IN THE SUPREME COURT OF CALIFORNIA

In re BETTIE WEBB,	)	No. S247074
	)	
	)	Ct. App. No. D072981
On	)	
	)	(Trial Ct. No.:
	)	SCS293150)
Habeas Corpus	)	
	)	
	)	
	)	

PETITIONER'S ANSWER BRIEF ON THE MERITS

The Honorable Stephanie Sontag, Judge
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ANGELA BARTOSIK, Chief Deputy
Office of the Primary Public Defender
County of San Diego
ROBERT L. FORD,
St. Bar No. 185617
Deputy Public Defenders
450 B Street, Suite 1100
San Diego, California 92101
(619) 338-4831

Attorneys for Petitioner
BETTIE WEBB

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San Diego, California 92101
(619) 338-4831

Attorneys for Petitioner
BETTIE WEBB

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THE ISSUES ADDRESSED BY THE FOURTH DISTRICT COURT OF APPEAL.

Does a magistrate have statutory or inherent authority to impose a bail search condition after a defendant has been released on bail in accordance with the bail schedule? Does the imposition of the condition constitute a pretrial restraint? Does a magistrate have the authority to impose such a condition without due process protections such as notice and a hearing or any showing that the defendant poses a heightened risk of misbehaving while on bail? (*In re Webb* (2018) 20 Cal.App.5th 44, 47-48, (*Webb*).)[1]

[1] As a policy matter the Supreme Court normally will accept the Court of Appeal's opinions, statement of the issues and facts. (Cal Rules of Court, Rule 8.500(c)(2).) Respondent framed the issue in his petition for review as: "Do trial courts possess inherent authority to impose reasonable bail conditions related to public safety on felony defendants who are released on monetary bail?" That is not the issue that was timely raised and argued in Court of Appeal below.

STATEMENT OF FACTS

Pursuant to Rule of Court 8.500(c)(2), as a policy matter, the court generally accepts the statement of facts from the Court of Appeal's opinion. Therefore, the statement of facts contained herein is based on the appellate court's opinion.

Bettie Webb was arrested and eventually charged in a felony complaint with knowingly bringing controlled substances 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.

At her arraignment, Ms. 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 inherent authority to do so. 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."

Ms. Webb moved the court to reconsider the condition, which the magistrate denied: "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." (*In re Webb, supra,* 20 Cal.App.5th at p. 47, fn. 2.)

Ms. Webb 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 the preliminary hearing: Ms. Webb smuggled into the prison a substance stipulated to be heroin in a useable amount. (*In re Webb, supra,* 20 Cal.App.5th at p. 47, fn. 3.)

Ms. Webb filed a petition for writ of habeas corpus in the Court of Appeal, raising the same challenges to the search condition. On January 31, 2018, in a published opinion, the majority granted Ms. Webb's petition for writ of habeas corpus. The court held that outside the statutory bail scheme set forth in the Penal Code, a trial court does not possess inherent authority to impose bail conditions once a felony defendant is released on bail. *(In re Webb, supra,* 20 Cal.App.5th at p. 51.) In a concurring opinion, Justice Patricia D. Benke agreed with the result, but concluded that consistent with then-existing case law, trial courts do have inherent authority to impose bail conditions in felony cases when a defendant is released on monetary bail. (*Id.* at p. 57.) Justice Benke did not agree that the imposition of a Fourth Amendment waiver was appropriate: "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. (*Id.* at p. 59.)

ARGUMENT AND AUTHORITIES

I.

RESPONDENT IS ASKING THIS COURT TO DECIDE ISSUES NOT CONSIDERED IN THE FOURTH DISTRICT COURT OF APPEAL.

Respondent put forth an issue not addressed in the Fourth District Court of Appeal. Respondent frames the issue as: "Do trial courts possess inherent authority to impose reasonable bail conditions related to public safety on felony defendants who are released on monetary bail." The Fourth District Court of Appeal, however, stated the issues as follows:

> 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.

(*In re Webb, supra,* 20 Cal.App.5th at pp. 47-48.)

The issue decided by the Fourth District Court of Appeal was much narrower than respondent now tries to make it. The court below analyzed the facts and based its reasoning on whether the trial court had statutory or inherent authority to impose a search condition on Ms. Webb. As part of their opinion, the majority reasoned that the imposition of a Fourth Amendment waiver was not reasonable bail condition:

> 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.

(*In re Webb, supra,* 20 Cal.App.5th at pp. 51-52.)

Justice Benke concurred: "Such a waiver is unrelated to any flight risk and only indirectly related to preventing harm to the community, as opposed to Webb herself." (*In re Webb, supra,* 20 Cal.App.5th at pp. 59-30.) It appears respondent agrees—a Fourth Amendment waiver is not a reasonable bail condition imposed to protect the public—otherwise there was no reason to broaden the issue beyond what was considered in the court below.

Because the matter was resolved on the issue of whether the court had inherent authority to deprive a defendant of an important constitutional right after posting money bail, the majority did not reach the third issue—Ms. Webb's contention the trial court denied her due process rights to notice and a fair hearing in depriving her of that right by imposing the bail condition. (*In re Webb, supra,* 20 Cal.App.5th at p. 57.) However, Justice Benke alluded to the lack of due process in her concurrence when she determined imposing a Fourth Amendment waiver would be more appropriate as a condition of probation when and if guilt has been established, and the focus of the proceedings is no longer on a defendant's guilt or innocence, but on rehabilitation and the prevention, over the long term, of future criminality. (*Id.* at pp., 59-60.)

The narrow issue in this case is guided by the ratio decidendi. The ratio decidendi is the principle or rule that constitutes the ground of the decision, and it is this principle or rule that has the effect of a precedent. It is therefore necessary to read the language of an opinion in the light of its facts and the issues presented to determine (a) which statements of law were necessary to the decision, and therefore binding precedents, and (b) which were arguments and general observations, unnecessary to the decision, i.e.,

dicta, with no force as precedents. (See 9 Witkin, Cal. Proc. 5th (2008) Appeal, § 509, p. 572; *Garfield Med. Center v. Belshé* (1998) 68 Cal.App.4th 798, 806, citing the text; 45 Harv. L. Rev. 1125; 4 Stanf. L. Rev. 509; 20 Am.Jur.2d (2005 ed.), Courts §133 et seq.) Respondent, however, is asking this Court to address an issue, whether the court may add reasonable bail conditions, that is broader than the issue considered below, and then asks this Court to reverse the judgement of the Court of Appeal by finding that trial courts possess inherent authority to impose reasonable bail conditions related to public safety on felony defendants released on bail.

This is in contrast to respondent's statement in the petition for review: "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." Respondent is now asking this Court to reverse the holding below: "Having concluded the trial court possessed neither statutory nor inherent authority to impose the Fourth Amendment waiver bail condition, we order the condition vacated." (*In re Webb, supra,* 20 Cal.App.5th at pp. 56-57.) The ruling should stand. The court below followed the legislative intent to have the courts set money bail as the primary means of protecting the public, while allowing bail conditions to be imposed when a defendant seeks lower bail or when the arresting officer believes that unusual circumstances requires a magistrate's review.

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II.

THE TRIAL COURT LACKED BOTH STATUTORY AND INHERENT AUTHORITY TO IMPOSE A FOURTH AMENDMENT BAIL CONDITION AFTER A DEFENDANT HAS POSTED BAIL IN ACCORDANCE WITH THE BAIL SCHEDULE.

A. Existing Constitutional and Statutory Authority Already Protects the Public.

Respondent's argument suggests the Legislature has failed to modify the bail statutes to effectively address the constitutional mandates enacted to protect public safety, and thus magistrates must use their inherent authority to fill the gaps in legislation. Not so. For every constitutional amendment enacted, the Legislature has responded by modifying the money bail system and provided the courts with powers to issue appropriate protective orders. Although money bail is criticized because it protects the public through incarceration, and thus inherently favors the wealthy, it is the current rule of law in this state. This section describes the actions taken by the Legislature geared towards public protection.

In 1982, through Proposition 4, California voters amended the California Constitution to require that California courts, when setting money bail, take into account the seriousness of the offense, the person's previous criminal record, and the likelihood that the person will appear to stand trial. Proposition 4 also allowed bail to be denied in felony cases involving acts of violence against another person, or felonies in which the defendant threatened another with great bodily injury, when the proof of

guilt is evident, or the presumption of guilt is great. (Cal. Const., art. I, § 12.)

The Legislature added public safety considerations five years later when it amended California Penal Code section 1275[2] to state the court will primarily consider public safety when setting bail. (See Assem. Bill No. 630 (1987-1988 Reg. Sess.) § 2.) The Legislature also modified section 1269b to provide a mandate for county courts to annually revise the uniform countywide schedule of bail for all bailable felony offenses and ordered judges to increase the amount of bail when there are aggravating or enhancing factors chargeable in the complaint. Factors justifying an increase in bail relate to the alleged injury to the victim, alleged threats to the victim or a witness to the crime charged, the alleged use of a firearm or other deadly weapon in the commission of the crime charged, the alleged use or possession of controlled substances by the defendant, and large amounts for the alleged possession of controlled substances. (*Id.* at § 1; Pen. Code, §1269b, subd. (c).) Thus, in the same bill, the Legislature gave a mandate to the courts to consider public safety when setting bail and perform an annual review of the bail schedule: "In adopting a uniform countywide schedule of bail for all bailable felony offenses the judges shall consider the seriousness of the offense charged." (Pen. Code, §1269b, subd. (e).) The legislative intent was for the courts to consider the seriousness of the charges and how they relate to public safety as a primary concern when setting the monetary amounts in the bail schedule.

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[2] All future section references are to the Penal Code, unless otherwise stated.

Further protections were added in 1997 when the Legislature passed Assembly Bill No. 45, to amend sections 136.2 and 1269c, for modifying bail statutes to add domestic violence protective orders and money bail increases. This was in response to amendments to the California Constitution that make victim and public safety the primary consideration when setting the monetary amount of bail in domestic violence cases. (See 1997 Cal ALS 847, 1997 Cal AB 45, 1997 Cal Stats. ch. 847; Pen. Code §§136.2, 1269c.)

Under the modifications of section 1269c, the Legislature added a public safety provision, allowing the arresting officer to request an order increasing bail from a magistrate. (The defendant may also request a lower bail either personally or through his attorney.) The court is then statutorily empowered to set bail at an amount to ensure the defendant's appearance and protect the public and victims, and has discretion to add conditions to bail. (Cal. Pen. Code § 1269c.) The legislature modified section 136.2 to mandate the protection of victims of domestic violence through the imposition of protective orders irrespective of bail.

In 1998, in order to further ensure public safety, the Legislature passed section 1270.1 to limit court discretion in reducing bail below the amount established by the bail schedule for a person charged with a serious or violent felony or certain domestic violence offenses. The court is required to make a finding of unusual circumstances, beyond the defendant merely making all court appearances and remaining law abiding and put the facts on the record. (See Pen. Code § 1275, subd. (c).) When the Legislature amended section 1275 it did not explicitly grant the trial court authority to impose bail conditions. (See *Gray v Super. Ct.* (2005) 125 Cal.App.4th 629, 641-642.) If the arresting officer did not make a bail recommendation under section

1269c, a two-day noticed hearing is required before the bail may be modified. (Pen. Code § 1270.1)

More recently, the electorate amended article I, section 28 of the California Constitution, through Proposition 9, to have the courts consider the safety of victims and family when setting bail and release conditions. (Ballot Pamp., Gen. Elec. (Nov. 4, 2008) text of Prop. 9, p. 128.) In 2010, the Legislature modified section 1269c to remove the court's discretion to lower bail upon the request of the defendant when he is charged with the offenses described in subdivision (a) of section 1270.1. (See 2010 Cal ALS 176, 2010 Cal SB 1049, 2010 Cal Stats. ch. 176.)

The Legislature has listened to the voters and formulated a system of protecting the public through an increase in money bail, the use of protective orders, and noticed hearings. The court may fashion non-monetary bail conditions of release when the accused requests a lower amount of money bail or an own recognizance release. (See Pen. Code §§1269c, 1318; *In re York* (1995) 9 Cal.4th 1133, 1141; *In re Humphrey* (2018)19 Cal.App.5th 1006, 1036.)

Contrary to respondent's position, the Legislature followed the constitutional mandates allowing courts to consider public safety as the primary consideration by implementing changes to the bail statutes. Working with the existing, but criticized, system of money bail, the Legislature's first step to protect the public, and victims, was to have the county judiciary set money bail through the bail schedule to incarcerate those who are accused of high risk offenses. The magistrates setting the bail schedule must consider the violence of the charged crime and enumerated enhancements in order to ensure public safety. The arresting officer may also request higher bail if he has extraordinary public safety concerns or a

belief the fruits of the crime would be used to make bail. When a lower bail is requested by defendants through section 1269c, the court is statutorily empowered to set terms and conditions that will help ensure both a defendant's constitutional right to reasonable bail and public safety. (See Pen. Code. §1269c; *In re Humphrey, supra,* 19 Cal.App.5th at p. 1036.)

The system is not perfect—it incarcerates the indigent and offers the wealthy a much earlier release from custody. The First District Court of Appeal criticized the existing money bail schedule as doing little to safeguard the public, since a dangerous defendant may be released because of his wealth, while a harmless indigent will suffer pretrial incarceration. (*In re Humphrey, supra,* 19 Cal.App.5th at p. 1029.) There could be several potential solutions available to the Legislature, including a bail schedule that includes alternatives to money bail. But that is not currently the system in place—money bail is set based upon the nature of the alleged crime in an effort to protect the public and victims.

However imperfect, the existing constitutional and statutory system uses increases in money bail to incarcerate those accused of dangerous behaviors and sets forth a rule of law the public can rely upon. Absent extraordinary circumstances, a defendant may post bail in accordance with the bail schedule and be released. The defendant can be assured the bail posted will keep him out of jail absent unusual circumstances: "Upon posting bail, the defendant or arrested person shall be discharged from custody as to the offense on which the bail is posted." (Pen. Code, §1269b, subd. (g).) The accused who cannot afford release have the right to request a lower bail from the magistrate who can statutorily add bail conditions reasonably related to assuring future court attendance and public protection.

Respondent states: "However, simply setting a monetary bail amount in some cases may not be enough to protect the public." (Respondent's Opening Brief in the Merits, (AOBM), p. 12.) As previously discussed, the arresting officer can ask a magistrate to increase money bail to protect the public in unusual circumstances. (Pen. Code §1269c.) This is consistent with the Legislative intent to protect the public by incarcerating the accused until a magistrate makes public safety determinations. Otherwise, respondent's complaint is with (1) the apparent statutory requirement under section 1269b that county judges employ a money bail schedule in the first instance to determine conditions of release, and (2) the choice of the county judges to predetermine that those accused of the charged offense can be released immediately pursuant to the predetermined bail schedule prior to an individualized hearing. Respondent may not like either policy, but it does not mean that the Legislature has given the courts authority to go back and add severe restrictions on liberty to an arrestee who has already posted bond and been released.

Respondent does not state why the existing money bail did not protect the public in this case, nor explain the overriding public need that would allow the trial court to impose "reasonable conditions" after money bail had been posted and the defendant appeared in court. Respondent's solution of allowing courts unlimited authority to fashion conditions of release at any stage in the proceedings without changed circumstances would result in defendants second guessing whether they should post bond if there was a potential for a slew of additional conditions to be added by unlimited and arbitrary judicial discretion. This would also result in both sides repeatedly

asking every judge to change the conditions of release one way or the other. This would run afoul of the holding in *In re Alberto* (2002) 102 Cal.App.4th 421, which requires good cause founded on changed circumstances relating to the defendant or the proceedings, not on the conclusion that the previous magistrate committed legal error when initially setting bail. (*Id.* at p. 430.) Indeed, respondent's solution of adding heretofore undefined "reasonable conditions" would lead to a rule of man instead of a rule of law.

B. The Court's Inherent Authority is Limited by Statute.

"It is ... well established that courts have fundamental inherent equity, supervisory, and administrative powers, as well as inherent power to control litigation before them. [Citation.] 'In addition to their inherent equitable power derived from the historic power of equity courts, all courts have inherent supervisory or administrative powers which enable them to carry out their duties, and which exist apart from any statutory authority. (*In re Reno* (2012) 55 Cal.4th 428, 522, (*Reno*).) In *Reno,* this Court determined it had the inherent supervisory and administrative power to impose page limits on exhaustion petitions in capital cases. (*Id.* at p. 521.) This Court explained that it did not "amend" the Rules of Court, and that under rule 8.384(a)(2), a death penalty inmate's first habeas corpus petition could still be filed without any limit on the number of pages or words. But to protect its docket, and ensure the proper functioning of the court, second and subsequent petitions in capital cases, would have a page limit. (*Id.* at pp.521-522.)

In *People v. Superior Court (Morales)* (2017) 2 Cal.5th 523, this Court also stated a trial court had inherent authority under Code of Civil Procedure section 187 to issue orders to preserve evidence when

implementing post-conviction discovery orders under section 1054.9. (*Id.* at p. 531.) As stated in *Morales*, under the relevant part of Code of Civil Procedure section 187:

> When jurisdiction is ... by any ... statute, conferred on a Court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this Code."

(*Id.* at p. 532.)

The Attorney General challenged the superior court's jurisdiction under Code of Civil Procedure (CCP) section 916, subdivision (a), to entertain preservation motions because such motions do not relate to any proceeding over which the court has jurisdiction, given the pendency of Mr. Morales's appeal. (*Id.* at p. 530.) However, this Court recognized that the trial court had jurisdiction to preserve the discovery as a necessary means of preserving Mr. Morales's right to the discovery. The inherent power of the court applies to "situations in which the rights and powers of the parties have been established by substantive law or court order but workable means by which those rights may be enforced, or powers implemented have not been granted by statute." (*Id.* at p. 532, quoting *Topa Ins. Co. v. Fireman's Fund Ins. Companies* (1995) 39 Cal.App.4th 1331, 1344.) This is consistent with older interpretations of CCP section 187: "The . . . power arises from necessity where, in the absence of any previously established procedural rule, rights would be lost or the court would be unable to function." (*James H. v. Superior Court* (1978) 77 Cal.App.3d 169, 175, quoting Witkin, Cal. Procedure (2d ed.) Courts, § 123, p. 392.)

These cases illustrate that the trial court has the inherent power to administer statutes in a way necessary to enforce the rights and powers of the parties involved when the statute is silent as to the procedure to be employed. Here, the statute is not silent—increasing bail and imposing bail conditions are specifically addressed. Moreover, the trial court does not have any authority to act in a way that amends the statute, and it cannot act in a way that will impinge upon the rights and powers of the parties involved, especially constitutional rights.

The case of *People v. Lujan* (2012) 211 Cal. App.4th 1499 is illustrative of the trial court's inherent authority to set procedures in trial to implement statutory intent while protecting the rights of the parties. In *Lujan,* the defendant was convicted of torturing two children, the second-degree murder of one of the children, and child abuse causing death. (*Id.* at p. 1503.) Although section 1347 allows child witnesses who are victims of certain crimes to testify remotely, the trial court used its inherent authority to permit the use of two-way, closed-circuit television for a child witness, who was the sister of the murder victim, after the necessity for that procedure was demonstrated, even though the witness was not a victim. (*Id.* at p. 1504.)

The Second District Court of Appeal interpreted the statute and found the Legislature in section 1347 declared its intent "to provide the court with discretion to employ alternative court procedures to protect the rights *of a child witness*, the rights of the defendant, and the integrity of the judicial process." (Pen. Code § 1347, subd. (a), italics added.) The court found the intent is not limited solely to child witnesses who are victims, citing Evidence Code section 765(b), which authorizes the court to "take special

care to protect" witnesses under 14 years of age "from undue harassment or embarrassment." (*Ibid.*) Thus, when necessary, the remote testimony by non-victim child witnesses was consistent with legislative intent, even if not specifically authorized by the statute. (*People v. Lujan, supra,* 211 Cal.App.4th at pp. 1507-1508.)

The court was careful to state that the statute did not violate the defendant's constitutional rights of confrontation. (*People v. Lujan, supra,* 211 Cal.App.4th at p. 1504-1505.) Furthermore, because the defendant did not contest the trial court's finding of necessity, the trial court did not abuse its discretion in ordering the procedure in his case. (*Id.* at p. 1508.)

However, the court was also mindful that courts must tread carefully when exercising their inherent authority to fashion new procedures. Reviewing courts may not sanction procedures of dubious constitutional validity or create procedural innovations that are inconsistent with the will of the Legislature or that usurp the Legislature's role by fundamentally altering criminal procedures (*People v. Lujan, supra,* 211 Cal.App.4th at p. 1507.) And here, the State's position goes far beyond mere procedures. Respondent would authorize trial courts to infringe the substantive liberty interests of arrestees in ways that the Legislature has not authorized. Such orders could be very intrusive to the privacy rights of the accused when not only search conditions are imposed, but also by having the court impose forced medical and mental health treatments. Although such conditions could validly be imposed at a hearing determining release conditions in the first instance, the Legislature has created no mechanism for courts to revisit their choice to allow release upon payment of secured money bail absent changed

circumstances. This is no mere technicality—it is essential to the rule of law.

Here, not only did the imposition of a Fourth Amendment waiver impinge upon Ms. Webb's substantial constitutional right to be free from unreasonable search and seizure, but it also violated her right to be free from custody upon payment of bail: "Upon posting bail, the defendant or arrested person shall be discharged from custody as to the offense on which the bail is posted." (See Penal Code § 1269b subd. (g).) "If, after the application is made, no order changing the amount of bail is issued within eight hours after booking, the defendant shall be entitled to be released on posting the amount of bail set forth in the applicable bail schedule." (See Penal Code § 1269c.) Any imposition of bail conditions, reasonable or not, would impact the statutory right to be released upon posting bail, and be detrimental to a defendant's reliance on the statutes.

This Court, when stating a trial court possessed the inherent authority to impose a no-contact order to protect the privacy of jurors, took pains to determine whether the statutes in effect at the time of the court's order limited its inherent power. (See *Townsel v. Superior Court* (1999) 20 Cal.4th 1084, 1094-1095.) This Court then analyzed the applicable statutes to determine the court's order did not conflict with the Legislature's intent to protect the jurors' privacy, safety, and well-being. (*Id.* at p. 1096.)

As stated in the prior section, the Legislature has chosen to exhaustively regulate the procedural aspects governing release on bail, and courts may direct the release of prisoners on bail only in the manner provided by statute. Any exercise of the court's inherent authority to set bail

must be a reasonable response to the problems and needs confronting the court's fair administration of justice, and the exercise of an inherent power cannot be contrary to any express grant of or limitation on the court's power contained in a rule or statute.

Although respondent states that some judges impose bail conditions in felony driving under the influence cases, there is no authority that supports the legitimacy of such conditions. Their reference to the conditions imposed in *People v. Internat. Fidelity Ins. Co.* (2017) 11 Cal.App.5th 456, 459 (hereafter Fidelity/*Fidelity*): that the defendant not drive; attend three Alcoholics Anonymous meetings per week; and abstain from alcohol, was dicta. The 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.) The same argument was made below, and the Fourth District Court of Appeal disregarded respondent's prior reference to their decision in *Fidelity* because it did not purport to address this issue. (*In re Webb, supra,* 20 Cal.App.5th at p. 56.) In short, it is unclear exactly what conditions respondent is asking this court to sanction as "reasonable conditions."

III.

PRIOR APPELLATE DECISIONS SUGGESTING THE COURTS HAD INHERENT AUTHORITY TO ADD BAIL CONDITIONS WERE DICTA.

Respondent, and the magistrate below, relied upon two appellate district cases to claim the court has the inherent power to impose a Fourth Amendment waiver after bail had already been posted according to the bail

schedule—*Gray v. Superior Court, supra*, and *In re McSherry* (2003) 112 Cal.App.4th 856, 861. Ms. Webb maintained the magistrate relied upon dicta from those cases when it claimed to have an inherent power to set bail conditions in this case, and the Fourth District Court of Appeal agreed. (*In re Webb, supra,* 20 Cal.App.5th at p. 56.)

In *McSherry*, the defendant was charged with violating five counts of section 653g (loitering about schools). At the initial bail hearing, the prosecutor informed the court that McSherry had two prior convictions for using his car to abduct two minor children for sexual gratification and also was convicted of five separate counts of violating section 653g. He was also convicted of rape, but subsequently released when DNA tests proved he was not the perpetrator. Based upon those representations, the trial court set bail at $50,000 per count; totally $250,000. After the jury convicted McSherry on three of the five counts, he requested bail on appeal. The trial court elected to continue the $250,000 bail, and after a hearing, issued a nunc pro tunc order imposing conditions on petitioner's bail pending appeal. The specific conditions were (1) petitioner was not to drive any motor vehicle; (2) petitioner was to stay at least 500 yards away from children under the age of 17; and (3) and petitioner was to stay at least 500 yards away from any school, park, playground, daycare center or swimming pool in which children were present. (*In re McSherry, supra,* 112 Cal.App.4th at pp. 858-859.)

When McSherry challenged his arrest for violation of those orders, the Court of Appeal first recognized that under section 1272 he was absolutely entitled to bail. (*In re McSherry, supra,* 112 Cal.App.4th at p. 860.) The

court then appears to have merged sections 1270, 1272 and 1275, noting bail conditions are not specifically mentioned in section 1272, but section 1270 empowers the court to allow an own recognizance (O.R.) release and set bail conditions for all misdemeanants pretrial by considering public safety as mandated under section 1275. (*Id.* at p. 861.) The court also noted bail conditions are specifically allowed by section 1270 when the court denies an O.R. release: "the court shall then set bail and specify the conditions, if any, whereunder the defendant shall be released." (*Ibid.*) The court reasoned it would defeat the Legislature's intent for public safety if it allowed a defendant to remain free on bail without any restrictions or conditions placed on his movements knowing the defendant had been to prison once for kidnapping and abusing a child, sent to a state mental hospital for mentally disordered sex offenders, and been convicted of at least eight separate misdemeanors involving loitering in and around schools and places where children congregate. "Accordingly, we hold that under section 1272, 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.) Although respondent points out the there are no bail conditions mentioned in Section 1272, bail conditions are allowed by section 1270 for all misdemeanants. (See *McSherry* at p. 861; Pen. Code 1270.) The court in *McSherry* did not rely upon "inherent authority" to support its decision. The court interpreted the Penal Code to effectuate the Legislature's purpose, but never claimed it had an inherent authority to impose conditions based upon common law.

Instead, the term "inherent authority" came from the First District Court of Appeal when deciding *Gray*. Dr. Gray was charged with several crimes relating to controlled substances. He posted bail and, without notice or a hearing, the Attorney General requested that his medical license be suspended pending trial. (*Gray v. Super. Ct.*, *supra*, 125 Cal.App.4th at p. 635.) The court held this constituted a deprivation of the defendant's due process rights and, discussing *In re York, supra,* 9 Cal.4th, at page 1152, noted the court may not deprive a defendant of a constitutional right pending trial if that individual has posted reasonable bail. (*Gray,* at p. 644.) The court noted: "[t]he trial court cannot justify imposing bail conditions in a manner depriving Gray of...constitutional rights on the ground that [he] would otherwise be confined and effectively deprived of those rights." (*Ibid.*)

But the court in *Gray* relied upon dicta from *McSherry* and secondary authority to support the magistrate's imposition of bail conditions: "Nevertheless, although 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 generally *In re McSherry*, *supra*, 112 Cal.App.4th at pp. 860–863; 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.]"].)" (See *Gray v. Super. Ct.*, *supra*, 125 Cal.App.4th at p. 642.) As described above, *McSherry* dealt with imposing bail conditions on a convicted misdemeanant, not a person facing charges by a felony complaint. The court based its analysis on Penal Code sections that specifically allowed imposing bail conditions for a misdemeanor arrest. The *McSherry* court

reasoned that if a trial court is statutorily authorized to impose bail conditions on a person charged with a misdemeanor (see Pen. Code § 1270, subd. (a)), then the Legislature surely intended similar conditions could be imposed when a defendant facing felony charges. (*McSherry, supra* at p. 862.) However, that holding is dicta, because McSherry was convicted of a misdemeanor, not a felony, and the statutory limitations placed on that court had nothing to do with the question presented or the court's interpretation of a statute regulating bail for misdemeanants.

Thus, the *Gray* court relied upon dicta when it concluded: "Still, the 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 the *inherent power* to impose bail conditions, it follows that the trial court may impose bail conditions intended to ensure public safety." (*Gray v. Super. Ct., supra*, 125 Cal.App.4th at p. 642, (italics added).) Thus, the First District Court of Appeal in *Gray* ignored the persuasive authority of this Court in *York* and followed the dicta from the Second District Court of Appeal in *McSherry.* In effect, the *Gray* court granted "inherent authority" to impose bail conditions beyond the court's statutory authority, but then disallowed those conditions because they violated due process. The First District could have reached the same result by simply following *York,* because the bail condition was not allowed by statute since Dr. Gray posted bail.

The *Gray* court based its ultimate holding on the fact that Dr. Gray's substantial rights were taken away without due process of law. There was no reason to claim the court had an inherent authority to add bail conditions

once bail had been posted. The magistrate in this case admitted that it was somewhat skeptical as to the origins and applicability of any inherent authority in this case, and it appears it had good reason to doubt whether it had such authority.

IV.

THERE IS NO CONFLICT WITH THE FIRST DISTRICT COURT OF APPEAL'S DECISION OF *IN RE HUMPHREY.*

Respondent claimed in the Petition for Review that the recent decision of *In re Humphrey* conflicted with this case but failed to mention any conflict of law in the opening brief. Under the present statutory scheme, the First District Court of Appeal recognized the trial court's consultation of the bail schedule is statutorily required, because under section 1275 subdivision (c), for serious or violent felonies, the court cannot depart from the amount prescribed by the schedule without finding unusual circumstances. (*In re Humphrey, supra,* 19 Cal.App.5th at p. 1043.) The court also recognized the nature of the present charges and the prior offenses are relevant to assessment of his dangerousness, and the bail schedule also serves useful functions in providing a means for individuals arrested without a warrant to obtain immediate release without waiting to appear before a judge (Pen. Code §1269b), as well as a starting point for the setting of bail. (*Humphrey* at pp.1043-1044.)

However, the *In re Humphey* court did suggest that a bail schedule based solely upon money bail implicates the constitutional right to pretrial liberty. Relying upon *United States v. Salerno* (1987) 481 U.S. 739, at page 750, the court recognized that the setting of bail affects a fundamental liberty interest and the constitutionality of the bail system must be viewed with

heightened scrutiny to ensure equal protection and due process concerns are properly addressed. (*In re Humphrey, supra,* 19 Cal.App.5th at. pp. 1015, 1034-1036.) The court recognized the present bail statutes only require a court to consider a defendant's ability to pay if the defendant raises the issue. (*Id.* at p. 1036; Cal. Pen Code §1270.1, subd. (c).) However, the defendant can also raise the issue of the ability to pay when requesting a lower bail or own recognizance release under section 1269c. (Pen. Code § 1269c.)[3] Thus, courts may consider the defendant's financial situation and alternative conditions of release when calculating what the person must pay to satisfy the state interests of public safety and his future appearance in court. (*Humphrey,* at p. 1029.) The *Humphrey* decision also support's petitioner's due process concerns: "We believe 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. (Citations.) (*Id.* at p. 1037.) The court pointed out that money bail only protects the public when it results in incarceration and is thus illogical because while a dangerous wealthy person may be released, a harmless indigent will suffer pretrial restraint. A court then protects the public through pretrial restraint and has little incentive to fashion alternative means to detention. (*Id.* at p. 1029.)

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[3] The court did indicate that the present system may be unconstitutional because it does not adequately prevent pretrial restraint for indigent clients. The court indicated rigorous procedural safeguards are necessary to assure the accuracy of determinations that an arrestee is dangerous and that detention is required due to the absence of less restrictive alternatives sufficient to protect the public. (*Humphrey* at p. 1041.)

Indeed, in her concurring opinion in the case below, Justice Benke pointed out the social inequities of the present system:

> 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 Workgroup, Pretrial Detention Reform, Recommendations to the Chief Justice (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."].)

(*In re Webb, supra,* 20 Cal.App.5th at p. 58, fn. 2.)

Petitioner disagrees that the majority opinion reinforces disparate treatment—the majority properly interpreted the statutory system that has been modified to comport with constitutional mandates. There is no conflict with *In re Humphrey* unless the present system of exclusively using money bail to set the bail schedule is deemed unconstitutional, because it affords a more immediate release for well-heeled defendants and keeps indigent clients incarcerated until they can have bail conditions set by a magistrate. The social inequities inherent in the existing statutory reliance of a bail schedule based solely on money bail has come under increasing criticism, but until bail reform comes from the Legislature, it is the system relied upon by the public. The court below properly interpreted the current system of bail, and disallowed bail conditions to be added once the money bail has been posted.

The bail system may not be perfect, but respondent fails to show that it fails to protect the public and necessitates the use of unfettered inherent authority.

CONCLUSION

The social inequities inherent in the existing statutory reliance of a bail schedule based solely on money bail has come under increasing criticism, but until bail reform comes from the Legislature, it is the system relied upon by defendants. The court below properly interpreted the current system of bail, and disallowed bail conditions to be added once the money bail has been posted. The bail system may not be perfect, but respondent fails to show that it fails to protect the public and necessitates the use of unfettered inherent authority. Petitioner respectfully requests this court affirm the judgment of the Court of Appeal and find there is no authority to impose a Fourth Amendment Waiver on felony defendants who have posted bail.

Dated: August 6, 2018

Respectfully submitted,

ANGELA BARTOSIK, Chief Deputy
Office of the Primary Public Defender

By: _/s/_____
ROBERT FORD
Deputy Public Defender

Attorneys for Defendant
BETTIE WEBB

CERTIFICATE OF WORD COUNT

I, Robert Ford, hereby certify that based on the software in the word processor program, the word count for this document is **7,161** words.

Dated: August 6, 2018

By: /s/
Robert Ford
Deputy Public Defender

CERTIFICATE OF SERVICE
Rule 1.21(c)

CASE NAME: *In re Bettie Webb*
Supreme Court/Ct. of Appeal No.: S247074/D072981
Super. Ct No.: SCS293150

I, Michael A. Owens, declare as follows:

I am employed in the County of San Diego, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 450 "B" Street, Suite 900, San Diego, California 92101-4009, in said County and State.

On August 6, 2018, I served the foregoing document:

PETITIONER'S ANSWER BRIEF ON THE MERITS

on the parties stated below, by the following means of service:

☒ **BY INTEROFFICE/U.S. MAIL**: Pursuant to Rule 1.21(b), on the above-mentioned date I personally deposited in the United States Mail, or through the San Diego County interoffice mail system, true and correct copies thereof, each in a separate envelope, postage thereon fully prepaid, addressed to the following **[See Service List]**. .

☒ **BY PERSONAL SERVICE**: On the date of execution of this document, I personally served true and correct copies of the above-mentioned document(s) on each of the following **[See Service List]**.

☒ **BY ELECTRONIC SERVICE**: I caused each such document to be transmitted electronically, to the parties indicated below, as authorized by California Rule of Court 8.71, through the TrueFiling service portal. **[See Service List]**.

☐ **BY E-MAIL**: On the above-mentioned date, I caused a true copy of said document to be emailed to said parties' e-mail addresses as indicated on the attached Service List. (Rules of Court, Rule 2.251(c)(1))

☒ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 6, 2018

/s/
Michael A. Owens
Declarant

SERVICE LIST

Hon. Stephanie Sontag , Judge
c/o San Diego Superior Court
P.O. Box 122724
San Diego, Ca 92112-2724
Phone: (619) 450-5500
appeals.central@sdcourt.ca.gov
(TrueFiling electronic service)

Court of Appeals – 4th DCA. Div. 1
Attn: Clerk of the Court
750 "B" Street, Suite 300
San Diego CA 92101
Phone: (619) 744-0760
(*Truefiling electronic service*)

South Bay District Attorney's Office
Attn: Appellate Division
333 H Street, Suite 4000
Chula Vista, CA 91910
Phone: (619) 498-5650
(by interoffice mail -- MS: S-109)

Xavier Becerra
California Attorney General
Attn: Appellate Division
600 West Broadway, Suite 1800
San Diego, CA 92101
Phone: (619) 645-2001
sdag.docketing@doj.ca.gov
(TrueFiling electronic service)

Summer Stephan
San Diego County District Attorney
Attn: Appellate Division
330 W. Broadway, 8th Floor
San Diego, CA 92101
Phone: (619) 531-3544
da.appellate@sdcda.org
(TrueFiling electronic service)

Ms. Bettie Webb
(*through counsel*)