

No. S277910

In the Supreme Court of the State of California

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IN RE GERALD JOHN KOWALCZYK

*Petitioner,*

On Habeas Corpus

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First Appellate District, Case No. A162977  
San Mateo County Superior Court, Case No. 21-SF-003700-A  
The Honorable Susan Greenberg, Judge  
The Honorable Elizabeth K. Lee, Judge  
The Honorable Jeffrey R. Finigan, Judge

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**ANSWER TO PETITION FOR REVIEW**

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## ISSUE

Did this Court's opinion in *In re Humphrey* reinterpret article I, section 12 to guarantee a right to pre-trial release and require courts set bail at an amount the defendant can afford?

## STATEMENT OF THE CASE

On April 8, 2021, the San Mateo County District Attorney filed a felony Complaint charging Petitioner with three felony counts of identify theft under Penal Code Section 530.5(a), one felony count of vandalism under Penal Code Section 594(b)(1), one misdemeanor count of identify theft under Penal Code Section 530.5(c)(1), and one misdemeanor count of petty theft under Penal Code Section 485. The trial court arraigned the petitioner on the complaint on April 16, 2021. The trial court set bail at \$75,000.

On May 6, the trial court heard argument regarding the petitioner's bail. Petitioner represented he could not afford \$75,000 bail and requested the court release him on his own recognizance or reduce bail to amount he could afford. The trial court denied Petitioner's request. The trial court considered Petitioners extensive criminal history, recent failures on probation and recent failures to comply with conditions of supervised release. Based on these considerations, the trial court ruled no non-financial conditions of release could ensure Petitioners presence at future court proceedings. Citing this Court's opinion in *In Re Humphrey* (2021) 11 Cal.5th 135, the trial court converted Petitioner's bail from \$75,000 to no bail.

On May 13, 2021, Petitioner's preliminary hearing concluded. The trial court found probable cause to hold Petitioner to answer on all charges alleged in the complaint except the allegation of vandalism under Penal Code Section 594(b)(1). At the conclusion of the hearing, Petitioner again moved the court to reduce bail. The court denied Petitioner's request.

On May 25, 2021, the San Mateo County District Attorney filed an information consistent with the holding order. On May 27, 2021, the trial court arraigned Petitioner on the information and set the case for trial.

On June 15, 2021, Petitioner again moved the court to reconsider bail, requesting the court release Petitioner on his own recognizance or set bail at an amount Petitioner could afford. The court denied the request, deferring to the previous judge's finding that no non-financial conditions of release could ensure Petitioner's presence at future court proceedings.

On July 6, 2021, Petitioner filed a habeas petition in the First District Court of Appeal challenging his detention.

On October 15, 2021, with the habeas petition still pending, Petitioner pled no contest to one misdemeanor count of identity theft under Penal Code Section 530.5(c)(1). The District Attorney dismissed the remaining charges alleged in the information pursuant to Petitioner's no contest plea. Petitioner was released from custody following the resolution of the case.

On March 11, 2022, with Petitioner's case complete and the issue of his custody no longer pending, the Court of Appeal dismissed Petitioner's habeas petition as moot.

On April 20, 2022, despite the real issue of Petitioner’s detainment rendered moot, Petitioner filed a petition for review in this Court. On June 22, 2022, this court granted the petition and directed the Court of Appeal to consider briefing and argument surrounding the interplay of bail provisions set forth in article I, section 12, subdivisions (b) and (c) of the California Constitution (hereinafter “section 12”), and article I, section 28, subdivision (f)(3) of the California Constitution (hereinafter “section 28”). On November 21, 2022, the Court of Appeal issued an opinion (hereinafter, “Opinion”).

Petitioner subsequently filed the instant petition for review.

## **REASONS FOR DENIAL OF THE PETITION**

### **I. THE COURT OF APPEAL’S OPINION IS CONSISTENT WITH THIS COURT’S PRECEDENT.**

Petitioner primarily objects to the Court of Appeal’s opinion, and seeks review thereof, on the basis the opinion conflicts with this Court’s recent holdings in *In re Humphrey* (2021) 11 Cal.5th 135 and *In re White* (2020) 9 Cal.5th 455. Petitioner incorrectly conflates this Court’s due process and equal protection analysis set forth in *Humphrey* with this Court’s interpretation of the statutory requirements for expressly denying bail under section 12 as set forth in *White*. A precise reading of each opinion reveals the standards are distinct, and further confirms the lower court’s opinion is consistent with both.

Section 12 contemplates a complete denial of any possibility of bail and sets forth the statutory requirements for any court to

hold a detainee in such a manner. In *Humphrey*, this court contemplated the due process and equal protection implications of holding a detainee at a bail amount beyond what the detainee can afford. (*Humphrey, supra*, 11 Cal.5th at p. 143.) Although the standards are closely related, this Court’s language in *Humphrey* established a clear distinction between the two. Such a distinction is appropriate. Section 12 does not contend to be a due process or equal protection standard, but rather, a constitutional provision subject to plain statutory interpretation.

Petitioner would have this Court’s opinion in *Humphrey* functionally amend section 12 from “shall be released on bail” to “shall be released on bail *a detainee can afford*.” The lower court correctly declined to find such an amendment to Section 12 in *Humphrey*. Accordingly, this Court should deny the petition and defer to the legislature for any potential amendment to express provisions of the California Constitution.

**A. The Court of Appeal’s opinion is consistent with this Court’s holding in *Humphrey*.**

This Court’s opinion in *Humphrey* plainly sets forth a detainee’s right under state and federal due process and equal protection principles to be free from detention based *solely* on the detainee’s ability to afford cash bail. (*Humphrey, supra*, 11 Cal.5th at p. 144.) This principle is not in dispute and is clearly restated in the lower court’s opinion in this case. (Opinion at pp. 26-27.) Yet, Petitioner would read further into *Humphrey* to contend this Court “explicitly erased” any distinction between unaffordable cash bail and a formal denial of bail as contemplated by section 12. (Petn. at p. 13.) As the lower court

found, such an argument finds no support in the text and context of *Humphrey*.

First, in *Humphrey*, this Court initiated the analysis surrounding the affordability of cash bail by stating, “[t]he common practice of conditioning freedom *solely* on whether an arrestee can afford bail is unconstitutional.” (*Humphrey, supra*, 11 Cal.5th at p. 143.) This Court elaborated that “where a financial condition is nonetheless necessary,” a detainee’s ability to pay must be weighed against the states compelling interests of protecting the community and ensuring a detainee’s presence at future court proceedings. (*Id.*) In “unusual circumstances,” the state’s compelling interests “may conflict with the arrestee’s fundamental right to pretrial liberty—a right that also generally protects an arrestee from being subject to a monetary condition of release the arrestee cannot satisfy.” (*Id.*) When such a conflict arises, a court should only detain an arrestee when the court “first find[s] by clear and convincing evidence that no condition short of detention” could reasonably vindicate the state’s interests. (*Id.*) In the “narrow circumstances” in which detention is deemed appropriate following such an analysis, the detention “doesn’t depend on the arrestee’s financial condition. Rather, it depends on the insufficiency of less restrictive conditions to vindicate compelling government interests: the safety of the victim and the public more generally or the integrity of the criminal proceedings.” (*Id.*) This Court held that detaining an accused on unaffordable bail without such an analysis “would

violate state and federal principles of equal protection and due process.” (*Id.*)

As the lower court correctly noted, the reasoning set forth above “meaningfully restricts, but does not purport to eliminate, the traditional power of a court to set bail at an amount that may prove unaffordable, so long as the court—after undertaking an individualized consideration of all relevant factors including the defendant’s ability to pay—makes the necessary findings to support a detention.” (Opinion at p. 27.)

The lower court’s conclusion is further implied in the “general framework” this Court offered in *Humphrey* for conducting such an analysis. (*Humphrey, supra*, 11 Cal.5th at p. 152.) Notably, this Court utilized the entirety of Section IV in *Humphrey* to identify the relevant state interests at play and set forth a standard of proof that would justify an order maintaining unaffordable bail. (*Id.* at pp. 152-56.)

In setting forth this new framework, this Court settled on the clear and convincing evidence standard after turning to section 12 for guidance: “In determining what kind of threat to victim or public safety is required, we look to the standard of proof set forth in article 1, section 12 of the California Constitution.” (*Id.* at p. 153.) With respect to justifying an order for unaffordable bail based on a detainees risk of flight, this Court acknowledged the state Constitution provides little guidance regarding the type of showing necessary to demonstrate a detainee may not return to court. (*Id.*) With no guiding reference point akin to section 12, this Court again turned to a

clear and convincing evidence standard: “Our state Constitution does not explicitly state what standard of proof is required to justify pre-trial detention when an arrestee poses a flight risk. On reflection, we agree with Humphrey that the standard of proof should likewise be clear and convincing evidence.” (*Id.*)

Petitioner, in contrast, advocates for an interpretation of *Humphrey* that would essentially render Section IV of the opinion entirely redundant. Under Petitioner’s interpretation, any setting of bail above what a defendant can afford would function as a *denial* of bail, rather than a setting of unaffordable bail, and therefore trigger a section 12 analysis. Under such an analysis, unaffordable bail would only be deemed constitutional for (a) capital crimes, (b) felony offenses involving great acts of violence or sexual assault, and (c) felony offenses involving threats of great bodily injured. The Court’s considered and measured selection of the clear and convincing standard in *Humphrey* would be unnecessary because the standard is expressly written in section 12.

Further, it would never be constitutionally permissible to set bail at an unaffordable amount based on concerns regarding a detainee returning to court. Subsections (a), (b) and (c) of Section 12 make no provision for denial of bail based on concerns surrounding a defendant’s flight from the jurisdiction or past failures to appear in court. Again, Petitioner’s interpretation of *Humphrey* would render that section of the opinion essentially unnecessary absent the repeal of section 12. The illogical implications of Petitioner’s position are undeniable and plainly

contradict this Court’s language and reasoning in *Humphrey*. The lower court agreed, “reject[ing] petitioners expansive and novel reading of section 12.” (Opinion at p. 23.)

In theory, it is possible to imagine circumstances in which this Court intended Petitioner’s interpretation of *Humphrey*. In such a scenario, this 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. However, this Court made no suggestion of this intention in the opinion, nor does this scenario follow logically from any reasonable reading.

Petitioner’s position could find solid footing if this Court were to find an implied repeal of section 12 through the enactment of section 28(f)(3). Without section 12 in place, and with section 28(f)(3)’s more permissive framework controlling, the *Humphrey* analysis and general framework would be essential in addressing any “denial” of bail, whether expressly stated or resulting functionally through the setting of unaffordable bail. Section 28(f)(3) sets forth factors to be considered in setting or denying bail but does not set forth the same express framework as Section 12. Without section 12 in place, *Humphrey*, as Petitioner reads the Opinion, would provide an essential and foundational analysis protecting due process and equal protection rights. It is clear, however, Petitioner is advocating strongly

against such an implied repeal of section 12, a line of reasoning that once again renders a substantial portion of *Humphrey* redundant.

Ultimately, Petitioner is not so much asking this Court to review the lower court's opinion, which plainly and logically restates this Court's position in *Humphrey*; but instead, asking this Court to review and alter *Humphrey* itself. Such review is unnecessary. Section 12 governs the actual and total denial of any possibility of bail. It is an express provision set forth by the legislature unmoored from due process and equal protection considerations. In contrast, this Court in *Humphrey* defined the due process and equal protection parameters for evaluating the practical problem of cash bail being set at an unaffordable amount. *Humphrey* by its plain language and context instructs the two standards are not the same. Should the legislature seek to expand Section 12 to require detainees be "released on *affordable* bail," it is free to do so at any time. This Court should decline to review on this basis.

**B. The Court of Appeal's opinion is consistent with this Court's holding in *White*.**

Petitioner errs in contending the lower court's interpretation of *Humphrey* renders this Court's Opinion in *White* meaningless. *White* does not contend to address a detainee's due process or equal protection rights. This Court, in *White*, considered the precise definition of historical and potentially ambiguous language within section 12, and identified the standard a reviewing court should apply when evaluating a lower court's denial of bail under section 12. (*White, supra*, 9 Cal.5th at pp.

462-63.) Although *White*'s analysis finds some natural overlap with the "general framework" set forth in *Humphrey*, the two standards remain legally distinct.

In *White*, this Court limited its analysis to defining the standard of review an appellate court should utilize in evaluating a trial court's decision to *deny* bail under section 12. (*White, supra*, 9 Cal.5th at p.462.) To begin the analysis, this Court considered the origin of key language within section 12: "Like most states, California allows courts to deny bail [under section 12] when the facts are 'evident' and the 'presumption great.' [citations omitted] This particular phrasing predates the Union, originating in the Pennsylvania Frame of Government of 1862: 'That all prisoners shall beailable by sufficient sureties, unless for capital offences where the proof is evident and the presumption great.'" (*Id.* at p. 463.) This Court continued, "[o]ur court, in step with the broad consensus that has emerged in other states, has interpreted this odd terminology to require evidence that would be sufficient to sustain a hypothetical verdict of guilt on appeal." (*Id.*) With this definition in place, this Court next addressed the standard a reviewing court should embrace in evaluating whether evidence presented to deny bail under section 12 was sufficient to sustain a hypothetical verdict of guilt.

*White*'s analysis is limited to interpreting the language and application of section 12, specifically in the context of *denying* bail. Of note, this Court in *White* offered no reference to a detainee's "due process" or "equal protection" rights—neither term appears in the opinion. Further, this Court made no

reference to any other independent constitutional protections guaranteed to pre-trial detainees. In contrast, this Court in *Humphrey* limited its analysis to a distinct situation not implicated by section 12's plain language: the setting of bail in an unaffordable amount. Though not without some practical overlap, the two standards remain distinct.

Petitioner advocates for an interpretation of *Humphrey* that would disregard this distinction. Petitioner contends *Humphrey* held the setting of unaffordable bail amounts to a technical *denial* of bail, and therefore, any setting of unaffordable bail triggers a section 12 analysis as defined in *White*. Petitioner contends that any other interpretation renders *White* irrelevant. (Petn. at pp. 14-15.)

The lower court's opinion correctly rejected petitioner's interpretation. Ironically, it is petitioner's interpretation that would render much of *Humphrey* irrelevant. Had this court in *Humphrey* intended to legally equate unaffordable bail with an outright denial of any possibility of bail, it could have simply turned to section 12 and *White* as the template for protecting a detainee's due process and equal protection rights. Instead, *Humphrey* identified a distinct and unique general framework, implying a clear technical distinction between the statutory prohibitions against denying bail, and the due process and equal protection prohibitions against the setting of unaffordable bail.

This distinction is perhaps most underscored by *Humphrey*'s extensive analysis surrounding a detainee's risk of flight as a basis for maintaining unaffordable bail. Under Petitioner's

interpretation, a detainee's risk of flight would *never* justify the setting of unaffordable bail because section 12 offers no basis for denying bail on concern a detainee will not return to court.

*Humphrey's* extensive analysis surrounding risk of flight exclusively implies a due process and equal protection standard distinct from section 12.

Once again, Petitioner's argument betrays this petition for review not as a critique of the lower court but as a request for this Court to revisit *Humphrey* in its entirety. Petitioner seeks a functional interpretation of section 12 in which the setting of unaffordable bail is legally indistinguishable from denying any possibility of bail. *Humphrey* offered no such interpretation. This court should decline review and leave *Humphrey* undisturbed.

**C. The Court of Appeal's historical analysis supports a legal distinction between Section 12's protections and those defined in *Humphrey*.**

Petitioner errs in contending the lower court's historical analysis of bail conditions is flawed. Petitioner argues the lower court incorrectly cited to *Ex Parte Duncan* (1879) 53 Cal. 410 [*Duncan I*] and *Ex Parte Duncan* (1879) 54 Cal. 75 [*Duncan II*] because each case deals with the concept of excessive bail rather than due process and equal protection principles implicated in *Humphry*. (Petn. at pp. 16-17.) Petitioner condemns the lower court for relying on "relics of a historical time when the legal system was less sensitive, or, as was too often the case, actively hostile, to the plight of poor and racial minorities." (Petn. at p.

17.) Petitioner’s contention betrays a willful misreading of the lower court’s opinion.

The lower court begins the aforementioned historical analysis by offering a clear interpretation of section 12: “the most natural reading of section 12 is that a person has a right to be released upon the posting of a sufficient security which a court, in its discretion, determines is adequate to accomplish the purpose of bail, i.e., to protect the public and victim safety and to ensure a defendant’s presence in court. This construction clearly promotes the constitutionally-based policy purposes of bail, while a contrary construction that categorically requires release on affordable bail does not.” (Opinion at p. 23.)

To find support for this reading, the lower court turned to historical precedent, primarily the aforementioned *Duncan I* and *Duncan II*. However, contrary to petitioner’s contention, the lower court did not refer to a pair of 1879 cases to justify any lamentable practices described or defended therein. But, instead, to find historical context supporting an interpretation of section 12 limiting its intended application to court orders denying bail—a practice readily distinguished from the setting of bail above that which a detainee can afford. Such a distinction is necessary, not to advocate for the practice of setting unaffordable bail, but to *interpret the intended meaning of section 12*. Just like this Court did in *White*, the lower court is simply engaging in an act of statutory interpretation.

Both *Duncan I* and *Duncan II*, flawed as they may be in practice, suggest an understanding of section 12 limiting its

application to a complete denial of any possibility of bail. With that historical context in place, and without any formal amendments to section 12 statutorily guaranteeing *affordable* bail, it becomes clear the due process and equal protection standards set forth in *Humphrey* must be distinct from the statutory standards expressly stated in section 12. While due process and equal protections standards are subject to natural reinterpretation by this Court, as Petitioner notes, the intended application of express provisions such as Section 12 should remain constant barring repeal or amendment.

Petitioner attempts to obscure the lower court's basis for citing historical precedent in an effort to enflame this Court's reading of the opinion. Instead, a plain and complete reading of the lower court's opinion reveals sound and thorough reasoning consistent with this Court's approach in *Humphrey*. Review should be denied.

## **II. THE COURT OF APPEAL'S OPINION DOES NOT AUTHORIZE TRIAL COURTS TO BYPASS THE REQUIREMENTS OF SECTION 12.**

Petitioner contends the lower court's interpretation of *Humphrey* allows "courts [to] simply bypass the requirements of section 12 and *White* if they intentionally require unaffordable cash bail rather than make an explicit detention order." (Petn. at p. 15.) In essence, Petitioner expresses concern rogue judges will disregard the law and act on their own prerogative to keep detainees in custody without conducting a lawful analysis. Although the granting of judicial discretion in almost any context can pose the risk of corruption, Petitioner errs in contending the

lower court's interpretation of *Humphrey* creates circumstances uniquely ripe for abuse.

Beyond the general framework set forth in *Humphrey*, ample guidelines exist surrounding the setting of cash bail. Examples include Penal Code section 1269b instructing each county to draft and adopt a uniform bail schedule, as well as conduct an annual review of the schedule. Subsection (e) further instructs on the factors the court should consider in establishing such a schedule. Penal Code section 1275 further identifies factors a court should consider in deviating from the uniform schedule. Various other code sections identify key procedural opportunities for detainees to challenge their bail setting (*See e.g.* Pen. Code sections 1270.2, 1270.25, 1269b, 1273, 1277, 1476, 1538.5(k).) When a detainee petitions for review of a trial court's bail setting, the reviewing court examines the trial court's reasoning for abuse of discretion. (*See In re Christie* (2001) 92 Cal.App.4th 1105, 1107.) The trial court's record on review "shall contain more than mere findings of ultimate fact or recitation of the relevant criteria for release on bail; the statement should clearly articulate the basis for the court's utilization of such criteria." (*In re Avignone* (2018) 26 Cal.App.5th 195, 204.) These regulations and rules are not exhaustive, but provide an example of the extensive regulation of cash bail in place prior to, and after, *Humphrey*.

Nevertheless, the possibility for judicial abuse exists any time a judge is granted some discretion to rule. The setting of bail is no different. Procedures like those outlined above provide guidance in the setting of bail, work to limit arbitrary bail

determinations, and set forth standards reviewing courts use to correct abuse and error in the setting of bail. But no procedure, save the setting of a uniform schedule for release and detainment, can eliminate the risk of rogue judges abusing their authority to issue orders in violation of express penal code sections, constitutional provisions, or this court's holdings.

Here, Petitioner errs in contending this landscape will suffer a dramatic shift should the lower court's interpretation of *Humphrey* be upheld. Petitioner expresses grave concern judges will intentionally bypass section 12's requirements and knowingly order cash bail above what a detainee can afford, regardless of the charged offense. This concern is entirely speculative. In fact, a judge could always bypass section 12's requirements in this manner. A judge, at any time on almost any case, could intentionally keep a defendant in custody indefinitely through the setting of excessive bail.

Far from exacerbating this speculative problem, the lower court's interpretation of *Humphrey* sets forth *greater* constitutional protections for a detainee under the opinion's general framework. Whereas before *Humphrey*, a court could order excessive bail justified through disingenuous reference to general factors outlined in the penal code; the same court must now consider (1) a detainee's ability to pay, (2) identify how the defendant's alleged conduct and history implicate the state's compelling interests, and (3) find by clear and convincing evidence no other non-monetary conditions of release can reasonably protect those interests. (*See Humphrey, supra*, 11

Cal.5th at pp. 154-55.) While this analysis remains less exacting than section 12's statutory analysis for denying any possibility of bail, the *Humphrey* framework substantially increased constitutional protections against judicial abuse.

This Court, in *Humphrey*, could have simply held the setting of unaffordable cash bail to be the functional and legal equivalent of denying bail. From there, this Court could have issued a much simpler opinion stating all denials of bail, both express and functional through setting unaffordable bail, are subject to a section 12 analysis. However, this Court did not utilize that approach. Instead of deferring to section 12 as set forth by the legislature, this Court identified a distinct constitutional analysis rooted in due process and equal protection. An analysis not subject to repeal or amendment by initiative or legislative action. Protections that will remain in place so long as due process and equal protection principles are upheld.

Petitioner would prefer a section 12 analysis in all cases, and to that end, contends rampant abuse will follow if the standards are not one and the same. This claim is entirely speculative and offered with no support beyond alarmist hypothesizing. In fact, *Humphrey* as interpreted by the lower court provides detainees with greater protections against improper detention than at any other time in California's history. While potential for judicial abuse continues to exist in any discretionary system, petitioner's speculative concerns should not form a basis for review.

**III. THE LOWER COURT’S OPINION DOES NOT IMPLICATE THE ISSUES THIS COURT IS CONSIDERING IN *IN RE HARRIS*.**

In *In re Harris*, the court of appeal considered the type of evidence a trial court may admit when evaluating a denial of bail under section 12. ((2021) 71 Cal.App.5th 1085, 1096.) After considered analysis, the court of appeal held proffers of evidence may be utilized to satisfy section 12’s clear and convincing evidence standard. (*Id.* at p. 1101.) The court did not specifically address the type of evidence required to satisfy a similar standard set forth in *Humphrey*. However, the court did conclude such proffers of evidence do not offend federal and state due process principles—the same principles in which a detainee’s rights under *Humphrey* are rooted. (*Id.*) This Court then granted a petition for review in *Harris* to consider the same issue: what evidence may a trial court consider when evaluating an order denying bail pursuant to section 12.

Unlike in this case, the petitioner in *Harris* is charged with willful and premeditated attempted murder, a violent felony that falls squarely within the scope of section 12, subsection (b). (*Id.* at p. 1092.) The trial court in *Harris* issued an order explicitly denying bail pursuant to section 12. (*Id.* at p. 1094.) On review, the court of appeal conducted an analysis considering the requirements of both section 12 and this Court’s general framework from *Humphrey*. Such a dual analysis was appropriate considering the two standards flow from different provisions within the California Constitution. Nevertheless, the court of appeal in *Harris* did not face the issue considered by the

lower court in this case because the charged offense in *Harris* falls squarely within section 12.

Here, Petitioner’s primary contention remains that any setting of unaffordable bail equates to a *denial* of bail under *Humphrey* and should therefore trigger the protections of section 12. Petitioner takes issue with the lower court finding distinction between each analysis. Such a distinction is relevant in this case because, prior to the issue becoming moot, Petitioner was charged with a non-violent felony. The resolution of this issue, should this Court view it as a live issue, will not have any impact on *Harris*.

Because section 12 is more exacting than *Humphrey*—requiring the allegation of a capital crime or a felony offense involving violence or the threat of violence—a lawful denial of bail under section 12 will almost certainly result in a lawful setting of unaffordable bail under *Humphrey*. In contrast, one can envision any number of lawful settings of unaffordable bail under *Humphrey* that undeniably run afoul of section 12. For example, a case such as this involving allegation of a non-violent felony in which a defendant is held at unaffordable bail based on concerns of flight.<sup>1</sup>

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<sup>1</sup> It bears mentioning that under Petitioner’s interpretation of *Humphrey* in which the setting of unaffordable bail is the legal equivalent of denying bail, a detainee charged with a non-violent felony who then claims indigence could *never* be held in custody regardless of repeated failures-to-appear or valid concerns surrounding risk of flight. Because the setting of unaffordable bail would always implicate section 12, and because a felony not

(continued...)

Because *Harris* deals with the former situation, a violent felony offense qualifying for denial of bail under section 12, the distinction at issue in this case will have no impact on the outcome of *Harris*. Should the setting of *unaffordable bail* be found proper—assuming *Humphrey*'s due process requirements are satisfied—the detention of *Harris* under section 12 would remain wholly unimpacted. On the other hand, should this Court upend its own precedent and hold unaffordable bail is the legal equivalent of denying bail for all purposes, *Harris* would again remain unimpacted. The newly implicated section 12 analysis triggered by such a holding was already conducted in *Harris* and formed the basis for the trial court order denying bail.

Because the lower court's opinion in this case does not implicate the issues this Court is considering in *Harris*, review should be denied.

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(...continued)

involving violence would never satisfy section 12, a defendant claiming indigence could come and go from court indefinitely as he or she pleases. The trial court would have no meaningful mechanism to compel an appearance should such a defendant decide to repeatedly disregard non-monetary conditions of release.

## CONCLUSION

Accordingly, Real Party in Interest requests that review be denied.

Respectfully submitted,

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February 13, 2023

**CERTIFICATE OF COMPLIANCE**

I certify that the attached ANSWER TO PETITION FOR REVIEW uses a 13-point Century Schoolbook font and contains 4,935 words.

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*District Attorney of San Mateo  
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February 13, 2023

**PROOF OF SERVICE BY MAIL**  
Supreme Court, Case No. S277910  
First Appellate District, Case No. A162977  
San Mateo County Superior Court, Case No. 21-SF-003700-A

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|---|--|
| <input checked="" type="checkbox"/> Office of the District Attorney<br>400 County Center, 3 <sup>rd</sup> Floor<br>Redwood City, CA 94063 | <input type="checkbox"/> Office of the District Attorney<br>400 County Center, 4 <sup>th</sup> Floor<br>Redwood City, CA 94063 |
| <input type="checkbox"/> Office of the District Attorney<br>1050 Mission Road<br>South San Francisco, CA 94080                            | <input type="checkbox"/> Office of the District Attorney<br>222 Paul Scannell Drive<br>San Mateo, CA 94402                     |

3. On February 15, 2023, I mailed from Redwood City, California the following documents (*specify*):

ANSWER TO PETITION FOR REVIEW

4. I served the documents by enclosing them in an envelope and (*check one*):

- a.  placing the envelope for collection and mailing following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.
- b.  depositing the sealed envelope with the United States Postal Service with the postage fully prepaid.

5. The envelope was addressed and mailed as follows:

Marsanne Weese  
255 Kansas Street, Suite 340  
San Francisco, CA 94103

CIVIL RIGHTS CORPS  
1601 Connecticut Ave NW, Suite 800  
Washington, DC 20009

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

  
\_\_\_\_\_  
Holly Sutton

STATE OF CALIFORNIA  
Supreme Court of California

**PROOF OF SERVICE**

STATE OF CALIFORNIA  
Supreme Court of California

Case Name: **KOWALCZYK (GERALD JOHN) ON  
H.C.**

Case Number: **S277910**

Lower Court Case Number: **A162977**

1. At the time of service I was at least 18 years of age and not a party to this legal action.
2. My email address used to e-serve: **rbaum@smcgov.org**
3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
ANSWER TO PETITION FOR REVIEW	Kowalczyk - Answer to petition for review

Service Recipients:

Person Served	Email Address	Type	Date / Time
Joshua Martin Office of the District Attorney	jxmartin@smcgov.org	e-Serve	2/16/2023 2:36:01 PM
Rebecca Dreyfuss Office of the District Attorney	rdreyfuss@smcgov.org	e-Serve	2/16/2023 2:36:01 PM
Avram Frey ACLU of Northern California 804789	afrey@aclunc.org	e-Serve	2/16/2023 2:36:01 PM
Katherine Hubbard Civil Rights Corps 302729	katherine@civilrightscorps.org	e-Serve	2/16/2023 2:36:01 PM
Salil Dudani Federal Defenders of San Diego	salil.dudani@gmail.com	e-Serve	2/16/2023 2:36:01 PM
Carson White Civil Rights Corps 323535	carson@civilrightscorps.org	e-Serve	2/16/2023 2:36:01 PM
Attorney Attorney General - San Francisco Office Court Added	sfagdocketing@doj.ca.gov	e-Serve	2/16/2023 2:36:01 PM
Rose Mishaan Attorney at Law 267565	rose.mishaan@gmail.com	e-Serve	2/16/2023 2:36:01 PM
Marsanne Weese Law Offices of Marsanne Weese 232167	marsanne@marsannelaw.com	e-Serve	2/16/2023 2:36:01 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

2/16/2023

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Date

/s/Roberto Galvez

---

Signature

Baum, Rebecca (212500 )

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Last Name, First Name (PNum)

San Mateo County District Attorney

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Law Firm