COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In Re Chelsea Becker,	)	No. F_____
Petitioner,	)	
	)	Trial Court No. 19CM-5304
	)	(Kings County)
On Habeas Corpus	)	

PETITION FOR WRIT OF HABEAS CORPUS
(Application for Immediate Release)

Following order denying own recognizance release and setting $2,000,000 money bail (Pen. Code §§ 1270, 1271, 1275, 1319, *et seq.*) by Hon. Robert S. Burns

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL FIFTH APPELLATE DISTRICT, DIVISION	COURT OF APPEAL CASE NUMBER:
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 42500 NAME: ROGER T. NUTTALL FIRM NAME: LAW OFFICES OF NUTTALL & COLEMAN STREET ADDRESS: 2333 MERCED STREET CITY: FRESNO STATE: CA ZIP CODE: 93721 TELEPHONE NO.: (559) 233-2900 FAX NO.: (559) 485-3852 E-MAIL ADDRESS: bryan@nuttallcoleman.com ATTORNEY FOR (*name*): PETITIONER	SUPERIOR COURT CASE NUMBER: 19CM-5304
APPELLANT/ CHELSEA BECKER PETITIONER: RESPONDENT/ KINGS COUNTY SUPERIOR COURT REAL PARTY IN INTEREST: PEOPLE OF THE STATE OF CALIFORNIA	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(*Check one*): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): PETITIONER, CHELSEA BECKER

2. a. [ ] There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. [X] Interested entities or persons required to be listed under rule 8.208 are as follows:

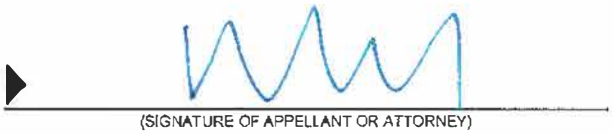
Full name of interested entity or person	Nature of interest (*Explain*):
(1) JACQUELINE GOODMAN	ATTORNEY FOR PETITIONER/DEFENDANT
(2) ROGER T. NUTTALL	ATTORNEY FOR PETITIONER/DEFENDANT
(3)	
(4)	
(5)	

[ ] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: APRIL 27, 2020

ROGER T. NUTTALL
(TYPE OR PRINT NAME)


(SIGNATURE OF APPELLANT OR ATTORNEY)

ISSUES

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, Chelsea Becker, by and through her attorneys of record, Roger T. Nuttall and Jacqueline Goodman, hereby petition this Court for a Writ of Habeas Corpus related to a $2,000.000 bail imposed on her on February 20, 2020 in the Kings County Superior Court in Trial Court No. 19CM-5304. The Petition requests the the Court release Ms. Becker on her own recognizance since the conduct alleged in the Complaint filed in this matter is not a crime in California and because the issues relied upon by the Superior Court to establish a $2,000,000 bail were contrary to the actual facts and evidence.

This Petition presents pure issues of law which were first raised in a bail hearing before the Superior Court held on February 20, 2020. Those purely legal and constitutional issues, fully discussed below, relate to the lack of legal authority of the prosecution to bring murder charges against this Petitioner given the limitations, as set forth in Penal. Code 187(b)(3), on who can be charged with murder and the effect that lack of authority should have on the imposition of any bail. Further, as is also described below, given the exigencies of the COVID-19 crisis, the Superior Court's unwillingness to promptly deal with the obvious dangers of incarcerating Petitioner on $2,000,000 bail necessitates this Petition.

This verified Petition sets forth the following facts and causes of action for issuance of said writ:

A. The Restraint Complained Of

Petitioner is the person who is the defendant in People v. Becker, Kings County Trial Court No. 19CM-5304 and who is now unlawfully confined and who has lost her liberty pursuant to an excessive and illegal pre-trial

bail which was imposed upon her. Sheriff David Robinson has legal custody of Petitioner at the Kings County Jail, 1570 Kings County Drive Hanford, CA 93230.

B. General Allegations Concerning the Construction of the Pleadings and Prior Proceedings in this Matter

Petitioner alleges that the facts herein are subject to any and all rights which Petitioner may have to enhance and/or amend this Petition following further investigation, discovery and evidentiary hearings in support of her claims for relief.

A Petition for Writ of Habeas Corpus is the only appropriate remedy to Petitioner's illegal incarceration.

WHEREFORE, petitioner respectfully prays that this Court:

1. Issue a Writ of Habeas Corpus and release Petitioner on her own recognizance; and/or

2. Issue an order to show cause so as to inquire into the legality of the restriction on Petitioner's liberty, and Order the Superior Court to release Petitioner; and

3. Grant Petitioner whatever further relief this Court deems appropriate and in the interest of justice.

Date: April 27, 2020

Respectfully submitted,

/s/Roger T. Nuttall

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I. STATEMENT OF FACTS AND PROCEDURE

A. Factual Background

Chelsea Becker is one of millions of Americans who each year experience miscarriages and stillbirths, and one of thousands who experience stillbirths (pregnancy losses after 20 weeks) each year in California. Ms. Becker is also one of millions of people who struggle with a drug dependency problem and economic indigency. Prior to her incarceration, she provided what support she could to her mother who cared for her youngest child.[1] These facts are not in dispute.

Despite three earlier live and healthy births, on September 10, 2019, Petitioner's last pregnancy ended in a stillbirth. On November 5, 2019 Ms. Becker was arrested for the crime of murder of her fetus. This claim not only lacks scientific basis (See e.g., Terplan and Wright letter attached to (Ex. 4) it is, as articulated below, without any basis in law.

B. Charge and Arrest

On October 31, 2019, the Kings County District Attorney charged Petitioner with one count of Murder of a Human Fetus, a felony, in violation of California Penal Code §187(a), alleging that Petitioner terminated her own pregnancy and thereby committed murder "with malice aforethought." Criminal Complaint (Ex. 2). The District Attorney lodged the charge despite the statute's explicit provision that the law may not be used to prosecute "any person who commits an act that results in the death of the fetus if … [t]he act was solicited, aided, abetted, or consented to by the mother of the fetus." Cal. Pen. Code § 187(b).

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[1] Petitioner has three children resulting from previous pregnancies. Until the investigation which resulted in her arrest in this matter, her mother, Jennifer Elaine Hernandez cared for her youngest one. *See* Declaration of Jennifer Elaine Hernandez (Ex 1).

On the same date that the complaint was issued, October 31, 2019, Kings County Superior Court Judge Robert S. Burns signed a warrant of arrest for Ms. Becker and issued a bail amount of $5,000,000.[2] Hanford Police Department, Supplement 8 Report (Nov. 6, 2019) (Ex. 3). Petitioner was arrested on November 5, 2019 and booked into the Kings County Jail on November 6, 2019. *Id.* Unable to afford *any* bail, Ms. Becker has remained in custody since that date.

C. First Motion for Reduction of Bail

On December 19, 2019, current counsel, Jacqueline Goodman, substituted in place of the public defender and, on January 31, 2020, filed her first motion to reduce Petitioner's bail. First Motion for Reduction of Bail (Ex. 4). At a hearing held on February 20, 2020, the prosecution provided misleading and facially inaccurate allegations of fact regarding Ms. Becker's criminal history, as well as a false allegation of a history of failure to appear in court. The Superior Court, without articulating *any* particular reasoning or analysis reduced Petitioner's bail from $5,000,000 to $2,000,000. Bail Hearing Transcript, February 20, 2020 at 5:26-27 (Ex. 5). This reduction in bail functioned as a distinction without a difference and, because it maintained a bail well beyond the indigent Petitioner's (or virtually anyone's) financial means, did nothing to alter her circumstance. She has therefore remained in custody since her November arrest.

D. Demurrer Motion

Petitioner submitted her still pending Notice of Demurrer, Demurrer To Complaint and Non-Statutory Motion to Dismiss, thereby moving the trial court to dismiss the charge against her for its facial insufficiency on April 2, 2020. Notice of Demurrer and Demurrer of Complaint; Non-Statutory

[2] This amount was in accordance with the Felony Bail Schedule for Kings County in effect at the time.

Motion to Dismiss (Apr. 2, 2020) (Ex.6). The prosecution has not yet provided a response to the demurrer, and the matter is set for a hearing on May 20, 2020.

E. Spread of COVID-19 and Second Motion for Reduction of Bail

While Petitioner languishes in jail awaiting the court's consideration as to whether she can be charged with murder for the loss of her own pregnancy, and despite fact that the plain language of the statue prohibits its use in this case, and despite the fact that courts have repeatedly rejected this misuse of the law in this way, since November 5, 2019 she has been held prisoner in an environment that we now know grows more dangerous and more precarious by the day. As this Court is aware, the COVID 19 pandemic has infected over 37,343 Californians and 847,349 Americans as of April 22, 2020. 1,419 have died in California as a result of the disease[3], which can only be stopped by social distancing and isolation. Those tools, however, are largely unavailable in a detention setting, placing inmates and detention facility staff at an increased risk for a disease that has already killed more than 47,349 Americans. As of mid-April, hundreds of people within California's jails and prisons had already been affected by the virus. *See* The Los Angeles Times (April 13, 2020), https://www.latimes.com/california/story/2020-04-13/more-inmates-jailers-testing-positive-as-coronavirus-continues-to-spread-through-jails (describing the number of inmates, police, jail and prison staff members who have become infected or are quarantined as a result of the virus). At least two Sheriff's deputies in California have already died from the virus as of the date of this filing. *Id.*

It was because of this rapid and ongoing spread of the disease that Petitioner filed her Supplemental Notice and Motion for O.R. Release or

[3] Tracking Coronavirus in California (Apr. 22, 2020) THE LOS ANGELES TIMES, https://www.latimes.com/projects/california-coronavirus-cases-tracking-outbreak

Reduction of Bail in Light of Covid-19 Pandemic and Consequent State of Public Health Emergency on March 26, 2020.(Ex. 7) Originally this emergency bail motion was set for hearing on April 10, 2020, but on March 30, 2020 the trial court continued the bail hearing on the supplemental emergency motion *for 50 days*, until May 20, 2020.[4] Because of the ongoing risk associated with being held without compliance with CDC guidelines, counsel for Petitioner, on April 1, 2020 attempted to refile the motion requesting an earlier hearing date of April 13, 2020, but it was learned that the court had instructed the court clerk to reject the motion since the hearing had already been adjourned to May 20, 2020, effectively denying the motion without permitting it to be filed. Thereafter, on April 10, 2020, Petitioner through the office of recently associated counsel, Roger T. Nuttall *again* attempted to file a Motion to Advance the Bail Hearing (Ex. 8). In this instance, the court declined to permit the filing of the motion based upon the court having considered the papers to not have been formatted correctly. *See* Letter from Superior Court (Apr. 17, 2020) (rejecting the effort to file the motion to advance the hearing (Ex. 9). With due respect, such a delay in permitting a hearing in light of the speed at which the virus has infected populations of facilities, cities, and even countries, tends to represent nothing more than the functional equivalent of the denial of the relief sought.

Every day that Petitioner spends incarcerated on the basis of a crime which, as to her, under the circumstances, does not exist, and in a facility that risks her health, is a violation of her statutory and constitutional rights under the Fourteenth and Eighth Amendments, Article 1, of the California Constitution, and the California Penal Code.

[4] The circumstances around this continuance are explained *infra*.

Petitioner seeks immediate relief in the form of a Writ of Habeas Corpus ordering her release or an alternative resolution that comports with the actual facts of this matter and complies with the California and United States Constitutions as well as the laws of California.

II. Contention

A bail of $2,000,000 is excessive where the charge is itself unconstitutional as a matter of law and contrary to the plain language of the statute charged. Similarly unlawful is the trial court's failure to consider Petitioner's ability to pay the amount ordered. Excessive bail functions as no bail and is a violation of due process and equal protection. Additionally, it is respectfully submitted that the Superior Court has abused its discretion by refusing to permit the filing of a motion to advance a hearing on Petitioner's motion for release as a result of COVID-19 in the face of a public health emergency, and rather, has insisted on the continued preventive detention of Ms. Becker until May 20, 2020 to consider her situation.

III. No Other Petition

No other Petition has been made, by or on the behalf of Ms. Becker, relating to this matter.

IV. Jurisdiction and Timeliness

The parties directly affected by the instant proceeding now pending in respondent court are Petitioner, by and through undersigned counsel, Jacqueline Goodman and Roger T. Nuttall; Respondent, the Superior Court of the County of Kings, State of California; and the People, real party in interest, by its counsel, the District Attorney of Kings County. The parties have been served with a copy of this petition pursuant to Code of Civil Procedure section 1107.

All of the proceedings about which this petition is concerned have occurred within the territorial jurisdiction of respondent court and of the

Superior Court of the State of California in and for Kings County, California.

The writ is taken without substantial delay, and is therefore, timely filed**.**

V. No Adequate Remedy at Law

Petitioner has no other speedy or adequate remedy at law. She is presently in custody unable to post a $2,000,000 money bail, and habeas relief lies as to bail review. *In re McSherry* (2003) 112 Cal.App.4th 856, 859. The standard of review on questions of law is de novo. *In re Taylor* (2015) 60 Cal. 4th 1019, 1035 ("[W]hen the application of law to fact is predominantly legal, such as when it implicates constitutional rights and the exercise of judgment about the values underlying legal principles, [the appellate] court's review is de novo."). The Court may grant the writ without an evidentiary hearing if the established facts justify relief. *McSherry*, 112 Cal.App.4th at 859.

Petitioner asks that a writ of habeas corpus be issued by this Court vacating the trial court's order, and ordering Petitioner released from custody in this case, or remanding to the lower court for an expedited immediate hearing with instructions that the court inquire into, and make findings regarding Petitioner's ability to pay the amount ordered, the danger presented to Petitioner by the COVID-19 pandemic, as well as those constitutionally and statutorily mandated factors explained below, so that the trial court may set a financial condition of release that does not operate

to detain Petitioner and/or release petitioner on her own recognizance with appropriate non-financial conditions of release.

Dated: April 27, 2020

Respectfully Submitted,

/s/Roger T. Nuttall

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VERIFICATION

I, ROGER T. NUTTALL, declare as follows:

I have read and reviewed the foregoing "Petition for Writ of Habeas Corpus" of Petitioner Chelsea Becker and know its contents. I am an attorney for Petitioner in this action. The matters stated in the Petition are true of my own knowledge, except as to those matters stated on information and belief, and as to those matters, I believe them to be true.

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

This declaration was executed on April 27, 2020 at Fresno, California.

/s/Roger T. Nuttall
ROGER T. NUTTALL

INTRODUCTION

The right to bail is a fundamental tenet of our state and federal justice system, meant to protect the accused's liberty interest and presumption of innocence, while also satisfying the state's interest in protecting public safety and ensuring the accused's presence at trial. "This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." *Stack v. Boyle* (1951) 342 U.S. 1, 4. This protection is rendered similarly meaningless where, as here, bail is set purposefully and prohibitively high and without consideration of the unique circumstances applicable to the accused and, in particular in the present case, the lack of legal viability of the charge against her.

Petitioner is being held on the allegation that experiencing a stillbirth allegedly caused by something a pregnant woman did (in this case, used drugs) or did not do (achieve total abstinence from drug use) is murder in California. California does not, as a matter of law, criminalize a woman for the loss of her pregnancy. Neither pregnancy nor a substance abuse disorder nor the dual status of being pregnant and addicted are crimes in California, nor are they indicative of a danger posed to others. However, it is upon this theory that the District Attorney for Kings County charged Petitioner with murder, and upon this theory that the Superior Court has ordered her detention in the absence of a $2,000,000 bail. Neither Ms. Becker nor her family has the financial means to secure the $2,000,000 bail.

Setting bail at this level means that Ms. Becker shall remain incarcerated for a non-existent crime at a time when detained individuals are at a heightened risk of contracting COVID-19 and suffering severe

health consequences. The fact that Petitioner now languishes needlessly, on account of only her indigency and the state's decision to bring a prosecution that is itself statutorily unauthorized and facially unconstitutional, is exacerbated multifold by the fact that detention facilities throughout the state and country have become fertile ground for the ongoing COVID-19 pandemic. As a result of the Superior Court's orders, it is now not only Petitioner's freedom that is needlessly in jeopardy, but also her life.

This misguided prosecution is based on misconceptions of both law and science, and as such, is unlawful. Petitioner's continued detention warrants a writ to secure her release.

AUTHORITIES AND ARGUMENT

I. The Trial Court's imposition of a $2,000,000 bail is excessive and violates Ms. Becker's constitutional and statutory rights to a reasonable bail.

Article I, § 12 of the California Constitution guarantees the accused's right to be released prior to trial on reasonable bail.[5] The trial court's order that Ms. Becker be held subject to $2,000,000, however, constitutes the functional equivalent of denial of bail and violates Article I, § 12 of the California Constitution as well as California's statutory guarantee of bail "as a matter of right" for all non-capital offenses. Cal. Pen. Code §1271.

[5] This right is subject to three exceptions: (1) capital crimes; (2) felony offenses involving acts of violence where the court has found, "upon clear and convincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others;" and (3) felony offenses where the court has found, also "on clear and convincing evidence that the person has threatened another with great bodily harm and that there is a substantial likelihood that the person would carry out the threat if released." *Id.* None of these exceptions applies to Ms. Becker's case, and she maintains her right to release on bail.

The reduction of her bail from $5,000,000 to $2,000,000 was an unusually confounding and effectively meaningless order by the court in terms of the recognition that Ms. Becker could never secure the funds to satisfy such a bail.

The court must take into consideration four factors when setting, reducing, or denying bail: "[1] protection of the public, [2] the seriousness of the offense charged, [3] the previous criminal record of the defendant, and [4] the probability of his or her appearing at trial or at a hearing of the case." Cal. Pen. Code § 1275(a)(1). All the while, public safety shall remain "the primary consideration." *Id. and See* Cal. Pen. Code § 1271. The Superior Court failed, however, to take into consideration *any* of these factors at any stage, and instead, set a bail amount that is obviously excessive and without regard for Petitioner's individual circumstances.

A. The Superior Court failed to consider that Petitioner does not present a threat to the public.

Where public safety should be the "primary consideration" underpinning any bail order, the Superior Court in this matter failed to assess the legal basis of the allegations against Ms. Becker so as to understand that, even if true and cognizable, they do not render her a threat to public safety. Petitioner is charged because she experienced a stillbirth which she allegedly caused by using a controlled substance. Neither an addiction to drugs, nor an alleged injury to her own pregnancy, supports a finding that Petitioner presents as a threat to public safety.

Petitioner's past use of a controlled substance does not render her a threat to the public or, by itself, constitute a crime. The Cal. Health & Safety Code D. 10, Uniform Controlled Substances Act proscribes varied conduct in relation to controlled substances including *current* use, possession, transportation and the sale of controlled substances, *but not* the past use of a controlled substance. *See People v. Mendoza* (1977) 76

Cal.App.3d Supp. 5, 10 [143 Cal.Rptr. 404] ("The use proscribed by section 11550 is a current use, not some use in the past.") This is because addiction itself, or substance abuse disorder, is not a crime, but is rather a medical condition characterized by "a cluster of cognitive, behavioral, and physiological symptoms indicating that the individual continues using the substance despite significant substance-related problems." Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 481, 483 (5th ed. 2013). Pretrial detention based solely on one's past use of a controlled substance is impermissible as a matter of law.[6]

Similarly, the experience of pregnancy loss cannot rationally be used to deem Petitioner to be a dangerous person. The experience of pregnancy loss and stillbirth is dishearteningly common. *See* Hoyert DL, Gregory ECW, *Cause of Fetal Death: Data from the Fetal Death Report, 2014* (Oct. 2016) Nat'l Vital Stat. Rep., vol 65 no 7 (In the United States, about 1 in 100 pregnancies result in stillbirth.); *see also* Childers, Linda, *In Effort to Decrease California's Stillbirth Rate, Advocates Encourage Pregnant Women to Count Baby's Kicks* (July 16, 2019) CALIFORNIA HEALTH REPORT ("According to the Centers for Disease Control and Prevention (CDC), California loses 2,465 babies a year to stillbirth."). However, even assuming that Ms. Becker ended her own pregnancy through drug use[7] - an

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[6] Even assuming that Ms. Becker had, at one time, a controlled substance in her possession, or might have such a substance in her possession in the future, that possession cannot rationally constitute the basis for a $2,000,000 bail. Rather, the King's County Bail Schedule, recommends only $5,000 bail for the possession of a controlled substance, a mere fraction of the $2,000,000 imposed.

[7] In the February 20, 2020 hearing on this matter, (Ex 5) the prosecution urged the court to maintain a $5,000,000 bail on the basis that, "for purposes of the bail review, the [c]ourt [was] to assume the charges are true." Hearing Transcript at pp. 5:6-7. Presumably, the court was asked to, and did, assume that Ms. Becker intentionally, voluntarily and consensually

allegation without scientific basis - such does not warrant a finding that she presents a threat to the public or, indeed, to any person.

Rather, one would have to assume that Petitioner must present as a threat to future hypothetical pregnancies and was detained on that basis or, more likely, simply detained because her alleged conduct was so distasteful and, undoubtedly, upsetting to the court. Such a detention or condition of probation, however, is itself unlawful as an infringement on Petitioner's fundamental right to procreate. *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541 (procreation is "one of the basic civil rights of man" and is "fundamental to the very existence and survival of the race"); *People v. Pointer* (1984) 151 Cal.App.3d 1128, 1139 [199 Cal.Rptr. 357] (reversing portion of sentencing order that prevented defendant, after felony child endangerment conviction, from conceiving during probationary period); *see also People v. Dominguez* (1967) 256 Cal.App.2d 623, 629 [64 Cal.Rptr. 290] (striking a probation condition that the defendant not become pregnant while unmarried on grounds that the defendant was "entitled to her freedom on probation unless it [was] revoked for lawful reasons"). Were the court to determine that detention was necessary to prevent Petitioner's becoming pregnant, there would be "no question that [such a condition] infringes the exercise of a fundamental right to privacy protected by both the federal and state constitutions." *Pointer*, 151 Cal.App.3d at 1139.

In short, no telling or retelling of the facts as alleged can lead a reasonable person to conclude that Petitioner presents as a threat to anyone and a $2,000,000 bail cannot rationally or constitutionally restrict Ms. Becker's liberty interest under the auspices of protecting either herself or any future pregnancy. Detention on these bases is unlawful.

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used methamphetamine to terminate her own pregnancy. This is *precisely* the conduct of a "mother of the fetus" that Penal Code 187(b)(3) defines as NOT subject to criminal liability under Penal Code 187(a).

B. In considering the seriousness of the charge, the Superior Court failed to consider the lack of prosecutorial authority to bring a charge against Petitioner which is not statutorily permitted.

There is not one appellate case in California affirming the charge of Penal Code 187(a) against a woman based on her pregnancy outcome. A number of trial level courts have dismissed such ill-conceived prosecutions for the very reasons described here. There is no way to rationally consider the seriousness of the charge against Ms. Becker without also considering the nature of the underlying allegations and, ultimately, the unlawfulness and unconstitutionality of the charge itself. This inquiry starts as simply as acknowledging that, where the criminal complaint alleges that Petitioner, contrary to *Penal Code* 187(a), "did unlawfully, and with malice aforethought murder a human fetus," Criminal Complaint (Ex. 2), the state alleges that Petitioner murdered her own fetus. It is clear that the Superior Court considered the seriousness of behavior that does not constitute a crime as a matter of California law.

California courts have repeatedly affirmed that California law does not permit the prosecution of a pregnant woman for the outcome of their pregnancies under any California criminal law. *See, e.g. Jaurigue v. People*, No. 18988, slip op. (Cal. Super. Ct. Aug. 21, 1992) https://tinyurl.com/rsnyrvl (dismissed fetal homicide charges against a woman who experienced a stillbirth, alleged to have been a result of drug use, finding statute could not be used to prosecute pregnant woman for the loss of her own pregnancy), writ denied, (Cal. App. 1992); *People v. Jones*, No. 93-5, Transcript of Record (Cal. J. Ct. Siskiyou County July 28, 1993) https://tinyurl.com/wc4xb3x (finding murder statute could not be used to prosecute defendant after newborn's death for alleged drug use and pregnancy) People v. Tucker, No. 147092 (Cal. Santa Barbara-Goteta Mun. Ct. June 1973). (In 1973, Claudia Tucker, shot herself and killed her fetus

after her husband threatened to leave her if she had another child. Ms. Tucker's attorneys filed a demurrer and Judge Arnold Gowans dismissed the murder charge. The District attorney unsuccessfully appealed the dismissal.) (These unpublished trial level cases are identified here not as authority, but as examples of courts having recognized the inapplicability of P.C. 187(a) to a women's pregnancy loss, *regardless* of the cause. Providing the Court with access to these cases does not run afoul of California Rules of court 8.1115(a) because these cases are not unpublished decisions of either the Court of Appeal or of the Superior Court Appellate Division); *see also Reyes v. Court* (1977) 75 Cal.App.3d 214 [141 Cal.Rptr. 912] (child endangerment statute cannot be used to prosecute woman for alleged actions while pregnant) For its part, since the late 1980s, California's legislature have considered and debated the need for criminal penalties, and chosen not to amend the law to include criminal sanctions against "substance-using mothers." Proposals to create crimes in relationship to pregnancy and drug use as well as efforts to expand the scope of criminal laws to include fetuses have been made and rejected since 2000. *See*, Sue Holtby et al*., Gender issues in California's perinatal substance abuse policy* (2000) 27 Contemporary Drug Problems 77, 89.

In determining bail and ultimately ordering Petitioner's detention, the Superior Court failed to acknowledge or consider the plain language of California's murder statute, which excludes the "mother of the fetus" from prosecution. Cal. Pen. Code § 187(b)(3). In construing the statute, the court must "begin with the plain, commonsense meaning of the language used by the Legislature. If the language is unambiguous, the plain meaning controls." *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1131 [150 Cal.Rptr.3d 533, 290 P.3d 1143] (quoting *Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499, 519 [128 Cal. Rptr. 3d 658, 257 P.3d 81]). The court may, however, "reject a literal construction

that is contrary to the legislative intent apparent in the statute or that would lead to absurd results[.]" *Id.* (quoting *Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 27 [109 Cal. Rptr. 3d 329, 230 P.3d 1117]).

California's murder statute is clear and unambiguous in excluding the prosecution of pregnant women. It states that the crime of murder "shall not apply to any person who commits an act that results in the death of a fetus if … [t]he act was solicited, aided, abetted, or consented to by the mother of the fetus." *Id.* Even assuming that Petitioner's drug use led to intrauterine fetal demise and stillbirth - an allegation lacking any scientific validity - prosecution of Petitioner, the mother, for a violation of Sec. 187 (a) is prohibited as a matter of law. *See id.* The Superior Court failed to so much as acknowledge the language of the statute in its continued order to detain Petitioner subject to $2,000,000 bail.

However, to the extent that the Superior Court engaged in the mental process so as to conclude that Petitioner is subject to prosecution because she allegedly committed, rather than "solicited, aided, abetted, or consented" to another person's commission of the act, construes the statute in violation of its clear legislative intent and in a manner that necessarily leads to absurd results. Even assuming that the terms of Section 187(b) are not themselves clear, the legislative intent to address *third party violence against* women and to exclude women from prosecution for the outcomes of their pregnancies including ending or attempting to end their own pregnancies is writ large. California's feticide law like all 38 states with feticide laws was passed to address *third party violence* against pregnant women. That is why even in states that don't have provisions making clear that the targets of such laws are not pregnant women/mothers, courts have refused to permit the use of those laws against them

In 1970, Penal Code § 187 was amended in response to the California Supreme Court's decision in *Keeler v. Superior Court* (1970) 2

Cal. 3d 61. In *Keeler*, a man attacked a pregnant woman, causing the woman to experience a stillbirth. The Supreme Court held that the state's homicide law did not reach fetuses and could therefore not be used to prosecute the man. In response, the Legislature amended Section 187 to permit murder prosecution of third persons for the killing of a fetus. *People v. Davis* (1994) 7 Cal.4th 797, 829. But, critically, the Legislature clarified that a pregnant woman herself could not herself be charged with murdering her fetus based on any of her own acts or omissions while pregnant. Cal. Pen. Code § 187(b).

Lest there be any doubt about the Legislature's intent, the primary author of the amendment, State Assemblyman W. Craig Biddle, executed an affidavit in 1990 (Ex 10) for use in *People v. Jaurequi*, *supra* which stated:

> [T]he purpose of my legislation as that purpose was explained to the Legislature: to make punishable as murder *a third party's* willful assault on a pregnant woman resulting in the death of her fetus. That was *the sole intent* of AB 816. No Legislator *ever* suggested that this legislation, as it was finally adopted, could be used to make punishable as murder conduct by a pregnant woman that resulted in the death of her fetus.

Biddle Affidavit ¶ 4 (Ex. 10) (emphasis added).

A statute that would disallow the prosecution of a woman for asking another to terminate her pregnancy, while permitting prosecution of that woman for seeking to terminate the pregnancy herself, or for experiencing a pregnancy loss for any reason, would lead to absurd results, run contrary to intent of the statute, and vastly expand the fetal homicide statute in a manner that would "impermissibly delegate basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis," thereby exposing any woman experiencing a negative pregnancy outcome to "arbitrary and discriminatory application" of the statute and potential criminal prosecution. *See People ex rel. Gallo v. Acuna* (1997) 14

Cal.4th 1090, 1116 [60 Cal.Rptr.2d 277, 929 P.2d 596] (quoting *Grayned v. City of Rockford* (1972) 408 U.S. 104, 109); *see also Gore*, 49 Cal.4th at 27 (courts should not apply a literal interpretation of the statute that would lead to absurd results) .[8]

That the charge under which Petitioner is currently detained is patently unlawful renders the question of whether the charged offense is "serious" a paradoxical one. While murder is of course "serious" as a matter of law, *see* Cal. Pen. Code § 1275(c); *see also* § 1192.7(c), a review of the complaint, on its face, demonstrates the lack of any legal basis for the present prosecution. The Superior Court should not have stopped its inquiry of seriousness – crediting it with making such an inquiry at all - simply at the term "murder", but rather should have considered the prosecutor's clear lack of authority to bring this prosecution *vel non*. Failure to consider the nature of the charge itself in assessing its seriousness renders the resultant bail amount excessive and unlawful.

C. The State misstated Petitioner's criminal record, and the Superior Court relied upon those misstatements in setting bail.

In addition to public safety and the seriousness of the charge, the court must also consider "the previous criminal record of the defendant" when setting or altering bail. Cal. Pen. Code § 1275(a). Petitioner advised the Superior Court in her motion to reduce bail that Ms. Becker "has no significant criminal history." Notice and Motion for Reduction of Bail (Jan. 31, 2020) at 4. (Ex. 4) However, without setting forth any particular analysis, the lower court apparently opted to rely, in error, upon

[8] Application of Section 187(a) to the present facts would not only expand it beyond its constitutional bounds and render it void for vagueness as well, such an expansion would also violate Ms. Becker's fundamental right to privacy under the Fourteenth Amendment, as articulated in more detail in Petitioner's Motion for Demurrer. Motion for Demurrer (Ex 6).

uncorroborated misstatements made by the prosecutor regarding Petitioner's record. During the bail review hearing, the prosecutor stated that Petitioner had "a strike conviction" and had served felony probation for violation of Cal. Pen. Code 245(a)(1), and that the conviction "does indicate she poses a risk to the community, as well as a flight risk." Bail Review Hearing Transcript at pp. at 5:19-22. (Ex 5) Those statements were patently false.

The exchange between the prosecutor and court during the hearing was a confusing one and provides little by way of clarification. The exchange referenced the Bail Review Report (Ex 11) which indicates a criminal history involving some sort of interaction with Cal. Pen. Code § 245(a)(1) and Health & Saf. Code, § 11550, but fails to provide any information pertaining to those interactions. It does not provide the year or approximate date of those interactions, whether they resulted in arrests or convictions, or any facts surrounding the incidents. Without these facts, it is impossible to rely on the report as elucidating the Petitioner's criminal record so as to make a determination in the interest of public safety, as required by Penal Code §§ 1275(a) and 1319. Nonetheless, the prosecutor's attempts at clarification, and erroneous statement that Ms. Becker did, indeed, have a "strike conviction" are simply unsupported by fact.

As stated in her original motion for bail reduction, Petitioner *does not* have a criminal record that would indicate either a threat to public safety or that she presents a flight risk. Petitioner *does not* have a strike conviction. Rather, the reference to Penal Code 245(a)(1) stems from an incident in July 2010, when Petitioner was only sixteen years old. She got into an argument with her mother and hit her with her hand. Petitioner's mother called the police and Petitioner was charged with P.C. 245(a)(1) as a juvenile in juvenile court. She entered into a plea agreement by which she pled to a misdemeanor assault and was sentenced to probation for two

years, and where she was released from probation early after 18 months. *See* Declaration of Jennifer Elaine Hernandez (Ex. 1). It should be noted that the sentence imposed on Petitioner for that arrest in 2010, two years of probation, is *not* a sentence for a violent felony, but rather, is a typical sentence for a misdemeanor assault. The conviction, therefore, was *not* for a felony violation of Penal Code 245(a), but rather for a misdemeanor.

Petitioner has made numerous attempts to obtain an official report of her criminal record to provide to this Court. However, in the face of a the lack of available personnel in the criminal justice system due to the Covid-19 crisis, as well as a lack of any response from the prosecution to Petitioner's request for information[9] the undersigned has been unable to obtain documentation of Ms. Becker's juvenile record and criminal record. Instead, all that has been generated is the report of an investigating detective in this matter which describes the minimal criminal record of Ms. Becker as being comprised of only misdemeanor convictions under the Health and Safety Code § 11550 consistent with someone struggling with a drug dependency problem. There is *no* reference to any Penal Code 245(a)(1) conviction. *See* Investigator's Report of criminal history excerpt (Ex 13). Petitioner is hopeful that the prosecution - with the resources of the state at its disposal, or, likely more expeditiously, this Court, pursuant to California Rules of Court 8.385, can generate an accurate juvenile and criminal record under the current unusual and stressful circumstances.

In any event, contrary to the prosecutor's statements and the Superior Court's conclusion, Ms. Becker has *no* felony history[10] and no strike conviction. Petitioner's criminal record provides *no* basis for concluding

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[9] Counsel's request for Petitioners criminal record April 17, 2020 (Ex. 12)

[10] Her misdemeanor controlled substance charge under Health & Saf. Code, § 11550 is certainly not a "strike conviction" and is part and parcel of having a substance abuse disorder. It in no way justifies the bail ordered.

that she presents as a threat to public safety, let alone a threat so grave as to require a bail amount functionally equivalent to a detention order.

D. Petitioner does not present as a flight risk, and $2,000,000 is unconstitutionally excessive to ensure her presence in court.

Like the factors articulated *supra*, there is no indication in the bail hearing transcript that the Superior Court meaningfully considered "the probability of [Petitioner] appearing at trial or at a hearing of the case," as mandated by Cal. Pen. Code § 1275(a). Had the court made a meaningful inquiry, however, it would have determined that the probability of Petitioner's appearance was and remains high, and that bail of $2,000,000 far exceeds any condition necessary to ensure her presence in court.

The accused maintains, even after arrest, a "strong interest in liberty." *United States v. Salerno* (1987) 481 U.S. 739, 750. Because that liberty interest is fundamental, pretrial release should be the norm, "and detention prior to trial or without trial is the carefully limited exception." *Id.* at 755. As a result, conditions of release must be narrowly tailored to meet the government's interest. Where the government "has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more." *Id.* at 754.[11] In this case, bail of

[11] Experts indicate that meeting this goal rarely requires detention. Rather than willfully fleeing justice, most nonappearance is the result of mundane and easily remedied factors including inadequate notice of court dates, the need to work, and a lack of childcare or transportation. *See, e.g.*, Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677, 729–35 (2018) (distinguishing" low-cost nonappearance," versus "true flight [from the jurisdiction of arrest]" and "local absconding"). These factors can be addressed by a number of initiatives and conditions of release that aim to maintain the liberty interest of the accused while ensuring their presence in court. Brice Cooke et. al., Univ. of Chicago Crime Lab, Using Behavioral Science to Improve Criminal Justice Outcomes: Preventing Failures to

$2,000,000 far exceeds any amount necessary to ensure Ms. Becker's presence at trial. Indeed, the evidence indicates that Ms. Becker does not present *any* risk of flight.

Had the Superior Court inquired beyond the prosecution's conclusory statements regarding flight risk, it would have determined that Ms. Becker does not present as a significant flight risk. During the bail review hearing, the prosecutor stated that Ms. Becker's criminal history, "does indicate she poses a risk to the community, as well as a flight risk," Bail Hearing Transcript a pp. 5:21-22.(Ex. 5) This statement has no basis in fact, and is, instead, a conclusory statement that any person with a criminal record of any sort must, ipso facto, present as a flight risk. She has no known history of failures to appear. The Bail Review Report (Ex. 11), erroneously states that, "[o]n October 31, 2019, the defendant failed to appear to Court and a Warrant of Arrest was issued in the amount of $5,000,000.00." Although an arrest warrant was issued on October 31, 2019, the warrant was *not* issued for a failure to appear and, indeed, Ms. Becker had no court hearing scheduled on that date. Rather, October 31 was the date that the Kings County District Attorney filed its criminal complaint against Petitioner and asked the court to issue a warrant for her arrest on that basis. Criminal Complaint (Ex. 2); Hanford Police Department Supplement 8 Report (Nov. 7, 2019) (Ex. 3) ("On 10-31-19, Kings County Superior Court Judge Robert S. Burns signed a warrant of arrest for Chelsea Becker for the felony charge of PC 187(a) with the bail amount of

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Appear in Court (2018) (rigorous controlled study finding that redesign of court-date notice form and text message reminders decreased nonappearance by 36%); Jason Tashea, *Text- Message Reminders Are a Cheap and Effective Way to Reduce Pretrial Detention*, ABA JOURNAL (July 17, 2018); *see also* Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344 (2014) (electronic monitoring is sufficient to prevent flight).

$5,000,000."). Petitioner was arrested one week later, on November 6, 2019, without incident, and has been held on millions of dollars bail since that date. Any statement that she ever failed to appear in court is simply false.

Rather, Ms. Becker has strong ties to the community, including children and all of her immediate family and friends in Kings County, and virtually no ties outside of California. See Bail Review Report (at 3: 12-14) (Ex 11). Her biological father, with whom Chelsea lived in 2012–2013, died in 2016; *and see*, Declaration of Jennifer Elaine Hernandez (Ex. 1). That she has obtained pro-bono private counsel in the present matter further decreases the likelihood of nonappearance.

II. The Superior Court's $2,000,000 is the functional equivalent of a preventive detention order and violates principles of equal protection and due process.

Article I, § 12 of the California Constitution prohibits any bail that is "excessive." This prohibition is in line with the historical purpose of bail. As explained by United States Supreme Court Justice Jackson,

> [t]he practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty. Without this conditional privilege, even those wrongly accused are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense.

Stack v. Boyle (1951) 342 U.S. 1, 7-8 (conc. op. of Jackson, J.); see also *Gerstein v. Pugh* (1975) 420 U.S. 103, 114, 123 ("Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships."). That right to release is understandably "conditioned upon the accused's giving adequate assurance that [s]he will

stand trial and submit to sentence if found guilty." *Stack*, 342 U.S. at 4. However, "[b]ail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment." *Id.* at 5; *Schilb v. Kuebel*, (1971) 404 U.S. 357, 365 (stating that "[b]ail is basic to our system of law and the Eighth Amendment's proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment").

Similarly, a bail order patently beyond and without regard for the accused's ability to pay violates principles of due process and equal protection. The Superior Court's $2,000,000 bail order not only violates these federal constitutional protections, but also violates the California Constitution's guarantee that bail not be "excessive." Cal Const, Art. I § 12 ("Excessive bail may not be required.").

Respectfully, it is submitted that the Superior Court violated the letter and spirit of each of these protections when, instead of carefully considering the circumstances of Petitioner, her case, the viability of the charge against her and her ability to pay, it followed a perfunctory path of least resistance - one that ineluctably, and unconstitutionally, led to pretrial detention.

A. The Trial Court's failure to consider Ms. Becker's ability to pay the $2,000,000 bail violated her right to due process and equal protection under the law, rendering her detention unlawful

California courts have recently considered whether a court must take into account, in setting bail, the accused's ability to pay, lest the accused is remanded for no distinguishing reason other than her poverty. *See In re Humphrey* (2018) 233 Cal.Rptr.3d 129 [417 P.3d 769] (granting review of the question of whether "principles of constitutional due process and equal protection require consideration of a criminal defendant's ability to pay in setting or reviewing the amount of monetary bail."). The Court of Appeals

recently held that, "[i]n setting money bail," a court must "consider the defendant's ability to pay and refrain from setting an amount so beyond the defendant's means as to result in detention." *In re Humphrey* (2018) 19 Cal.App.5th 1006, 1037 [228 Cal.Rptr.3d 513] (*hereinafter* "*Humphrey*") (*review granted In re Humphrey*, 233 Cal. Rptr. 3d 129). "If the court finds that it must impose money bail in excess of the defendant's ability to pay, it must consider whether there are any less restrictive alternatives that would ensure his or her future court appearances." *In re White* (2018) 21 Cal.App.5th 18, 32, n. 8 [229 Cal.Rptr.3d 827] (relying on *Humphrey*).

In *Humphrey*, this Court held that a bail amount of $350,000 in a first degree residential robbery case, set without consideration of the defendant's ability to pay, ran afoul of the due process and equal protection guarantees of the Fourteenth Amendment. (2018) 19 Cal.App.5th 1006 [228 Cal.Rptr.3d 513]. Pursuant to the Court's holding, currently under review, a judicial officer setting bail must (1) consider the defendant's ability to pay, and (2) if it "concludes that an amount of bail the defendant is unable to pay is required to ensure his or her future court appearances, it may impose that amount only upon a determination by clear and convincing evidence that no less restrictive alternative will satisfy that purpose." *Id.* at 1037. The Court reasoned that "the clear and convincing standard of proof is the appropriate standard because an arrestee's pretrial liberty interest, protected under the due process clause, is 'a fundamental interest second only to life itself in terms of constitutional importance.'" *Id.* (quoting *Van Atta v. Scott* (1980) 27 Cal.3d 424, 435 [166 Cal. Rptr. 149, 613 P.2d 210]). a*nd See*, Cal. Pen. Code § 1319.

Inexplicably, as it appears, in the present case, the court neither considered Ms. Becker's inability to post the bail ordered nor did the court consider any less restrictive means to ensure her appearance. *See generally* Bail Review Hearing Transcript (Ex. 5). Like the court in *Humphrey*,

"[d]ue to its failure to make these inquiries, the trial court did not know whether the [financial] obligation it imposed would serve the legitimate purposes of bail or impermissibly punish petitioner for [her] poverty." *Humphrey*, 19 Cal. App. 5th at 1031 *(pending review*). And like in *Humphrey*, where a wealthier person would be released under otherwise identical circumstances, Petitioner's indigence has resulted in her pretrial incarceration on account of no distinguishing factor but her poverty.

As a result, Petitioner has been deprived of her liberty interest for over six months. Petitioner anticipates that the state will argue that $2,000,000 could not have been excessive because it was below the $5,000,000 listed on the Schedule of Bail for Kings County. This argument simply misses the point: that blind rubber stamping of bail amounts based on a schedule, by definition, fails to take into consideration anything other than the charge lodged by the state. Most obviously, it fails to take into account that a wealthy person charged with murder may walk free and consult with her attorneys in advance of trial, while an indigent one must remain in custody. It similarly fails to consider the individual circumstances of the accused, her history, and ties to the community. And most importantly, for this case, such perfunctory adoption of a scheduled bail fails to take into account the obvious illegality of the charge on which the accused is being held. "As this case demonstrates," therefore, "unquestioning reliance upon the bail schedule without consideration of a defendant's ability to pay, as well as other individualized factors bearing upon his or her dangerousness and/or risk of flight, runs afoul of the requirements of due process for a decision that may result in pretrial detention." *Humphrey*, 19 Cal.App.5th at 1044 (*review granted*).

Perhaps even more compelling than the similarities to the circumstances in *Humphrey*, are the differences. In that case, the lower court set bail for the petitioner on the basis that he had three serious prior

offenses and, in the case at bar, was alleged to have entered the home of an elderly victim and burgled the home while the victim was present. *Id.* at 1042 n. 19. Assuming the truth of the allegations, they unquestionably constitute a crime. *See* Pen. Code § 211 (first degree residential robbery); Pen. Code § 459 ((first degree residential burglary). The circumstances in Humphrey are in stark contrast both to the allegations in the present matter - which themselves fail to amount to a violation of *any* provision of California law - and to Petitioner's lack of significant criminal record. Unlike the petitioner in *Humphrey*, Petitioner has no significant criminal history. Where the Humphrey court was presented with conduct which threatened an elderly person in his home, there has been no allegation, let alone evidence, that Petitioner is a threat to anyone. In spite of these differences, Petitioner is being held on bail of almost *six times* the amount held to be unconstitutionally high in *Humphrey*.

Bail set at $2,000,000 clearly functions as a remand order for anyone and everyone except the wealthiest defendants. For Ms. Becker, it functions entirely as a denial of bail, contrary to the requirements of Article I, § 12 of the California Constitution and the due process and equal protection guarantees of the Fourteenth Amendment.

III. The Superior Court has denied Petitioner her procedural and substantive due process rights by refusing to timely hear her motion for release as a result of the ongoing COVID-19 pandemic.

Because of the Superior Court's unlawful bail order, Petitioner remains incarcerated just as COVID-19 has gained momentum in the United States and threatens vulnerable populations throughout the country. Among those most vulnerable are those incarcerated or working in jails and prisons. In one California jail, at least 80 inmates and 55 employees have tested positive for the virus, and two veteran deputies have died as a result of contracting it. Winton, Richard, More inmates, jailers testing positive as

coronavirus spreads in Southland, The Los Angeles Times (April 13, 2020), https://www.latimes.com/california/story/2020-04-13/more-inmates-jailers-testing-positive-as-coronavirus-continues-to-spread-through-jails. Jails and prisons are particularly susceptible to the spread of COVID-19 because of the tight quarters, lack of personal protective equipment, and near impossibility of social distancing. Bluntly stated, America's

> correctional facilities are frequently crowded and unsanitary, filled with an aging population of often impoverished people with a history of poor health care, many of whom suffer from respiratory problems and heart conditions. Practices urged elsewhere to slow the spread of the virus — avoiding crowds, frequent handwashing, disinfecting clothing — are nearly impossible to carry out inside.

Williams, Timothy, Weiser, Benjamin, Rashbaum, William K, 'Jails are Petri Dishes': Inmates Freed as the Virus Spreads Behind Bars; *The New York Times* (Mar. 30, 2020). https://www.nytimes.com/2020/03/30/us/coronavirus-prisons-jails.html Because of this impossibility, the virus spreads quickly in detention facilities and places the lives of inmates, staff, and even those outside of the facility at risk. *See, e.g.,* 73% Of Inmates At An Ohio Prison Test Positive For Coronavirus, NPR (Apr. 20, 2020) (at least 73% of inmates at one detention facility in Ohio tested positive for the virus) https://www.npr.org/sections/coronavirus-live-updates/2020/04/20/838943211/73-of-inmates-at-an-ohio-prison-test-positive-for-coronavirus . While some jails are releasing inmates in order to stem outbreaks, critics say it is not happening quickly enough to save lives and resources. *Id*. As a result, Ms. Becker remains, unjustifiably, in an environment ideal for the virus to thrive and spread.

The Chief Justice of the California Supreme Court has recognized the "unprecedented" nature of the danger confronting those incarcerated in

California. The Justice issued an advisory to the state's 58 Superior Courts on March 20, 2020 recommending that they consider early release for county jail and juvenile hall inmates who have fewer than 60 days remaining on their sentences. *See* Letter to Presiding Judges and Court Executive Officers of the California Courts (Mar. 20, 2020) (Ex. 14). While Petitioner is not directly covered by the letter, that she is not dangerous and is serving time *pretrial* rather than in the form of a sentence upon conviction weighs even more heavily in favor of her immediate release to preserve her own health and that of those around her.[12]

Despite the near universally accepted need to address and address quickly the spread of the virus, the Superior Court in this matter on March 30, 2020 has delayed hearing Petitioner's Supplemental Notice and Motion for O.R. Release or Reduction of Bail in Light of COVID-19 Pandemic and Consequent State of Public Health Emergency (Ex. 7) (*hereinafter* "COVID Motion") by adjourning the hearing for 50 days to May 20, 2020.[13] Such a delay in the face of a fast moving, constantly changing, and

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[12] Notably, the Superior Court in the present case would have received the advisory well in advance of its repeated directives that Petitioner would not be permitted to have her motion for release heard in any semblance of an expedited manner

[13] Petitioner filed her motion with the Superior Court on March 26, and a hearing was set for April 10, 2020. Petitioner, through counsel, had separately come to an agreement with the state to continue a preliminary hearing in the matter from March 30 until May 20, 2020. On March 30, 2020, the parties came before the court for a pretrial conference. Counsel for Petitioner, however, was unavailable for the conference, and another attorney stood in as a courtesy. *See* Hearing of Pretrial Conference (Mar. 30, 2020) (Ex. 15). In a confusing exchange with the court, the attorney agreed to continue the hearing date, not only for the preliminary hearing, but also, in error, for the emergency COVID Motion. *Id.* at 4-5. The court pressed that continuing the emergency bail reduction motion "made sense to [him]," and courtesy counsel, as he was standing before the court, erroneously agreed. *Id.* Of course, however, delaying a motion for release

ultimately unforgiving pandemic can prove deadly. As stated in Petitioner's COVID Motion, immediate release is necessary in order to ensure her continued health and because her alleged conduct does not constitute a crime in California.

The Superior Court's functional refusal to hear the motion while meaningful relief may still be offered, further compromises Petitioner's federal and state constitutional rights to due process under the law and renders her continued pretrial detention unlawful.

CONCLUSION

In order to sustain the liberty interest guaranteed under the Fourteenth Amendment, pretrial detention must be the exception rather than the rule. The Superior Court in the present case, however, has treated the issuance of a bail amount as a perfunctory process without regard for the individual circumstances of the accused and in violation of her statutory and state and federal constitutional rights. The Superior Court's failure to consider the patent illegality of the charge against Petitioner as well as her inability to post the bail ordered renders its order unlawful.

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in light of a fast-moving, unpredictable and sometimes lethal pandemic does not make logical or equitable sense.

Counsel for Petitioner immediately on April 1 *tried* to file a motion to advance the hearing date which explained the confusion of courtesy counsel at the March 30 hearing and that Petitioner had *not* agreed to delay hearing her motion. The court, however, refused to even permit the motion to advance the hearing to be filed and, after *a second* attempt to file a similar motion was made on April 10, 2020 which included an attached Declaration of John Hastrup, appearance attorney (Ex. 8) the court issued a letter (Ex. 9) stating that even *that* filing of the motion would not be permitted because it was not, in the court's view, formatted correctly, thereby effectively denying the motion without any due process and depriving Petitioner of the opportunity to even make a record.

The bottom line here is that this already unlawful detention is seriously exacerbated by the health crisis that now confronts us all. Where, as here, release does not threaten the safety of the public, where petitioner does not have the criminal record which was asserted by the prosecution in open court, where petitioner has never failed to appear in in court despite the erroneous bail review report to the contrary upon which the court relied, and where the Petitioner has been charged with conduct that is not a crime in California, Petitioner should not have to risk her own life, to say nothing of her liberty, as a result of the failures of the lower court. In consideration of the current state of emergency, the threat presented by continued detention to Petitioner's health, as well as her financial means, her lack of a significant criminal record, the lack of any evidence that she has ever failed to appear in any court hearing and the simple fact that the charge pending against her does not exist, Petitioner respectfully seeks a writ ordering her immediate release or an alternative resolution that comports with the actual facts of this matter and complies with the California and United States Constitutions and laws of California.

Dated: April 27, 2020

Respectfully submitted,

/s/ Roger T. Nuttall

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CERTIFICATE OF WORD COUNT

I, Roger T. Nuttall, co-counsel for Chelsea Becker, petitioner and defendant, do hereby certify and verify, pursuant to the California Rules of Court, rule 8.204(c)(1), that the word processing program used to generate this brief indicates that the word count for this document (Petition for Writ of Habeas Corpus Memorandum of Points and Authorities and Application for Immediate Release) is 9,287 words, excluding the tables, this certificate, and any attachment permitted under rule 8.486(b)(1).

I declare that the foregoing is true and correct to the best of my knowledge and belief at the time of making this verification.

EXECUTED on April 25, 2020, under penalty of perjury under the laws of the State of California, in Fresno, California.

/s/ Roger T. Nuttall
ROGER T. NUTTALL

PROOF OF SERVICE

STATE OF CALIFORNIA,)
COUNTY OF FRESNO.)

I am employed in the County of Fresno, State of California. I am over the age of eighteen (18) and not a party to the within action; my business address is: 2333 Merced Street, Fresno, California 93721.

On **April 27, 2020**, I served the foregoing document described as: **PETITION FOR WRIT OF HABEAS CORPUS, EXHIBITS TO PETITION FOR WRIT OF HABEAS CORPUS,** on the interested parties in this action by placing a copy thereof enclosed in a sealed envelope addressed as follows:

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[X] [U.S. MAIL]

[X] {State} I declare under penalty of perjury, under the laws of the State of California the above is true and correct.

EXECUTED on **April 27, 2020**, at Fresno, California.

/s/ Bryan Murray
BRYAN MURRAY