1. Jeff Adachi
2. Public Defender

City and County of San Francisco

1. Matt Gonzalez Chief Attorney
2. Attorney First MI Last, SBN #######
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4. San Francisco, CA 94103

7 Direct: (415)

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8

9 Attorneys for Defendant

# **Superior Court of California**

1. **City and County of San Francisco**

12

# 13 **People of the State of California,**

14

1. Plaintiff,
2. vs.

17

# **Defendant,**

18

19 Defendant.

20

Court No:

# **Motion for Formal Bail Hearing and Order Releasing Defendant on Own Recognizance or Bail Reduction**

Date: Time: Dept:

1. The First District Court of Appeal in *In re Humphrey*, recently held
2. that when a court sets bail, it must inquire into and determine a
3. defendant’s ability to pay, consider nonmonetary alternatives to money
4. bail, and, if the court determines that a defendant cannot afford the bail 25

26

* 1. the court finds necessary, follow the procedures and make the findings
  2. for a valid order of detention.1
  3. Defendant moves the court for a bail hearing and an order granting
  4. own-recognizance release or release on appropriate financial or non-
  5. financial conditions. Money bail, as set, is beyond Defendant’s ability to
  6. pay, operating as a no-bail detention order despite no court having made
  7. the findings required under state and federal law for a valid detention
  8. order. Because Defendant should not be detained before trial, this court
  9. must order release on conditions narrowly tailored to the government’s

Defendant has made no

* 1. interests in court appearance and public safety.2 11

IF NEEDED]

prior applications for own recognizance release or reduced bail. [MODIFY

12

# 13 **Statement of the Case and Facts**

Defendant is facing a pending felony/misdemeanor in Court

14

Number(s).

**and/or**

The incident allegedly occurred as follows

15 .

Defendant is **[also]** facing a pending misdemeanor/felony motion to

16

1. revoke in Court Number(s). Brief description.

# **Statement of Facts about Defendant**

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1. 1 *In re Humphrey* (2018) 19 Cal.App.5th 1006, 1014, review granted May 23, 2018, S247278. Under California Rules of Court, rule 8.1115(e)(1),
2. published appellate court opinions pending review in the California
3. Supreme Court “may be cited for potentially persuasive value.”

2 Several judges in the Northern District of California have granted writs

1. of habeas corpus on similar grounds to *Humphrey*. See, e.g., *Coleman v. Hennessy* (N.D. Cal. Jan. 5, 2018) No. 17-CV-06503-EMC, 2018 WL
2. 541091 at \*1; *Rodriguez-Ziese v. Hennessy* (N.D. Cal. Dec. 6, 2017) No.

17-CV-06473-BLF, 2017 WL 6039705, at \*3; *Reem v. Hennessy* (N.D.

26 Cal. Nov. 29, 2017) No. 17-CV-06628-CRB, 2017 WL 6765247, at \*1.

1

where, raised where, raised with/by whom, how long, elementary and

[Begin the narrative. INSERT SOME BASICS on their history: born

2

middle and high school, etc.]

3

EXAMPLE EXAMPLE

* 1. Family and Friends.
  2. Education and employment.
  3. Community

DEFENDANT

EXAMPLE

EXAMPLE

7

religious organizations.

has stable housing in San Francisco

OR

and/or

1. is needed at home to support .

children/ailing mother

DEFENDANT

# **Memorandum of Points and Authorities**

1. The due process and equal protection clauses of the Fourteenth
2. Amendment require this court to make certain findings with a
3. heightened evidentiary standard before ordering release conditioned on
4. payment of money bail. A financial condition of release, which should
5. only be ordered to address flight risk concerns, requires the court to
6. make findings about the defendant’s ability to pay and alternative, non-
7. financial conditions of release.3 Where the court’s concern is public
8. safety, the court should either order the defendant detained after making
9. the required findings, or require appropriate, non-financial conditions of
10. release.4 This court should find that the requirements for pretrial
11. detention are not met and order release either on Defendant’s own
12. recognizance or on appropriate, narrowly tailored conditions.

# **1. When setting money bail, the court should make findings**

1. **regarding Defendant’s ability to pay and non-financial**

24

25

26 3 *Humphrey*, *supra*, 19 Cal.App.5th at 1025. 27 4 See *id*. at 1028-29.

# 1 **alternative conditions of release that focus on court attendance.**

2

In determining whether a financial condition of release should be

3

imposed to address flight risk concerns, the court should make certain

4

findings to ensure that the financial condition does not result in

5

detention solely based on wealth status. “[A] court may not order pretrial

6

detention unless it finds either that the defendant has the financial

7

ability but failed to pay the amount of bail the court finds reasonably

8

necessary to ensure his or her appearance at future court proceedings;

9

or that the defendant is unable to pay that amount and no less

10

restrictive conditions of release would be sufficient to reasonably assure

11

such appearance; or that no less restrictive nonfinancial conditions of

12

release would be sufficient to protect the victim and community.”5

1. **A. Defendant does not have the ability to pay bail amount as set.**
2. When requiring a financial condition of pretrial release, the court
3. should determine whether that condition of release will cause
4. Defendant’s detention because of inability to pay. This finding is “critical”
5. in order to “guard against improper detention based only on financial
6. resources.”6 “[A] court which has not followed the procedure and made
7. the findings required for an order of detention must, in setting money
8. bail, consider the defendant’s ability to pay and refrain from setting an
9. amount so beyond the defendant’s means as to result in detention.”7
10. Here, bail is $ \_. 23

24 5 *Id.* at 1025.

25 6 *Id.* at 1036.

7 *Id.* at 1037 (citing *Bearden v. Georgia* (1983) 461 U.S. 660; *United*

26 *States v. Salerno* (1987) 481 U.S. 739; *Turner v. Rogers* (2011) 564 U.S. 431).

27

1 is indigent.

that pays minimum wage/supports family members/etc.

Defendant

2

Even a

S/he is homelessness/unemployed/works a job

1. relatively small secured financial condition of release will cause
2. Defendant’s detention. The court should release Defendant on non-
3. financial conditions that will ensure court appearance.
4. **B. Less restrictive conditions of release are adequate to serve the government’s interests.**

7

“If the court concludes that an amount of bail the defendant is unable

8

to pay is required to ensure his or her future court appearances, it may

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impose that amount only upon a determination *by clear and convincing*

10

*evidence* that no less restrictive alternative will satisfy that purpose.”8

11

The clear and convincing standard of proof is required because an

12

arrestee’s pretrial liberty interest, protected under the due process

13

clause, is “a fundamental interest second only to life itself in terms of

14

constitutional importance.”9

15

Defendant

A financial condition of release is not required. Based on ’s

16

history

Defendant

and community ties, this court should release on

17

his/her

own recognizance and, if necessary, impose a non-financial

18

Point to evidence showing that Defendant is not

condition of release. a

19

flight risk, e.g. Public Safety Assessment (“PSA”) Report indicates that

20

PSA recommends “Release…

Defendant has no prior failures to appear10

/

21

22

8 *Humphrey, supra*, 19 Cal.App.5th at 1037 (emphasis added);

1. reasonable bail conditions were allowed in *In re McSherry* (2003) 112

Cal.App.4th 856 (misdemeanor: stay-away order); *Gray v. Superior Court*

1. (2005) 125 Cal.App.4th 629 (felony: no-medical-practice order).
2. 9 *Id.* (quoting *Van Atta v. Scott* (1980) 27 Cal.3d 424, 435).
3. 10 See Exhibit LETTER: Public Safety Assessment (“PSA”) Report –
4. CLIENT.
5. 11/Defendant has close ties to the community because of family/job/etc.
6. The facts favor own-recognizance release.
7. There are numerous non-financial conditions of release adequate to
8. serve the government’s interests in court appearance. This court can
9. order reminders/check-ins/ankle monitoring/etc. These less-restrictive
10. alternatives are effective and narrowly tailored to secure Defendant’s
11. court appearance.

# **2. Bail determinations should be based on individualized**

1. **criteria.**
2. In determining whether a financial condition of release is required, the
3. court should not simply apply the bail schedule to the charges.
4. “[D]ecisions that may result in pretrial detention must be based on
5. factors related to the individual defendant’s circumstances.”12 Because
6. bail schedules “represent the antithesis of the individualized inquiry
7. required before a court can order pretrial detention,”13 this court should
8. not exclusively rely on the bail schedule. Once this court determines that
9. public safety and victim safety do not require pretrial detention and
10. defendant should be released, “the important financial inquiry is not the
11. amount prescribed by the bail schedule but the amount necessary to
12. secure the defendant’s appearance at trial or a court-ordered hearing.”14
13. With this in mind, the court should not use the statutory bail
14. schedule as a guideline because scheduled bail unconstitutionally (due
15. 11 See Exhibit LETTER: Public Safety Assessment (“PSA”) Report –
16. CLIENT.
17. 12 *Humphrey*, *supra*, 19 Cal.App.5th at 1041. 26 13 *Id.* at 1042.

27 14 *Id.*

* 1. process and equal protection violations) sets bail without regard to
  2. individualized consideration resulting in the detention of the indigent.15 If
  3. this court determines that a financial condition of release is necessary to
  4. ensure court appearance, the individualized circumstances require that
  5. money bail be set in a minimal amount. Just focusing on the severity of
  6. the sentence is improper in adjudging likelihood of reappearance; the
  7. court should balance individualized factors: ties to the community, prior
  8. court attendance record to decide.16 9 [

Indictment Felonies

NOTE remove if motion is not being filed POST PX- D22 or on

Under Penal Code section 1289, the Court, upon

10 ]

showing good cause can increase or reduce bail after the defendant has been admitted to bail upon indictment or information.17 However, good

11

12

cause must be founded on changed circumstances relating to the

13

defendant or the proceedings, not on the conclusion that another judge

14

committed legal error in previously setting bail.18

15

16

17

1. 15 “For poor persons arrested for felonies, reliance on bail schedules
2. amounts to a virtual presumption of incarceration. According to a San Francisco study, last year 85 percent of the inmates of the county jail
3. were awaiting trial and ‘[o]f these, 40–50% could be released if they could afford to pay their bail.’ (The Financial Justice Project, Office of the
4. Treasurer & Tax Collector of the City and County of San Francisco, Do the Math: Money Bail Doesn’t Add up for San Francisco (June 2017) p.
5. 4.)”(*Humphrey*, *supra*, 19 Cal.App.5th at 1044.
6. 16 *Humphrey*, *supra* at 19 Cal.App.5th at 1038, citing *In re Pipinos* (1982) 33 Cal.3d 189, 198-199 (bail on appeal reverse despite findings that Pipinos was a “‘substantial flight risk,’” representing “‘some risk to society,’” and did not have a “‘substantial likelihood of success on

24

1. appeal.’”
2. 17 Penal Code section 1289.
3. 18 *See In re Alberto* (2002) 102 Cal.App.4th 421, 430.

# **3. Public Safety: This court should address any public safety concerns by requiring appropriate non-monetary**

* 1. **conditions of release.**
  2. Where a court’s concern is public safety, it can order a defendant
  3. detained after making the required findings under California
  4. Constitution article I, section 12(b) or (c) [NOTE: only if client is eligible
  5. for detention under California Constitution article I, section 12—check
  6. whether charged with felony involving violence/threats], or it can order
  7. appropriate non-financial conditions of release. A court should not,
  8. however, set a financial condition of release to address public safety
  9. concerns. Because the findings required for an order of detention cannot
  10. be made, the court should address any public safety concerns through
  11. non-monetary conditions of release.
  12. **A. The government’s interest in public safety does not require pre-**
  13. **trial detention here.**
  14. The court can only detain a felony defendant (misdemeanants cannot
  15. be detained without bail pretrial) based on public safety if it makes the
  16. findings required by article I, section 12 of the California Constitution.
  17. Before bail is set or denied under section 12(b) or (c),19 the detainee is
  18. entitled to a full evidentiary hearing, and the court should make several
  19. substantive findings.20 First, the court should determine whether the
  20. defendant is charged with an offense that fits into the category of “felony

22

19 Article I, section 12(a) applies only to capital crimes and is thus not

1. applicable to Defendant’s case.
2. 20 *See Humphrey*, *supra*, 19 Cal.App.5th at 1023 (“Subsections (b) and (c) of section 12 provide that a court cannot deny admission to bail to a
3. defendant charged with violent acts or who threatened another with great

bodily harm, except on the basis of “clear and convincing evidence” that

1. there is “a substantial likelihood the defendant’s release would result in
2. great bodily harm to others.”).
3. offenses involving acts of violence on another person” under section 12(b)
4. or 12(c), whether the defendant is charged with any felony offense and
5. whether the defendant is alleged to have threatened another person with
6. “great bodily harm.” Second the court must make an individualized
7. determination that the proof against the arrestee is substantial.21 And
8. third, the State must prove by “clear and convincing evidence” that
9. anything short of complete pretrial incapacitation would create “a
10. substantial likelihood the person’s release would result in great bodily
11. harm.”22 Only if these findings are made can this court order Defendant’s
12. detention based on public safety.
13. This court should not detain Defendant under article I, section 12(b) 12 or 12(c).

applicable) or threat of great bodily injury. Second, the proof against

First, argue that the offense involves no act of violence (if

13

defendant is not substantial because identity issue/alibi/etc. (if

14

applicable). Finally, the state cannot prove by clear and convincing

15

evidence that defendant’s release would cause great bodily harm. Include

16

a sentence with evidence about defendant’s unlikelihood to harm others.

17

1. **B. This court should not set money bail based on public safety**
2. **concerns but can address any legitimate concerns by requiring appropriate non-monetary conditions.**
3. If the court does not order defendant’s detention under article I,
4. section 12, it cannot set money bail in response to public safety 22
5. 21 *In re Nordin* (1983) 143 Cal.App.3d 538, 543 (stating standard for “when the facts are evident or the presumption great” is met when there
6. is substantial evidence to sustain a verdict or the “quantum of evidence
7. is that necessary to sustain a conviction on appeal”).

22 This standard requires that evidence be “so clear as to leave no

1. substantial doubt” or, put differently, “sufficiently strong to command
2. the unhesitating assent of every reasonable mind.” *Id.*
3. concerns. As the Court of Appeal and Judge Breyer of the Northern
4. District of California have held, money bail should not be imposed in
5. response to concerns about public safety.23 Money bail can have no
6. deterrent effect on new criminal activity as a matter of law because
7. committing a crime while out on money bail does not result in forfeiture
8. of bail.24 Money bail cannot create a financial deterrence against new
9. crimes. As a matter of law, the court’s only valid interest in imposing
10. money bail is reasonably assuring appearance.

Defendant

1. poses no significant risk to public safety or the victim’s

Public Safety Assessment (“PSA”) Report

1. safety. 11

offenses/etc.25

recommends “Release… 26

12

e.g. age/low score on PSA/character evidence

13

14

has

In addition, the

Other facts suggesting s/he is not dangerous,

Defendant

no prior convictions/no convictions for dangerous

(

). Therefore, any concerns

1. 23 *Humphrey*, *supra*, 19 Cal.App.5th at 1029 (*“Money bail, however, has no logical connection to protection of the public, as bail is not forfeited upon*
2. *commission of additional crimes*. . . . Accordingly, when the court’s

concern is protection of the public rather than flight, imposition of money

1. bail in an amount exceeding the defendant’s ability to pay unjustifiably relieves the court of the obligation to inquire whether less restrictive
2. alternatives to detention could adequately protect public or victim safety

and, if necessary, explain the reasons detention is required.”[italics

1. added.]); *Reem v. Hennessy* (N.D. Cal. Dec. 21, 2017) No. 17-CV-06628- CRB, 2017 WL 6539760, at \*4 (“The state constitution requires state
2. courts to set bail in cases [where defendant is not eligible for detention

under article I, section 12], yet it has no rational basis for doing so where

1. the defendant only poses a threat to public safety—not a flight risk.”).
2. 24 Penal Code sections 1269b(h), 1305(a); see also *People v. Nat’l Auto. & Cas. Ins. Co.* (2002) 98 Cal. App. 4th 277, 285 (“‘Forfeiture of bail’ can
3. only occur in one circumstance—when a defendant fails to appear at a
4. scheduled court appearance without sufficient excuse.”).

25 See Exhibit LETTER: Public Safety Assessment (“PSA”) Report –

1. CLIENT.
2. 26 See Exhibit LETTER: Public Safety Assessment (“PSA”) Report –
3. CLIENT.
4. this court has about public safety can be appropriately addressed by
5. non-monetary conditions of release.

a stay-away order/a no-weapons

1. The court could impose 4

counseling and testing/anger management counseling/curfew/home

condition/protective orders/alcohol monitors/substance abuse

5

confinement/GPS monitoring.

1. These alternatives are not only
2. constitutional, but they are cheaper, more effective, and far less intrusive
3. than pretrial detention.

# **4. Defendant’s pretrial incarceration will exacerbate this**

1. **County’s practice of disproportionately setting higher bails for African Americans and Latinos.**

11

Research studies have consistently found that African American

12

defendants receive harsher bail outcomes than those imposed on white

13

defendants.27 Nearly every study on the impact of race in bail

14

determinations concludes that African Americans are detained pretrial

15

at a higher rate with higher bail than are white arrestees with similar

16

charges and criminal histories. Over twenty-five studies document racial

17

disparities in bail determinations in state cases,28 federal cases,29 and

18

19

1. 27 See Give Us Free: Addressing Racial Disparities in Bail Determinations
2. by Cynthia E. Jones.

28 Racial and Ethnic Disparity in Pretrial Criminal Processing, 22 Just.

1. Q. 170, 187 (2005) Traci Schlesinger; Racial and Ethnic Differences in Pretrial Release and Decisions and Outcomes: A Comparison of Hispanic,
2. Black and White Felony Arrestees, 41 Criminology 873, 880-81 (2003)
3. Stephen DeMuth.

29 Race, Sex, and Pretrial Detention in Federal Court; Indirect Effects and

1. Cumulative Disadvantage, 57 U. Kan. L. Rev. 879 (2009) Cassia Spohn; Criminal Justice Decision Making as a Stratification Process: The Role of
2. Race and Stratification Resources in Pretrial Release, 5 J. Quantitative
3. Criminology 57 (1989), Celesta A. Albonetti et al.
4. juvenile delinquency proceedings.30 The adverse impact of race and
5. ethnicity on bail determinations is not isolated to particular regions of
6. the country, but is a pervasive and widely-acknowledged problem,
7. documented in vast areas of the country,31 and similarly affecting Latino
8. defendants.32
9. Overall, the odds of similarly-situated African American and Latino
10. defendants being held on bail because they could not pay the bond
11. amounts imposed were *twice* that of white defendants.33
12. This is a longstanding and pervasive inequity.34 The court should set
13. bail with an eye to ensuring no unconscious, implicit, or institutional
14. bias has affected it. 12

30 Reducing Racial Disparities in Juvenile Detention (2001) Eleanor

1. Hinton Hoytt.
2. 31 Race and Presentencing Decisions: The Cost of Being African American, Racial Issues in Criminal Justice: The Case of African
3. Americans 137, 140-41, (2003) Marvin D. Free (meta-analysis of bail

studies in 2003 between 1979 and 2000, including 18 studies all

1. showing African Americans receiving higher bail than white, including studies controlling for all varying factors.

17

32 Pretrial Release of Latino Defendants Final Report (2008) Pretrial

1. Justice Institute; David Levin.
2. 33 Demuth Study, *supra*, at p. 897; See also San Francisco Controller’s Report, County Jail Needs Assessment, August 15, 2013, at p. 11-12;
3. See also Women’s Community Justice Reform Blueprint A Gender-

Responsive, Family-Focused Approach to Integrating Criminal and

1. Community Justice, April 2013, Adult Probation Department and Sheriff’s Department, City and County of San Francisco; See also
2. Summary of Key Findings – San Francisco Justice Reinvestment

Initiative: Racial & Ethnic Disparities Analysis for Reentry Council by W.

1. Haywood Burns Institute (June 23, 2015) (https:[//www.burnsinstitute.org/publications/san-francisco-justice-](http://www.burnsinstitute.org/publications/san-francisco-justice-)
2. reinvestment-initiative-racial-and-ethnic-disparities-analysis-for-the-re-

entry-council).

25

34 See: Report on Race & Incarceration In San Francisco: Two Years

1. Later, by Chet Hewitt, Andrea D. Shorter, and Michael Godfrey, Center on Juvenile and Criminal Justice, October 1994 (African-American were
2. 11 % of SF’s general adult population, but made up 48% of the county’s

# **Conclusion**

Defendant

* 1. should be granted own-recognizance release because

[summarize your strongest factual argument].

* 1. The court should address
  2. any concerns about public safety through non-monetary conditions of
  3. release and should address concerns about flight risk either with non-
  4. monetary conditions or with a financial condition of release attainable for
  5. Defendant. 8

9 Dated:

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Respectfully submitted,

Attorney name

Deputy Public Defender Attorney for Defendant

inmates; Latinos comprised 15% of the general adult population, but

1. accounted for 29% of the jail population); see also Race & Incarceration in San Francisco: Localizing Apartheid, October 1992, Center on Juvenile
2. and Criminal Justice, by Chet Hewitt, Ken Kubota, and Vincent Schiraldi
3. (earlier, similar data).

## - 13 -

1

* 1. I declare:

# **Declaration of Counsel**

* 1. I am a deputy public defender for San Francisco County and, in that
  2. capacity, I represent the defendant.
  3. All information in the Statement of the Case and Facts of the attached
  4. motion is taken from my review of discovery provided by the state.
  5. All information in the Statement of Facts about defendant of the
  6. attached motion is taken from conversations with, letters by, emails by, 9

and declarations of [IF RELEVANT]: defendant and his family and friends

10

1. [IF RELEVANT – add any other people as necessary].
2. I am informed and believe that:
3. ● bail, as set, is unreasonably great and disproportionate to the
4. offense involved and violates the constitutional proscription against
5. excessive bail.
6. ● the prospects of financial loss and criminal penalty for failure to
7. appear under the terms of a release on own recognizance or bail are well
8. understood by 19 ●

defendant

1. process.

and are a deterrent to flight.

has neither incentive nor resources to evade the court’s

defendant

1. The foregoing is true and correct of my own knowledge, except on
2. those matters stated on information and belief, and as to those, I believe
3. them to be true.
4. Executed on , at San Francisco, 25

California.

26

1. Attorney name
2. Deputy Public Defender

Attorney for Defendant

1

2 Exhibit A: 3

EXHIBIT NAME

EXHIBIT NAME

Exhibit :

4

1. Exhibit :

EXHIBIT NAME

1. Exhibit : 7

EXHIBIT NAME

EXHIBIT NAME

Exhibit :

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9 Exhibit : 10

EXHIBIT NAME

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# **List of Exhibits**

1

2 I say: 3

# **Proof of Service**

I am over eighteen and not a party to this action. My business address

4

1. is 555 Seventh Street, San Francisco, California 94l03.
2. I caused to be filed and served the attached document on 7
3. Assistant District Attorney [Type ADA name here]
4. San Francisco District Attorney 850 Bryant Street, 3rd Floor
5. Francisco, CA 94103

11

12 I declare under penalty of perjury that the foregoing is true and 13

correct. Executed on \_ in San Francisco, California.

14

15

16

17

18 [Type your name here]

19

20

21

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