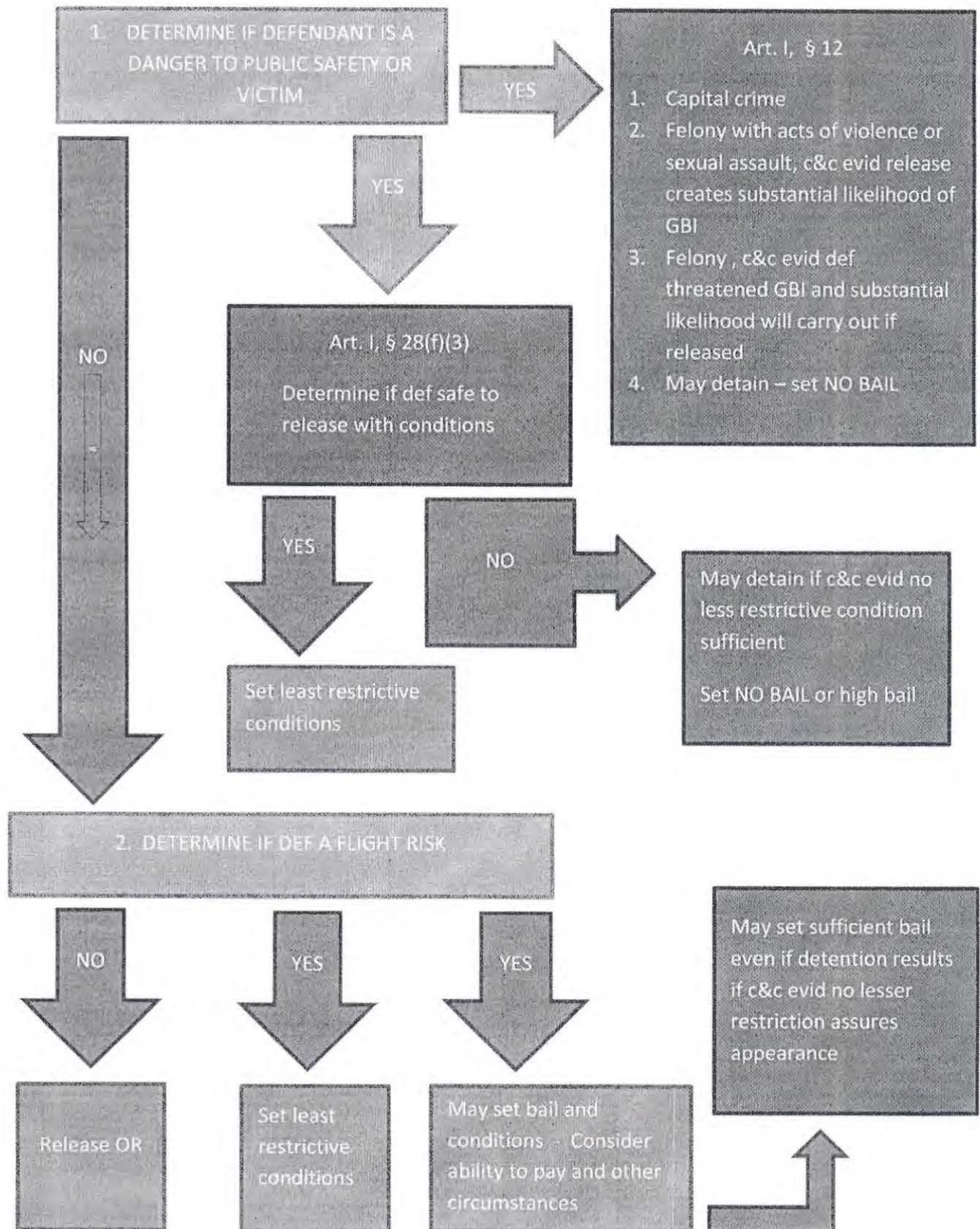


SETTING OF BAIL

J. RICHARD COUZENS
Placer County Superior Court (Ret.)



MEMORANDUM

FROM: J. RICHARD COUZENS
Judge of the Placer County Superior Court (Ret.)

DATED: January 30, 2018

RE: *In re Humphrey* (2018) ___ Cal.App.5th ___ [A152056]
Ability to pay determination required for bail setting and requirements for pretrial detention

In re Humphrey is an appellate decision arising out of the denial of a petition for writ of habeas corpus. The writ is based on the allegation that the trial court failed to consider the petitioner's ability to pay and other individualized circumstances in setting his bail. The appellate court reversed the denial of the petition, remanding the matter for "a new bail hearing at which [petitioner] is afforded the opportunity to provide evidence and argument, and the court considers his financial resources and other relevant circumstances, as well as alternatives to money bail."

The following memorandum is divided into two parts: the first section outlines the procedural parameters attendant the *Humphrey* decision. The second part excerpts key portions of the decision providing a basis for the suggested bail setting procedures.

I. Practical application of *Humphrey*

A. The effective date of the decision

Humphrey was filed January 25, 2018, and is immediately effective and binding on all trial courts in this state. (Calif. Rules of Court, Rule 8.115, subd. (d).) Absent a request for rehearing or petition for review by the Supreme Court, the opinion of the court of appeal generally will be final 30 days after filing. (Calif. Rules of Court, Rule 8.366, subd. (b)(1).)

B. Use of bail schedules

Bail schedules remain a valid tool for setting of bail. Bail schedules may properly be used:

- (1) To determine the relative seriousness of the current crime and the defendant's criminal record, relevant to the determination of the defendant's dangerousness;
- (2) To permit persons to obtain release prior to court involvement by the posting of the scheduled bail;
- (3) As a starting point in the determination of the proper bail to be set when the court issues a warrant;
- (4) As a starting point "for a court setting bail provisionally in order to allow time for assessment of a defendant's financial resources and less restrictive alternative conditions by the pretrial services agency;" and
- (5) To set bail when the defendant does not oppose detention.

Bail schedules, however, may not be rigidly followed without consideration of "a defendant's ability to pay, as well as other individualized factors bearing upon his or her dangerousness and/or risk of flight." Once a court determines the defendant does not need to be detained for reasons of public or victim safety and the defendant should be released on bail, "the important financial inquiry is not the amount prescribed by the bail schedule but the amount necessary to secure the defendant's appearance at trial or a court-ordered hearing."

C. Process for determining bail setting

Although there are any number of ways the bail issue can be approached, it seems the following procedural sequence will reduce the need to determine ability to pay when such a determination is not relevant to the defendant's custody status.

- (1) **Whether the defendant is too dangerous to release:** The court should first determine whether the defendant is ineligible for bail under the provisions of article 1, section 12 of the constitution, *or otherwise presents a danger to the public or victim*. If the court determines by clear and convincing evidence that no condition of supervision or alternative to custody will adequately protect the public or a victim, the court may order preventive detention without regard to setting of a particular amount of bail – it would be a "no bail" setting. If the defendant should be detained, it would be improper for the court to set an excessively high bail solely for the purpose of accomplishing the detention. Under these circumstances, ability to pay is irrelevant. Defendant's resources will have some bearing on the extent to which he could be required to pay the costs of supervision necessary to protect the public. But that issue likely will be worked out with the agency providing supervision.

To be clear, *Humphrey* held that a court may preventively detain a person where the court determines by clear and convincing evidence that "no less restrictive

nonfinancial conditions would be sufficient to protect the victim and community.” (*Humphrey*, page 17.) The court did not limit such authority to capital offenses or crimes of violence specified in article 1, section 12 of the constitution.

- (2) **Whether the defendant is a flight risk:** If the defendant is otherwise suitable for release on bail, the court should select an amount that is sufficient to secure the defendant’s future court appearances. The determination should at least include an examination of (1) the defendant’s ties to the community, including his employment, the duration of his residence, his family attachments and his property holdings; (2) the defendant’s record of appearance at past court hearings or of flight to avoid prosecution; and (3) the severity of the sentence defendant faces. It is important that the record reflect a weighing of these factors against each other. For example, it would be inappropriate for the court to base its decision solely on the potential punishment without also consideration of the defendant’s ties to the community and record of appearances. The setting of the amount of bail may start with the bail schedule, but must be adjusted depending on the defendant’s ability to pay and other individualized circumstances. *Humphrey* does not further define “ability to pay.” Presumably the ability to pay will be determined by all of the defendant’s financial circumstances and resources, including the ability to obtain a commercial bail bond. If the defendant cannot post the amount set by the court, the court may nevertheless keep the bail as set if it finds by clear and convincing evidence that no less restrictive non-financial conditions of release will assure the defendant’s future court appearances.
- (3) **The nature of the hearing on bail:** *Humphrey* offers some guidance as to the nature of the bail hearing. In remanding the case for a new bail hearing, the appellate court ordered that the defendant shall be “afforded the opportunity to provide evidence and argument.” The opinion quoted at length that portion of the U.S. Supreme Court opinion in *States v. Salerno* (1987) 481 U.S. 739 (*Salerno*) which reviewed the federal Bail Reform Act of 1984. As noted in *Humphrey*, “*Salerno* described the protections included in the Bail Reform Act as follows: ‘The Government must first of all demonstrate probable cause to believe that the charged crime has been committed by the arrestee, but that is not enough. In a full-blown adversary hearing, the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person. [Citation].’ (*Salerno, supra*, 481 U.S. at p. 750.) ‘Detainees have a right to counsel at the detention hearing. [Citation.] They may testify in their own behalf, present information by proffer or otherwise, and cross-examine witnesses who appear at

the hearing. [Citation.] The judicial officer charged with the responsibility of determining the appropriateness of detention is guided by statutorily enumerated factors, which include the nature and the circumstances of the charges, the weight of the evidence, the history and characteristics of the putative offender, and the danger to the community. [Citation.] The Government must prove its case by clear and convincing evidence. [Citation.] Finally, the judicial officer must include written findings of fact and a written statement of reasons for a decision to detain. [Citation.] The Act's review provisions, [citation], provide for immediate appellate review of the detention decision.' (*Id.* at pp. 751-752.)"

Although *Humphrey* stopped short of expressly finding the precise standards of *Salerno* applicable to California bail hearings, it did observe that *Salerno's* "safeguards, which the court relied upon in upholding the statute, are relevant to our consideration of the inquiries and findings necessary before a presumptively innocent arrestee may be detained prior to trial."

Whether a bail hearing will be conducted as a full-blown adversarial proceeding with witnesses and cross-examination, or as a summary proceeding will depend on the approach ultimately taken by the court and counsel. While *Humphrey* clearly allows the defendant to present "evidence" at a bail hearing, nothing in the opinion suggests the parties cannot use a less formal approach to at the hearing. Such informal procedures might be the making of offers of proof, a review of available documentary evidence, and the consideration of reports prepared by pretrial services, including the results obtained by the use of validated risk assessment tools.

In addition to the factors specifically delineated in *Humphrey*, the court should consider the factors listed in Penal Code, sections 1270.1 and 1275 in setting the appropriate amount of bail. "At the hearing, the court shall consider evidence of past court appearances of the detained person, the maximum potential sentence that could be imposed, and the danger that may be posed to other persons if the detained person is released. In making the determination whether to release the detained person on his or her own recognizance, the court shall consider the potential danger to other persons, including threats that have been made by the detained person and any past acts of violence. The court shall also consider any evidence offered by the detained person regarding his or her ties to the community and his or her ability to post bond." (Pen. C., § 1170.1, subd. (c).)

Penal Code, section 1275, subdivision (a), provides: "(1) 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. In

setting bail, a judge or magistrate may consider factors such as the information included in a report prepared in accordance with Section 1318.1. (2) In considering the seriousness of the offense charged, a judge or magistrate shall include consideration of the alleged injury to the victim, and 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, and the alleged use or possession of controlled substances by the defendant. (b) In considering offenses wherein a violation of Chapter 6 (commencing with Section 11350) of Division 10 of the Health and Safety Code is alleged, a judge or magistrate shall consider the following: (1) the alleged amounts of controlled substances involved in the commission of the offense, and (2) whether the defendant is currently released on bail for an alleged violation of Chapter 6 (commencing with Section 11350) of Division 10 of the Health and Safety Code."

- (4) **Timing of the hearing:** *Humphrey* does not directly address the timing of the bail hearing. To the extent possible, the hearing should be held within the normal statutory time for arraignment. The opinion suggests, however, it may be an appropriate use of the bail schedule to set bail "provisionally in order to allow time for assessment of a defendant's financial resources and less restrictive alternative conditions by the pretrial services agency." The opinion does not specify a particular time within which the bail review must occur; presumably it must be within a reasonable time depending on the defendant's particular circumstances.

Penal Code, section 1270.2 provides that if a person is detained because of an inability to post the bail set by the court, the person is entitled to "an automatic review" of the bail setting by the court having jurisdiction in the matter. The review must be held within five days of the original setting. While section 1270.2 does not directly apply to circumstances where the court has continued the bail hearing on a provisional setting of bail, it does suggest that any review of the defendant's custody status be concluded expeditiously.

- (5) **Statement on the record:** The court's ruling on bail, including the reasons for setting bail at a particular amount or denying a bail setting, must be fully set forth on the record. The record should also reflect the court's weighing of the various factors it considers. Article I, section 28, subdivision (f)(3) requires that the reasons also be included in the minutes of the proceeding: "When a judge or magistrate grants or denies bail or release on a person's own recognizance, the reasons for that decision shall be stated in the record and included in the court's minutes."

II. Key portions of the appellate opinion

Although the entire *Humphrey* opinion should be read for accuracy and context, for convenience, the following key excerpts have been taken from the decision:

[Pages 2-3] As we will explain, although the prosecutor presented no evidence that non-monetary conditions of release could not sufficiently protect victim or public safety, and the trial court found petitioner suitable for release on bail, the court's order, by setting bail in an amount it was impossible for petitioner to pay, effectively constituted a *sub rosa* detention order lacking the due process protections constitutionally required to attend such an order. Petitioner is entitled to a new bail hearing at which the court inquires into and determines his ability to pay, considers nonmonetary alternatives to money bail, and, if it determines petitioner is unable to afford the amount of bail the court finds necessary, follows the procedures and makes the findings necessary for a valid order of detention. [Footnote omitted; emphasis added.]

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[Page 5] The Attorney General now agrees with petitioner that a writ of habeas corpus should issue for the purpose of providing petitioner with a new bail hearing. As stated in the return: "The Department of Justice has determined that it will not defend any application of the bail law that does not take into consideration a person's ability to pay, or alternative methods of ensuring a person's appearance at trial. Given this determination, after further deliberations, we withdraw our earlier assertion that the magistrate was not obligated to make any additional inquiry into petitioner's ability to pay under the circumstances of this case."

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[Page 17] As we shall describe, the principles underlying these cases dictate that a court may not order pretrial detention unless it finds either that the defendant has the financial ability but failed to pay the amount of bail the court finds reasonably necessary to ensure his or her appearance at future court proceedings; or that the defendant is unable to pay that amount and no less restrictive conditions of release would be sufficient to reasonably assure such appearance; or that no less restrictive nonfinancial conditions of release would be sufficient to protect the victim and community.

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[Pages 20-21] [In the context of pretrial bail] the relevant governmental interests are ensuring a defendant's presence at future court proceedings and protecting the safety of victims and the community. The liberty interest of the defendant, who is presumed innocent, is even greater; consequently, as will be further explained, it is particularly important that his or her liberty be abridged only to the degree necessary to serve a

compelling governmental interest. (See *LopezValenzuela v. Arpaio*, *supra*, 770 F.3d at p. 779; *Salerno*, *supra*, 481 U.S. at pp. 749-750, 755.) When money bail is imposed to prevent flight, the connection between the condition attached to the defendant's release and the governmental interest at stake is obvious: If the defendant fails to appear, the bail is forfeited. (§§ 1269b, subd. (h); 1305, subd. (a).) A defendant who is unable to pay the amount of bail ordered—assuming appropriate inquiry and findings as to the amount necessary to protect against flight—is detained because there is no less restrictive alternative to satisfy the governmental interest in ensuring the defendant's presence. (See *United States v. Mantecon-Zayas* (1st Cir. 1991) 949 F.2d 548, 550; *Brangan v. Commonwealth* (Mass. 2017) 80 N.E.3d 949, 960, 963.) [Footnote omitted.] Money bail, however, has no logical connection to protection of the public, as bail is not forfeited upon commission of additional crimes. Money bail will protect the public only as an incidental effect of the defendant being detained due to his or her inability to pay, and this effect will not consistently serve a protective purpose, as a wealthy defendant will be released despite his or her dangerousness while an indigent defendant who poses minimal risk of harm to others will be jailed. Accordingly, when the court's concern is protection of the public rather than flight, imposition of money bail in an amount exceeding the defendant's ability to pay unjustifiably relieves the court of the obligation to inquire whether less restrictive alternatives to detention could adequately protect public or victim safety and, if necessary, explain the reasons detention is required.

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[Page 21] [*Bearden v. Georgia* (1983) 461 U.S. 660 (*Bearden*)] and its progeny “ ‘stand for the general proposition that when a person's freedom from governmental detention is conditioned on payment of a monetary sum, courts must consider the person's financial situation and alternative conditions of release when calculating what the person must pay to satisfy a particular state interest.’ Otherwise, the government has no way of knowing if the detention that results from failing to post a bond in the required amount is reasonably related to achieving that interest.” (*Hernandez v. Sessions* (9th Cir. 2017) 872 F.3d 976, 992-993.)

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[Page 31] The *Bearden* line of cases, together with *Salerno* and *Turner*, compel the conclusion that a court which has not followed the procedures and made the findings required for an order of detention must, in setting money bail, consider the defendant's ability to pay and refrain from setting an amount so beyond the defendant's means as to result in detention. ¶ If the court concludes that an amount of bail the defendant is unable to pay is required to ensure his or her future court appearances, it may impose that amount only upon a determination by clear and convincing evidence that no less restrictive alternative will satisfy that purpose. 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." (*Van Atta v. Scott* (1980) 27 Cal.3d 424, 435; see *Santosky v. Kramer* (1982) 455 U.S. 745, 756 ["This court has mandated an intermediate standard of proof—'clear and convincing evidence'—when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money' "]; *Addington v. Texas* (1979) 441 U.S. 418, 427 ["the individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence"]; § 12 [clear and convincing evidence required to establish facts necessary for exception to constitutional right to pretrial release in noncapital cases].)

....

[Pages 33-34] With respect to the likelihood of flight, the *Pipinos* court considered the factors noted in *Podesto*: "Because the primary purpose of bail is assurance of continued attendance at future court proceedings [citation], a defendant to qualify for release on appeal must satisfactorily demonstrate that the likelihood of his flight is minimal in light of the following three criteria: '(1) the defendant's ties to the community, including his employment, the duration of his residence, his family attachments and his property holdings; (2) the defendant's record of appearance at past court hearings or of flight to avoid prosecution; and (3) the severity of the sentence defendant faces.'" (*Pipinos, supra*, 33 Cal.3d at p. 199, quoting *Podesto, supra*, 15 Cal.3d at pp. 934-935.) *Pipinos* satisfied the first two criteria, but the trial court was " 'persuaded that he wouldn't give much pause to flee,' " solely on the ground that he faced a four-year prison term. This was improper, the Supreme Court stated, because *Podesto* requires that one factor be weighed against the others, "and the court's failure to mention the other factors . . . does not permit us to review in what manner, if at all, it balanced defendant's community ties and record of court appearances against the incentive to flight suggested by the prison term.'" (*Pipinos*, at p. 199.) This balancing is required because "otherwise denial of bail would be proper in any case in which a prison term is imposed, regardless of offsetting factors presented by defendant." (*Id.* at p. 200.) Additionally, the absence of balancing "fails to promote the policy purpose underlying our requirement of a statement of reasons—guarding against careless decision making. Although the court may very well have engaged in careful analysis of the facts and law, its failure to articulate its reasons for finding defendant a flight risk leaves us without the benefit of its analysis." (*Ibid.*) *Pipinos* also concluded the trial court's finding that the defendant was a " 'danger to society' " was "deficient with respect to providing a basis for meaningful review and guarding against careless decision making." (*Pipinos, supra*, 33 Cal.3d at p. 200.) The trial court did "not expressly state that there is a probability that defendant will continue to engage in criminal

conduct. Instead, the court obliquely refers to defendant's 'basic character flaws,' and bases its conclusion of danger to society on the fact that there is no evidence of a 'metamorphosis.' We may conceivably infer that the court found, based on its assessment of defendant's character, that it was unlikely that defendant would forego his profitable trafficking in controlled substances. However, a primary purpose of the *Podesto* requirement of a statement is precisely to prevent this type of speculative judicial second-guessing, especially when, as here, we are asked to draw inferences as to inferences the trial court might have drawn." (*Ibid.*) "Because of the court's failure to articulate its reasons for finding defendant a danger to the community, we cannot ascertain the manner in which the court exercised its discretion. We do not know if the denial of bail was based upon the circumstances and propensities of the individual defendant, or whether it was based upon precisely the generalizations of future criminality *Podesto's* standards were meant to prevent. *Podesto* urges caution in denying bail based on the propensities of the defendant and warns courts 'not [to] adopt an ironclad, mechanical policy of denying bail to all who commit a particular crime.' [Citations.]" (*Id.* at p. 201.)

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[Page 35] Failure to consider a defendant's ability to pay before setting money bail is one aspect of the fundamental requirement that decisions that may result in pretrial detention must be based on factors related to the individual defendant's circumstances. This requirement is implicit in the principles we have discussed—that a defendant may not be imprisoned solely due to poverty and that 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.

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[Pages 39-40] Petitioner does not facially challenge the use of the San Francisco bail schedule. Nor do we condemn the trial court's consultation of the schedule: Such consultation is statutorily required, because for serious or violent felonies the court cannot depart from the amount prescribed by the schedule without finding unusual circumstances. (§ 1275, subd. (c).) The nature of the present charges against petitioner and his prior offenses are relevant to assessment of his dangerousness, and the schedule provides a useful measure of the relative seriousness of listed offenses. 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 (§ 1269b), as well as a starting point for the setting of bail by a judge issuing an arrest warrant or for a court setting bail provisionally in order to allow time for assessment of a defendant's financial resources and less restrictive alternative conditions by the pretrial services agency, or if a defendant does not oppose pretrial detention. As this

case demonstrates, however, unquestioning reliance upon the bail schedule without consideration of a defendant's ability to pay, as well as other individualized factors bearing upon his or her dangerousness and/or risk of flight, runs afoul of the requirements of due process for a decision that may result in pretrial detention. Once the trial court determines public and victim safety do not require pretrial detention and a defendant should be admitted to bail, the important financial inquiry is not the amount prescribed by the bail schedule but the amount necessary to secure the defendant's appearance at trial or a court-ordered hearing.

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[Page 45] For the reasons we have discussed, the trial court erred in setting bail at \$350,000 without inquiring into and making findings regarding petitioner's ability to pay and alternatives to money bail and, if petitioner's financial resources would be insufficient and the order would result in his pretrial detention, making the findings necessary for a valid order of detention. **Petitioner is entitled to a new bail hearing at which he is afforded the opportunity to provide evidence and argument, and the court considers his financial resources and other relevant circumstances, as well as alternatives to money bail. If the court determines that petitioner is unable to afford the amount of money bail it finds necessary to ensure petitioner's future court appearances, it may set bail at that amount only upon a determination by clear and convincing evidence that no less restrictive alternative will satisfy that purpose. The court's findings and reasons must be stated on the record or otherwise preserved.** [Emphasis added.]

....

[Page 46] The problem, as our Chief Justice has shown, requires the judiciary, not just the Legislature, to change the way we think about bail and the significance we attach to the bail process. Though legislation is desperately needed, administration of the bail system is committed to the courts. It will be hard, perhaps impossible, for judicial officers to fully rectify the bail process without greater resources than our trial courts now possess. Nevertheless, the highest judicial responsibility is and must remain the enforcement of constitutional rights, a responsibility that cannot be avoided on the ground its discharge requires greater judicial resources than the other two branches of government may see fit to provide. Judges may, in the end, be compelled to reduce the services courts provide, but in our constitutional democracy the reductions cannot be at the expense of presumptively innocent persons threatened with divestment of their fundamental constitutional right to pretrial liberty.