# IN THE SUPREME COURT OF CALIFORNIA

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

## PETITIONER'S SUPPLEMENTAL BRIEF:

## WHAT EFFECT DOES SB10 HAVE ON THE RESOLUTION OF THE ISSUES PRESENTED BY THIS CASE?

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## WHAT EFFECT DOES SB10 HAVE ON THE RESOLUTION OF THE ISSUES PRESENTED BY THIS CASE?

The legislature enacted Senate Bill No. 10 (2017–2018 Reg. Sess.) (SB 10) to eliminate money bail as a condition of pretrial release. The legislature added sections 1320.7 to 1320.33 to the Penal Code[1] to establish a system of pretrial release based upon risk assessments formulated to determine the least restrictive nonmonetary condition, or combination of conditions, that will reasonably assure public safety and the defendant's return to court. This Court requested a supplemental brief to address what effect SB 10 has on the resolution of the issues presented by this case.

The main issue presented and decided below remains: Does a magistrate have statutory or inherent authority to impose a bail

[1] All future statutory references are to the California Penal Code.

search condition after a defendant has been released on bail in accordance with the bail schedule? (*In re Webb* (2018) 20 Cal.App.5th 44, 47-48, (*Webb*).) The Fourth District Court of Appeal interpreted the United States and California Constitutions, along with the current bail statutes, to determine that the trial court does not have statutory or inherent authority to impose a bail search condition. Now, SB 10 will soon give the court statutory authority to impose the least restrictive nonmonetary condition or combination of conditions that will reasonably assure public safety and the defendant's return to court. Thus, although there will now be statutory authority to allow the imposition of bail conditions at arraignment, the question remains if imposing a Fourth Amendment waiver will be allowed as a least restrictive condition. SB 10 does not suggest what release conditions are to be imposed, but orders the Judicial Council and local authorities to determine the least restrictive non-monetary conditions to impose. It remains to be seen if a bail search condition will meet the criteria of "least restrictive" or remain an unreasonable condition as decided by the court below. Ms. Webb contends that under the new statutes, a bail search condition should not be allowed under circumstances similar to her case. [2]

## ARGUMENT AND AUTHORITIES

## I.

## UNLIKE THE CURRENT BAIL STATUTES, SB 10 MANDATES THE IMPOSITION OF BAIL CONDITIONS AT ARRAIGNMENT.

The decision below was based upon a strict statutory construction of California's constitutional mandate: "A person shall be released on bail by sufficient sureties..." (Cal Const, Art. I § 12.) According to *Black's Law*

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[2] Ms. Webb has pleaded guilty, and has a Fourth Amendment waiver imposed until April 15, 2021.

*Dictionary*, a "surety" is defined as "[a] person who is primarily liable for the payment of another's debt or the performance of another's obligation." (BLACK'S LAW DICTIONARY 1482 (8th ed. 2004).) The new law appears to have a different view of what constitutes a surety, and immediately calls into question whether the new statutes will satisfy California's Constitutional right to pretrial release. With mounting opposition from the bail-bond industry, there is a possibility that the legislation may be delayed or never take effect. Until the measure takes effect, the issues below remain important for those who are able to post bond.

SB 10 appears to grant the court the power to order a preventive detention unless there is a constitutional right to be released:

> At the detention hearing, the court may order preventive detention of the defendant pending trial or other hearing only if the detention is permitted under the United States Constitution and under the California Constitution, and the court determines by clear and convincing evidence that no nonmonetary condition or combination of conditions of pretrial supervision will reasonably assure public safety or the appearance of the defendant in court as required. The court shall state the reasons for ordering preventive detention on the record.

(See Pen. Code §1320.20 (d)(1).)

Thus, constitutional provisions will guide how the new law will be interpreted. The United States Constitution does not address bail or preventive detention; instead it prohibits deprivation of liberty without due process of law. (US Const., 5th Amend.) Section 12 of the California Constitution, like the preceding bail provisions of the California Constitution, "was intended to abrogate the common law rule that bail was a matter of judicial discretion by conferring an absolute right to bail except in a narrow class of cases." (*In re Law* (1973) 10 Cal.3d 21, 25.) The provision "establishes a person's right to obtain release on bail from pretrial custody,

identifies certain categories of crime in which such bail is unavailable, prohibits the imposition of excessive bail as to other crimes, sets forth the factors a court shall take into consideration in fixing the amount of the required bail, and recognizes that a person 'may be released on his or her own recognizance in the court's discretion.'" (*In re York* (1995) 9 Cal.4th 1133, 1139–1140, fn. omitted; *In re Humphrey* (2018) 19 Cal.App.5th 1006, 1022-1023.)

Because Senate Bill 10 abolishes the bail schedule, it appears to substitute "sufficient sureties" found in the California Constitution with the least restrictive pretrial release conditions. The legislative intent of SB 10 is to confer a right to be released unless specified crimes are charged, or Pretrial Assessment Services determines the defendant is dangerous. As written, SB 10 would allow a low risk defendant, such as Ms. Webb, to be released pre-arraignment by Pretrial Assessment Services because she was not accused of violating a violent felony, had no prior criminal history, and thus no prior violent crimes, no failures to appear, and did not previously violate release conditions. (See Pen. Code §1320.10)

Under current law, once bail is posted the court has no authority to add bail conditions. (Pen. Code § 1269b, subd. (g)) Senate Bill 10, however, orders the arraignment court to "order a defendant released on his or her own recognizance or supervised own recognizance with the least restrictive nonmonetary condition or combination of conditions that will reasonably assure public safety and the defendant's return to court." (Pen. Code §1320.17) Thus, the issue as to whether the court has statutory or inherent authority to add conditions to bail that has already been posted becomes moot once the new statute takes place, because there is no longer bail to be posted

and the court has statutory authority to add the least restrictive conditions it deems necessary.

However, the question remains: Is a bail search condition the least restrictive nonmonetary condition needed to assure future attendance and protection of the public?

## II.

## UNDER SB 10 A BAIL SEARCH CONDITION IMPOSED AT ARRAIGNMENT WILL REMAIN AN UNREASONABLE AS AN OVERLY RESTRICTIVE NONMONETARY CONDITION.

The Fourth District Court of Appeal determined the trial court had no statutory or inherent authority to impose a search condition on Ms. Webb. Although the court found no statutory or inherent authority to impose a search condition, part of the analysis concluded the imposition of a Fourth Amendment waiver was unreasonable:

> 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: "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." (*In re Webb, supra,* 20 Cal.App.5th at pp. 59-30.) With little benefit of insuring public safety, such a pretrial restraint would be overly restrictive under the new statutes.

The second issue addressed by the Court of Appeal was whether the imposition of the condition constitutes a pretrial restraint. (*In re Webb, supra,* 20 Cal.App.5th at p.48.) The court below found that it was not only a pretrial restraint, but an unreasonable one: "[O]nce 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... such an infringement of Webb's constitutional rights after she has posted reasonable bail is unwarranted. (*In re Webb, supra,* 20 Cal.App.5th at p. 53.) Because Senate Bill 10 promotes the use of the "least restrictive nonmonetary condition or combination of conditions" to release some defendants, it is important to determine whether the imposition of a Fourth Amendment waiver is a least restrictive and reasonable condition to be imposed that will reasonably assure public safety and the defendant's return to court.

Senate Bill 10 does not define or suggest bail conditions but mandates the Judicial Council to adopt California Rules of Court and forms to: "Prescribe the imposition of pretrial release conditions, including the designation of risk levels or categories." (See Pen. Code §1320.24 (a)(5).) Because these conditions have not been developed, it is unknown if requiring a Fourth Amendment waiver will be constitutionally allowed without some due process considerations.

The National Conference of State Legislatures (NCSL) compiled a list of Pretrial Release Conditions that have been adopted by various states. In a document released on September 15, 2016 the NCSL suggested the following Pretrial Release Conditions:

1) Any Reasonable Condition Necessary.

2) Supervision by a pretrial services program.

3) Electronic Monitoring.

4) Partial Confinement: house arrest, work release, curfew and in-patient treatment.

5) Appearance as a condition of pretrial release.

6) Crime Prohibition.

7) Movement Restrictions.

8) Change of address notifications.

9) Resident Restrictions

10) Association Restrictions.

11) Protection or No Contact orders.

12) Weapons Prohibitions.

13) Domestic Violence Threats Prohibitions.

14) Regular contact with attorney.

15) Requirements for Employment or Education.

16) Change of Employment Notice.

17) Controlled Substance prohibition.

18) Substance Monitoring or Treatment.

19) Mental Health or Domestic Violence treatment.

20) An extradition waiver agreement.

(See http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-conditions.aspx#/.) A search condition is not listed because it has not been considered a reasonable pretrial release condition.

The Pretrial Detention Reform Workgroup submitted suggestions for pretrial conditions to the Chief Justice on October 2017:

> These options may include weekly contact with a pretrial services officer, drug testing, location monitoring supervision, home confinement, text reminders, protective orders, curfew conditions, referral to specialized services, and supervision

> for defendants with mental illness, developmental disabilities, and/or co-occurring substance use and mental health disorders.

(See Jud. Council of Cal., Pretrial Detention Reform—Recommendations to the Chief Justice (October 2017), p. 51.)

There is no mention of search conditions in these suggested release conditions.

As discussed in the previous section, SB 10 appears to follow constitutional guarantees of pretrial release absent findings by "clear and convincing evidence that no nonmonetary condition or combination of conditions of pretrial supervision will reasonably assure public safety or the appearance of the defendant in court as required." (See Pen Code §1320.20 (d)(1).)

SB 10 will abolish section 1318, subdivision (a)(2), which allows an own recognizance release upon the "defendant's promise to obey all reasonable conditions imposed by the court or magistrate." (See Pen Code § 1318.) This statute was the basis for this Court to allow the imposition of a bail search condition on those who bargain for an own recognizance release, because "the conditions clearly relate to the prevention and detection of further crime and thus to the safety of the public." (*In re York, supra,* 9 Cal.4th at p. 1145.) In finding that a search condition imposed upon those seeking OR release was reasonable, this court applied a rather unique analysis of why a person who could not make bail really had no Fourth Amendment protections anyway:

> [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. Because an incarcerated individual generally is subject to random drug testing and warrantless search and seizure in the

> interest of prison security, the conditions challenged in the present case do not place greater restrictions upon an OR releasee's privacy rights than the releasee would have experienced had he or she not secured OR release. Viewed from this perspective, the challenged conditions do not require an OR releasee to "waive" Fourth Amendment rights that he or she would have retained had OR release been denied. Instead, the conditions simply define the degree of liberty that the court or magistrate, in his or her discretion, has determined is appropriate to grant to the OR releasee.

(*In re York*, *supra* 9 Cal.4th at pp. 1149-1150.)

Significantly, the language in SB 10 does not rely upon the term "reasonable" conditions, but instead uses the term "least restrictive" nonmonetary condition or combination of conditions. (See Pen Code §§1320.10, 1320.13, 1320.17, 1320.18, 1320.20.) Under the new bail statutes, an own recognizance release is now statutorily mandated for many defendants. Thus, those defendants, like Ms. Webb, will still have a reasonable expectation of privacy because they are presumed to be released from custody. A Fourth Amendment waiver should not be considered as a least restrictive nonmonetary condition and should not be imposed without some due process protections. Under SB 10 the imposition of a bail search condition would require the defendant to actually "waive" the Fourth Amendment rights because there is no presumed pretrial restraint absent specific circumstances that indicate dangerousness.

The third issue presented by this case was: 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, supra,* 20 Cal.App.5th at p. 48.) Justice Benke felt the Fourth Amendment waiver should not have been imposed before a finding of guilt: "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." (*Id.* at pp. 59-60.)

SB 10 supports the finding below that the imposition of a Fourth Amendment waiver is not a reasonable condition, and under the new laws it is certainly not the least restrictive condition to be imposed to promote public safety.

## CONCLUSION

SB 10 gives the trial court statutory authority to impose least restrictive nonmonetary conditions, but a requiring a Fourth Amendment waiver does very little to protect the public, impinges upon an important constitutional right, and is best suited as a tool for rehabilitation after there has been a conviction. Thus, although the trial court will have a statutory right to impose conditions under the new legislation, the finding below that a bail search condition is unreasonable should not be disturbed.

Dated: October 5, 2018

Respectfully submitted,

ANGELA BARTOSIK, Chief Deputy
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By: /s/_____
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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 **2,495** words.

Dated: October 5, 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 October 5, 2018, I served the foregoing document:

***PETITIONER'S SUPPLEMENTAL BRIEF***

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 October 5, 2018

Michael A. Owens
Declarant

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