

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

In re GERALD JOHN KOWALCZYK

Petitioner,

on Habeas Corpus.

Case No.: S277910

First District Court of Appeal  
No. A162977

San Mateo Superior Court  
No. 21-SF-003700-A

**REPLY TO ANSWER TO PETITION FOR REVIEW**

After Opinion Filed in the Court of Appeal  
First Appellate District  
From Petition for Writ of Habeas Corpus  
From Detention Order by Superior Court of San Mateo County  
Honorable Susan Greenberg, Superior Court Judge  
Honorable Elizabeth K. Lee, Superior Court Judge  
Honorable Jeffrey R. Finigan, Superior Court Judge

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## ARGUMENT

Respondent acknowledges that *Kowalczyk* allows judges to bypass section 12 and *In re White* (2020) 9 Cal.5th 455 so long as they do so by imposing an intentionally unaffordable cash bail order rather than denying bail outright. In endorsing this practice, *Kowalczyk* undermines *White*, *Humphrey*, and its own holding that section 12, rather than section 28(f)(3), delineates which cases are eligible for pretrial detention.

Respondent offers several erroneous arguments to justify this anomalous holding. First, despite being the exact practice permitted by the lower court, respondent insists that it is “alarmist hypothesizing” to think judges would “intentionally” detain people outside section 12 by “knowingly order[ing] cash bail above what a detainee can afford, regardless of the charged offense.” (Answer to Petition for Review [hereinafter “Answer”], pp. 20-21.) Second, respondent maintains that if courts *did* intentionally order unaffordable cash bail outside of section 12’s limitations, it would be consistent with *In re Humphrey* (2021) 11 Cal.5th 135, a case which forbade unaffordable cash bail. Third, respondent denies *Humphrey*’s key premise that unaffordable cash bail orders are the legal equivalent of explicit detention orders. (Answer, p. 11.) And fourth, respondent argues that if section 12 were to limit pretrial detention via unaffordable cash bail orders, *Humphrey* would be rendered irrelevant.

These arguments betray deep misunderstandings of *Kowalczyk*, *Humphrey*, and their associated constitutional principles. Petitioner addresses each of them in turn, beginning with the incompatibility of the lower court’s opinion with its own holding that

section 12 governs pretrial detention. Finally, petitioner discusses the intersection of *Kowalczyk* and *In re Harris*, S27632, which concern separate constitutional questions surrounding the deprivation of liberty pretrial and do not impact one another.

**I. THE *KOWALCZYK* OPINION AUTHORIZES TRIAL COURTS TO BYPASS SECTION 12 ENTIRELY BY SETTING UNAFFORDABLE CASH BAIL.**

Respondent concedes that “[a] judge, at any time on almost any case, could intentionally keep a defendant in custody indefinitely through the setting of” unaffordable cash bail and “bypass section 12’s requirements in this manner.” (Answer, p. 20.) This rule undermines the lower court’s own holding that section 12 controls and the government’s reading of article I, section 28(f)(3) as a “grant of judicial discretion to deny bail release in all noncapital cases” is wrong. (Opinion, pp. 684-686.) A grant of judicial discretion to impose pretrial detention in *all* cases, regardless of whether they meet section 12’s standards as defined by *White*, is precisely what *Kowalczyk*’s holding authorizing unaffordable cash bail in any case accomplishes.

Under the Court of Appeal’s opinion, there is no requirement that these unaffordable-cash-bail detentions be limited to cases in which a court could order detention without bail under section 12. A court could intentionally detain someone by setting unaffordable cash bail when they stand accused only of misdemeanors or nonviolent felonies. It could intentionally detain someone by setting unaffordable cash bail without finding that the State had put forward evidence of guilt that would be sufficient to sustain a conviction on appeal. (*White, supra*, 9 Cal.5th at p. 616.) It could intentionally detain someone by setting unaffordable cash bail without finding a

“substantial likelihood that the defendant’s release would result in great bodily harm to others.” (*Ibid.*) And, even in cases in which a person may meet the standards for pretrial detention under section 12, it could simply set unaffordable cash bail rather than conduct an additional analysis under section 12 to justify a formal detention order. In other words, the range of defendants who may be detained pretrial under the lower court’s opinion is just the same as it would be had the lower court found section 12 had been silently repealed, leaving section 28 to control.

Nevertheless, respondent claims that petitioner’s concern that “rogue judges” (Answer, p. 18) would actually detain people outside section 12 via unaffordable cash bail is “entirely speculative and offered with no support beyond alarmist hypothesizing” (*Id.* at p. 21.) This argument is badly confused. Far from relying on “rogue judges,” this practice is *precisely* what *Kowalczyk* endorses.

The lower court acknowledges that *Humphrey* creates an affirmative duty to inquire into a person’s ability to pay before setting unaffordable cash bail. (Opinion, p. 27.) But it held that courts should do so in order to knowingly and intentionally detain them via a cash bail order they cannot afford. *Kowalczyk* would allow courts to set unaffordable cash bail only after finding that “no conditions short of *detention*” “could reasonably protect the state’s interests in assuring public and victim safety and the arrestee’s appearance in court.” (*Ibid.* [emphasis added.]) In other words, according to the lower court, not only may courts set unaffordable cash bail, but they may *only* do so in cases in which they are intentionally using the cash bail to detain someone pretrial, after finding that their *detention* is necessary.

Such behavior would not be that of “rogue judges [disregarding] the law and act[ing] on their own prerogative to keep detainees in custody without conducting a lawful analysis,” as respondent pontificates. (Answer, p. 18.) Rather, the Court of Appeal’s opinion in this case renders section 12 and, this court’s careful analysis of its requirements in *In re White*, completely irrelevant to the “lawful analysis” surrounding pretrial detention.

## II. RESPONDENT MISCHARACTERIZES *HUMPHREY*.

Respondent mischaracterizes several critical aspects of *Humphrey* in order to obfuscate its obvious tension with the lower court’s ruling. For three reasons, this effort is unavailing.

First, contrary to respondent’s assertion, *Humphrey* does not suggest that trial courts have authority to detain arrestees by means of unaffordable cash bail. (Answer, p. 10; see *Humphrey, supra*, 11 Cal.5th generally.) *Humphrey* affirms that due process and equal protection allow “detention” and “refusing pretrial release” given appropriate findings, but it nowhere authorizes conditioning pretrial release on an unattainable financial condition. (See, e.g., *Humphrey, supra*, 11 Cal.5th at p. 143.) Respondent’s interpretation to the contrary is utterly lacking in support. In fact, earlier this year, the Second District Court of Appeal held in *In re Brown* (2022) 76 Cal.App.5th 296 that “setting [unaffordable] bail knowing full well that it was the equivalent of a pretrial detention order—is directly at odds with the requirements for a constitutionally valid bail determination as articulated in *Humphrey*.” (*Id.* at p. 306.) Respondent ignores *Brown*, and this glaring split in authority, entirely.

Second, *Humphrey* unequivocally held that an unaffordable money bail order is the functional equivalent of an explicit detention order. Respondent contends that the practice of denying bail is “readily distinguished from the setting of bail above that which a detainee can afford”, but fails to specify *how* the two practices are distinguishable other than in name. (Answer, p. 17.) In so doing, respondent ignores the clear language in *Humphrey* that equates detention via unaffordable bail with a denial of bail. For example, the *Humphrey* court used the term “effectively detain” to describe a defendant who remained in jail because they could not afford to post cash bail. (*Humphrey, supra*, 11 Cal.5th at p. 143.) It also states that: an “arrestee’s fundamental right to pretrial liberty . . . generally protects an arrestee from being subject to a monetary condition of release the arrestee can’t satisfy . . .”. (*Ibid.*) And *Humphrey* expressly refers to unaffordable cash bail order as “the functional equivalent of a pretrial detention order.” (*Id.* at p. 151.) Thus, the plain language of *Humphrey* indicates that detention on unaffordable bail is one and the same as a denial of bail. This is in line with prior cases holding that once bail is authorized, an unaffordable sum is “the functional equivalent of no bail.” (*In re Christie* (2001) 92 Cal.App.4th 1105, 1109.)

Indeed, even the court below affirmed that *Humphrey* articulated the due process requirements to support an explicit order of detention, before erroneously reasoning that “*a fortiori* a bail order in an amount higher than a defendant can afford would also be appropriate” under those circumstances. (Opinion p. 29.)<sup>1</sup>

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<sup>1</sup> This reasoning fails because it ignores the right against wealth-based detention at the heart of *Humphrey*, which rests on equal protection and due process principles. (See, e.g.,

Finally, Respondent argues—without any citation or explanation—that the constitutional standards announced in *Humphrey* apply exclusively to orders of unaffordable cash bail, rather than to explicit orders of detention. (Answer, p. 15.) But this Court held in *Humphrey* that *any* order resulting in pretrial detention must comply with the state and federal due process and equal protection requirements governing pretrial detention. (*Humphrey, supra*, 11 Cal.5th at p. 143.) In denying this holding, respondent misunderstands both the content of *Humphrey* and the role of due process. This court recognized that Mr. Humphrey’s detention on unaffordable cash bail implicated his substantive due process right to pretrial liberty, in addition to his “equal protection right[] against wealth-based detention.” (*Humphrey, supra*, 11 Cal.5th at p. 151.) Hence *Humphrey* repeatedly cites *United States v. Salerno* in defining the constitutional prerequisites for orders of detention, a case that involved explicit detention orders rather than unaffordable money bail orders. (See, e.g., *U.S. v. Salerno* (1987) 481 U.S. 739, 751 [“When the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community,

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*Humphrey, supra*, 11 Cal.5th at pp. 150-151.) Given this right, even when the state may deprive a person of pretrial liberty, it may not condition that deprivation on access to cash. Because the state may not violate equal protection when depriving someone of a right consistent with due process, it does not follow “*a fortiori*” from the fact that the state may detain a person that the state may also limit such detention to the indigent. To the contrary, the United States Supreme Court has specifically rejected this reasoning when explaining why the state must provide criminal defendants with free transcripts for appeal even though “a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all.” (*Griffin v. Illinois* (1956) 351 U.S. 12, 18 [“[A] State that does grant appellate review can[not] do so in a way that discriminates against some convicted defendants on account of their poverty.”].)

we believe that, consistent with the Due Process Clause, a court may disable the arrestee from executing that threat.”], *cited in Humphrey, supra*, Cal.5th at p. 153.) *Humphrey*’s principles are therefore no less applicable to explicit detention orders, which just as surely infringe on the fundamental right to pretrial liberty, as recognized in *Salerno*.

In short, respondent’s mischaracterizations of *Humphrey* in support of his arguments against review should be rejected.

### **III. LIMITING DETENTION TO THOSE CASES AUTHORIZED BY SECTION 12 DOES NOT RENDER *HUMPHREY* IRRELEVANT.**

Respondent contends that section 12 would render *Humphrey* irrelevant. (Answer, p. 12.) Not so. Section 12 requires threshold findings to determine whether someone is eligible for pretrial detention under the state constitutional provision “specifically addressing bail,” (*Humphrey, supra*, 11 Cal.5th at p. 155) and *Humphrey* identifies additional requirements to determine whether pretrial detention comports with due process and equal protection. *Both* are necessary to justify an order of pretrial detention. This Court was clear in *Humphrey* that making the findings to justify pretrial detention under the state and federal constitutions’ due process and equal protection clauses is necessary, but not sufficient. (*Ibid.*) The significance of the question remanded to the Court of Appeal in this case was whether there are *additional* standards under the state constitution that govern pretrial detention beyond the due process and equal protection limitations announced in *Humphrey*, or whether the voters have silently repealed those standards. (*Id.* at p. 155, fn. 7.) Before a court may order pretrial detention, the government must put forward (1) evidence of guilt of a “qualifying offense” under

section 12 that would be sufficient to sustain a conviction on appeal (*White, supra*, 9 Cal.5th at p. 616); (2) in noncapital cases, “clear and convincing evidence that there is a substantial likelihood the person’s release would result in great bodily harm to others” (*Ibid*); and (3) clear and convincing evidence that no less restrictive condition or combination of conditions could reasonably protect the government’s interests in assuring victim or public safety or the person’s return to court. (*Humphrey, supra*, 11 Cal.5th at pp. 154.)

In establishing this third prerequisite, *Humphrey* is of critical importance under petitioner’s interpretation of section 12. (*Compare White, supra*, 9 Cal.5th at p. 470 [declining to determine whether that section 12 mandates consideration of less restrictive alternatives as a prerequisite to detention] with *Humphrey, supra*, 11 Cal.5th at pp. 151-52 [holding that “[pretrial] detention is impermissible unless no less restrictive conditions of release can adequately vindicate the state’s compelling interests.”]) Further, *Humphrey* offers an additional crucial procedural protection for all pretrial defendants: *Humphrey* requires an individualized inquiry into their ability to pay before setting a financial condition of release, in order to ensure that they are not unlawfully detained by an unaffordable financial condition. (*Humphrey, supra*, 11 Cal.5th at p. 151.) These are not mere “redundancies.”

In any event, an additional reason why *Humphrey* is not redundant with section 12 as interpreted by petitioner is put forward by respondent himself:

[T]his Court could have offered *Humphrey*’s “general framework” as a due process based constitutional backstop of sorts; a framework that would only be triggered should the legislature repeal section 12 at some time in the future. In such a

landscape, *Humphrey*'s framework would functionally remain dormant until repeal or amendment occurred...

(Answer, p. 12.) In other words, even if *Humphrey* does *not* expound protections in excess of section 12 in the two ways specified above, this would not be anomalous: it is commonplace that state constitutions are more protective of individual rights than the U.S. Constitution. (See e.g. *Serrano v. Priest* (1976) 18 Cal.3d 728, 765 n.43 [“While we must enforce the minimum constitutional standards imposed upon us by the United States Supreme Court’s interpretation of the Fourteenth Amendment, we are free, and we are under a duty, to develop additional constitutional rights and privileges under our ... Constitution”] [quotation omitted].) In fact, *Humphrey* expressly noted that “[e]ven when a bail determination complies with the above prerequisites, the court must still consider whether the deprivation of liberty caused by an order of pretrial detention is consistent with state statutory and constitutional law specifically addressing bail”—and that its opinion did *not* “resolve[]” that question. (*Humphrey, supra*, 11 Cal.5th at p. 155.)

In fact, this Court in *Humphrey* highlighted the possibility that detaining someone based *solely* on flight may be permitted under due process and nevertheless be forbidden by the state constitution. (*Humphrey, supra*, 11 Cal.5th at p. 153, n.6.) This possibility is not, as respondent suggests, a reason to allow courts to *bypass* those heightened protections. (Answer, pp. 15-16.) Instead, it is an acknowledgement of the fact that California voters have, three times, unequivocally affirmed that the state constitution should go beyond the federal constitution, and ensure that people who are accused only

of misdemeanor or non-violent crimes, against whom the state has not mustered sufficient evidence or whose release is not likely to result in violence, are not detained pretrial. (*See, generally*, Pet. Add'l Br. pp. 16-21.)

Nor is it the case, as respondent sensationalizes, that section 12's heightened protections leave courts with "no meaningful mechanism" to address repeated violations of "non-monetary conditions of release", allowing those "claiming indigence [to] [...] come and go from court indefinitely as he or she pleases." (Answer, p. 24 n.1.) Courts possess a well-stocked toolbox to address flight and safety concerns for those released pretrial. This includes partnering with pretrial services, social-workers and community organizations to address the root causes of someone's non-compliance or non-appearance, which are often as simple as a lack of childcare, transportation, or court-date reminders. Where justified, courts can also levy more restrictive pretrial release conditions including: stay-away or no-contact orders, participation in mental-health or substance-abuse treatment, ordering someone to reside at a different address, home-detention, residence at a locked-door in-patient treatment program, GPS ankle-monitoring, continuous alcohol monitoring devices, the suspension of drivers licenses, the seizure of passports, the freezing of assets and more. Regardless of whether someone is eligible for pretrial detention under section 12, someone who fails to appear at a court hearing may have a warrant issued for their arrest, be arrested, and then brought to court. (Pen. Code, § 978.5.) Where that failure to appear was willful, prosecutors may charge them with a new crime—a *felony*, in certain circumstances—of which they may be convicted even if proven innocent of the underlying offense. (Pen. Code, §§ 1320,

1320.5.) Violations of protective orders, restraining orders, and stay-away orders too, can be the basis of a new criminal charge. (Pen. Code, § 273.6.) And, if someone were to be released pretrial pending any felony charge, then commit a new felony offense, they would be eligible for sentencing enhancements adding an additional two years in state prison to their eventual sentence. (Pen. Code, § 12022.1.) In the most extreme circumstances, courts can summarily adjudge those who violate court-orders compelling their appearance or conditions of release guilty of contempt and sentence them to up to five days in custody. (Code of Civ. Proc., §§ 1211, 1218, subd. (a).)

Under this framework, not only do section 12 and *Humphrey* each protect distinct constitutional rights, but—contrary to respondent’s mischaracterizations—they do so in a way that allows the state to protect its interest in ensuring appearance and protecting the public safety. And the constitutional floor imposed by due process and equal protection matter regardless of what section 12 independently provides. Therefore, limiting pretrial detention to those cases outlined in section 12 vindicates both the constitutional principles in *Humphrey* and voters’ longstanding intent to ensure the enormous harms of pretrial detention are imposed only in the most serious cases where the defendant poses a threat of violence.

**IV. KOWALCZYK AND *IN RE HARRIS* CONCERN DISTINCT CONSTITUTIONAL QUESTIONS AND THEIR OUTCOMES DO NOT DEPEND ON ONE ANOTHER.**

The lower court’s opinion here has no implications for the outcome of *In re Harris*, S27632. In *Harris*, this Court will determine the specific *procedural* requirements that are triggered when the state seeks to detain someone pretrial.

*Kowalczyk* asks whether cases in which the state may seek to detain someone pretrial are *substantively* delineated by section 12. The *Kowalczyk* opinion has no impact on the issues this Court is considering in *Harris*.

### **CONCLUSION**

In *Humphrey*, this Court recognized that the long-standing practice of detaining people pretrial through the use of unaffordable cash bail was unconstitutional. In doing so, it ushered in a new framework to promote equity and transparency in pretrial detention decisions and limit the use of pretrial detention to circumstances in which it is necessary and lawful. Since that groundbreaking decision, trial courts have struggled with how to implement this Court's mandates. The *Kowalczyk* opinion only exacerbates that confusion, particularly given that it conflicts with other authority on this issue. The lower court's opinion here violates not only the language but the spirit of *Humphrey* in authorizing an expanded pretrial detention regime beyond section 12. It also eviscerates its own holding that section 12 governs pretrial detention in California, allowing courts to order pretrial detention in any case regardless of charge, evidence of guilt, or dangerousness.

This Court's guidance is needed to ensure that the constitutional principles articulated by *Humphrey* are respected in practice and that pretrial detention is imposed only sparingly, fairly, and in compliance with our state constitution. This Court should grant this petition for review.

Dated: February 27, 2023

Respectfully submitted,

\_\_\_\_\_/s/\_\_\_\_\_  
Marsanne Weese

\_\_\_\_\_/s/\_\_\_\_\_  
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**CERTIFICATE OF WORD COUNT**

I, Marsanne Weese, declare and certify under penalty of perjury that I am an attorney licensed to practice law in the State of California (SBN 232167). I certify that the attached petition with memorandum of points and authorities is prepared in 13-point Times New Roman Font and contains 3,432 words, not including captions, proof of service, verification tables, or this certificate.

Dated: February 27, 2023

\_\_\_\_\_/s/\_\_\_\_\_  
Marsanne Weese

STATE OF CALIFORNIA  
Supreme Court of California

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