IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re Christopher Lee White, Petitioner, On Habeas Corpus.	Case No. S248125

Fourth District Court of Appeal, Division One, Case No. D073054
San Diego County Superior Court Case No. SCN376029

PETITIONER'S OPENING BRIEF ON THE MERITS

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Petitioner's Opening Brief on the Merits

Petitioner Christopher White respectfully submits this Opening Brief on the Merits.

Issues on Review

The court ordered briefing and argument on the following issues:

1. Under what circumstances does the California Constitution permit bail to be denied in noncapital cases? Included is the question of what constitutional provision governs the denial of bail in noncapital cases – article I, section 12, subdivisions (b) and (c), or article I, section 28, subdivision (f)(3),[1] of the California Constitution – or, in the alternative, whether these provisions may be reconciled.
2. What standard of review applies to the review of denial of bail?
3. Did the Court of Appeal err in affirming the trial court's denial of bail?

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[1] References to the constitutional provisions of article I, sections 12 and article I, section 28 shall be cited as "section 12" and "section 28."

Introduction

The California Constitution has guaranteed the right to bail[2] since its inception in 1849. Article I, section 12 requires release on bail for noncapital crimes with two very limited exceptions. Article I, section 28, the "Victim's Bill of Rights," does not mention section 12 or the right to bail it confers. Subdivision (f)(3) of section 28 does, however, state that a person "may" be released on bail in noncapital cases and that, "in setting, denying or reducing bail" the court shall consider factors such as victim and public safety. (Cal. Const. art. I, § 28, subd. (f)(3).)

Interpreting article I, section 28, subdivision (f)(3) as conferring discretion on the courts to deny bail would operate as an implied repeal of the centuries-old right to bail. There is a strong presumption against implied repeal, and it should and can be avoided by reconciling the two constitutional provisions. There is no evidence the electorate intended to repeal section 12 in enacting the amendments to section 28. Instead, the voters intended to have the courts consider victim safety in setting and granting bail as provided in section 12. This interpretation does not conflict with section 12 and it effectuates voter intent.

The trial court in this case denied bail to White under section 12, subdivision (b). This exception to bail is permitted only if there is substantial evidence of the accused's guilt and it is established by clear and convincing evidence that there is a substantial likelihood the accused's release would result in great bodily harm to others. (Cal. Const. art, I §12, subd. (b).) The Court of Appeal affirmed the trial court's order, applying a deferential standard of review. (*In re White* (2018) 21 Cal.App.5th 18.)

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[2] "The right to bail" is synonymous with the right to pretrial liberty. Thus, "bail" includes monetary bail and non-monetary conditions of release.

The guarantee of pretrial liberty is a significant constitutional right. Therefore, the denial of this fundamental liberty interest should be subject to an independent, de novo review by the appellate court. De novo review promotes consistency and uniformity in the rules governing the deprivation of the constitutional right of liberty.

The trial court erred in denying White's right to bail under section 12, subdivision (b). To deprive White of his liberty under this exception, there must be substantial evidence to support the charged offense of attempted kidnap to commit rape. The record does not support this finding. White was with his friend Owens standing by his truck after spending time at the beach. Owens suddenly ran up and grabbed a 15-year-old girl with no encouragement from White. White's shocked reaction to Owens' assault was consistent with that of an uninvolved person witnessing a friend's sudden and unexpected commission of a crime. No criminal intent can be inferred from White's hesitancy to intervene. After White apologized to the girl for his friend's behavior, he said "go in the house," but it was unclear to whom this was directed– the victim or Owens, though White's apology and Owens' inaction suggests it was directed to the girl. There is no substantial evidence of White's aiding Owens in this assault; the evidence is consistent with White's innocence.

The state also utterly failed to establish by clear and convincing evidence that there was a substantial likelihood White would cause great bodily harm to others if he was released on bail. White, a 27-year old man with no prior criminal record and no history of violence, did not inflict great bodily injury on anyone, nor is there any evidence that he would inflict great bodily injury if he was released on bail. The crime alone, aiding and abetting an unarmed felony assault, is not predictive of future violence. The facts of this case did not justify denial of bail under subdivision (b) of

section 12.

The state implicitly admitted this by offering White a plea bargain that resulted in his immediate release on summary probation. In the prosecutor's view, White only presented an imminent danger to the public while he asserted his constitutional right to a jury trial. The use of public safety as a pretext to punish the accused and coerce a guilty plea is not an imaginary danger; this case is a vivid reminder of why the right to bail is viewed as essential to due process.

Denying bail to an accused with no criminal record for aiding an unarmed felony assault would fill the jails with pretrial detainees and seriously dilute the invaluable constitutional guarantee of pretrial liberty afforded by section 12. The courts must protect the fundamental right to pretrial liberty by strictly limiting no-bail detention of the presumptively innocent.

Statement of the case

Christopher White was arrested on July 28, 2017, and charged with co-defendant Jeremy Owens with attempted kidnaping with intent to commit rape (Pen. Code[3] §§ 664/ 209, subd. (b)), assault with intent to commit rape (§ 220, subd. (a)(1)), contact with a minor with intent to commit a sexual offense (§ 288.3, subd. (a)) and false imprisonment (§§ 236 and 237, subd. (a).) All the offenses arise out of an assault occurring on July 26, 2017.

White was arraigned, pled not guilty and was detained without bail at the arraignment.

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[3] All statutory references are to the Penal Code unless otherwise stated.

A preliminary hearing was held on October 4 and 5, 2017.[4] Before the hearing, White filed letters from family and friends attesting to his character for non-violence in support of his bail request.[5] At the end of the preliminary hearing, the court bound White over for trial on all counts and conducted a hearing on White's request for bail. (Exh. B, pp. 190, 192-195.)

The defense requested release on bail of $50,000, identifying these factors supporting release: (i) White's support and lifelong ties to the community in Arizona, where White planned to live with his parents pending trial; (ii) White's gainful employment before his arrest as a cable installer; (iii) White's willingness to abide by any conditions of release set by the court, including stay away orders; (iv) White's lack of any prior criminal record; and (iv) White's significantly less culpable role in the offense conduct, carrying a maximum sentence of 9 years in state prison. White's parents were in attendance at the hearing and numerous family members wrote letters attesting to White's character for non-violence. (Exh. A; Exh. B, pp. 191-192.)

The prosecution requested detention for co-defendant Jeremy Owens, the perpetrator of the assault. As to White, the prosecutor stated that the court "is on sound legal ground to deny him bail," but submitted the issue to the court, in recognition that White "is not as culpable" as the co-defendant. (Exh. B., p. 195.)

The trial court found that "one defendant inflicted the acts of violence, the other person aided and abetted in that," and found "on the

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[4] The reporter's transcript of the October 4 and 5, 2017, preliminary hearing is attached to White's writ filed in the Court of Appeal as Exhibit B.

[5] Attached to the writ as Exhibit A is White's request for bail with supporting letters.

basis of 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" and that "the individual at threat would be [the complaining witness] herself" and that "other children, who are the most vulnerable members of our society, would be at risk based on the conduct in this case and what's alleged to have occurred in this case." (Exh. B, p. 196.) The court ordered White detained without bail. (Exh. B, p. 196.)

On November 3, 2017, White filed a writ of habeas corpus in the Court of Appeal challenging his detention. The Court of Appeal requested an informal response from the District Attorney and White filed a reply. On December 11, 2017, the Court of Appeal issued an order to show cause, set a briefing schedule, and indicated oral argument would be deemed waived unless either party requested it, in which case it could not be held until two months later on February 12, 2018. The District Attorney filed a response on December 22, and requested oral argument. White filed a traverse on January 4, 2018, and did not request oral argument.

The case was argued and submitted on February 12, 2018. On February 23, 2018, at a readiness conference, the state confirmed its offer to have White plead guilty to an accessory to attempted kidnap (§ 32) with three years summary probation and one year local custody. With credit for the seven months he had served, White would be entitled to immediate release. White rejected the offer. (See, Exhibit A attached to the Request for Judicial Notice filed with this petition.)

In the meantime, four months after filing the writ, the Court of Appeal issued its March 6, 2018, decision denying the writ. White filed a petition for rehearing on March 12, arguing that the state's continued detention of White constituted punishment and was not for the purpose of protecting the public, since the state was willing to release White

immediately if he pled guilty. White requested that the appellate court take judicial notice of the transcript of the readiness conference. The Court of Appeal denied the request for judicial notice and the rehearing petition.

White filed a petition for review, granted by this Court on May 23, 2018. This Court also granted White's request for judicial notice, but denied his request for immediate admission to bail.

Statement of facts

The evidence at the preliminary hearing established that, after White and Owens went to the beach, the two were standing by White's truck when Owens ran across the street and grabbed a 15-year-old girl, J.D., who was waxing her surfboard in front of her house. (Exh. B, pp. 28-30, 43.) She managed to break free of Owens. (Exh. B, p. 32.) She said "That's not cool. You guys can't do that." (Exh. B, p. 33.) White said "we're sorry" or "sorry" and J.D. backed away toward the gate, facing them. White remained standing by his truck. (Exh, p. 33, 54-56.) J.D. "had a feeling" that White was "almost kind of like the lookout guy." because he was "keeping his eye up and down the street." (Exh. B, p. 74.)

J.D. turned and opened the gate, and heard White say "go in the house." She assumed White directed this statement to Owens. (Exh. B, p. 34.) She locked the gate and went into her house. (Exh. B, pp. 34.) Owens and White left in the truck. (Exh. B, p. 34.)

White was arrested two days later. He repeatedly told the police that he did not know Owens was going to assault the girl and did not share Owens' intent. (See e.g., Exhs, C and D[6], pp. 205, 210, 212, 223-224, 227, 229, 230, 234.) He told the police that he was in his truck near the beach

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[6] Exhibits C and D are the transcripts of the recorded police interviews of White introduced at the preliminary hearing.

drying off and relaxing after he went body surfing with Owens. (Exh. C, p. 210.) Owens commented that the girl across the street was pretty, but White did not think much of it because they "say that kind of stuff about girls all the time." (Exh. C, p. 212.)

Owens ran up to the girl across the street and White thought Owens was "going to talk to her." (Ex. C, pp. 205, 212.) He saw Owens grab J.D. and White said "yo, stop" and Owens stopped and looked "really confused." (Exh, C, p. 206.) White said it happened fast. (Exh C., p. 213.) White said "sorry," Owens ran back to the truck and White left in the truck with Owens. (Exh. C, p. 214.)

White asked Owens why he grabbed the girl and Owens said he did not know; "a primal instinct" came over him. (Exh. C., p. 214.) White told the police he thought Owens was "struggling with some mental health issues" and White had been looking for a therapist for him. (Exh. C, p. 206.)

At the station, two detectives interrogated White. The detectives suggested White was a "look out" and White appeared to agree that Owens said "hey watch out," but White did not agree that he knew Owens was going to grab J. D. (Exh. D, 225, 249.) The police also had White agree that he may have said "go get her" to Owens, but White said he meant go talk to her. (Exh. D., p. 242-244.) Despite the police officers efforts to get White to confess, White consistently denied that he knew that Owens intended to grab J. D. (Exh. D, pp. 223-224, 227, 229, 230, 234.)

Argument

I. Article I, section 12 governs the accused's right to be released on bail pending trial. Article I, section 28 can be reconciled with section 12 to require the court to consider victim safety in setting bail and in determining whether detention is permitted under section 12's exceptions to the grant of bail.

A. Summary of argument.

Section 12 establishes a comprehensive scheme governing the right to bail, including limited and specific exceptions to the denial of bail, a standard and allocation of proof, factors that must be considered in setting bail, and provisions regarding own recognizance release. (Cal. Const., art. I, § 12.) It unambiguously guarantees the right to bail, except in very specific and limited circumstances.

The 2008 amendments to section 28, on the other hand, expanded the right of crime victims to receive notification of court hearings and provide input during phases of the criminal justice process, restricted the early release of sentenced inmates, and changed the procedures for granting and revoking parole. (Cal. Const. art. I, § 28.) It contains two provisions concerning bail, subdivisions (b)(3) and (f)(3). Article I, section 28, subdivision (b)(3) grants crime victims the right to "have the safety of the victim and the victim's family considered in fixing the amount of bail and release conditions for the defendant." (Cal. Const. art. I, § 28.)

Section 28, subdivision (f)(3) provides that "[a] person may be released on bail by sufficient sureties, except for capital crimes" and that, "in setting, reducing or denying bail," the court "shall take into consideration" a number of factors, including victim safety. (Cal. Const. art. I, § 28, subd. (f)(3).)

The issue presented here is whether the voters' purpose in enacting the 2008 amendments was to establish a broad range of "rights" for crime

victims, including a guarantee that crime victims' safety would be considered in making bail decisions under section 12, or whether the voters, by implication, meant to drastically alter a centuries-old constitutional law governing an accused's right to bail by repealing section 12. Familiar rules of statutory construction favor the former interpretation.

The law shuns implied repeals, and this result should be avoided, particularly where it involves the repeal of a historic fundamental right such as the right to bail under section 12. Section 28 may be harmonized with section 12 without sacrificing this important right to bail by construing it to require the court to consider victim safety in setting conditions of release and in determining whether the two limited exceptions to bail in section 12 apply. This interpretation of section 28 reflects the voters' intent and is consistent with subdivision (b)(3)'s pronouncement of the right the voters intended to grant to crime victims as a result of this initiative.

The history and the election materials in support of the amendments to section 28 support this interpretation. Nothing in the Legislative Analyst's analysis, the Attorney General's summary or the arguments for and against the initiative even mention section 12 or pretrial detention. There is no evidence the electorate intended to repeal section 12 or expand the limits on pretrial detention, and such an intent cannot be imputed in the absence of evidence.

B. Text of article I, section 12 and article I, section 28, subdivision (f)(3).

The bail and own recognizance provisions of section 12 establish the circumstances under which an accused has a constitutional right to be released on bail pending trial. Section 12 mandates release on bail except in three limited circumstances. It provides, in relevant part:

A person shall be released on bail by sufficient sureties, except for:

a) Capital crimes when the facts are evident or the presumption great;[7]

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

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

(Cal. Const. art I, § 12.)

Section 12 also allows a court to release an accused on his or her own recognizance, and requires that the court consider, in setting the amount of bail, "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." (Cal. Const., art. I, § 12.)

Section 28, subdivision (f)(3) was the product of two ballot initiatives, Proposition 8 passed in 1982 and Proposition 9, passed in 2008. It provides:

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[7] The phrase "when the facts are evident or the presumption great" means there must be substantial evidence to support the defendant's commission of the crime. (*People v. Nordin* (1983) 143 Cal.App.3d 538, 543.)

Public Safety Bail. A person may be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great. Excessive bail may not be required. In setting, reducing or denying bail, the judge or magistrate shall take into consideration the protection of the public, the safety of the victim, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case. Public safety and the safety of the victim shall be the primary considerations.

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

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

When a judge or magistrate grants or denies bail or release on a person's own recognizance, the reasons for that decision shall be stated in the record and included in the court's minutes.

C. Background to the enactment and amendments to section 12 and section 28.

To understand the relationship between section 12 and the bail provisions of section 28, some historical background regarding both constitutional provisions is necessary.

1. *The history of the constitutional right to bail under section 12.*

Although section 12 has been amended by initiative over the years, its guarantee of bail has been enshrined in the California Constitution since its adoption in 1849. (*People v. Tinder* (1862) 19 Cal. 539, 542 : Justice

Field (before he was a U.S. Supreme Court Justice) construed California's constitutional Right to Bail Clause as it appeared in 1849: "In all [cases, except capital cases where the proof is evident or presumption great], the admission to bail is a right which the accused can claim, and which no Judge or Court can properly refuse.") The predecessor to section 12. article I, section 6, provided that "[a]ll persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great. Excessive bail may not be required."

In 1974, the voters adopted recommendations proposed by the California Constitution Revision Commission to permit release on an accused's own recognizance, enacting article I, section 12. (*People v. Standish* (2006) 38 Cal.4th 858, 890.) Like its predecessor, section 12 proscribed governmental discretion to deny bail.[8]

2. *Proposition 8 and Proposition 4*

In 1982, the California electorate was presented with two competing propositions affecting the right to bail. Proposition 4 would amend section 12 to allow pretrial detention under very limited and specific circumstances. The amendment permitted detention where "(1) Acts of violence on another person are involved and [the] court finds substantial likelihood the person's release would result in great bodily harm to others" or "(2) The person has threatened another with great bodily harm and [the] court finds substantial likelihood the person would carry out the threat." (Ballot Pamp., Primary Elec. (June 8, 1982), summary prepared by the Attorney General.) The

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[8] Section 12, as amended in 1974, read, "A person shall be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great. Excessive bail may not be required. ¶ A person may be released on his or her own recognizance in the court's discretion." (*Van Atta v. Scott* (1980) 27 Cal.3d 424, 452, n. 33.)

prosecution would be required to prove the exception applied by clear and convincing evidence. (*Ibid.*) The amendment also stated that, in fixing bail, the court must consider the seriousness of the offense, the person's previous criminal record, and the probability of appearance at trial. (*Ibid.*)

Proposition 8, the "Victims' Bill of Rights," proposed to repeal section 12 and substitute article I, section 28, subdivision (e) in its place. (*People v. Standish* (2006) 38 Cal.4th 858, 874.)

Both propositions passed. Because Proposition 8 would have repealed section 12, there was a direct conflict between Proposition 4 and the bail provisions of section 28 and the two could not be reconciled. (*People v. Standish, supra*, 38 Cal.4th at p. 877.) Therefore, the bail and own recognizance provisions in Proposition 8 "never became effective because a competing initiative measure on the same ballot (Proposition 4) garnered more votes than Proposition 8." (*People v. Standish, supra*, at pp. 874-875, and cases cited therein.) Thus, section 28, subdivision (e) never took effect.

3. *Proposition 9 and Marsy's Law*

In 2008, the electorate enacted by referendum Proposition 9, the "Victim's Bill of Rights Act of 2008: Marsy's Law." The new law amended section 28 of the California Constitution to grant enumerated legal rights to victims of crime, including the right to notice and an opportunity to be heard in criminal proceedings. One enumerated right is "to have the safety of the victim and the victim's family considered in fixing the amount of bail and release conditions for the defendant." (Cal. Const., art. I, § 28, subd. (b)(3).)

The invalidated section 28, subdivision (e) was renumbered as subdivision (f)(3) and amended to add the terms "safety of the victim" and strike out language that proscribed own recognizance release for those

individuals accused of a serious felony. Proposition 9, unlike Proposition 8, did *not* repeal section 12. The ballot pamphlet for the 2008 General Election contained the few minor changes to the invalid section 28, subdivision (e) in italics and strikeout type. The bulk of former section 28, subdivision (e) was set out in non-italics, erroneously informing voters that it was an existing part of our constitution, rather than an inoperative provision. (Cf. Cal. Elec. Code § 9086(f) ["provisions of [a] proposed measure differing from the existing laws affected shall be distinguished in print, so as to facilitate comparison"].)

The ballot materials for Proposition 9 made scarce mention of bail. The Legislative Analyst's overview of Proposition 9 stated the measure would "amend the State constitution and various state laws to (1) expand the legal rights of crime victims and the payment of restitution by criminal offenders, (2) restrict the early release of inmates, and (3) change the procedures for granting or revoking parole." (Voter Information Guide, Gen. Elec. (Nov. 4, 2008), analysis of Prop. 9 by Legislative Analyst, p. 58.)

The Legislative Analyst identified three "changes made" by Proposition 9: "restitution," "notification and participation of victims in criminal justice proceedings," and "other expansions of victims' legal rights." (Voter Information Guide, Gen. Elec. (Nov. 4, 2008), analysis of Prop. 9 by Legislative Analyst, at p. 59.) Among those "legal rights" expanded was "that the safety of a crime victim must be taken into consideration by judges in setting bail for persons arrested for crime." (*Ibid.*)

The proponents argued the proposition "levels the playing field" by "guaranteeing crime victims the right to justice and due process." (Voter Information Guide, Gen. Elec. (Nov. 4, 2008), analysis of Prop. 9 by

Legislative Analyst, at p. 62.) The proponents also stated the initiative would "require that a victim and their family's safety must be considered by judges making bail decisions for accused criminals," and argued crime victims should be notified of the accused's pretrial release and parole hearings. (*Ibid.*)

The opponents argued that the law already permitted victims the "right to be notified if their offender is released," and to participate in parole hearings and sentencing. The opponents contended that the proposition would create a costly "duplication of existing laws." (Voter Information Guide, Gen. Elec. (Nov. 4, 2008), analysis of Prop. 9 by Legislative Analyst, at p. 62.)

D. The amendments to the bail provisions in section 28 reflect the voters' intent to require courts consider victim safety in setting or granting bail under section 12, not to repeal section 12's guarantee of bail or expand the strict limitations on pretrial detention.

If subdivision (f)(3) is interpreted to confer absolute discretion on the court to deny bail, it would directly conflict with section 12. Because there was no explicit repeal of section 12 contained in Proposition 9, the question here is whether the voters intended to implicitly repeal this fundamental constitutional right to bail by amending section 28.

In interpreting a constitutional provision enacted by the electorate, the court's "'paramount task is to ascertain the intent of those who enacted it.'" (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1037, quoting *Thompson v. Department of Corrections* (2001) 25 Cal.4th 117, 122.) The court will interpret voter intent using the same principles that govern statutory construction. (*Ibid.*)

1. *An implied repeal of section 12 should be avoided.*

Rules of statutory construction require an attempt to reconcile statutory provisions relating to the same subject matter whenever possible in order to avoid conflict. (*Taxpayers to Limit Campaign Spending v. Fair Pol. Practices Com.* (1990) 51 Cal.3d 744, 747.) "'The law shuns repeals by implication . . . .'" (*Kennedy Wholesale, Inc. v. State Bd. of Equalization* (1991) 53 Cal.3d 245, 249, quoting *Board of Supervisors v. Lonergan* (1980) 27 Cal.3d 855, 868.) "Indeed, '[s]o strong is the presumption against implied repeals that when a new enactment conflicts with an existing provision,' [i]n order for the second law to repeal or supersede the first, the former must constitute a revision of the entire subject, so that the court may say that it was intended to be a substitute for the first." (Citations omitted.) (*Kennedy Wholesale, Inc. v. State Bd. of Equalization, supra*, 53 Cal.3d at p. 249.) An implied repeal should not be found unless ". . . the later provision gives undebatable evidence of an intent to supersede the earlier. . . ." (*Hays v. Wood* (1979) 25 Cal.3d 772, 784.)

The presumption against implied repeal applies with full force to partial repeals and amendments. "[A]ll presumptions are against a repeal by implication . . . , including partial repeals that occur when one statute implicitly limits another statute's scope of operation." (*Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830, 838.)

2. *Nothing in the text of section 28 indicates the voters intended to repeal section 12 or expand the limitations on pretrial detention.*

Section 28 does not mention section 12. The drafters of section 28 knew very well how to repeal section 12 because they had the example of Proposition 8, which contained an express repeal of section 12. (Ballot

Pamp., Primary Elec. (June 8, 1982) text of Prop. 8, § 2, p. 33.) And it is highly unlikely the voters would by mere implication overrule such a firmly established and fundamental right that has been in our Constitution since its inception. "[It] is not presumed that the legislature in the enactment of statutes intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication." (*Brown v. Memorial Nat. Home Foundation* (1958) 162 Cal.App.2d 513, 537.)

The language of section 28, read as a whole, does not support an expansion on the limits of pretrial detention in section 12. Subdivision (b) of section 28 lists the enumerated "rights" granted to victims by the referendum. Subdivision (b)(3) pertains to bail, guaranteeing "the safety of the victim and the victim's family [is] considered in fixing the amount of bail and release conditions for the defendant." Notably, subdivision (b)(3) does not mention the granting or denying of bail. (Cal. Const. art I, § 28, subdivision (b)(3).)

The three primary purposes of the initiative were to provide crime victims with notification of and an opportunity to be heard in criminal proceedings, to restrict the early release of convicted inmates and to change the procedures for granting and revoking parole. (Cal. Const. art I, § 28.) It did not purport to overhaul section 12, and if it was intended to do so, it would have been mentioned in the initiative.

Moreover, the language of section 28, subdivision (f)(3) does not authorize an abandonment of the fundamental right to bail by vesting trial courts with the discretion to deny it. Stating that a person "may be released on bail" should be interpreted as meaning that a person "must" or "will" be released on bail consistent with section 12. This phrase does not explicitly or implicitly grant any new power to the court; it is an acknowledgment of

the court's obligation under section 12. At best, it is vague. "[J]udicial authorities have construed 'may' as both discretionary and mandatory." (*People v. Ledesma* (1997) 16 Cal.4th 90, 95.)

Subdivision (f)(3)'s statement that the court, in "setting, denying or reducing bail" "shall" consider certain factors, suffers the same vagaries. "Shall," like "may," is susceptible to multiple meanings. (*People v Ledesma, supra*, 16 Cal.4th at p. 95, citing 1A Sutherland, Statutory Construction (5th ed. 1993) pp. 763-769 ["'shall' can be construed as either mandatory or directory as well as denote future operation"].) Subdivision (f)(3)'s reference to "setting, reducing or denying bail" should be interpreted as requiring the court to factor in victim safety when determining whether the limitations in section 12 apply. This interpretation is consistent with section 12. Indeed, in this case, the trial court cited the victim's safety as well as public safety as factors warranting White's detention under section 12, subdivision (b). (*White, supra,* 21 Cal.App.5th at p. 24.)

If the voters intended to vest the court with discretion to deny bail, it would have said so directly, as section 28, subdivision (f)(3) does in describing the authority of the court to grant own recognizance release: "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.*" [Italics added.] (Cal. Const, art. I, §28, subd. (f)(3).) Notably, the text referring to the court's discretionary authority discusses consideration of the factors in "setting bail," not "denying" bail. (*Ibid.*) That is an implicit recognition that the court's authority to set the amount and conditions of bail is discretionary, while the court's authority to deny bail is not.

3. *The ballot materials show that the voters did not intend to repeal section 12.*

Because an implied repeal of a constitutional provision creates a latent ambiguity, "it is appropriate to consider indicia of the voters' intent other than the language of the provision itself" in construing it. (*Kennedy Wholesale, Inc. v. State Bd. of Equalization* (1991) 53 Cal.3rd 245, 250.)

A court should also consider extrinsic evidence in interpreting an initiative when the language is ambiguous "when read in the context of the whole constitution." (*Kennedy Wholesale, supra*, at p. 249; *People v. Valencia* (2017) 3 Cal.5th 347, 357.) In *Kennedy Wholesale*, this Court was tasked with construing article XIII A, section 3, of the California Constitution (section 3), which requires a supermajority of the Legislature to increase taxes. (*Id.* at pp. 248-249.) The plaintiff read section 3 to mean that only the Legislature can raise taxes. (*Id.* at p. 249.) Interpreted this way, section 3 would conflict with article IV, section 1, of the Constitution, which reserves the initiative power to the voters. (*Ibid.*)

Because section 3 was ambiguous when read in conjunction with article IV, section 1, the court in *Kennedy Wholesale* considered the section's history, the ballot materials and other indications of the voters' intent. (*Id.* at pp. 249-250.) Since neither the text of section 3 nor the ballot materials "even mention[ed] the initiative power, let alone purport[ed] to restrict it," this Court declined to adopt an interpretation of section 3 according to its plain meaning alone. (*Ibid.*)

As in *Kennedy Wholesale*, the text of section 28 does not mention section 12, and no language in section 28 supports a repeal of section 12 or an expansion of that section's limited conditions under which the constitutional right to bail can be denied. And, as will be seen, neither do the ballot materials.

4. *Nothing in the ballot materials supports a repeal of section 12 or expansion of its limitations on pretrial detention.*

The voter guide does not mention section 12, let alone inform the voters that section 28 would repeal section 12. The court "cannot presume that. . . the voters intended the initiative to effect a change in the law that was not expressed or strongly implied in either the text of the initiative or the analysis and arguments in the official ballot pamphlet." (*People v. Valencia, supra*, 3 Cal.5th at p. 364, quoting *Farmers Ins. Exchange v. Superior Court* (2006) 137 Cal.App.4th 842, 857-858.)

"T]he Legislative Analyst must provide an analysis that is 'easily understood by the average voter' and it 'may contain background information, including the effect of the measure on existing law and the effect of the enacted legislation which will become effective of the measure is adopted, and shall generally set forth in an impartial manner the information the average voter needs to adequately understand the measure.'" (*People v. Valencia, supra*, 3 Cal.5th at pp. 365-366, quoting, Elec. Code § 9087, subd. (b).)

In *Valencia*, this Court construed a provision of Proposition 47, which redesignated specified felony offenses as misdemeanors, and held it did not apply to inmates sentenced under the Three Strikes Reform Act. (*Valencia, supra*, 3 Cal.5th at p. 375.) This Court held that it would be unreasonable to believe voters casting ballots for Proposition 47 understood their vote would ease the sentences of Three Strike offenders because there was no mention of the Three Strikes Law in the initiative, the Legislative Analyst mentioned no effect on the existing Three Strikes Reform Act and did not discuss the fiscal impact of resentencing Three Strike offenders, and Proposition 47 lacked any procedure for resentencing such offenders. (*Id.* at

pp. 361, 366-369.)

As in *Valencia*, there was no mention of section 12 in the Proposition 9 ballot materials. In the "Changes Made by This Measure," the Legislative Analyst indicated that "[t]he Constitution would be changed to specify that the safety of a crime victim must be taken into consideration by judges in setting bail for persons arrested for crimes." (Voter Information Guide, Gen. Elect. (Nov. 4, 2008) analysis by Legislative Analyst, pp. 58-59 .) This is consistent with the enumerated right set forth in section 28, subdivision (b)(3). The Legislative Analyst's analysis was silent about preventive detention and the right to bail in section 12.

The Attorney General's summary also stated the measure "[e]stablishes victim safety as a consideration in determining bail or parole." (Voter Information Guide, *supra*, Official Title and Summary, p. 58.) The Attorney General, too, said nothing about expanding the limits of pretrial detention set by section 12. (*Ibid.*) Neither the Legislative Analyst nor the Attorney General interpreted Proposition 9 as expanding the limits of pretrial detention contained in section 12; indeed, the election materials said nothing about the denial of bail, as opposed to setting bail.

The Legislative Analyst cited the fiscal effects of Proposition 9 as resulting in "(1) state and county fiscal impacts due [to] restrictions on early release, (2) potential net state savings from changes in parole board procedures, and (3) changes in restitution funding and other fiscal impacts." (Voter Information Guide, *supra*, at p. 60.) There was no analysis of the fiscal effects of the denial of bail due to victim safety, public safety, or any of the other factors specified in subdivision (f)(3). (*Ibid.*) There also was no mention of increased court costs that would result as a byproduct of a full-blown detention hearing in every case. (*Ibid.*) In fact, the Legislative Analyst suggested counties might mitigate the effects of overcrowded jails

caused by the restriction on early release in Proposition 9 by "*decreasing* the use of pretrial detention of suspects." [Italics added.] (*Id.* at p. 61.) Obviously, if section 28, subdivision (f)(3) was to be read as expanding eligibility for pretrial detention, the voters would not be told that a potential effect of Proposition 9 would be to decrease the use of pretrial detention.

And this stands in stark contrast with the election materials provided to the voters for Proposition 8, which would have repealed section 12. There, the Legislative Analyst informed voters that Proposition 8 would "increase the cost of operating county jails by increasing the jail populations (for example more people accused of crimes could be denied bail in order to assure public safety. . ." and "increase court costs (for example, costs could increase due to more extensive bail hearings. . ." (Ballot Pamp., *supra*, Analysis by the Legislative Analyst, p. 55.) If section 28 was intended to expand the limits on detention, the Legislative Analyst would have similarly informed the electorate of the significant increase in the jail population and court costs resulting from the initiative's passage.

5. *Proposition 9 did not include a comprehensive scheme and procedures governing bail determinations.*

Section 12 provides a comprehensive blueprint for making detention and bail determinations, including specific circumstances for the denial of bail, standard and burden of proof, and criteria for the setting of bail and release on own recognizance. Section 28, subdivision (f)(3), on the other hand, provides no guidance as to how a court would exercise any new discretion to make significant decisions involving a defendant's constitutional rights in every felony case. Glaringly absent from section 28, subdivision (f)(3) is a standard or allocation of proof. There are also no standards guiding a court's determination whether to deny a defendant his

constitutional right to bail. The lack of procedures for implementing sweeping changes to the right to bail in this state make it clear the voters did not intend to enact sweeping changes. (See *People v. Valencia, supra*, 5 Cal.4th at pp. 368-369 [The absence of procedures for resentencing Third Strike offenders made it less likely that the voters intended Proposition 47 to apply to the Three Strikes Reform Act].)

This Court recently stated that it could not "infer a realization of a voter intent where there was nothing to enlighten it in the first instance." (*Valencia, supra*, 3 Cal.5th at p 375.) Nothing in the text of section 28, the Attorney General's summary, the Legislative Analyst's summary or the proponents' arguments informed the voters that the amendments to section 28 would repeal section 12 or expand its limits on when the right to bail can be denied. Therefore, it should not be interpreted as such. Instead, section 28 can be reconciled with section 12 by construing section 28 as requiring courts to consider victim safety in the bail determinations it makes under section 12.

E. Section 28, subdivision (f)(3), does not reflect the voters' intent because its text was erroneously presented to voters as an existing and valid part of our Constitution.

The lack of intent to repeal section 12 or expand the limits of pretrial detention is evident from application of the standard rules of statutory construction. There is, however, another very significant fact militating against a finding that the voters intended to substantively change section 12 by its amendments to section 28. Subdivision (f)(3) consists of amendments to the former (and invalid) subdivision (e), found to have no effect in *Standish*. (*Standish, supra*, 38 Cal.4th at pp. 874-875.) As explained below, voter intent to abolish or even amend a centuries-old fundamental right cannot be reliably construed from language the voters

were not asked to enact. The voters' intent is more reliably ascertained by examining other available evidence of intent, such as the enumerated victim "rights" and the ballot materials.

In the preamble to the text of the new law, the voters were told that the initiative proposed to amend the California Constitution, with additions in italicized type:

> "This initiative measure amends a section of the California Constitution and amends and adds sections to the Penal Code; therefore, existing provisions proposed to be deleted are printed in strikeout type and new provisions proposed to be added are printed in *italic type* to indicate that they are new." [Italics in original]

(Voter Information Guide, Gen Elec. (Nov. 4, 2008), preamble to text of Prop. 9, p. 128.)

The text[9] informed voters the only new (italicized) portions of the

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[9] This is the text as it appeared to the voters, with italics and strikeouts:

~~(c)~~ *(3)* Public Safety Bail. A person may be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great. Excessive bail may not be required. In setting, reducing or denying bail, the judge or magistrate shall take into consideration the protection of the public, *the safety of the victim*, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case. Public safety *and the safety of the victim* shall be the primary ~~consideration~~ *considerations*.

A person may be released on his or her own recognizance in the court's discretion, subject to the same factors considered in setting bail. ~~However, no person charged with the commission of any serious felony shall be released on his or her own recognizance.~~

Before any person arrested for a serious felony may be released on bail, a hearing may be held before the magistrate or judge, and the

renumbered section 28, subdivision (f)(3) were (1) the addition of *"the safety of the victim"* as a factor the court "shall" consider in "setting, reducing, or denying bail," (2) the addition of "*the safety of the victim*" as a primary consideration in making that decision, and (3) that the prosecuting attorney "*and the victim*" be notified of any bail hearing in serious felony cases. (*Id.* at p. 130.) Aside from these italicized phrases, the drafters of the initiative presented section 28 subdivision (f)(3) in non-italicized text as if it was already a part of our Constitution.

Neither the Attorney General, the Legislative Analyst, the opponents or the proponents told the voters they would be enacting the provisions of former section 28, subdivision (e), which had been invalidated by a competing proposition 26 years earlier and has never been part of our state's Constitution. There is no evidence in the measure or the ballot materials for Proposition 9 that the voters were being asked or that they intended to enact the language of the defunct section 28, subdivision (e), rejected by the greater number of voters in 1982.

Although courts will apply a presumption that, in adopting an initiative, the voters did so being "aware of existing laws at the time the initiative was enacted" (*Professional Engineers in California Government v. Kempton*, *supra*, 40 Cal.4th at p. 1048), section 28 subdivision (e) was not in existence before the election and the voters were not asked to enact it. Cal. Elec. Code § 9086(f) ["provisions of [a] proposed measure differing

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prosecuting attorney *and the victim* shall be given notice and reasonable opportunity to be heard on the matter.

When a judge or magistrate grants or denies bail or release on a person's own recognizance, the reasons for that decision shall be stated in the record and included in the court's minutes. (Voter Information Guide, *supra*, text of Prop. 9, p. 128.)

from the existing laws affected shall be distinguished in print, so as to facilitate comparison"] Despite their extensive legal training and expertise, neither the Legislative Analyst nor the Attorney General caught the mistake in Proposition 9. The language of section 28, subdivision (f)(3) cannot be relied upon to determine voter intent *because they were not asked to vote on it.*

No intent, let alone an intent to overthrow a fundamental part of our constitution, can be attributed to the language of subdivision (f)(3), since the voters would not realize it was an invalid provision that was never part of our Constitution in the first instance.

F. Section 28 can be reconciled with section 12 to require the court to consider victim safety in setting bail and in determining whether section 12, subdivisions (b) and (c) apply.

That does not mean that the change to the Constitution envisioned by the voters in amending section 28 cannot be realized. Courts must, where possible, harmonize statutes and reconcile inconsistencies in them. (*Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal.4th 783, 805.)

Construction of section 28 as amended and in context with the entire Constitution reasonably supports an interpretation that would require the courts to consider victim safety in setting conditions of release, as provided in subdivision (b)(3) and as spelled out in the ballot materials. Subdivision (f)(3) is susceptible to the interpretation that victim safety should also be considered by the court in "denying" bail, i.e: in determining whether either exception to release on bail in section 12, subdivision (b) or (c) applies. The requirement in subdivision (f)(3) that victims receive notice and reasonable opportunity to be heard before any person arrested for a serious

felony may be released on bail can also be given effect. This interpretation harmonizes section 12 with section 28, while effectuating the voters' intent to prioritize victim safety.

II. Securing a correct determination of the fundamental liberty interest implicated in an individual's pretrial detention requires independent, de novo review of a trial court's decision to deny bail.

The second issue to be resolved is the standard of review on appeal for a trial court's denial of bail under the exceptions to bail in section 12.

A. Whether the "facts are evident or the presumption is great" is reviewed for substantial evidence, sufficient to sustain a conviction on appeal.

The Courts of Appeal in *In re Nordin* (1983) 143 Cal.App.3d 538 (*Nordin*) and *White, supra*, agreed that the standard "the facts are evident" or "the presumption is great" have been deemed met when there is substantial evidence to sustain a verdict, and "the quantum of evidence is that necessary to sustain a conviction on appeal." (*Nordin, supra*, 143 Cal.App.3d at p. 543; *White, supra*, 21 Cal.App. 5th at p. 25.) The authority for this standard is found in *In re Application of Weinberg* (1918) 177 Cal. 781, 782 and *Ex parte Curtis* (1891) 92 Cal. 188, 189. Thus, this question appears to be settled.

B. Whether there is a substantial likelihood the defendant will commit great bodily if released on bail is subject to independent review.

The question of the standard of review to be applied to the trial court's denial of bail under section 12, subdivisions (b) and (c) is not settled.

The Court of Appeal in this case concluded that the trial court's finding of a substantial likelihood White would cause great bodily injury if

released was "essentially factual" and applied the substantial evidence standard of review. (*White, supra*, 21 Cal.App.5th at p. 29.) The Court of Appeal recognized that its decision conflicted with *Nordin, supra,* 143 Cal.App.3d 538, but rejected *Nordin's* reasoning that independent review is required in habeas corpus proceedings. (*White, supra*, 21 Cal.App.5th at p. 29, n. 6.)

Nordin cited *In re Hochberg* (1970) 2 Cal.3d 870, 874, footnote 2, for the proposition that courts conduct an independent review of issues raised by habeas corpus. The Court of Appeal in this case, however, distinguished *Hochberg*, stating that it did "not speak to the myriad other situations where habeas corpus review arises and other standards are used." (*White, supra*, 21 Cal.App.5th at p. 29, n. 6.)

The conclusion in *Nordin*, however, is supported by this Court's decision in *In re Bell* (1942) 19 Cal.2d 488. In *Bell*, this Court discussed the appropriateness of issuing a writ of habeas corpus in reviewing proceedings which occurred in the trial court. "[The] courts can permit an independent review by habeas corpus of matters over which the trial court had jurisdiction, apart from any remedy by appeal, because it is warranted by the importance of securing a correct determination on the question of constitutionality. 'It must never be forgotten that the writ of *habeas corpus* is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired . . . . the rule is not so inflexible that it may not yield to exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent.'" (*In re Bell, supra*, 19 Cal.2d at p. 493, quoting *Bowen v. Johnston* (1939) 306 U.S. 19, 26, 27 [original italics] .)

The interest in pretrial liberty is a "fundamental" right. (*United States v. Salerno* (1987) 481 U.S. 739, 750; *Van Atta v. Scott* (1980) 27

Cal.3d 424, 435, overruled on other grounds in *In re York* (1995) 9 Cal.4th 1133, 1134 n.7 ["Th[e] decision [whether an individual will be released prior to trial] affects the detainee's liberty, a fundamental interest second only to life itself in terms of constitutional importance"].) Thus the decision to detain a person under section 12 presents a constitutional question of great magnitude – because denial of bail deprives an accused of the right to liberty secured by the California and United States Constitutions. In such circumstances, independent review is warranted to secure "a correct determination on the question of constitutionality." (*Bell, supra*, 19 Cal.2d at 493.)

This is consistent with other Supreme Court precedents that have determined that independent review is particularly favored when a constitutional right is implicated. (*People v. Cromer* (2001) 24 Cal.4th 889, 899 (*Cromer*); *People v. Louis* (1986) 42 Cal.3d 969, 987 (*Louis*).) In *Cromer* and *Louis,* this Court discussed the standard of review to be applied to a court's due diligence finding for locating a missing witness, which implicates the right of confrontation. (*Cromer, supra*, at pp. 897-898; *Louis, supra*, at p. 988.) The *Cromer* court quoted *Louis* at length in its determination that the issue, because it concerned a constitutional right, required independent review:

> We concluded in *Louis* that a trial court's due diligence determination presenting a mixed question of law and fact, should be subject to independent review: " '[T]o decide if the facts satisfy the legal test of [due diligence] . . . necessarily involves us in an inquiry that goes beyond the historical facts. The mixed question of [due diligence] is rooted in constitutional principles and policies. Like many such mixed questions, its resolution requires us to consider abstract legal doctrines, to weigh underlying policy considerations, and to balance competing legal interests. . . . [¶] This is a question that no amount of factfinding will answer. . . . [¶] When, as

> here, the application of law to fact requires us to make value judgments about the law and its policy underpinnings, and when, as here, the application of law to fact is of clear precedential importance, the policy reasons for de novo review are satisfied and we should not hesitate to review the [trial] judge's determination independently.'" [Citations omitted.] (*People v. Cromer, supra*, 24 Cal.4th at p. 899.)

When important constitutional rights are involved in a given issue, closer, independent appellate review is called for.

While the issue of whether the defendant should be denied bail will depend on the facts presented in a particular case, appellate courts must be able to inform the trial court's efforts by defining the legal significance of the facts under the given exception. The inquiry is not "essentially factual" as the Court of Appeal in this case concluded because the "application of law to fact will require the consideration of legal concepts and involve the exercise of judgments about the values underlying legal principles." (*Louis, supra*, 42 Cal.3d at p. 987.) As the United States Supreme Court stated in *Lilly v. Virginia* (1999) 527 U.S. 116: "[A]s 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." (*Id.* at p. 136.)

Whether there is a substantial likelihood that a person will commit great bodily injury if released is not "so factually idiosyncratic and highly individualized as to lack any precedential value. To the contrary, this is an area of constitutional law in which 'the law declaration aspect of independent review potentially may guide [the courts], unify precedent, and stabilize the law.'" (*Cromer, supra*, 24 Cal.4th at p. 901, quoting *Thompson v. Keohane* (1995) 516 U.S. 99, 115, and discussing the issue of

due diligence to locate a missing witness.) And given the substantial right of liberty at stake in applying the exceptions to bail in section 12, the establishment of legal rules and consistency in application is essential. (See *Haworth v. Superior Court* (2010) 50 Cal.4th 372, 386 [applying independent review to an arbitrator's duty to disclose public censure].)

The Court of Appeal in this case also indicated the substantial evidence standard should apply because the trial court has "resolved a disputed factual issue" and the appellate court has only the "cold unadorned words" in a transcript, citing *Escobar v. Flores* (2010) 183 Cal.App.4th 737, 749. *Escobar* has no application here for several reasons. *Escobar* involved the issue of whether the trial court erred in refusing to order a father to return a child to his mother in Chile based on a finding that the child objected to being returned to Chile and "had attained an age and degree of maturity at which it was appropriate to take account of his views." (*Id.* at p. 740.) The appellate court refused to apply a de novo standard of review to the factual question of the child's maturity level because it had only the "cold, unadorned words on the pages of the reporter's transcript," whereas the trial court "had the living, breathing child before it." (*Id.* at pp. 748-749.) "Thus, the trial court had the ability to judge the child's maturity not only by what he said, but by how he said it, and how he presented himself when he said it -- in other words, by the nuance, demeanor, body language, expression and gestures that the appellate court is denied." (*Id.* at p. 749.)

Thus, the decision in *Escobar* hinged on the trial court's assessment of the demeanor and maturity level of a child witness. (*Escobar, supra*, 183 Cal.App.4th at p. 749.) Predicting whether White would commit great bodily injury if released on bail did not depend at all on any witness's demeanor, and an appellate court is as or better able to determine whether

the facts meet the legal standard. Also, *Escobar* did not involve the deprivation of a constitutional right. It involved a determination of whether a child was mature enough to make a decision about where he wanted to live, a far cry from deciding whether a presumptively innocent person is going to be locked in a jail for months waiting to be tried, having limited access to his lawyer and suffering from the psychological pressure of confinement.[10]

The trial court here also did not "resolve a disputed factual issue." A credibility determination regarding J. D.'s testimony introduced at the preliminary hearing to prove there was sufficient evidence to bind White over for trial is separate from the issue of whether White is substantially likely to commit crimes involving great bodily injury. The trial court applied a constitutional legal standard to undisputed facts relating to White's role in the offense, the circumstances of the offense, White's lack of a criminal record or violent history, and letters written by family and friends attesting to his non-violence.

These are the typical facts a trial court will consider to try to predict if the defendant is substantially likely to cause great bodily injury if released. And the typical universe of facts in deciding this legal issue will not be so unmanageable in their variety to outweigh the significant interest in having uniform legal rules regarding who can be deprived of their liberty before being convicted.

A substantial evidence standard without independent review leaves it

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[10] The other case cited by the Court of Appeal, *Maslow v. Maslow* (1953) 117 Cal.App.2d 237, 243, involved the sufficiency of the evidence to support the trial court's order denying plaintiff an annulment of her marriage, a case which also does not involve a fundamental constitutional right.

up to the trial courts to decide what facts are legally significant, leading to confusion and inconsistent results. While the prediction of a substantial likelihood of great bodily injury is "'a fluid concept' that takes its substance from context and cannot be reduced to simple legal rules . . . [n]evertheless, application of a de novo standard of review will further the development of a uniform body of law and clarify the applicable legal principles. . ." (*Haworth, supra*, 50 Cal.4th at p. 386.) When substantial rights are at stake, consistent legal principles must guide the fact finder. (See *e.g.*, *Ornelas v. United States* (1996) 517 U.S. 690, 697-698 [applying independent review to determinations of reasonable suspicion and probable cause under the Fourth Amendment].)

To promote consistency and uniformity in the application of rules governing the loss of a detainee's liberty, "a fundamental interest second only to life itself" (*Van Atta v. Scott, supra,* at p. 435), an independent standard of review must be applied.[11]

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[11] Inconsistency in the application of the legal rules involving a right as fundamental as pretrial liberty undermines the integrity of our judicial system. It creates a perception that our laws are arbitrarily applied. For example, in 2017, when White was detained, San Diego County courts set bail for individuals charged with directly perpetrating multiple forcible and completed felony sex offenses. See: http//www.cbs8.com/story/37997415/yuma-officer-facing-rape-charges-in-san-diego. (Man charged with eight felony sex counts including forcible rape, oral copulation and digital penetration released on $250,000 bail.) https://www.kiiitv.com/article/news/local/man-arrested-after-alleged-sexual-assault-of-a-babysitter/490382785. (Man charged with sexually assaulting and beating a babysitter released on $10,000 bail.) https://www.kpbs.org/news/2018/feb/22/san-diego-sheriffs-deputy-accused-groping-faces-cr/ (Man charged with sexual assault of 12 women over a two and a half year period from 2015 to 2017 had bail set at $100,000.)

White, on the other hand, a young man with no criminal record, was detained based on his charged crime of aiding and abetting an attempted kidnap, and the prosecutor offered him a "time served" deal while insisting

III. The trial court erred in denying White his constitutional right to bail under Article I, section 12.

The final issue to be resolved is whether the trial court erred in detaining White. As the Court of Appeal observed, section 12, subdivision (b) has two prongs. (*White, supra*, 21 Cal.App.5th at pp. 24-27.) The first is whether there is substantial evidence White perpetrated the crimes. The second is whether clear and convincing evidence established there was a substantial likelihood White would cause great bodily harm if he was released. (Cal. Const. art. I, §12, subd. (b).) Neither prong was established.

A. There was not substantial evidence that White aided and abetted the charged offenses.

As discussed, the first prong of section 12, subdivision (b) requires substantial evidence to support a conviction. (*Nordin, supra*, 143 Cal.App.3d at p. 543.) "In addressing a challenge to the sufficiency of the evidence supporting a conviction, the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that 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. Kraft* (2000) 23 Cal.4th 978, 1053–1054.)

There was no doubt Owens perpetrated an attack on J. D. But there was not substantial evidence White aided and abetted Owens. A person aids and abets the commission of a crime when he or she, "(i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of

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he was too dangerous to be released before trial.

the crime." (*People v. Beeman* (1984) 35 Cal.3d 547, 561.) Thus, the prosecution had to show not only that White knew that Owens' intended to kidnap J. D. for a sexual purpose, but also that White actually participated in Owens' attempt to kidnap J. D.

This the state failed to do. The Court of Appeal concluded that White aided in Owens' offense by acting as a lookout. (*White, supra*, 21 Cal.App.5th at p. 26.) But the evidence is insufficient to support this allegation. White's actions are consistent with innocence and raise no inference that he was a lookout: White was standing near his truck listening to music when his companion rushed across the street and grabbed J. D.

J. D.'s belief that White was a lookout because he was "keeping his eye up and down the street" does not establish White was a lookout for a kidnapper or rapist. J. D.'s speculation as to what White was doing -- her "feeling he was almost kind of like the lookout guy" -- is not sufficient to infer White was acting as a lookout or knew Owens wanted to attack, kidnap or rape J. D. White's behavior is just as consistent with the stunned reaction of a person witnessing a friend commit a sudden and unexpected crime.

The Court of Appeal found White aided Owens because he "did not intervene during the attack but instead encouraged Owens to take J. D. into her house." (*White, supra*, at p. 26.) Culpability is not imposed upon a person who fails to render aid to another in peril. (*People v. Oliver* (1989) 210 Cal.App.3d 138, 147.) A person who witnesses an attack has less time to reflect upon the matter, less time and opportunity to intervene and may place himself in harm's way if he tries to intervene.[12]

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[12] White told the officers that Owens was "stronger" than him, which explains his hesitancy. (Exh. C, p. 212.)

The Court of Appeal relied on J. D.'s testimony that White said "go in the house" and her speculation that this statement was directed to Owens. (Exh. B, p. 34.) But it's unclear from the circumstances who White intended to address in making the statement. J. D. did not see White make the statement; she heard it when she had her back turned as she was going through the gate. (*Ibid.*) It is just as rational to infer that White's statement was directed at J. D., telling her to go into the house to get away from Owens.

The evidence supports an inference that White's comment was directed to J. D. since Owens did not comply with White's directive by trying to go into the house after her. White apologized to J. D. before he said "go in the house," which is also consistent with his intent to protect, not harm, J. D.

It is the factfinder's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one which suggests guilt and the other innocence. (*People v. Kraft*, *supra*, 23 Cal.4th at p. 1054.) When "the proven facts give equal support to two inconsistent inferences, neither is established." (*People v. Tran* (1996) 47 Cal.App.4th 759, 772, internal quotation marks and citations omitted.) This rule applies to cases in which circumstantial evidence is the basis for proof of an element or of guilt. "[I]f the evidence viewed in the light most favorable to the verdict gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged, this court must reverse the conviction. This is so because where an equal or nearly equal theory of guilt and a theory of innocence is supported by the evidence viewed in the light most favorable to the prosecution, a reasonable jury must necessarily entertain a reasonable doubt." (*United States v. Flores-Rivera* (1st Cir. 1995) 56 F.3d 319, 323, internal quotation marks

and ellipses omitted, quoting *United States v. Sanchez* (5th Cir. 1992) 961 F.2d 1169, 1173, reaffirmed in *United States v. Santillana* (5th Cir. 2010) 604 F.3d 192, 195.) Other federal circuits also follow this rule. (See, e.g., *United States v. D'Amato* (2d Cir. 1994) 39 F.3d 1249, 1256 ["the government must do more than introduce evidence at least as consistent with innocence as with guilt", internal quotation marks and citations omitted]; *United States v. Harris* (7th Cir. 1991) 942 F.2d 1125, 1129 ["where the evidence as to an element of a crime is equally consistent with a theory of innocence as a theory of guilt, that evidence necessarily fails to establish guilt beyond a reasonable doubt", internal quotation marks and citation omitted; *Cosby v. Jones* (11th Cir. 1982) 682 F.2d 1373, 1383 ["if the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged, then a reasonable jury must necessarily entertain a reasonable doubt"].) Applying this rule to these facts, the evidence here is as – if not more – consistent with innocence as guilt.

White's presence at the scene of this crime will not support a conclusion of his aiding and abetting. (*In re Michael T.* (1978) 84 Cal.App.3d 907, 911; *Juan H. v. Allen* (9th Cir. 2005) 408 F.3d 1262.) There is no evidence White knew Owens planned to attack J. D. or agreed to assist Owens in the attack. While White may have been in a position to observe what Owens was doing or intervene, from this fact it is not reasonable to conclude that he assisted Owens in perpetrating the crime.

Finally, the Court of Appeal cites White's statement to the police that he told Owens to "go get her," but White told the police that he meant "go talk to her. " (*White, supra,* 21 Cal.5th at p. 23.) White consistently denied that he knew Owens was going to attack J. D. (Exhs. C and D, pp. 205, 210, 212, 223-224, 227, 229, 230, 234.) White also told the police that

after the attack, he asked Owens why he assaulted J. D. and Owens said he was overcome by a "primal instinct." (Exh. C, 207; *White, supra*, 21 Cal.App.5th at p. 23.) The police seized White's cell phone and obtained his Internet search history, which confirmed White's lack of knowledge: after the attack White conducted Internet searches for "Why would someone act on their primal instincts?" (Ex. B, 109, *White, supra*, at p. 23.)

In sum, the conclusion that White's actions were only consistent with his aiding and abetting Owens and not the understandable reaction of a shocked but uninvolved friend, crosses the line from permissible inference to improper speculation.

B. The record does not establish a substantial likelihood of great bodily harm to others if White was released on bail.

The Court of Appeal found there was a substantial likelihood White would cause great bodily harm to others if released on bail based on the circumstances of the charged crime and no other factor. (*White, supra,* 21 Cal.App.5th at pp. 30-31.) The circumstances of the crime the appellate court found predictive of future violence were the "deliberate" nature of the attack occurring "during the day on a heavily trafficked street" and "target[ing] a vulnerable stranger." (*Id.* at p. 30.) Because the attack "could apply to any stranger," and White acted "brazenly," (when he stood by his truck in shock), the trial court could infer that White would likely "attack again" (although he did not attack in this case). (*Id.* at p. 31.)

There is no reason to believe that a person who acts brazenly in a heavily trafficked area will be more likely to commit great bodily harm than a person who acts with stealth in private. In fact the opposite is true. Stealth suggests planning. Planned acts are seen as possessing a higher level of moral culpability and are also viewed as more dangerous. Committing a crime out of public view is more dangerous because it increases the

probability of success and evasion of detection.

Similarly, there is no evidence that defendants who commit a crime against a stranger are more likely to reoffend. With the exception of robbery, more violent crimes are committed by non-strangers than strangers. (Hessick, *Violence Between Lovers, Strangers and Friends*, (2007) 85 Wash. U. L. Rev. 343, 344-345 [The "majority of violent crimes are committed by people who know their victims"].) And studies show that "[a] significant number of individuals who commit violence in a personal relationship commit a further violent act within the same relationship." (*Id.* at p. 375.) Absent some evidence that a person is a serial offender, there is no rational basis to treat defendants accused of a crime against a stranger any differently than a person who commits a crime against a non-stranger. (*Hessick, supra*, at p. 401.) The perception that strangers who commit crimes are more dangerous is based on stereotypes and fear, not empirical evidence. (*Id.* at pp. 362-363, 388-390.)

The trial court did not give adequate consideration to the significant factors militating against a finding of future dangerousness, such as White's lack of prior record and history of non-violence. The court relied only on the nature of the charged offense to deny him bail. The lack of a criminal history weighs heavily against detention. Relying on empirical methods and a nationally representative fifteen-year data set of over 100,000 defendants, one study determined that individuals with no prior criminal record are significantly less likely to be rearrested pretrial than those with criminal records. (See Baradaran and McIntyre, *Predicting Violence* (2012) Texas L. Rev. 497, 558 [concluding that "the number of previous convictions is directly correlated with future likelihood to be arrested"].)

Detaining a person based on his or her arrest for a particular crime is

not the individualized determination mandated by the federal constitution. (*United States v. Scott* (9th Cir. 2006) 450 F.3d 863, 874) "Neither [*United States v.*] *Salerno* nor any other case authorizes detaining someone in jail while awaiting trial, or the imposition of special bail conditions, based merely on the fact of arrest for a particular crime." (*Ibid.*) There must be some evidence other than the charged offense to predict a finding of future dangerousness. Here, there was nothing.

And even assuming the denial of bail may be predicated on the charged offense alone, a substantial likelihood of the commission of future crimes resulting in great bodily injury cannot be inferred from White's alleged participation in this crime. White played a passive role in this offense; he stood by his truck and did not initiate or participate in the assault. He did not try to assist Owens in the physical attack or come to Owens' aid when J. D. freed herself from Owen's grasp. If White was inclined to hurt J. D., he could have easily overpowered this slight 15- year-old girl. He did not. Instead, he stayed across the street by his truck and apologized to J. D. for Owens' behavior. (Exh. B, p. 33.) Even the interrogating officers did not believe that White was "the type of guy that was going to go grab some girl." (Exh. C, p. 232.)

Owens' conduct did not cause great bodily injury. No weapons were used and the contact between J. D. and Owens was brief. J. D. sustained minor injuries: a fingerprint mark and redness on her neck. (Exh. B, pp. 42-43.)

White's post-offense conduct does not portend future dangerousness. He cooperated fully with the police. After the offense, he talked to his friend about getting counseling for Owens. (Exh. C, p. 229-230.) His Internet history after the offense, showing he searched for "why would

someone act on their primal instincts,"suggests Mr. White was trying to determine what motivated Owens to attack J. D. (Exh. B, p. 109.) A violent predator would not spend time trying to determine why his friend acted on his "primal instincts."

On this record, denying White bail under section 12, subdivision (b) based on a "substantial likelihood [his] release would result in great bodily harm to others" was error.

C. Pretrial detention should be the exception, not the rule.

If the facts in this case are sufficient to deny bail, then aiding and abetting any unarmed felony assault would require a no-bail order. The jails would be overflowing with pretrial detainees, and the constitutional "guarantee" of release on bail would be illusory for a large category of accused persons. Such expansive use of pretrial detention is not necessary.[13] The state has an array of means to keep an eye on a defendant without placing him or her in the distinctly punitive setting of jail. Widely accepted alternatives include home detention, electronic monitoring, stay away orders and supervised release.

The exceptions to section 12 should be strictly construed to preserve the presumption of innocence. The right to bail is essential to the right to a fair trial – by allowing the accused to prepare his or her defense and have better access to his or her lawyer. It is also essential to the presumption of

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[13] The study conducted by Baradaran and McIntyre concluded that more defendants can be safely released pretrial. (Baradaran and McIntyre, *supra*, at p. 558.) "Of all of the defendants released [pretrial], only 16% are rearrested for any reason, 11% are rearrested for a felony, and only 1.9% are rearrested for a violent felony. To look at it another way, about 80% of released pretrial defendants have less than a 3% chance of being rearrested pretrial for a violent crime." (*Ibid.*)

innocence – to prevent the imposition of punishment prior to conviction. The exceptions to section 12 must be strictly construed to ensure its application serves a regulatory, not a penal, purpose.

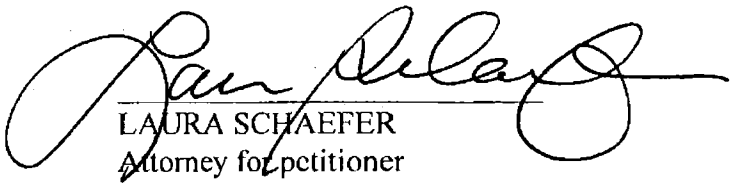
Indeed, this case presents "no more eloquent demonstration of the coercive power of authority to imprison upon prediction, or of the dangers which the almost inevitable abuses [of such power] pose to the cherished liberties of a free society." (*United States v. Salerno, supra*, 481 U.S. 766-767, (dis. opn. of Marshall, J.) The prosecution persisted in keeping White detained, claiming his release imminently threatened the safety of the community – that is, as long as he demanded a trial. If White pled guilty, the prosecution was willing to immediately release into the community this allegedly "dangerous individual" who at any moment was likely to commit great bodily harm on others. The prosecution's "concern" for public safety inexplicably vanished with White's plea.

IV. Conclusion

"Punishment first, trial later" is anathema to our judicial system. "Unless th[e] right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." (*Stack v. Boyle* (1951) 342 U.S. 1, 4.) The constitutional right to bail should be protected and the limitations on the right strictly construed to favor liberty of the presumptively innocent.

Respectfully submitted,

Dated: August 28, 2018



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Certificate of Word Count

I, Laura Schaefer, counsel for appellant certify pursuant to the California Rules of Court, rule 8.504(d)(1) that this brief contains 12944 words as calculated by the Word Perfect software in which it was created.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 28, 2018, at San Diego, California.

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CHRISTOPHER LEE WHITE

People v. White
Case No. S248125

Proof of service

I, the undersigned declare that: I am over the age of 18 years and not a party to the case; I am a resident of the County of San Diego, State of California, where the mailing occurs; and my business address is 934 23rd Street, San Diego, California 92102.

I further declare that I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business.

On August 28, 2018, I caused to be served the following document: PETITIONER'S OPENING BRIEF ON THE MERITS by placing a copy of the document in an envelope addressed to each addressee, respectively, as follows:

Christopher Lee White
c/o 934 23rd Street
San Diego, CA 92102

I then sealed each envelope and, with postage thereon fully prepaid, I placed each for deposit in the United States Postal Service, this same day, at my business address shown above, following ordinary business practices.

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Proof of electronic service

Furthermore, I declare that I electronically served from my electronic service address of mj@boycc-schaefer.com on August 28, 2018, to the following entities:

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(via truefiling)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 28, 2018, at San Diego, California.

Mary Elena Joslyn