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Excessive Bail and California Penal Code Section 13521

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EXCESSIVE BAIL AND CALIFORNIA
PENAL CODE SECTION 13521

California Penal Code section 13521 requires that a criminal defendant must deposit an additional five dollars for every twenty dollars of bail prescribed by the judge for his release.[1] The statute further provides that the penalty deposit is a contingent payment which is to be returned if bail is returned, and is forfeited if bail is also forfeited.[2] The penalty deposit may be waived at the discretion of the judge in the event it would create a hardship on the defendant.[3]

On August 30, 1971, the court of appeals in *McDermott v Superior Court*[4] held that section 13521 was unconstitutional in that the requirement for the penalty deposit violated provisions in the California Constitution which prohibit excessive bail in criminal cases.[5] Subsequently, the California Supreme Court granted a hearing in *McDermott*—the hearing was set for December 6, 1971—thereby vacating the lower court judgment.[6] Reference to *McDermott* in this note will be to the appellate court opinion in the unofficial reports and will involve the reasoning of the appellate court relative to the excessive bail issue.[7] This note will analyze the bail and penalty provisions of

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1. CAL. PEN. CODE § 13521 (West Supp. 1971) provides: "On and after September 18, 1959, there shall be levied a penalty assessment in an amount equal to five dollars ($5) for every twenty dollars ($20), or fraction thereof, of every fine, penalty, and forfeiture imposed and collected by the courts for criminal offenses.

"When any deposit of bail is made for an offense to which this section applies, the person making such deposit shall also deposit a sufficient amount to include the assessment pre[s]cribed in this section for forfeited bail. If bail is forfeited, the amount of such assessment shall be transmitted by the clerk of the court to the county treasury and thence to the State Treasury pursuant to this section. If bail is returned, the assessment   shall also be returned."

"In any case where a person convicted of any offense to which this section applies is imprisoned until the fine is satisfied, the judge may waive all or any part of the penalty assessment the payment of which would work a hardship on the person convicted or his immediate family."

2. *Id.*
3. *Id.*
4. 97 Cal. Rptr. 171 (Ct. App. 1971), *hearing granted*, Oct. 27, 1971.
5. CAL. CONST. art. I, § 6.
6. In California, upon the grant of a hearing by the supreme court, the court of appeal's decision loses all effect as a judgment or as precedent to be followed in the decision of legal questions that may thereafter arise. CAL. RULES OF CT. (Misc. R.) 976(e) (West 1971). *See, e.g.*, Ponce v. Marr, 47 Cal. 2d 159, 161, 301 P.2d 837, 839 (1956); Knouse v. Nimocks, 8 Cal. 2d 482, 483-84, 66 P.2d 438, 438-39 (1937).
7. *See* Blatz Brewing Co. v. Collins, 69 Cal. App. 2d 639, 650, 160 P.2d 37,

section 13521 and will review the reasoning of the court of appeals in its holding that such provisions constituted excessive bail and were thus unconstitutional. The note will also discuss *Sawyer v. Barbour*,[8] the primary California case authority relied upon by the state attorney general for the proposition that the penalty deposit required under section 13521 does not constitute excessive bail, and will conclude that the court of appeals in *McDermott* was correct in its ruling.

The Factual Setting in McDermott

Petitioner McDermott faced criminal charges, and the court set bail for his release from custody at $1,000 plus a $250 penalty deposit.[9] McDermott challenged the constitutionality of the penalty deposit on the grounds that it violated the California and United States con- stitutional guarantees against excessive bail.[10] The court of appeals agreed with McDermott and held that section 13521 violated California constitutional provisions which prohibit the imposition of excessive bail.[11] The court reasoned that since it is left to the discre- tion of the judge to determine the amount of "reasonable" bail under California Penal Code section 1275, any additional amount imposed upon the defendant to secure his release from custody was per se un- reasonable and therefore the penalty deposit required under section 13521 was unconstitutional as excessive bail.[12] The court cited ap- provingly the findings of the San Francisco Committee on Crime[13] which had been formed to study the operations of the various courts in the San Francisco judicial system.[14] The committee had issued a report on the criminal court of San Francisco, and in its study of the bail and recognizance system had also concluded that section 13521 was "probably unconstitutional as a violation of due process or a denial of equal protection of the laws."[15] The committee felt that the penalty assessment provisions of section 13521 deviated from the only permissible purpose of bail—to require the accused to post sufficient collateral to insure his presence in court.[16] The committee's objec-

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43 (1945), where the court of appeal quoted at length from the opinion in a vacated and later dismissed case because its analysis and conclusions were "logical, persuasive and correct."

    8.   142 Cal. App. 2d 827, 300 P.2d 187 (1956).

    9.   97 Cal. Rptr. at 171-72.

    10. *Id.* at 172.

    11. *Id.* at 174.

    12. *Id.*

    13. *Id.* at 172.

    14. SAN FRANCISCO COMMITTEE ON CRIME, A REPORT ON THE CRIMINAL COURT OF SAN FRANCISCO, pt. II, *Bail and O.R. Release* (1971).

    15. *Id.* at 31.

    16. *Id.*

tion to section 13521 was that the statutory penalty deposit made it more difficult for an accused to post bail because the amount of the prospective penalty assessment was added onto the figure previously set to insure the defendant's presence, and thus the net effect of the statute was to levy a tax or fine upon a person simply because he had been accused of a crime.[17]   The committee recommended that the legislature amend section 13521 to eliminate the penalty deposit and to provide simply that on the forfeiture of bail, 25 percent of the bail be paid to the police officer's training fund, thus meeting the revenue requirements intended by the legislature and eliminating the extra burden imposed on the criminal defendant seeking release on bail.[18]

The court of appeals in *McDermott*[19] also noted that if the penalty assessment were deemed to be a fine, it would still be unconstitutional.   The court reasoned that the defendant seeking admission to bail is not a convicted offender, and to thus impose a fine on one who had not been convicted of an unlawful act would be to impose punishment before conviction which would thereby violate due process.[20]

The court in *McDermott* discussed the fact that penal code section 1275 contains no provision for punishing the defendant or for raising revenue for the state, and that the statute does not set any specific amount for bail.   Instead, the amount of bail is left solely to the judge's determination based on the defendant's record, the seriousness of the charges against him, and the probability that the defendant will appear for trial.   The court concluded that since section 1275 provides the relevant factors which the judge is to consider in setting *"reasonable"* bail, any additional amount required to secure the defendant's release from custody is per se unreasonable, and the penalty deposit required under section 13521 was thus unconstitutional.

Bail Set for a Criminal Offense

Various connotations have been accorded the term "bail," but in its most popular sense it is the security given to insure the subsequent appearance of a prisoner released from imprisonment before the termination of criminal proceedings against him.[21]   The courts have consistently held that the only permissible use of bail in a criminal case is to dissuade the accused from leaving the jurisdiction of the indicting forum,[22] and that bail is not to be used to punish the defendant nor to

17. *Id.*
18. *Id.* at 32.
19. 97 Cal. Rptr. at 173-74.
20. *Id.*
21. Sawyer v. Barbour, 142 Cal. App. 2d 827, 833, 300 P.2d 187, 190 (1956).
22. *In re* Newbern, 55 Cal. 2d 500, 504, 360 P.2d 43, 45, 11 Cal. Rptr. 547,

raise revenue for the state.[23] The courts have also stated that the amount of bail required in each case is properly left to the discretion of the trial judge giving due regard to these basic principles.[24] California Penal Code section 1275 has incorporated into statutory form the relevant factors to be considered by the judge in setting bail.

> In fixing the amount of bail, the judge . . . shall take into consideration the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his appearing at the trial or hearing of the case.[25]

In *Stack v. Boyle*[26] the United States Supreme Court held that bail set at a higher figure than an amount reasonably calculated to assure the defendant's presence at trial was excessive and violated the Eighth Amendment of the United States Constitution.[27] Since the sole permissible purpose of bail in California is to secure the defendant's presence at trial,[28] the *Stack* conclusion would appear fully applicable to bail requirements in California. In any event, bail set at a higher figure than an amount reasonably calculated to assure the defendant's presence at trial is excessive and violates the California Constitution.[29] Since section 1275 provides the relevant criteria to be utilized by the judge in establishing "reasonable" bail, the additional deposit required under section 13521 to secure the defendant's release from custody would, by definition, be excessive and thus unconstitutional as was held by the *McDermott* court.

California Penal Code Section 13521—Bail or Penalty?

The California attorney general had argued in *McDermott* that no excessive bail problem was involved because section 13521 provided for the inclusion of the additional deposit for the prospective penalty assessment *within* the total amount fixed by the court to insure the defendant's appearance.[30] Therefore, since the judge would include

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549 (1961); *In re* Brumback, 46 Cal. 2d 810, 813, 299 P.2d 217, 219 (1956); *Ex parte* Duncan, 54 Cal. 75, 77 (1879); Sawyer v. Barbour, 142 Cal. App. 2d 827, 833, 300 P.2d 187, 190 (1956); People v. Calvert, 129 Cal. App. 2d 693, 698, 277 P.2d 834, 838 (1954); General Cas. Co. v. Justice's Court, 41 Cal. App. 2d 784, 788, 107 P.2d 663, 665 (1940); County of Los Angeles v. Maga, 97 Cal. App. 688, 692, 276 P. 352, 353 (1929).

    23. See authorities cited in note 22 *supra*.

    24. *See* Wadey v. Justice Court, 176 Cal. App. 2d 426, 428, 1 Cal. Rptr. 382, 384 (1959); *In re* Morehead, 107 Cal. App. 2d 346, 349, 237 P.2d 335, 337 (1951); *In re* Tsuyi Horiuchi, 105 Cal. App. 714, 715, 288 P. 708, 708-09 (1930).

    25. CAL. PEN. CODE § 1275 (West 1970).

    26. 342 U.S. 1 (1951).

    27. *Id.* at 5.

    28. See authorities cited in note 22 *supra*.

    29. CAL. CONST. art. I, § 6.

    30. 97 Cal. Rptr. at 172.

the amount required under section 13521 in fixing the defendant's bail, the statute did not require the defendant to post any collateral to secure his release above the amount of bail thus established. The attorney general thus concluded that section 13521 could not possibly be interpreted as imposing excessive bail upon the defendant. The attorney general's interpretation, however, does not appear warranted in view of the express statutory language in section 13521.

Section 13521 expressly provides that a 25 percent penalty assessment is to be added *onto* every fine, penalty, and forfeiture imposed by the courts for criminal offenses.[31] The section further provides that when the bail deposit is made, an additional deposit *shall also* be made to cover the amount of the prospective penalty assessment.[32] The statute distinguishes between the amount posted as bail and the amount deposited for the penalty assessment when the bail is forfeited or returned.[33] When bail is forfeited, the penalty is imposed and the amount of the penalty deposit is to be transmitted by the clerk of the court to the county treasury and thence to the state treasury; when bail is returned to the defendant, the amount deposited for the prospective penalty assessment is *also* to be returned to the defendant.[34]

As previously noted, "bail" is generally interpreted to mean the security given to ensure the appearance of a prisoner in order to obtain his release prior to the termination of proceedings against him.[35] If the legislature had intended that the penalty assessment be included as part of that security, the language in the statute could hardly have been more inappropriate, since the statute clearly provides that the deposit for the penalty assessment is *in addition to "bail."* Thus, by the express terms of the statute, the legislature more clearly intended that the determination of the amount fixed by the court to insure the defendant's appearance—the bail—precede the determination of the penalty assessment. Therefore, the argument of the attorney general that the penalty assessment deposit under section 13521 should be considered as part of the "bail" appears to be refuted by the language of the statute.

The attorney general had further argued that unless the amount of the penalty deposit under section 13521 was considered as part of the amount set as bail, there would be a possible conflict with other California Penal Code sections.[36] He argued that since Penal Code sec-

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31. CAL. PEN. CODE § 13521 (West 1970).
32. *Id.*
33. *Id.*
34. *Id.*
35. See text accompanying note 21 *supra.*
36. 97 Cal. Rptr. at 173.

tions 1269(b) and 1295 provide for the discharge of the accused upon the posting of bail, the penalty assessment must necessarily be included as part of the bail since posting bail is the *only* requirement for discharge of the accused from custody.[37]   If the penalty assessment were not included as part of the bail amount, argued the attorney general, the accused could obtain release upon the posting of bail without having made any deposit for the prospective penalty assessment and this would be contrary to the provisions of section 13521.[38]

The court in *McDermott* countered this argument, however, by pointing out that if the penalty assessment were considered to be included as part of the bail amount so as to avoid conflict with Penal Code sections 1269(b) and 1295 as had been contended by the attorney general, section 13521 would nonetheless conflict with other Penal Code sections if so construed.[39]   For example, Penal Code sections 1307 and 1463 provide for fixed percentage allocations of every dollar of forfeited bail between city and county treasuries.[40]   Neither statute provides for the allocation of any bail revenue to the police officer's training fund as was specifically provided under section 13521. If section 13521 were construed as calling for the inclusion of the penalty assessment within the amount fixed as bail as contended by the attorney general, 25 percent of the funds which were to be allocated solely to the city and county treasuries under sections 1307 and 1463 would have to be reallocated to the police officer's training fund in order to satisfy the revenue requirements of section 13521.[41]   Since section 13521 did not purport to amend the allocation provisions of

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37. *Id.* (emphasis added). CAL. PEN. CODE § 1269b(c) (West Supp. 1971) provides: "Upon posting such bail . . . the defendant or arrested person shall be discharged from custody as to the the offense on which the bail is posted." *Id.* § 1295 (West 1970) provides: "The defendant, or any other person, at any time after an order admitting defendant to bail or after the arrest and booking of a defendant for having committed a misdemeanor, instead of giving bail may deposit with the clerk of the court in which the defendant is held to answer or notified to appear for arraignment, the sum mentioned in the order, or if no order, in the schedule of bail previously fixed by the judges of said court, and upon delivering to the officer in whose custody defendant is a certificate of the deposit, defendant must be discharged from custody."

38. *See* Brief for Respondent at 7, McDermott v. Superior Court, 97 Cal. Rptr. 171 (Ct. App. 1971).

39. 97 Cal. Rptr. at 173.

40. *See* CAL. PEN. CODE §§ 1307, 1463 (West 1970). Penal Code section 1307 provides that bail deposited with the superior court and forfeited goes to the county treasury. Penal Code section 1463 provides that forfeited bail collected by municipal and justice courts is to be distributed, in percentages fixed by that statute, among county and city treasuries, depending on who made the arrest. For example, where an arrest is made by an Oakland police officer, 22 percent of forfeited bail goes to the County of Alameda and the remainder to the City of Oakland.

41. 97 Cal. Rptr. at 173.

1307 and 1463, the court concluded that the arguments of the attorney general were without merit.

Also lending support to the court's conclusion was the recent case of *Williams v. Dickey*,[42] cited by the plaintiff in *McDermott*,[42a] in which the argument was made that the enactment of section 13521 had not been opposed by the Association of California Cities nor the County Supervisors Association because the legislature had made it clear that the statute was intended to raise *extra* money, not to *reallocate* money from the cities and counties to the police officer's training fund. This argument appears to coincide with the conclusion of the *McDermott* court that the legislature intended the regular bail funds to be distributed in accordance with sections 1307 and 1463 and that only the additional penalty assessment under section 13521 was to be distributed to the police officer's training fund.[43]

The *McDermott* court also noted that if the attorney general's argument were to be accepted—that the penalty deposit be deemed part of bail—consistency of interpretation would require that the penalty assessment be included in, rather than added onto, the fines and penalties enumerated in section 13521 to the detriment of local government treasuries.[44] Under this interpretation—that the penalty assessment should be considered as a part of the total amount of bail— section 13521 would require that 25 percent of such amount be given to the police officer's training fund and the local government treasuries would thus be deprived of 25 percent of the funds already allocated to them by Penal Code section 1463.[45]

The court further stated that even if it were assumed that a judge included the penalty assessment in the figure denominated "bail," there would still be no assurance that the judge included the deposit for the penalty assessment in the amount determined to be sufficient to secure the defendant's presence at trial.[46] The court pointed out that the amount necessary to secure the defendant's presence could be set by the judge, the 25 percent penalty deposit then added, and the

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42. Civil No. C-70, 1716 A.J.Z. (N.D. Cal., Apr. 30, 1971).

42a. Brief for Plaintiff at 5, McDermott v. Superior Court, 97 Cal. Rptr. 171 (1971).

43. 97 Cal. Rptr. at 173.

44. *Id.*

45. *Id.*

46. *Id.* at 172. The attorney general, in *McDermott*, admitted that there is no way to establish a standard to determine whether penalty assessments required by section 13521 were added to or included in the bail. Brief for Respondent at 3, McDermott v. Superior Court, 97 Cal. Rptr. 171 (1971). The practice varies from county to county and among different judges in the same county. *See* 97 Cal. Rptr. at 172; SAN FRANCISCO COMMITTEE ON CRIME, A REPORT ON THE CRIMINAL COURT OF SAN FRANCISCO, pt. II, *Bail and O.R. Release* 31 (1971).

combined amount misnomered "bail."[47] In cases involving arrest warrants where the magistrate undertakes fixing bail, the attorney general has previously ruled that the magistrate must set bail in accordance with sections 815(a) and 1275 *and then add* the penalty assessment to the warrant.[48] Thus, even were the judge to take into account the penalty assessment in fixing bail, this would be in addition to the "reasonable" bail established in accordance with section 1275 and would thus be unconstitutional.

Summary

Penal Code section 1275 provides the relevant factors to be considered by a judge in establishing bail, and is the only statute which instructs the judge as to what factors to consider in determining the amount the defendant should deposit to secure his release. Section 1275 does not refer to section 13521 at all. There is nothing in the legislative history of section 1275 or of section 13521 to indicate that the legislature ever intended that the judge should consider the prospective penalty assessment in setting the amount of bail. On the contrary, the express language of section 13521 and the allocation provisions of sections 1307 and 1463 indicate that the penalty assessment of section 13521 is an amount which has been added to that previously established as "reasonable" bail. Furthermore, there appears to be no basis for contending that the legislature intended that judges and magistrates determine the amount of appropriate bail under section 1275, and then recalculate the bail to include the penalty deposit required under section 13521.

Sawyer v. Barbour—Penalty Assessments under
California Vehicle Code Section 773

In *Sawyer v. Barbour*,[49] the court dealt with a provision in the California Vehicle Code similar in form to section 13521.[50] Former California Vehicle Code section 773 provided that in order to reimburse the state for amounts appropriated for driver training, a penalty was to be assessed on all bail set for all offenses involving violations of

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47. 97 Cal. Rptr. at 172-73.
48. 35 Ops. Cal. Att'y Gen. 77, 80-81 (1960). California Penal Code § 815(a) (West 1970) specifies the procedure the judge shall follow in fixing bail when an arrest warrant is issued. It provides in part: "At the time of issuing a warrant of arrest, the magistrate shall fix the amount of bail which in his judgment in accordance with the provisions of section 1275 will be reasonable and sufficient for the appearance of the defendant following his arrest, if the offense is bailable."
49. 142 Cal. App. 2d 827, 300 P.2d 187 (1956).
50. *Compare* Cal. Stat. 1953, ch. 1878, § 1, at 3667, *as amended,* Cal. Veh. Code § 42051 (West 1971), *with* Cal. Pen. Code § 13521 (West Supp. 1971).

the Vehicle Code.[51]   In determining whether or not the penalty assess-
ment was an excessive addition to bail, the *Sawyer* court held that the
penalty assessment constituted a fine, not bail.[52]   The court noted that
for violations of the Vehicle Code, the proper procedure in fixing
bail was to determine from the bail schedule how much the defendant
would be required to post in order to secure his attendance at trial
and then to add the penalty assessment;[53] the penalty assessment in
Vehicle Code section 773 was thus determined by the court to be in
addition to, and not part of, the bail.[54]   The court concluded that the
penalty assessment was merely an additional punishment imposed on
Vehicle Code violators and found this to be constitutional since the
penalty assessment did not constitute cruel and unusual punishment
nor was it imposed *ex post facto*.[55]

  Sawyer was relied upon almost exclusively by the court of appeals
in another case, *People v. Norman*,[56] which upheld the constitutionality
of section 13521, and it is the principal if not sole case authority to
date for the proposition that the penalty deposit under section 13521
does not constitute excessive bail.[57]   The court in *Sawyer*, however,
was primarily concerned with a situation in which forfeiture of bail
acts as a substitute for the payment of the defendant's fine and is
administratively treated by the court as equivalent to conviction for
the offense charged.[58]

> The penalty assessment is an exaction imposed as punish-
> ment for an unlawful act.   It is laid on conviction, or on for-
> feiture of bail which is equivalent to a conviction. . . .   In the
> event of acquittal it is returned.[59]

  Although bail issued for a vehicular offense is theoretically sim-

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  51.   Cal. Stat. 1953, ch. 1878, § 1, at 3667, *as amended*, CAL. VEH. CODE
§ 42051 (West 1971).
  52.   142 Cal. App. 2d at 834-35, 300 P.2d at 191.
  53.   *Id.* at 834, 300 P.2d at 191.
  54.   *Id.*
  55.   *Id.* at 835-36, 300 P.2d at 192.
  56.   252 Cal. App. 2d 381, 398-99, 60 Cal. Rptr. 609, 623-24 (1967).
  57.   *In re* Harris, 69 Cal. 2d 486, 446 P.2d 148, 72 Cal. Rptr. 340 (1968), where
the California Supreme Court, in passing upon a petitioner's proceeding in habeas cor-
pus to secure his release from the constructive custody of bail imposed under a
civil arrest order, deemed section 13521 constitutional as applied to bail in a criminal
case.   This determination was dictum supplied in a footnote to the court's opinion,
and was unsupported by reasoning.   The court in *Harris* merely cited *People v.
Norman*.
  In *Norman* the defendant attacked the constitutionality of the section 13521 pen-
alty assessment.   The court stated only that there was no merit to defendant's objec-
tions, citing Sawyer v. Barbour, 142 Cal. App. 2d 827, 300 P.2d 187 (1956), in sup-
port of its conclusion.
  58.   142 Cal. App. 2d at 835-36, 300 P.2d at 192.
  59.   *Id.*

ilar to bail in a criminal case,[60] in practice the courts have administratively allowed such bail to become a means of securing payment of the fine issued for the vehicular offense.[61] California Vehicle Code section 40512 provides that forfeiture of bail issued for a Vehicle Code violation may, at the court's discretion, serve to extinguish the defendant's liability for the violation.[62] In 75 percent of all cases involving Vehicle Code violations, the defendant deposits his bail as a means of paying his fine, and upon forfeiture of that bail his penal liability is extinguished.[63] Thus, in the vast majority of situations involving Vehicle Code offenses, the *Sawyer* reasoning is appropriate—payment of the penalty assessment at the time bail is posted is proper because the posting of bail is in actuality the payment of the fine.

However, even though in the majority of cases the posting of bail and the payment of the fine are considered synonymous, until the time for appearance has passed and the bail has been forfeited, it is not a fine. Until the bail has been forfeited, its theoretical function is to insure the defendant's presence at trial.[64] For most persons accused of Vehicle Code violations no constitutional problem regarding bail arises because the deposit of bail is made for the purpose of paying the fine when the bail is forfeited. However, for the remaining Vehicle Code violators—estimated at 25 percent—who make their deposit of bail, not for the purpose of paying the fine, but for the purpose of securing their release from custody, the reasoning of *Sawyer* would appear erroneous. The defendant seeking his release from custody is confronted with the choice of paying the penalty assessment or remaining in custody.

Among that 25 percent was petitioner Sawyer who deposited his bail not for the purpose of extinguishing his penal liability under section 40512, but for the purpose of securing his release from custody and subsequently appearing to contest the charge against him.[65] He paid the penalty assessment in addition to the bail required to secure his presence at trial under protest and later instituted an action to recover the penalty assessment, contending that it violated his constitutional right to reasonable bail.[66] In light of Sawyer's particular predicament, the *Sawyer* court acknowledged that a penalty assessment added to bail might involve constitutional problems:

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60. *See* CAL. VEH. CODE § 40511 (West 1971); Note, *California Traffic Law Administration*, 12 STAN. L. REV. 388, 400 (1960).

61. *See California Traffic Law Administration, supra* note 60, at 400.

62. CAL. VEH. CODE § 40512 (West 1971).

63. *See California Traffic Law Administration, supra* note 60, at 400, 438.

64. *See* CAL. VEH. CODE § 40511 (West 1971); *California Traffic Law Administration, supra* note 60, at 400.

65. 142 Cal. App. 2d at 832, 300 P.2d at 190.

66. *Id.* at 832-33, 300 P.2d at 190.

> We do not construe section 773 as requiring a person charged with an offense covered thereby to deposit the penalty assessment in cash when he is admitted to bail on an undertaking with sureties. To do so might impair the right to bail on sufficient sureties in violation of article I, section 6 of the Constitution. . . . We read "deposit of bail" as meaning deposit of cash or deposit of an undertaking with sufficient sureties. If a person charged with an offense covered by section 773 deposits an undertaking, he may include the amount of the penalty assessment in the undertaking or deposit the amount in cash.[67]

Even though the court apparently acknowledged the defendant's constitutional right to be admitted to bail on an undertaking with sufficient sureties, the court appears to have completely disregarded the defendant's constitutional right to bail in a reasonable amount. Thus, when Vehicle Code violators post bail to secure their release from custody, the court's holding in *Sawyer* appears to be in error under the reasoning of *McDermott*. Even though the defendant secures his release by means of cash or an undertaking with sureties, he is still forced to deposit an amount in excess of that necessary to secure his presence at trial in order to be released from custody.[68]

In any event, the court's holding in *Sawyer* is clearly inapplicable to Penal Code violators such as McDermott. Not only is there no comparable Penal Code provision to Vehicle Code section 40512, which provides for the discretionary extinguishment of a defendant's penal liability upon forfeiture of bail, but the plaintiff in *McDermott* was seeking bail to secure his release from custody—not to provide for the eventual payment of a fine.[69]

Sawyer's clouded reasoning which applied to section 13521 could lead to the erroneous impression that while a penalty deposit under section 13521 could not be justified as bail, such a deposit could be justified as a penalty, separate and distinct from bail, which is an additional forfeited amount imposed on one who commits the unlawful act of failing to appear. The statutory requirement that the amount of the penalty is to be deposited together with the bail when the defendant seeks release could possibly be justified as the only practical way of

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67. *Id.* at 837, 300 P.2d at 192-93.

68. *See* Cain v. United States, 148 F.2d 182 (9th Cir. 1945). In that case appellant sought release on bail pending appeal of his case in which a judgment imposing both a fine and imprisonment had been rendered. Bail was set at $20,000 by the trial court with the provision that the bail bond deposited also serve as security for the payment of the $10,000 fine decreed in the judgment of the trial court. In reducing bail from $20,000 to $10,000, the court of appeal held that it constituted excessive bail to require the appellant to deposit, in addition to an amount sufficient to secure his presence at trial, an additional amount to secure payment of the fine in order to be released from custody.

69. 97 Cal. Rptr. at 171-72.

insuring that the penalty, if incurred by the defendant because he failed to appear, would ultimately be paid. While it cannot be disputed that the legislature can impose more than one penalty for an unlawful act[70]—in this situation it would be the forfeiture plus the penalty assessment—and while it can be argued that the only practical way of enforcing the payment of the penalty assessment is to require payment before the defendant is released, nonetheless the net effect of such an interpretation is still to require the defendant to deposit excessive bail. Whether the defendant is required to make the payment as bail, in addition to bail, or as a deposit to insure payment of a fine for an offense he may later commit, the fact remains that he is still forced to deposit more than would otherwise be necessary to insure his presence at trial in order to be released from custody. In other words, regardless of the terms applied, the deposit of the penalty as a precondition to release has the effect of bail, and to the extent that such deposit exceeds the amount sufficient to secure the defendant's presence at trial, it is excessive and therefore unconstitutional.

Bail Under Federal Statutes

The attorney general also argued in *McDermott* that if the penalty deposit were interpreted to represent an addition to bail, then the situation would be analogous to the bail required under certain federal statutes.[71] Under those federal statutes, bail, in a civil suit for forfeiture and damages, is set *"relative"* to the amount of the fine and damages which may be assessed against the defendant according to the attorney general.[72] Therefore, by analogy, the attorney general contended that it would be proper to require a defendant to post bail relative to a penalty assessment he may later incur for the crime alleged.[73] The attorney general's analogy of the federal statute to section 13521 does not appear well founded. The federal statute provides:

> *And such person may be arrested and held to bail in such sum as the district judge may order, not exceeding the sum of $2,000, and twice the amount of the damages sworn to in the affidavit of the person bringing the suit.*[74]

The federal statute provides that the district judge is to determine the amount of bail required, and the statutory provisions regarding

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70. People v. Durrant, 119 Cal. 201, 208-09, 51 P. 185, 187 (1897); Sawyer v. Barbour, 142 Cal. App. 2d 827, 836-37, 300 P.2d 187, 192 (1956).

71. Brief for Petitioner at 7, McDermott v. Superior Court, Civil No. 22844 (Sup. Ct., filed Oct. 1, 1971). *See* 31 U.S.C. §§ 231-33 (1970).

72. 31 U.S.C. § 233 (1970).

73. Brief for Petitioner at 7, McDermott v. Superior Court, Civil No. 22844 (Sup. Ct., filed Oct. 1, 1971).

74. 31 U.S.C. § 233 (1970) (emphasis added).

the fine and damages set forth in the wording of the statute merely pro-
vides a *ceiling* for the permissible bail thus established. The defendant
is not necessarily forced to deposit the amount of the fine and dam-
ages provided for in the commission of the unlawful act in order to
secure his release. The requirements under the two statutes are, there-
fore, entirely distinguishable. The underlying purpose of the federal
statute is to limit the amount of bail which the judge can set. Con-
gress has apparently decided that the unlawful act committed by the
accused is not so heinous as to warrant the judge, in establishing rea-
sonable bail, to impose a bail on the accused exceeding the fine and
twice the amount of alleged damages. If desired, the California leg-
islature may also establish a similar ceiling for bail for a particular
offense, and it would also be appropriate for the legislature to establish
"reasonable" bail for a particular offense. However, there is no indi-
cation that the legislature intended to do either when it enacted section
13521.

Conclusion

    McDermott v. Superior Court is the first decision to hold that the
penalty deposit required under section 13521 violates a defendant's
constitutional right to reasonable bail. The court concluded that since
the sole permissible purpose of bail in a criminal case is to insure the
defendant's appearance in court, and since section 1275 of the Penal
Code sets forth the appropriate criteria for establishing reasonable
bail—the seriousness of the offense charged, the prior criminal record
of the defendant and the probability of his appearing at trial—section
13521 imposed an excessive amount for the release of the defendant
and was thus unconstitutional. Whether the California Supreme Court
has upheld or rejected the decision of the court of appeals has not
been published at the date of this writing.[75] Regardless of the final
disposition of *McDermott*, however, the California legislature should
amend section 13521 to clearly provide that the statute applies only in
cases where bail has been forfeited, and to eliminate the requirement of
a deposit for the penalty assessment as a precondition to release of
the defendant from custody. In this way, the revenue required for
police officers' training will be supplied without unnecessarily burden-
ing an innocent defendant seeking his release from custody.

                                                        *Michael Desmarais**

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    75. The hearing was held on Dec. 6, 1971, but as of the date of this writing
no opinion has yet been given.