



1515 CLAY STREET, 20TH FLOOR  
P.O. BOX 70550  
OAKLAND, CA 94612-0550

Public: (510) 879-1300  
Telephone: (510) 879-0756  
Facsimile: (510) 622-2270  
E-Mail: Joshua.Klein@doj.ca.gov

August 19, 2020

Jorge E. Navarrete  
Clerk of the Supreme Court  
Supreme Court of California  
350 McAllister St.  
San Francisco, CA 94102

RE: *In re Kenneth Humphrey*, No. S247278: Response to respondent's renewed request to order that Court of Appeal opinion have binding effect pending this Court's review

Dear Mr. Navarrete:

The Court of Appeal issued its published opinion in *In re Humphrey* (2018) 19 Cal.App.5th 1006, on January 25, 2018. This Court granted review on May 23, 2018. Under California Rules of Court, rule 8.1115(e)(1), the Court of Appeal's published opinion therefore "has no binding or precedential effect, and may be cited for persuasive value only," "unless otherwise ordered by the Supreme Court." On June 25, 2018, counsel for respondent Kenneth Humphrey filed a letter requesting that this Court order that the Court of Appeal opinion have a binding or precedential effect until this Court issues its own decision on the case. (See Rule 8.1115(e)(3).) The Court denied that motion on August, 22, 2018. Briefing in this case has been completed; argument has not yet been scheduled.

On August 4, 2020, counsel for respondent Kenneth Humphrey filed a letter renewing respondent's request to grant the Court of Appeal opinion a binding or precedential effect, based on changed circumstances. As counsel for petitioner, we support that request in part.

1. With respect to federal constitutional requirements, the Court of Appeal's published opinion essentially holds that, where a criminal defendant is otherwise judged suitable for release pending trial, equal protection and due process principles restrict a trial court from causing that defendant to nonetheless be detained through the setting of bail in an unnecessarily high amount that the defendant cannot pay.<sup>1</sup> We view that core constitutional principle to be clear and

---

<sup>1</sup> See *Humphrey, supra*, 19 Cal.App.5th at p. 1044 ["Once the trial court determines public and victim safety do not require pretrial detention and a defendant should be admitted to bail, the important financial inquiry is not the amount prescribed by the bail schedule but the amount necessary to secure the defendant's appearance at trial or a court-ordered hearing."]; *id.* at p. 1037 ["If the court concludes that an amount of bail the defendant is unable to pay is

unassailable—pretrial detention should depend on an individualized assessment of the need for the person to be detained, rather than on the defendant’s financial resources. (See Br. of Attorney General as Amicus Curiae, at pp. 12-15.)

We acknowledge that the general rule upon a grant of review is for the underlying case to remain published, but to have only persuasive value rather than precedential effect, while review is pending. (Rule 8.1115(e)(1).) And we recognize that this Court previously concluded that the Court of Appeal opinion in *Humphrey* should not have precedential effect. (Order, Aug. 22, 2018.) But the unexpected change in circumstances caused by the unprecedented impacts of the novel coronavirus pandemic warrant reconsideration of that earlier decision. Petitioner agrees that the core federal constitutional holding in the Court of Appeal’s decision is supported by decisions from the U.S. Supreme Court and the high courts of other jurisdictions. Precedent may be somewhat less clear about certain subsidiary issues, such as the standard of proof that must be met for an order that results in pretrial detention. But in the current circumstances, statewide implementation of the core principle has become especially important for bail decisions occurring during the pendency of this Court’s review. With respect to that aspect of the Court of Appeal’s opinion, we therefore join in respondent’s renewed request for this Court to order that it have binding precedential effect.

2. The Court of Appeal’s comments on an issue of state constitutional law, however, should be excluded from an order granting precedential effect to the opinion. (See Cal. Rules of Court, rule 8.1115(e)(3) [noting that this Court may determine which parts of an opinion should have binding precedential effect].) One of the issues in this Court’s grant of review is: “Under what circumstances does the California Constitution permit bail to be denied in noncapital cases? Included is 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.” (See Order, May 23, 2018.) The Court of Appeal discussed those issues in Part IV of its opinion. (See *Humphrey*, *supra*, 19 Cal.App.5th at pp. 1046-1048.) As respondent notes, the opinion did not directly decide that issue. (See *id.* at p. 1047.) But the opinion does contain statements that might be interpreted, by litigants and superior courts, as effectively determining the issue. (See, e.g., *id.* at p. 1047, fn. 28 [“the provenance of section 28 gives no indication it was meant to render section 12 ineffective”]; *ibid.* [“the ballot pamphlet ... did not suggest that the public safety bail provision proposed by Proposition 9 was incompatible in any way with the right to bail provided by section 12”].) Unlike the federal constitutional holding described above, this state constitutional issue is vigorously contested by the parties here. Moreover, no U.S. Supreme Court decisions will govern this Court’s state-law determination, and there are no decisions from

---

required to ensure his or her future court appearances, it may impose that amount only upon a determination by clear and convincing evidence that no less restrictive alternative will satisfy that purpose.”]; *id.* at p. 1037 [“[A] court which has not followed the procedures and made the findings required for an order of detention must, in setting money bail, consider the defendant’s ability to pay and refrain from setting an amount so beyond the defendant’s means as to result in detention.”].

other jurisdictions construing analogous provisions. Until this Court decides the state constitutional issue in this case, the issue deserves further consideration by the State's lower courts—and this Court should avoid any action that might unintentionally forestall that process.

As a result, any order by this Court in response to respondent's motion should specify that the Court of Appeal's opinion has binding effect *with the exception of Part IV*. That would make clear that, during the pendency of review, the Court's action is not intended to preclude the parties from contesting that issue—or to preclude lower courts from deciding it *de novo*—in particular cases in which prosecutors request detention under section 28 in order to protect the safety of the public or of particular victims.<sup>2</sup>

Sincerely,

/s/ Joshua A. Klein

JOSHUA A. KLEIN  
Deputy Solicitor General

For XAVIER BECERRA  
Attorney General

---

<sup>2</sup> The last paragraph of Part IV does not discuss the state constitutional issue. Instead, it summarizes what the trial court should do on remand, based on the opinion's previously stated federal holdings. Because those duties are already clear from the other parts of the opinion, it will suffice to give the rest of the opinion binding effect, while withholding such effect from Part IV.

**DECLARATION OF SERVICE BY E-MAIL and U.S. Mail**

Case Name: **In re Kenneth Humphrey on Habeas Corpus**

Case No.: **S247278**

We declare:

We are employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. We are 18 years of age or older and not a party to this matter. We are familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business by Lois Buzbee-Osby.

On August 19, 2020, A. Cerussi served the attached **LETTER TO CLERK OF COURT IN RE KENNETH HUMPHREY, NO. S247278: RESPONSE TO RESPONDENT'S RENEWED REQUEST TO ORDER THAT COURT OF APPEAL OPINION HAVE BINDING EFFECT PENDING THIS COURT'S REVIEW** by transmitting a true copy via electronic mail. In addition, Lois Buzbee-Osby placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, 1300 I Street, Suite 125, Sacramento, California 95814, addressed as follows:

**SEE ATTACHED SERVICE LIST**

We declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on August 19, 2020, at Sacramento, California.

A. Cerussi  
\_\_\_\_\_  
Declarant for Service by E-Mail

/s/ A. Cerussi  
\_\_\_\_\_  
Signature

Lois Buzbee-Osby  
\_\_\_\_\_  
Declarant for Service by US Mail

/s/ Lois Buzbee-Osby  
\_\_\_\_\_  
Signature

Document received by the CA Supreme Court.

*In re Kenneth Humphrey on Habeas Corpus*  
Supreme Court of California  
Case No.: S247278

Thomas Gregory Sprankling  
Wilmer Cutler Pickering Hale and Dorr LLP  
950 Page Mill Road  
Palo Alto, CA 94304-3498

Hon. Jason Anderson  
San Bernardino County  
District Attorney's Office  
303 West Third Street, 6<sup>th</sup> Floor  
San Bernardino, CA 92415-0042  
*Counsel for Depublication Requestor*

Donald Bartell  
Bartell Beloian & Hensel  
5053 La Mart Drive #201  
Riverside, CA 92507  
*Counsel for Amicus Curiae Cal. DUI Lawyers Assoc.*

Nina Salarno Bresselman  
Crime Victims United of California  
130 Maple Street, Suite 300  
Auburn, CA 95603  
*Counsel for Amici Curiae*

Maya Beth Karwande  
Keker, Van Nest & Peters  
633 Battery Street  
San Francisco, CA 94111  
*Counsel for Amici Curiae Crime Survivors*

Belinda Martinez Vega  
Venable LLP  
2049 Century Park E, Suite 2300  
Los Angeles, CA 90067-3125  
*Counsel for Amicus Curiae American Bar Association*

Seth P. Waxman  
Wilmer Cutler Pickering Hale & Dorr LLP -  
1875 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006

Mark Zahner  
California District Attorney Association  
921 11th Street, Suite 300  
Sacramento, CA 95814-4524  
*Counsel for Depublication Requestor*

Kymberlee Claire Stapleton  
Criminal Justice Legal Foundation  
2131 L Street  
Sacramento, CA 95816  
*Counsel for Amicus Curiae*

Mary McCord  
Institute for Constitutional Advocacy  
and Protection  
Georgetown University  
600 New Jersey Avenue NW  
Washington, DC 20001  
*Counsel for Amici Curiae*

Lara Abigail Bazelon  
Federal Public Defender  
321 E Second Street  
Los Angeles, CA 90012  
*Counsel for Amici Curiae Law Professors*

J. Bradley Robertson  
Bradley Arant Boulton Cummings LLP  
1819 Fifth Avenue North  
Birmingham, AL 35203  
*Counsel for Amici Curiae Cal. Assoc. of Pretrial Services et al.*

*In re Kenneth Humphrey on Habeas Corpus*  
**Supreme Court of California**  
**Case No.: S247278**

A Marisa Chun  
Crowell & Morning LLP  
Three Embarcadero Center, 26<sup>th</sup> Floor  
San Francisco, CA 94111  
*Counsel for Amici Curiae Bar Association of  
San Francisco*

County of San Francisco  
Superior Court of California  
Hall of Justice  
850 Bryant Street  
San Francisco, CA 94103

First Appellate District  
Court of Appeal of the State of California  
Division Two  
350 McAllister Street  
San Francisco, CA 94102