Case No. S248125

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re CHRISTOPHER LEE WHITE,

Petitioner,

On Habeas Corpus

APPLICATION OF CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE FOR PERMISSION TO APPEAR AS *AMICUS CURIAE* ON BEHALF OF PETITIONER (RULE 8.520(f) AND BRIEF IN SUPPORT OF PETITIONER

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APPLICATION OF CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE TO APPEAR AS *AMICUS CURIAE* ON BEHALF OF PETITIONER (RULE 8.520(f))

TO THE HONORABLE CHIEF JUSTICE TANI CANTIL-SAKAUYE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

California Attorneys for Criminal Justice (hereafter CACJ) applies under California Rules of Court, Rule 8.520(f)(5), for permission to appear as amicus curiae on behalf of Petitioner Christopher Lee White. This application is brought in compliance with Rule 8.520(f)(1) and (5), and is also made in view of the Court's Order dated September 12, 2018, permitting amici curiae to "...file supplemental briefs."

A. Identification of CACJ[1]

CACJ is a nonprofit California corporation. According to Article IV of its bylaws, CACJ was formed to achieve certain

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[1] The undersigned, certifies to this Court pursuant to the dictates of Rule 8.520(f)(4) that no party or counsel for a party in the pending appeal authored any part of this proposed *amicus* brief. In addition, the undersigned certifies that no party or person other than the undersigned, or *amicus curiae* and its members or counsel, has contributed any monies, services, or other form of consideration to assist in the preparation or submission of this brief.

objectives including "to defend the rights of persons as guaranteed by the United States Constitution, the Constitution of the State of California and other applicable law." CACJ is administered by a Board of Governors consisting of criminal defense lawyers practicing within the State of California. The organization has approximately 1,700 members, primarily criminal defense lawyers practicing before Federal and State courts. These lawyers are employed throughout the State both in the public and private sectors. CACJ has often appeared before this Court, the United States Supreme Court, and the Courts of Appeal in California and elsewhere on issues of importance to its membership. CACJ's appearance as an amicus curiae before this Court has been recognized in a number of the Court's published decisions.

B. Statement of Interest

This case concerns the determination of the fundamental liberty interest of all persons accused by the State of a crime, rightly or wrongly, and who are legally eligible for an order permitting their voluntarily appearance in court rather than to be held in a jail cell and be transported to locked facilities and

restrained in the courtroom. The right to pretrial release based on reasonable bail or release on own recognizance, as well as the right to a determination of non-detention under Senate Bill 10 (2017-2018 Session, effective October 1, 2019), is required by Due Process and Equal Protection as well as the right against Excessive Bail under the federal Constitution and the longstanding case law of this Court.

Victims' rights are of significant concern under California law. But in the context of this litigation, victims' rights do not trump the liberty, and Due Process, related interests of the individual seeking pretrial release while preparing to respond to the State's accusations.

The issues framed in this case have been of importance to CACJ since its founding in 1973 and are of particular importance given its role over the last few years in attempting to remove reliance on monetary bail. As an early sponsor of SB 10, and a respectful critic as it was finally amended and passed, CACJ has a particular interest in how this Court's ruling in the present case may impact the interpretation of the new laws on preventive detention under SB 10. CACJ's members daily represent

individuals charged with crimes whose possible pretrial detention is in question as a result of the issues presented in this litigation. And as a result of these matters, CACJ has an interest in appearing as amicus curiae in this matter.

CACJ proposes to file a brief to support the Petitioner's Opening Brief on the Merits, including Petitioner's assertions that the language of Cal. Const. Art I, § 12(b) (2) and (3) and that of Cal. Const. Art I, § 28(f)(3) are in conflict but can be reconciled, Petitioner's arguments on the standard of review, and Petitioner's arguments on the merits of Mr. White's claims. However, we write specifically to assert that there is a fundamental difference between the provisions of § 12(b) and § 28(f)(3) that involve Constitutional considerations of the fundamental rights of liberty, due process and equal protection with regard to the former and a general statement of victims' rights in the latter.

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For the foregoing reasons, CACJ respectfully requests that the Court accept and file the accompanying brief in his case.

Dated: October 10, 2018

Respectfully submitted,

CACJ Amicus Committee
Robert M. Sanger
Stephen K. Dunkle, Chair

By: ROBERT M. SANGER (SKD)
Robert M. Sanger
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BRIEF OF *AMICUS CURIAE* CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE ON BEHALF OF PETITIONER CHRISTOPHER LEE WHITE (RULE 8.520(f)(1))

TO THE HONORABLE CHIEF JUSTICE TANI CANTIL-SAKAUYE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

INTRODUCTION

The right of liberty is perhaps the most fundamental right of a person in this Country and this State. It is enshrined in the Declaration of Independence and embodied in the concepts contained in the Bill of Rights and subsequent Amendments, including the Fourteenth Amendment. Liberty pending criminal allegations is at the core of this liberty interest and is embodied in the concept of the presumption of innocence. In a criminal prosecution, that presumption is symbolized by liberty pending adjudication. The right to pretrial liberty has been incorporated into our statutes and our Constitution in California.

The liberty interest assured by these laws is also reflects values that we also hold fundamental as individuals. The notions of Due Process and fair trial that exist in law are considered

fundamental by all Californians. Pretrial detention, unless absolutely necessary, is to be avoided due to its clearly adverse effect on a fair trial. In addition, we respect equality and seek not to treat persons differently based on arbitrary criteria, seeking not to classify or differentiate them based on the ability to post monetary bail or their arbitrary selection by other means, such as unfair presumptions of guilt or unproven risk assessment tools.

This liberty interest cannot be subjugated to a broad preference for the rights of complaining witnesses or to the invocation of popular fear factors or the deployment of pseudo-scientific "assessment tools." Certainly complaining witnesses are a set within which is a subset of true victims within which is another subset of victims whose allegations (or assumptions about those allegations) involve risk to them or others. There is provision for this within the limited exceptions to bail under Cal. Const. Art I, § 12(b) (2) and (3). However, the broader counter-presumption of guilt of the accused in the "Victims' Bill of Rights" amendments to Cal. Const. Art I, § 28(f)(3) cannot supersede the well established liberty interest rendered tepidly in § 12(b) or more enthusiastically in the

Declaration of Independence and the Constitutional provisions of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

In enacting SB 10, California has responded to demonstrated unfairness in the money bail system by seeking to change its approach to pretrial detention related decision-making. However, the new statute has incorporated certain flaws into the scheme that require action from the court. The criteria set forth in SB 10 to support preventive detention are not reliable or proven, the assessment tools are not validated, and the procedures do not provide due process. In addition, the failure of SB 10 to require consistent application from courtroom to courtroom or county to county will result in a denial of equal protection.

I.

LIBERTY IS THE NORM AND CONSTITUTES A FUNDAMENTAL CONSTITUTIONAL RIGHT ENFORCED BY DUE PROCESS AND EQUAL PROTECTION

"In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United*

States v. Salerno (1987) 481 U.S. 739, 755.

Both the federal and state constitutions enshrine liberty as a fundamental value. When the federal government was created in Philadelphia, the focus of the new Constitution was on the rule of law, both creating and limiting the federal government. As a condition of the Constitution's ratification, a Bill of Rights was appended which further reinforced the importance of liberty.

The Bill of Rights was followed by the Civil War Amendments, notably the Fourteenth Amendment, specifically stating that no "State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." It is important to note that liberty, along with life and property, were assured by the Fourteenth Amendment but were enforced by "due process of law" and "equal protection of the laws."

Thus, consistently, the principles of our Nation included liberty at the forefront. And, consistently, the rule of law – due process and equal protection – were heralded as the mechanism to enforce that principle of liberty.

The California Constitution also embraces the fundamental

right of liberty in Article I, § 1: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." These liberty rights are enforced by the rule of law as set forth in Article I, § 7: "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws."

With regard to pretrial release of a person arrested for alleged crime, there was at one time in California only one basis to deny bail and effect outright preventive detention: That was in "Capital crimes when the facts are evident or the presumption great." (See former Cal. Const. Article I, § 6) Despite any other exception to the right to bail, it remained possible to set cash bail so high relative to a person's ability to make bail, that preventive detention effectively occurred.[2] But, until recently, outright preventive detention was reserved for capital cases and only where facts are evident or the presumption great -- whatever that

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[2]This is concurrently under review in this Court in *In re Kenneth Humphrey* (review granted May 24, 2018, S247278).

means.

In the last 50 years in this Country, the fear of crime has been stoked by politicians. Article I, § 12, was added to set forth two additional specific grounds for preventive detention in addition to capital cases:

> A person shall be released on bail by sufficient sureties, except for:
> . . .
>
> (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
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> (c) Felony offenses when the facts are evident or the presumption great and the court finds based on clear and convincing evidence that the person has threatened another with great bodily harm and that there is a substantial likelihood that the person would carry out the threat if released.

§ 12 nevertheless continued to provide some concern for due process:

> Excessive bail may not be required. In fixing the amount of bail, the court shall take into consideration the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her

> appearing at the trial or hearing of the case. A person may be released on his or her own recognizance in the court's discretion.

§ 12, including (b) and (c) of that section, therefore guarantee minimum due process that applies to the liberty interest of people arrested, in that there are two and only two exceptions for preventive detention in addition to capital cases. It is clear and unambiguous as to what it protects and whom it seeks to protect. It is specific to the liberty right. It is specifically applied to all people in California and more specifically to people who may be arrested. We respectfully submit that even § 12(b) and (c) do not adequately protect against wrongful pretrial detention under the principles of liberty in the federal Constitution but it is clear that it is intended to do so.

Article I, § 28, on the other hand, is a broad panoply of provisions that "include broader shared collective rights that are held in common with all of the People of the State of California." (Subsection (a)(4)). Such a pronouncement of broad claims or even more specific promotion of the rights of crime victims cannot supercede specific liberty rights by undermining the liberty rights to be free from pretrial detention.

By analogy, there is another provision in § 28(a)(4):

"Victims of crime have a collectively shared right to expect that persons convicted of committing criminal acts are sufficiently punished in both the manner and the length of the sentences imposed by the courts of the State of California." While it is also exhortatory, it could not be considered to supersede statutory maximums, let alone constitutional limits on excessive sentences.

Then, § 28(f)(3) sets forth the rights that victims, not people at risk of their liberty, have with regard to bail.[3] It neither expressly repeals the specific protections set forth in § 12(b) for the people nor does it say, "notwithstanding any other provision of law." More importantly, it does not say that it is limiting the rights of persons detained but, instead, sets forth, at best, the

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[3]The evolution of § 28(f)(3) need not detain us here but it was not linear. See, *People v. Standish* (2006) 38 Cal.4th 858, 874-875; *People v. Barrow* (1991) 233 Cal.App.3d 721, 723; see also *In re York* (1995) 9 Cal.4th 1133, 1140 n.4 ("Because Proposition 4 received more votes than did Proposition 8, the bail and OR release provisions contained in Proposition 4 are deemed to prevail over those set forth in Proposition 8. (Cal. Const., art. II, § 10, subd. (b); *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 255, 186 Cal.Rptr. 30, 651 P.2d 274; *People v. Barrow* (1991) 233 Cal.App.3d 721, 723, 284 Cal.Rptr. 679 [additional citations omitted.]") It was then amended by Proposition 9 in 2008 although it was subject to a failure to properly delineate to the voters the portion of the existing law that had been found inoperative pursuant to *Standish*, *Barrow* and *York*, *supra*. We support Petitioner's argument in this regard.

victims' concerns in determining pre-trial release or detention.

Of course, if § 28(f)(3) does supersede § 12, then Petitioner White wins. In the case of Petitioner, the trial court specifically held that he was detained under the criteria of § 12(b) and, there is an argument that, if § 28(f)(3) does supersede § 12(b), then White cannot be detained. Section 28(f)(3) provides for the original exception for preventive detention, that of capital cases. Section 28(f)(3) does not include the language of § 12(b) and, if § 28(f)(3) superseded § 12(b), then it eliminated the exception for, "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."

If, on the other hand, § 28(f)(3) does not supersede § 12, then the more expansive language of § 28(f)(3) that, "Public safety and the safety of the victim shall be the primary considerations" is exhortatory and not further restrictive of the rights of the people in § 12. The Victims Bills of Rights, Proposition 8 in 1982

and Proposition 9 on 2008, were a product of the political project of fear. They also had a intuitive plausibility in that they catered to sympathy, not entirely unjustified, for victims. However, they were not provisions that expressly or impliedly overruled, superseded or otherwise contracted the liberty rights of the people.

To the extent there is a conflict, the plain language of § 12 prevails in that it, albeit imperfectly, guarantees some aspects of the fundamental right of liberty. Section 28(f) expresses concerns on behalf of victims but victims do not and cannot dictate that fundamental liberty rights be stripped when they are guaranteed by other portions of the Constitution. As another example, punishment without trial might also be in the interests of victims but no amount of exhortatory language can deprive the rest of the people of California of their right to trial. Similarly here the interests of victims cannot deprive the rest of the people of their liberty interest in pretrial release.

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II.

PROCEDURAL DUE PROCESS RULES MUST BE ROBUST AND RELIABLE

The Supreme Court while analyzing rules that merely pertained to deprivation of property – welfare benefits – held that procedural rules must meet the requirements of due process. The court said, "But procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions." *Mathews v. Eldridge* (1976) 424 U.S. 319, 344. While this applied to property, the Supreme Court has recognized that the right to pretrial liberty is "fundamental." *United States v. Salerno* (1987) 481 U.S. 739, 750. Certainly, the fundamental right to liberty must require a process of truthfinding that is robust and reliable.

In the present situation, preventive detention is not supported by any indications of procedural reliability and the risk of error in the truthfinding process as to both failures to appear and future dangerousness have a demonstrated risk of error that

is daunting.[4] However, assuming for the sake of this analysis that the § 28 has three limited categories for preventive detention (a), (b) and (c) and they have some support in truthfinding regarding future dangerousness, § 28(f)(3), if it impliedly repealed or modified § 28(b) and (c), would make that determination even less effective as a truthfinding process.

It appears that, in Mr. White's case, Petitioner was detained under § 12(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." Petitioner argues persuasively that the plain meaning of the words in subsection (b) are not met in his case. However, the Court also asked, "What constitutional provision governs the denial of bail in non-capital cases (Cal. Const. art I, § 12(b) and (c) or Cal. Const. art I, § 28 (f)(3)) or, in

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[4]While this case deals with pre-SB 10 law, this court will consider this same issue where the legislature has attempted to replace monetary bail with other risk assessment procedures to determine risk of not appearing in court or risk of offending.

the alternative, whether these provisions may be reconciled."

The answer to that is that § 12(b) and (c) are not sufficiently robust to provide due process cover for preventive detention but that, if § 28(f)(3) were to be applied, it would lose any pretense as a truthfinder. In particular, § 28(f)(3) says, "Public safety and the safety of the victim shall be the primary considerations." This provision has no due process mechanisms, standards of evidence or even types of evidence that are expressed or implied. It is just the sort of catch phrase that allows for an arbitrary application. How is a judge to have any idea whether or not a person would present a danger to the public or the victim, except in the most extreme circumstances. And, in the present case, there was no such showing and, in fact, the prosecutor offered Petitioner, on the record, immediate release on probation in exchange for a plea.

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III.

THE PROCEDURES UNDER SECTIONS 12(B) OR 28(F)(3) ARE NOT PREDICTIVE SUFFICIENT TO DETERMINE WHO SHOULD BE DETAINED AND WHO SHOULD BE RELEASED

A determination as to who may or may not appear in court and who might offend in the future, two totally different matters, is a forensic enterprise. It is a matter of calculating probabilities which is a function of the science of statistics. Statistics, in turn, is the study of uncertainty. Calculations of the degree of uncertainty is a matter of expertise in statistics, computer science, and is based on collecting reliable and relevant data. As will be shown, both in prediction of failures to appear and in the prediction of offending are not the subject of reliable forensic science and would not be admissible under *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579, *Kumho Tire Co. v. Carmichael* (1999) 526 U.S. 137 or *Sargon v. Univ. Southern Cal.* (2012) 55 Cal.4th 747.

First, every person presents a risk of not appearing at a future place and time and every person presents at least the

possibility that they might commit an offense in the future. Therefore, any assessment of risk of either of these two possible future events with regard to any particular person can never rule out that as to such person the event will not occur. This would include persons who were accused of a crime as well as those who were not. To eliminate risk of either event with regard to the entire population would require detention of every single person. This, of course, is contrary to the well established rights of liberty and would be a violation due process.[5]

Examining "failure to appear" as the first concern of bail,[6] it turns out that there is very little risk of a failure to appear if proper procedures are put in place. Studies have parsed failures to appear and found that most are simply the result of lack of attention, confusion, distraction and other issues that are addressable. Few are "true" flight risks where the accused seeks to flee the jurisdiction. See, Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. Chi. L. Rev. 677, 729–35 (2018). There is no validated

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[5]In a bizarre sense, it would not violate equal protection since everyone would be locked up.

[6]Both §§ 12 and 28(f)(3) indicate a consideration in bail is the probability of his or her appearing at the trial or hearing of the case.

process to accurately determine who will take flight. The Supreme Court said regarding flight risk: "Admission to bail always involves a risk that the accused will take flight. That is a calculated risk which the law takes as the price of our system of justice." *Stack v. Boyle* (1951) 342 U.S. 1, 8.

The second criteria is the prediction of future dangerousness. In § 12(b), the section invoked in White's case, in order to detain without bail for a felony involving violence on another person or felony sexual assault offenses, the court must find that "based upon clear and convincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others." In § 28(f)(3), the court is to "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." This is in addition to the calculation of the "probability of his or her appearing" in the case. Future dangerousness is, again, a statistical determination based on analysis of data using probability formulae or algorithms. But it does not work. Most people who are released do not offend before trial. In fact, to say "re-offend" denies the accused the

presumption of innocence. Research shows that the risk of a person who is accused and one who is not to offend with in a "pretrial" period is roughly the same. Sandra G. Mayson, *Dangerous Defendants*, 127 Yale L.J. 490 (2018). Mayson, albeit tongue-in-cheek, suggested that future dangerousness determinations could be conducted at the Department of Motor Vehicles when people go to renew their licenses. Patrons could be taken into custody based on how they fared notwithstanding the fact that they were not facing current charges. Based on her research, the effect on public safety would be about the same.

Even risk assessment tools are not predictive as to who will offend if released from custody. Proficiency studies show that risk assessment tools, modeled on some sort of rigorous predictive algorithm do not get it right 90% of the time; they get it right only 8% or 8.6% of the time. Even using an algorithm, which is not included in the language of §§ 12(b) or 28(f)(3), would not result in a predictive process that would pass muster under *Daubert*, *Kumho Tire* or *Sargon*. Here, even under the language of § 12(b) and (c), let alone § 28(f)(3), a judge can only speculate as to future dangerousness. But, if she were equipped with the latest in risk

assessment tools, she still would be speculating.

This court's holding in *Sargon* agreed with the Court of Appeal in saying, "We construe this to mean that the matter relied on must provide a reasonable basis for the particular opinion offered, and that an expert opinion based on speculation or conjecture is inadmissible." And, of course, the improper speculation in *Sargon* was held to be inadmissible in a case where the jury was to decide damages regarding the loss of market share. There, the expert was not permitted to testify although he was an expert because he did not have the data or the expert basis to determine market share. This court said that such important issues cannot rest on guess, surmise or conjecture. If the probability of offense during the pretrial period is less than 10%, then the judge, whether basing his decision on an unreliable algorithm or his own speculation, is deciding a person's liberty on no more than guess, surmise or conjecture.

If the liberty interest of a person detained is a fundamental constitutional right it is entitled to heightened judicial protection, and any order denying release can be constitutionally justified only if the state "first establish [es] that it has a compelling

interest which justifies the [order] and then demonstrate[s] that the [order is] necessary to further that purpose." *People v. Olivas* (1976) 17 Cal.3d 236, 251, citing *Serrano v. Priest* (1971) 5 Cal.3d 584, 597; *In re Antazo* (1970) 3 Cal.3d 100, 110-111; *Westbrook v. Mihaly* (1970) 2 Cal.3d 765, 784-785. As such, § 12(b) and (c) and § 12(f)(3) reduces the judicial protections to speculation in violation of *Sargon* standards and which fall far below the heightened judicial protections by which the state "first establish [es] that it has a compelling interest which justifies the [order] and then demonstrate[s] that the [order is] necessary to further that purpose." *Id.*

IV.

THE PASSAGE OF SENATE BILL 10 DOES NOT RESOLVE THE ISSUES RAISED BY PETITIONER

Senate Bill 10 was passed and signed into law by Governor Brown on August 28, 2018 but will not take effect until October 1, 2019 pursuant to Penal Code § 1320.34. SB 10 amends Government Code § 27771 to impose additional responsibilities on the county probation department and on probation officers or some other department to do pretrial risk assessments or to have

the court do so or to create a new agency to do so. That agency, or part of an existing agency, now to be known as "Pretrial Assessment Services," would be responsible for assessing people arrested and for releasing some of them, referring some of them to the court and detaining some of them for days or – subject to court order – for the entire time they are awaiting trial.

The Penal Code was also amended, effective October 1, 2019, to first repeal the laws relating to bail, including cash bail, bail bonds and property bonds pursuant to new Penal Code § 1320.6. Second, a new Chapter 1.5 is added commencing with Penal Code §§ 1320.7 through 1320.33 which will become effective on the same date as the repeal.[7] The uncodified portion of the law requires, "To the extent practicable, Judicial Council shall coordinate with the Chief Probation Officers of California to provide training efforts, conduct joint training, and otherwise collaborate in necessary startup functions to carry out this act."[8]

The procedure for pretrial release or detention is multi-level but, at the heart of the new pre-trial release and detention

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[7] Penal Code § 1320.23.

[8] Section 5 of SB 10, uncodified.

law, is the concept of risk. That is addressed through two general approaches. One is to use a list of categories of offenses that will disqualify a pretrial detainee from being released immediately or, in some cases, during the remainder of the time awaiting trial. The second is to require a "pretrial risk assessment" in support of which Probation or the Pretrial Assessment Services will use a "validated risk assessment tool"[9] to predict whether a detainee will make court appearances and whether a detainee will commit a subsequent offense. The categories of risk will be "high," "medium," and "low."

What is, or should, grab the attention of this Court is that the new procedures are less concerned with whether a detainee will appear in court and more upon the risk of offending in the future. This later is basically "preventive detention." In other words, through a combination of the type of crime alleged and the results of a "risk assessment tool," the probation officer or Pretrial Assessment Services Officer will make a decision to

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[9]Penal Code §1320.7(f): "'Pretrial risk assessment' means an assessment conducted by Pretrial Assessment Services with the use of a validated risk assessment tool, designed to provide information about the risk of a person's failure to appear in court as required or the risk to public safety due to the commission of a new criminal offense if the person is released before adjudication of his or her current criminal offense."

release a person or hold that person in jail for further evaluation based on risk of offending. That further evaluation may eventually go to a judge who will decide whether to detain the person for the entire time until trial.

Has no one seen the movie "Minority Report?"[10] There, a government unit called "PreCrime" would arrest and detain people who were determined to be future criminals. They used the psychic powers of "precogs" who had "foreknowledge" of the future behavior of individuals. Suffice it to say, it does not end well. But, literary or cinematic characterizations aside, preventive detention based on risk assessment tools is far less reliable than the predictions of the fictional "precogs."

First, the categories of eligible offenses with which a person is charged and related criteria is arbitrary and does not have a scientifically validated correlation to either appearing in court or offending in the near future. There are various criteria at the various stages of the proceedings but, to summarize:

Under Penal Code § 1320.10, Pretrial Assessment Services (PAS) can release a person on conditions if the person was

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[10] Steven Spielberg, director, "Minority Report (2002)."

assessed with a "low risk" prior to arraignment but who is not charged with sex offenses, misdemeanors involving domestic violence, a person who has made threats or violated stalking laws, or a person who has been arrested for a felony involving violence or threats of violence, or being armed or who has been arrested for a third offense driving under the influence within the past 10 years, DUI with injury or with a .20 or more blood alcohol level, or a person arrested for any type of restraining order violation within five years, had failures to appear, was pending trial or sentencing, on post-conviction release supervision, threatened or intimidated a witness, violated pretrial release within five years, has been convicted of or is now in custody charged with a serious or violent felony. People assessed as "medium risk" will be subject to possible release based on criteria to be established by the court and PAS.

If a person is not released by PAS but is a low or medium risk, that person may be evaluated by the court for a pre-arraignment release. However, the court may not release people pre-arraignment if they were assessed as "high risk" or if they are charged with a serious or violent felony or were pending trial or

sentencing in a felony case at the time of arrest. As to the people who qualify for consideration, the court is to consider information from the defendant, victim and prosecution. "The court may decline to release a person pending arraignment if there is a substantial likelihood that no condition or combination of conditions of pretrial supervision will reasonably assure public safety or the appearance of the person as required." Penal Code § 1320.13(h). And, there shall be a presumption that no conditions of release will assure safety if the alleged crime involved violence or threatened violence, the person was armed or used a deadly weapon, was on any form of supervised release, intimidated or threatened a witness or victim or violated the terms of pretrial release.

The next level would be at the arraignment but only if the victim was given notice of the hearing and have a reasonable opportunity to be heard. Penal Code § 1320.16. This, of course, could delay the hearing on pre-trial detention. The PAS assessment would be considered by the court with other information. At the time of the arraignment, the prosecutor may make a motion seeking detention of the defendant pending trial

based on much of the same criteria as creates a presumption of detention. The hearing would be held no later than three days after the motion for detention is filed or five days if the defendant was not in custody before arraignment with a right to ask for up to three additional days continuance. Penal Code § 1320.19. And, at the preventive detention hearing, once again there is a rebuttable presumption that no conditions of release would satisfy public safety if the crime is violent felony, the person is assessed as "high risk," the person was convicted within five years of a serious or violent felony, the person was facing sentencing on a violent felony, had intimidated or threatened a witness or victim, or was on supervision at the time of arrest. The prosecutor has to establish probable cause for the present offense and the judge has to make a preventive detention ruling by clear and convincing evidence which may be based on hearsay.

Merely adding procedural steps that prolong the detention of individuals does not serve the people's liberty interests. *City of Riverside v. McLaughlin* (1991) 500 U.S. 44, 53. Defendants might be disserved by adding procedural complexity into an already complicated system. Thus, pretrial release should be

determined quickly under *McLaughlin* but, if there is a delay, the trial court's statement of reasons shall "contain more than mere findings of ultimate fact or a recitation of the relevant criteria for release on bail; the statement should clearly articulate the basis for the court's utilization of such criteria." *In re Pipinos* (1982) 33 Cal.3d 189, 193; see also, *In re Podesto* (1976) 15 Cal.3d 921, 937–938.

All in all, a person accused could be detained for a few hours on a "low risk" minor case, for a couple of days for a pre-arraignment hearing, five to ten days for an arraignment hearing and a few more if the prosecutor seeks preventive detention pretrial. And, of course, if the person is detained pretrial, the person could be detained for months or longer awaiting trial. Since there will be no monetary bail, detention is detention until, if ever, PAS or the court orders release.

The offenses charged and all the related criteria are based on some scientifically unvalidated theories that, more likely than not, were the result of political negotiations as SB 10 was going through committees and the legislative process. There is some folklore appeal to the conclusion that some of these criteria are

related to appearance at court or public safety, but there are no studies that support either a rate of failures to appear or future dangerousness based on these categories of crime and related criteria. And the choice is binary, either a person is released or not. It is true that different conditions could be imposed on release but the most fundamental effect on a person's liberty interest is to be locked up based on presumptions backed by speculation, guess, surmise and conjecture. See, *Sargon v. Univ. Southern Cal.* (2012) 55 Cal.4th 747.

As briefed above, the use of a "risk assessment tool" does not add anything to the scientific nature of the statistical analysis. Probabilities based on complex algorithms do not meet *Daubert, Kumho Tire* or *Sargon* unless they are validated and validation is required by Penal Code §1320.7(f). Validation of a method is an evaluation of the procedure used to analyze data regarding the quality, reliability and consistency of the analytical technique. In other words, the method is more or less valid if it follows scientific criteria, is repeatable and renders consistent results. Validation is often associated with independent verification which means that an independent agency will test the

procedures in place and confirm that the procedure has the quality, reliability and consistency claimed by the user.

As the PCAST Report[11] makes clear, scientific validity involves both "foundational validity" and "validity as applied." Much of forensic science has been based on "rough heuristics to aid in criminal investigations and were not grounded in validation practices of scientific research."[12] Such validity, to meet current forensic standards, must be based on the standards of a "research culture." This means, "that (1) methods must be presumed to be unreliable until their foundational validity has been established based on empirical evidence and (2) even then, scientific questioning and review of methods must continue on an ongoing basis." Using any combination of these criteria or assessment tools has not been validated and, given the current research, cannot be.

Ultimately, SB 10 as presently constituted is no better at

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[11] President's Council of Advisors on Science and Technology (PCAST), *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* (September 2016).

[12] National Research Council. STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD. The National Academies Press. Washington DC. (2009) 128.

creating truthfinding criteria to support preventive detention, nor at creating due process or equal protection. The criteria are not reliable or proven, the assessment tools are not validated, the procedures do not provide due process and the overall operation of SB 10 is so wildly unreliable that there will not even be rough consistency from courtroom to courtroom or county to county thereby denying equal protection.

It is a good thing that monetary bail is repealed. Anatole France, famously said, "In its majestic equality, the law forbids rich and poor alike to sleep under bridges, beg in the streets and steal loaves of bread."[13] It could be said that monetary bail permits all, rich an poor alike, to be confined in jail awaiting trial. It is true that SB 10 should result in fewer people being held in jail simply because of their poverty but it will be also true that the rich and the poor will also be randomly detained for days, months or longer based on unpredictive criteria and unvalidated algorithms.

CONCLUSION

Amicus, California Attorneys for Criminal Justice, has abiding concerns about the fairness of the criminal process to

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[13]Anatole France, *The Red Lily*, Chapter VII (1894).

determine conditions leading to granting or denying bail or granting pretrial release or detention. We hope we have shed some light from our perspective on the Court's questions regarding Cal. Const. Article I, § 12 and § 28(f)(3) as well as the issues regarding SB 10. We respectfully submit that Petitioners' claims are well taken and that the Petition for Writ of Habeas Corpus should be granted.

Dated: October 10, 2018

Respectfully submitted,

CACJ *Amicus Curiae* Committee
Robert M. Sanger
Stephen K. Dunkle, Chair

By: ROBERT M. SANGER (SKD)
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CERTIFICATE OF WORD COUNT

California Rules of Court, Rule 14 (c)(1)

I have run the "word count" function in WordPerfect Office X6 and hereby certify that this brief contains 6,582 words, including footnotes.

Dated: October 10, 2018

Robert M. Sanger (SLS)

Robert M. Sanger

PROOF OF SERVICE

I, the undersigned declare:

I am over the age of 18 years and not a party to the within action. I am employed in the County of Santa Barbara. My business address is 125 E. De La Guerra Street, Suite 102, Santa Barbara, California, 93101.

On October 10, 2018, I served the foregoing document entitled: **APPLICATION OF CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE TO APPEAR AS *AMICUS CURIAE ON BEHALF OF PETITIONER* (RULE 8.520(f) AND BRIEF IN SUPPORT OF PETITIONER** on the interested parties in this action by depositing a true copy thereof as follows:

See Attached Service List

__X__ **BY U.S. MAIL** - I am readily familiar with the firm's practice for collection of mail and processing of correspondence for mailing with the United States Postal Service. Such correspondence is deposited daily with the United States Postal Service in a sealed envelope with postage thereon fully prepaid and deposited during the ordinary course of business. Service made pursuant to this paragraph, upon motion of a party, shall be presumed invalid if the postal cancellation date or postage meter date on the envelope is more than one day after the date of deposit.

__X__ **BY ELECTRONIC MAIL.** I caused the document to delivered by electronic mail to the interested party at the email address indicated on the attached service list.

__X__ **STATE** - I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed this October 10, 2018 at Santa Barbara, California.

Jacob W. Swanson

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