibid.*)

After arrest, a neutral magistrate must approve continued detention. (*Id.* at pp. 113-114.) The standard remains probable cause. (*Id.* at p. 114 ["Accordingly, we hold that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest."]) Because the standard is simply probable cause, there is no need for an adversarial hearing to determine it. (*Id.* at pp. 120-122.) And informal procedure is permitted because of the nature of a probable cause determination. (*Id.* at p. 121.)

Humphrey never discusses the Fourth Amendment. It cites *Gerstein's* recognition that pretrial confinement can greatly inconvenience a defendant, yet fails to acknowledge that *Gerstein* established probable cause as the standard for pretrial confinement. (*Humphrey*, *supra*, at p. 25.)

C. *Humphrey* Violated the Statutory Bail Scheme by Adding a New Element Which Was Cautioned Against In *Webb*

On January 31, 2018, the Fourth District Court of Appeal, Division One issued an opinion on a bail issue in *In re Webb*, *supra*. In that decision, the court examined whether a Fourth Amendment waiver by the Defendant could be maintained as a condition of bail. In holding that it could not, the *Webb* court applied the correct body of law regarding bail in California. It quoted *In re York*, *supra*, 9 Cal.4th 1133, 1149, which explained that "a defendant who is unable to post reasonable bail has no constitutional right to be free from confinement prior to trial…" (*Webb*, *supra*, at pp. 10-11.)

Finally, the court in *Webb* made a telling and significant statement: "No court has inherent authority to ignore or violate the statutory bail scheme." (*Supra*, at p. 16.) *Webb* held that it wasn't the province of the trial court to change the statutory bail scheme established by the legislature.

It should be equally true that the Court in *Humphrey* cannot impose an additional burden of showing that a less-restrictive means would be ineffective to

secure future court appearances when that requirement appears nowhere in the statutory scheme.[10] The court simply grafted this additional element under the guise of a constitutional imperative.[11]

III.

THE BURDEN IS ON THE DEFENDANT TO SHOW HIS OR HER TIES TO THE COMMUNITY AND ANY INABILITY TO PAY THE SCHEDULE AMOUNT

As described above, *Humphrey* was wrongly-decided. It violates the California Constitution and conflicts with other binding appellate authority.

Even assuming that *Humphrey* were to be applied here, the burden is on defendant to show an inability to post bail. In *Humphrey*, the court noted, "Nothing in the record suggests petitioner's claim of indigency was not bona fide, and neither the district attorney nor the court questioned the veracity of the claim." (*Humphrey*, *supra*, at p. 41.) It therefore remanded the case for the defendant to "provide evidence and argument." (*Id.* at p. 45.)

The People in this case *do* question the veracity in the defendant's claim that he is unable to pay the bail amount set. This should be done by admissible evidence, not simply counsel's representations. Arguments and statements of attorneys are not evidence. (*People v. Barajas* (1983) 145 Cal.App.3d 809 – 810.)

The burden of producing evidence is "the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue." (Evid. Code, § 110.)

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[10] The suggestion otherwise by *Humphrey* is tantamount to requiring the people prove a negative, "a burden virtually impossible to discharge under our criminal standards of proof." (*Bloom v. Municipal Court* (1976) 16 Cal.3d 71, 76, citing to *Miller v. California* (1973) 413 U.S. 15, 22.)

[11] Given the tension between these two poles, the *Webb* court's unwillingness to add language to the bail statutes and the *Humphrey* court's eagerness to do so, as well as the long standing application of the bail statutes, the law is clearly unsettled. Where appellate decisions are in conflict, a trial court may make a choice between the decision to adopt the superior reasoning. (*Auto Equity Sales v. Superior Court* , *supra at* 456.)

In *Van Atta v. Scott* (1980) 27 Cal.3d 424, 438 (*Van Atta*) (superseded in part by statute)[12] the Court stated regarding whether a detainee would bear the burden of proving ties to the community:

> [T]he detainee is clearly the best source for this information and for names of individuals who could verify such information. Moreover, the detainee has a substantial incentive to cooperate in providing this information. If the burden of producing this evidence were placed on the prosecution, that incentive would disappear. [...] Therefore, this court is persuaded that due process does not require the prosecution to bear the burden of producing evidence of the detainee's lack of community ties.[13]

(*Id.* at pp. 438 – 439.)

If *Humphrey* is the basis for the defendant's claim that *only* ability to pay and securing attendance at future hearings is at issue, it is clear from the opinion itself that the defendant should put on admissible evidence of his alleged inability to pay and his ties to the community.

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[12] *Van Atta* was decided prior to the passage of Proposition 4 in 1982. It stated that the "sole issue at the OR hearing is whether the detainee will appear at subsequent court proceedings." *Id* at 148. The court in *In re York*, *supra*, 9 Cal.4th 1133, fn. 7, stated that "...insofar as the quoted statement in *Van Atta* may be understood to reflect a state constitutional limitation upon the considerations that a court or magistrate properly may take into account in determining whether to grant a defendant's request for OR release, it is clear that *Van Atta* no longer accurately embodies the state constitutional principles that govern release on bail or OR. Nothing contained in the current language of article I, section 12—which provides, in relevant part, that '[a] person may be released on his or her own recognizance in the court's discretion'—properly may be interpreted to limit a court or magistrate to imposing *only* those OR release conditions that are aimed at ensuring a defendant's appearance at future court proceedings."

[13] The Court also held that proof that the Defendant was a flight risk, in the form of prior failures to appear, etc., and presumably the prior criminal record of the Defendant should be the People's burden. (*Van Atta*, *supra*, at p. 439.)

IV.

EVEN THE *HUMPHREY* COURT RECOGNIZED THE SIGNIFICANCE OF THE BAIL SCHEDULE AND THE PRESUMPTION IN SERIOUS OR VIOLENT CASES

Curiously, at least with regards to charged serious or violent felonies and hearings under Penal Code sections 1270.1, and 1275, subd. (c), *Humphrey* actually states the correct law:

> Nor do we condemn the trial court's consultation of the schedule: Such consultation is **statutorily required**, because for serious or violent felonies the court cannot depart from the amount prescribed by the schedule without finding unusual circumstances. (§ 1275, subd. (c).) The nature of the present charges against petitioner and his prior offenses **are relevant to assessment of his dangerousness, and the schedule provides a useful measure of the relative seriousness of listed offenses**."

(*Humphrey*, *supra*, at p. 39.)

As a result, under Penal Code sections 1275, subdivision (c), and 1270.1, the bail schedule is the presumptive amount of bail, and absent a finding of "unusual circumstances," should remain the amount of bail.

V.

AN INDIVIDUAL WHO [ADD FACTS ABOUT YOUR CASE, SUCH AS CRIME COMMITTED, CIRCUMSTANCES SHOWING DANGEROUSNESS, ETC.] IS DANGEROUS; THE COURT SHOULD NOT VIOLATE THE CONSTITUTION TO MAKE IT EASIER FOR HIM/HER TO GAIN PRETRIAL RELEASE

For all its language about "thousands of people languish[ing] in the jails of this state even though they have been convicted of no crime," (*Humphrey*, *supra*, at p. 1), the *Humphrey* opinion fails to even recognize the well-established principle that the presumption of innocence "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*, *supra*, 441 U.S. 520, 533.)

In the present case, the evidence [adduced at the preliminary hearing or gathered during the investigation] shows that [insert facts of your case showing the seriousness of the offense, any flight risk related facts available to you, prior record of the Defendant etc.] There is no available alternative to pre-trial detention of which the People are aware that will keep the public safe from the defendant's poor choices. [Describe other factors for the court to consider.]

VI.

CONCLUSION

Humphrey was wrongly-decided. It is inconsistent with over a hundred years of case law on how bail works in California. When such a conflict arises, the court may choose which authority to follow. Here, the court should follow the commands of California's constitution, and the appellate cases that do the same. Conversely, the constitution does not require that bail be set at a low level where a particular defendant can pay it; prior case law explicitly holds that ability to pay is not the standard for determining whether bail is excessive.

The People respectfully request that the Court follow the commands of the California Constitution and the Penal Code and deny the Defendant's motion for bail reduction, or release on his own recognizance.

Dated: xxxxxxx

Respectfully submitted,

MICHAEL A. RAMOS,
District Attorney,

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XXXXXXXXXXX,
Deputy District Attorney.

PROOF OF SERVICE