POINTS AND AUTHORITIES

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Week Of	Topic	Guest	30 min
Feb. 20, 2018	*In re Humphrey* Welfare & Institutions Code §8103	Tim Wagstaffe	**General**

In re Humphrey, 2018 WL 550512[1]

This P&A will summarize the Court of Appeal opinion, issued on January 25, 2018, which impacts bail decisions in California. On February 20, the California Attorney General announced he will not seek review of the Court of Appeal's decision.

The Court of Appeal in *Humphrey* summarizes its principles regarding money bail:

- **"A defendant may be not be imprisoned solely due to poverty."**

- **"Rigorous procedural safeguards are necessary to assure the accuracy of the determination that a defendant is dangerous, and detention is necessary in the absence of less restrictive alternatives to protect the public."**

I. The Concern of the Court of Appeal

The Court of Appeal quotes from the 2017 State of the Judiciary Address in which the Chief Justice of the California Supreme Court told the Legislature: "I think it's time for us to really ask the question whether or not bail effectively serves its purpose, or does it in fact penalize the poor." The Court of Appeal also refers to the declaration in Senate Bill No. 10, the California Money Bail Reform Act of 2017, which states that modernization of the pretrial system is urgently needed in California because many individuals, who have not been convicted of a crime, are held in county jails and are awaiting trial "because they cannot afford to post money bail or pay a commercial bail bond company." The Court of Appeal also quotes from a speech given in 1979 by (then) Governor Jerry Brown, in which he described the California bail system as a "tax on poor people," and proposed that California move closer to the federal system. As will be discussed later in this P&A summary, the Court of Appeal comments favorably on aspects of the federal Bail Reform Act.

[1] The Court of Appeal opinion is 46 pages long. This P&A handout is intended solely to be a shortened summary.

II. The Court of Appeal's Holding

1. The Court of Appeal states (and notes the parties agree) that the due process and equal protection clauses of the Fourteenth Amendment require courts "to make two additional inquiries and findings before ordering release conditioned on the posting of money bail – whether the defendant has the financial ability to pay the amount of bail ordered, and, if not, whether less restrictive conditions of bail are adequate to serve the government's interest."

2. The Court of Appeal concludes that because the trial court erred in failing to inquire into the petitioner's financial circumstances and less restrictive alternatives to money bail, the writ of habeas corpus should issue for the purpose of providing petitioner a new bail hearing.

III. The Facts and Proceeding in the Courts Below

A. The Underlying Offenses, Arrest and Charges

1. The petitioner Kenneth Humphrey was 63-years old and lived in the same apartment building as the victim, who was 79 years old. The men lived on different floors and didn't know each other. Humphrey followed the victim into his apartment and asked him about money. At one point the petitioner told the victim to get on the bed and threatened to put a pillow case over his head. After the victim gave the petitioner $2, the petitioner stole $5 and a bottle of cologne.

2. The petitioner was arrested and charged with first degree robbery, residential burglary, inflicting injury (but not great bodily injury) on an elder, and theft from an elder. (p.*3.)

B. The initial Setting of Bail

1. At arraignment, the petitioner requested that he be released on his own recognizance, given his age, his community ties as a lifelong resident of San Francisco, as well as his unemployment and financial condition, the minimal property loss, the age of the three alleged prior convictions (the most recent in 1992), the absence of any criminal record "of any sort" for more than 14 years, and the fact he never previously failed to appear at a court-ordered proceeding. (*Id.*)

2. The prosecutor asked the court to follow the Public Safety Assessment from pretrial services which did not recommend release, and requested bail set at $600,000. The court did so. The court relied on the seriousness of the crime, the vulnerability of the victim, and the recommendation from pretrial services. (p.*4.)

C. Petitioner's Motion for Bail

1. Pursuant to Penal Code section 1270.2, the petitioner filed a motion for a formal bail hearing, and an order releasing him on OR or reducing his bail. The petitioner argued that the bail, as set, was beyond his means and was therefore the functional equivalent of no bail. (*Id.*)

2. The petitioner's motion discussed his "life-long" efforts to deal with addiction. Beginning in his teenage years, he had suffered from substance abuse that he tried periodically, but unsuccessfully, to address. The petitioner's motion stated that after he committed the offenses in this case, he was accepted into a six-month residential treatment program that serves homeless men and women with substance abuse problems. The designated intake date, set by the program, was the day after the bail hearing. (p.*5.)

D The Hearing on the Bail Motion

1. The hearing on petitioner's bail motion took place five days before the date set for his preliminary hearing. Petitioner's counsel reiterated the arguments in the written motion, stating that "though this was a 'three strikes' case, the prior convictions were very old, the most recent having occurred a quarter of a century ago in 1992." (*Id*.)

2. The prosecutor pointed out that because one of the petitioner's priors was a felony for which he served a prison sentence, under Penal Code section 1275 the court had to find unusual circumstances in order to deviate from the bail schedule. Arguing there were no such circumstances, the prosecutor urged the court not to reduce bail. The prosecutor added the petitioner should be considered "a great public safety risk" because he "followed a disabled senior into his home. He stole from him. He did so in a building that he resided in." The prosecutor also argued that the petitioner was a flight risk because he was exposed to a lengthy prison sentence. (*Id*.)

3. The one-page form risk assessment report from pretrial services did not indicate that anyone ever met with petitioner, and provided no individualized risk assessment of the petitioner. The Court of Appeal said it report provided no information about supervised release programs involving features such as required daily or periodic check-ins with the pretrial service agency, drug testing, home detention, electric monitoring or other less restrictive options. (p.*6.)

4. The trial court, in explaining its decision, stated it had public safety concerns because of the nature of the offense, noting it was similar to offenses the petitioner had committed in the past. The court said in terms of the small amount taken, "I'm not going to provide less protection to the poor than to the rich." The court said the petitioner's criminal history and the circumstances of the offenses, which it t described as "basically a home invasion," were captured in the scheduled bail of $600,000. (*Id*.)

5. However, the court noted it could deviate from the bail schedule on the basis of unusual

circumstances, and said the defendant's willingness to participate in the treatment program and his strong ties to the community qualified as unusual circumstances. But the court still believed a high bail was warranted "because of public safety and flight risk concerns," so the court modified the bail to $350,000. The court added as a condition of probation that the petitioner would have to participate in the treatment program upon release on bail. Petitioner's counsel noted that because the petitioner was too poor to make the $350,000 bail, he would have to remain in custody pending trial and would be unable to participate in the treatment program. The trial court did not comment on this point. (*Id.*)

IV. The California Bail Process

A. The California Constitution

1. Article I, section 12

a. *Humphrey* states: "Section 12, which addresses only the subject of bail, limits the cases in which a defendant is not entitled to release to those involving capital crimes or involving certain other felonies if it is established by clear and convincing evidence that release would result in a substantial likelihood of great bodily harm to others."

b. Section 12 additionally provides: "Excessive bail may not be required. In fixing the amount of bail, the court shall take into consideration the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at trial or hearing in the case."

2. Article 1, Section 28

a. Section 28 establishes and ensures enforcement of 17 rights for victims of criminal acts, one of which is the right one of which is the right "[t]o have the safety of the victim and the victim's family considered in fixing the amount of bail and release conditions for the defendant." (subd. (b)(3).)

b. With respect to that victim's right, subdivision (f)(3) of section 28, entitled "Public Safety Bail," provides that "[i]n setting, reducing or denying bail, the judge or magistrate shall take into consideration the protection of the public, the safety of the victim, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case. Public safety and the safety of the victim shall be the primary consideration."

B. The Statutes

The statutes implementing the constitutional right to bail are set forth in Penal Code sections 1268–1276.5. Some of the provisions are discussed expressly in *Humphrey* as stated below:

1. A defendant charged with an offense not punishable with death "may be admitted to bail before conviction, as a matter of right," and "[t]he finding of an indictment does not add to the strength of the proof or the presumptions to be drawn therefrom." (§§ 1270.5, 1271.)

2. However, before any person arrested for any specified serious offense may be released on bail in an amount that is either more or less than the amount contained in the schedule of bail for that offense, or may be released on his or her own recognizance, a hearing must be held at which "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." (§ 1270.1, subds. (a) & (c).)

3. In determining 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." (§ 1270.1, subd. (c).)

4. Where bond is set in a different amount from that specified in the bail schedule, "the judge or magistrate shall state the reasons for that decision and shall address the issue of threats made against the victim or witness, if they were made, in the record." (§ 1270.1, subd. (d).)

5. A person detained in custody prior to conviction for want of bail is entitled, no later than five days from the time of the original order fixing bail, to an automatic review of the order fixing the amount of bail on the original accusatory pleading. (§ 1270.2)

6. Section 1275, which describes the factors judicial officers are obliged to consider in making bail determinations, tracks the exact language of subdivision (f)(3) of section 28 in declaring that "[i]n 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." (§ 1275, subd. (a)(1).)

7. Section 1275 additionally states that "[i]n 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 possession of controlled substances by the defendant." (§ 1275, subd. (a)(2).) Before a court reduces bail to below the amount established by the applicable bail schedule for specified serious offenses "the court shall make a finding of unusual circumstances and shall set forth those facts in the record." (§ 1275, subd. (c).)

8. As will be discussed later in this P&A, the Court of Appeal in *Humphrey* states: "The only requirement in the bail statutes that a court considering imposition of money bail take into account the defendant's financial circumstances is that the court consider 'any evidence offered by the

detained person' regarding ability to post bond. (§ 1270.1, subd. (c).)

V. Due Process and Equal Protection Claim: The Findings the Trial Court Must Make

In this section of the opinion, the Court of Appeal explains that the petitioner relies on two lines of cases supporting his claim that the due process and equal protection clauses of the Fourteenth Amendment required the trial court to determine if the availability of less restrictive non-monetary conditions of release would achieve the purposes of bail. (p.*9.)

A. Cases Related to Inability to Pay Fine or Restitution

1. The Court of Appeal explains that the first line of cases "does not relate to bail directly but more generally to the treatment of indigency in cases in which a defendant is exposed to confinement as a result of his financial inability to pay a fine or restitution." As the Court of Appeal describes, these cases establish that a defendant may not be imprisoned solely because he is unable to make a payment that a wealthier defendant can make in order to avoid imprisonment. (*Id*.)

2. The key case in the Court of Appeal's discussion is *Bearden v. Georgia* (183) 461 U.S. 660, in which the trial court revoked the indigent defendant's probation because he was unable to pay his fine, and ordered him to serve the remaining portion of his probationary period in prison. (p.*10.)

3. The United State Supreme Court in *Bearden* said that absent the probationer willfully refusing to pay a fine or restitution when he has the means to pay, "it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available." (*Bearden*, 461 U.S. at pp. 668-669.) "Only if alternate measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay." (*Bearden*, at p. 672.) To deprive a probationer of his conditional freedom simply because, through no fault of his own, he was unable to pay a fine or restitution "would be contrary to the fundamental fairness required by the Fourteenth Amendment." (*Bearden*, at pp. 672-673.) (*Id*.)

4. The Court of Appeal here in *Humphrey* notes that the issues are different in the pretrial bail context. The relevant government interest is not punishment and deterrence, but rather ensuring a defendant's presence at future court proceedings and protecting the safety of victims and the community. Nevertheless, the issue is the same: how to assure the government's interest when the defendant cannot pay the monetary obligation determined by the court. (p.*11.)

5. The Court of Appeal states: "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. 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. 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." (p.*11, internal citations omitted.)

6. The Court of Appeal concludes that *Bearden* and its progeny stand for the proposition that when a person's freedom from government detention is conditioned on a money payment, courts must consider the person's financial circumstances and alternative conditions of release when calculating how much a person has to pay to satisfy the particular state interest. Otherwise, if the arrestee is detained because he did not post bail, the government has no way of knowing if the bail was an amount reasonably required to achieve the state's interest. (p.*12.)

7. Here, the petitioner was detained prior to trial due to his financial inability to post bail in the amount of $350,000. This amount was fixed by the court without consideration of either the petitioner's financial circumstances or less restrictive alternative conditions of release. "The court's error in failing to consider these factors eliminated the requisite connection between the amount of bail fixed and the dual purpose of bail, [which are] assuring petitioner's appearance and protecting public safety." (*Id*.)

8. "Due to trial court's failure to make these inquiries, the trial court did not know whether the $350,000 obligation it imposed would serve the legitimate purposes of bail or impermissibly punish petitioner for his poverty." (*Id*.)

B. How the Federal Bail System Informs the California Process

1. The petitioner in Humphrey relies on a second line of cases to support his claim that the due process and equal protection clauses of the Fourteenth Amendment require the trial court to consider less restrictive non-monetary conditions that would achieve the purpose of bail. As the Court of Appeal explains: "[T]he second line [of cases] are bail cases, primarily *United States v. Salerno* [1978] 481 U.S. 739, establishing that, because the liberty interest of a presumptively innocent arrestee rises to the level of a fundamental constitutional right, the right to bail cannot be abridged except through a judicial process that safeguards the due process rights of the defendant and results in a finding that no less restrictive condition or combination of conditions can adequately assure the arrestee's appearance in court and/or protect public safety . . . ."

2. In other words, in this section of the opinion, the Court of Appeal opines on procedural

safeguards necessary to protect the liberty interest that is at stake. The Court of Appeal looks at federal cases and the federal Bail Reform Act of 1984, and states that the safeguards in the federal system "are relevant to our considerations of the inquiries and findings necessary before a presumptively innocent arrestee may be detained prior to trial."

3. The Court of Appeal begins by citing certain provisions of the federal Bail Reform Act of 1984, a statute quite different from the California bail scheme. The Court of Appeal in *Humphrey* states: "That Act provides that "[a] judicial officer . . . before whom an arrested person is brought shall order that such person be released or detained, pending judicial proceedings" (18 U.S. C. § 3141(a)) and that the judicial officer "shall order the pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court," subject to specified conditions, "unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community." (18 U.S.C. § 3142(b).) *Thus, if the offense is not made statutorily unbailable [i.e. the person may be released prior to the court date], the presumption is release pending trial."* (p.*13, emphasis added).

4. Under the federal Bail Reform Act, judges have four options: (1) release the arrestee on personal recognizance or upon execution of an unsecured appearance bond; (2) release the arrestee subject to conditions; (3) temporarily detain the arrestee; (4) detain the arrestee. (18 U.S.C. § 1342(a).) (p.*13, fn. 12.)

5. Unlike the California scheme, there is a prohibition against money bail in the federal Bail Reform Act. The Act explicitly prohibits federal courts from imposing a financial condition that would result in a defendant's pretrial detention. (18 U.S.C. §1342(c)(2). (p.*16, fn. 16).

6. The federal Bail Reform Act authorizes courts to make release decisions that consider the likelihood that an arrestee might flee and the danger a person may pose to others. The Supreme Court in *United States v. Salerno*, *supra*, 481 U.S.at p. 775, said the "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." But the *Salerno* court also concluded that in appropriate circumstances, such detention can outweigh an arrestee's liberty interest. In *Salerno*, the high court discussed the extensive safeguards mandated by the Bail Reform Act to assure the accuracy by the court that release of a particular arrestee would endanger public safety. The Court of Appeal in *Humphrey* adopts the view of the petitioner that (while acknowledging the differences in the California bail system) those inquiries and findings are relevant in California courts regarding when the arrestee can be detained prior to trial. (p.*14.)

7. The *Salerno* court stated that "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." Detainees have a right to counsel and may testify on their own behalf, present information, and cross-examine witnesses. In determining the propriety of detention, the judicial officer is guided by statutorily enumerated factors, which include the nature and circumstances of the charges, the weight of the evidence, the history and

characteristics of the offender, and the danger to the community. Also, the judicial officer must include written findings of fact and a written statement of reasons supporting a decision to detain. (*Salerno*, at pp. 751-752.)[2] (p.*14.)

8. The Court of Appeal in *Humphrey* states that because the federal bail scheme at issue in *Salerno* is not a money-bail system as we have in California, the Supreme Court in *Salerno* had no need to address the circumstances of an indigent defendant. So the Court of Appeal here looks at another Supreme Court case, *Turner v. Rogers* (2100) 564 U.S. 431, which involved a father's unpaid child support obligations. The Supreme Court held that jailing a defendant without inquiring into his financial status would violate the due process clause. The Supreme Court suggested a number of procedural safeguards that could significantly reduce the risk of erroneous deprivation of liberty. These safeguards, which focus on ability to pay, include use of a form to elicit the defendant's relevant financial information; an opportunity at the hearing for the defendant to respond to questions about his financial status; an express finding by the court that the defendant has the ability to pay. The Supreme Court in *Turner* stated it was providing only examples, and that States could provide equivalent procedures. (p.*16.)

9. Likewise, the *Humphrey* court said that a determination of ability to pay is critical in the bail context to guard against improper detention based only on financial resources. However, the Court of Appeal states that only one bail statute addresses this point – section 1270.1, sub. (c) – and this provision only requires a court to consider a defendant's ability to pay if the defendant raises the issue. (§1270.1, subd. (c).) Moreover, section 1270.1, subd. (c) applies only when a person is arrested for specified offenses. (*Id*.)

10. At this point in the opinion, after considering procedural safeguards and ability to pay, the Court of Appeal says this: "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." (p. *17.)

11. The Court of Appeal in *Humphrey* then emphasizes another protection identified in the *Salerno* and *Turner* opinions, which are findings by the court and a statement of decision. The Court of Appeal notes that the bail statutes require statements of reasons only to a limited degree, but section 28, subdivision (f)(3), requires that when a judicial officer grants or denies bail or releases a person on his or her own recognizance, "the reasons for that decision shall be stated in the record and included in the court's minutes." (*Id*.)

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[2] Nevertheless, while the Court of Appeal in *Humphrey* finds the "full-blown adversary hearing" "relevant" to inquiries and findings in California courts, it does not state this type of hearing is required.

12. *Humphrey* finds guidance in cases addressing the adequacy of judicial explanations where release on bail was denied pending appeal. Cursory statements or bare conclusions such as "substantial flight risk," "danger to society," do not promote the "goal of ensuring that judges engage in careful and reasoned decisionmaking." These statements do not identify the specific facts relied on by the trial court. A court is "duty-bound to articulate its evaluative process and show how it weighed the evidence presented in light of the applicable standards." Moreover, such inadequate statements do not inform the reviewing court "of the manner in which the court exercised its discretion." (p.*18.)

VI. Bail Determination Must Be Based on Individualized Criteria

A. Bail Schedules

1. The Court of Appeal states: "The $600,000 bail initially ordered in this case was prescribed by the county bail schedule, which was also the anchor for the $350,000 reduced bail order. Bail schedules provide standardized money bail amounts based on the offense charged and prior offenses, regardless of other characteristics of an individual defendant that bear on the risk he or she currently presents." (p.*20.)

2. "These schedules, therefore, represent the antithesis of the individualized inquiry required before a court can order pretrial detention. Bail schedules have been criticized as undermining the judicial discretion necessary for individualized bail determinations, as based on inaccurate assumptions that defendants charged with more serious offenses are more likely to flee and reoffend, and as enabling the detention of poor defendants and release of wealthier ones who may pose greater risks." (*Id*.)

B. The Good and the Bad of Bail Schedules

1. The Court of Appeal states: "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).)" (p.*20.)

2. The Court stated 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." (*Id*.)

3. "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." (*Id*.)

C. The Court of Appeal Applies the Principles to *Humphrey*

The Court of Appeal makes these observations regarding the effect of reliance on the bail schedule as to petitioner Humphrey:

"[T]he prosecution did not present any evidence, let alone clear and convincing evidence, to establish that 'no condition or combination of conditions of release would ensure the safety of the community or any person,' thereby justifying abridgment of petitioner's liberty interest while awaiting trial. To the contrary, the prosecution did not dispute that any risk petitioner posed to victim and public safety could be sufficiently mitigated with the conditions of release the court imposed, and the court, by ordering petitioner's release on money bail with these conditions, implicitly so found." (p.*22.)

"The conditions requiring petitioner to participate in the supervised residential drug treatment program and to stay away from the victim addressed the particular circumstances of petitioner and the offense, but the bail amount was based solely on the bail schedule rather than any individualized inquiry into the amount necessary to satisfy the purposes of money bail in this case. And while the court attempted to acknowledge petitioner's circumstances by lowering the initially set amount of bail, the reduction from $600,000 to $350,000 was ineffectual. The reduction could be meaningful only if the court had reason to believe it possible for petitioner to post bail in the lower amount; but the court did not find or explain such a possibility, and the record suggests that, as defense counsel stated, petitioner was no more able to post bail in the amount of $350,000 than he was to post bail in the amount of $600,000." (*Id*.)

"Nothing in the record suggests petitioner's claim of indigency was not bona fide, and neither the district attorney nor the court questioned the veracity of the claim. The court thus reached the anomalous result of finding petitioner suitable for release on bail but, in effect, ordering him detained (and therefore rendering him unable to participate in the treatment program the court had made a condition of release)." (*Id*.)

The Court of Appeal concluded as to petitioner: "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 alternatives will satisfy that purpose." (p.*23.)

Welfare and Institutions Code section 8103: The Prosecutor's Role When the Person Wants His Guns Back After a 5150 Detention

1. Pursuant to Welfare and Institutions Code section 8103, subdivision (f), a person who has been admitted to a mental health facility pursuant to section 5150 may not own, possess, control, receive or purchase any firearm for a period of five years after detention (§ 8103, subd. (f)(1)) unless the person requests a hearing

2. Section 8103(f)(3) provides that upon discharge from the facility where the person was admitted, the facility shall inform the person of the five year ban. The facility must also inform the person that he can request a hearing for an order permitting him to own, possess, control, receive or purchase a firearm. The facility shall provide to the person the form for a request for a hearing. The Department of Justice prescribes the form. If the person requests the hearing, the facility shall forward the form to the superior court unless the person states that he will submit the form to the court.

3. The person may make a single request for a hearing at any time during the five-year period of the ban. (§8103, subd. (f)(4))

4. The superior court shall set a hearing date and notify the Department of Justice and the District Attorney. The People are the plaintiff in the proceeding. (§ 8103, subd. (f)(5).)

5. The People bear the burden of proving, by a preponderance of the evidence, that the person subject to the firearms prohibition "would not be likely to use firearms in a safe and lawful manner." (§ 8103, subd. (f)(6).) For purpose of meeting this burden, the People can subpoena medical records of events the led to the 5150 commitment and events during the continued commitment; rely on police reports, DOJ records; call witnesses.

6. Hearsay is admissible. Section 8103, subdivision (f)(5), states that "declarations, police reports …, and any other material and relevant evidence that is not excluded under Section 352 of the Evidence Code, shall be admissible at the hearing under this section ."

7. If the district attorney "declines or fails to go forward in the hearing" scheduled pursuant to section 8103, subdivision (f)(5), the court must relieve the person of the firearms prohibition. (§ 8103, subd. (f)(8).)

Suggestions for future shows, ideas on how to improve P&A, and other comments or criticisms should be directed to P&A author Mary Pat Dooley at (510) 272-6249, marypat.dooley@acgov.org. Technical questions should be addressed to Gilbert Leung at (510) 272-6327. Participatory students: MCLE Evaluation sheets are available on location and certificates of attendance are constructively maintained in your possession in the Ala. Co. Dist.Atty computer banks.

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