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12 Attorneys for Defendant

13 **Superior Court of California**
14 **San Francisco County**

15 **People of the State of**
16 **California,**

17 Plaintiff,

18 vs.

19 **Defendant,**

20 Defendant.

21 Court No: [redacted]

22 **Motion for Formal Bail**
23 **Hearing and Order**
24 **Releasing Defendant on**
25 **Own Recognizance or Bail**
26 **Reduction**

27 Date: [redacted]
28 Time: [redacted]
29 Dept: [redacted]

30 The First District Court of Appeal in *In re Humphrey*, recently held
31 that when a court sets bail, it must inquire into and determine a
32 defendant's ability to pay, consider nonmonetary alternatives to money
33 bail, and, if the court determines that a defendant is unable to afford the

1 amount of bail the court finds necessary, follow the procedures and
2 makes the findings necessary for a valid order of detention.¹

3 Accordingly, Defendant **name** moves the court for a bail hearing and
4 an order granting own-recognizance release or release on appropriate
5 financial or non-financial conditions. Money bail, as set, is beyond
6 Defendant's ability to pay, operating as a no-bail detention order despite
7 no court having made the findings required under state and federal law
8 for a valid detention order. Because Defendant should not be detained
9 before trial, this court must order release on conditions that are narrowly
10 tailored to the government's interests in court appearance and public
11 safety.²
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23 ¹ *In re Humphrey* (Cal. Ct. App. Jan. 25, 2018) No. A152056, 2018 WL
550512, at *2[2018 Cal. App. LEXIS 64.].

24 ² Several judges in the Northern District of California have granted writs
25 of habeas corpus on similar grounds to *Humphrey*. See, e.g., *Coleman v.*
26 *Hennessy* (N.D. Cal. Jan. 5, 2018) No. 17-CV-06503-EMC, 2018 WL
541091 at *1; *Rodriguez-Ziese v. Hennessy* (N.D. Cal. Dec. 6, 2017) No.
27 17-CV-06473-BLF, 2017 WL 6039705, at *3; *Reem v. Hennessy* (N.D.
28 Cal. Nov. 29, 2017) No. 17-CV-06628-CRB, 2017 WL 6765247, at *1.

1 **Statement of the Case and Facts**

2 Defendant is facing a pending felony/misdemeanor in Court

3 Number(s). Brief description. **AND/OR**

4
5 Defendant is **[also]** facing a pending misdemeanor/felony motion to
6 revoke in Court Number(s). Brief description.

7
8 Defendant has made no prior applications for own recognizance release or
9 reduced bail. **[MODIFY IF NEEDED]**

10 **Statement of Facts about Defendant**

11
12 **[Begin the narrative. INSERT SOME BASICS on their history: born**
13 **where, raised where, raised with/by whom, how long, elementary and**
14 **middle and high school, etc.]**

15
16 **EXAMPLE** Family and Friends.

17
18 **EXAMPLE** Education and employment.

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20 **EXAMPLE** Community **and/or** religious organizations.

21
22 **EXAMPLE** **DEFENDANT** has stable housing in San Francisco **OR**
DEFENDANT is needed at home to support **children/ailing mother.**

23 **Memorandum of Points and Authorities**

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

11 **1. When setting money bail, the court must make findings**
12 **regarding Defendant's ability to pay and non-financial**
13 **alternative conditions of release that focus on court**
14 **attendance.**

14 In determining whether a financial condition of release should be
15 imposed to address flight risk concerns, the court must make certain
16 findings to ensure that the financial condition does not result in
17 detention solely on the basis of wealth status. "[A] court may not order
18 pretrial detention unless it finds either that the defendant has the
19 financial ability but failed to pay the amount of bail the court finds
20 reasonably necessary to ensure his or her appearance at future court
21 proceedings; or that the defendant is unable to pay that amount and no
22 less restrictive conditions of release would be sufficient to reasonably
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27 ³ *Humphrey, supra*, 2018 WL 550512, at *9.

28 ⁴ See *id.* at *11.

1 assure such appearance; or that no less restrictive nonfinancial
2 conditions of release would be sufficient to protect the victim and
3 community.”⁵

4 **A. Defendant does not have the ability to pay the money bail**
5 **amount that is set.**

6 When requiring a financial condition of pretrial release, the court
7 must determine whether that condition of release will result in
8 Defendant’s detention because of inability to pay. This finding is “critical”
9 in order to “guard against improper detention based only on financial
10 resources.”⁶ “[A] court which has not followed the procedure and made
11 the findings required for an order of detention must, in setting money
12 bail, consider the defendant’s ability to pay and refrain from setting an
13 amount so beyond the defendant’s means as to result in detention.”⁷

14 Defendant is indigent. S/he is currently experiencing
15 homelessness/unemployed/works a job that pays minimum
16 wage/supports family members/etc. Even a relatively small secured
17 financial condition of release will result in Defendant’s detention.
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25 ⁵ *Id.* at *9.

26 ⁶ *Id.* at *16.

27 ⁷ *Id.* at *17 (citing *Bearden v. Georgia* (1983) 461 U.S. 660; *United States*
28 *v. Salerno* (1987) 481 U.S. 739; *Turner v. Rogers* (2011) 564 U.S. 431).

1 Accordingly, the court should release Defendant on non-financial
2 conditions that will ensure court appearance.

3 **B. Less restrictive conditions of release are adequate to serve the**
4 **government's interests.**

5 “If the court concludes that an amount of bail the defendant is unable
6 to pay is required to ensure his or her future court appearances, it may
7 impose that amount only upon a determination *by clear and convincing*
8 *evidence* that no less restrictive alternative will satisfy that purpose.”⁸

9 The clear and convincing standard of proof is required because an
10 arrestee's pretrial liberty interest, protected under the due process
11 clause, is “a fundamental interest second only to life itself in terms of
12 constitutional importance.”⁹

13 A financial condition of release is not required in this case. Based on
14 Defendant's history and community ties, this court should release
15 Defendant on his/her own recognizance and, if necessary, impose a non-
16 financial condition of release. Point to evidence showing that Defendant
17 is not a flight risk, e.g. Public Safety Assessment (“PSA”) Report indicates
18 that Defendant has no prior failures to appear¹⁰/PSA recommends
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26 ⁸ *Humphrey, supra*, 2018 WL 550512, at *17 (emphasis added).

27 ⁹ *Id.* (quoting *Van Atta v. Scott* (1980) 27 Cal.3d 424, 435).

28 ¹⁰ See Exhibit LETTER: Public Safety Assessment (“PSA”) Report –
CLIENT.

1 “Release...¹¹/Defendant has close ties to the community because of
2 family/job/etc. The facts favor own-recognition release.

3 Furthermore, there are numerous non-financial conditions of release
4 that are adequate to serve the government’s interests in court
5 appearance. This court can order reminders/check-ins/ankle
6 monitoring/etc. These less-restrictive alternatives are effective and
7
8 narrowly tailored to secure Defendant’s court appearance.

10 **2. Bail determinations must be based on individualized**
11 **criteria.**

12 In determining whether a financial condition of release is required, the
13 court cannot simply apply the bail schedule to the charges. “[D]ecisions
14 that may result in pretrial detention must be based on factors related to
15 the individual defendant’s circumstances.”¹² Because bail schedules
16 “represent the antithesis of the individualized inquiry required before a
17 court can order pretrial detention,”¹³ this court cannot exclusively rely on
18 the bail schedule. Once this court determines that public safety and
19 victim safety do not require pretrial detention and defendant should be
20 released, “the important financial inquiry is not the amount prescribed
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27 ¹¹ See Exhibit LETTER: Public Safety Assessment (“PSA”) Report –
28 CLIENT.

¹² *Humphrey, supra*, 2018 WL 550512, at *19.

¹³ *Id.* at *20.

1 by the bail schedule but the amount necessary to secure the defendant's
2 appearance at trial or a court-ordered hearing."¹⁴

3 With this in mind, the court should not use the statutory bail
4 schedule as a guideline because scheduled bail unconstitutionally (due
5 process and equal protection violations) sets bail without regard to
6 individualized consideration resulting in the detention of the indigent.¹⁵ If
7 this court determines that a financial condition of release is necessary to
8 ensure court appearance, the individualized circumstances of this case
9 require that money bail be set in a minimal amount.

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13 **3. Public Safety: This court should address any public**
14 **safety concerns by requiring appropriate non-monetary**
15 **conditions of release**

16 Where a court's concern is public safety, it can order a defendant
17 detained after making the required findings under California
18 Constitution article I, section 12(b) or (c) [NOTE: only if client is eligible
19 for detention under California Constitution article I, section 12—check
20 whether charged with felony involving violence/threats; if this is a
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23 _____
14 *Id.*

24
25 15 "For poor persons arrested for felonies, reliance on bail schedules
26 amounts to a virtual presumption of incarceration. According to a San
27 Francisco study, last year 85 percent of the inmates of the county jail
28 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
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.
4.)" (*In re Humphrey* (Jan. 25, 2018, No. A152056) __ Cal.App.5th __ ;
2018 Cal. App. LEXIS 64 at *59-60.

1 misdemeanor add “and no-bail pretrial detention based on public safety
2 is not available for misdemeanors.”], or it can order appropriate non-
3 financial conditions of release. A court cannot, however, set a financial
4 condition of release to address public safety concerns. Because the
5 findings required for an order of detention cannot be made in this case,
6 the court should address any public safety concerns through non-
7 monetary conditions of release.
8

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10 **A. The government’s interest in public safety does not require pre-
11 trial detention here.**

12 The court can only detain a felony defendant (misdemeanants cannot
13 be detained without bail pretrial) based on public safety if it makes the
14 findings required by article I, section 12 of the California Constitution.
15 Before bail is set or denied under section 12(b) or (c)¹⁶, the detainee is
16 entitled to a full evidentiary hearing, and the court must make several
17 substantive findings.¹⁷ First, the court must determine whether the
18 defendant is charged with an offense that fits into the category of “felony
19 offenses involving acts of violence on another person” under section 12(b)
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25 ¹⁶ Article I, section 12(a) applies only to capital crimes and is thus not
applicable to Defendant’s case.

26 ¹⁷ See *Humphrey*, *supra*, 2018 WL 550512, at *8 (“Subsections (b) and (c)
27 of section 12 provide that a court cannot deny admission to bail to a
28 defendant charged with violent acts or who threatened another with great
bodily harm, except on the basis of “clear and convincing evidence” that
there is “a substantial likelihood the defendant’s release would result in
great bodily harm to others.”).

1 or 12(c), whether the defendant is charged with any felony offense and
2 whether the defendant is alleged to have threatened another person with
3 “great bodily harm.” Second the court must make an individualized
4 determination that the proof against the arrestee is substantial.¹⁸ And
5 third, the State must prove by “clear and convincing evidence” that
6 anything short of complete pretrial incapacitation would create “a
7 substantial likelihood the person’s release would result in great bodily
8 harm.”¹⁹ Only if these findings are made can this court order Defendant’s
9 detention on the basis of public safety.

13 This court should not detain Defendant under article I, section 12(b)
14 or 12(c). First, argue that the offense doesn’t involve an act of violence (if
15 applicable) or threat of great bodily injury. Second, the proof against
16 defendant is not substantial because identity issue/alibi/etc. (if
17 applicable). Finally, the state cannot prove by clear and convincing
18 evidence that defendant’s release would result in great bodily harm.
19 Include a sentence with evidence about defendant’s unlikelihood to harm
20 others.

24 _____
25 ¹⁸ *In re Nordin* (1983) 143 Cal.App.3d 538, 543 (stating standard for
26 “when the facts are evident or the presumption great” is met when there
27 is substantial evidence to sustain a verdict or the “quantum of evidence
28 is that necessary to sustain a conviction on appeal”).

¹⁹ This standard requires that evidence be “so clear as to leave no
substantial doubt” or, put differently, “sufficiently strong to command
the unhesitating assent of every reasonable mind.” *Id.*

B. This court cannot set money bail based on public safety concerns but can address any legitimate concerns by requiring appropriate non-monetary conditions.

If the court does not order defendant’s detention under article I, section 12, it cannot set money bail in response to public safety concerns. As the Court of Appeal and Judge Breyer of the Northern District of California have held, money bail cannot be imposed in response to concerns about public safety.²⁰ Money bail can have no deterrent effect on new criminal activity as a matter of law because committing a crime while out on money bail does not result in forfeiture of bail.²¹ Money bail thus cannot create a financial deterrence against new crimes. Accordingly, as a matter of law, the court’s only valid

²⁰ *Humphrey, supra*, 2018 WL 550512, at *11 (“Money bail, however, has no logical connection to protection of the public, as bail is not forfeited upon commission of additional crimes. . . . Accordingly, when the court’s concern is protection of the public rather than flight, imposition of money bail in an amount exceeding the defendant’s ability to pay unjustifiably relieves the court of the obligation to inquire whether less restrictive alternatives to detention could adequately protect public or victim safety and, if necessary, explain the reasons detention is required.”[italics 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 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 the defendant only poses a threat to public safety—not a flight risk.”).

²¹ Pen. Code §§ 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 only occur in one circumstance—when a defendant fails to appear at a scheduled court appearance without sufficient excuse.”).

1 interest in imposing money bail is reasonably assuring appearance at
2 trial.

3 **Defendant** does not pose a significant risk to public safety or the
4 victim's safety. **Defendant** has **no prior convictions/no convictions for**
5 **dangerous offenses/etc.**²² **Other facts suggesting s/he is not dangerous,**
6 **e.g. age/low score on PSA/character evidence.** Therefore, any concerns
7 that this court has about public safety can be appropriately addressed by
8 non-monetary conditions of release. The court could impose **a stay-away**
9 **order/a no-weapons condition/protective orders/alcohol**
10 **monitors/substance abuse counseling and testing/anger management**
11 **counseling/curfew/home confinement/GPS monitoring.** These
12 alternatives are not only constitutional, but they are cheaper, more
13 effective, and far less intrusive than pretrial detention.
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18 **4. **Defendant's** pretrial incarceration will exacerbate this**
19 **County's practice of disproportionately setting higher**
20 **bails for African Americans and Latinos.**

21 Research studies have consistently found that African American
22 defendants receive significantly harsher bail outcomes than those
23 imposed on white defendants.²³ Specifically, nearly every study on the
24
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27 ²² See Exhibit **LETTER**: Public Safety Assessment ("PSA") Report –
CLIENT.

28 ²³ See Give Us Free: Addressing Racial Disparities in Bail Determinations
by Cynthia E. Jones.

1 impact of race in bail determinations has concluded that African
2 Americans are subjected to pretrial detention at a higher rate and higher
3 bail amounts than are white arrestees with similar charges and criminal
4 histories. Over twenty-five studies document racial disparities in bail
5 determinations in state cases,²⁴ federal cases,²⁵ and juvenile delinquency
6 proceedings.²⁶ The adverse impact of race and ethnicity on bail
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8 determinations is not isolated to particular regions of the country, but is
9
10 a pervasive and widely-acknowledged problem, documented in vast areas
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12 of the country,²⁷ and similarly affecting Latino defendants.²⁸
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17 ²⁴ Racial and Ethnic Disparity in Pretrial Criminal Processing, 22 Just.
18 Q. 170, 187 (2005) Traci Schlesinger; Racial and Ethnic Differences in
19 Pretrial Release and Decisions and Outcomes: A Comparison of Hispanic,
Black and White Felony Arrestees, 41 Criminology 873, 880-81 (2003)
Stephen DeMuth.

20 ²⁵ Race, Sex, and Pretrial Detention in Federal Court; Indirect Effects and
21 Cumulative Disadvantage, 57 U. Kan. L. Rev. 879 (2009) Cassia Spohn;
22 Criminal Justice Decision Making as a Stratification Process: The Role of
Race and Stratification Resources in Pretrial Release, 5 J. Quantitative
Criminology 57 (1989), Celesta A. Albonetti et al.

23 ²⁶ Reducing Racial Disparities in Juvenile Detention (2001) Eleanor
Hinton Hoytt.

24 ²⁷ Race and Presentencing Decisions: The Cost of Being African
25 American, Racial Issues in Criminal Justice: The Case of African
26 Americans 137, 140-41, (2003) Marvin D. Free (meta analysis of bail
27 studies in 2003 between 1979 and 2000, including 18 studies all
showing African Americans receiving higher bail than white, including
studies controlling for all varying factors.

28 ²⁸ Pretrial Release of Latino Defendants Final Report (2008) Pretrial
Justice Institute; David Levin.

1 Overall, the odds of similarly-situated African American and Latino
2 defendants being held on bail because they were unable to pay the bond
3 amounts imposed were *twice* that of white defendants.²⁹
4

5 This is a longstanding and pervasive inequity in our criminal justice
6 system, as evidenced by similar numbers gathered over a decade ago.³⁰
7 The court should keep these stark facts in mind in setting bail so as not
8 exacerbate any unconscious, implicit or institutional bias that may exist.
9

10 **Conclusion**

11 **Defendant** should be granted own-recognition release because
12 **[summarize your strongest factual argument]**. The court should address
13 any concerns about public safety through non-monetary conditions of
14 release and should address concerns about flight risk either with non-
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18 ²⁹ Demuth Study, *supra*, at p. 897; See also San Francisco Controller's
19 Report, County Jail Needs Assessment, August 15, 2013, at p. 11-12;
20 See also Women's Community Justice Reform Blueprint A Gender-
21 Responsive, Family-Focused Approach to Integrating Criminal and
22 Community Justice, April 2013, Adult Probation Department and
23 Sheriff's Department, City and County of San Francisco; See also
24 Summary of Key Findings – San Francisco Justice Reinvestment
25 Initiative: Racial & Ethnic Disparities Analysis for Reentry Council by W.
26 Haywood Burns Institute (June 23,
27 2015)([https://www.burnsinstitute.org/publications/san-francisco-
28 justice-reinvestment-initiative-racial-and-ethnic-disparities-analysis-for-
the-re-entry-council](https://www.burnsinstitute.org/publications/san-francisco-justice-reinvestment-initiative-racial-and-ethnic-disparities-analysis-for-the-re-entry-council)).

29 ³⁰ See: Report on Race & Incarceration In San Francisco: Two Years
30 Later, by Chet Hewitt, Andrea D. Shorter, and Michael Godfrey, Center
31 on Juvenile and Criminal Justice, October 1994 (African-American were
32 11 % of SF's general adult population, but made up 48% of the county's
33 inmates; Latinos comprised 15% of the general adult population, but
34 accounted for 29% of the jail population); see also Race & Incarceration
35 in San Francisco: Localizing Apartheid, October 1992, Center on Juvenile
36 and Criminal Justice, by Chet Hewitt, Ken Kubota, and Vincent Schiraldi
37 (earlier, similar data).

1 monetary conditions or with a financial condition of release that is
2 attainable for Defendant.

3 Dated: _____
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Respectfully submitted,
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7 _____
8 Attorney name
9 Deputy Public Defender
10 Attorney for Defendant
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Declaration of Counsel

1 I, the undersigned, declare under penalty of perjury as follows:

2 I am a deputy public defender for the City and County of San
3 Francisco and in that capacity I have been assigned to the defense of the
4 defendant in the above-entitled action.

5 All information in the Statement of the Case and Facts of the attached
6 motion is taken from my review of discovery provided by the state.

7 All information in the Statement of Facts about defendant of the
8 attached motion is taken from conversations with, letters by, emails by,
9 and declarations of [IF RELEVANT]: defendant and his family and friends
10 [IF RELEVANT – add any other people as necessary].

11 I believe that bail, as presently set, is unreasonably great and
12 disproportionate to the offense involved and violates the constitutional
13 proscription against excessive bail.

14 I believe that the prospects of pecuniary loss and criminal penalty for
15 failure to appear in accordance with the terms of a release on own
16 recognizance or bail are well understood by defendant and are a
17 deterrent to flight.

18 I further believe defendant has neither incentive nor resources to
19 evade the court’s process.

20 In view of the above, I respectfully request that the defendant be
21 released on own recognizance. The foregoing is true and correct of my
22 own knowledge, except as to those matters stated on information and
23 belief, and as to those, I believe them to be true.

24 Executed on _____, at San Francisco,
25 California.

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Attorney name

List of Exhibits

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Exhibit A: **EXHIBIT NAME**

Exhibit : **EXHIBIT NAME**

Exhibit : **EXHIBIT NAME**

Proof of Service

1 I say:

2 I am over eighteen years of age and not a party to the above action.
3 My business address is 555 Seventh Street, San Francisco, California
4 94103.

5 I caused to be filed and served the attached document on:

6
7 San Francisco District Attorney, 3rd Floor
8 850 Bryant Street
9 San Francisco, CA 94103

10 I declare under penalty of perjury that the foregoing is true and
11 correct.

12 Executed on in San Francisco, California.

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