S247074

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **BETTIE JAMES WEBB,** Defendant and Appellant.	No.

Appeal from the Fourth Appellate District, Division One, Case No. D072981
Superior Court of San Diego County, Case No. SCS293150
The Honorable Stephanie Sontag, Judge

PETITION FOR REVIEW

SUMMER STEPHAN
District Attorney
MARK A. AMADOR
Deputy District Attorney
Chief, Appellate & Training Division
LINH LAM
Deputy District Attorney
Asst. Chief, Appellate & Training Division
MARISSA A. BEJARANO, SBN 234544
Deputy District Attorney
330 W. Broadway, Suite 860
San Diego, CA 92101
Tel.: (619) 531-4232
Fax: (619) 515-8632
Email: Marissa.Bejarano@sdcda.org

Attorneys for Plaintiff and Respondent

Table of Contents

Page

Table of Authorities

Cases **Page**

Statutes

Penal Code

Other Authorities

California Rules of Court

California Constitution

Secondary Sources

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Respondent, the People of the State of California, respectfully petitions this court to grant review in this matter pursuant to rule 8.500, of the California Rules of Court.

In a published opinion filed on January 31, 2018, the majority of the Court of Appeal, Fourth Appellate District, Division One, granted petitioner's Petition for Writ of Habeas Corpus. The court struck a Fourth Amendment waiver bail condition imposed by the trial court, following petitioner's release from custody on bail, in a felony case. The court found trial courts do not have inherent authority to impose bail conditions on a felony defendant released on bail. Justice Patricia D. Benke, in a concurring opinion, agreed with the result but held, in line with then-existing case law, that trial courts do have inherent authority to impose bail conditions in felony cases when a defendant is released on monetary bail.

A copy of the slip opinion is attached to this petition as Exhibit A (hereafter cited as "Slip Opn.").

ISSUE PRESENTED[1]

Do trial courts possess inherent authority to impose reasonable[2] bail conditions related to public safety on felony defendants who are released on monetary bail?

---

[1] The issue presented in this petition was timely raised and argued in the Court of Appeal. (Cal. Rules of Court, rule 8.500(c)(1).) No petition for rehearing was filed in the Court of Appeal because the issue was fully presented and argued. (Cal. Rules of Court, rule 8.500(c)(2).)

[2] This court has noted that reasonableness depends on "the relationship of the condition to the crime or crimes which defendant is charged and to the defendant's background, including his or her prior criminal conduct." (*In re York* (1995) 9 Cal.4th 1133, 1151, fn. 10.)

REASONS FOR REVIEW

Prior to this case, Courts of Appeal recognized that trial courts possess inherent authority to impose reasonable bail conditions, related to public safety, on felony defendants released on monetary bail, even when not statutorily authorized. (See *In re McSherry* (2003) 112 Cal.App.4th 856, 860-863 (*McSherry*) [public safety, not certainty of a defendant's future court appearance, is the primary consideration for imposing bail; Legislature did not intend courts be prevented from setting bail conditions for person charged with serious or violent felony]; accord *Gray v. Superior Court* (2005) 125 Cal.App.4th 629, 642 (*Gray*) citing *McSherry*, *supra*, 112 Cal.App.4th at p. 862 [enactment of statute authorizing bail conditions in misdemeanor case implies that the Legislature intended to permit added conditions on felony-charged defendant released on bail].)

In contrast to the preceding case authority, the majority of the court here stripped away a trial court's inherent authority to impose reasonable bail conditions, related to public safety, on a felony defendant, with one narrow exception; that exception is when a peace officer or felony defendant, *prior to arraignment*, seeks to change the money bail amount above or below the bail schedule. (Pen. Code, § 1269c [permits application for increase or reduction of bail; once application made, if change to bail amount does not occur within eight hours after *booking*, original bail schedule amount stands].) In all other circumstances, the practical effect of the majority opinion is that courts are now powerless to impose reasonable bail conditions, related to public safety, once a defendant charged with a felony is released on bail.

Complicating this matter, two days before the opinion in this case was issued, the First District Court of Appeal, issued its decision in *In re Humphrey* (Jan. 25, 2018, A152056) __ Cal.App.5th __ (2018 WL 550512) (*Humphrey*, Slip Opn., A152056). The *Humphrey* decision requires that

monetary bail be set in an amount the defendant can afford and requires the courts to consider what conditions are available to attach to bail in order to keep the public safe in all cases.

Thus, in the same week, trial courts were given conflicting rules pertaining to pretrial release on bail in felony cases.

Respondent seeks review to resolve this conflict among the Courts of Appeal:

> whether a trial court possesses inherent authority to impose reasonable bail conditions, related to public safety, on felony defendants released on monetary bail. A decision by this court will provide uniform guidance to all the courts of this state. (See Cal. Rules of Court, rule 8.500(b)(1) [review of a Court of Appeal decision may be ordered when necessary to secure uniformity of decision or to settle an important question of law].)

Of note, respondent does not seek review of whether the bail condition imposed in this case was a proper exercise of the trial court's inherent authority. Rather, respondent seeks to resolve the conflict in the law created by this case and *Humphrey* as to whether the trial court has inherent authority to impose reasonable conditions, related to public safety, when a felony defendant is released on bail.[3]

STATEMENT OF THE CASE AND FACTS

Petitioner Bettie Webb was arrested and charged in a felony complaint with knowingly bringing a controlled substance into a state prison (Pen. Code, § 4573) and unauthorized possession of a controlled substance in a prison (Pen. Code, § 4573.6). She posted a $50,000 bond in accordance with the bail schedule and was released prior to arraignment. At

---

[3] Respondent recognizes that at the commencement of the current state legislative session, California Senate Bill No. 10 (Money Bail Reform Act of 2017), was introduced. However, the final language of the bill, if the bill will pass, and when the bill would pass are all unknown. Review is necessary now to provide guidance to all the courts of this state.

her arraignment, she pleaded not guilty to the charges, but over her objection the magistrate imposed a condition that she would be subject to a Fourth Amendment waiver, finding it had inherent authority to do so. She petitioned for a writ of habeas corpus in the superior court challenging the search condition. Pointing out the magistrate had not made a verified showing of facts, the superior court denied the petition, citing facts from the preliminary hearing. (Slip Opn. at pp. 1-2.)

At the preliminary hearing, there was testimony that petitioner smuggled into the prison heroin in a usable amount. (Slip Opn. at p. 2.) The petitioner filed a petition for writ of habeas corpus in the court of appeal. She argued the magistrate lacked statutory and inherent authority to impose the post-bail search condition, and imposition of the condition constituted a pretrial restraint without due process protections such as notice and a hearing or any showing that she posed a heightened risk of misbehaving while on bail. (Slip Opn. at pp. 2-3.)

The majority of the Fourth District Court of Appeal, Division One, held that a trial court does not possess inherent authority, outside the statutory bail scheme set forth in the Penal Code, to impose bail conditions once a felony defendant is released on bail. (Slip Opn. at pp. 8-17.) In her concurring opinion, Justice Benke, disagreed with the majority, finding "that a trial court has inherent authority to impose conditions on a defendant's release," even when a defendant posts the monetary bail amount set forth in the bail schedule. (Slip Conc. Opn. at p. 1.)

No petition for rehearing was filed.

ARGUMENT

I.
THE MAJORITY OPINION THAT TRIAL COURTS DO NOT POSSESS INHERENT AUTHORITY TO IMPOSE REASONABLE BAIL CONDITIONS, RELATED TO PUBLIC SAFETY IS DIRECTLY CONTRARY TO CASE LAW

The California Constitution provides that except in three enumerated cases "a person shall be released on bail." (Cal. Const., art. I, § 12.) The Constitution further provides that "[i]n setting, reducing or denying bail . . . [p]ublic safety and the safety of the victim shall be the primary considerations." (Cal. Const., art. I, § 28, subd. (f)(3).) The statutes implementing the constitutional right to bail are set forth in title 10, chapter 1 of the Penal Code. (See Pen. Code, §§ 1268-1276.5.)

Within that statutory scheme, bail conditions are authorized under two statutes. First, Penal Code section 1270 [release on non-capital offense; procedure], states that as to misdemeanor defendants, if a trial court determines they should not be released on their own recognizance because they pose a public safety risk or because it will not assure the presence of the defendant, "the court shall then set bail and specify the conditions, if any, whereunder the defendant shall be released." (Pen. Code, § 1270, subd. (a).)

Second, Penal Code section 1269c [increase or reduction of bail; application by peace officer or defendant; determination by magistrate] provides for imposition of bail conditions in one limited situation. (Pen. Code, § 1269c.) That statute permits a defendant who is arrested without a warrant for a bailable offense, *prior to arraignment*, to apply for "bail lower than that provided in the schedule or on his own recognizance," or for a peace officer to apply for an increase in bail prior to arraignment. (Pen. Code, § 1269c.) The statute provides that when "that application" is made the magistrate or commissioner:

> [I]s authorized to set bail in an amount that he or she deems sufficient to ensure the defendant's appearance or to ensure the protection of a victim, or family member of a victim, of domestic violence, and to set bail on the terms and conditions that he or she, in his or her discretion, deems appropriate, or he or she may authorize the defendant's release on his or her own recognizance.

(Pen. Code, § 1269c.)

If, after application, the magistrate does not change the bail schedule amount within eight hours of *booking*, the defendant's release is subject to posting the original bail schedule amount. (Pen. Code, § 1269c.)

Importantly, when a matter did not fall squarely within the above two narrow circumstances, the Courts of Appeal, prior to this case, generally recognized that trial courts had inherent authority to impose reasonable bail conditions related to public safety. (See *McSherry*, *supra*, 112 Cal.App.4th at p. 863; *Gray*, *supra*, 125 Cal.App.4th at pp. 641-642.)

The first case to hold that trial courts had inherent authority to impose bail conditions outside the statutory framework was *McSherry*. Both rehearing and review were denied in that case. In *McSherry*, the defendant was convicted of three misdemeanor counts of loitering about schools and sentenced to 18 months in county jail. (*McSherry*, *supra*, 112 Cal.App.4th at p. 859.) After the sentence was imposed, the defendant requested bail pending appeal of his matter. (*Ibid.*) The court granted the defendant's request but ordered bail conditions out of concern for public safety. The bail conditions were 1) the defendant was not to drive any motor vehicle, 2) stay at least 500 yards away from children, and 3) stay at least 500 yards away from any school, park, playground, daycare center or swimming pool in which children were present. (*Ibid.*) Subsequently, the defendant filed a writ of habeas corpus in the Court of Appeal arguing that the trial court did not have authority to impose the bail conditions on the granting of his bail because Penal Code section 1270, which permitted the

court to release misdemeanor defendants on bail and impose bail conditions, only related to the release on bail before conviction, not post-conviction. (*Id.* at pp. 861-862.)

On review, the Second District Appellate Court, Division Seven disagreed with the defendant. The reviewing court noted Penal Code section 1270 allows a court to set bail and specify conditions as to a defendant when they are simply charged with a misdemeanor. (*In re McSherry*, *supra*, 112 Cal.App.4th at p. 860.) The court recognized that the defendant did not fall squarely within that statute because, at the time the condition was imposed, he had been convicted and sentenced. The court then noted:

> To accept petitioner's contentions would mean that a court has the power to impose bail conditions on a person who has merely been charged with a crime and before the nature of his involvement has been determined, but once the defendant has been found guilty and found to be deserving of the maximum sentence, then the court must release the defendant as a matter of right and is powerless to impose any conditions on his or her bail.
>
> Such an interpretation is nonsensical. Petitioner's arguments also lead to the conclusion that even though a court can set bail conditions for an unconvicted misdemeanant, it could not do so for a person charged with a violent or serious felony because "conditions" are not mentioned in section 1270.1. Likewise, if a defendant has been convicted of a felony, under petitioner's view, even though the right is [sic] bail is discretionary, the court is powerless to impose bail conditions . . . This cannot be what the Legislature intended.

(*Id.* at pp. 861-862.)

The court then set its focus on determining the legislative intent. (*Id.* at p. 862.) In doing so, the court first noted the California Constitution "mandates with certain exceptions, that persons involved in the criminal process have the right to have reasonable bail." (*Ibid.*) The court continued, "Within the bail statutory framework is the Legislature's overriding theme;

the safety of the public is of paramount importance. [Citations.]" (*Id.* at p. 862.) The court concluded, "Given the circumstances of the Legislation and the overall plan, it would defeat the Legislature's purpose to hold that a person . . . was absolutely entitled to remain free on bail without any restrictions or conditions . . ." (*Id.* at p. 863.) "Accordingly, we hold that under section 1272[4], a trial court has the right to place restrictions on the right to bail of a convicted misdemeanant as long as those conditions relate to the safety of the public." (*Id.* at p. 863.) Thus, the *McSherry* court held the trial court had inherent authority to impose bail conditions on the defendant's release despite the fact that the statutory bail framework did not expressly permit a trial court to impose bail conditions on such a defendant post-conviction.

Following *McSherry*, the First District Appellate Court, Division Three, was presented with the question of whether the trial court could prohibit a defendant, released on monetary bail for felony offenses, from practicing medicine as condition of bail. (*Gray*, *supra*, 125 Cal.App.4th at p. 635.) The court noted that like *McSherry*, there was no statute authorizing the trial court to impose the bail condition. (*Id.* at p. 641.) However, relying on *McSherry* the court found "there is a general understanding that the trial court possesses inherent authority to impose conditions associated with release on bail." (*Id.* at p. 642.) The court ultimately concluded that while the bail condition in that case was "not per

---

[4] Penal Code section 1272 provides in relevant part: "After conviction of an offense not punishable with death, a defendant who has made application for probation or who has appealed may be admitted to bail: ¶ . . . ¶ 2. As a matter of right, before judgment is pronounced pending application for probation in cases of misdemeanors, or when the appeal is from a judgment imposing imprisonment in cases of misdemeanors." (Pen. Code, § 1272, subd. (2).) The statute makes no reference to bail conditions.

se unreasonable," under the circumstances, imposition of the condition violated the defendant's' right to procedural due process. (*Id.* at p. 643.)

Most recently, on January 29, 2018, two days before the opinion in this case was issued, the First District Appellate Court, Division Two, in *Humphrey,* also recognized a trial court's inherent authority and obligation to impose bail conditions outside the statutory bail scheme to protect the public. In that case, bail was set in an amount impossible for the defendant to pay. (*Humphrey*, Slip Opn., A152056, at p. 4.) On review, the Court of Appeal held that setting an amount of bail impossible for a defendant to pay constituted a *sub rosa* or de facto detention. (*Id.* at pp. 2, 17.) The court further noted that before a trial court could impose such a detention order, due process protections were required. (*Id.* at p. 16.) The court remanded the matter for a new bail hearing requiring the trial court to inquire about the defendant's ability to pay and consider imposition of nonmonetary bail conditions to ensure public safety. (*Id.* at p. 24.)

Accordingly, the decision in *Humphrey* now contemplates the release of felony defendants on bail in an amount they are able to afford, with conditions intended to ensure the safety of the public. Thus, the *Humphrey* court implicitly holds, like the courts in *McSherry* and *Gray*, that trial courts possess inherent authority to impose reasonable bail conditions, related to public safety. Because, as set forth above, when monetary bail has been set for a felony offense, bail conditions are only statutorily authorized, *prior to arraignment*, upon application of a peace officer, defendant, or his/her representative. (Pen. Code, § 1269c.) In all other felony cases, bail conditions are not statutorily authorized, and thus, may only be imposed if trial courts possess inherent authority to impose bail conditions.

Thus, the Court of Appeal's decision in this case, that trial courts do not have inherent authority to impose reasonable bail conditions related to

public safety, has resulted in a split of authority on an important question of law, and review is necessary to secure uniformity and provide direction to all courts of this state.

II.
THE CALIFORNIA CONSTITUTION, THE PENAL CODE, AND PUBLIC POLICY DEMAND THAT TRIAL COURTS HAVE INHERENT AUTHORITY TO IMPOSE REASONABLE CONDITIONS RELATED TO PUBLIC SAFETY ON FELONY DEFENDANTS RELEASED ON BAIL

In reaching the conclusion that trial courts do not possess inherent authority to impose reasonable bail conditions related to public safety, the majority first relied on Penal Code section 1269b. (Slip. Opn. at p. 5.) The court stated that section "provides without qualification that upon posting bail, 'the defendant or arrested person shall be discharged from custody as to the offense on which the bail is posted.' " (Slip. Opn. at pp. 5, 14.) The court further stated that once a trial court sets bail, having considered the Penal Code section 1275 factors, which include public safety, the court has "effectively determined that releasing the accused person pending trial does not present an unreasonable public safety risk," and the court has neither statutory authority to impose bail conditions, nor inherent authority to impose bail conditions, on a felony defendant except in the limited circumstance of an application made pursuant to Penal Code section 1269c. (Slip. Opn. at pp. 5-7.)

However, that result cannot be reconciled with existing Constitutional provisions and the Penal Code. Specifically, section 28 of the California Constitution, adopted by the voters of this state, states that victims of crimes have a right to have their safety and their family's safety "considered in fixing the amount of bail *and release conditions* for the defendant." (Cal. Const., art. 1, § 28, subd. (b)(3), italics added.) That language, contrary to the majority's reasoning, contemplates the setting of

bail coupled with bail conditions, despite the fact that public safety would have been taken into consideration in setting the monetary amount of bail. The same was recognized in *Humphrey*. In the *Humphrey* opinion, the court recognized that money bail is a pledge to assure future appearance and may only incidentally protect the public if a defendant is detained in custody; however, when the concern is the protection of the public, the court must inquire into whether "less restrictive alternatives," i.e. conditions, are available. (*Humphrey*, Slip Opn., A152056, at pp. 20-21.)

Additionally, Penal Code sections 1269c and 1270 evidence that public safety must be considered in setting monetary bail amounts and that courts possess authority to impose bail conditions. For example, Penal Code section 1269c, permits a trial court to reduce the monetary bail amount below the bail schedule on the defendant's request. In setting a lower bail amount, the magistrate or commissioner "is authorized to set bail in an amount that he or she deems sufficient" not only to ensure the defendant's appearance but also to protect the victim. Notably, along with the fact that the protection of the victim will also be considered when setting the monetary bail amount, the statute expressly permits the trial court to impose bail conditions. (Pen. Code, § 1269c.)[5]

Similarly, Penal Code section 1270, which discusses bail conditions as they relate to persons charged with misdemeanors, provides that if a

---

[5] Penal Code section 1269c provides in pertinent part: "The magistrate or commissioner to whom the application is made is authorized to set bail in an amount that he or she deems sufficient to ensure the defendant's appearance or to ensure the protection of a victim, or family member of a victim, of domestic violence, and to set bail on the *terms and conditions* that he or she, in his or her discretion, deems appropriate, or he or she may authorize the defendant's release on his or her own recognizance."

(Pen. Code, § 1269c; italics added.)

defendant charged with a misdemeanor is not released on his own recognizance because he or she could pose a public safety risk or because it will not assure the presence of the defendant, then "the court shall then set bail *and* specify the conditions, if any, whereunder the defendant shall be released." (Pen. Code, § 1270, subd. (a), italics added.) That language also suggests that even though public safety will have already been taken into consideration in setting the monetary bail, the court retains authority to impose reasonable non-monetary bail conditions to ensure public safety.

Such policy makes sense. "[T]he dominant form of release for felony bookings is bail." (Sonya Tofya et al., Pretrial Release in California (Public Policy Inst. Of Cal., May 2017), www.Ppic.org/content/pubs/report/R_0517STR.prdf). And, simply stated, in certain cases the monetary bail amount is not enough to ensure the safety of the public, and the court exercising its inherent authority should be able to impose reasonable conditions it deems necessary to ensure public safety. Felony driving under the influence (DUI) cases are a prime example. In those cases, trial courts generally set bail at or above the bail schedule. Additional conditions such as monitoring the consumption of alcohol, restricting a defendant's right to drive a motor vehicle, and requiring a defendant to attend AA meetings, are routinely imposed to protect the safety of the public. (See Taylor & Johnson, Cal. Drunk Driving (5th ed. 2016) Pretrial release, § 5:7 ["[s]ome judges impose conditions on pretrial release," "an attorney should expect such conditions"].)

To extend that DUI example, often, drivers are arrested for misdemeanor DUI, and may post bail pursuant to the bail schedule for a first-time misdemeanor DUI offender and be released from custody. At arraignment or post-arraignment, the charging agency may discover multiple DUI priors in the driver's history, changing what was believed to be a misdemeanor offense into a felony offense. With more information,

not available at booking, the court now has knowledge that the repeat DUI offender's danger to the public has increased exponentially, and the court must have inherent authority to add bail conditions in lieu of increased bail, if it determines that conditions will best ensure the public's safety. The *Webb* court's prohibition of bail conditions in situations like these directly conflict with the *Humphrey* court's rule that conditions may be imposed in conjunction with bail, as well as common sense.

Another group of felony defendants who secure release on bail are individuals charged with serious or violent felonies, and those charged with sex offenses. (Sonya Tofya et al., Pretrial Release in California (Public Policy Inst. Of Cal., May 2017), www.Ppic.org/content/pubs/report/R_0517STR.prdf). In felony sex offenses involving minors, in order to protect non-victim children, trial courts will impose stay away orders from schools, parks, and other public establishments that children frequent, as conditions of bail. In other cases, where electronics are used to lure minors to engage in sexual activities, trial courts impose restrictions on the use of the same electronics, as a condition of bail.

In sum, to protect the public as mandated in the California Constitution, trial courts must possess inherent authority to impose reasonable bail conditions related to public safety on felony defendants released on bail. The utility of imposing conditions and monetary bail amounts in felony cases was recognized by Justice Benke in this case:

> I think we must recognize the practical necessity that in particular cases, in order to assure a defendant's appearance and protect the public from harm, a trial court has the power to impose conditions which restrain the behavior or provide monitoring of a defendant while criminal proceedings are pending-even where as here, the defendant has the ability to post cash bail.

(Slip Conc. Opn. at p. 3.) The majority's decision in this case, reaching the opposite conclusion, creates a split of authority on an important question of law and runs contrary to public safety.

CONCLUSION

Respondent respectfully requests review be granted to determine whether trial courts possess inherent authority to impose reasonable conditions related to public safety on felony defendants released on bail, and resolve the current split in authority.

Dated: February 16, 2018

Respectfully Submitted,

SUMMER STEPHAN
District Attorney
MARK A. AMADOR
Deputy District Attorney
Chief, Appellate & Training Division
LINH LAM
Deputy District Attorney
Asst. Chief, Appellate & Training Division

MARISSA A. BEJARANO
Deputy District Attorney

Attorneys for Plaintiff and Respondent

CERTIFICATE OF WORD COUNT

I certify that this PETITION FOR REVIEW, including footnotes, and excluding tables and this certificate, contains 3,879 words according to the computer program used to prepare it.

MARISSA A. BEJARANO, SBN 234544
Deputy District Attorney

EXHIBIT A

Filed 1/31/18 (unmodified version)

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re BETTIE WEBB on Habeas Corpus.	D072981 (San Diego County Super. Ct. Nos. HC11619 & SCS293150)

ORIGINAL PROCEEDING in habeas corpus. Petition granted with directions.

Angela Bartosik and Robert Louis Ford for Petitioner,

Summer Stephan, District Attorney, Mark A. Amador and Marissa A. Bejarano, Deputies District Attorney, for Respondent.

Bettie Webb was arrested and eventually charged in a felony complaint with knowingly bringing controlled substances into a state prison (Pen. Code,[1] § 4573) and unauthorized possession of a controlled substance in a prison (§ 4573.6). She posted a $50,000 bond in accordance with the bail schedule and was released. At her arraignment, Webb pleaded not guilty to the charges, but over her objection the magistrate imposed a condition that she would be subject to a Fourth Amendment waiver, finding it had

1 Undesignated statutory references are to the Penal Code.

inherent authority to do so.[2] She petitioned for a writ of habeas corpus in the superior court challenging the search condition. Pointing out the magistrate had not made a verified showing of facts, the superior court denied the petition, citing facts developed at Webb's preliminary hearing.[3]

Webb files the present petition for a writ of habeas corpus contending the magistrate lacked statutory or inherent authority to impose the bail search condition, and imposition of the condition constitutes a pretrial restraint without due process protections such as notice and a hearing or any showing that she poses a heightened risk of misbehaving while on bail. Webb has properly sought habeas relief on this issue.

---

2 The magistrate recited the waiver terms as follows: "You will be the subject of a Fourth Amendment waiver, which means you must submit your person, property, vehicle, personal effects to search at any time and any place, with or without a warrant, with or without reasonable cause when required by a pretrial services officer, a probation officer, or any other law enforcement officer." Thereafter, Webb moved the court to reconsider the condition. The magistrate denied the motion. It explained its reasoning in part: "I believed then and I still believe that when you are dealing with a drug-related case, and more specifically a smuggling case, that it would suggest to the court that Ms. Webb had to get those drugs from somewhere. That means that she has connections and contacts. She herself may be involved in drug dealing. And it's—the whole idea then is to make sure that while she is out, that she can be—that she is subject to a Fourth Amendment waiver, which allows her person—everything that the Fourth Amendment waiver allows her to do to make sure that society is protected from the further drug dealing, which, obviously is harmful to society."

3 In denying the habeas petition, the court stated: "Here, it does not appear there was a 'verified showing' of the facts relied upon by the magistrate who imposed the Fourth Amendment waiver condition; at least not at the arraignment or at the hearing of the reconsideration motion. Nonetheless, a preliminary hearing was held after the condition was imposed, and after the instant petition was filed (but before the [informal response] and Reply were filed). At that preliminary hearing, there was testimony that petitioner smuggled into the prison a substance stipulated to be heroin in a useable amount. This is sufficient to support the magistrate's imposition of the Fourth Amendment waiver condition." (Footnotes omitted.)

(*People v. Standish* (2006) 38 Cal.4th 858, 884 ["it is settled that defendants may correct error in the setting of bail by seeking a writ of habeas corpus . . . ordering reconsideration of custody status or release"]; *In re Douglas* (2011) 200 Cal.App.4th 236, 247.) We issued an order to show cause, and conclude the trial court had no authority to condition Webb's bail on a waiver of her Fourth Amendment rights. Accordingly, we grant Webb's petition and order the search condition stricken from her bail order.

DISCUSSION

I. *Review Standard*

On this habeas corpus appeal, " '[o]ur standard of review is de novo with respect to questions of law and the application of the law to the facts.' " (*In re Hansen* (2014) 227 Cal.App.4th 906, 914.) Here, the basic facts are undisputed, and the question before us is primarily one of law. Additionally, the trial court did not conduct an evidentiary hearing in denying Webb's habeas petition below, but, as stated, merely cited testimony from her preliminary hearing. When, as here, a superior court considers a petition for habeas corpus without an evidentiary hearing, " 'the question presented on appeal is a question of law, which the appellate court reviews de novo. [Citation.]' [Citation.] Similarly, when a trial court makes findings 'based solely upon documentary evidence, we independently review the record.' " (Cf. *In re Stevenson* (2013) 213 Cal.App.4th 841, 857, quoting *In re Rosenkrantz* (2002) 29 Cal.4th 616, 677; *In re Zepeda* (2006) 141 Cal.App.4th 1493, 1497 [deferential review unwarranted where trial court holds no evidentiary hearing on habeas petition and court grants petition based solely upon documentary evidence].)

II. *Legal Principles*

The California Constitution provides, with exceptions not applicable here, that "[a] person "shall be released on bail by sufficient sureties . . . ." (Cal. Const., art. I, § 12;[4] see *In re York* (1995) 9 Cal.4th 1133, 1139 & fn. 4 (*York*).) It prohibits excessive bail. (*Ibid.*) The Constitution further provides that the primary considerations of bail shall be "[p]ublic safety and the safety of the victim . . . ." (Cal. Const., art. I, § 28, subd. (f), par. (3); *Gray v. Superior Court* (2005) 125 Cal.App.4th 629, 642; *In re McSherry* (2003) 112 Cal.App.4th 856, 861.) California's Legislature has codified this principle in section 1275, which lists the factors to be considered in issuing a bail order. That section provides in part: "In setting, reducing, or denying bail, a judge or magistrate shall take into consideration the protection of the public, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at trial or at a hearing of the case. The public safety shall be the primary consideration."

---

4 Section 12 of article I of the Constitution provides in full: A person shall be released on bail by sufficient sureties, except for: [¶] (a) Capital crimes when the facts are evident or the presumption great; [¶] (b) Felony offenses involving acts of violence on another person, or felony sexual assault offenses on another person, when the facts are evident or the presumption great and the court finds based upon clear and convincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others; or [¶] (c) Felony offenses when the facts are evident or the presumption great and the court finds based 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. [¶] Excessive bail may not be required. In fixing the amount of bail, the court shall take into consideration the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case. [¶] A person may be released on his or her own recognizance in the court's discretion."

(§ 1275, subd. (a)(1); see *People v. Accredited Sur. & Cas. Co., Inc.* (2004) 125 Cal.App.4th 1, 7 ["The unambiguous purpose of section 1275 is public safety"].)

A person charged with a bailable offense who seeks pretrial release from custody typically may either post bail, or alternatively seek the privilege of release on his or her own recognizance (OR). (*York*, *supra*, 9 Cal.4th at p. 1141; *People v. Standish* (2006) 38 Cal.4th 858, 884; § 1270, subd. (a) ["Any person who has been arrested for, or charged with, an offense other than a capital offense may be released on his or her own recognizance by a court or magistrate who could release a defendant from custody upon the defendant giving bail, including a defendant arrested upon an out-of-county warrant"].) As for the option of bail, superior court judges of each county are required to adopt and annually revise a uniform countywide bail schedule for bailable felony and misdemeanor offenses, as well as non-Vehicle Code infractions, and in doing so, they "shall consider the seriousness of the offense charged." (§ 1269b, subds. (c), (e).) For an accused who has not yet appeared in court, bail "shall be in the amount fixed in the warrant of arrest or, if no warrant of arrest has been issued, the amount of bail shall be pursuant to the uniform countywide schedule of bail . . . ." (§ 1269b, subd. (b); see *People v. Lexington National Insurance Corporation* (2015) 242 Cal.App.4th 1098, 1102.) The law provides without qualification that upon posting bail, "the defendant or arrested person shall be discharged from custody as to the offense on which the bail is posted." (§ 1269b, subd. (g).) Under this statutory bail scheme, a court that sets bail after having made the required section 1275 assessments has effectively determined that

releasing the accused person pending trial does not present an unreasonable public safety risk.

An accused who bargains for OR release, on the other hand, is statutorily required to, among other things, "obey all reasonable conditions imposed by the court or magistrate." (§ 1318; *York*, *supra*, 9 Cal.4th at p. 1141.) Hence, when an accused person seeks to be released from custody on OR, the Legislature is deemed to have granted courts or magistrates broad discretion to require that person to comply with all reasonable OR release conditions, including, in appropriate cases, a promise to comply with warrantless searches and seizures that may implicate a defendant's constitutional rights. (*York*, at pp. 1144-1147.) "Unlike [a person who has posted reasonable bail], a defendant who is unable to post reasonable bail has no constitutional right to be free from confinement prior to trial and therefore lacks the reasonable expectation of privacy possessed by a person unfettered by such confinement." (*York*, at p. 1149.)

In contrast, the Legislature makes no mention of a court or magistrate's authority to impose conditions for a person released on the scheduled amount of bail for a felony offense. (See *Gray v. Superior Court*, *supra*, 125 Cal.App.4th at p. 641.) Section 1275, pertaining to setting of bail generally, does not refer to conditions. (*Gray v. Superior Court*, at p. 642.) Bail conditions are referenced in only two Penal Code sections, one of which—section 1270—governs persons charged with misdemeanors.[5] The other, section

---

5 (See *Gray v. Superior Court*, *supra*, 125 Cal.App.4th at p. 642; *In re McSherry*, *supra*, 112 Cal.App.4th at pp. 861-862.) Section 1270 provides in part: "A defendant who is in custody and is arraigned on a complaint alleging an offense which is a

1269c, sets forth procedures (a peace officer declaration or application by the accused personally or through another) by which a court may depart from the bail schedule by either increasing or decreasing the bail amount. (§ 1269c; see *People v. Lexington National Insurance Corporation*, *supra*, 242 Cal.App.4th at p. 1103.) On such an application, the magistrate or commissioner "is authorized to set bail in an amount that he or she deems sufficient to assure the defendant's appearance or to assure the protection of a victim [or family members]," and "to set bail on the terms and conditions that he or she, in his or her discretion, deems appropriate . . . ." (§ 1269c.)

III. *There is No Statutory Basis for the Court's Imposition of the Fourth Amendment Waiver Bail Condition*

Here, as the People admit, Webb posted the scheduled amount of bail; she did not seek to decrease it, and neither the court nor any law enforcement officer suggested an increased amount was appropriate. No other scenario in which the Legislature authorized imposition of appropriate bail conditions—for misdemeanants or departures from the bail schedule—applies, and we will not insert text to the statutory scheme to accomplish a purpose that does not appear on its face. (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 545; *Aqua Vista Homeowners Association v. MWI, Inc.* (2017) 7 Cal.App.5th 1129,

---

misdemeanor, and a defendant who appears before a court or magistrate upon an out-of-county warrant arising out of a case involving only misdemeanors, shall be entitled to an own recognizance release unless the court makes a finding on the record, in accordance with Section 1275, that an own recognizance release will compromise public safety or will not reasonably assure the appearance of the defendant as required. Public safety shall be the primary consideration. If the court makes one of those findings, the court shall then set bail and specify the conditions, if any, whereunder the defendant shall be released." (§ 1270, subd. (a).)

1140.) The best indication of Legislative intent are the words of the statutes the Legislature has enacted (*People v. Toney* (2004) 32 Cal.4th 228, 232) and though the Legislature knows how to write statutes granting a court or magistrate authority to impose bail conditions, it has not done so in this circumstance. This is a sufficient indication of the Legislature's intent. (Cf. *Staniforth v. Judges' Retirement System* (2016) 245 Cal.App.4th 1442, 1454; *County of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798, 825 ["Where statutes involving similar issues contain language demonstrating the Legislature knows how to express its intent, ' "the omission of such provision from a similar statute concerning a related subject is significant to show that a different legislative intent existed with reference to the different statutes" ' "].) In their return, the People concede no specific statute addresses a trial court's authority to impose a bail condition on a defendant who has posted reasonable bail for a felony offense. Under the circumstances, the magistrate lacked statutory authority to impose the Fourth Amendment waiver bail condition on Webb.

IV. *The Court Did Not Possess Inherent Authority to Impose a Fourth Amendment Waiver Condition*

The magistrate here nevertheless issued the Fourth Amendment waiver condition on the theory that it had inherent authority to impose reasonable conditions under *In re McSherry*, *supra*, 112 Cal.App.4th 856 and *Gray v. Superior Court*, *supra*, 125 Cal.App.4th 629. It stated that "a [Fourth] Amendment waiver condition is a reasonable condition of release when you are dealing with drug-related offenses."

We conclude the magistrate had no such authority to deprive Webb of her Fourth Amendment right, and her right under article I, section 13 of the California Constitution, to be free from unreasonable searches and seizures as a condition to her release after she posted the scheduled amount of bail. She is a pretrial releasee who has not been tried or convicted of a crime, she retains a reasonable expectation of privacy in her home, and she has a right to be free from confinement. (See *York*, *supra*, 9 Cal.4th at p. 1149; *Gray v. Superior Court*, *supra*, 125 Cal.App.4th at p 644; *Cruz v. Kauai County* (9th Cir. 2002) 279 F.3d 1064 ["one who has been released on pretrial bail does not lose his or her Fourth Amendment right to be free from unreasonable seizures"].) Persons who are released pending trial "have suffered no judicial abridgment of their constitutional rights." (*U.S. v. Scott* (9th Cir. 2006) 450 F.3d 863, 872.)

York informs our conclusion. In *York*, on a habeas writ filed by petitioners facing one or more felony drug charges, the California Supreme Court held that a trial court was not prohibited from conditioning OR release on the releasee's agreement to submit to random drug testing and warrantless searches and seizures. (*York*, *supra*, 9 Cal.4th at pp. 1137-1138.) The law setting forth requirements for an OR release agreement, section 1318, subdivision (a)(2), specifically authorized imposition of "all reasonable conditions" in connection with such release. (*York*, at p. 1146.) The court rejected the petitioners' argument that imposition of the conditions violated their Fourth Amendment and state constitutional right to be free from unreasonable searches and seizures, and their

California constitutional rights to privacy and due process. (*Id.* at pp. 1148-1149, 1151.)[6] It held the conditions did not violate Fourth Amendment protections, distinguishing the rights of a person who bargained for OR release and cannot post bail from persons who have posted reasonable bail: "[P]etitioners' contention that the OR release conditions . . . inevitably violate the Fourth Amendment rights of OR releasees rests upon the flawed premise that a defendant who seeks OR release has the same reasonable expectation of privacy as that enjoyed by persons not charged with any crime, *and by defendants who have posted reasonable bail. Unlike persons in these latter categories . . . , a defendant who is unable to post reasonable bail has no constitutional right to be free from*

---

6 In *York*, the petitioners further contended that the OR release conditions infringed on their right to be presumed innocent. (*York*, *supra*, 9 Cal.4th at p. 1147.) The court rejected the contention, relying on United States Supreme Court authority holding that the presumption of innocence had " 'no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.' " (*Id.* at p. 1148, italics omitted, quoting *Bell v. Wolfish* (1979) 441 U.S. 520, 533.) Though *Bell v. Wolfish* involved the rights of persons who were placed in a custodial facility before trial (*Bell*, at p. 523), according to *York*, its holding "mirrors established California law." (*York*, at p. 1148 [characterizing *Ex parte Duncan* (1879) 53 Cal. 410, 411 as holding "no presumption of innocence attaches to a pretrial determination of the amount of bail to be set"].) *York* also relied on a District of Columbia case that stated "[t]he presumption of innocence . . . has never been applied to situations other than the trial itself. To apply it to the pretrial bond situation would make any detention for inability to meet conditions of release unconstitutional." (*York*, at p. 1148, quoting *Blunt v. United States* (D.C.App. 1974) 322 A.2d 579, 584, superseded by statute on other grounds as stated in *Best v. U.S.* (D.C.App. 1994) 651 A.2d 790, 792.) *York* concluded, "Clearly, whether a pretrial detainee is released OR with—or without—conditions has no bearing upon the presumption of innocence to which that person is entitled *at trial*." (*York*, at p. 1148.) We fully appreciate that under *York*, the presumption of innocence doctrine is not a consideration in imposing or not imposing bail conditions, contrary to the suggestion of our concurring colleague.

confinement prior to trial and therefore lacks the reasonable expectation of privacy possessed by a person unfettered by such confinement." (*Ibid.*, italics added.)[7]

York's import is that once a person has posted the required amount of bail, they have a constitutional right to be free from confinement, and maintain a reasonable expectation of privacy for purposes of Fourth Amendment protections. (*Robey v. Superior Court* (2013) 56 Cal.4th 1218, 1224 [" 'The touchstone of Fourth Amendment analysis is whether a person has a "constitutionally protected reasonable expectation of privacy" ' "].) Though *York* did not reach the propriety of a Fourth Amendment waiver in felony cases, we do so here, and accept *York*'s reasoning as a persuasive indication that such an infringement of Webb's constitutional rights after she has posted reasonable bail is unwarranted. " ' "[E]ven if properly characterized as dictum, statements of the Supreme Court should be considered persuasive." ' " (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 330; see also *State v. Continental Insurance Company* (2017) 15 Cal.App.5th 1017, 1033.)

---

7 *York* also held that the conditions were not unconstitutional because the person on OR release "is not required to agree to such restrictions, but rather is subject to them only if he or she consents to their imposition, in exchange for obtaining OR release." (*York*, *supra*, 9 Cal.4th at p. 1150.) *York* went on to reject the argument that the conditions violated equal protection principles, but declined to reach the propriety of the Fourth Amendment waiver condition on a person who has posted reasonable bail: "[W]e assume, without deciding, that petitioners are correct in asserting that warrantless drug testing and search and seizure conditions could not be imposed upon a defendant who is able to, and does, post reasonable bail . . . ." (*York*, at p. 1152.) It held the suggestion that section 1318 created an impermissible wealth-based classification was essentially a challenge that the bail process itself was unconstitutionally discriminatory, a contention it had previously rejected. (*Ibid.*)

Neither of the two cases relied upon by the magistrate presiding over Webb's arraignment, and the superior court on Webb's habeas petition, support imposition of a Fourth Amendment waiver bail condition under these circumstances. *In re McSherry*, *supra*, 112 Cal.App.4th 856 did not determine the propriety of bail conditions, much less a Fourth Amendment waiver condition, for an accused charged with a felony. Nor did it purport to recognize a court's inherent authority to set bail conditions in such a circumstance. In *McSherry*, the trial court imposed stay-away orders and an order prohibiting driving upon a defendant who had been *convicted of misdemeanors* (loitering around schools) and sentenced to custody. (*Id.* at p. 859.) The defendant, who had a lengthy criminal history of sexually abusing minors, sought to post bail pending appeal, which was expressly authorized as a matter of right in section 1272.[8] (*Id.* at pp. 858-860.) The question on his habeas writ was whether the trial court could also impose reasonable bail conditions. (*Id.* at p. 858.) Though the court did not clearly articulate petitioner's habeas arguments, the petitioner relied on authority holding that public safety was not a consideration in imposing bail conditions. (*Id.* at p. 861.) In addressing that point, the appellate court in *McSherry* observed that section 1270 permitted it to specify bail conditions for a person charged with a misdemeanor who is denied OR release, but that under section 1275 as amended in 1987, public safety was the primary consideration.

---

8 In part, section 1272 provides: "After conviction of an offense not made punishable with death, a defendant who has made application for probation or who has appealed may be admitted to bail: [¶] . . . [¶] 2. As a matter of right, before judgment is pronounced pending application for probation in cases of misdemeanors, or when the appeal is from a judgment imposing imprisonment in cases of misdemeanors."

(*Id.* at p. 861.) It found "nonsensical" the proposition that the law authorized a court to impose bail conditions on a person merely charged with a misdemeanor, but the court was powerless to do so after a defendant had been found guilty of such a crime and deserving of the maximum sentence. (*Id.* at pp. 861-862.)

In obiter dictum, the *McSherry* court expanded on the petitioner's unspecified arguments and their presumed consequences: "Petitioner's arguments also lead to the conclusion that even though a court can set bail conditions for an unconvicted misdemeanant, it could not do so for a person charged with a violent or serious felony because 'conditions' are not mentioned in section 1270.1. Likewise, if a defendant has been convicted of a felony, under petitioner's view, even though the right [to] bail is discretionary, the court is powerless to impose bail conditions even though the defendant's conviction may present a significant legal issue which could lead to a reversal and even though sections 1272 and 1272.1 require the judge to state on the record the reasons for or against granting bail. This cannot be what the legislature intended." (*In re McSherry*, *supra*, 112 Cal.App.4th at p. 862.) Ultimately, the court held that given the constitutional right to reasonable bail, the Legislature's statutory framework and focus on public safety, the bail conditions in the circumstances presented were *statutorily* authorized: that section 1272 granted a trial court the right to place restrictions on the right to bail of a convicted misdemeanant as long as they related to public safety. (*Id.* at p. 863.)

We decline to rely upon *McSherry*'s dictum. But *McSherry* nevertheless cannot properly be read as granting courts or magistrates authority to impose conditions in

felony cases beyond that envisioned by the Legislature in its comprehensive bail scheme. Such a reading constitutes an impermissible amendment of the statutory scheme, contrary to the Legislature's expressed intent. The Legislature has not authorized bail conditions in such cases; but unconditionally requires that a person who has posted bail "shall be discharged from custody . . . ." (§ 1269b, subd. (g).)

Nor does *Gray* convince us to uphold the superior court's order. The court's decision in *Gray* rested on *McSherry's* dictum, as well as a criminal law treatise citing section 1269c,[9] to posit a "general understanding that the trial court possesses inherent authority to impose conditions associated with release on bail." (*Gray v. Superior Court*, *supra*, 125 Cal.App.4th at p. 642.) In *Gray*, the trial court at the request of the California Medical Board conditioned a medical doctor's release on bail on the surrender of his medical license. (*Id.* at p. 636.) The appellate court recognized that the court's bail condition lacked express statutory authority, as the physician was charged with felony counts. (*Id.* at pp. 641-642.) It nevertheless suggested, citing *McSherry*'s dictum, that the court could impose the condition so long as it was reasonable and intended to ensure public safety: "In *McSherry*, the court reasoned that if a trial court is statutorily authorized to impose bail conditions on a person charged with a misdemeanor [citation], then the Legislature surely intended similar conditions could be imposed when a defendant facing felony charges is released on bail." [Citation.] There appears to be little

---

9 (See Criminal Law Procedure and Practice (Cal CEB), § 5.35 ["Magistrates have the authority to set bail on conditions that they consider appropriate. Pen. [Code,] § 1269c"].)

dispute that a trial court may impose conditions associated with release on bail; the question is whether and to what extent the court's authority is limited. [¶] . . . [T]he court in *McSherry* concluded that because public safety is the Legislature's overriding theme in the bail statutory framework, and because the trial court has inherent power to impose bail conditions, it follows that the trial court may impose bail conditions intended to ensure public safety. [Citation.] [¶] Bail conditions intended for public protection must be reasonable, however." (*Gray v. Superior Court*, *supra*, 125 Cal.App.4th at p. 642.)

Gray ultimately held the license suspension condition was not per se unreasonable, but rather was unreasonable because it violated the physician's procedural due process rights to a noticed hearing, which he otherwise would have gotten had he appeared before the Medical Board. (*Gray v. Superior Court*, *supra*, 125 Cal.App.4th at pp. 638-639, 643.) Citing *York*'s distinction between a person on OR release and release on bail in conducting its reasonableness analysis, *Gray* concluded: "Here, Gray was able to post bail and therefore had a right to be free from confinement. The trial court cannot justify imposing bail conditions in a manner depriving Gray of due process or other constitutional rights on the ground that Gray would otherwise be confined and effectively deprived of those rights. Under the circumstances presented here, it was unreasonable to deprive Gray of his due process rights in connection with his professional license after he was able to post reasonable bail." (*Id.* at p. 644.)

Gray's holding as to a court's inherent authority to impose a license suspension bail condition, to the extent it is at all relevant to the search condition imposed here, is

premised on *McSherry*'s unpersuasive dictum. And *Gray*, like *McSherry*, is inapposite, and does not support the court's imposition of Webb's Fourth Amendment waiver bail condition. Neither case permits a court to use its inherent "equity supervisory, and administrative powers" to exercise reasonable control over proceedings (see *In re Reno* (2012) 55 Cal.4th 428, 522) or " 'create new forms of procedures' " (*People v. Lujan* (2012) 211 Cal.App.4th 1499, 1507) so as to infringe Webb's fundamental Fourth Amendment rights against warrantless searches and seizures in this context. (Accord, *Innes v. Diablo Controls, Inc.* (2016) 248 Cal.App.4th 139, 143, fn. 5 ["Our inherent power to adopt litigation procedures [under *In re Reno*, *supra*, 55 Cal.4th 428] does not authorize us to create substantive shareholder rights beyond those expressed in the Corporations Code"; quoting *Doe v. City of Los Angeles*, *supra*, 42 Cal.4th at p. 545.) No court has inherent authority to ignore or violate the statutory bail scheme.

In its return, the People point to this court's statement in *People v. Internat. Fidelity Insurance Company* (2017) 11 Cal.App.5th 456, that "[t]he trial court has discretion to 'set bail on the terms and conditions [it] deems appropriate' " and the "power to impose reasonable bail conditions intended to ensure public safety." (*Id.* at p. 462.) In making the referenced remarks concerning the court's discretion to set bail conditions, this court cited to section 1269c, governing departures from the bail schedule. (*Id.* at p. 462.) *Fidelity* did not discuss or recognize a court's "inherent power" to set bail conditions; it involved an insurer's claim that bail conditions materially increased its risk under the bond, requiring the bond be exonerated. (*Id.* at p. 459.) In fact, as Webb points out, this court found Fidelity had forfeited its argument, made in reply, that the bail

conditions waiving the defendant's constitutional rights were unauthorized by law, and expressly declined to address it. (*Id.* at p. 464, fn. 2.) *Fidelity* does not purport to address the scenario facing us, in which an accused facing felony charges has posted scheduled bail.

Having concluded the trial court possessed neither statutory nor inherent authority to impose the Fourth Amendment waiver bail condition, we order the condition vacated. We need not reach Webb's contention that the court denied her due process rights to notice and a fair hearing in imposing the bail condition.

DISPOSITION

The trial court is directed to vacate the portion of its bail order imposing the warrantless search condition, and ensure that the modification of bail is communicated to all relevant law enforcement agencies forthwith. The opinion will be final as to this court 10 days after the date of filing. (Cal. Rules of Court, rule 8.387(b)(3)(A).)

O'ROURKE, J.

I CONCUR:

HUFFMAN, J.

BENKE, Acting P.J.

I concur in the result.

I agree with my colleagues that, on this record, the trial court erred in imposing, as a condition of bail, a requirement that Webb waive her Fourth Amendment right to be free of warrantless or unreasonable searches of her person, property, vehicle, and personal effects. However, unlike my colleagues, I agree with the courts in *In re McSherry* (2003) 112 Cal.App.4th 856, 861 (*McSherry*) and *Gray v. Superior Court* (2005) 125 Cal.App.4th 629, 642 (*Gray*), that a trial court has inherent authority to impose conditions on a defendant's release, even when a defendant is able to post the amount of bail set forth in the court's bail schedule. As the court in *Gray* stated: "[A]lthough the statutory authority is limited, there is a general understanding that the trial court possesses inherent authority to impose conditions associated with release on bail. (See [*McSherry*]; 1 Criminal Law Procedure and Practice (Cont.Ed.Bar 7th ed.2004) § 4.26, p. 76 ['Magistrates have the authority to set bail on conditions that they consider appropriate. [Citation.]'].) In *McSherry*, the court reasoned that if a trial court is statutorily authorized to impose bail conditions on a person charged with a misdemeanor (see Pen. Code,[1] § 1270, subd. (a)), then the Legislature surely intended similar

---

1 All further statutory references are to the Penal Code.

conditions could be imposed when a defendant facing felony charges is released on bail. (*McSherry, supra*, 112 Cal.App.4th at p. 862.) There appears to be little dispute that a trial court may impose conditions associated with release on bail; the question is whether and to what extent the court's authority is limited." (*Gray, supra*, 125 Cal.App.4th at p. 642.)

Significantly, the inherent power recognized in *McSherry* and *Gray* has also been expressly recognized by the voters and the Legislature. In adopting Proposition 8 in 1982, the voters plainly recognized such an inherent authority and placed in our constitution the requirement that crime victims have the right to have "the safety of the victim and the victim's family considered in fixing the amount of bail *and release conditions for the defendant.*" (Cal. Const., art. 1, § 28, subd. (b)(3), italics added.) The Legislature expressly recognized a trial court's inherent authority to impose conditions on release, even when a defendant is able to post cash bail. When a peace officer believes a bail higher than is set in a bail schedule is required or a defendant believes a lower bail is sufficient, section 1269c permits a magistrate to "set bail in an amount that he or she deems sufficient to ensure the defendant's appearance or to ensure the protection of a victim . . . and *to set bail on the terms and conditions that he or she, in his or her discretion, deems appropriate*, or he or she may authorize the defendant's release on his or her own recognize." (Italics added.) As the court's in *McSherry* and *Gray* noted, section 1270 subdivision (a) also expressly recognizes a trial court's inherent power to set bail conditions when a defendant has been charged only with misdemeanors.

I think we must recognize the practical necessity that in particular cases, in order to assure a defendant's appearance and *protect the public from harm*, a trial court has the power to impose conditions which restrain the behavior or provide monitoring of a defendant while criminal proceedings are pending—even where as here, the defendant has the ability to post cash bail. In this regard, I note an accused felon's right to bail arises in the context of probable cause to believe the accused has committed a felony and has been detained. Where there is probable cause to believe a defendant has committed a felony and criminal proceedings are pending, a trial court must assure the defendant's appearance and consistent with the right to bail, protect the public; *the presumption of innocence, which will operate at trial, has no application*. (*In re York* (1995) 9 Cal.4th 1133, 1147–1148 (*York*).)[2]

In any event, given the recognition by both the voters and the Legislature of the inherent power of trial courts to add conditions when releasing a defendant on bail and

---

2 In finding that trial courts have no inherent power to place conditions on bail, the majority opinion requires that trial courts turn a blind eye to the risks a particular accused felon may present so long as the defendant has the wherewithal to post bail. In doing so the majority not only expressly departs from *McSherry* and *Gray*, but reaches a result that appears to place emphasis on the absence of any determination of guilt. That implication is of course at odds with the views expressed by the court in *York* with respect to the presumption of innocence.

In addition, while not dispositive here, I note that in providing defendants who have access to wealth with freedom from *any* pretrial restraint, the majority opinion reinforces the disparate treatment of wealthy and poor defendants in our bail system, a recent subject of some concern. (See Pretrial Detention Reform, Recommendations to the Chief Justice, Pretrial Detention Reform Workgroup (October 2017), p. 1: "California's current pretrial release and detention system unnecessarily compromises victim and public safety because it bases a person's liberty on financial resources rather than the likelihood of future criminal behavior and exacerbates socioeconomic disparities and racial bias.")

the practical necessity that trial courts have such power in particular cases, unlike my colleagues I am unwilling to diverge in any respect from the opinions in *McSherry* and *Gray*.

Although trial courts have the power to impose conditions on defendants who post cash bail, I also agree with the court in *Gray*, that a court's power to do so is fairly narrow. (*Gray, supra*, 125 Cal.App.4th at pp. 642–643.) Clearly, a trial court's inherent power is not coextensive with a court's power when, as in *York*, *supra*, 9 Cal.4th at pp. 1148–1149, a defendant has asked for release, not as a matter of right, but under a trial court's discretionary power. As the court in *York* took some pains to explain, when a defendant is asking for relief from detention under circumstances in which he or she has no right to release, a trial court has fairly broad power to impose conditions on his or her release. (*Ibid.*) A trial court also has fairly broad powers when a defendant's guilt has been established either by plea or verdict and the defendant has asked to avoid custody and be released on probation. (See *People v. Relkin* (2016) 6 Cal.App.5th 1188, 1194.) In the procedural setting presented here, however, a court's inherent power must be carefully constrained. A trial court's inherent power is limited by, among other matters, the principle that public safety concerns *do not* permit *the outright denial* of bail where no specific constitutional provision permits it. (See art. 1, § 12, Cal. Const.; *People v. Standish* (2006) 38 Cal.4th 858, 877; *In re Underwood* (1973) 9 Cal.3d 345, 351.) Thus, any condition on bail may not be so onerous that it amounts to the denial of bail or places an unnecessary burden on the defendant's liberty.

Here, where Webb has exercised her constitutional right to bail and where at this stage of the proceedings her guilt has not been established, any invasion of her other constitutional rights must be closely connected to a risk of flight or a risk of harm to the community and based on a factual record which supports such an intrusion. Importantly, where a condition of bail invades a constitutional right, trial courts must consider whether the extent of the invasion is warranted by the nature and imminence of the risk, and whether, as the court in *Gray* determined, there are alternative means of protecting the public's interests. (See *Gray, supra*, 125 Cal.App.4th at pp. 642–644.) While it is true, as the trial court stated, that given the circumstances which gave rise to the charges against Webb, there is some likelihood she is a habitual drug user and associates with other drug users and distributors, on this record which comes to us only after her arraignment, I am not convinced the fairly intrusive remedy of imposing a Fourth Amendment waiver on her is appropriate. Such a waiver is unrelated to any flight risk and only indirectly related to preventing harm to the community, as opposed to Webb herself. A waiver certainly can be imposed as a condition of probation, when and if her guilt has been established, and the focus of the proceedings is no longer on her guilt or innocence but on rehabilitation and the prevention, over the long term, of future criminality.

Thus, I concur in the majority's direction that on remand the Fourth Amendment waiver imposed by the trial court be stricken. I would, however, do so without prejudice

to the right of the People to present a factual basis for imposing other conditions on Webb's bail.

I CONCUR IN THE RESULT:

BENKE, Acting P. J.

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **Petition for Review**
Case Number: **TEMP-C4C02MW9**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **Marissa.bejarano@sdcda.org**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
PETITION FOR REVIEW	Petition for Review

Service Recipients:

Person Served	Email Address	Type	Date / Time
Marissa Bejarano San Diego County District Attorney 234544	Marissa.bejarano@sdcda.org	e-Service	2/16/2018 5:01:45 PM
ADI Services Additional Service Recipients	eservice-court@adi-sandiego.com	e-Service	2/16/2018 5:01:45 PM
Attorney General Office Additional Service Recipients	sdag.docketing@doj.ca.gov	e-Service	2/16/2018 5:01:45 PM
DA Appellate Additional Service Recipients	da.appellate@sdcda.org	e-Service	2/16/2018 5:01:45 PM
San Diego superior court Additional Service Recipients	appeals.central@sdcourt.ca.gov	e-Service	2/16/2018 5:01:45 PM

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

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

--
Date

/s/Marissa Bejarano
Signature

Bejarano, Marissa (234544)
Last Name, First Name (PNum)

San Diego County District Attorney
Law Firm