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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Appellant, v. JARED JACOB STANDISH, Defendant and Respondent.	B166344 (Los Angeles County Super. Ct. No. MA025716)

APPEAL from an order of the Superior Court of Los Angeles County, Thomas R. White, Judge. Affirmed.

Steve Cooley, District Attorney, Brent D. Riggs and Shirley S. N. Sun, Deputy District Attorneys, for Plaintiff and Appellant.

Michael P. Judge, Public Defender, Robert M. Wilder and John Hamilton Scott, Deputy Public Defenders, for Defendant and Respondent.

Penal Code section 859b[1] requires that a criminal defendant's preliminary examination be held within 10 court days from the time of arraignment or plea, if the

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[1] All further undesignated statutory references are to the Penal Code.

defendant is in custody. The 10-day period may be extended for good cause, but the defendant must be granted a conditional release on his or her own recognizance (O.R.) pending the hearing. Respondent Jared Jacob Standish's preliminary hearing was extended past the 10-court-day period, but his request to be released on his own recognizance was denied. Subsequently, upon Standish's pre-trial motion, pursuant to section 995 the superior court set aside an information charging him with various offenses, on the ground section 859b had been violated. Plaintiff and appellant the People of the State of California appeal the superior court's order. We conclude the failure to grant Standish the statutorily-mandated O.R. release denied his substantial rights, entitling him to relief under section 995. We therefore affirm the trial court's order.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*[2]

Sometime during the first week of April 2002, Standish dangled his two-year-old daughter, Brittany, from the family's second story apartment balcony over a concrete pavement below. Neighbors yelled to Standish to take Brittany back inside, and after dangling her for approximately two minutes, he did so. Annette Madison, one of Standish's neighbors, telephoned child protective services.

On April 5, 2002, Standish killed the family cat by choking, stomping, and decapitating it. Brittany was present during part of Standish's attack on the pet before her mother could remove her, and Brittany subsequently saw the cat's blood on the walls and floor and knew her father had killed it.

Standish threw the cat's body onto Madison's balcony. Madison informed police, and Standish was arrested. Subsequently, when Standish was released on bond, he exited his apartment as Madison was entering hers, and stated, "Whoa, aren't you scared." Standish then began punching his wife, Jennifer, in the face with his fists. Madison

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[2] We glean the facts from the evidence presented at the preliminary hearing.

telephoned police again. Standish subsequently told Madison that she had put a spell on him and had broken up his family, and he was going to cut her throat.

2. *Procedure.*

a. *Proceedings prior to December 2002.*

The record before us does not contain the original complaints filed against Standish, or most minute orders prior to December 2002. According to the comments of the parties below and the representations of the parties on appeal, charges were originally brought against Standish related to the incidents in which he killed the cat and dangled Brittany over the balcony. He was released on bail, whereupon he made threats to Madison and punched his wife. He was rearrested, additional charges were filed related to the new incidents, and the two cases were consolidated. Proceedings were suspended pursuant to section 1368, so that Standish's competence could be evaluated. He was placed in custody for that purpose in April 2002. Standish was eventually found competent to stand trial in late November or early December 2002. The case was set for preliminary hearing but was dismissed because the People were unable to produce Madison as a witness.

According to the parties, the operative complaint that is at issue here was re-filed on December 11, 2002, in case No. MA025716, and Standish was arraigned and pleaded not guilty on the same date.

b. *Continuance granted on December 24, 2002.*

Standish's preliminary hearing was scheduled for December 24, 2002, the ninth day of the ten-day statutory period for holding the preliminary hearing after arraignment. On that date, the defense announced ready. The People moved to continue the hearing for good cause, on the grounds that witness Madison, who had been subpoenaed, was nonetheless out-of-state for the holidays. Madison had left a message for the prosecutor, who had been engaged in another trial, stating that she had received the subpoena but had prepaid tickets for a vacation during the holidays. Standish objected to the continuance and asked to be released on his own recognizance if the court granted it. He did not

expressly argue that section 859b required his release. Defense counsel represented that Standish was taking medication that "address[ed] the issues he had before."

The court, the Honorable Randolph A. Rogers, stated, "Right now I'm not inclined to release him on his own recognizance. I might have considered that, I suppose, if this is really a medical issue and I had some sort of competent medical testimony. But the file is replete with incidents that obviously cause great concern." It found good cause to continue the matter and set a new date of January 7, 2003. It also set "further proceedings" for January 3, 2003, in case Madison became available by that date.

c. *Standish's December 31, 2002 motion for dismissal or release.*

On December 31, 2002, Standish moved for dismissal of his case. Appearing before the Honorable Steven D. Ogden, Standish argued that on December 24, "There was a request for Mr. Standish to be released from custody, based upon going past the 10-day period under 859b of the Penal Code. That was denied, and I don't believe with any good reason for not releasing him." Defense counsel argued that even if the witness was unavailable, the People could have introduced the testimony of a police officer pursuant to Proposition 115. Therefore, defense counsel asked that the case be dismissed or, "at a minimum," Standish be released from custody pending the preliminary hearing. Standish reiterated his objection to the previously-scheduled continuance "under 859b."

The court stated that it would not reconsider the good cause issue, because a different judge had already concluded good cause existed. It denied the motion to dismiss and refused to release Standish on his own recognizance, but stated Standish could renew the motion without prejudice on January 7, 2003, the date scheduled for the preliminary hearing.

d. *Preliminary hearing.*

On January 7, 2003, the matter was sent for preliminary hearing, again before Judge Rogers. Standish moved that he be released on his own recognizance pursuant to section 859b, "in that his preliminary hearing could have and should have occurred under Proposition 115 within the time period and there should not have been a good cause finding to go outside the period." The prosecutor represented that, "[t]he officer that

would have been needed was not available on the date that was set for preliminary hearing. . . . [¶] We were not able to go forward on that day, Prop. 115 or otherwise." The court denied the motion, reasoning, "I would be at a loss to understanding [*sic*] how I can grant the motion anyway because I'm the one that found good cause on December 24 to continue to today's date."

The preliminary hearing transpired and Standish was held to answer on charges of cruelty to an animal (§ 597, subd. (a)), cruelty to a child by inflicting unjustifiable physical pain or mental suffering (§ 273a, subd. (b)), making criminal threats (§ 422), child abuse (§ 273a, subd. (a)), and battery upon a spouse or cohabitant (§ 243, subd. (e)(1)). An information filed on January 21, 2003, in case No. MA025716 charged Standish with the crimes for which he was held to answer, and included allegations that Standish had personally used a deadly and dangerous weapon, a knife, when committing cruelty to an animal (§ 12022, subd. (b)(1)), and that the criminal threats and spousal battery offenses were committed while Standish was released from custody within the meaning of section 12022.1.

At the close of the preliminary hearing, Standish renewed his motion for dismissal of the case pursuant to section 859b or for release on his own recognizance. The court did not further address the request.

e. *Standish's motion to set aside the information.*

On February 27, 2003, Standish filed a motion to set aside the information pursuant to section 995, on the grounds he had not been legally committed by a magistrate. He asserted that he was illegally held in custody at the time of his preliminary hearing in violation of section 859b; it was "questionable" whether good cause to continue the hearing existed; and section 859b required his O.R. release. In opposition, the People raised various waiver arguments.

Judge Thomas R. White heard and granted Standish's motion. The court rejected the People's waiver arguments and concluded the right to a timely preliminary hearing was a fundamental right. It found "there was a denial of the defendant's rights under 859b; that the defendant should have been released on his own recognizance, and that

based upon that denial, the 995 motion should be granted." It set aside counts 1, 2, and 3, pursuant to section 995. At a further hearing conducted on March 24, 2003, the court set aside the accusation on counts 4 and 5, pursuant to section 995.[3] Standish was released.

DISCUSSION

1. *Waiver issues.*

Preliminarily, we address the People's claims of waiver. The People argue that Standish "waived [his] rights under section 859b by failing to assert them in a timely manner." The People fault Standish for moving for dismissal rather than bringing a petition for a writ of habeas corpus, mandate, or prohibition, for purportedly "acquiesc[ing] in the continuance," and purportedly failing to sufficiently state his objection to the continuance.

The People failed to raise these contentions in their opening brief. It is well settled that contentions raised for the first time in the reply brief are waived. (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 482, fn. 10*; People v. Baniqued* (2000) 85 Cal.App.4th 13, 29; *Katelaris v. County of Orange* (2001) 92 Cal.App.4th 1211, 1216, fn. 4.)

In any event, the People's claims appear to lack merit. While section 871.6 provides that either the People or the defendant may file a petition for writ of mandate or prohibition in the superior court if the magistrate fails to comply with section 859b's time limits, nothing in section 871.6 suggests that this is the *only* avenue of relief open to the parties. Section 871.6 does not purport to limit the availability of relief under section 995. The People cite no authority *requiring* that extraordinary writ relief must be sought in order to avoid waiving the right to challenge the error committed here. The trial court below found, and we agree, that counsel did not waive the statutory time limit by, after

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[3] The court and prosecutor initially questioned whether the untimeliness problem applied to counts 4 and 5, because those counts were added to the complaint at the preliminary hearing on January 7, 2003. On March 24, 2003, after considering the matter, the trial court dismissed the two remaining counts. No contention is raised on appeal that counts 1 through 3 should be treated differently than counts 4 and 5.

the trial court had granted the motion for a continuance over Standish's objection, failing to object when the magistrate informed him that the date scheduled for further proceedings would be "day 8 of 10," rather than day 10 of 10.[4]

2. *Section 859b.*

Section 859b provides, in pertinent part,[5] that "the defendant and the people have the right to a preliminary examination at the earliest possible time . . . ." It requires that

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[4] Standish argues that the trial court's dismissal of the information was proper because, in addition to the failure to release him on his own recognizance, the People failed to provide adequate notice of the motion to continue and failed to establish good cause for the continuance. The People argue the good cause and notice issues are waived. We need not reach these issues in light of our conclusion affirming the trial court on other grounds, and we assume, without deciding, that good cause for the continuance existed. Likewise, we need not reach Standish's other waiver arguments.

[5] Section 859b provides in pertinent part: "Both the defendant and the people have the right to a preliminary examination at the earliest possible time, and unless both waive that right or good cause for a continuance is found as provided for in Section 1050, the preliminary examination shall be held within 10 court days of the date the defendant is arraigned or pleads, whichever occurs later, or within 10 court days of the date criminal proceedings are reinstated pursuant to Chapter 6 (commencing with Section 1367) of Title 10 of Part 2.

"Whenever the defendant is in custody, the magistrate shall dismiss the complaint if the preliminary examination is set or continued beyond 10 court days from the time of the arraignment, plea, or reinstatement of criminal proceedings . . . and the defendant has remained in custody for 10 or more court days solely on that complaint, unless either of the following occur:

"(a) The defendant personally waives his or her right to preliminary examination within the 10 court days.

"(b) The prosecution establishes good cause for a continuance beyond the 10-court-day-period.

"For purposes of this subdivision, 'good cause' includes, but is not limited to, those cases involving allegations that a violation of one or more of the sections specified in subdivision (a) of Section 11165.1 or in Section 11165.6 has occurred and the prosecuting attorney assigned to the case has another trial, preliminary hearing, or motion to suppress in progress in that court or another court. Any continuance under this paragraph shall be limited to a maximum of three additional court days.

"If the preliminary examination is set or continued beyond the 10-court-day period, the defendant shall be released pursuant to Section 1318 unless:

unless he or she waives the right, a defendant in custody and charged with a felony must have a preliminary examination within 10 court days of the arraignment, plea, or reinstatement of criminal proceedings after a mental competency determination. (§ 859b; *In re Samano* (1995) 31 Cal.App.4th 984, 990; 4 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Pretrial Proceedings, § 129, p. 331.) If the People are unready to proceed within the 10-day period, but show good cause for a continuance, the in-custody defendant's preliminary examination may be set beyond the 10-day limit. However, absent specified exceptions, none of which apply here, the defendant must be released from custody on his or her own recognizance, pursuant to section 1318.[6] (§ 859b; *Landrum v. Superior Court* (1981) 30 Cal.3d 1, 5-6, fn. 4; *People v. Henderson* (2004) 115 Cal.App.4th 922, 930-931; *In re Samano, supra,* at p. 990; 4 Witkin & Epstein, Cal. Criminal Law, *supra,* § 130 (2), p. 332.) "Under section 859b, a defendant who is charged with a felony and is in custody has an absolute right to a preliminary examination within 10 court days after the arraignment or one of the other enumerated circumstances. If the court fails to conduct the preliminary examination within the 10-

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"(1) The defendant requests the setting of continuance of the preliminary examination beyond the 10-court-day period.

"(2) The defendant is charged with a capital offense in a cause where the proof is evident and the presumption great.

"(3) A witness necessary for the preliminary examination is unavailable due to the actions of the defendant.

"(4) The illness of counsel.

"(5) The unexpected engagement of counsel in a jury trial.

"(6) Unforeseen conflicts of interest which require appointment of new counsel.

"The magistrate shall dismiss the complaint if the preliminary examination is set or continued more than 60 days from the date of the arraignment, plea, or reinstatement of criminal proceedings . . . unless the defendant personally waives his or her right to a preliminary examination within the 60 days."

[6] Section 1318 allows a defendant to be released on his or her own recognizance only when he or she files a signed release agreement, promising that he or she will appear as ordered, obey all reasonable conditions imposed by the court or magistrate, remain in the state absent leave of the court, and waive extradition.

day period, the in-custody defendant is entitled to a dismissal." (*People v. Henderson, supra,* at pp. 930-931, fns. omitted.)

Section 859b is supplementary to and a construction of the constitutional right to a speedy trial. (*People v. Luu* (1989) 209 Cal.App.3d 1399, 1404; *People v. Kowalski* (1987) 196 Cal.App.3d 174, 179.) It " 'reflects a clear legislative intention to prevent prolonged incarceration prior to a preliminary hearing.' [Citations.]" (*In re Samano, supra,* 31 Cal.App.4th at p. 990.) Its purpose is " 'to eliminate the possibility that persons charged with felonies might suffer prolonged incarceration without a judicial determination of probable cause merely because they are unable to post bond in order to gain their freedom.' " (*Blake v. Superior Court* (1980) 108 Cal.App.3d 244, 248; *Landrum v. Superior Court, supra,* 30 Cal.3d at p. 12 [" 'Section 859b reflects a clear legislative intention to prevent prolonged incarceration prior to a preliminary hearing.' "]; *People v. Kowalski, supra,* at p. 178.) Section 859b "dovetail[s] with the defendant's and the People's right to speedy trial. [Citation.]" (*In re Samano, supra,* at p. 990.)

3. *Section 859b's own recognizance release requirement is not discretionary.*

When construing a statute, we attempt to ascertain the Legislature's intent so as to effectuate the purpose of the law. (*People v. Smith* (2004) 32 Cal.4th 792, 797; *People v. Canty* (2004) 32 Cal.4th 1266, 1276.) "In determining such intent, we begin with the language of the statute itself. [Citation.] That is, we look first to the words the Legislature used, giving them their usual and ordinary meaning. [Citation.] 'If there is no ambiguity in the language of the statute, "then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs." ' [Citation.]" (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 192; *People v. Smith, supra,* at p. 797; *People v. Canty, supra,* at p. 1276.) The word "shall" is ordinarily construed as mandatory, unless such a construction would imply an unreasonable legislative purpose. (*People v. Superior Court (Zamudio)*, *supra,* at p. 194; *Judith P. v. Superior Court* (2002) 102 Cal.App.4th 535, 551.)

Here, the statutory language is unambiguous: "If the preliminary examination is set or continued beyond the 10-court-day period, *the defendant shall be released*

pursuant to Section 1318" (i.e., on his or her own recognizance after signing a release agreement) unless specified exceptions not present here exist. (§ 859b, italics added.)

Despite the import of the statutory language, the People argue that O.R. release is merely discretionary under section 859b. They urge, "the court must have the discretion to impose stringent conditions or even deny O.R. if in the circumstances of the case and in light of the O.R. report, the defendant's release on his own recognizance poses an unacceptable threat to the public safety." The People posit that the Legislature "had no intention of compromising public safety" when it enacted section 859b.

In support, the People point to the portion of section 859b that provides a defendant "charged with a capital offense in a cause where the proof is evident and the presumption great" need not be released from custody when the preliminary examination is continued, for good cause, past the 10-court-day period (§ 859b, subd. (2)). Second, they note that a defendant granted O.R. release under section 859b "shall be released pursuant to Section 1318[.]" (§ 859b.) Section 1318 provides that a defendant shall not be released from custody on his or her own recognizance unless, among other things, the defendant promises to "obey all reasonable conditions imposed by the court or magistrate." (§ 1318, subd. (a)(2).) Third, they reference section 1318.1, which provides for an investigative staff to make recommendations regarding a defendant's suitability for release upon his or her own recognizance.

We agree that public safety is of great concern, and that the aforementioned provisions likely were implemented to safeguard the public. But the People's argument proves too much. The cited provisions suggest that the Legislature has already considered and weighed the interest in public safety when enacting the statutory scheme, and has struck the balance in favor of limiting O.R. release only as specified in the statute. " 'Under the familiar rule of construction, *expressio unius est exclusio alterius*, where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed. [Citations.]' [Citation.]" (*Woodliff v. California Ins. Guarantee Assn.* (2003) 110 Cal.App.4th 1690, 1706; *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1161.) Here, section 859b contains six specified exceptions, two of which appear

to be related to safety concerns. (§ 859b, subd. (2) [exception for persons charged with capital offenses, where the proof is evident and the presumption great]; subd. (3) [exception where a necessary witness is unavailable due to the actions of the defendant].) Had the Legislature intended to create a more general "public safety" exception to the release requirement, it clearly knew how to do so.

Moreover, reading the statute the way the People suggest would render it a practical nullity. Many, if not most, defendants charged with felony offenses can be said to present public safety concerns. If the trial court had discretion to deny O.R. release to all such persons, section 859b would be eviscerated. We therefore decline to announce a judicially created public safety exception to section 859b's O.R. release provision. Such a rule would not comport with the legislative intent underlying the statute, or with common sense.

4. *The California Constitution does not conflict with section 859b or preclude O.R. release*.

Next, the People appear to argue section 859b is unconstitutional, at least in part. They contend that "[i]mplementation of section 859b must take into account the California Constitution."

"In the June 1982 election the voters passed Proposition 4, which amended California Constitution, article I, section 12, regarding bail. They also passed Proposition 8, the victim's bill of rights, which amended the criminal law in a variety of ways . . . ." (*People v. Barrow* (1991) 233 Cal.App.3d 721, 722.) Proposition 4 amended article I, section 12 of the California Constitution by, among other things, expanding the circumstances in which a court could deny bail. (See Ballot Pamp., Primary Elec. (June 8, 1982) text of Prop. 4, p. 17.) Proposition 4 did not amend the existing provision of article I, section 12 that, "[a] person may be released on his or her own recognizance in the court's discretion." (Cal. Const., art. I, § 12; *Dant v. Superior Court* (1998) 61 Cal.App.4th 380, 384-385, fn. 6; Ballot Pamp., Prop. 4, *supra,* at p. 17.)

Proposition 8, on the other hand, sought to repeal section 12 of article I of the California Constitution. (See Ballot Pamp., Primary Elec. (June 8, 1992), text of Prop. 8,

at p. 33.) It also added subdivision (e), "Public Safety Bail," to article I, section 28, of the California Constitution. (*In re York* (1995) 9 Cal.4th 1133, 1140, fn. 4.) That section provided, "In setting, reducing or denying bail, the judge or magistrate shall take into consideration the protection of the public, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case. *Public safety shall be the primary consideration.* [¶] 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. However, *no person charged with the commission of any serious felony shall be released on his or her own recognizance*." (Ballot Pamp., Prop. 8, *supra,* at p. 33, italics added.)

The People appear to suggest that the italicized language buttresses their public safety argument, and prohibits the release of a person charged with a serious felony pursuant to section 859b.

The People's position is problematic. First, contrary to their argument that *both* Proposition 4's and Proposition 8's bail provisions became law, California courts have repeatedly held to the contrary, and stated that the bail and own recognizance provisions of Proposition 8 *did not* become law. As explained by the California Supreme Court: "The provisions set forth in article I, section 12, of the California Constitution were contained in Proposition 4, enacted by the voters at the June 1982 Primary Election. Proposition 4 received more votes than did Proposition 8, an omnibus initiative that, in the same election, added (among other provisions) article I, section 28, subdivision (e), to the California Constitution, providing in pertinent part: '*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.*' . . . [¶] Because Proposition 4 received more votes than did Proposition 8, the bail and OR release provisions contained in Proposition 4 are deemed to prevail over those set forth in Proposition 8. [Citations.]" (*In re York, supra,* 9 Cal.4th at p. 1140, fn. 4; see also *Dant v. Superior Court, supra,* 61 Cal.App.4th at pp. 384-385, fn. 6; *People v. Cortez* (1992) 6 Cal.App.4th 1202, 1211 ["The conflict between the bail provisions of Proposition 4 and Proposition 8 rendered the bail provisions of

Proposition 8 inoperative."]; *People v. Barrow, supra,* 233 Cal.App.3d at p. 723 ["Because Proposition 4 received a greater number of votes, the bail provisions of Proposition 8 never went into effect."].) Therefore, the provision in article I, section 28, subdivision (e), that no person charged with the commission of any serious felony shall be released on his or her own recognizance, is not operative and the People's reliance upon it is misplaced.

In arguing to the contrary, the People rely upon *Yoshisato v. Superior Court* (1992) 2 Cal.4th 978, 987-988. *Yoshisato* observed that article II, section 10, subdivision (b) of the California Constitution mandates that if the provisions of two or more measures approved at the same election conflict, those of the measure receiving the highest affirmative vote prevail. (*Id.* at p. 987; Cal. Const., art. XVIII, § 4 [initiative constitutional amendments]; Cal. Const., art II, § 10, subd. (b) [initiative statutes]; *People v. Cortez, supra,* 6 Cal.App.4th at p. 1210.) *Yoshisato* held that this "bright line" rule applied when the measures in question were presented to the voters as competing or alternative measures, because of " 'the analytical difficulty and practical impossibility of implementing the presumed, but in fact unknown, will of the electorate by judicially merging *competing* initiative regulatory schemes.' [Citation.]" (*Yoshisato v. Superior Court, supra,* at p. 988.) In the case of complementary or supplementary measures, however, no such problem arises and effect should be given to both measures. (*Ibid.*) In that case, the measures should be compared provision by provision and the provisions of the measure receiving the lower number of affirmative votes are operative so long as they do not conflict with the provisions of the measure that received the higher number of affirmative votes, and the nonconflicting provisions are severable from any that conflict. (*Ibid.*)

Proposition 8 sought to *repeal* article I, section 12 of the California Constitution; Proposition 4 sought to *amend* that same provision. Moreover, as to the portion of Proposition 8 relied upon by the People – the provision that "no person charged with the commission of any serious felony shall be released on his or her own recognizance" – a provision-by-provision review with Proposition 4 reveals a conflict. Proposition 4 left

unchanged the provision that, "A person may be released on his or her own recognizance in the court's discretion." Proposition 8, in contrast, would have eliminated at least a substantial portion of a judge's discretion by precluding O.R. release in the case of all serious felonies. Under these circumstances, the provision of Proposition 8 prohibiting O.R. release of persons charged with serious felonies must be viewed as competing with Proposition 4. Accordingly, the "bright line" rule is applicable, and Proposition 4 – the measure that received the greater number of votes – prevails in this regard. (See *Yoshisato v. Superior Court, supra,* 2 Cal.4th at p. 987.)

In any event, even if the portion of Proposition 8 in question had become law, we do not believe it would assist the People's argument. The flaw in the People's reasoning is that they view the bail provisions in a vacuum. We do not determine the meaning of a statute from a single word or sentence but instead, must harmonize provisions relating to the same subject. (*People v. Anderson* (2002) 28 Cal.4th 767, 775-776.) "Accordingly, a statute should be construed with reference to the whole system of law of which it is a part. [Citation.]" (*Id.* at p. 776.) Here, a statement in a bail provision cannot be read without reference to the relevant time limits imposed upon the People by other statutes. Under the People's reasoning, if Proposition 8's bail provision precluded a defendant charged with a serious felony from ever being released O.R., the People would be insulated from compliance with the time limits imposed by section 859b, a statute geared toward preserving speedy trial rights. Read in isolation, the portion of Proposition 8 at issue would prevent the release of a defendant charged with committing a serious felony, no matter how long he or she was held without a preliminary hearing or trial. We avoid interpreting a statute in a way that would lead to absurd results. (*People v. Lopez* (2003) 31 Cal.4th 1051, 1056.) Accordingly, we conclude there is no conflict between section 859b and the California Constitution.[7]

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[7] The People further rely upon article I, section 12, subdivisions (b) and (c), of the California Constitution, which state that a person shall not be released on bail if he or she has been charged with committing, inter alia: "Felony offenses involving acts of violence on another person . . . when the facts are evident or the presumption great and the court

5. *The court properly set aside the information pursuant to section 995.*

Having rejected the People's arguments that the magistrate had discretion to keep Standish in custody pending the preliminary hearing, we must next consider whether dismissal of the information was the proper remedy for the violation of section 859b, and whether a motion to set aside the information pursuant to section 995 was a proper procedural vehicle to seek it. We answer both questions affirmatively.

Section 995 provides, in pertinent part: "(a) Subject to subdivision (b) of Section 995a, the indictment or information shall be set aside by the court in which the defendant is arraigned, upon his or her motion, in either of the following cases: [¶] . . . [¶] (2) If it is an information: [¶] (A) That before the filing thereof the defendant had not been legally committed by a magistrate." It is well "settled that denial of a substantial right at the preliminary examination renders the ensuing commitment illegal and entitles a defendant to dismissal of the information on timely motion. [Citations.]" (*People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 523; see also, e.g., *People v. Konow* (2004) 32 Cal.4th 995, 1022-1023, 1027; *Miller v. Superior Court* (2002) 101 Cal.App.4th 728, 740; *People v. Duncan* (2000) 78 Cal.App.4th 765, 772; *People v. Luu, supra,* 209 Cal.App.3d at p. 1401.) As we explained in *People v. West* (1990) 224 Cal.App.3d 1337, 1342, the "Legislature has provided numerous basic safeguards to assure criminal defendants a 'fair trial' during the commitment process as well as at trial. [Citations.] These forms of procedure ' "establish a substantial right vested in every person charged with crime and should not be lightly waved aside. [Citation.]" ' [Citation.] If the

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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"; and "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." (Cal. Const., art. I, § 12, subds. (b), (c).) It is unclear how these provisions aid the People's argument. They pertain to the trial court's grant of bail, not the release of a defendant on his own recognizance when a preliminary hearing cannot be timely held. The issue before us is not whether bail was properly set for Standish. As we have explained, provisions governing bail cannot be viewed in a vacuum.

magistrate disregards substantial rights guaranteed to the defendant the resulting commitment is unlawful. [Citation.] If the commitment is unlawful, the information 'shall' be set aside by the court in which the defendant is arraigned pursuant to Penal Code section 995." (*Id.* at p. 1342.) An information will not be set aside under section 995 " 'merely because there has been some irregularity or minor error in procedure in the preliminary examination. [Citation.]' " (*People v. Pennington* (1991) 228 Cal.App.3d 959, 964; *Jennings v. Superior Court* (1967) 66 Cal.2d 867, 874.)

"Our review is an independent one where our task is to determine whether the defendant was denied a substantial right at the preliminary examination. [Citations.]" (*People v. Luu, supra,* 209 Cal.App.3d at p. 1401.) Substantial rights, within the meaning of section 995, have been held to include, inter alia, the right to counsel, to cross-examine witnesses, and to present an affirmative defense at the preliminary hearing, as well as to "substantial procedural rights," including the statutory rights to complete the hearing in one session and to have a closed hearing. (*People v. West, supra,* 224 Cal.App.3d at p. 1342; *Jennings v. Superior Court, supra,* 66 Cal.2d at pp. 874-875; *People v. Pennington, supra,* 228 Cal.App.3d at p. 964.) "Courts have found defendants not 'legally committed: (1) where the preliminary hearing [was] not conducted within 10 court days following arraignment . . . ." (*People v. West, supra,* at p. 1343.) "The right to a speedy trial is a substantial right. [Citation.]" (*Miller v. Superior Court, supra,* 101 Cal.App.4th at p. 740.)

Cases construing earlier versions of section 859b, which did not contain the current provision allowing for a good cause continuance if the defendant is released O.R. (see *Landrum v. Superior Court, supra,* 30 Cal.3d at pp. 5-6, fns. 4, 6, & p. 12; Stats. 1977, ch. 1152, § 1, pp. 3698-3699), held that a defendant was not legally committed where the 10-day time limit had been violated. For example, *Serrato v. Superior Court* (1978) 76 Cal.App.3d 459, superseded by statute on other grounds as stated in *Stroud v. Superior Court* (2000) 23 Cal.4th 952, 965, held a violation of the time limit rendered the resulting commitment illegal, entitling the defendant to relief under section 995. *Serrato* explained that the version of section 859b then extant established the "absolute right" of

an in-custody defendant to a preliminary hearing within the statutory 10-day period. (*Serrato v. Superior Court, supra,* at pp. 464-465.) The defendant was not required to establish prejudice to obtain pretrial relief: "[I]f a magistrate disregards a substantial right" guaranteed to a defendant, "the resulting commitment is unlawful; an affirmative showing of prejudice is not required where the right is absolute or mandatory in nature. [Citations.]" (*Id.* at p. 467; see also *Johnson v. Superior Court* (1979) 97 Cal.App.3d 682, 686 [in-custody defendant whose preliminary examination was held outside the statutory time period entitled to relief under section 995; no showing of prejudice was required].)

In *Stroud v. Superior Court, supra,* 23 Cal.4th 952, the California Supreme Court considered the application of section 861, which requires dismissal of a criminal complaint if the preliminary examination is not completed in one session, unless the magistrate, for good cause shown by affidavit, postpones it. (*Id.* at p. 956.) In dicta, the court explained: "Section 995 requires that an information be set aside upon the defendant's motion if, among other things, 'before the filing [of the information] the defendant had not been legally committed by a magistrate.' [Citation.] In *People v. Pompa-Ortiz* [*supra,* 27 Cal.3d 519] . . . [the court] deemed it 'settled that the denial of a *substantial right* at the preliminary examination renders the ensuing commitment illegal and entitles a defendant to dismissal of the information on timely motion. [Citations.]' . . . Under current law, it thus seems to follow that *if* a violation of section 861 occurred, and the magistrate nonetheless refused to dismiss the complaint, the defendant's subsequent commitment was not legal, and he was thus deprived of a substantial right for which *pretrial* relief is available under section 995, even if he suffered no prejudice beyond the interruption or delay itself. [Citation.]" (*Stroud v. Superior Court, supra,* at p. 963, fn. 4.)

More recently, *People v. Konow, supra,* 32 Cal.4th 995, held that a defendant is denied a substantial right affecting the legality of the commitment when a magistrate erroneously and prejudicially fails to consider whether to dismiss a complaint in furtherance of justice under section 1385. (*Id.* at pp. 1001-1002, 1024-1025.) In *Konow*,

the defendants were various officers and employees of the California Alternative Medicinal Center, Inc. (CAMC), a for-profit corporation formed after the passage of Proposition 215 (the "Medical Use of Marijuana" initiative), to sell and distribute marijuana to qualified patients and primary caregivers. (*Id.* at pp. 1002, 1004.) The defendants were prosecuted for felony marijuana sales, despite much evidence that they had attempted to operate within the confines of the law and sought endorsement of their activities from the city attorney and the chief of police. (*Id.* at pp. 1003-1005.) The magistrate initially ordered the complaint dismissed on grounds that, inter alia, the statute under which the defendants were being prosecuted was invalid as applied to sales to qualified patients and primary caregivers. (*Id.* at p. 1006.) The People's subsequent motion to compel reinstatement of the complaint was granted. On remand, the original magistrate declined the defendants' invitation to dismiss the complaint under section 1385. The magistrate indicated that he would " 'dearly love to accept' " the invitation because he believed that on the facts of the case, justice was being "subverted." (*Id.* at p. 1009.) However, he felt constrained to deny the request by the order compelling reinstatement of the complaint. (*Ibid.*) The defendants moved in superior court to set aside the information under section 995, arguing, inter alia, that they had been denied a substantial right – i.e., the magistrate's consideration of whether to dismiss the complaint in furtherance of justice under section 1385. (*Id.* at pp. 1009, 1021.)

The California Supreme Court concluded that the superior court may set aside an information under section 995 "when the magistrate erroneously and prejudicially has failed to consider whether to dismiss the complaint in furtherance of justice under section 1385." (*People v. Konow, supra,* 32 Cal.4th at p. 1021.) *Konow* acknowledged that a defendant has no right to make a formal motion before a magistrate to dismiss in furtherance of justice pursuant to section 1385. (*Id.* at p. 1022.) Nonetheless, a defendant may informally suggest that the magistrate exercise his or her authority to dismiss on his or her own motion. *Konow* relied upon *Jennings v. Superior Court, supra,* 66 Cal.2d 867, which considered whether the denial of a defendant's right to present an affirmative defense at his preliminary hearing infringed a substantial right. (*Jennings v.*

Superior Court, supra, at p. 871.) *Jennings,* in turn, had contrasted two earlier cases -- *Mitchell v. Superior Court* (1958) 50 Cal.2d 827 and *Priestly v. Superior Court* (1958) 50 Cal.2d 812 -- which had considered whether restriction or denial of the right of cross-examination at the preliminary hearing denied defendants' substantial rights. (*People v. Konow, supra,* at pp. 1023-1024.) In *Jennings,* and impliedly in *Priestly,* curtailment of the defendants' right to cross-examine constituted the denial of a substantial right; in *Mitchell,* it did not. (*People v. Konow, supra,* at p. 1023; *Jennings v. Superior Court, supra,* at pp. 878-880; *Currie v. Superior Court* (1991) 230 Cal.App.3d 83, 98-99.) In essence, the distinction between the cases was that in *Jennings* and *Priestly,* the cross-examination was intended to discredit the People's case, whereas in *Mitchell,* the cross-examination was intended only to assist in preparation for trial. " ' "Not [in] every instance in which a cross-examiner's question is disallowed will defendant's right to a fair hearing be abridged, since the matter may be too unimportant [citation], or there may be no prejudice [citation], or the question may involve issues which can be brought up at a more appropriate time [citation]." ' " (*People v. Konow, supra,* at p. 1024, quoting *Jennings v. Superior Court, supra,* 66 Cal.2d at p. 879.)

From these authorities, *Konow* gleaned that "a defendant is denied a substantial right affecting the legality of the commitment when he or she is subjected to prejudicial error, that is, error that reasonably might have affected the outcome (see *Currie v. Superior Court*[*, supra,* 230 Cal.App.3d at pp. 98-101])." (*People v. Konow, supra,* 32 Cal.4th at p. 1024.) This holding, *Konow* reasoned, "is in accord with judicial practice in other areas of the law where, as in the context of plain error rules, a defendant is deemed to be denied a substantial right by exposure to prejudicial error. [Citations.]" (*People v. Konow, supra,* at pp. 1024-1025.) Thus, "to deny a defendant a substantial right affecting the legality of the commitment . . . the magistrate's failure must be *prejudicial* as well as *erroneous*." (*Id.* at p. 1025, fn. 10.)

We believe a defendant's statutory right to O.R. release pending a preliminary hearing set after the 10-court-day deadline can only be characterized as a substantial right. The time limit and the release provision are both aimed at the same goal:

preventing the prolonged incarceration of defendants without a probable cause determination. (See *In re Samano, supra,* 31 Cal.App.4th at p. 990; *Landrum v. Superior Court, supra,* 30 Cal.3d at p. 12; *People v. Kowalski, supra,* 196 Cal.App.3d at p. 178.) It cannot seriously be disputed that liberty is a substantial right in this context. (Cal. Const., art. I, § 7, subd. (a) [a person may not be deprived of life, liberty, or property without due process of law]; *People v. Olivas* (1976) 17 Cal.3d 236, 251 [concluding that personal liberty is a fundamental interest, second only to life itself, protected under both the California and United States Constitutions]; *People v. Applin* (1995) 40 Cal.App.4th 404, 409 ["Personal liberty is a fundamental right."].) Indeed, a comparison with *Konow* highlights the substantial nature of the right at issue here. If the deprivation of an opportunity to have a magistrate consider a section 1385 dismissal is a substantial right, certainly a defendant's statutorily-mandated right to O.R. release, which impacts his or her personal liberty, must be characterized as a substantial right.

We recognize that when *Serrato* and *Johnson* were decided, the right to O.R. release was "absolute," under the versions of section 859b then in effect. (E.g., *Serrato v. Superior Court, supra,* 76 Cal.App.3d at p. 464.) Under current law, in contrast, there are limited exceptions to section 859b's 10-day limit, and the statute may "be tempered by constitutional principles and principles affecting the administration of justice." (*In re Samano, supra,* 31 Cal.App.4th at pp. 990, 993 [the request of one properly joined defendant for a continuance of the preliminary examination with good cause shall be deemed a request of all jointly charged defendants]; see also *People v. Kowalski, supra,* 196 Cal.App.3d at p. 179 [where a defendant's invocation of his right to a preliminary hearing within 10 days conflicts with his constitutional right to counsel, the constitutional right prevails]; *People v. Luu, supra,* 209 Cal.App.3d at pp. 1405, 1407 [absent a showing of prejudice, section 859b does not require dismissal of a complaint if the preliminary hearing is set past the 10-day period without good cause unless the defendant is in custody].) Nonetheless, the existence of such exceptions does not change the fact that the statutory right to O.R. release is a substantial right. Because violation of the O.R. release provision impacts a substantial right, violation of that right renders the ensuing

commitment illegal and entitles a defendant to dismissal of the information through a timely motion brought pursuant to section 995.

We also conclude that *Konow*'s language, while seemingly broad, does not impose a prejudice requirement in all instances where a defendant claims violation of a substantial right. Of course, challenges to irregularities in the preliminary examination procedure brought for the first time after trial do not require reversal unless the defendant demonstrates prejudice. "[W]hen a defendant presents, by way of a pretrial writ petition, claims that establish irregularities in preliminary hearing procedures, the court will grant relief – for example, dismissal and remand for a new, properly conducted preliminary hearing – 'without any showing of prejudice.' [Citation.] But when such claims are presented for the first time on appeal, 'irregularities . . . which are not jurisdictional in the fundamental sense shall be reviewed under the appropriate standard of prejudicial error and shall require reversal only if the defendant can show that he was *deprived of a fair trial or otherwise suffered prejudice* as a result of the error at the preliminary examination.' [Citation.]" (*People v. Stewart* (2004) 33 Cal.4th 425, 461-462; see also *People v. Coleman* (1988) 46 Cal.3d 749, 773; *People v. Pompa-Ortiz, supra,* 27 Cal.3d at p. 529; *Merrill v. Superior Court* (1994) 27 Cal.App.4th 1586, 1595; *People v. Luu, supra,* 209 Cal.App.3d at p. 1404.) Indeed, this principle has been restated by our Supreme Court *after* its decision in *Konow*. (*People v. Stewart, supra,* at p. 461.) Instead, it is apparent that *Konow*'s discussion of the prejudice requirement is limited to those types of errors that can only impact a substantial right if they result in prejudice. *Konow*'s citation to *Currie v. Superior Court, supra,* 230 Cal.App.3d at pp. 98-101, is illustrative. (*People v. Konow, supra,* 32 Cal.4th at p. 1024.) *Currie* held, "The denial of certain rights is inherently substantial. *Jennings* provides examples: denial of counsel, failure of the magistrate to advise a defendant of his right to counsel, denial of a reasonable continuance to obtain counsel, granting an unsupported prosecution continuance motion (thereby violating § 861), and allowing, over defendant's objection, an unauthorized person to remain during the hearing (thereby violating § 868). [Citation.]" (*Currie v. Superior Court, supra,* at p. 98.) A "more selective test" is

applied when the alleged violation of a substantial right is based upon the magistrate's evidentiary rulings. (*Jennings v. Superior Court, supra,* 66 Cal.2d at p. 875; *Currie v. Superior Court, supra,* at p. 98.) *Konow*'s prejudice requirement therefore appears to apply where the right at issue cannot have affected a defendant's substantial rights in the absence of prejudice.

The denial of O.R. release is not in this category. Denial of the right to O.R. release – i.e., to liberty – is inherently substantial. (Cf. *Currie v. Superior Court, supra,* 230 Cal.App.3d at p. 98.) While denial of O.R. release may or may not affect the outcome of the case, in every instance the denial infringes upon a defendant's liberty interests. It therefore follows that denial of O.R. release to a defendant in contravention of section 859b deprives the defendant of a substantial right affecting the legality of the commitment, and the information may properly be set aside if the defendant brings a timely section 995 motion.

The People point to language in section 859b that "the magistrate shall dismiss the complaint if the preliminary examination is set or continued beyond 10 court days from the time of the arraignment . . . ." (§ 859b.) From this language, the People argue that section 859b authorizes only the magistrate to dismiss a complaint up to the time the preliminary hearing is set or continued, and does not authorize a trial court "to set aside the information after the defendant has been held to answer in a preliminary hearing set beyond the statutory period." Once the preliminary hearing has been held and probable cause found, the People argue, the purpose of section 859b has been served, in that the accused is no longer being held without probable cause. Because section 859b does not contain any reference to a trial court's dismissal of the information, the People argue, the principle of *expressio unius est exclusio alterius* suggests no other remedy is available. Instead, the People assert, the proper method to challenge an erroneous failure to release the defendant pursuant to section 859b is through a petition for writ of habeas corpus or mandamus.

These arguments fail. Apart from the language of section 859b, as we have discussed, it is well settled that section 995 provides for dismissal of the information

when a defendant's substantial rights at the preliminary hearing are violated. As we have noted *supra,* while section 871.6 allows for writ relief, section 871.6 does not affect the availability of a section 995 motion. Moreover, the People's argument – essentially that a defendant held past the 10-day limit in violation of the release requirement has nothing to complain about after the preliminary hearing is eventually held – lacks merit. The People acknowledge "the purpose of section 859b is primarily to ensure the speedy judicial determination of probable cause, and *failing that*, to effect the release of a defendant confined solely on the charge more than 10 days without such [a] determination." It is difficult to see how either of those goals could be accomplished if the People's interpretation of the statute was the law. Standish received neither a determination of probable cause within the requisite time limit, nor was he released. The fact the court later found probable cause does not ameliorate the original violation of his timely-asserted rights. Under the People's theory, presumably a defendant could be held for *any* length of time prior to the preliminary examination, as long as probable cause was eventually adjudicated in a preliminary hearing. We decline to read the law in such an unreasonable manner.

DISPOSITION

The order is affirmed.

CERTIFIED FOR PUBLICATION

ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.