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 REPLY BRIEF ON THE MERITS

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Table of contents

Table of authorities

Cases **Page**

Table of authorities (continued)

Constitutional provisions

Other authorities

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Petitioner's Reply Brief on the Merits

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

Argument

I.

The Amendments to Section 28 Should Not Be Construed to Confer Discretion to Deny Bail.

Respondent agrees that, by passing Proposition 9 in 2008, the voters did not intend to repeal article I, section 12, but contends article I, section 28 should be construed to confer discretion to deny bail. This construction will effectively eliminate the right to bail in section 12 and subsume its exceptions.

Respondent's proposed interpretation does not reflect the voters' intent in adopting the amendments to section 28. Respondent fails to acknowledge that the voters were not informed that subdivision (f)(3) had been held inoperative and the voters were not asked to consider it. The text and ballot materials also do not support respondent's proposed interpretation.

A. Voter intent cannot be reliably ascertained from section 28, subdivision (f)(3)'s text because it is inoperative.

Respondent argues that article I, section 28, subdivision (f)(3) "has not been ruled to be invalid" (Respondent's Brief on the Merits (RBM), p. 10), but does not explain why it is valid in light of this Court's decision in *People v. Standish* (2006) 38 Cal.4th 858. *Standish* held that former section 28, subdivision (e), renumbered as section 28, subdivision (f)(3), is inoperative. (*Id.* at pp. 874-875.) Respondent does not even acknowledge that Proposition 9 made minor amendments to the invalid section 28, subdivision (e)[1], and relegates its discussion of *Standish* to a footnote. (RBM, p. 14, n. 3.) Because section 28, subdivision (f)(3) amended the inoperative section 28, subdivision (e), the latter cannot be ignored in construing the former.

The construction of section 28, subdivision (f)(3) is dependent on the intent of the voters, the "paramount consideration" for the court. (*In re Lance* (1985) 37 Cal.3d 873, 889.) To determine voter intent, the court must first look to what was actually presented to the voters in the 2008 election; they were asked to consider minor amendments to an inoperative provision. (Voter Information Guide, Gen. Elec. (Nov. 4, 2008), text of Prop. 9, p. 33; *People v. Standish, supra,* 8 Cal.4th 858.) The voters were not informed that the provision they were asked to amend was inoperative; it was presented in the voter guide as an existing part of the Constitution. Since the voters were not asked to consider most of the language in section 28, subdivision (f)(3), it can't be relied on to determine voter intent.

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[1] As explained in White's Opening Brief on the Merits at pages 21 to 23, Proposition 9 amended section 28, subdivision (e) to add the consideration of victim safety in making bail determinations and to require that victims be provided notice and an opportunity to be heard before a court releases an accused charged with a serious felony.

B. Respondent's interpretation of section 28, subdivision (f)(3) would repeal section 12, a result respondent agrees the electorate did not intend.

Respondent agrees that, with the passage of Proposition 9, the 2008 electorate did not intend to repeal article I, section 12 of the California Constitution. (RBM, p.15.) But respondent's interpretation of section 28, subdivision (f)(3) as granting the courts broad discretionary authority to deny bail would, as a practical matter, repeal section 12.

Respondent asserts that discretionary authority to deny pretrial release under section 28, subdivision (f)(3) can coexist with section 12, but does not explain how the right to bail is retained if section 28, subdivision (f)(3) confers discretion to deny it.

To work around this obvious contradiction, respondent redefines section 12 by its exceptions as granting authority to deny bail, and not as prohibiting detention subject to narrow and specific exceptions.[2] (RBM, pp. 19-20.) Respondent then argues that because section 28 does not allow the release of individuals under the exceptions to the right to bail in subdivisions (b) and (c) of section 12, it is consistent with section 12. (RBM, pp.18-19.) Indeed, it so consistent that it is impossible to imagine a scenario where a court would ever need to invoke the exceptions to section 12. If the court is permitted to make a discretionary finding that preventive

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[2] The exceptions are: (a) capital crimes, (b) violent felony offenses where 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; and (c) felony offenses where the court finds based upon clear and convincing evidence that the person threatened another with great bodily harm and that there is a substantial likelihood that the person would carry out the threat if released. (Cal. Const., art. I, § 12 (a), (b) and (c).)

detention is necessary, it would not need to determine if there is a substantial likelihood the accused's release would result in great bodily harm to others under subdivisions (b) and (c) of section 12. These exceptions to the right to bail would be subsumed by section 28, subdivision (f)(3).

Interpreting section 12 as conferring authority to deny bail is inconsistent with its text, its purpose, the voters' intent, and this Court's construction of the constitutional provision. The plain language of section 12 expressly prohibits the court from detaining an accused. It states "[a] person shall be released on bail. . . " Its use of the term "shall" imposes a mandatory duty on the State to release an accused pending trial. There is nothing ambiguous about this phrase.

And this Court has uniformly interpreted section 12 consistent with this definition – as conferring a right to bail. (*People v. Tinder* (1862) 19 Cal. 539, 542 ["the admission to bail is a right which the accused can claim, and which no Judge or Court can properly refuse."]; *Ex parte Voll* (1871) 41 Cal. 29, *In re Scaggs* (1956) 47 Cal.2d 416, *In re Law* (1973) 10 Cal.3d 21, 25, *People v. Standish* (2006) 38 Cal.4th 858, 877.)

The intent and purpose of section 12 was "to abrogate the common law rule that bail was a matter of judicial discretion by conferring an absolute right to bail." (*In re Law*, *supra*, 10 Cal.3d at p. 25.) And while the California voters have amended section 12 to create limited and factually specific exceptions to the right to bail, its historical definition and purpose remain unchanged.

Respondent insinuates the 1982 and 1994 amendments transformed section 12 to confer discretionary pretrial detention authority. This vastly overstates the effect of these amendments.

The voters adopted two exceptions to the right to bail with the passage of Proposition 4. Consistent with case law in effect in 1982, the Legislative Analyst in Proposition 4's ballot materials advised the voters that the state Constitution permitted the court to deny bail "*only* for those who are accused of crimes punishable by death. . ." and that the initiative would allow bail to be denied under "two additional set of circumstances," adopted as subdivisions (b) and (c) of section 12. (Ballot Pamp., Primary Elec. (June 8, 1982), summary prepared by the Legislative Analyst, p. 16, original italics.) Thus, the ballot materials informed the voters that there was an absolute right to bail except in capital cases, and the initiative would add two limited exceptions. The initiative said nothing about abrogating the right to bail or conferring discretion on the courts to deny it.

The Attorney General's analysis of Proposition 189, passed twelve years later, again recognized section 12's right to bail, informing the voters that the initiative would amend the "State Constitution to add felony sexual assault offenses to crimes currently excepted to right to bail." (Voter Information Guide, Gen. Elec. (Nov. 8, 1994) summary prepared by the Attorney General, p. 6.)

If respondent's interpretation of section 28, subdivision (f)(3) is adopted, section 12's right to bail and its limited exceptions would be nullified, repealing the constitutional provision by implication, a result respondent readily agrees the voters did not intend. This is sufficient reason not to adopt respondent's proposed interpretation of section 28, subdivision (f)(3).

C. The text of section 28, subdivision (f)(3) does not confer broad discretion to deny bail.

Respondent's interpretation of section 28, subdivision (f)(3) would impliedly repeal section 12, a result respondent agrees the voters did not intend. This resolves the issue. But this interpretation should also be rejected because the plain language of section 28, subdivision (f)(3) does not support it. If the drafters intended to confer discretion to deny pretrial release, they would have done so expressly.

Respondent proclaims, without analysis, that section 28, subdivision (f)(3) "gives the court discretion to release a defendant, charged with a non-capital crime, on pretrial bail but requires the court to consider specific factors, including [sic] public and the victim's safety, before setting, reducing or denying that bail." (RBM, p. 12.) Respondent later asserts that section 28, subdivision (f)(3) "contains a discretionary provision which provides '[a] person may be released on bail. . . except for capital crimes. . .'", and notes that "may" generally connotes a "permissive action unless the context requires otherwise." (RBM, pp. 17-18.)

As respondent acknowledges "may" is not always construed as permissive and depends on context. (RBM, p. 18.) In *People v. Ledesma* (1997) 16 Cal.4th 90, 95, the court explained that construction of the term "may" as permissive is not a "fixed rule of statutory construction," and that, given the "definitional diversity" of the term "may" it cannot be considered in isolation, but requires the court to "focus more broadly on the language, context, and history" of the statute. (*Ibid.*)

The term "may" is ambiguous. And when the language of an initiative is ambiguous, the court should consider extrinsic evidence, such as the ballot materials, to interpret it. (*Professional Engineers in California*

Government v. Kempton (2007) 40 Cal.4th 1016, 1037.) Additionally, the initiative's language must also be construed in the context of the Constitution." (*Kennedy Wholesale, Inc. v. State Bd. of Equalization* (1991) 53 Cal.3d 245, 249-250.) White thoroughly discussed these rules of statutory construction and their application to section 28 in the Opening Brief on the Merits, at pages 24 to 31, and will not reiterate them here.

Respondent's interpretation of section 28, subdivision (f)(3) should be rejected because it does not reflect the voters' intent. The voters in 2008 did not intend to replace the longstanding constitutional right to bail in section 12 with broad discretionary authority to detain individuals accused of crimes. Section 28 should not be construed to repeal section 12, but only to require courts to consider victim safety in making pretrial release determinations within the parameters of section 12. This interpretation leaves intact section 12's guarantee of the release on bail, while ensuring consideration of victim safety in determining whether the defendant fits within the narrow class of individuals who must be detained under section 12.

II.

The Validity Of a Detention Order Presents a Mixed Question of Law and Fact Regarding the Deprivation of a Fundamental Constitutional Right, Warranting Independent Review.

Respondent argues that, because section 12, subdivision (b) requires proof by clear and convincing evidence, it should be reviewed for substantial evidence. (RBM, p. 22.) In support of this argument, respondent cites a number of civil cases and juvenile court cases involving family reunification. (See, e.g., *Stromerson v. Averill* (1943) 22 Cal.2d 808, 815; *Beeler v. American Trust Co.* (1944) 24 Cal.2d 1, 7; *Crail v. Blakely* (1973) 8 Cal.3d 744, 750.) None of these cases involve fundamental constitutional

rights.

Pretrial incarceration exacts substantial and irreparable costs on an accused — loss of employment and home, separation from family, impairment of the right to effectively defend the case, and great psychological and physical suffering. The detention of an accused is a very serious matter and must be dealt with by the courts in a manner which clearly appreciates the degree of loss suffered by an individual whose guilt has not been adjudicated. It is a decision that is not on par with a state law evidentiary ruling, a will contest, or even family reunification. It is a decision that strikes at the very core of the liberty protected by the Due Process Clause. (*Zadvydas v. Davis* (2001) 533 U.S. 678, 690 ["Freedom from imprisonment — from government custody, detention, or other forms of physical restraint — lies at the heart of the liberty that [the Due Process] Clause protects"].) It is difficult to conceive of a decision more worthy of an appellate court's careful and independent review.

Respondent also argues the general proposition that the clear and convincing evidence standard applies in the trial court only, and "[o]n appeal, the usual rule of conflicting evidence is applied, giving full effect to the respondent's evidence, however slight, and disregarding the appellant's evidence, however strong." (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 371.)

White agrees that the historical facts upon which the court relies to make a ruling under section 12, subdivision (b) must be established by clear and convincing evidence, and that the trial court's findings of fact in this regard are entitled to deference. White does not suggest that a reviewing court decide factual questions under the clear and convincing evidence standard. White also acknowledges that, on review of a detention order, full

effect should be given to the prosecution's evidence. This is the "usual rule of conflicting evidence" referred to in Witkin. (9 Witkin, *supra*, §371.)

But the ultimate legal conclusion of whether the historical facts found establish a substantial likelihood that an individual poses a risk of great bodily harm to others if released is subject to independent review on appeal, as are other legal questions implicating fundamental constitutional rights. (*See, e.g., People v. Cromer* (2001) 24 Cal.4th 889, 899; *People v. Louis* (1986) 42 Cal.3d 969, 987.)

This is the standard for review of pretrial detention orders in the Ninth Circuit, quoted at length here: "We review the district court's factual findings under a deferential, clearly erroneous standard. *United States v. McConney*, 728 F.2d 1195, 1200 (9th Cir.) (en banc), cert. denied, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984). In a release determination, however, the conclusion based on those factual findings presents a mixed question of fact and law. The inquiry transcends the facts presented and requires both the consideration of legal principles and the exercise of sound judgment about the values which underly those principles. *McConney*, 728 F.2d at 1202. In reviewing a district court's order denying pretrial release, we must ensure not only that the factual findings support the conclusion reached, but also that the person's constitutional and statutory rights have been respected. See *Truong Dinh Hung v. United States*, 439 U.S. 1326, 1328-29, 58 L.Ed.2d 33, 99 S.Ct. 16 (1978) (Brennan, J., in chambers); *Stack v. Boyle*, 342 U.S. at 4. Accordingly, we may make an independent examination of the facts, the findings, and the record to determine whether the pretrial detention order is consistent with those constitutional and statutory rights. *McConney*, 728 F.2d at 1202." (*United States v. Motamedi* (9th Cir. 1985) 767 F.2d 1403, 1405.)

Significantly, the two seminal California cases deciding the applicable standard of review for mixed questions of law and fact implicating constitutional rights also relied on *United States v. McConney*, 728 F.2d 1195. (*People v. Cromer* (2001) 24 Cal.4th 889, 899; *People v. Louis* (1986) 42 Cal.3d 969.)

In *People v. Cromer*, *supra*, 24 Cal.4th 889, the court held that the trial court's determination that the prosecution exercised due diligence in locating an absent witness to justify admission of the witness's preliminary hearing testimony is subject to de novo review. The *Cromer* court observed that typically, the due diligence inquiry will be based on largely undisputed facts. (*Id.* at p. 900.) The court explained that "the events on which the due diligence determination turns do not play out in the courtroom . . . . To the extent that these outside events are disputed, the trial court's resolution of disputed factual issues, often by determining the credibility of witnesses, is reviewed deferentially on appeal under the substantial evidence standard. But once a trial court through its findings has determined the historical facts, it is no better situated than an appellate court to make the predominantly legal determination that those facts do or do not demonstrate prosecutorial due diligence in locating the absent witness." (*Id.* at p. 902.)

As with the due diligence inquiry, typically, the facts the court considers at a pretrial detention hearing are not in dispute. As in this case, the evidence will consist of the defendant's criminal history, character for violence, and the circumstances of the charged offense. These facts can be easily ascertained. The defense does not usually present extensive evidence of the charged crime at an arraignment or preliminary hearing. If such evidence is presented, the trial court can resolve any factual conflict, and those findings would be entitled to deference on appeal. The appellate

court, however, is in as good a position to determine the legal question of whether there is a substantial likelihood that a defendant's release poses a risk of great bodily harm to others.

In arguing that the court's pretrial detention order was "based entirely on [White's] factual dispute of the evidence" (RBM, p. 30), respondent confuses the first prong of section 12, subdivision (b) – whether the "facts are evident or the presumption is great" – with the second prong, whether there is a substantial likelihood the accused will commit great bodily harm if released. The former is reviewed for substantial evidence. (*In re Application of Weinberg* (1918) 177 Cal. 781, 782.) But the two prongs involve separate inquiries.

Although respondent argues the court's determination was "entirely factual" (RBM, p. 30), respondent fails to point to any significant factual conflicts resolved by the trial court. White admitted he was present at the scene, that Owens ran over and grabbed the victim and that White stood by his truck. White argued he was not a candidate for detention, given his alleged role in the offense, lack of criminal record and character for non-violence. He argued the legal significance of the facts, and did not dispute how the events occurred.

The deprivation of liberty is at the core of what our Constitution protects and justifies independent review.

III.

The Trial Court Erred in Detaining White Under Section 12.

Respondent argues substantial evidence supported the trial court's decision, because based on the preliminary hearing testimony, there was a substantial likelihood White's release would result in great bodily harm to others. (RBM, pp. 35-36.) Respondent summarizes the preliminary hearing

testimony, presents the Court of Appeal's reasoning, and concludes that the trial court's decision, based on a "resolution of pure questions of fact," was correct.

Respondent does not individually analyze the two separate prongs of subdivision (b) of section 12: (1) "when the facts are evident or the presumption great" – which requires a finding of substantial evidence that White aided and abetted Owens and (2) whether there is a substantial likelihood great bodily harm would result if White was released. Instead, respondent collapses the two prongs into one and relies exclusively on the nature of the crime to justify the detention order. Respondent reargues the points raised by the Court of Appeal.

A pretrial detention order under section 12, subdivision (b) requires a finding be made under each prong; the two are not the same. In the Opening Brief on the Merits at pages 42 through 45, White addressed the Court of Appeal's analysis regarding whether there was substantial evidence of White's aiding and abetting to support the first prong of section 12, subdivision (b), and at pages 45 through 48, White addressed the Court of Appeal's analysis with respect to the second prong of whether there is a substantial likelihood great bodily injury would result if White was released. White will not reiterate those analyses.

Predicting whether there is a substantial likelihood that an individual will cause great bodily harm to others is not determined in a vacuum by only reviewing the facts of the alleged crime, especially if there are multiple defendants with varying levels of culpability. To make this determination, the court must analyze a defendant's individualized circumstances, including such factors as criminal history and character for non-violence.

This individualized determination is mandated by the federal

Constitution. (*United States v Salerno* (1987) 481 U.S. 789, 750-52.) *Salerno* upheld the constitutionality of the Bail Reform Act because it limited the circumstances in which detention would occur and provided procedural safeguards to ensure courts made individualized decisions about detention in every case. (*Ibid.*)

By deferring the question to the trial court, the Court of Appeal assumed the court considered White's lack of criminal record, his family support, his character for non-violence, and his passive role in the alleged offense. (*People v. White* (2018) 21 Cal.App.5th 18, 31.) But the trial court's ruling does not reflect this. The trial court did not make any detailed findings to support the detention order, but instead, just recited the constitutional criteria for detaining both defendants, without distinguishing Mr. White's individual circumstances or characteristics, or his role in the offense. The court provided no reasons for finding that Mr. White posed such a grave risk. (Exh. B, p. 196.)

Decisions about pretrial detention must be based on specific individualized facts to ensure only those individuals who pose a danger are kept in custody. It is also necessary to curb prosecutors from employing pretrial detention as a coercive strategy.

This case is illustrative. The prosecution offered Mr. White the choice of asserting his innocence and staying in jail or pleading guilty and going home on probation.[3] (Exhibit A attached to the Request for Judicial

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[3] There is no significant difference between probation conditions and pretrial release conditions. The very same kind of monitoring restrictions that probation employs – such as stay away orders and computer and GPS monitoring – can be ordered as conditions of pretrial release. Either Mr. White poses a danger if released with conditions or he does not.

Notice.) The prosecutor stated it had extended this time-served offer, and informed the court that a decision on the validity of the detention order was pending in the Court of Appeal, and "[o]nce that is received, I think that we will be in continued discussions regarding the disposition of this case." (Exhibit A to Request for Judicial Notice, p. 4.) Thus, the prosecutor acknowledged the coercive effect of the detention order.

The only reason to keep someone like Mr. White detained is to coerce a guilty plea or obtain an unfair advantage in the criminal case by restricting White's access to his lawyer and his ability to prepare his defense. Individualized assessment of risk under section 12 and independent review are needed to prevent this abuse.

IV.

Conclusion

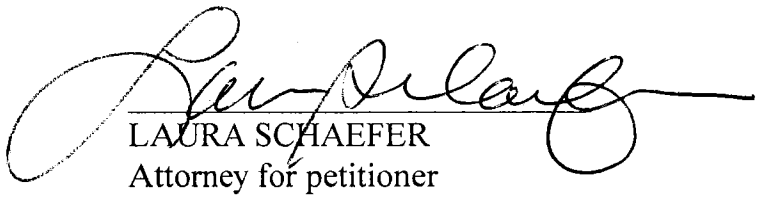
Respondent agrees that the voters did not intend to repeal section 12 by passage of section 28, subdivision (f). But respondent's interpretation of section 28 would subsume section 12, repealing it by implication. Interpreting the amendments to section 28, subdivision (f)(3) as requiring courts to consider victim safety in determining whether the narrow exceptions to section 12's right to pretrial release apply would leave section 12 intact and give effect to the voters' intent in passing the amendments to section 28.

Because pretrial detention orders made under section 12 deprive individuals of their liberty, the most fundamental right of Due Process, such orders must be subject to independent review. This is consistent with the reasoning of this Court's decisions in *People v. Cromer*, *supra*, 24 Cal.4th 889, 899 and *People v. Louis*, *supra,* 42 Cal.3d 969, and Ninth Circuit cases.

Applying that standard in this case, the court erred in detaining White under section 12. The court failed to conduct an individualized determination of White's specific circumstances, including his lack of criminal record, his passive role in the alleged offense and his character for non-violence. Such an assessment, with independent review conducted by an appellate court, ensures a presumptively innocent person's liberty interests are curtailed only in cases where the individual poses an actual risk of danger. It also reduces the prosecutors' use of detention to coerce pleas.

Respectfully submitted,

Dated: December 3, 2018



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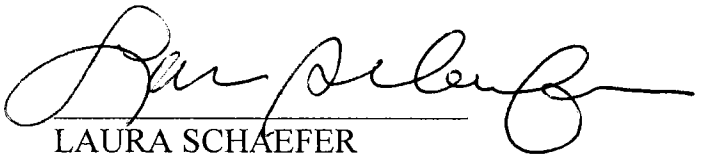
Certificate of Word Count

I, Laura Schaefer, counsel for appellant certify pursuant to the California Rules of Court, rule 8.504(d)(1) that this brief contains 4030 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 December 3, 2018, at San Diego, California.



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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 December 3, 2018, I caused to be served the following document: PETITIONER'S REPLY BRIEF ON THE MERITS by placing a copy of the document in an envelope addressed to each addressee, respectively, as follows:

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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@boyce-schaefer.com on December 3, 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 December 3, 2018, at San Diego, California.

Mary Elena Joslyn