PREHEARING RELEASE OF PROBATIONERS: AB 1228

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I. INTRODUCTION

Assembly Bill No. 1228 (2021-2022 Reg. Leg. Sess.) (AB 1228) amends Penal Code[1] section 1203.2 and adds section 1203.25 to establish the circumstances under which persons accused of a violation of probation are entitled to release from custody pending a formal hearing on the violation. The legislation makes available to persons on post-conviction probation supervision many of the procedural protections applicable to pretrial release outlined by the California Supreme Court in *In re Humphrey* (2021) 11 Cal.5th 135 (*Humphrey*). The legislation first amends section 1203.2, dealing with many forms of post-conviction supervision, to direct the court to a new statute when considering the custody status of persons on probation supervision. The legislation next enacts section 1203.25 dealing with the custody status of persons charged with a probation violation.

II. EFFECTIVE DATE

AB 1228 becomes effective on January 1, 2022. The new rules governing the custody status of probationers will apply to all persons arrested on an alleged probation violation after that date. Because the custody status of an individual is continuing in nature and always subject to modification by the court, the new provisions also will apply to persons being held on probation violations prior to January 1, 2022. Persons in custody who are pending a revocation of probation as of January 1, 2022, likely will be entitled to a review of their custody status based on the enactment of AB 1228.

Although the legislation becomes effective on January 1, 2022, there is nothing to prevent a court from applying the new concepts embodied in AB 1228 prior to the operative date. To avoid a glut of cases seeking review of custody status in the days following January 1st, a prudent court may choose to immediately begin the review process in anticipation of the new rules. Although not binding, the principles established by the new legislation would guide the court's discretion.

III. AB 1228 IS LIMITED TO PROBATIONERS

It is clear from the plain language of AB 1228 that its provisions are limited to persons held on a probation violation. Many of the provisions of section 1203.2 apply to other forms of post-conviction supervision, including mandatory supervision, postrelease community supervision, and parole. (§ 1203.2, subd. (a).) The statute has now been amended to provide: "[W]henever

[1] Unless otherwise indicated, all statutory references are to the Penal Code.

a *person on probation* who is subject to this section is arrested, with or without a warrant or the filing of a petition for revocation as described in subdivision (b), the court shall consider the release of a *person on probation* from custody in accordance with Section 1203.25." (Italics added.) Section 1203.2, subdivision (a), directs the court to section 1203.25 when considering release of *probationers* arrested on an alleged violation. Section 1203.25 is replete with references to *persons on probation*, not other forms of post-conviction supervision. In short, nothing in sections 1203.2 or 1203.25 offers any suggestion the provisions of AB 1228 will apply to any persons on post-conviction supervision other than probation.[2]

It is unlikely there is any serious equal protection concern if the new provisions are inapplicable to other forms of post-conviction supervision. Persons who are placed on probation generally are considered at the low end of risk of future criminal conduct. Persons on mandatory supervision, postrelease community supervision, and parole, however, have been determined to be unsuitable for release on probation due to factors related to the underlying criminal offense or the defendant's criminal record. There is a rational basis for distinguishing between persons on probation and persons under supervision where probation has been denied.

IV. PROCEDURE EFFECTIVE AT ARRAIGNMENT

The new procedures are effective when the probationer has been "arrested, with or without a warrant or the filing of a petition for revocation" of probation. (§ 1203.2, subd. (a).)

The new procedure is applicable to the arraignment proceeding and thereafter, but prior to the formal probation violation hearing. Section 1203.25, subdivision (a), begins: "All persons released by a court *at or after the initial hearing and prior to a formal probation violation hearing* pursuant to subdivision (a) of Section 1203.2 . . . ." (Italics added.) It is clear the statute is addressing release by the court at or after the initial appearance, *i.e.*, the arraignment. The new procedures do not govern the discretion of the police officer, probation officer, or custody facility to make traditional release or detention decisions. However, nothing in the legislation would prohibit a court from considering the factors as part of a pretrial release program if authorized by the court.

Persons serving flash incarceration at time of arraignment

The new procedures are inapplicable to probationers who are serving a period of flash incarceration at the time of the arraignment or subsequent hearing on release. Section 1203.2, subdivision (a), only requires consideration of section 1203.25 if the person is not "otherwise serving a period of flash incarceration." Presumably, once the period of flash incarceration has been served, the person would then be eligible for the court to consider release under the provisions of section 1203.25.

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[2] If the defendant is on probation for one case and another form of supervision for another case, likely the process for dealing with prehearing release will be treated separately for each form of supervision.

V. PRESUMPTION OF RELEASE PRIOR TO HEARING

Section 1203.25 establishes a presumption for release of persons accused of a probation violation. The nature of the presumption will depend on whether the underlying criminal offense is a felony or misdemeanor. Section 1203.25, subdivision (a) provides: "All persons released by a court at or after the initial hearing and prior to a formal probation violation hearing pursuant to subdivision (a) of Section 1203.2 shall be released on their own recognizance unless the court finds, by clear and convincing evidence, that the particular circumstances of the case require the imposition of an order to provide reasonable protection to the public and reasonable assurance of the person's future appearance in court."

A. Misdemeanor cases

Section 1203.25, subdivision (d), provides that a defendant charged with a violation of misdemeanor probation must be released unless the person has violated a court order. As stated in subdivision (d): "The court shall not deny release for a person on probation for misdemeanor conduct before the court holds a formal probation revocation hearing, unless the person fails to comply with an order of the court, including an order to appear in court in the underlying case, in which case subdivision (a) shall apply."

Subdivision (d) directs the release of "a person on probation for misdemeanor conduct." The phrase is grammatically ambiguous. The phrase could mean that its provisions apply to persons on probation for an *underlying misdemeanor offense*; or the statute could mean that the *violation* was new misdemeanor conduct. The context of the provision suggests the former interpretation – section 1203.25, subdivision (d), applies when the underlying criminal offense is a misdemeanor.

Unless an exception applies, subdivision (d) specifies the "court shall not deny release" for a person on misdemeanor probation. The statute allows imposition of conditions under certain circumstances. Whether it is appropriate to impose conditions of release will depend on the application of section 1203.25, subdivision (a), discussed, *infra*.

Subdivision (d) provides an exception to the presumption of release where "the person fails to comply with an order of the court, including an order to appear in court in the underlying case . . . ." Likely subdivision (d) refers to violations of orders made by the court to protect the public and assure future court appearances by the defendant. Accordingly, if the court has directed the defendant to appear and the defendant thereafter fails to appear in court, or the court has issued a criminal protective order and the defendant violates the order, the court may proceed under the provisions of section 1203.25, subdivision (a), in issuing further orders. See discussion of additional orders, *infra*. Likely this language is not intended to include violation of the general conditions of probation – to apply subdivision (d) in such a broad manner would have the exception swallowing the rule.

Likely it is the intent of the legislation that the failure to observe a court order would be based on a violation of an order entered in the case at issue, not a reference to past failures to observe orders entered in unrelated cases. Presumably every probationer will be entitled to release without conditions until there is the first violation in the case.

If the court intends to preserve the ability to impose additional conditions of release or to place the defendant on a "no bail" status for violation of a court order, the court must be clear in stating the defendant's required conduct. For example, the court must order the defendant to appear at the next proceeding or at least enter an order at the beginning of the proceedings that the defendant must personally appear at all future court dates unless expressly excused by the court or counsel. Best practice would have the court release the defendant on a formal signed release agreement pursuant to section 1318. Such a release agreement should order the defendant to appear as directed, obey all laws and orders of the court, and not leave the state without permission of the court. The minutes should indicate the entry of the order in open court with the defendant present.

Section 1203.25 does not distinguish between formal or informal grants of probation. Nothing in the new statute suggests there is any difference between the two forms of supervision.

Order of preventive detention without a violation of a court order

It is not clear whether the court has the authority to enter an order of preventive detention (or setting "no bail") without the defendant having first violated a court order. The plain meaning of section 1203.25, subdivision (d), is that such a violation must occur before the defendant can be detained. Such an interpretation means the court can never detain a person on a violation of misdemeanor probation at the initial arraignment on the violation.[3]

It is an open question whether the provisions of California Constitution, article I, section 12 and section 28, subdivision (f)(3), apply to post-conviction release decisions. Section 28, subdivision (f)(3), for example provides, in part, 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 considerations." If section 1203.25, subdivision (d), is applied as its plain meaning would suggest, it would preclude the court from considering the factors required by the constitution – something the Legislature may not direct given the constitutional mandate.

The ultimate question, however, is whether the provisions of the constitution governing bail have any application to post-conviction release proceedings. *In re Podesto* (1976) 15 Cal.3d 921, 929-930, for example, holds the constitutional provisions on bail apply only to persons who

[3] If the violation is based on a new crime, nothing in section 1203.25 prevents the court from ordering preventive detention for the new crime, assuming the required showing is made. (See § 1203.25, subd. (g), discussed, *infra*.)

have not yet been convicted. Does the fact that the Legislature is now imposing rules that parallel pre-conviction rules on post-conviction defendants trigger a full consideration of the factors outlined in the constitution? This is an issue that will be resolved after further appellate review.

B. Felony cases

Section 1203.25, subdivision (e), provides a defendant charged with a violation of felony probation must be released unless the court makes a finding by clear and convincing evidence that there are no "reasonably available" means to provide "reasonable" protection of the public and "reasonably" assure the defendant will make future court appearances. As stated in subdivision (e): "The court shall not deny release for a person on probation for felony conduct before the court holds a formal probation revocation hearing unless the court finds by clear and convincing evidence that there are no means reasonably available to provide reasonable protection of the public and reasonable assurance of the person's future appearance in court." The requirement of "clear and convincing evidence" and no reasonable alternative to a denial of pre-hearing release is consistent with the *Humphrey* decision. (See, *e.g.*, *Humphrey*, 11 Cal.5th at p. 153.)

Section 1203.25, subdivision (e), clearly contemplates the possibility of preventive detention for a violation of felony probation if there is a showing, by clear and convincing evidence, there are no means reasonably available to offer reasonable protection of the public and assure the defendant's further court appearances. To make such a finding, the court will be required to consider the alternatives to custody suggested in section 1203.25, subdivision (b), discussed, *infra*, and cash bail authorized in section 1203.25, subdivision (c), discussed, *infra*.

Unlike for persons on misdemeanor probation under section 1203.25, subdivision (d), section 1203.25, subdivision (e), does not expressly direct the court to consideration of section 1203.25, subdivision (a), if further orders are necessary. Such a directive, however, is implied from the structure of the statute. Subdivision (e) provides the overarching rule for release of persons on felony probation. Subdivisions (a) and following provide the exceptions to the general rule and the procedural mechanics of implementing the new provisions. If justified by clear and convincing evidence, the court will be permitted to impose conditions of release or preventive detention for persons on felony probation as authorized by section 1203.25, subdivisions (a) and (e), and other relevant authority.

Application of California Constitution, Art. I, § 28, subdivision (f)(3) to determination of custody status

As noted above, it is clear that section 1203.25 permits preventive detention for a person charged with a violation of felony probation. The detention order is permitted if there is clear and convincing evidence that other means of monitoring the defendant will not be sufficient to protect the public or assure future court appearances. What is not clear is whether the

provisions of California Constitution, article I, section 12 and section 28, subdivision (f)(3), require additional factors to consider in making the release decision. Section 28, subdivision (f)(3), for example provides, in part, 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 considerations." If section 1203.25, subdivision (e), is applied as its plain meaning would suggest, it would preclude the court from considering the factors required by the constitution – something the Legislature may not direct given the constitutional mandate.

The ultimate question, however, is whether the provisions of the constitution governing bail have any application to post-conviction release proceedings. *In re Podesto* (1976) 15 Cal.3d 921, 929-930, for example, holds the constitutional provisions on bail apply only to persons who have not yet been convicted. Does the fact that the Legislature is now imposing rules that parallel pre-conviction rules on post-conviction defendants trigger a full consideration of the factors outlined in the constitution? This is an issue that will be resolved after further appellate review.

VI. CONDITIONS OF RELEASE

The rules governing the imposition of conditions of release on a probationer begin with section 1203.25, subdivision (a). The presumption is that persons released prior to a hearing on a misdemeanor or felony violation of probation will be released on their own recognizance. "All persons released by a court at or after the initial hearing and prior to a formal probation violation hearing pursuant to subdivision (a) of Section 1203.2 *shall be released on their own recognizance . . .* " (§ 1203.25, subd. (a); italics added.) It appears the intent of the legislation is to require release on a person's own recognizance *without any additional conditions*.[4] If the court desires additional conditions of release, the court must find "by clear and convincing evidence, that the particular circumstances of the case require the imposition of an order to provide reasonable protection to the public and reasonable assurance of the person's future appearance in court." (*Ibid*.)

A. Entry of an order by the court

If the requisite showing is made, the court may enter "an order" to provide reasonable protection of the public and assure the defendant's appearance in court. The phrase "an

[4] The most recent floor analysis done by the Legislature summarized the legislation: "[AB 1228] specifies that persons released from custody prior to a probation violation hearing shall be released on their own recognizance unless the court finds, by clear and convincing evidence, that the particular circumstances of the case require imposition of *conditions of release* in order to provide reasonable protection of the public and reasonable assurance of the person's future appearance in court." (Assembly Floor Analysis – Concurrence in Senate Amendments, AB 1228 (Lee) As Amended September 3, 2021, page 1; italics added.)

order" is not specifically defined. Presumably it means the court may enter any order, consistent with the provisions of section 1203.25, that will reasonably meet the interests of the state in protecting the public and assuring future court appearances. Such conditions might include electronic monitoring, telephonic reporting and similar conditions listed in section 1203.25, subdivision (b), discussed, *infra*. Such an order also could include preventive detention, if warranted by the circumstances of the case; preventive detention orders are also limited by the provisions of subdivision (d) for defendants on misdemeanor probation, and by subdivision (e) for defendants on felony probation.

"The court shall make an *individualized determination* of the factors that do or do not indicate that the person would be a danger to the public if released pending a formal revocation hearing. Any finding of danger to the public must be based on clear and convincing evidence." (§ 1203.25, subd. (a)(1); italics added.) The requirement of an individualized determination is in accordance with *Humphrey*. (See *Humphrey*, 11 Cal.5th at p. 156.)

Section 1203.25, subdivision (a)(1), only requires the individualized determination of the defendant's risk to the public; no mention is made of the risk of failure to appear. Likely this is a legislative oversight. If the court is considering the risk of non-appearance, the court should make an "individualized determination" of the factors that do or do not make the defendant a flight risk.

B. The court's decision

The findings by the court on the factors related to risk to the public and risk of flight must be made by clear and convincing evidence. (§ 1203.25, subd. (a)(1) and (f).) The requirement is consistent with *Humphrey*. (See *Humphrey*, 11 Cal.5th at p. 156.) Although it is not clear from the statute, it appears the intent of the Legislature to require findings in justification for the entry of any order imposing conditions on release. Certainly, such findings are required for an order of detention.

1. Evidence considered by the court

The court's decision must be based on all the evidence presented, including any probation report. (§ 1203.25, sub. (f).) Presumably the probation report could include information provided by the probation department in the petition for revocation or orally or in writing by the probation officer at arraignment on the petition.

It is likely permissible for the court to consider traditional sources of information about the defendant and the violation, including offers of proof and argument of counsel. Certainly, the defense, the prosecution, and the court desire an efficient means of conveying relevant information to the court during the arraignment – traditionally an informal and summary proceeding.

Although not required by section 1203.25, either party could call live witnesses on the issue of the defendant's release.

In accordance with *Humphrey*, likely the court should assume the truth of the alleged violation of probation. (See *Humphrey*, 11 Cal.5th at p. 153.)

"The court shall not require the use of any algorithm-based risk assessment tool in setting conditions of release." (§ 1203.25, subd. (a)(2).) While the court likely may not use a risk assessment tool in determining the type of supervision it should order, it is not clear whether the court may nevertheless use a risk assessment tool in determining the *suitability* of the defendant for release.

2. Determining risk[5]

In determining the circumstances of the defendant's release, the court must determine the public safety or flight risk posed by the defendant. The court likely may consider the factors listed in art. I, § 28(f)(3), of the constitution and sections 1270.1 and 1275:

- The protection of the public [safety of the public shall be the primary consideration] and the danger to the public if the defendant is released, or released without conditions;
- The seriousness of the offense charged, including consideration of the alleged injury to the victim, and alleged threats to the victim or a witness to the violation charged, the alleged use of a firearm or other deadly weapon in the commission of the violation charged, the alleged use or possession of controlled substances by the defendant, and the potential sentence;
- In considering domestic violence DV cases, current or past violations of restraining or protective orders, evidence of lethality (e.g., strangulation), safety of victim's children or any other person, threats made by defendant to the victim, past violence against a partner, and evidence presented by the prosecutor pursuant to section 273.75, subdivision (a);
- The previous criminal record of the defendant;

[5] The risk factors are taken from authorities discussing the right to pretrial release. It has long been held the California constitutional provisions regarding the right to bail apply only to persons who have not been convicted of a criminal offense. (See, *e.g., In re Podesto* (1976) 15 Cal.3d 921, 929-930.) Because AB 1228 has incorporated many of the procedural protections articulated in *Humphrey*, a decision relating to pretrial release, courts may find it appropriate to consider pre-conviction risk factors when addressing post-conviction release in the context of an alleged violation of probation.

- The probability of the defendant appearing at the violation hearing, including record of past appearances; and

- In considering offenses charged under the Health and Safety Code, the court should consider: (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 the Health and Safety Code.

Humphrey stated the factors to be considered by the court in making an individualized assessment of the defendant's risk of failure on pretrial release. These include:

- Protection of the public as well as the victim

- The seriousness of the charged offense

- The arrestee's previous criminal record

- The arrestee's history of compliance with court orders

- The likelihood that the arrestee will appear at future court proceedings

(*Humphrey*, 11 Cal.5th at p. 152.)

A court's determination of risk "should focus . . . on risks to public or victim safety or to the integrity of the judicial process that are reasonably likely to occur." (*Humphrey*, 11 Cal.5th at p. 154.)

3. Findings by the court

The court's findings must be made on the record. Subdivision (f) specifies the findings must be made "orally on the record." Undoubtedly it would not be reversible error for the court to enter its reasons in writing on the record. The court's reasons must be entered in the minutes if there is no court reporter and one of the parties requests it. (*Ibid*.) It is not clear whether entry in the minutes can be required if the proceedings are being electronically recorded.

C. Conditions of release

Section 1203.25, subdivision (b), specifies "[r]easonable conditions of release may include, but are not limited to, reporting telephonically to a probation officer[6], protective orders, a global

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[6] Earlier versions of AB 1228 specified telephonic reporting to a "court services officer." The change undoubtedly was made because supervision of a defendant on probation naturally falls first to the probation officer. However, if

positioning system (GPS) monitoring device or other electronic monitoring, or an alcohol use detection device." The list of supervision options in section 1203.25, subdivision (b), is expressly non-exclusive. In any event, "[t]he court shall impose the least restrictive conditions of release necessary to provide reasonable protection of the public and reasonable assurance of the person's future appearance in court." (§ 1203.25, subd. (a)(3).)

1. Cost of conditions of release

Subdivision (b) provides "[t]he person shall not be required to bear the expense of any conditions of release ordered by the court." The legislation does not require the court or county to provide any of the means of supervision, only that if such tools are used, regardless of the defendant's ability to pay, the government must assume the cost. The lack of specific tools of supervision may limit the alternatives to custody available to the court. The legislation does not parse the duty to cover the costs between the court, the county, or the state.

2. Ordering bail

AB 1228 singles out "bail" for special consideration by the court. "Bail shall not be imposed unless the court finds by clear and convincing evidence that other reasonable conditions of release are not adequate to provide reasonable protection of the public and reasonable assurance of the person's future appearance in court." (§ 1203.25, subd. (c)(1).)

The legislation defines "bail" as "cash bail." The measure of cash bail is consistent with the considerations discussed in *Humphrey*. (See *Humphrey*, 11 Cal.5th at p. 156.) "'Bail' as used in this section is defined as cash bail. A bail bond or property bond is not bail. In determining the amount of bail, the court shall make an individualized determination based on the particular circumstances of the case, and it shall consider the person's ability to pay cash bail, not a bail bond or property bond. Bail shall be set at a level the person can reasonably afford." (§ 1203.25, subd. (c)(2).)

While the amount of bail must be based on consideration of the defendant's ability to pay cash bail rather than the premium for a bail bond, nothing in AB 1228 prohibits the defendant from posting a bail bond for the amount set by the court. "The officer in charge of [a custody facility and other designated persons] may approve and accept bail in the amount fixed by . . . [the] order admitting to bail *in cash or surety bond* . . . ." (§ 1269b, subd. (a); italics added.) "Upon posting bail, the defendant or arrested person shall be discharged from custody as to the offenses on which bail is posted." (§ 1269b, subd. (g).)

"Ability to pay" is not defined in the statute. Although *Humphrey* requires the court to consider the defendant's ability to pay in setting the amount of bail, the decision also did not establish a

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a court has a pretrial services program that will be used to monitor persons on prehearing release on a violation of probation, there is no reason why the court could not order reporting to the program. .

definition of "ability to pay."[7] In determining defendant's ability to pay, the court may take guidance from section 987.8, subdivision (g)(2), for reimbursement of counsel costs: "'Ability to pay' means the overall capability of the defendant to reimburse the costs, or a portion of the costs, of the legal assistance provided to him or her, and shall include, but not be limited to, all of the following: [¶] (A) The defendant's present financial position. [¶] (B) The defendant's reasonably discernable future financial position. In no event shall the court consider a period of more than six months from the date of the hearing for purposes of determining the defendant's reasonably discernable financial position.... [¶] (C) The likelihood that the defendant shall be able to obtain employment within a six-month period from the date of the hearing. [¶] (D) Any other factor or factors which may bear upon the defendant's financial capability to reimburse the county for the costs of the legal assistance provided to the defendant." Determining ability to pay may be aided by the use of Judicial Council form CR-115.

Section 1203.25 does not assign a burden of proof to the determination of the ability to pay. The court, however, has the duty to inquire into the defendant's financial circumstances and to determine the lowest level of restrictions that will reasonably meet the interests of the state.

VII. NEW CHARGES

"If a new charge is the basis for a probation violation, nothing in this section shall be construed to limit the court's authority to hold, release, limit release, or impose conditions of release for that charge as permitted by applicable law." (§ 1203.25, subd. (g).)

AB 1228 permits the court to independently consider the circumstances of release on new charges which may also be the basis of a probation violation. The rules governing the release of the defendant on the probation violation do not change because the violation happens to be the commission of a new crime. Section 1203.25 merely provides that the court will not be constrained by its provisions in determining the circumstances of release for the new crime.

It is at least theoretically possible for a defendant to be entitled to release on a violation of probation but be held in custody on the new crime. The court and counsel must be alert to the possibility of this circumstance which could inadvertently deprive the defendant of custody credit on the probation violation. If the defendant is detained on the new crime but released on the violation of probation based on the new crime, the defendant may be deprived of credit in the probation case. If the defendant is otherwise being detained on the new charge, defense counsel should stipulate to at least nominal bail in the probation case to potentially assure the entitlement to presentence custody credit in both cases.

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[7] Senate Bill No. 262, introduced in the 2021 legislative session, contained a definition of "ability to pay" in the context of pretrial setting of bail. The bill was withdrawn by the author with assurances it will be reintroduced in 2022.

CHECKLIST FOR PREHEARING RELEASE ON PROBATION VIOLATIONS

I. **Defendant is on probation** – NOT PRCS, mandatory supervision, or parole [PC § 1203.25(a)]
   A. Defendant not serving flash incarceration [PC § 1203.2(a)]

II. **Misdemeanor VOP**
   A. May not deny release [PC § 1203.25(d)]
      a. Exception: Def violated court order in the case
   B. Constitutional considerations [Const. Art. I, § 28(f)(3)]
      a. Protection of public and safety of victim
      b. Seriousness of charges
      c. Previous record
      d. Probability of appearing at hearing
   C. May release on conditions if clear and convincing evidence – see *infra*
   D. If defendant is released, use formal O.R. form [PC § 1318] with any added conditions

III. **Felony VOP**
   A. May not deny release [PC § 1203.25(e)]
      a. Exception: clear and convincing evidence no reasonably available alternative to reasonably protect public and reasonably assure appearances
   B. Constitutional considerations [Const. Art. I, § 28(f)(3)]
      a. Protection of public and safety of victim
      b. Seriousness of charges
      c. Previous record
      d. Probability of appearing at hearing
   C. May release on conditions if clear and convincing evidence - see *infra*
   D. If the defendant is released, use formal O.R. form [PC § 1318] with any added conditions

IV. **Conditions of release**
   A. May impose conditions if clear and convincing evidence that conditions are needed to provide reasonable protection of public and reasonable assurance of future court appearance [PC § 1203.25(a)]
   B. Make individualized determination of factors indicating risk to public or flight risk [PC § 1203.25(a)(1)]
      a. Findings based on all evidence and any probation report [PC § 1203.25(f)]
      b. Assume truth of allegations of violation [*Humphrey*, 11 Cal.5th 135, 153]

c. Likely may not require risk assessment for setting conditions of release [possible use for determining suitability for release] [PC § 1203.25(a)(2)]

C. Determining risk
   a. Consider Const. Art. I, § 28(f)(3) and PC §§1270.1 and 1275
      i. Protection of public [primary consideration]
      ii. Seriousness of charge – weapons, injury, threats, use of drugs, potential sentence
      iii. In DV cases – violations of protective orders, lethality, safety of victim and family, threats, past violence
      iv. Criminal record
      v. Probability of appearance – record of past non-appearance
      vi. Drug offenses – quantity of drugs, whether the defendant is on bail
   b. Factors in *Humphrey*, 11 Cal.5th at p. 152
      i. Protection of public and victim
      ii. Seriousness of charge
      iii. Criminal record
      iv. History of compliance with court orders
      v. Likelihood of future court appearance

D. Findings by the court
   a. Orally on record – entered in minutes if no reporter and requested by party [PC § 1203.25(f)]

E. Conditions of release
   a. Conditions imposed must be the least restrictive necessary to protect the public and assure the defendant's appearance [PC § 1202.25(a)(3)]
   b. Reasonable conditions: telephonic reporting, GPS, SCRAM or similar conditions [PC § 1203.25(b)]
   c. May not impose bail unless clear and convincing evidence that other conditions are not adequate to protect public and assure appearance [PC § 1203.25(c)(1)]
      i. Must be based on individualized determination
      ii. Setting must be based on ability to pay cash bail (not bail bond)
   d. May not require defendant to pay for cost of conditions of release [PC § 1203.25(b)]

V. VOP BASED ON NEW CRIME

A. If VOP based on new crime, may set bail independently of VOP procedures [PC § 1203.25(g)]

B. Review custody status and bail setting if defendant eligible for release on VOP but not on new crime – may affect custody credits for VOP