IN THE SUPREME COURT OF CALIFORNIA

IN RE JOHN HARRIS, JR., On Habeas Corpus.	Case No.: S272632

REPLY BRIEF ON THE MERITS

Court of Appeal Case No. A162891
San Mateo Superior Court Case No. 21-NF-002568A
The Honorable Amarra A. Lee, Superior Court Judge

Marsanne Weese (SBN 232167)
Rose Mishaan (SBN 267565)
Law Offices of Marsanne Weese
255 Kansas Street, Suite 340
San Francisco, CA 94103
Tel: (415) 565-9600
Fax: (415) 565-9601
Email: marsanne@marsannelaw.com

Attorneys for Petitioner by Appointment of the Court

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REPLY BRIEF ON THE MERITS

INTRODUCTION

In order to ensure that every defendant's fundamental right to liberty is protected, petitioner urges this Court to require that only reliable, tested information be used to support an order of pretrial detention. Further, procedural safeguards are necessary to ensure that pretrial detention is only ordered in those "narrow circumstances" when it is necessary to protect public safety. (*In re Humphrey* (2021) 11 Cal.5th 135, 143.)

In arguing that "informal modes of proof" are sufficient to meet the high evidentiary standards of article I, section 12 of the California Constitution [hereinafter "Section 12"], respondent creates strawman arguments regarding the definition of evidence. (Answer Brief on the Merits [hereinafter "Answer"], pp. 22, 29.) Respondent seeks to undermine the statutory protections of the rules of evidence by arguing that the California Evidence Code does not apply at detention hearings. (Answer, pp. 25-27.) Redefining evidence in this way risks lowering, in practice, the

high standard necessary to indefinitely incarcerate someone presumed innocent. Further, without the guidance of the Evidence Code, trial courts will arbitrarily determine who gets detained pretrial and who does not.

ARGUMENT

I. THE USE OF "PROFFER" IS INSUFFICIENT TO MEET CALIFORNIA'S HIGH EVIDENTIARY STANDARD FOR PRETRIAL DETENTION UNDER ARTICLE 1, SECTION 12 OF THE CALIFORNIA CONSTITUTION.

This Court has established that an order of detention must be based on evidence of "reasonable, credible, solid value" sufficient to sustain a hypothetical verdict of guilty. (*In re White* (2020) 9 Cal.5th 455, 463.) This exacting standard is to ensure that information used to deprive an individual of so fundamental a right as liberty is reliable. Respondent acknowledges that the reliability of the information presented to the court is central to evaluating the adequacy of pretrial detention proceedings. (Answer, p. 31.) However, respondent's argument fails to provide the protections to ensure such proceedings are, in fact, fair and reliable.

Here, respondent attempts to broaden the definition of evidence beyond what is contemplated in the Evidence Code. (Answer, pp. 22-23.) Respondent asserts that "proffer" as defined by Evidence Code section 401 is distinct from "proffer" in detention hearings. According to respondent and absent authority, detention hearing proffer is "summaries of information learned from witnesses and other sources." (Answer, p. 26.)

There is no statutory authority that supports this definition. Moreover, this asserted definition renders Evidence Code sections 402 and 403 meaningless, both undermining legislative intent and removing a safeguard to ensure the reliability of information.

Respondent attempts to support this view by referring to other types of criminal proceedings. For example, respondent argues that "strict rules of evidence" do not govern at preliminary hearings allow. (Answer, p. 27.) This is incorrect. The Evidence Code fully applies to preliminary hearings, with one exception: the allowance of testimony as to one level of hearsay by qualified police officers, under Penal Code section 872, subdivision (b). The statutory exception is narrowly applied only to preliminary hearings, which importantly require a lower standard of proof than detention hearings. Further, the fact that the Penal Code section 872 contains an exception to Evidence Code section 1200 indicates that section 1200 is otherwise applicable. This is consistent with Evidence Code section 300.

Respondent then argues that Evidence Code section 300 does not apply to detention hearings, as Penal Code section 1319 allows the court to consider information presented by the prosecution. (Answer, p. 27.) The error in this argument is that Penal Code section 1319 has no explicit exception to Evidence Code section 300, unlike Penal Code section 872. Moreover, Penal Code section 1319 refers to own recognizance release, not

pretrial detention.

Detention proceedings under Section 12 are different proceedings than those for determining under what terms a person must be released, governed by Penal Code sections 1275 and 1318, et seq., as well as *Humphrey*. Penal Code section 1319 falls under Article Nine of the Penal Code, which establishes the "procedure related to release on own recognizance." The only Penal Code section that arguably carves out an exception to Evidence Code section 300 is section 1275, which allows the court to consider a pretrial services risk assessment report "[i]n setting, reducing, or denying bail." (Pen. Code, § 1275.) That narrow exception to the rules of hearsay, however, in no way renders Evidence Code section 300 inapplicable to detention proceedings.

Respondent repeatedly refers to "trial-like procedures" and "evidence that would be admissible at trial." (Answer, pp. 9, 22, 31.) Yet, the Evidence Code does not define evidence "admissible at trial." It simply refers to evidence. This is an attempt to create a lesser standard of evidence that is not authorized by the Evidence Code. Respondent similarly redefines procedural safeguards, such as those discussed in *United States v. Salerno* (1987) 481 U.S. 739, 742-743, as specific to trials, but provides no support for this distinction.

Further, respondent ignores *In re White*, *supra*, 9 Cal.5th at pp. 463-

464, which demonstrated a need for evidence greater than proffer to sustain a detention order. Specifically, this Court held that, "what counts under the standard for upholding the trial court's decision here is not whether there's any evidence at all supporting the defendant's contention. It's whether a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*Id*. at p. 465.) Such a standard cannot be met by untested information, such as the proffer presented at petitioner's hearing. Respondent's attempts to redefine evidence used in a detention hearing undermines the reliability of the information and effectively lowers the clear and convincing evidence standard.

II. THE USE OF "PROFFER" AT PETITIONER'S DETENTION HEARING VIOLATED HIS RIGHT TO DUE PROCESS.

Respondent argues that existing procedural safeguards are sufficient to meet the requirements of due process, thus permitting proffered evidence at detention hearings. (Answer, pp. 33-34.) Respondent further urges this Court to disregard petitioner's arguments in favor of increased procedural safeguards—ignoring precedence that the adequacy of proffered evidence necessarily depends on the presence of additional procedural safeguards. (Answer, p. 39-41; *Salerno, supra,* 481 U.S. at pp. 751-752.)

A. Due Process Requires Additional Procedural Safeguards before Proffer Can Be Relied Upon.

Respondent asserts that petitioner's discussion regarding procedural

safeguards is "not properly presented." (Answer, p. 39.) This argument ignores *Salerno*'s holding, that proffer complies with due process in the context of a statute with "extensive" procedural safeguards. (*Salerno*, *supra*, 481 U.S. at pp. 743, 751-752.) The Court of Appeal erroneously declined to decide which, if any, of these safeguards are necessary to comply with due process. (*In re Harris* (2021) 71 Cal.App.5th 1085, 1098, fns. 5, 6.)

Respondent argues that existing procedural protections are sufficient, such as the right to counsel, the clear and convincing evidence standard, the right to present evidence, and the prosecutor's duty of candor. (Answer, pp. 33-34.) A prosecutor's duty of candor is not a safeguard. It is a rule of professional conduct placed on all attorneys, both prosecution and defense. Placing the responsibility for safeguarding a defendant's right to liberty on the prosecution presents a clear conflict of interest. Even ethical prosecutors have blind spots and are interested in a particular outcome in a criminal case. Secondly, there is no remedy for a violation of this duty of candor, such as there is for a *Brady* violation. (See *Brady v. Maryland* (1963) 373 U.S. 83.)

Other purported safeguards highlighted by respondent are likewise insufficient to guard against erroneous deprivation of liberty. Respondent notes that a defendant may present his own evidence to the court. In order

for this safeguard to have any real benefit to the defendant, it must be accompanied by the right to notice, discovery, and the opportunity to challenge the prosecution's evidence. For example, here, the prosecution asserted that the DNA evidence linking petitioner to the charged crime provided sufficient proof to establish the "facts evident and presumption great" standard. However, petitioner could not challenge that assertion, as he did not have access to the DNA evidence. (Petition, Exh. I, pp. 97-98, 100.) Had petitioner been provided with that discovery, he might have had an opportunity to challenge the strength of the evidence that the court was relying on in detaining him. Petitioner was also not provided reports regarding petitioner's ex-lovers, who provided information on petitioner's scarf fetish and violent sexual fantasies. (Petition, Exh. I, p. 100.) Had he been provided proper discovery before the hearing, he would have at least had the opportunity to challenge such claims.

Other safeguards identified by respondent—such as the requirement that judges set forth their findings on the record and in the minutes, and the availability of review through a petition for habeas corpus—do nothing to ensure the accuracy of the information relied upon by the court. (Answer, p. 34.) Further, habeas proceedings are often lengthy and there is no requirement that courts act on them promptly. Given that this case involves *pretrial* detention, many, if not most, habeas petitions will become moot

before they ever get heard. Petitioner's case is an example of this: petitioner has been detained pretrial for over year while his habeas petition has been litigated.

The procedural safeguards identified by petitioner serve to not only ensure the reliability of information used to detain a defendant, but also comply with *Humphrey*'s mandate that pretrial detention should be used only in unusual circumstances and in compliance with constitutional requirements. (*Humphrey*, *supra*, 11 Cal.5th at p. 143.)

B. Case Law Supports Petitioner's Argument that the Use of Proffer Here Violated Due Process.

Respondent focuses on non-controlling authority from other jurisdictions to argue that "Harris offers no reason to depart from these authorities." (Answer, p. 36.) The cases cited by respondent rely on bail reform statutes. Respondent relies on *State ex rel. Torrez v. Whitaker* (N.M. 2018) 410 P.3d 201 from New Mexico and various federal cases. Both jurisdictions allow for the use of proffers at detention hearings under specific statutory or constitutional schemes. In New Mexico, the constitutional amendment discussed in *Whitaker* specifically requires a noticed hearing and expedited appellate review. The *Whitaker* Court acknowledged the need for safeguards, holding that "[d]ue process requires a meaningful opportunity to cross-examine testifying witnesses or otherwise challenge the evidence presented by the state a pretrial detention

hearing." (*Id.* at p. 216.) The court also noted that New Mexico's constitutional provisions allowing for pretrial detention "were modeled in large part on federal detention statutes, using strikingly similar language." (*Id*. at p. 217.)

Similarly in *State v. Zhukovskyy* (N.H. 2021) 174 N.H. 430, the court analyzed whether the New Hampshire detention statute required an evidentiary hearing. California has no analogous statute authorizing the use of proffers in detention proceedings or ensuring additional safeguards at those proceedings.

Other jurisdictions require similar safeguards to those identified by petitioner. For example, in *Simpson v. Owens* (2004) 207 Ariz. 261, 265, the Arizona Supreme Court concluded that a "full and adversarial bail hearing" was necessary before the defendant could be detained without bail under the state's Constitution. At the defendant's initial appearance, the prosecutor requested that bail be denied. (*Id*. at p. 264.) No evidence was presented, but the prosecutor proffered several pieces of information to show that "the proof is evident or the presumption great," and that the defendant was a flight risk. (*Ibid*.) After a lengthy discussion of the burden and standard of proof required for a no-bail detention, the court held that:

> [T]he court should admit only such evidence as is material to the question [of whether the proof is evident or presumption great that the accused committed one of the constitutionally-

> enumerated crimes]. The accused is entitled to counsel. The parties must have the right to examine/cross-examine the witnesses and to review in advance those witnesses' prior statements that are written. The court must make a determination on the record whether there is evident proof or great presumption that the accused committed one of the statutory charges, including the facts it finds and the analysis it employs.

(*Id*. at pp. 275-276.)

Similarly, the Utah Supreme Court held that in detention hearings in capital cases, the accused must be given adequate notice to prepare for the hearing; the accused may bring his own evidence and witnesses; and the accused may cross-examine the prosecution's witnesses. (*State v. Kastanis* (Utah 1993) 848 P.2d 673, 676.) The *Kastanis* Court further held that reliance on the preliminary hearing transcript at a bail hearing was error, as "a defendant usually does not present any evidence" at a preliminary hearing and in fact the defendant did not present evidence. (*Ibid*.) Other jurisdictions have adopted similar evidentiary procedures. (See, e.g., *Massey v. Mullen* (1976) 117 R.I. 272, 275-276, holding that a *Miranda*-deficient confession, or otherwise "constitutionally-infirm evidence" was inadmissible at detention hearings.)

While placing great weight on the due process analyses of other jurisdictions, respondent fails to engage with California precedent indicating that information presented through statements by counsel cannot

meet the requirements of due process. In *People v. Naidu* (2018) 20 Cal.App.5th 300, 315, the court held:

> Having established that the due process clauses, both state and federal, require some presentation of evidence in the element of danger to the public, we now examine whether that rule was satisfied in this case. We conclude it was not. No witnesses testified at the bail hearing. While CSLB filed a written request for suspension of petitioner's business license, it submitted very little that might even be construed as evidence that the public would be in danger if petitioners retained use of their business license.

Respondent seeks to distinguish *Naidu* by arguing that the offer of proof in that case was less reliable than that presented here, as the "prosecution presented a detailed summary of facts it had gathered and explained the sources for those facts." (Answer, p. 33.) But this distinction ignores *Naidu's* holding. The *Naidu* Court held specifically found that "statements by counsel" are not evidence and not sufficient to deprive pretrial defendants of a substantial interest. (*Naidu, supra*, 20 Cal.App.5th at p. 313.) Therefore, it is not merely the quality of the information that the court took issue with, but the fact that it was presented through statements by counsel and not evidence.

Rather than address *Naidu*'s holding, respondent relies on a single statement that "a license suspension, could, in at least some cases, be supported by no more than the return of an indictment or the filing of an

information." (*Naidu*, *supra*, 20 Cal.App.5th at p. 314.) This citation is devoid of context. First, in petitioner's case, neither an indictment nor an information has been returned or filed. Second, the *Naidu* Court went on to explain this distinction by reviewing California's criminal procedure and noting that an indictment or information "is supported by conclusions drawn by a magistrate or grand jury after presentation of evidence. In contrast, the complaint in a felony case *is not supported by evidence* but instead begins the process of introducing it." (*Id.* at p. 316, *emphasis added*.) Lastly, the *Naidu* Court's qualifier, "in some cases," indicates that even in a case where an indictment has been returned or an information filed, the record may still be insufficient to support a license suspension.

Since California does not have a statute that directly addresses detention hearing procedure, using proffers cannot be deemed compliant with due process without the necessary safeguards identified by petitioner. As such, petitioner's right to due process was violated here.

III. REQUIRING PROCEDURAL SAFEGUARDS AT A DETENTION HEARING DOES NOT PLACE AN UNDUE BURDEN ON THE GOVERNMENT.

Respondent argues that "practical concerns" regarding the ability of the parties to present evidence at such an early stage of criminal proceedings is untenable. (Answer, p. 23.) Respondent's concern about witness' inability to attend a scheduled detention hearing is misplaced,

considering that those witnesses could be required to attend a preliminary hearing within ten days of arraignment. The prosecution further has the power to subpoena witnesses and documents and should be prepared to defend its request for pretrial detention at the first opportunity. Even cases cited by respondent indicate that requiring such safeguards is feasible. For example, in *In re Nordin* (1983) 143 Cal.App.3d 538, 542, three live witnesses testified at the defendant's detention hearing. Therefore, the practical concerns cited by respondent are insufficient to deny petitioner necessary procedural safeguards.

CONCLUSION

Statements by counsel in lieu of evidence are insufficient to meet the constitutional standard for pretrial detention. Section 12 requires evidence of a "reasonable, credible, and solid value" sufficient to sustain a hypothetical verdict of guilt. Further, the use of a "proffer," without procedural safeguards, violated petitioner's right to due process. This Court therefore should reverse the lower court's decision holding that proffered evidence is sufficient to meet the standards of Section 12 and state and federal due process rights.

//

Dated: June 28, 2022

Respectfully Submitted,

MARSANNE WEESE
Attorney for Petitioner

ROSE MISHAAN
Attorney for Petitioner

WORD COUNT CERTIFICATE

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 brief contains 2,976 words, according to the word count produced by the Microsoft Word program used to produce this document, not including the Table of Contents and Table of Authorities and that the brief uses a Times New Roman size 13 font.

Dated: June 28, 2022

MARSANNE WEESE
Attorney for Petitioner

STATE OF CALIFORNIA
Supreme Court of California

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