No. S248125

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re Christopher Lee White,

on Habeas Corpus.

Application for Leave to File *Amici* Brief and Proposed Brief of *Amici Curiae* ACLU of Northern California, ACLU of Southern California and ACLU of San Diego and Imperial Counties in Support of Petitioner Christopher Lee White

After Decision by the Court of Appeal
Fourth Appellate District, Division 1, Case No. D073054

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APPLICATION

Pursuant to Rule 8.520(f) of the California Rules of Court, the American Civil Liberties Union ("ACLU") of Northern California, ACLU of Southern California, and ACLU of San Diego and Imperial Counties (collectively "*Amici*") respectfully apply for permission to file the *Amici Curiae* brief contained herein.

The proposed *Amici Curiae* brief will address the Court's second and third questions about the proper standard of review that applies to review of the denial of bail and whether the Court of Appeal erred in this case in affirming the trial court's denial of bail to defendant White.

Amici are the three California affiliates of the national ACLU, a nationwide nonprofit, nonpartisan organization with more than 1.75 million members dedicated to preserving and protecting the principles of liberty and equality embodied in the state and federal Constitutions and related statutes. The ACLU of California entities, which together have an approximate membership of 300,000, have a longstanding interest in preserving the constitutional rights of persons involved in the criminal justice system and have often submitted amicus briefs to this Court in such cases. The ACLU of California affiliates have a strong interest in and familiarity with pretrial release law and policy in California and the limits on pretrial detention under the state and federal Constitutions.

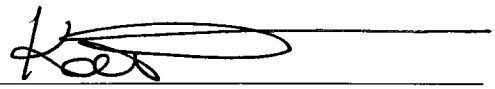
No party, or counsel for any party, in this matter has authored any

part of the accompanying proposed *Amici Curiae* brief, nor has any person or entity made any monetary contributions to fund the preparation or submission of this brief.

Dated: January 4, 2019

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA, INC.

By: 

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INTRODUCTION

Amici submit this brief to address the Court's second and third questions: "What standard of review applies to the review of denial of bail? and "Did the Court of Appeal err in affirming the trial court's denial of bail?"[1]

The answer to the second question is that independent review, rather than "substantial evidence" review, is required for review of denial of bail because that review involves a mixed question of law and fact and one that implicates fundamental constitutional interests.

The answer to the third question is that the Court of Appeal erred in affirming the trial court's denial of bail. Article I, section 12 of the California Constitution ("Section 12") requires release on bail[2] for noncapital crimes with two extremely circumscribed exceptions. The trial

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[1] *Amici* have already answered the Court's first question about the limits of preventive detention under the California Constitution and the reconciliation between Article I, sections 12(b) and (c) and 28(f)(3) of the California Constitution in an amicus brief filed in *In re Humphrey*, S247278, on October 9, 2018. *Amici* do not reprise those arguments here.

[2] *Amici* treat the concept of bail, as it has historically been construed, as conferring a right to release, rather than simply a right to have a monetary amount set, and as referring to both monetary and non-monetary conditions of release. *See, e.g.*, *Stack v. Boyle*, 342 U.S. 1, 4-5 (1951) (discussing bail in the context of the "traditional right to freedom before conviction" and "[t]he right to release before trial"); Timothy R. Schnacke, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform*, U.S. DOJ, Nat'l Inst. of Corrs., 19-35 (Sept. 2014), *available at*: https://nicic.gov/fundamentals-bail-resource-guide-pretrial-practitioners-and-framework-american-pretrial-reform.

court in this case denied petitioner Christopher White bail under Section 12, subdivision (b). This exception applies only to felony offenses involving acts of violence on another person, or felony sexual assault offenses on another person, when there is substantial evidence of the guilt of the accused and it is established by "clear and convincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others." Cal. Const., art. I, § 12(b). The trial court erred in making this finding below, and the Court of Appeal, impermissibly applying a deferential standard of review, affirmed the trial court's denial of bail. *In re White*, 21 Cal. App. 5th 18, 29-31 (2018). Had the Court of Appeal applied the correct standard of de novo review, the court would have recognized that White's pretrial release was constitutionally compelled.

STATEMENT OF THE CASE

Defendant White was charged as an accomplice to an attempted kidnapping and assault with intent to commit rape and lesser related charges. The factual allegations are not in dispute. The evidence adduced at the preliminary hearing established that White stood nearby while the main perpetrator, Owens, allegedly tried to abduct a teenage girl. No weapon was used during the offense. According to the complaining witness's own testimony, White apologized to her during the incident. *Id.* at 22, Pet'r's Ex. B, 33. White denied having knowledge of Owens's intent to the police, with whom he cooperated. Pet'r's Exs. C and D, 205-206, 212, 223-224,

227, 229, 230, 234. However, the testimony also established probable cause to believe that, *inter alia*, White acted as lookout, served as a getaway driver, and said words that instigated Owens during the incident. *White,* 21 Cal. App. 5th at 21-24.

Taken as a whole, this evidence was likely sufficient to at least hold White to answer for the felony crimes charged in the complaint. *See* Cal. Pen. Code § 995. Whether it was enough to preventively detain White pending trial is another matter entirely—and the focus of this brief.

White sought reasonable bail after the preliminary hearing. A twenty-seven-year-old high-school graduate, White was employed as a cable installer prior to his arrest. He had many letters of support from family and friends and had lifelong ties in Arizona, which was where he planned to live with his parents pending trial. He was not on probation, parole or other supervised release at the time of this incident; in fact, he had no prior criminal history at all. Pet'r's Ex. A. White did not challenge the victim's credibility; rather he argued that the undisputed facts belied a shared criminal intent with the main perpetrator. He requested bail be set at $50,000. Pet'r's Ex. B, 183-86, 191-92.

The trial court detained both White and his co-defendant without bail, stating that "In looking at this case and the facts of the case . . . The Court finds on the basis of the clear and convincing evidence that there is a substantial likelihood that the release of either of these gentlemen would

result in great bodily harm to others." *White*, 21 Cal. App. 5th at 24. In affirming the trial court's order, the Court of Appeal applied the deferential "substantial evidence" standard of review, *id.* at 25, which derives from the standard to determine whether evidence is sufficient at trial, under which "the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence that is, evidence which is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." *People v. Johnson*, 26 Cal. 3d 557, 578 (1980). Although the Court of Appeal acknowledged that this was a close call, it upheld the detention order. *White,* 21 Cal. App· 5th at 31. Had it applied the correct standard of independent review, it would have reversed. This ruling was constitutional error, and this Court should reverse.

ARGUMENT

I. Pretrial detention orders must be reviewed de novo because the determination about whether a defendant may be detained due to a finding of risk is a mixed question of law and fact implicating constitutional rights

A. Mixed questions of law and fact implicating constitutional rights demand de novo review

The United States Supreme Court has characterized mixed questions of law and fact this way: "[T]he historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant] statutory [or constitutional] standard, or to put it another way,

whether the rule of law as applied to the established facts is or is not violated." *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982).

Although not all instances of application of law to fact are subject to independent review, the seminal case from the United States Court of Appeal for the Ninth Circuit, *United States v. McConney*, which has been cited with approval multiple times by this Court, held that if the question of "whether the rule of law as applied to the established facts is or is not violated" requires the court "to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles, then the concerns of judicial administration will favor the appellate court, and the question should be classified as one of law and reviewed de novo." *United States v. McConney*, 728 F.2d 1195, 1203 (9th Cir. 1984) (en banc), *cert. denied*, 469 U.S. 824, 105 S. Ct. 101, 83 L. Ed. 2d 46, (internal citation omitted), *overruled on other grounds as recognized by United States v. Camou*, 773 F. 3d 932 (2014). This mixed question of fact and law stands in contrast to the precursor fact-finding, which lies more properly in the province of the trial court due to that court's superior ability to observe the demeanor of witnesses, make credibility determinations, and conduct other live inquiry available only to the trier of fact. *See, e.g., id.* at 1201.

McConney also held that "[t]he predominance of factors favoring de novo review is even more striking when the mixed question implicates

constitutional rights," because "[i]n cases involving such questions, the application of law to fact will usually require that the court look to the well defined body of law concerning the relevant constitutional provision." *Id.* at 1203. The court ultimately determined that as to whether exigent circumstances justified the violation of the knock and announce rule, "[t]he mixed question of exigency [was] rooted in constitutional principles and policies," the resolution of which required the court "to consider abstract legal doctrines, to weigh underlying policy considerations, and to balance competing legal interests," such as determining how to "strike a balance between two sometimes conflicting societal values—the safety of law enforcement officers and fourth amendment privacy interests." *Id.* at 1205. Thus, it held that the district court's determination was properly subject to independent review. *Id.*

The two California Supreme Court cases that have decided the applicable standard of review for mixed questions of law and fact implicating constitutional rights relied heavily on *McConney* in holding that independent review was required. In *People v. Louis*, the Court "appl[ied] the *McConney* functional analysis" in holding "that the issue of [a prosecutor's] due diligence in procuring a witness's attendance [which implicates the constitutional right of confrontation] is subject to independent review." *People v. Louis*, 42 Cal. 3d 969, 988 (1986). Although the *Louis* court did not issue a definitive ruling on the standard of

review, because it determined that it was not necessary to resolve the case in front of it, the Court revisited the issue in *People v. Cromer*. In affirming the reasoning in *Louis*, this Court further explained that the "trial court does not have a first-person vantage" in determining whether the prosecution's efforts to find a witness satisfy due diligence in the same way it would, for example, in determining juror bias or a defendant's competency to stand trial. *People v. Cromer*, 24 Cal. 4th 889, 901 (2001) (quoting *Thompson v. Keohane*, 516 U.S. 99, 114-15 (1995)). Nor did the Court find "a determination of due diligence so factually idiosyncratic and highly individualized as to lack any precedential value." *Id.* Instead, it held that the inquiry into due diligence in finding a witness "involve[d] . . . an inquiry that [went] beyond the historical facts," and instead was a mixed question "rooted in constitutional principles and policies," that required the Court "to consider abstract legal doctrines, to weigh underlying policy considerations, and to balance competing legal interests." *Id.* at 899-900 (quoting *McConney*, 728 F.2d at 1205). Thus, the trial court's application of the facts to the law in that case would be subject to independent review. *Id.*

The *Cromer* court also noted that its "conclusion that a trial court's due diligence determination is subject to independent review comports with [the] court's usual practice for review of mixed question determinations affecting constitutional rights." *Id.* at 901-02 (citing cases in which trial

court's determinations as to juror misconduct, voluntariness of confession, reasonableness of search, validity of *Miranda* waiver, and reasonableness of detention had all been held subject to independent review); *see also id.* at 898 (citing *Lilly v. Virginia*, 527 U.S. 116, 136 (1999) (holding that when determining questions about the admissibility of hearsay, "as with other fact-intensive, mixed questions of constitutional law, . . . '[i]ndependent review is . . . necessary . . . to maintain control of, and to clarify, the legal principles' governing the factual circumstances necessary to satisfy the protections of the Bill of Rights")). A review of the case law confirms that California courts generally review motions to suppress evidence obtained in violation of the Fourth Amendment under this standard and thereby apply de novo review. *See id.*; *see also People v. Leyba*, 29 Cal. 3d 591, 596-97 (1981) (reviewing a trial court's determination as to the reasonableness of a stop involved a two-step process—the first wherein the facts underlying the stop were adduced and which were afforded deferential review and the second wherein the appellate court exercised its independent judgment in measuring the found facts against the constitutional standard of reasonableness in the search context); *People v. Glaser*, 11 Cal. 4th 354, 362 (1995). Similarly, "[a] claim of ineffective assistance of counsel presents a mixed question of fact and law, which is generally subject to de novo review, especially where constitutional rights are implicated." *In re Alcox*, 137 Cal. App. 4th 657, 664–65 (2006), *as modified on denial of*

reh'g (Mar. 28, 2006), *rev. denied* (June 28, 2006) (citing *In re Resendiz*, 25 Cal. 4th 230, 248–250 (2001), *abrogated by Padilla v. Kentucky*, 559 U.S. 356 (2010)).

B. Pretrial detention orders impinge on constitutionally protected liberty interests

The standard of appellate review is vitally important in pretrial detention determinations. This Court has long recognized that the decision whether to detain a criminal defendant prior to trial is of great consequence, because "the detainee's liberty [is] a fundamental interest second only to life itself in terms of constitutional importance." *Van Atta v. Scott*, 27 Cal. 3d 424, 435 (1980), *superseded by statute as stated* in *In re York*, 9 Cal. 4th 1133, 1148 (1995); *People v. Olivas*, 17 Cal. 3d 236, 251 (1976) ("We conclude that personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and United States Constitutions."). The Court has explained that "a denial of pretrial release inflicts a direct 'grievous loss' upon the detainee" because the defendant remains confined in restrictive jail conditions with limited contact to visitors "often for periods of several months, despite the fact that there has been no determination of his guilt or innocence." *Van Atta v. Scott*, 27 Cal. 3d at 435 (internal citation omitted). As further noted by this Court, "other important deprivations which follow pretrial incarceration," include the impairment of attorney-client communications and the curtailment of a

defendant's ability to adequately prepare a defense, which can "impair[]" the "effectiveness of counsel's assistance and the detainee's right to a fair trial." *Id.* at 435-36 (citations omitted). The Court has further highlighted the critical consequences pretrial detention has on an individual outside the courtroom, including by "imperil[ing] his job, interrupt[ing] his source of income, and impair[ing] his family relationships." *Id.* at 436 (citing *Gerstein v. Pugh*, 420 U.S. 103, 114, 123 (1975)). Finally, the Court has acknowledged that "the burdens associated with pretrial detention are by no means limited to the detainee and his family," and that "[t]he total costs of pretrial confinement constitute a drain on public funds," including not only the costs associated with incarcerating individuals, but also ancillary costs, "such as welfare payments to families of detainees who lose their income." *Id.* at 436-37.

The United States Supreme Court has similarly long acknowledged the critical nature of a pretrial defendant's liberty interest and the severe consequences that attach to pretrial confinement in setting constitutional limits on pretrial detention. In holding that a judicial probable cause determination was necessary in the context of post-arrest detention, the Supreme Court observed that "the consequences of prolonged detention" can be "serious," including, as cited in *Van Atta*, that the detention "may imperil the suspect's job, interrupt his source of income, and impair his family relationships," in addition to negatively impacting his "ability to

assist in preparation of his defense." *Gerstein v. Pugh*, 420 U.S. at 114, 123; *see also Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 52, 55-56 (1991) (noting the importance of the defendant's interests in remaining free prior to trial in setting a 48-hour deadline for probable cause hearings). In a case involving a speedy trial claim, the Supreme Court explained that "[t]he time spent in jail awaiting trial has a detrimental impact on the individual," and "often means loss of a job" and "disrupt[ion of] family life," in addition to the defendant's being "hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense." *Barker v. Wingo*, 407 U.S. 514, 532–33 (1972).

Finally, the Supreme Court has made clear that due to the "fundamental nature of [the] right" to liberty, "liberty is the norm, and detention prior to trial" must be a "carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 750, 755 (1987) (setting forth this standard in the context of reviewing the constitutionality of the Federal Bail Reform Act); *see also Stack v. Boyle*, 342 U.S. 1, 4 (1951) (explaining that the "traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction . . . Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning"); *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 777 (9th Cir. 2014) (citing to precedent limiting pretrial detention in striking down a

pretrial detention statute that was not narrowly tailored to serve a compelling state interest). At bottom, the Supreme Court has consistently held that "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

Recent research provides empirical support for these long-held judicial principles. Academic studies have found that being subject to pretrial detention increases both the likelihood of conviction and the length of the ultimate sentence imposed. *See, e.g.*, Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711, 741–59, 787 (2017); Will Dobbie, Jacob Goldin & Crystal S. Yang, *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 Am. Econ. Rev. 201, 224-26, 234 (2018). The research also shows that detention can negatively impact defendants' future employment prospects, Dobbie et al., 227-32, 235, that pretrial detention can negatively impact the welfare and safety of the families and communities of criminal defendants. *See e.g.* Jocelyn Simonson, *Bail Nullification*, 115 Mich. L. Rev. 585, 612-21 (2017); Vera Institute of Justice, *Incarceration's Front Door: The Misuse of Jails in America* (Feb.

2015) at 5, 12-13.[3]

The significance of these studies is twofold. First, they confirm why freedom is so critical to presumptively innocent, pretrial detainees. Second, they reveal how overuse of pretrial detention can have the perverse effects of decreasing public safety and community welfare by eliminating support systems and destroying communities.[4]

In sum, the standard of review in this context is critical.

C. Determinations of pretrial release warrant independent appellate review

Here, although findings about historical facts—such as the facts underlying the charged offense, defendant's criminal history, statements made by the defendant and witnesses—are subject to deferential review, a court's determination that those facts mean there is a substantial likelihood that the defendant will harm another upon pretrial release involves a legal conclusion that exceeds simple fact-finding. As with the determination of exigency in *McConney*, the determination whether there is a level of dangerousness supporting pretrial detention requires the court to "strike a balance between two sometimes conflicting societal values"—here the

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[3] *Available at*: https://www.vera.org/publications/incarcerations-front-door-the-misuse-of-jails-in-america

[4] *See e.g.* Brief of *Amicus Curiae* Crime Survivors for Safety and Justice, filed in *In re Humphrey*, S247278, Oct. 9, 2018; Brief of *Amici Curiae* National Law Professors of Criminal, Procedural and Constitutional Law, filed in *In re Humphrey*, S247278, Oct. 9, 2018.

defendant's due process liberty interest and the risk of harm to potential victims. *See McConney*, 728 F.2d at 1205.

The legal framework to be applied to a pretrial detention determination is animated by constitutional principles and policies. It includes the recognition that liberty is the norm, but also requires courts to strike a balance between freedom and other societal interests. In the pretrial release context, those principles should include the following: (1) pretrial detention should be rare; (2) any doubt should be resolved in favor of release; (3) a person should not be detained pretrial solely on generalizations about future criminality that lack any limiting principle or individualized basis; (4) no judge ought or need presume the truth of the charges for purposes of a bail determination. *See, e.g.*, *Salerno*, 481 U.S. at 755 ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."); *United States v. Motamedi*, 767 F.2d 1403, 1407 (9th Cir. 1985) ("In concluding that the Government's burden in denying bail on the basis of flight risk is that of the preponderance of the evidence, we are not unmindful of the presumption of innocence and its corollary that the right to bail should be denied only for the strongest of reasons"); *Truong Dinh Hung v. United States*, 439 U.S. 1326, 1329 (1978) (Brennan, J., in chambers) ("I am mindful that '[t]he command of the Eighth Amendment that [e]xcessive bail shall not be required . . . *at the very least* obligates judges passing upon the right to bail

to deny such relief only for the strongest of reasons.'" (internal citations omitted)); *White,* 21 Cal. App. 5th at 29 ("it will be the "rare" and "unusual" case where a court is able to make a finding authorizing detention); *United States v. Townsend*, 897 F.2d at 994 (citing *Herzog v. United States*, 75 S.Ct. 349, 351 (Douglas, Circuit Justice 1955) (doubts about the propriety of release are to be resolved in favor of defendants).

The claim that the finding that White's release would result in great bodily harm to others is a purely factual one is also unpersuasive as a matter of basic evidentiary rules. *Cf. White,* 21 Cal. App. 5th at 29, Resp. Brief on the Merits, 22. Assertions of fact can be proven true or false. Witnesses testify to facts in court. Here, for example, the alleged victim's statement that White and his co-defendant were staring at her before the incident is a fact. In crediting her testimony, the trial judge adopted this fact. However, a determination that, based on all of these facts, White's detention was permissible under the state constitution is a decidedly legal conclusion. No witness could competently testify to this in court: it would be an improper opinion, properly subject to objection as speculative or beyond the province of the witness. *See generally* Cal. Evid. Code § 702.

Moreover, this determination does not rely on a trial court's first-hand observation of witnesses or assessment of credibility; instead, once the trial court has found the underlying facts via witness testimony or evidence in the proceedings, the determination of risk requires a court "to

consider abstract legal doctrines, to weigh underlying policy considerations, and to balance competing legal interests," in applying the facts to the law. *People v. Cromer*, 24 Cal. 4th at 899-900 (quoting *McConney*, 728 F.2d at 1205, fn. omitted). Thus, it is unlike the types of conduct that remain properly evaluated by the trial court, such as determinations of whether a juror is biased or whether a defendant is not competent to stand trial. *See Cromer*, 24 Cal. 4th at 901. Instead, because pretrial detention orders implicate fundamental constitutional rights, robust appellate review is necessary.[5]

The conclusion that detention orders demand de novo appellate review under the California Constitution is buttressed by Ninth Circuit law holding that de novo review is appropriate for pretrial detention orders issued under the Federal Bail Reform Act. In *United States v. Motamedi*, the Ninth Circuit held that although it would review the lower court's factual findings in support of the detention order under a clearly erroneous

[5] This is not to be confused with review of a typical trial court order setting bail in a certain amount, which is reviewed for abuse of discretion. *In re Christie*, 92 Cal. App. 4th 1101, 1107 (2001). De novo review is only appropriate if a bail determination functions as a de facto detention order. *See In re Humphrey*, 19 Cal. App. 5th 1006, 1022 (2018) *rev. granted* (quoting *In re Taylor*, 60 Cal. 4th 1019, 1035 (2015) (where the material facts are undisputed and "the application of law to fact is predominantly legal, such as when it implicates constitutional rights and the exercise of judgment about the values underlying legal principles, [the appellate] court's review is de novo.")

standard, "[i]n a release determination ... the conclusion based on those factual findings presents a mixed question of fact and law," which "inquiry transcends the facts presented and requires both the consideration of legal principles and the exercise of sound judgment about the values which underly those principles." *United States v. Motamedi*, 767 F.2d 1403, 1405 (9th Cir. 1985) (citing *McConney*, 728 F.2d at 1202). The court further clarified that "[i]n reviewing a district court's order denying pretrial release, [it] must ensure not only that the factual findings support the conclusion reached, but also that the person's constitutional and statutory rights have been respected." *Id.* (citing *Truong Dinh Hung*, 439 U.S. at 1328-29). Thus, the court held that it "may make an independent examination of the facts, the findings, and the record to determine whether the pretrial detention order is consistent with those constitutional and statutory rights." *Id.* (citing *McConney*, 728 F.2d at 1202); *see also United States v. Townsend*, 897 F.2d 989, 994 (9th Cir. 1990) (citing *Motamedi* and *McConney* in holding that it would conduct an "independent examination of the record to determine whether the pretrial detention order [was] consistent with the defendant's constitutional and statutory rights and [would] arrive at [its] conclusion *de novo*").

Finally, considerations of judicial administration weigh in favor of de novo review. The application of law to fact here is of precedential importance. Development of a body of law is particularly critical at this

juncture in view of efforts to end the use of money bail and increased reliance on other objective factors to make pretrial release determinations. *See, e.g.*, S.B 10, 2017-2018 Reg. Sess. (Cal. 2018). As *McConney* held, mixed questions of law and fact involving constitutional rights "usually require that the court look to the well-defined body of law concerning the relevant constitutional provision." *McConney*, 728 F.2d at 1203. Appellate courts are far better positioned to develop this law than trial courts and well poised to ensure uniform application of the relevant constitutional provisions. There is a strong need for the appellate courts to provide a cohesive body of case law and independently review the decisions of overburdened trial courts that lack the luxury of time and multiple decisionmakers. *Id.* at 1201 (explaining that "appellate judges are freer to concentrate on legal questions because they are not encumbered, as are trial judges, by the vital, but time-consuming, process of hearing evidence," and noting the benefit of having "the judgment of at least three members of an appellate panel is brought to bear on every case"). The need for independent appellate review is particularly strong here, where constitutional rights are at issue.

Absent independent review, deference to trial court decisions would inevitably lead to factually similar pretrial detainees being afforded or denied liberty depending on which trial judge happened to hear their case. This would be a far cry from satisfying the protection of the Bill of Rights.

II. The Court of Appeal erred in affirming the trial court's denial of bail

A. Applying the proper standard of de novo review, it is clear that the Court of Appeal erred in affirming the trial court's denial of bail

Applying the proper standard of de novo review here, it is clear that the Court of Appeal erred in affirming the trial court's denial of bail.

The undisputed historical facts include the following: Christopher White, a high-school graduate, was employed as a cable installer prior to his arrest. He had many letters of support from family and friends and a stable home to return to upon release. He had no prior criminal history. Pet'r's Ex. A. The preliminary hearing testimony established, *inter alia,* that White stood nearby while his co-defendant tried to abduct the complaining witness, apologized to the complaining witness after the attempted abduction, said words alleged to have instigated the co-defendant, and quickly drove the co-defendant away after the incident. *White*, 21 Cal. App. 4th at 21-23. White told police he was starting to look for a counselor for Owens due to his friend's recent struggle with mental health issues. Pet'r's Ex. B, 206.

Applying the legal framework to these facts and informed by the value judgments and competing interests at stake, the trial court erred in detaining White under Section 12. Apart from the conduct alleged here, in which White played, at most, an indisputably passive role, there was no

basis to imprison him pending trial. White had a job, family and community support, and no criminal record. This record is simply devoid of any evidence (let alone clear and convincing evidence) that White's release would result in a "substantial likelihood" of harm to others. To conclude otherwise would be to render nugatory the meaning of the term "substantial likelihood." *Cf. White*, 21 Cal. App. 5th at 28 ("[t]his standard requires more than a more possibility, and it cannot be based on speculation about the general risk to public safety if a defendant is released."); *see generally People v. McDuffie*, 144 Cal. App. 4th 880, 887-888 (2006) (reversing trial court's involuntary medication order, because the state's evidence, which showed that at best the defendant had "a fifty to sixty percent chance of 'improving' if treated with the recommended antipsychotic drugs," was "simply not enough to support the trial court's finding that these drugs [were] "substantially likely" to render McDuffie competent to stand trial."). If White could not obtain pretrial release, it is hard to imagine how anyone else could.

And yet, in affirming the trial court's denial of bail, the Court of Appeal reasoned that since "[t]he criminal intent that led to the attack could apply to any stranger . . . [t]he trial court could therefore reasonably infer that [the defendant] would likely attack again . . . if released on bail." *White*, 21 Cal. App. 5th at 31. Essentially, the court concluded that by dint of the accusation alone, featuring a daytime crime against a stranger (one in

which White remained by the truck), the evidence was "so clear as to leave no substantial doubt" that White's release would result in a substantial likelihood of great bodily harm to others. *See id.* at 29-31 (citing *In re Nordin*, 143 Cal. App. 3d at p. 543 (describing clear and convincing evidence as "so clear as to leave no substantial doubt").[6]

This flawed logic lacks a limiting principle: taken to its logical extension, anyone charged with a crime of violence, whether as an accomplice or a principal, is to be automatically detained. If one is constitutionally permitted to assume that someone accused of committing a "brazen" crime against a stranger is substantially likely to harm another person if released, then *everyone* charged with a crime against a stranger can be automatically detained on this basis. On the other hand, defendants charged with crimes against people they know would logically fare no better. If someone is accused of committing a "brazen" violent crime against someone they know, why would that person not be equally detainable on the theory that if released, there exists a substantial likelihood that they would harm someone they know?

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[6] The government objected to the setting of bail as well. *White*, 21 Cal. App. 5th at 23. The sincerity of the government's concern is belied by the fact that White was subsequently offered a credit for time served deal – even though he was still not provided bail. *See* Ex. A attached to Petitioner's Request for Judicial Notice at 4.

This Court has already rejected this kind of speculation in *In re Pipinos*, 33 Cal. 3d 189, 199-202 (1982). That case concerned an appellant who sought bail on felony appeal, which is subject to the trial court's discretion. Nonetheless, even under that deferential lens of abuse of discretion, this Court rejected a trial court's conclusory finding that defendant posed "some substantial flight risk," solely because of the impending prison term he faced, in the absence of any balancing of countervailing factors: "Otherwise denials of bail would be proper in any case in which a prison term is imposed, regardless of offsetting factors presented by the defendant." *Id.* at 199. *Pipinos* relied on this Court's earlier admonition in *In re Podesto*, 15 Cal. 3d 921, 936 n. 10 (1976), that courts should not "adopt an ironclad, mechanical policy of denying bail [on appeal] to all who commit a particular crime." Here, rather than offering any particularized assessment, the trial court simply parroted the constitutional criteria for detention and offered no insight into its consideration of White's relative role in the incident, lack of criminal history, or character for non-violence. Pet'r's Ex. B, 195-96. As this Court has held in the context of denial of bail on appeal, denial of bail requires more than a "judicial conversance with the applicable standards," or else detention hearings risk becoming empty formalities. *In re Pipinos*, 33 Cal. 3d at 202.

That reasoning applies with equal force in this context. It would be mere conjecture to assume from the generic characteristics of a "stranger crime of violence" that a given individual's release is substantially likely to result in great bodily harm to others. If such conjecture were permitted, trial courts could arbitrarily deny bail to defendants charged with certain categories of cases, based solely on the alleged propensities of defendants, without regard to any of the individualized characteristics of a particular defendant—and detention, instead of freedom, would become the norm. *Cf. Salerno*, 481 U.S. at 755.

B. No court should assume the defendant guilty for purposes of pretrial detention determinations

No matter how robust the standard of appellate review of pretrial detention orders, it will be meaningless if an observation made by the Court of Appeal in footnote 5 is not addressed. There the Court of Appeal remarked that "in bail proceedings, the historical rule has been that the defendant is presumed *guilty* after indictment." *White*, 21 Cal. 5th at 30 n. 5. This is a variant of an oft-repeated mantra that for purposes of setting bail, the court must "presume" that the charges against the accused are true. There is no legal authority for this claim. The case generally relied upon for this proposition, *Ex parte Duncan*, 53 Cal. 410 (1879), did say—more than 100 years ago—that "except for the purpose of a fair and impartial trial before a petit jury, the presumption of guilt arises against the prisoner upon

the finding of an indictment against him." *Id.* at 411 (citing *Ex parte Ryan*, 44 Cal. 555, 558 (1872)). However, when this Court decided *Duncan*, "An indictment . . . [wa]s something more than a mere accusation based upon probable cause . . . A grand jury ought to find an indictment when all the evidence before them, taken together, is such as in their judgment would, if unexplained or uncontradicted, warrant a conviction by the trial jury." *People v. Tinder*, 19 Cal. 539, 539 (1862), *disapproved by People v. Cummiskey,* 3 Cal. 4th 1018 (1993).

By 1949, the law had changed. California now permits an indictment upon a mere accusation based upon probable cause. *See Lorenson v. Superior Court*, 35 Cal. 2d 49, 56-57 (1950); Cal. Penal Code § 995. This change undermined the legal basis for *Duncan's* "presumption of guilt" and has caused a perceptible shift in the rule. In *In re York*, 9 Cal. 4th at 1148, this Court cited *Duncan* but recalibrated its holding, explaining that "a presumption of innocence" does not apply to the determination of bail.

But, the inapplicability of a "presumption of innocence" is a far cry from there being a "presumption of guilt" in bail determinations. It is true that the "presumption of innocence" is a procedural protection that applies to the trial. By definition pretrial detainees have not been adjudicated guilty. *See, e.g. Stack v. Boyle*, 342 U.S. at 4 ("Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."). Thus, while a court hearing

an application for pretrial release need not presume a defendant innocent at the bail hearing, by the same token it also should not presume him guilty. It can and should fairly assess the wide spectrum of evidence in support of release, both aggravating and mitigating facts, mindful of the principle that pretrial detention should be exceptional. This case illustrates the perils of affording too much weight to the government's evidence during the preliminary stages of prosecution. Detention can become in effect a form of punishment, which is an impermissible purpose of a pretrial detention order. The Ninth Circuit cautioned against this in reversing a lower court's pretrial detention order:

> It is apparent from the record below that the district court accorded great weight to the charges against Motamedi and the Government's assertions of his guilt . . . Although the statute permits the court to consider the nature of the offense and the evidence of guilt, the statute neither requires nor permits a pretrial determination that the person is guilty . . . *Otherwise, if the court impermissibly makes a preliminary determination of guilt, the refusal to grant release could become in substance a matter of punishment.*

Motamedi, 767 F.2d at 1408 (emphasis added) (citations omitted).

While the statutory framework in federal court is different, the reasoning is analogous. Detaining a defendant solely by relying on preliminary evidence of his guilt, ignoring other mitigating evidence, and simply assuming from the accusations alone that release will be "substantially likely" to cause a danger to others, comes very close to a

form of pretrial punishment. This Court should explicitly reject such a proposition.

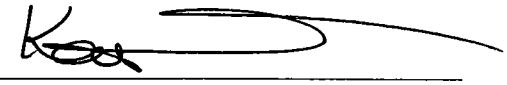
CONCLUSION

For far too long, pretrial release was assured only to the wealthy. Thanks to judicial, political and legislative reforms, this right is now acknowledged to belong to everyone, regardless of financial means. This Court should act to ensure the promise of bail reform does not become an empty formality by securing a meaningful standard of appellate review. For the foregoing reasons, this Court should hold that de novo review applies to appellate determinations of pretrial detention orders and that the trial court erred in this case in denying bail.

Dated: January 4, 2019

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA, INC.

By: 

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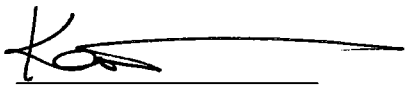
CERTIFICATE OF WORD COUNT

I certify pursuant to California Rule of Court 8.204 that this Brief of *Amici Curiae* contains 6,361 words, including footnotes, but excluding the cover, application, tables, signature blocks, and this certification, as calculated by the word count feature of Microsoft Word.

Dated: January 4, 2019 By: 

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PROOF OF SERVICE

I, Alec Bahramipour, declare under penalty of perjury under the laws of the State of California that the following is true and correct:

I am employed in the City of San Francisco, County of San Francisco, California, in the office of a member of the bar of this court, at whose direction the service was made. I am over the age of eighteen (18) years, and not a party to or interested in the within-entitled action. I am an employee of the American Civil Liberties Union Foundation of Northern California, and my business address is 39 Drumm Street, California 94111.

On January 4, 2019, I served the following document(s):

Application for Leave to File *Amici* Brief and Proposed Brief of *Amici Curiae* ACLU of Northern California, ACLU of Southern California, and ACLU of San Diego and Imperial Counties in Support of Petitioner Christopher Lee White

In the Following Case:
In re Christopher Lee White,
on Habeas Corpus.
No. S248125

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X__ By U.S. Mail enclosing a true copy in a sealed envelope in a designated area for outgoing mail, addressed with the aforementioned addressees. I am readily familiar with the business practices of the ACLU Foundation of Northern California for collection and processing of correspondence for mailing with the United States Postal Service and correspondence so collected and processed is deposited with the United States Postal Service on the same date in the ordinary course of business.

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 4, 2019 at San Francisco, California.

Alec Bahramipour,
Declarant