

# The Inquisitive Prosecutor's Guide



A Publication of the Santa Clara County District Attorney's Office

The Santa Clara County District Attorney's Office is a State Bar of California  
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**Date: June 12, 2020**

**2020-IPG-44 (BAIL ISSUES: *WHITE*, *AYALA* & ER4)**

This IPG features a new case from the California Supreme Court discussing when a trial court can deny bail to a defendant and the standard of review for that decision (*In re White* 2020 WL 2563831) as well as an appellate court case dealing with the scope and validity of Emergency Rule 4, adopted by the Judicial Council of California in response to the ongoing emergency situation caused by the COVID-19 pandemic (*Ayala v. Superior Court of San Diego County* (2020) 48 Cal.App.5th 387). Plus, an update on the status of Emergency Rule 4 (relating to bail).

The podcast features Santa Clara County prosecutors Alison Filo and Jeff Rubin and provides **60 minutes of (self-study) MCLE general credit**.

It may be accessed and downloaded at: <http://sccdaipg.podbean.com/>.

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**In Reviewing a Denial of Bail, an Appellate Court Must Determine Whether the Record Contains Substantial Evidence of a Qualifying offense — And, If So, Whether Any Reasonable Fact Finder Could Have Found, By Clear and Convincing Evidence, A Substantial Likelihood The Defendant’s Release Would Result in Great Bodily Harm to Others. If Both Elements Are Satisfied and Bail Has Been Denied, The Reviewing Court Then Considers Whether the Denial Was an Abuse of Discretion. *In re White* 2020 WL 2563831**

**Facts and Procedural Background**

In the hours leading up to a sexual assault upon a 15-year old female victim, defendant spent time with co-defendant (Owens) at the beach. (*Id.* at p. \*2.) “As their day together progressed, Owens repeatedly spoke to [the defendant] about ‘grabbing’ girls ‘caveman style’ and sent out feelers to gauge whether [the defendant] would intervene if Owens ‘was taking things too far.’ (*Id.* at p. \*5.) After the two men left the beach, they perched themselves near a home where the victim was staying. The victim noticed both defendant and Owens “staring at her and watching her every movement.” (*Id.* at p. \*2.)

After discussing the victim’s physical appearance, Owens said, “I think I’m going to go up and get that girl,” at which point [the defendant] encouraged him to “go and get her.” (*Id.* at p. \*2.) The defendant later claimed, “he thought Owens was just going to talk to her” but admitted that Owens had asked him to “look out for me, or whatever, keep an eye or something like that.” (*Ibid.*) The victim believed that the defendant was acting as a lookout. (*Ibid.*)

After the victim began waxing her surfboard outside the home, Owens came up behind the victim, grabbed her neck, shoved her face toward the driveway and said “All right. Let’s do this.” (*Id.* at p. 3.) The victim was able to fight the co-defendant off. During this time, the victim kept saying, “No. No. Stop. Stop.” When she managed to get away, both Owens and the defendant “seemed startled and confused — apparently surprised that she had escaped Owens’s grip.” (*Ibid.*) As the victim sped to reenter her house, she thought she heard White say “sorry.” (*Ibid.*) Yet the defendant also told Owens to “[g]o in the house,” as the victim backed up through the gate. (*Ibid.*)

In his later statement to the police, the defendant claimed that when he realized what was happening, he told Owens to stop. He denied telling Owens to “take her in the [house].” (*Id.* at p. \*3, fn. 2.)

Based on the assault of the victim, the defendant and co-defendant Owens were jointly charged with “attempted kidnapping with intent to commit rape (Pen. Code, § 209, subd. (b)), assault with intent to commit rape (*id.*, § 220, subd. (a)(1)), contact with a minor with intent to commit a sexual offense (*id.*, § 288.3, subd. (a)), and false imprisonment (*id.*, §§ 236, 237, subd. (a)).” (*Id.* at p. \*2.)

At his preliminary hearing, the defendant requested release on reasonable bail. That request was denied based on evidence produced at the preliminary hearing. (*Id.* at p. \*3.)

**\*Editor’s note:** Although not entirely clear from the California Supreme Court opinion, based on the Court of Appeal opinion, it appears the defendant was originally detained without bail. “In advance of his preliminary hearing, [the defendant] filed a written request for bail. It alleged that he had no criminal history and was not a violent person. It was supported by a number of letters from family and friends.” (*In re White* (2018) 21 Cal.App.5th 18, 23.) Bail was denied after the magistrate heard the evidence at preliminary examination. (*Id.* at p. 24.)

After the Court of Appeal upheld the denial of bail, the California Supreme Court “granted review to decide what standard of review applies to a trial court’s denial of bail under article I, section 12(b), and whether the Court of Appeal erred in affirming the trial court’s denial of bail in this case.” (*Id.* at p. \*4.)\*

**\*Editor’s note:** The California Supreme Court also initially granted review to decide “Under what circumstances does the California Constitution permit bail to be denied in noncapital to cases? Included is the question of what constitutional provision governs the denial of bail in noncapital cases -article I, section 12, subdivisions (b) and (c), or article I, section 28, subdivision (f)(3), of the California Constitution -or, in the alternative, whether these provisions may be reconciled.” (*White (Christopher Lee) on H.C.* (Cal. 2018) 233 Cal.Rptr.3d 128 [417 P.3d 768].) However, as discussed in this IPG at pp. 7-8, the Court ultimately punted on this question.

## **Holding and Analysis**

1. “[D]efendants charged with noncapital offenses are generally entitled to bail.” (*Id.* at p. \*4 citing to article I, section 12 of the California Constitution.)

Article I, section 12, in pertinent part, provides that “[a] person shall be released on bail by sufficient sureties, except for:

(a) Capital crimes when the facts are evident or the presumption great;

*(b) Felony offenses involving acts of violence on another person, or felony sexual assault offenses on another person, **when the facts are evident or the presumption great** and the court finds based upon clear and convincing evidence that there is a **substantial likelihood** the person's release would result in great bodily harm to others; or*

(c) Felony offenses when the facts are evident or the presumption great and the court finds based on clear and convincing evidence that the person has threatened another with great bodily harm and that there is a substantial likelihood that the person would carry out the threat if released.” (Emphasis added by IPG.)

**\*Editor’s note:** Article I, section 12 also states “[e]xcessive 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 the trial or hearing of the case. ¶ A person may be released on his or her own recognizance in the court's discretion.”

When the trial court denied bail, it relied on the exception set forth in section 12(b) (italicized above). (*Id.* at p. \*4.)

2. In the appellate court and in the California Supreme Court, the defendant challenged the “trial court’s findings under article I, section 12(b) that ‘the facts are evident [and] the presumption great’ with respect to any qualifying charged offense and that ‘there is a substantial likelihood the person’s release would result in great bodily harm to others.’” (*Id.* at p. \*4.) It was not disputed that defendant was charged with one or more qualifying felonies involving acts of violence or sexual assault. (*Ibid.*)
3. The facts underlying the qualifying charge are “evident” or the “presumption great” when there is “evidence that would be sufficient to sustain a hypothetical verdict of guilt on appeal.” (*Ibid* [citing to *Ex parte Weinberg* (1918) 177 Cal. 781, 782; *In re Troia* (1883) 64 Cal. 152, 153 and *In re Nordin* (1983) 143 Cal.App.3d 538, 543.)\*

The *White* court stated the “standard is more stringent than mere ‘sufficient cause,’ which is the showing required to hold a defendant to answer for an offense.” (*Id.* at p. \*4.)\*

**\*Editor’s note:** This standard is arguably inconsistent with previous holdings of the California Supreme Court and other appellate court decisions. The California Supreme Court has previously equated the “facts are evident or presumption is great” standard to the standard for determining when the evidence is sufficient to warrant a grand jury in bringing in an indictment. (See *Ex parte Curtis* (1891) 92 Cal. 188, 189.) And had previously equated the standard for determining whether there is sufficient evidence to warrant a grand jury indictment to the standard for determining whether a holding order after preliminary hearing should issue. (See *Cummiskey v. Superior Court* (1992) 3 Cal.4th 1018, 1027). In *Maniscalco v. Superior Court* (1993) 19 Cal.App.4th 60, the court indicated the standard for showing facts are “evident” or presumption great in denying bail was akin to standard for holding order. (Id. at p. 63, fn. 4; see also *In re Page* (1927) 82 Cal.App. 576, 578 [“it has been held that to sustain an order refusing to admit a prisoner charged with a capital offense to bail, it is not necessary that the evidence should be so convincing as to justify a verdict against the accused, but it is sufficient if it points to him and induces the belief that he may have committed the offense charged”].)

4. “Whether that evidentiary threshold has been met is a question a reviewing court considers in the same manner the trial court does: by assessing whether the record, viewed in the light most favorable to the prosecution, contains enough evidence of reasonable, credible, and solid value to sustain a guilty verdict on one or more of the qualifying crimes.” (Id. at p. \*5.) This level of evidence is considered “substantial” evidence. (Ibid.)

5. The standard is met “[e]ven if a hypothetical fact finder might find the evidence susceptible to two interpretations, one of which suggests guilt and the other innocence[.]” (Ibid.) “[T]he relevant inquiry here is whether, in light of all the evidence, **any** reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (Ibid, emphasis in original.)

The trier of fact is not bound to accept the assertions of the defendant as to his intent or as to what the defendant’s claimed occurred. (Ibid.)

6. The standard was met in the instant case because “the record contain[ed] substantial evidence to support a finding that [the defendant] aided and abetted Owens’s assault with intent to rape.” (Ibid [bracketed information added by IPG].)

7. To deny bail under article I, section 12(b), a trial court must **also** find, by clear and convincing evidence, ‘a substantial likelihood the person’s release would result in great bodily harm to others.’” (Id. at p. \*6.) “Clear and convincing evidence requires a specific type of showing — one demonstrating a “high probability” that the fact or charge is true.” (Id. at p. \*7.)

8. The decision should not rest “‘merely on the fact *of arrest* for a particular crime,’ but on an ‘individualized determination’ that [the defendant’s] release threatened others with a substantial likelihood of great bodily harm.” (*Id.* at p. \*8, emphasis added.)

The decision takes into consideration the nature and underlying facts of the charged crime. Thus, in *White*, the court considered the fact the defendant engaged in an attempted kidnapping and assault with intent to commit rape on a minor as both “bore what a reasonable observer would surely call a substantial likelihood of great bodily harm to [the victim].” (*Id.* at p. \*7; **see also** at p. \*7 [noting the “trial court, after all, could not ignore the most recent evidence of [defendant]’s behavior as it bore on his character and his likelihood of reoffending.”].)

9. The standard for reviewing *this* determination is “whether any reasonable trier of fact could find, by clear and convincing evidence, a substantial likelihood that the person’s release would lead to great bodily harm to others.” (*Id.* at p. \*6.) This is a question of fact that is reviewed deferentially to see if there is “substantial” evidence supporting the determination. (*Ibid.*)
10. Under this deferential standard of review, the court held “there was sufficient evidence to support the trial court’s finding that [the defendant] would cause great bodily harm to this victim or others, if released.” (*Id.* at p. \*7.)
11. The court **rejected** the claim that “an arrestee’s presumption of innocence mandates an independent standard of review.” (*Id.* at p. \*6, fn. 4.) The court agreed “that release on bail generally safeguards the presumption of innocence principle” but held that “the presumption does not *itself* restrict a court’s authority to order pretrial detention in appropriate cases.” (*Ibid*, emphasis in original.)
12. The court pointed out that even where a person “falls within the article I, section 12(b) exception”, this does not mean a trial court is “*required* to deny bail.” (*Id.* at p. \*8, emphasis in original.) Such a person does not have “does not have a right to bail, yet may nonetheless be granted bail — or release on the person’s own recognizance — in the trial court’s discretion.” (*Id.* at p \*8.)
13. “In exercising that discretion, a trial court must consider, at a minimum, ‘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 the trial or hearing of the case’ — and among

those factors, ‘public safety shall be the primary consideration.’” (*Id.* at p. \*9 citing to Pen. Code, § 1275(a).) In addition, because “a defendant in custody naturally has a greater incentive to plead guilty than does a defendant on pretrial release, especially if the time to trial roughly matches the defendant’s potential sentence exposure”, “[i]n weighing whether a defendant should be detained, trial judges should be mindful that pretrial detention has a practical impact on even an innocent defendant’s decision whether to negotiate a plea.” (*Id.* at p. \*9.)

14. Because *this* determination by the trial court “calls for an exercise of judgment based on the record before the court, [an appellate court will] review a trial court’s ultimate decision to deny bail for abuse of discretion.” (*Id.* at p. \*9 [bracketed information added by IPG].)

15. Under the “abuse of discretion” standard, “a trial court’s factual findings are reviewed for substantial evidence, and its conclusions of law are reviewed de novo. [Citation omitted.] An abuse of discretion occurs when the trial court, for example, is unaware of its discretion, fails to consider a relevant factor that deserves significant weight, gives significant weight to an irrelevant or impermissible factor, or makes a decision so arbitrary or irrational that no reasonable person could agree with it.” (*Ibid*; see also *In re Avignone* (2018) 26 Cal.App.5th 195, 210 [noting the abuse of discretion standard is highly deferential, but nonetheless overturning trial court’s decision to increase bail where decision was “arbitrary, capricious, and resulted in a miscarriage of justice”].)

16. In the instant case, the trial court exercised its discretion “after hearing sworn testimony from the victim herself and an audio recording of [the defendant’s] interviews with the investigating detectives — and after [the defendant] had the opportunity to cross-examine witnesses and offer evidence.” (*Id.* at p. \*9.)

“A reasonable fact finder could conclude, based on the evidence presented at the adversarial hearing, that [the defendant] was guilty of at least one of these offenses beyond a reasonable doubt. A court could also conclude, by clear and convincing evidence, there was a substantial likelihood that [the defendant’s] release could result in great bodily harm to others. [Thus,] [t]he trial court’s decision to order [the defendant] detained on this basis was no abuse of discretion. (*Ibid* [bracketed information added by IPG].)

17. Notwithstanding the basis for the original grant of review, the court declined to decide what role, if any subdivision (f)(3) of article I, section 28 of the California Constitution has in in the

decision to deny bail under article I, section 12(b) “[b]ecause concerns about victim safety would only reinforce the trial court’s decision to deny bail” in the instant case. (*Ibid.*)

**\*Editor’s note:** Subdivision (f)(3) of article I, section 28 of the California Constitution provides:

“Public Safety Bail. A person may be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great. Excessive bail may not be required. In 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.

A person may be released on his or her own recognizance in the court’s discretion, subject to the same factors considered in setting bail.

Before any person arrested for a serious felony may be released on bail, a hearing may be held before the magistrate or judge, and the prosecuting attorney and the victim shall be given notice and reasonable opportunity to be heard on the matter.

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.”

Nor did the court “decide how section 12(b) and section 28, subdivision (f)(3) interact more broadly.” (*Ibid.*)

18. In addition, the court expressly did not resolve “whether, before denying bail, a court must first determine that no condition or conditions of release can adequately protect public or victim safety.” The court stated its “opinion should not be read as reaching that question.” (*Ibid.*)

**\*Editor’s note (Part I of II):** Some or all of the issues left undecided in *White* may potentially be decided in another case pending before the California Supreme Court: *Humphrey (Kenneth) on H.C* (Cal. 2018) 233 Cal.Rptr.3d 129 [417 P.3d 769]. In granting review on its own motion in *that* case, the California Supreme Court stated, “The issues to be briefed and argued are limited to the following:

(1) Did the Court of Appeal err in holding that principles of constitutional due process and equal protection require consideration of a criminal defendant’s ability to pay in setting or reviewing the amount of monetary bail?

(2) In setting the amount of monetary bail, may a trial court consider public and victim safety? Must it do so? [Cont’d next page]

(3) Under what circumstances does the California Constitution permit bail to be denied in noncapital cases? Included is the question of what constitutional provision governs the denial of bail in noncapital cases - article I, section 12, subdivisions (b) and (c), or article I, section 28, subdivision (f)(3), of the California Constitution—or, in the alternative, whether these provisions may be reconciled.” (*Ibid.*)

[Continued next page]

**\*Editor’s note (Part II of II):** The *Court of Appeal* decision (*In re Humphrey* (2018) 19 Cal.App.5th 1006) opined that it was a violation of due process and equal protection *to set bail* without making findings and inquiries regarding a defendant’s financial ability to post bail and *without considering whether less restrictive non-monetary conditions of release would achieve the purposes of bail, i.e., ensuring defendant’s appearance while protecting the public.* (*Id.* at pp. 1014.) However, there is language in that opinion suggesting these findings are *also* necessary when the court does *not* set bail. For example, in *Humphrey* the court stated the setting of “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 . . .” (*Id.* at p. 1014.) And later in the opinion, the *Humphrey* court stated “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.*” (*Id.* at p. 1026, emphasis added by IPG.)

19. Finally, the court also expressly did not “resolve what constraints, if any, Penal Code section 1271 imposes on a trial court’s authority to deny bail in noncapital cases” as “[n]either party cited that provision.” (*Ibid.*)\*

**\*Editor’s note:** Section 1271 states: “In what cases defendant may be admitted to bail before conviction. If the charge is for *any other offense*, he *may* be admitted to bail before conviction, *as a matter of right.*” (Pen. Code, § 1271, emphasis added by IPG.) On its face, the statute does not identify the offenses for which a defendant may *not* be admitted to bail as a matter of right. But section 1271 must be read in conjunction with the section immediately preceding at the time of its enactment in 1872: Penal Code section 1270. At that time, section 1270 stated: “A *defendant charged with an offense punishable with death cannot be admitted to bail*, when the proof of his or her guilt is evident or the presumption thereof great. The finding of an indictment does not add to the strength of the proof or the presumptions to be drawn therefrom.” (Former Pen. Code, § 1270, emphasis added by IPG.) The content of former section 1270 was carried over into current Penal Code section 1270.5. Thus, section 1271 has been interpreted as mandating bail as a matter of right in *noncapital* cases. (**See e.g., *In re Underwood*** (1973) 9 Cal.3d 345, 347-350.) However, it is likely that whatever absolute right to bail was imposed by section 1271 in noncapital cases, it was overridden by the subsequent passage of Proposition 4 which, inter alia, amended the California Constitution to permit courts to deny bail in certain circumstances by adding subdivisions (b) and (c) to article I, section 12. (**See *People v. Standish*** (2006) 38 Cal.4th 858, 875, fn. 7.) Amendments made to Article I, section 28(f)(3) of the California Constitution by Proposition 9 (Marsy’s Law) in 2008 may also have implicitly overridden the absolute right to bail of section 1271 in noncapital cases and/or overridden article 1, section 12. (**See *In re Humphrey*** (2018) 19 Cal.App.5th 1006, 1046, fn. 28 [rev. gtd].)

## Questions an Inquisitive Prosecutor Might Have About Bail After Reading *White*

### 1. Does *White* help establish there is a presumption of guilt at bail hearings – or at least no presumption of innocence?

As noted above, the California Supreme Court in *White* rejected the claim that “an arrestee’s presumption of innocence mandates an independent standard of review” and noted that while “release on bail generally safeguards the presumption of innocence principle” this did not mean the presumption “itself restrict[s] a court’s authority to order pretrial detention in appropriate cases.” (*Id.* at p. \*6, fn. 4.) However, unlike the Court of Appeal in *White*, the California Supreme Court did not *directly* state that the presumption of innocence was inapplicable at bail hearings. (Compare *In re White* (2018) 21 Cal.App.5th 18, 28, fn. 5 [the presumption of innocence “is a doctrine to be applied at trial; it has no application to the rights of a pretrial detainee” – citing to *Bell v. Wolfish* (1979) 441 U.S. 520, 533 and *In re York* (1995) 9 Cal.4th 1133, 1148].) Nor did the California Supreme Court in *White* strongly indicate (again, unlike the Court of Appeal) that persons presumed to be guilty at a bail hearing. (Compare *In re White* (2018) 21 Cal.App.5th 18, 28, fn. 5 [noting “in bail proceedings, the historical rule has been that the defendant is presumed guilty after indictment” – citing to *Ex parte Ryan* (1872) 44 Cal. 555, 558 and *Ex parte Duncan* (1879) 53 Cal. 410, 411; and that this presumption of guilt “appears to be reflected in the language of the constitutional requirement that the facts must be evident or the presumption—of guilt—great” – citing to *In re Application of Westcott* (1928) 93 Cal.App. 575, 576 ].)

Of course, the Court of Appeal decision in *White* is not citeable. However, the cases it cited in support of the proposition that the presumption of innocence did *not* apply at pretrial hearings and that the presumption of guilt *does* apply (at least post-indictment or post-preliminary examination) may properly be relied upon when defendants argue to the contrary. In addition, prosecutors may cite to *In re Horiuchi* (1930) 105 Cal.App. 714, a case involving a challenge on habeas to the setting of bail, where the court stated: “For the purpose of fixing the amount of bail this court will assume the guilt of the accused. In *Ex parte Duncan*, 53 Cal. 410, the Supreme Court said: ‘We must assume in this proceeding that the petitioner is guilty of the ten distinct felonies of which he is indicted. We must assume his guilt, though when he shall be tried it may be made to appear that he is wholly innocent of all the charges.’ *Ex parte Ryan*, 44 Cal. 558; *Ex parte Ruef*, 7 Cal.App. 750, 96 P. 24.” (*Horiuchi* at p. 715.)

Whether a presumption of guilt applies at bail hearings when *no* indictment or holding order has yet issued is an open question. (Cf., *United States v. Scott* (9th Cir. 2006) 450 F.3d 863, 874 [“That an individual is charged with a crime cannot, as a constitutional matter, give rise to any inference that he is more likely than any other citizen to commit a crime if he is released from custody. Defendant is, after all, constitutionally presumed to be innocent pending trial, and innocence can only raise an inference of innocence, not of guilt.”].)

**2. Does *White* require that there be testimony presented from witnesses subject to cross-examination at the bail hearing in order to establish the nature of the crime, whether there is sufficient proof to convict, and/or the defendant present a risk to committing great bodily harm if released?**

In upholding the trial courts’ exercise of its discretion, the *White* court noted that the trial court considered the factors it needed to consider under Penal Code section 1275 and did so, “after hearing sworn testimony from the victim herself and an audio recording of [the defendant’s] interviews with the investigating detectives — and after [the defendant] had the opportunity to cross-examine witnesses and offer evidence. (*In re White* 2020 WL 2563831, at \*9.) Does this suggest that if a bail hearing precedes the px, the bail hearing will turn into a mini-trial? *Probably* not.

Even in *White*, the trial court considered hearsay (i.e., the letters from persons in support of a grant of bail). (*Id.* at p. \*4.)

It is not entirely clear what are the evidentiary rules governing bail hearings when the question is whether bail may be denied pursuant to section 12 of Article I of the California Constitution. No case has specifically addressed whether a full-blown evidentiary hearing is required. In previous cases, it has been noted that the judge’s determination at the bail hearing was based on: a review of a grand jury transcript (see *People v. Superior Court (Kim)* (1993) 20 Cal.App.4th 936, 938); a review of the preliminary examination transcript (see *In re Nordin* (1983) 143 Cal.App.3d 538, 542); depositions and testimony (see *Ex parte Curtis* (1891) 92 Cal. 188, 1910); the judge having heard the preliminary examination (see *In re Page* (1927) 82 Cal.App. 576, 577); and the judge’s familiarity with the evidence due to having sat on the prior trial on the same crime (see *Maniscalco v. Superior Court* (1993) 19 Cal.App.4th 60, 64).

It is reasonable to believe that the information that can be relied upon in a hearing on whether bail should be denied will be the same kind of information that can be relied upon in hearings on how much bail should be set or whether the defendant may be released on his or her own recognizance. What can be considered at a hearing on *setting* bail was discussed in a 1988 Attorney General’s opinion. In that opinion the Attorney General made the following observations:

First, “[h]earings held to set or reduce bail or to release the defendant on his or her own recognizance have traditionally been informal.” (71 Ops. Cal. Atty. Gen. 64, \*2.)

Second, “[e]ither side may produce evidence through testimony, declarations, or representations.” (71 Ops. Cal. Atty. Gen. 64, \*2., citing to ***Van Atta v. Scott*** (1980) 27 Cal.3d 424, 437 [involving OR hearings]; **see also *In re Humphrey*** (2018) 19 Cal.App.5th 1006, 1048 [review granted] [noting the defendant was entitled to a “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.”].)

Third, “[u]sually the magistrate considers the defendant’s record and oral representations from both sides without requiring a formal oath or declaration. However, the magistrate may require actual testimony, or affidavits or declarations.” (71 Ops. Cal. Atty. Gen. 64, \*2., citing to ***Van Atta v. Scott*** (1980) 27 Cal.3d 424, 441.)

Fourth, “[l]ocal court rules frequently establish procedures for the hearing. Both parties should be prepared to present evidence acceptable to the magistrate.” (71 Ops. Cal. Atty. Gen. 64, \*2.)

Fifth, “[s]tate law does not require a defense attorney to file a written declaration of supporting facts under penalty of perjury when applying for a reduction in bail or an own recognizance release on behalf of the defendant.” (71 Ops. Cal. Atty. Gen. 64, \*4.)

Moreover, while “[t]he United States Supreme Court has never *directly* addressed the issue whether live witnesses are required at detention hearings, . . . decades of federal circuit and district court opinions, as well as state appellate decisions, have consistently answered that question in the negative. . .”. (***State ex rel. Torres v. Whitaker*** (N.M. 2018) 410 P.3d 201, 215 [and doing a comprehensive review of state and federal law concerning the question of what evidence is admissible at bail hearings], emphasis added.)

Additionally, in **United States v. Salerno** (1987) 481 U.S. 739, the United States Supreme Court indirectly approved of hearsay testimony and proffers when they addressed the constitutionality of the federal Bail Reform Act of 1984. Under the Act, a person who has been arrested is “afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information *by proffer* or otherwise. The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing.” (18 U.S.C.A. § 3142(f)(2)(B), emphasis added.)

The **Salerno** court held that “the procedural protections encompassed in the Federal Act, such as the right to counsel, the right to cross-examine any witnesses who do appear at the hearing, the right to *present information by proffer* or otherwise, and the clear and convincing burden of proof provided ‘extensive safeguards ... [that] far exceed’ what is required by the due process standards articulated in **Gerstein**.” (**State ex rel. Torrez v. Whitaker** (N.M. 2018) 410 P.3d 201, 209 citing to **Salerno** at 751-752, emphasis added.)

And since **Salerno**, “a number of federal courts have specifically addressed whether the Federal Act permits a defendant to be detained pretrial based solely on nontestimonial information proffered by the government.” (**State ex rel. Torrez v. Whitaker** (N.M. 2018) 410 P.3d 201, 209.) Among those courts: **United States v. Smith** (D.C. Cir. 1996) 79 F.3d 1208, 1209-1210 [holding that the government may proceed by way of proffer instead of presenting live witnesses]; **United States v. Gaviria** (11th Cir. 1987), 828 F.2d 667, 669 [“the government as well as the defense may proceed by proffering evidence subject to the discretion of the judicial officer presiding at the detention hearing”]; **United States v. Winsor** (9th Cir. 1986) 785 F.2d 755, 756 [holding that the government may present information “by proffer or hearsay” and that the “accused has no right to cross-examine adverse witnesses who have not been called to testify”]; **United States v. Delker** (3d Cir. 1985) 757 F.2d 1390, 1396 [holding that “discretion lies with the district court to accept evidence by live testimony or proffer”]; **United States v. Acevedo-Ramos** (1st Cir. 1985) 755 F.2d 203, 206, 208 [acknowledging that often the parties “simply describe to the judicial officer the nature of their evidence; they do not actually produce it,” while simultaneously acknowledging a court's discretion to insist on direct testimony]; **see also United States v. LaFontaine** (2d Cir. 2000) 210 F.3d 125, 131 [stating that “proffers are permissible both in the bail determination and bail revocation contexts” but that a court “*must also ensure the reliability of the evidence, by selectively insisting upon the production of the underlying*”

*evidence or evidentiary sources where their accuracy is in question*” (internal quotation marks and citation omitted].)

There are no published California cases addressing whether a court can *require* live witnesses at the bail hearing. But the Attorney General has opined that a magistrate may require actual testimony, or affidavits or declarations.” (71 Ops. Cal. Atty. Gen. 64, \*2., citing to ***Van Atta v. Scott*** (1980) 27 Cal.3d 424, 441.) Other courts have indicated live testimony may be required at least where there is a question as to the accuracy of a proffer. (***See e.g., United States v. Terrones*** (S.D. Cal. 1989) 712 F.Supp. 786, 791 [a “judicial officer is authorized to reconcile the demand for speed in these [bail] proceedings and the reliability of the evidence by selectively insisting on the production of evidentiary sources where there is a question as to its accuracy”]; ***United States v. Cabrera Ortigoza*** (S.D. 2000) 196 F.R.D. 571, 574 [recognizing authority to do so in federal court].)

Similarly, there are no published California cases addressing whether a defense counsel would be allowed to call *adverse* witnesses (i.e., prosecution witnesses) at the bail hearing. (***Cf., In re Humphrey*** (2018) 19 Cal.App.5th 1006, 1048 [review granted] [noting the defendant was entitled to a “bail hearing at which he is afforded the opportunity to provide evidence and argument . . .”].) This, too, would likely be within the discretion of the court albeit subject to a reasonably detailed defense proffer as to the reasons why the witness would be necessary. (***Cf. United States v. Cabrera Ortigoza*** (S.D. 2000) 196 F.R.D. 571, 574.)

**\*Editor’s note:** *If a court believes that a full-blown evidentiary hearing is required at a pre-preliminary examination bail hearing, prosecutors should ask that such a bail hearing be postponed until the preliminary examination. If that is not acceptable, it might be advisable to attach sworn declarations executed under penalty of perjury by peace officers to support factual assertions at a pre-px motion to deny bail.*

### **3. Will the holdings in *White* have any impact on how bail hearings are conducted if the voters allow SB 10 to go into effect in November of 2020?**

In 2018, the legislature passed a bail reform law (Senate Bill 10). In general, the bill replaced the current bail system and replaced it with a system under which persons would be subject to pretrial release or detention based on an assessment of the person’s risk of failing to appear in court and of being a danger to public safety if released. (***See*** [New] Pen. Code, 1320.6

[repealing Penal Code sections 1268-1320.5 (Chapter 1 of Title 10 of Part 2 of the Penal Code)]; [New] Pen. Code, §§ 1320.7-1320.34 (Chapter 1.5 of Title 10 of Part 2 of the Penal Code)].)

Under the new statutory scheme, defendants are to be assessed as low risk, medium risk, or high risk. Those deemed as having a low risk of failing to appear in court and a low risk to public safety would be released from jail, while those deemed a high risk would remain in jail, with a chance to argue for their release before a judge. Those deemed a medium risk could be released or detained, depending on the local court's rules. (See [New] Pen. Code, §§ 1320.9-1320.20.) Subject to certain exceptions, persons suspected of committing misdemeanors would not be subject to a risk assessment. ([New] Pen. Code, § 1320.8)

SB 10 was signed into law by Governor Brown in August of 2018 and was slated to go into effect on October 1, 2019. (**See *In re Webb*** (2019) 7 Cal.5th 270, 274.) However, “[f]ollowing its enactment, this legislation was suspended pursuant to a referendum petition [“California Replace Cash Bail with Risk Assessments Referendum (2020)”]. Now, it will only be effective if approved as a referendum measure at the November 2020 election.” (***Ibid*** [bracketed information added by IPG].)

**\*Editor’s note:** Voters in California have the power to exercise approve or reject most types of new legislation by means of a referendum if the referendum measure is proposed within 90 days of the enactment of the new legislation. (**See** Cal. Const., art. II, § 9.)

SB 10 expressly did not seek to amend the federal or California Constitution. Section 1 of SB 10 states: “It is the intent of the Legislature by enacting this measure to permit preventive detention of pretrial defendants only in a manner that is consistent with the United States Constitution, as interpreted by the United States Supreme Court, and only to the extent permitted by the California Constitution as interpreted by the California courts of review.” (Sen. Bill No. 10 (2018 Reg. Sess.) ch. 244, Sec. 1.)

Since the ***White*** decision was interpreting Article 1, section 12, of the California Constitution, the standards laid out in ***White*** for reviewing a decision to release or hold a defendant should still apply. However, whether a decision to release (or not to release) constitutes an abuse of discretion is necessarily tied to the factors that must be taken into consideration under the new statutes. Thus, for example, it might be considered an abuse of the discretion for a court not to take into consideration the “pretrial risk assessment” as mandated under new Penal Code sections 1320.9 and 1320.10 in a post SB 10 bail determination.

## **Trial Courts Do Not Violate the Judicial Council’s Emergency Rule #4 by Increasing Bail or Imposing Reasonable Conditions of Bail in Individual Cases**

***Ayala v. Superior Court of San Diego County*** 2020 WL 2048620 [(2020) 48 Cal.App.5th 387, petition for review filed May 5, 2020]

### **Facts and Procedural Background**

“A state of emergency exists in the State of California as a result of the ongoing COVID-19 pandemic.” (*Id.* at p. \*1.) While the pandemic is ongoing, holding court hearings are high-risk “because they require gatherings of judicial officers, court staff, litigants, attorneys, witnesses, defendants, law enforcement, and juries in numbers well in excess of what is allowed for gathering under current executive and health orders.” (*Ibid.*) Moreover, [m]any inmates have ongoing court cases and courts cannot be assured that safe social distancing can be maintained with the transport of in-custody defendants and the holding cells adjacent to or within courthouses.” (*Ibid.*)

In response to the pandemic, the Governor of California issued “Executive Order N-38-20, which “conferred on the Judicial Council unprecedented authority to promulgate rules governing court administration, practice, and procedure as necessary to address the emergency.” (*Ibid.*) This order expressly “provides that, to the extent any such rule adopted by the Judicial Council would be inconsistent with any statute concerning civil or criminal practice or procedure, the relevant statute or portion thereof is suspended to resolve the inconsistency.” (*Ibid.*)\*

**\*Editor’s note:** “As authority for the order, the Attorney General and the District Attorney cite[d] Government Code section 8571. That section provides, ‘During a state of war emergency or a state of emergency the Governor may suspend any regulatory statute, or statute prescribing the procedure for conduct of state business, or the orders, rules, or regulations of any state agency ... where the Governor determines and declares that strict compliance with any statute, order, rule, or regulation would in any way prevent, hinder, or delay the mitigation of the effects of the emergency.’” (*Id.* at p. \*1, fn. 2.) Whether section 8571 truly provides the authority for the issuance of Executive Order N-38-20 (or, for that matter, the subsequent Emergency Orders issued by the Judicial Council -see below) is an ongoing issue. However, because neither party challenged the Governor’s authority to issue that executive order (or the Judicial Council’s authority to issue Emergency Rules based on the executive order), the *Ayala* court did not address the validity of either Executive Order N-38-20 or Rule 4. (*Ibid.*)

“Pursuant to this authority, and its constitutional obligation to ‘adopt rules for court administration, practice and procedure’ (Cal. Const., art. VI, § 6, subd. (d)), the Judicial Council considered and adopted eleven emergency rules covering various aspects of civil and criminal practice . . .”. (*Id.* at p. \*2.) One of those rules was Emergency Rule 4. (*Ibid.*)

Emergency Rule 4 relates to bail. It provides a “statewide Emergency Bail Schedule” and, in pertinent part, states that: (i) with the exception of certain listed offenses: “bail for all misdemeanor and felony offenses must be set at \$0” (Emergency Rule 4(c); (ii) “bail for all violations of misdemeanor probation, whether the arrest is with or without a bench warrant, must be set at \$0” (Emergency Rule 4(f)(1); and (iii) “[b]ail for all violations of felony probation, parole, post-release community supervision, or mandatory supervision, must be set in accord with the statewide Emergency Bail Schedule, or for the bail amount in the court’s countywide schedule of bail for charges of conviction listed [in the exceptions to the statewide Emergency Bail Schedule]” (Emergency Rule 4(f)(2).). (*Ibid.*)

**\*Editor’s note** (Part I of II): Emergency Rule 4, in full, provides:

(a) Purpose

Notwithstanding any other law, this rule establishes a statewide Emergency Bail Schedule, which is intended to promulgate uniformity in the handling of certain offenses during the state of emergency related to the COVID-19 pandemic.

(b) Mandatory application

No later than 5 p.m. on April 13, 2020, **each superior court must apply the statewide Emergency Bail Schedule:**

- (1) To every accused person arrested and in pretrial custody.
- (2) To every accused person held in pretrial custody.

(c) Setting of bail and exceptions

Under the statewide Emergency Bail Schedule, bail for all misdemeanor and felony offenses must be set at \$0, with the exception of only the offenses listed below:

- (1) A serious felony, as defined in Penal Code section 1192.7(c), or a violent felony, as defined in Penal Code section 667.5(c);
- (2) A felony violation of Penal Code section 69;
- (3) A violation of Penal Code section 166(c)(1);
- (4) A violation of Penal Code section 136.1 when punishment is imposed under section 136.1(c); 18
- (5) A violation of Penal Code section 262;
- (6) A violation of Penal Code sections 243(e)(1) or 273.5;
- (7) A violation of Penal Code section 273.6 if the detained person made threats to kill or harm, has engaged in violence against, or has gone to the residence or workplace of, the protected party;
- (8) A violation of Penal Code section 422 where the offense is punished as a felony;
- (9) A violation of Penal Code section 646.9;
- (10) A violation of an offense listed in Penal Code section 290(c);
- (11) A violation of Vehicle Code sections 23152 or 23153;
- (12) A felony violation of Penal Code section 463; and
- (13) A violation of Penal Code section 29800. [Cont’d next page]

(d) Ability to deny bail

Nothing in the Emergency Bail Schedule restricts the ability of the court to deny bail as authorized by article I, section 12, or 28(f)(3) of the California Constitution. [Cont’d next page]

**\*Editor's note (Part I of II):**

(e) Application of countywide bail schedule

(1) The current countywide bail schedule of each superior court must remain in effect for all offenses listed in exceptions (1) through (13) of the Emergency Bail Schedule, including any count-specific conduct enhancements and any status enhancements.

(2) Each superior court retains the authority to reduce the amount of bail listed in 34 the court's current countywide bail schedule for offenses in exceptions (1) through (13), or for any offenses not in conflict with the Emergency Bail Schedule.

(f) Bail for violations of post-conviction supervision

(1) Under the statewide Emergency Bail Schedule, bail for all violations of misdemeanor probation, whether the arrest is with or without a bench warrant, must be set at \$0.

(2) Bail for all violations of felony probation, parole, post-release community supervision, or mandatory supervision, must be set in accord with the statewide Emergency Bail Schedule, or for the bail amount in the court's countywide schedule of bail for charges of conviction listed in exceptions (1) through (13), including any enhancements.

(g) Sunset of rule

This rule will remain in effect until 90 days after the Governor declares that the 10 state of emergency related to the COVID-19 pandemic is lifted, or until amended or repealed by the Judicial Council."

In response to Emergency Rule 4, the San Diego County Superior Court issued a general order implementing Emergency Rule 4. The order provided that the superior court should apply the Emergency Bail Schedule "in the same manner as the regularly adopted San Diego County Bail Schedule" except as specified in the order. (*Id.* at p. \*3.)

The order stated, "For persons arrested prior to the effective date and time of this order, bail shall be set in accordance with the [Emergency Bail Schedule]. However, ***the court retains the traditional authority in an individual case to depart from the bail schedule or impose conditions of bail to assure the appearance of the defendant or protect public safety.***" (*Ibid.*, emphasis added by IPG.)

**\*Editor's note:** The San Diego Superior Court order also "adopted a procedure for making individualized assessments regarding persons held in custody: 'Persons whose bail is reduced to zero by the [Emergency Bail Schedule] shall be released from custody at 5:00 p.m. on April 15, 2020, or as soon thereafter as is feasible, unless prior to 5:00 p.m. on April 15, 2020, the prosecuting agency notifies the Sheriff that it will be requesting an increase in bail, a "no bail" hold, or imposition of conditions of release.' The order required that the prosecuting agency provide a list of such objections to defense counsel by the same date and time. Under the order, the prosecution and defense counsel must meet and confer regarding the objections within 24 hours. If the parties subsequently agree that a person could be released on zero bail under the Emergency Bail Schedule, he or she shall be released by the sheriff. If the parties agree that a person could be released on increased bail, or subject to conditions, the parties shall submit a stipulation and proposed order to the court to that effect and notify the sheriff. If the parties cannot agree, and the defendant has not yet been arraigned, 'the prosecuting agency shall put the matter on the video-court calendar commencing Monday, April 20, 2020, or as soon as practical thereafter, for arraignment and bail review.' In all other cases where the parties cannot agree, 'the matter will be reviewed by a judicial officer via telephone conference as soon as practical.'" (*Id.* at p. \*3.) "For newly arrested persons, the order provides that bail must be set in accordance with the Emergency Bail Schedule. But, as with persons already in custody, the order adopted a procedure for considering departures from the Emergency Bail Schedule and bail conditions: 'Requests for a modification of the bail amount, or for conditions of release, shall be made to the daytime or after-hours duty judge. If bail is modified, or conditions imposed, the court will notify the Sheriff's Watch Commander at the detention facility where the defendant is housed, and the Sheriff shall note the change on defendant's paperwork, including any release papers.'" (*Ibid.*)

The San Diego County Public Defender filed an objection in response to the San Diego County Superior Court general order implementing Emergency Rule 4, which was overruled by the Presiding Judge. (*Id.* at p. \*3.) The Public Defender (representing between 100 and 200 persons in pretrial custody for whom a bail increase or bail conditions are sought), petitioned for a writ of mandate. (*Id.* at p. \*4.)

The petition asked for a rescinding of the implementation order, contending “bail for offenses and violations covered by the rule must be set at zero dollars, and the superior court has no authority to increase bail or impose conditions in an individual case.” (*Id.* at p. \*1.) The petition also contended the “implementation order, including the remote hearings contemplated therein, violate various constitutional protections.” (*Ibid.*)

“In a second petition, three individuals arrested for violating their *postconviction* supervision also challenge the superior court's implementation of Emergency Rule 4. They allege that they are being held in custody without bail and the superior court refuses to apply Emergency Rule 4 to them.” (*Id.* at p. \*4, emphasis added.)

## **Holding and Analysis**

1. “The superior court judges in each county are required by statute to adopt a “countywide schedule of bail” for bailable felony, misdemeanor, and infraction offenses (except Vehicle Code infractions). (Pen. Code, § 1269b, subd. (c).)” (*Id.* at p. \*4.)
2. “The countywide bail schedule sets out the “presumptive” amount of bail for the identified offenses.” (*Ibid.*)

In general, before a defendant’s appearance in court, the amount of bail is set pursuant to the bail schedule for the county in which the defendant is required to appear when “no warrant of arrest has been issued . . .” (*Id.* [citing to Pen. Code, § 1269b(b)].)

However, the bail schedule does not always dictate the amount of bail set.

If a defendant has been arrested based on a warrant, “the bail shall be in the amount fixed in the warrant of arrest . . .”. (*Ibid.*)

“If a defendant is arrested without a warrant for a bailable felony offense or for the misdemeanor offense of violating a domestic violence restraining order, and a peace officer has

reasonable cause to believe that the amount of bail set forth in the schedule of bail for that offense is insufficient to ensure the defendant's appearance or to ensure the protection of a victim, or family member of a victim, of domestic violence,' the officer may apply for an order setting a higher bail.” (*Id.* at p. \*5 [citing to Pen. Code, § 1269c].)

“Likewise, for most offenses, the defendant may apply for release ‘on bail lower than that provided in the schedule of bail or on his or her own recognizance.’” (*Ibid.*)

“If a defendant does not make bail, he is entitled to automatic review of the order fixing the amount of bail.” (*Id.* at p. \*5 [citing to Pen. Code, § 1270.2].)

“In the course of a criminal case, the court may revisit the amount of bail under various circumstances.” (*Id.* at p. \*5 citing to, e.g., Pen. Code, § 1289.)

3. “The court need not adhere to the scheduled amount, but rather has the discretion to make individualized determinations as appropriate. A court’s consideration of the amount of bail in an individual case is governed by mandatory factors identified in the California Constitution” which include “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.” (*Id.* at p. \*5 [citing to Cal. Const., art. I, § 28, subd. (f)(3)].) “The bail statutes set out these factors to guide the court's discretion as well.” (*Id.* at p. \*5 [citing to Pen. Code, § 1275, subd. (a)].)
4. Moreover, “courts have the authority to impose conditions related to public safety on persons released on bail.” (*Id.* at p. \*5 [citing to Cal. Const., art. I, § 28, subd. (b)(3) and *In re Webb* (2019) 7 Cal.5th 270, 278.]) Albeit “[a]ny condition must be reasonable, and there must be a sufficient nexus between the condition and the protection of public safety.” (*Id.* at p. \*5 citing to *Webb* at p. 278.)

**\*Editor’s note:** In *Webb*, the actual condition imposed was that the defendant agree to waive her Fourth Amendment right to be free of warrantless or unreasonable searches as a condition of bail. (*Id.* at p. 271.) However, the validity of the specific search condition was not addressed by the California Supreme Court because “[t]he district attorney expressly did not seek review of the specific question ‘of whether the bail condition imposed in this case was a proper exercise of the trial court’s inherent authority’” but only on the “broad question of whether trial courts have authority to impose conditions on felony defendants who are released on bail[.]” (*Id.* at p. 274 [and noting as well that the charges against the defendant were resolved by a guilty plea so the issue of the propriety of the specific bail condition had been mooted].) The *Webb* court also did not “consider in detail the exact contours of this authority” to impose conditions of bail but did stress that the authority to do so was “fairly narrow.” (*Id.* at p. 278.)

5. “[T]he implementation order is not inconsistent with Emergency Rule 4. The history and language of the rule show that the Judicial Council intended to adopt a statewide bail schedule, which like countywide bail schedules [merely] sets the *presumptive* bail amount for the covered offenses and violations. (*Id.* at p. \*1 [emphasis in original, bracketed information added by IPG].) “Because Emergency Rule 4 created a statewide bail *schedule*, it does not foreclose the ability of the superior court to depart from the schedule” in the same manner as courts do so under the regularly adopted San Diego County bail schedule. (*Id.* at p. \*8, emphasis in original.) “The superior court retains the ability to depart from the scheduled zero bail amount or impose bail conditions under appropriate circumstances in an individual case.” (*Id.* at p. \*10.)

6. “The Judicial Council did not intend to suspend the array of statutes governing bail, as well as the superior court’s inherent authority, which allow the court to depart from the scheduled bail amount or impose bail conditions in individual cases under appropriate circumstances.” (*Ibid.*) Emergency Rule 4 “can reasonably be interpreted to preserve the court’s existing authority to increase bail from the scheduled zero bail amount if the circumstances and existing statutes allow such a departure.” (*Id.* at p. \*6.)

While recognizing that “[t]he statute governing countywide bail schedules must be suspended *in part* to accommodate the statewide Emergency Bail Schedule,” the court declined to “imply any broader suspension.” (*Id.* at p. \*8, emphasis added by IPG.)

7. The court rejected the argument that the procedure for determining whether defendants will be released on zero bail, or whether bail will be increased or conditions imposed as described in the implementation order of the San Diego County Superior Court is unauthorized and unconstitutional. (*Id.* at p. \*8.)

“It is beyond dispute that “Courts have inherent power ... to adopt any suitable method of practice, both in ordinary actions and special proceedings, if the procedure is not specified by statute or by rules adopted by the Judicial Council.”” (*Ibid.*) “That inherent power entitles trial courts to exercise reasonable control over all proceedings connected with pending litigation ... in order to insure the orderly administration of justice.” (*Ibid.*)

Emergency Rule 4 “establishes a statewide Emergency Bail Schedule, but it does not dictate the procedures courts must use to apply it to defendants in custody. The procedure implemented

by the superior court was a reasonable exercise of its inherent supervisory and administrative powers.” (*Id.* at p. \*9.) This procedure does not conflict with Emergency Rule 4. (*Ibid.*) The court also rejected the contention that when a court considers the prosecution’s objection to the scheduled amount, it runs afoul of the rule that a “second judge may not generally reconsider a first judge's bail determination without good cause.” (*Id.* at p. \*9.) The court found that rule inapplicable because “there has been no finding by a court that any individual defendant’s bail should be set at zero dollars” and “[w]hen the [trial] court considers the prosecution’s objection to the scheduled amount, it is considering bail for the first time under the revised schedule. It is not reconsidering a prior zero dollar bail determination.” (*Ibid* [bracketed information added by IPG].)

8. The court of appeal held the claim in the second petition that three individuals arrested for violating their postconviction supervision were being held in custody without bail in a manner inconsistent with Emergency Rule 4 was moot since the parties appeared to agree “that Emergency Rule 4 applies to the postconviction petitioners, and indeed two postconviction petitioners have been released under the rule . . .”. (*Ibid.*)

**\*Editor’s note:** As to the third named postconviction petitioner who remained in custody on a court-issued arrest warrant, the district attorney contended that “the Emergency Bail Schedule does not apply to postconviction petitioners who were convicted of underlying felonies and arrested pursuant to a *court-issued warrant specifying a bail amount* (or no bail).” (*Id.* at p. \*9, emphasis added by IPG.) The appellate court observed the defendant did not directly respond to the prosecution claim and found the issue moot as to this third individual (presumably) on this basis. The court did note, however, that “[s]pecific disputes regarding the application of Emergency Rule 4 to postconviction defendants, if any, may be raised in future proceedings.” (*Ibid.*)

9. The court rejected defendants’ claim that remote or telephonic hearings to resolve bail disputes were “unnecessary and unwarranted” because this contention was premised on an erroneous interpretation of Emergency Rule 4; namely, that trial courts were precluded from entertaining “any objections to the release on zero bail of a defendant charged with a covered offense (except complete denial of bail under article I, section 12 of the California Constitution).” (*Id.* at p. 10.)
10. The court also rejected a *separate* claim that the remote or telephonic hearings contemplated by the San Diego Superior Court implementation order violated the state constitutional right to be personally present with counsel (Cal. Const., art. I, § 15) and the federal and state

constitutional right to effective assistance of counsel. However, the claim was not rejected on its merits but because the issue was not ripe. (*Id.* at p. \*10.)

No specific defendant was identified as having been forced to participate in a nonconsensual remote or telephonic hearing and the appellate court was not inclined to provide a blanket advisory opinion on the constitutionality of such hearings “without a record of the factual and legal circumstances at issue as they relate to that particular individual.” (*Id.* at p. \*11.)

11. Although it did not appear to have anything to do with the *constitutional* claims, in the context of its general discussion of the challenge to remote hearings, the court briefly discussed the question of whether the superior court’s implementation order comported with Emergency Rule 3, which was another rule adopted by the Judicial Council addressing the use of remote and telephonic hearings. The court noted that “[t]he superior court’s implementation order [was] not facially inconsistent with Emergency Rule 3 and as a result, the court concluded that the defendants “failed to establish any basis for relief against the superior court's implementation order itself.” (*Id.* at p. \*10.)
12. Lastly, while the defendants attempted to litigate the validity of holding remote hearings without the consent of the defendant (a procedure not specifically authorized by Emergency Rule 3), the court declined to address this issue because the defendants did “not include any argument regarding consent in their petitions” as the hearings had not yet occurred and because “[t]he evidence they submit[ted] in support of their argument was not included in their petitions and likewise did not exist until afterward.” (*Id.* at p. \*11.)

**SEE IMPORTANT UPDATE ON EMERGENCY RULE 4 ON THE NEXT PAGE**

**NEXT EDITION: A NEW CASE FROM THE CALIFORNIA SUPREME COURT ON WHETHER IT IS MISCONDUCT FOR A PROSECUTOR TO ARGUE THAT A TESTIFYING OFFICER SHOULD BE BELIEVED BECAUSE THE OFFICER WOULD NOT PUT HIS CAREER ON THE LINE OR AT RISK OR SUBJECT HIMSELF TO POSSIBLE PROSECUTION FOR PERJURY (*RODRIGUEZ* [S251706]);**

**THE CONTINUING IMPACT OF SB 1437 ON PRIOR MURDER CONVICTIONS AND CURRENT PROSECUTIONS OF MURDERS UNDER A FELONY MURDER, NATURAL AND PROBABLE CONSEQUENCE, OR PROVOCATIVE ACT MURDER THEORY; OR**

**A PRINT ONLY EDITION ON PROTECTING CONFIDENTIAL INFORMATION AND INFORMANTS**

Suggestions for future topics to be covered by the Inquisitive Prosecutor’s Guide, as well as any other comments or criticisms, should be directed to Jeff Rubin at (408) 792-1065. 🐕

**UPDATE:** On June 10, 2020, the Judicial Council approved a recommendation from its six internal committees that **Emergency Rule 4 be rescinded**. The memorandum discussing that change stated that, as a result of changing circumstances, “including the reduction in local jail populations, the decision by CDCR to allow intake of convicted individuals currently housed in county jails, and the variations among California local health department orders, the chairs of the Judicial Council’s six internal committees recommend that the Judicial Council (1) repeal emergency rule 4, the statewide COVID-19 Emergency Bail Schedule; (2) provide direction to the superior courts about implementation issues related to the repeal of the COVID-19 Emergency Bail Schedule; and (3) support the action of the Chief Justice to rescind the statewide authorization to extend the time for arraignments in her March 30, 2020 order. When the EBS is repealed effective June 20, 2020, each superior court has the option of returning to the countywide bail schedule in effect on April 5, 2020, or using a revised bail schedule the court has adopted or subsequently adopts. Each court may determine—taking into consideration the conditions within its county, guidance from local health and other government officials, current jail population, and input from justice partners—to further revise its countywide bail schedule to more effectively meet local public health and safety considerations. Although the EBS will no longer be in effect, courts are not required to reset bail for any person for whom bail was set in accordance with the EBS. Similarly, a court retains discretion to adjust the amount of a person’s bail due to changed circumstances in accordance with existing statutory and case law. Courts are encouraged to retain or adopt schedules with \$0 bail or significantly reduced bail levels for most misdemeanors and low-level felonies, where appropriate. In addition, courts are encouraged to maximize the safe release of individuals prearraignment, or at arraignment by own recognizance or supervised release informed by a pretrial risk assessment when available. In the regrettable instance that COVID-19 public health conditions reoccur or worsen severely in the state of California, the Judicial Council will consider reinstating a statewide Emergency Bail Schedule.” (<https://jcc.legistar.com/View.ashx?M=A&ID=793396&GUID=148E67E5-F24A-4FEC-AA1B-609CA5D3B2D1> at pp. 6-7.)