SUPREME COURT OF CALIFORNIA
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Supreme Court No. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re Christopher Lee White, Petitioner, On Habeas Corpus.	Court of Appeal No. D073054 Superior Court No. SCN376029

PETITION FOR REVIEW AND REQUEST FOR IMMEDIATE ADMISSION TO BAIL UNDER PENAL CODE SECTION 1476

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To The Honorable Tani Cantil-Sakauye, Chief Justice, and the Honorable Associate Justices of the Supreme Court of the State of California:

Petitioner, Christopher Lee White, seeks review in this Court following a published decision of the Court of Appeal, Fourth Appellate District, Division One, filed March 6, 2018, upholding the trial court's order detaining petitioner Christopher White without bail. A copy of the court's opinion is attached to this petition as Appendix A.

White seeks immediate admission to bail pending this proceeding under Penal Code section 1476.[1] White has been incarcerated since July 28,

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[1] Penal Code section 1476 provides: Any court or judge authorized to grant the writ, to whom a petition therefor is presented, must endorse upon the petition the hour and date of its presentation and the hour and date of the granting or denial of the writ, and must, if it appear that the writ ought to issue, grant the same without delay; and if the person by or

2017, and his trial date is set to commence on May 14, 2018. He will suffer irreparable harm if he is not released from pretrial custody and admitted to bail.

Issues presented

1. Article I, §12 (b), of the California Constitution allows pretrial detention without bail only if the state proves that the defendant's release "will result in a substantial likelihood of great bodily injury." Can the state detain a person without bail under Article I, §12 (b), if he or she has no criminal history and is alleged to have aided and abetted an unarmed assault not resulting in great bodily injury?
2. Is the standard of review for the constitutional question of whether the trial court erred in ordering detention independent or deferential?
3. Before ordering pretrial detention, is a trial court required to consider whether alternatives to detention could reasonably satisfy the state's interest in ensuring public safety?

Necessity for review

For eight months, the state has detained 27- year-old Christopher White without bail after his arrest for aiding and abetting his co-defendant's attempted kidnap to commit rape, an offense carrying a maximum 9 year sentence. Evidence adduced at the preliminary hearing established that White's co-defendant Jeremy Owens grabbed a 15-year-old girl outside her house and pushed her to the ground. She broke free and started to go back to her house. According to the girl, White said "get in the house," but White

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upon whose behalf the application for the writ is made be detained upon a criminal charge, may admit him to bail, if the offense is bailable, pending the determination of the proceeding.

did not physically assist Owens in the assault. Owens ran to White's truck and White drove them from the scene. No weapons were used, and the girl sustained minor injuries: a fingerprint mark and redness on her neck. The trial court detained White, who has no criminal history, without bail, citing Article I, § 12, subdivision (b).

Just days before the Court of Appeal issued its decision, the state offered Mr. White a plea bargain of probation with time served on the record, which White rejected. White obtained the reporter's transcript of this hearing and filed a petition for rehearing and a request for judicial notice of the transcript in the Court of Appeal. White argued that the state did not have a legitimate safety concern because it was willing to release White, but only if he pled guilty, and asserted that his continued pretrial detention was punishment in violation of due process. The Court of Appeal denied the request for judicial notice and the rehearing petition.

Under the California Constitution, bail is a matter of right, with very limited exceptions. Article I, § 12, subdivision (b) carves out an exception for perpetrators of violent felony offenses, but only where the evidence of guilt is substantial and there is clear and convincing evidence of a substantial likelihood that the person's release would result in great bodily injury to others.

This case is the first to interpret this exception and it takes an expansive view of the state's power to detain the presumptively innocent. "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 (*Salerno*).) The Court of Appeal's decision turns what is supposed to be a "carefully limited exception" into the norm. It allows detention without bail where a defendant with no criminal history is accused

of encouraging an unarmed assault. Mr. White did not inflict great bodily injury on anyone during this crime or at any other time. There is no evidence from which one could reasonably predict that White would, if released, cause great bodily injury to anyone; White has no criminal history. The Court of Appeal has set the bar for pretrial detention too low. Review should be granted to guide the courts in applying what should be a limited exception to the constitutional mandate of admission to bail.

Pretrial liberty is a fundamental right. The question of whether a trial court properly deprives a person of this fundamental right is a constitutional one, requiring independent review. The Court of Appeal in this case, however, applied a deferential substantial evidence standard, disagreeing with *In re Nordin* (1983) 143 Cal.App.3d 538, 543. (*In re White* (2018) 21 Cal.App.5th 18, 29, n.6.) The Court of Appeal in *Nordin* held that the standard of review for determining whether the exceptions in Article I, § 12 apply is de novo. (*Nordin, supra*, 143 Cal.App.3d at p. 543.) Review is required to settle this conflict.

The Court of Appeal also concluded that a court is not constitutionally required to consider less restrictive alternatives before remanding an arrestee to custody. Incarceration is the most severe form of limitation on liberty. For this reason, due process mandates that before the state can detain a defendant, it must determine if there are less restrictive means of ensuring public safety. (*Salerno, supra*, 481 U.S. at p. 750, 752, 755.) 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. None were considered here, and, according to the Court of Appeal, the court was not required to consider such alternatives.

(*In re White, supra*, 21 Cal.App.5th at p. 32, n. 8.) Before a court may deprive an accused of his liberty for safety reasons, the court must find that no conditions of bail will protect the public.

Failure of the courts to cautiously and sparingly resort to pretrial incarceration of accused individuals will strain the already overburdened county jails. Recently, in *In re Humphrey* (2018) 19 Cal.App.5th 1006, the court held that a defendant's ability to pay must be considered in setting monetary bail. This will likely result in more individuals being released with non-monetary alternatives to confinement. But it will also likely cause prosecutors to routinely seek detention of individuals under Article I, §12(b), now that "de facto" detention by imposing unaffordable bail is no longer an option. This will lead to a substantial increase in California's jail population, already overburdened with inmates serving jail terms under realignment.

Finally, pretrial detention should never be used to punish the presumptively innocent. Although the Supreme Court in *Salerno* held that neither the Due Process Clause nor the Eighth Amendment prohibits preventive detention entirely, it also recognized that each does limit the state's detention authority. (*Salerno, supra*, 481 U.S. at pp. 746-748.) Pretrial detention will constitute punishment – and so violate substantive due process– if it is irrational or "excessive" in relation to its regulatory goal, or if it is inflicted with punitive intent. (*Ibid*; see also *Bell v. Wolfish* (1979) 441 U.S. 520, 535 ["In evaluating the constitutionality of conditions or restrictions of pretrial detention . . . the proper inquiry is whether those conditions amount to punishment of the detainee."] .)

Here, the state is willing to release Mr. White if he pleads guilty, but not if he goes to trial. The state's offer of a "time-served deal" necessarily means that the state is detaining Mr. White not for the legitimate regulatory

purpose of curtailing reasonably predictable dangerous conduct, but to punish him, which the Due Process Clause and United States Supreme Court precedents squarely prohibit. "Punishment first, trial later" is anathema to our judicial system.

Review should be granted to settle the important question of when detention is constitutionally authorized, since this impacts the fundamental liberty interests of accused individuals. Conflicting decisions regarding the standard of review for assessing the infringement of this right should be reconciled. The courts should be required to seek alternatives to confinement to protect the public, while also limiting the incarceration of the presumptively innocent. Finally, the state should not use pretrial detention to punish the accused or coerce a guilty plea, a practice that is offensive to our system of justice. Since Mr. White's continued detention is unconstitutional, he requests immediate admission to bail pending these proceedings under Penal Code section 1476.

Statement of the case and facts

Chris White, was arrested on July 28, 2017, and charged with attempted kidnaping with intent to commit rape (Pen.[2] Code § 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.

Mr. White was charged with co-defendant Jeremy Owens. He was arraigned, pled not guilty and was detained without bail at the arraignment.

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

A preliminary hearing was held on October 4 and 5, 2017. The reporter's transcript is attached to Mr. White's writ filed in the Court of Appeal as Exhibit B. Before the hearing, Mr. White filed a request for bail. Attached to the writ as Exhibit A is Mr. White's request for bail, with supporting letters.

The evidence at the preliminary hearing established that, after Mr. White and Owens went to the beach, the two were standing by Mr. White's truck, when Owens ran across the street and grabbed the 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.) Mr. White remained standing by his truck and looked "freaked out." (Exh. B, p. 56.) He said "sorry," and the girl walked toward the gate to her side yard. (Exh. B, p. 33.) According to the girl, Mr. White said "get in the house." (Exh. B, p. 33.) The girl entered the gate and went into her house. (Exh. B, p. 34.) Owens and White left in the truck. (Exh. B, p. 34.) Mr. White maintained to 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[3], pp. 205, 210, 212, 223-224, 227, 229, 230, 234.)

Mr. White told the police that Owens had talked generally about his desire to go "caveman style" on a girl, but Mr. White told the police he did not believe Owens was serious about this. (Exh. D, pp 254.) Mr. White also told the police Owens asked Mr. White if he "would stop him" if he"got out of hand" with a girl, and Mr. White told him he would. (Exh. D, p. 226.) Mr. White admitted they looked at girls at the beach that day – typical 27-year - old male behavior. The police suggested Mr. White was a "look out" and

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

Mr. White appeared to agree Owens said "hey watch out," but Mr. White did not agree that he knew Owens was going to grab this girl. (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.)

At the end of the preliminary hearing, the court bound Mr. White over for trial on all counts. (Exh. B. p. 190.) The court then conducted a hearing on Mr. White's request for bail. (Exh. B, pp. 192-195.)

The defense requested release on reasonable bail of $50,000. The defense identified these factors supporting release on bail: (i) Mr. White's parental support and lifelong ties to the community in Arizona, where Mr. White planned to live with his parents pending trial; (ii) Mr. White's gainful employment before his arrest as a cable installer; (iii) Mr. White's willingness to abide by any conditions of release set by the court, including stay away orders, (iv) Mr. White's lack of any prior criminal record and (iv) Mr. White's significantly less culpable role in the offense conduct, carrying a maximum sentence of 9 years in state prison. Mr. White's parents were in attendance at the hearing and numerous family members wrote letters attesting to Mr. 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 Mr. 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 Mr. White "is not as culpable" as the co-defendant. (Exh. B., p. 195.)

Tracking the language of Article 1, § 12 (b) of the California Constitution, the trial court found that "one defendant inflicted the acts of violence, the other person aided and abetted in that," and found, "on the

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 "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.) Although the court recognized it was "unusual," the court ordered Mr. White detained without bail. (Exh. B, p. 196.)

Mr. White filed a writ of habeas corpus in the Court of Appeal challenging his no bail detention. The Court of Appeal first requested an informal response from the District Attorney and permitted Mr. White to reply to the informal response. On December 11, 2017, the court issued an order to show cause and set an expedited 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. Mr. White filed a traverse on January 4, 2018.

The case was argued and submitted on February 12, 2018. On February 23, 2018, at a readiness conference, the state's offer of a plea bargain to Mr. White was placed on the record. The state offered to allow Mr. White to plead guilty to an accessory to attempted kidnap to commit rape (§ 32) with three years probation and one year local custody. With credit for the seven months he had served, Mr. White would be entitled to immediate release. Mr. White rejected the offer. (See, Exhibit A attached to the Request for Judicial Notice filed with this petition.) Mr. White ordered a copy of the transcript.

In the meantime, on March 6, 2018, the Court of Appeal issued its

decision denying Mr. White's writ. Mr. White filed a petition for rehearing on March 12, arguing that the state's continued detention of Mr. White constituted punishment and was not for the purpose of protecting the public, since the state was willing to release White immediately, but only if he pled guilty.[4] Mr. 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.

Argument

I. Mr. White requests that he be admitted to bail pending these proceedings under Penal Code section 1476 because he will suffer irreparable harm if he continues to be detained during his trial, set for May 14, 2018

Mr. White has now been detained without bail for over eight months. He has been incarcerated in excess of the amount of time the state requested he serve under a proposed plea agreement. Mr. White, who is 27 years old and has no prior contact with the criminal justice system, is under tremendous pressure to accept this offer, since it means he will gain his immediate release. But Mr. White maintains his innocence and wants to go to trial. Given these circumstances, the continued detention of Mr. White constitutes punishment, without the imprimatur of a jury, in violation of his right to substantive due process. (*Salerno, supra*, 481 U.S. at 746-48.)

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[4] It is troubling that the prosecution offered a deal to Mr. White that would result in his immediate release, while arguing to the Court of Appeal that Mr. White's detention was required to protect the public. "Every lawyer has an obligation to file pleadings only in a good-faith belief that valid grounds exist for the relief sought, an obligation that should weigh heavily with those exercising the power of public prosecution." (*United States v. Melendez-Carrion* (2d. Cir 1986)790 F.2d 984, 993, citing *United States v. Berger* (1935) 295 U.S. 78, 88.)

Mr. White has limited access to his trial counsel while he is in custody and the stress of being incarcerated during trial will affect his ability to assist his counsel. Studies show that pretrial detainees are more likely to be convicted at trial. (See, Mary T. Phillips, N.Y.C. Criminal Justice Agency, Inc., Pretrial Detention and Case Outcomes, Part 1: Nonfelony Cases 25 (2007), http://www.nycja.org/lwdcms/doc-view.php?module=reports&module id=669&doc name=doc (describing the length of pretrial detention as one of the most important factors determining the likelihood of conviction); Samuel R. Wiseman, Pretrial Detention and the Right to be Monitored,123 Yale L.J. 1344, 1355 n.44 (2014) (describing this phenomenon and collecting sources.)

Given the irreparable injury and continuing violation of Mr. White's constitutional rights caused by his pretrial incarceration, he requests admission to affordable bail under section 1476, which allows a court to order a detainee admitted to bail pending writ proceedings. In light of the State's implied concession that White does not pose a danger to public safety by virtue of their offering him a "time served" deal, White requests that the amount of bail not be so high as to result in his de facto detention.

II. Review should be granted to provide guidance to the trial courts in applying California Constitution Article I, Section 12, which allows preventive detention under very limited circumstances

A. Bail is a matter of right under the California Constitution, and detention is allowed only under very limited circumstances

Under our state constitution, a detainee is entitled to release as a matter of right. (Cal. Const. Art. I, § 12 (right to bail); § 1271 (bail a matter of right).) There are only three express exceptions to the right to bail:

> a) Capital crimes when the facts are evident or the presumption great;
>
> 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. 1, § 12.) Here, the trial court invoked subdivision (b) of Article 1, § 12 to detain Mr. White. (Exh. B, pp. 186-187.)

Before bail is denied under § 12(b), the court must make findings based on "clear and convincing evidence" of a substantial likelihood of great bodily harm to others or a specific person. There must be a showing "the facts are evident or the presumption great' and the courts have determined this requires substantial evidence necessary to sustain a conviction on appeal. (*In re Nordin, supra,* 143 Cal.App.3d at p. 543.)

B. Evidence that Mr. White knew of Owens' purpose and aided Owens was not substantial

The evidence Mr. White aided and abetted Owens is not substantial. Mr. White consistently denied knowing that Owens was going to attack this girl. (Exhs. C and D, pp. 205, 210, 212, 223-224, 227, 229, 230, 234.) The Court of Appeal emphasized Mr. White's statement to "go in the house" as evidence of encouragement. (Exh. B, p. 180.) But it was not clear whether this remark was directed to the girl or Mr. Owens. The girl testified Mr. White made this statement when she was heading toward the gate to the yard. (Exh. B, p. 33.) Viewed through the prism of White's association with her attacker, she construed this as Mr. White telling Owens to "get in the house" to go after her. But the facts do not support this inference, because when Mr. White made this statement, she was not in the house. She was outside, so the only logical inference to be drawn from the evidence is that White warned the girl to go in the house to get away from Owens. (Exh. B, p. 33.)

The Court of Appeal also concluded the evidence supported an inference that White acted as a lookout, because the girl testified White and Owens "stared at her" and stared at others, who reported to police after the fact that White and Owens looked "creepy." But staring at someone and looking "creepy' does not amount to aiding and abetting an assault.

When a defendant is prosecuted as a principal under a direct aiding and abetting theory of liability, the evidence must establish the defendant "(1) [w]ith the knowledge of the unlawful purpose of the perpetrator, and (2) [w]ith the intent or purpose of committing or encouraging or facilitating the commission of the crime, (3) by act or advice, aids promotes, encourages or instigates the commission of the crime." (§ 31; *People v. Hill* (1998) 17

Cal.4th 800, 851.) "Mere presence at the scene of a crime which does not itself assist its commission or mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting." (*In re Michael T.* (1978) 84 Cal.App.3d 807, 911.)

The evidence here establishes Mr. White was merely present at the scene, and this is insufficient to prove by substantial evidence that he aided and abetted the assault. (*In re Michael T.* (1978) 84 Cal.App.3d 907.)

Indeed, there was evidence in the record that Owens acted independently, supporting Mr. White's version of events. Mr. Aguilar, a friend of Mr. White and Owens, told the police he talked to Owens after Mr. White was arrested and asked him why White got arrested. Owens laughed hysterically and said what happened in Encinitas was not Mr. White's fault. (Exh. B. pp. 90-91.) Owens told Aguilar he had an urge to "snatch" someone ever since he saw Aguilar's girlfriend four days before the offense. (Exh. B, p. 92.) Owens said Mr. White did not know what was going on and afterwards Mr. White told Owens he could not engage in this type of behavior and they needed to leave. (Exh. B, p. 97.)

Mr. White told police Owens told him after the offense he did not know why he grabbed the girl, and that he got a "primal instinct." (Exh. D, p. 207.) The police analyzed Mr. White's cell phone internet history and found searches entered a day after the offense for "why would someone act on their primal instincts?" and "What to do if someone you know is being brainwashed?" (Exh. B, p. 109), corroborating White's statements to the police that Owens acted independently, due to some emotional disturbance.

There is, therefore not substantial evidence to support the trial court's finding that the "facts are evident" or the "presumption great" to support Mr. White's pretrial detention under Article I, § 12(b).

C. Review should be granted to reconcile the conflict between *Nordin* and this case

The Court of Appeal deferred to the trial court's determination of whether there was a substantial risk Mr. White's release would result in great bodily injury. (*In re White, supra*, 21 Cal.App.5th at p. 29, n. 6.) In doing so, it disagreed with the *Nordin, supra*, 143 Cal.App.3d at page 543, which reviewed the evidence to support the exception in Article I, § 12 independently. (*White, supra*, at p. 29, n. 6.)

Constitutional issues are always reviewed de novo. (*State of Ohio v. Barron* (1997) 52 Cal.App.4th 62, 67.) Pretrial liberty is a fundamental right. (*United State v. Salerno, supra*, 481 U.S. at p. 750.) Where "a crucial liberty interest is at stake," as here, "an independent determination by the appellate court would seem appropriate in light of the nature of the question to be determined." (*United States v. Delker* (3rd Cir. 1985) 757 F.2d 1390, 1399; see *Van Atta v. Scott* (1980) 27 Cal.3d 424, 435, superseded on other grounds via constitutional amendment (Prop. 4) as recognized 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 question of whether the trial court erred in depriving a defendant of this fundamental right should, like other constitutional questions, be reviewed de novo.

Before conviction, a defendant charged with a felony not punishable with death is entitled to be admitted to bail "as a matter of right," unless he falls within one of the two limited exceptions to bail. (Art. I, § 12.) After conviction, his admission to bail is a "matter of discretion." (*In re Scaggs* (1956) 47 Cal.2d 416, 418.) "This important difference in the status of a

defendant before and after conviction is one of long standing in both the statutes and judicial decisions of California and arises from the fact that, upon conviction, the defendant loses the benefit of the presumption of innocence and is presumed to be guilty." (*Ibid.*)

Whether a defendant should be deprived of his liberty before trial is not a matter of discretion. It is a matter of right. Therefore, a deferential standard of review is inappropriate.

D. There was not clear and convincing evidence that Mr. White's release would result in great bodily harm to J.D or other minors, judged under any standard of review

This detention order is not supported by clear and convincing evidence that Mr. White's release on bail would likely result in great bodily harm, required by the California Constitution.

The Court of Appeal held that Mr. White's aiding and abetting this assault, which did not result in great bodily injury, is sufficient to support this finding. If this was the case, however, then aiding and abetting any violent felony assault would require a no-bail order. Mr. White's role in the offense as an aider and abettor to an unarmed assault is not predictive of future violent conduct resulting in great bodily injury.

The offense conduct does not support the court's finding. Owens' conduct in grabbing the victim and pushing her to the ground did not cause great bodily injury, nor was it likely to result in great bodily injury. J.D. sustained minor injuries: a fingerprint mark and redness on her neck. (Exh. B, pp. 42-43.) No weapons were used and the contact between J.D. and Owens was brief.

Mr. White's individual conduct in this case also does not support a finding that Mr. White's release would result in great bodily injury. The

prosecution version of the case is that Mr. White stood by his truck as a "lookout" when Owens assaulted the girl and drove Owens from the scene. He did not try to assist Mr. Owens in the physical attack or come to Mr. Owens' aid when J.D. freed herself from Owen's grasp. If he was inclined to hurt J.D., Mr. White could have easily overpowered this 15- year- old girl. He did not. Instead, he apologized to J.D. for Owens' behavior. (Exh. B, p. 33.)

Nothing in Mr. White's statements suggests he presents a physical danger to anyone. Although the police pressured Mr. White to admit that he knew of Owens' plan, Mr. White remained steadfast in his assertion that he did not know or share Owens' intent. (See, e.g., Exh. C, pp. 229, 240, 241, 244, 245, 246.) He told the police he was "even nervous to approach a girl to talk to her." (Exh. C, p. 233.) The police eventually gave up on this line of questioning, and tried to suggest Mr. White just wanted to see what Mr. Owens would do: "You got caught up in the frenzy. . .You got caught up in and you got some kind of sexual pleasure or enjoyment or excitement out of thinking that he was going to get the girl." (Exh. C, p. 246.) Mr. White denied this was the case. (Exh. C, p. 246.) Even the interrogating officers did not believe that Mr. White was "the type of guy that was going to go grab some girl." (Exh. C, p. 232.)

Nothing in Mr. White's background or post-offense conduct established he would cause great bodily injury if he was released on bail. He has no criminal record and has been described as non-violent. (Exh. A.) He cooperated 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 the girl. (Exh. B, p. 109.) A violent predator would not spend time trying to determine why his friend acted on his "primal instincts."

Mr. White is 27 years old, has no criminal record, has substantial ties to the community he grew up in, and has the support of his parents. (Exh. B, pp. 191-192.) He was employed as a cable installer at the time of the offense, and numerous persons who knew him attested to his non-violent character. (Exh. A; Exh. B, p. 191.) These people also indicated that Mr. White was respectful of women. (Exh. A.)

There was no evidence that Mr. White ever inflicted great bodily injury or that he intended to do so on that, or any other day. There is no evidence that Mr. White will cause great bodily injury if he is released.

Mr. White's limited conduct in the offense is not sufficient to show that he would cause great bodily injury to anyone if he was released, as required by the California Constitution. If this set of facts – an unarmed aiding and abetting an assault causing no great bodily injury – sets the bar for detaining individuals prior to trial, the county jails should expect to see a marked increase in the number of pretrial detainees.

III. The trial court is constitutionally required to determine whether there are less restrictive alternatives to pretrial incarceration to protect the public, while not unduly restricting the detainee's liberty

There is no evidence the trial court considered less restrictive alternatives. The Court of Appeal held that courts are not required to determine that no bail conditions or combination of conditions would be sufficient to protect the public before remanding an accused into custody. (*White, supra*, 21 Cal.App.5th at p. 32, n.8.) It held the Supreme Court decision in *Salerno* "does not apply to state court proceedings" because it only considered the constitutionality of the federal bail act. (*Ibid.*)

In *Salerno*, the Supreme Court upheld the 1984 Bail Reform Act against a substantive due process facial challenge. (*Salerno, supra*, 481 U.S 739.) *Salerno* concluded that the Act was not unconstitutional in its determination of weighing the defendant's interest in liberty against the government's interest in community safety. (*Salerno, supra*, 481 U.S. at p. 755.) The *Salerno* Court's conclusion was based on its belief that the regulatory goal that Congress sought to achieve in the 1984 Act was not punishment, but public safety, because the Act contained "extensive safeguards," such as the requirement that the court determine there were no less restrictive alternatives to pretrial incarceration that would protect the public. (*Id.* at pp. 750, 752.)

As one court observed, "it is clear from Salerno and other decisions that the constitutionality of a pretrial detention scheme turns on whether particular procedures satisfy substantive due process standards." (*Simpson v. Miller* (Ariz. 2017) 387 P.3d 1270, 1276.) The Bail Reform Act required that before an arrestee could be remanded, the court must find "that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community." (18 U.S.C. § 3142(f); *Salerno, supra*, 481 U.S. at p. 742.) The *Salerno* court determined the Bail Reform Act of 1984 fell within the carefully limited exception to pretrial liberty because the Act contained this requirement. (*Salerno, supra*, 481 U.S. at p. 755 [concluding that the procedural safeguards render the act constitutional, including the requirement that the court make written findings that the defendant represents "a threat to the safety of individuals or to the community which no condition of release can dispel"]; see also *Brangan v. Commonwealth* (Mass. 2017) 80 N.E.3d 949, 954 [The "state may not enact detention

schemes without providing safeguards similar to those which Congress incorporated into the Bail Reform Act"].)

Under *Salerno*, the state may deprive a presumptively innocent person of physical liberty only if the detention is carefully tailored to advance a compelling interest. (*See Salerno*, *supra*, 481 U.S. at p. 746 [subjecting the federal Bail Reform Act to heightened judicial scrutiny and holding that the government may detain individuals before trial only where that detention is carefully limited to serve a "compelling" government interest]; see also, *Lopez-Valenzuela v. Arpaio* (2014) 770 F.3d 772, 780 [applying heightened scrutiny to Arizona bail law because it infringes on the "fundamental" right to pretrial liberty]; *Coleman v. Hennessy* (N.D. Cal. Jan. 5, 2018) No. 17-CV-06503-EMC, 2018 WL 541091, at *1 [holding "freedom from bodily restraint is a fundamental right and infringement thereon must be narrowly tailored to serve a compelling state interest"]; *Rodriguez-Ziese v. Hennessy* (N.D. Cal. Dec. 6, 2017) No. 17-CV-06473-BLF, 2017 WL 6039705, at *3 [same]; *Reem v. Hennessy* (N.D. Cal. Nov. 29, 2017) No. 17-CV-06628-CRB, 2017 WL 6765247, at *1 [same]; *O'Donnell v. Harris County, Tx.* (S.D. Tex. 2017) 251 F.Supp.3d. 1052, 1143 [finding that release from custody before trial "implicates fundamental constitutional guarantees: the presumption of innocence and the right to prepare for trial"]; *Brangan v. Commonwealth*, *supra*, 80 N.E.3d 949, 954 [applying strict scrutiny to protect the "fundamental right to liberty" of pretrial defendants].)

Every court to consider the question has agreed that this strict scrutiny inquiry requires a court to evaluate alternatives to pretrial detention and to order detention only after a finding that there are no less restrictive alternatives short of a remand to custody. (*Humphrey*, *supra*, 19 Cal.App.5th

at p. 1029 [holding that unattainable condition of release can be imposed only after a determination by clear and convincing evidence that no less restrictive alternative will satisfy that purpose]; *O'Donnell*, *supra*, 251 F.Supp.3d at 1140 ("[P]retrial detention of indigent defendants who cannot pay a financial condition of release is permissible only if a court finds, based on evidence and in a reasoned opinion, either that the defendant is not indigent and is refusing to pay in bad faith, or that no less restrictive alternative can reasonably meet the government's compelling interest"].) This makes sense: if pretrial detention must be narrowly tailored so that it is used only when necessary, the State may not detain if there are other available alternatives that could meet its regulatory interests through less restrictive means.

The Court of Appeal's suggestion to the contrary marks a dramatic departure from well-settled law. If a court could detain an accused while finding that less restrictive alternatives were available to satisfy the government's regulatory interest in protecting the public, it would not withstand heightened scrutiny. California courts have acknowledged that courts must consider and make findings about alternatives to pretrial detention. (*See, e.g.*, *Humphrey*, *supra*, 19 Cal.App.5th 1006; *Coleman*, *supra*, 2018 WL 541091, at *1; *Rodriguez-Ziese*, 2017 WL 6039705, at *1.)

Consideration of less restrictive alternatives to incarceration is not only constitutionally mandated, it is good policy. A "detention or money bail" policy inherently limits experimentation because the state is not motivated to find alternative ways to achieve the state's goal of protecting the public without unduly restricting the detainee's liberty.

The Court of Appeal also stated that *In re Humphrey*, *supra*, 19 Cal.App.5th 1006, is "inapposite" because the court set bail, and did not

detain the defendant under Article I, § 12. (*White, supra*, at p. 32, n. 8.) *Humphrey* explains that setting an unattainable condition of release is de facto detention. (*Humphrey, supra,* at p. 1037 & n.11.) This proposition is uncontroversial. If an amount of money bail is impossible for a person to attain, then it is the same thing as setting no bail at all. The *Humphrey* court held that a court can only impose a financial condition of release that will operate to detain a person *if* the court makes the findings required for a valid order of detention. (*Id.* at pp. 1037-1038, 1045.) Then, after engaging in extensive analysis of the requirements under the U.S. Constitution for a valid detention order, the *Humphrey* court explained that such an order must include a finding that no less restrictive conditions of release would be sufficient" to assure court appearance or public safety. (*Ibid.*)

Thus *Humphrey* is not, as the Court of Appeal concluded, inapposite; it is directly on point and, like every other case to consider the question, compels the opposite conclusion. Under the U.S. Constitution, a trial court *must* make a finding that no conditions of release would be sufficient to protect public safety before ordering a person detained. Because the Court of Appeal's decision conflicts with these precedents, review should be granted to settle the conflict created.

IV. Conclusion

Mr. White requests this Court grant review to settle these important questions affecting the fundamental pretrial liberty of individuals accused of crimes. The Court of Appeal's expansive interpretation of Article I, § 12(b) should be rejected, because pretrial detention is not the norm and is reserved only for those cases where "it is substantially likely great bodily injury will result" if the defendant is released. Aiding and abetting an unarmed assault, resulting in no great bodily injury by an individual who has no criminal

history or record of violence does not meet this standard. And a valid detention order, to pass constitutional muster, must include findings that no less restrictive alternatives will protect the public. No such findings were made here. Finally, Mr. White requests this Court order that he be immediately admitted to affordable bail, since the court would only be doing what the state deems is appropriate to protect public safety, with the only caveat being his guilty plea.

Respectfully submitted,

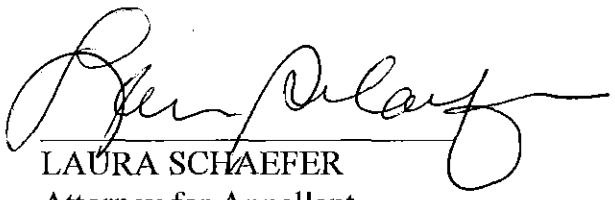
Dated: April 10, 2018

LAURA SCHAEFER
Attorney for Appellant
CHRISTOPHER LEE WHITE

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 6629 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 April 10, 2018, at San Diego, California.



LAURA SCHAEFER
Attorney for Appellant
CHRISTOPHER LEE WHITE

People v. White

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 April 10, 2018, I caused to be served the following document: PETITION FOR REVIEW, EXHIBITS TO PETITION FOR REVIEW, REQUEST FOR JUDICIAL NOTICE, by placing a copy of the document in an envelope addressed to each addressee, respectively, as follows:

Christopher Lee White
Booking Number 17148034
Vista Detention Facility
325 South Melrose Drive, Suite 200
Vista, CA 92081

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.

////

///

Proof of electronic service

Furthermore, I declare that I electronically served from my electronic service address of mj@boyce-schaefer.com on April 10, 2018, to the following entities:

Dan Owens
Deputy District Attorney
Dan.Owens@sdcda.org

Peter Quon, Jr.
Deputy District Attorney
Peter.Quon@sdcda.org

San Diego County Superior Court
Appeals.Central@SDCourt.ca.gov

Office of the Attorney General
Sdag.docketing@doj.ca.gov

Fourth District Court of Appeal
Division One
(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 April 10, 2018, at San Diego, California.

Mary Elena Joslyn

EXHIBIT A

Filed 3/6/18

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re CHRISTOPHER LEE WHITE on Habeas Corpus.	D073054 (San Diego County Super. Ct. No. SCN376029)

ORIGINAL PROCEEDING in habeas corpus. Robert J. Kearney, Judge. Petition denied.

Boyce & Schaeffer, Laura Schaefer, Robert E. Boyce and Benjamin Kington for Petitioner.

Summer Stephan, District Attorney, Jesus Rodriguez, Assistant District Attorney, Peter Quon, Jr., Mark A. Amador, Linh Lam and Daniel Owens, Deputy District Attorneys for San Diego County District Attorney.

Petitioner Christopher Lee White is in custody awaiting trial on charges of attempted kidnapping with intent to commit rape (Pen. Code, § 209, subd. (b)),[1] assault with intent to commit rape (§ 220, subd. (a)(1)), contact with a minor with intent to

1 Further statutory references are to the Penal Code unless otherwise specified.

commit a sexual offense (§ 288.3, subd. (a)), and false imprisonment (§§ 236, 237, subd. (a)). At his preliminary hearing, White requested release on reasonable bail.

The California Constitution provides that a defendant "shall be released on bail by sufficient sureties" unless an exception applies. (Cal. Const., art. I, § 12.) One such exception covers "[f]elony 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 on clear and convincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others." (*Id.*, art. I, § 12, subd. (b).) The trial court here recognized that it is "unusual" to deny bail for a noncapital offense, but it nonetheless found that the exception applied.

White challenges the court's finding by petition for writ of habeas corpus. (§ 1490.) He asserts that the court erred by finding that the constitutional exception applied. For reasons we will explain, we disagree and deny the petition.

FACTUAL AND PROCEDURAL BACKGROUND

Fifteen-year-old J.D. lived with her family near the beach in Encinitas, California. On July 26, 2017, she was staying with friends because her family had been on vacation. In the afternoon, she rode her bicycle to her family's house to get her surfboard and go surfing. Across from her house she saw two men standing near a blue truck. They were playing loud music and looked out of place. J.D. felt like they were watching her.

A woman loading her car nearby saw the two men and thought they looked "creepy." The men were staring at her as well. She was concerned that they might burglarize her vacation rental after she left. The woman's son thought they were being

"creepy" also, so he took a Snapchat video of them. He told police he was worried about the men wanting to kidnap his younger brothers.

J.D. had a bad feeling about the men, so she went through a gate into her neighbor's yard, hopped over the fence, and went into her garage. She later said she was trying to prevent the men from seeing where she lived. J.D. retrieved her surfboard from the garage, went out front, and left the surfboard in her driveway. The men were still staring at her, which made her feel uncomfortable.

J.D. went inside, but she became concerned that someone would try to steal her surfboard. She grabbed some surfboard wax, went back outside, and started to wax the surfboard. The men were still standing by their truck. J.D. noticed a few people walk by, and a surfer came up from the beach and asked to borrow some wax. This request was normal, so J.D. agreed.

J.D. continued to wax her surfboard in the driveway. At some point, when she had her back to the road, one of the men from the truck came up behind her and grabbed her neck "like a pressure lock." The man—later identified as White's roommate Jeremiah Owens—shoved J.D.'s face toward the driveway, but J.D. managed to catch herself with her hands. Owens said, "All right. Let's do this." He tried to pull her upright and toward the truck. J.D. repeatedly told him "no" and "stop."

J.D. managed to fight Owens off and step away from him. She saw the other man—later identified as White—still standing by the truck, looking up and down the street. She told Owens and White, "That's not cool. You can't do that." White said, "We're sorry" or "Sorry," and J.D. backed away toward her house. But then, while J.D.

was watching them, White looked at Owens and said, "Go in the house." J.D. thought Owens would try and attack her again.

J.D. went through the gate, locked it "as fast as [she] could," and ran into the house. Her neighbor's dog was barking near the gate. J.D. was "really scared" and locked both doors into the house. She thought Owens and White were going to follow her inside. She thought they might break the lock on the gate or hop over the fence. She was going to hide, but she heard the truck's engine start. She looked outside and saw White in the driver's seat. Owens ran around to the passenger side. J.D. thought they looked scared, and they drove quickly away. She started hyperventilating and crying. She tried and eventually succeeded in calling her parents, who told her to call the police. She called 911, and police responded.

The police began an investigation and detained White. In two interviews with police, White denied knowing that Owens intended to attack J.D. White said Owens told him he thought J.D. was pretty. White admitted he "might have said go and get her" to Owens, but he said he meant go "talk to her." Owens then told him "hey watch out" or "watch this" and walked over to J.D. White said he thought Owens was just going to talk to her. White claimed that, when the attack began, he yelled at Owens to stop and told J.D. he was sorry. White said Owens told him afterwards that a "primal instinct" came over him. White was concerned that Owens had mental health issues. Forensic examination of White's mobile phone revealed an internet search history in the days after the attack that included the questions, "Why would someone act on their primal

instinct?," "How can you tell if someone you know is being brain washed?," and "What to do if someone you know is being brainwashed?" Owens was later arrested as well.

The San Diego County District Attorney charged White and Owens with the offenses identified above. White was arraigned, pleaded not guilty, and was detained without bail. In advance of his preliminary hearing, White filed a written request for bail. It alleged that he had no criminal history and was not a violent person. It was supported by a number of letters from family and friends.

At the preliminary hearing, the court heard testimony from J.D. and several investigating officers. After the testimony, the prosecution asked the court to find probable cause and bind White and Owens over for trial. The prosecution believed that Owens was the direct perpetrator and White was an aider and abettor of the attack on J.D. The court agreed. It found J.D. to be a credible witness. As to White, it found persuasive the following facts and inferences from J.D.'s testimony: (1) White and Owens loitered in front of J.D.'s house without any legitimate purpose, (2) they stared at J.D. in an abnormal manner, (3) White told Owens he should go into the house with J.D., (4) White waited for Owens to come back from attacking J.D. and drove away with him, and (5) White behaved like a lookout during the attack.

The court then heard White's request for bail. White's counsel argued that White was a high school graduate, was gainfully employed as a cable installer, and had the support of family and friends. He requested that bail be set at $50,000. Owens requested bail as well. The prosecution opposed. As to White, it argued, "I will submit to the Court that Mr. White did, in fact, aid and abet, encouraged this very violent crime. And I

believe the Court is on sound legal ground to deny bail to him. I'll submit to the Court as to whether you would like to set bail, given the fact that he is not as culpable perhaps as Mr. Owens in being the direct perpetrator."

The court recognized, "It would be an unusual case, in fact, it would be the quite rare case where someone was held on a non-capital offense without bail." But the court believed the circumstances justified remand without bail here. It explained, "In looking at this case and the facts of the case, I do believe the facts are evident, [and] the presumption is great. I do find by clear and convincing evidence that one defendant inflicted the acts of violence, the other person aided and abetted in that. The Court finds on the basis of the clear and convincing evidence that there is a substantial likelihood that the release of either of these gentlemen would result in great bodily harm to others. I think the individuals [*sic*] at threat would be J.D. herself. I also think 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 occur[red] in this case. So it is extremely unusual, but I do find under these particular facts that the burden is met."

White challenged the court's remand order by petition for writ of habeas corpus in this court. He requested that we direct the trial court to vacate the order and set reasonable bail. We requested and received an informal response from the district attorney. After considering the petition and the informal response, we issued an order to show cause why the relief sought by White should not be granted. This proceeding followed.

DISCUSSION

I

As noted, the California Constitution provides that a defendant "shall be released on bail by sufficient sureties" unless an exception applies. (Cal. Const., art. I, § 12.) The Constitution initially contained a single exception, for "capital offenses when the proof is evident or the presumption great." (Former Cal. Const., art. I, § 6; *In re Application of Weinberg* (1918) 177 Cal. 781, 782; *Ex parte Curtis* (1891) 92 Cal. 188, 189; *In re Nordin* (1983) 143 Cal.App.3d 538, 543 (*Nordin*).) The electorate later adopted an initiative constitutional amendment that added two additional exceptions. (Cal. Const., art. I, § 12, amended by initiative, Primary Elec. (June 8, 1982); see *In re Bright* (1993) 13 Cal.App.4th 1664, 1667, fn. 4; *Nordin*, at p. 543.)

One of the added exceptions, which is at issue here, covers "[f]elony 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 on clear and convincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others[.]" (Cal. Const., art. I, § 12, subd. (b).)[2] White challenges the trial court's findings that (1) "the facts are evident or the

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2 The phrase "felony sexual assault offenses on another person" was not part of the original exception. It was added later. (See Assem. Const. Amend. No. 37, Stats. 1994 (1993-1994 Reg. Session) res. ch. 95, approved Nov. 8, 1994.) The other added exception covers "[f]elony offenses when the facts are evident or the presumption great and the court finds based on clear and convincing evidence that the person has threatened another with great bodily harm and that there is a substantial likelihood that the person would carry out the threat if released." (Cal. Const., art. I, § 12, subd. (c).)

presumption great" and (2) "there is a substantial likelihood the person's release would result in great bodily harm to others."

II

Although its phrasing is archaic, the requirement that "the facts are evident or the presumption great" has long been held to mean simply that the evidence in the record would be sufficient to sustain a conviction. (*Nordin, supra*, 143 Cal.App.3d at p. 543; see *In re Application of Weinberg, supra*, 177 Cal. at p. 782; *Ex parte Curtis, supra*, 92 Cal. at p. 189.) Our consideration of this requirement is therefore governed by the familiar substantial evidence standard: "When the sufficiency of the evidence to support a conviction is challenged on appeal, we review the entire record in the light most favorable to the judgment to determine whether it contains evidence that is reasonable, credible, and of solid value from which a trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] Our review must presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] Even where, as here, the evidence of guilt is largely circumstantial, our task is not to resolve credibility issues or evidentiary conflicts, nor is it to inquire whether the evidence might reasonably be reconciled with the defendant's innocence. [Citations.] It is the duty of the jury to acquit the defendant if it finds the circumstantial evidence is susceptible to two interpretations, one of which suggests guilt and the other innocence. [Citation.] But the relevant inquiry on appeal is whether, in light of all the

evidence, '*any* reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt.' " (*People v. Zaragoza* (2016) 1 Cal.5th 21, 44 (*Zaragoza*).)[3]

White is alleged to have aided and abetted Owens in the commission of the charged offenses. " '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 the crime.' " (*People v. Hill* (1998) 17 Cal.4th 800, 851.) J.D. testified that White and Owens watched her for an unusual length of time, making her feel uncomfortable; that White appeared to act as a lookout for Owens; that White did not intervene during the attack but instead encouraged Owens to take J.D. into her house; and that White waited for Owens after the attack and drove him away. While White's statements to police denied any malicious intent, he acknowledged discussing J.D.'s attractiveness and telling Owens to "go and get her." Based on this record, a reasonable jury could find beyond a reasonable doubt that White and Owens agreed that Owens would attack J.D. while White acted as his lookout. The jury could find credible J.D.'s interpretation of White's behavior and of his statement

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3 The phrase "the facts are evident or the presumption great" has the same meaning for the trial court, so its assessment of this requirement is governed by the same substantial evidence standard. Because sufficiency of the evidence is a legal question, we do not defer the trial court's determination. We review the record independently to determine whether the evidence would be sufficient to sustain a conviction. This situation is analogous in substance to a trial court's consideration of a motion for acquittal under section 1118.1 and our review thereof. (See *People v. Houston* (2012) 54 Cal.4th 1186, 1215; *People v. Whisenhunt* (2008) 44 Cal.4th 174, 200.)

("Get in the house") and convict him of the charged offenses on that basis. White has not shown that the evidence in the record would be insufficient to sustain his conviction.

White points out that mere presence at the scene of a crime, or failure to intervene, is insufficient in and of itself to constitute aiding and abetting. (See *People v. Pettie* (2017) 16 Cal.App.5th 23, 57; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911.) But J.D.'s testimony shows that White's participation was much greater than simply presence at the scene or failure to intervene. A jury could reasonably infer that White acted as a lookout during the attack and encouraged Owens to continue after J.D. first fought him off.

While a reasonable jury could alternatively find that Owens acted independently, as White claims, the constitutional standard requires us to consider whether the evidence would be sufficient to sustain a conviction, presuming the existence of every fact a jury could reasonably deduce from the evidence and resolving any conflicts in the evidence in favor of upholding the order. (See *Zaragoza, supra*, 1 Cal.5th at p. 44; *Nordin, supra*, 143 Cal.App.3d at p. 543.) Under this standard, the evidence would be more than sufficient to sustain White's conviction of the charged offenses—even if a reasonable jury, viewing the evidence differently, would be justified in acquitting him.

III

The second requirement, that the court find by "clear and convincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others[,]" has not been defined in prior authorities. The parties have not cited, and our

research has not found, any published opinions discussing its meaning. We will therefore consider the issue here.

Historically, with the exception of capital cases, bail was available to a defendant without regard to his threat to public safety. (*In re Underwood* (1973) 9 Cal.3d 345, 349–350.) The former provisions of the California Constitution prohibited applying a public safety exception to the general right to reasonable bail. (*Id.* at p. 351.) In adopting the exception at issue here, and its companion "threat" exception, the electorate abrogated the prior rule. "In 1982, the voters were presented with a ballot measure proposing an amendment of article I, section 12 to allow courts to deny release on bail in the interest of public safety." (*People v. Standish* (2006) 38 Cal.4th 858, 892 (conc. & dis. opn. of Chin, J.); see *id.*, at p. 875 (maj. opn. of George, C.J.).)

Statutory enactments confirm this focus on public safety. Section 1275 provides, in relevant part, "In setting, reducing, or denying bail, a judge or magistrate shall take into consideration the protection of the public, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at trial or at a hearing of the case. The public safety shall be the primary consideration."

(§ 1275, subd. (a)(1).)[4] "In considering the seriousness of the offense charged, a judge or magistrate shall include consideration of the alleged injury to the victim, and alleged threats to the victim or a witness to the crime charged, the alleged use of a firearm or other deadly weapon in the commission of the crime charged, and the alleged use or possession of controlled substances by the defendant." (§ 1275, subd. (a)(2).)

These statutory factors must be considered with an eye toward the ultimate determination set forth in the California Constitution: whether there is "clear and convincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others." (Cal. Const., art. I, § 12, subd. (b).) The seriousness of a charged offense involving interstate financial fraud might, for example, be directly relevant to the amount of reasonable bail (see *People v. Amata* (1969) 270 Cal.App.2d 575, 584–585), but it would be less relevant to the court's assessment of likelihood of great bodily harm to others if the defendant were released. Similarly, the likelihood of a defendant showing up for future hearings or trial is directly relevant to the amount of reasonable bail, but it is relevant to the consideration of the likelihood of great bodily

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4 Similar factors have appeared in the California Constitution since 1982. (Former Cal. Const., art. I, § 28, subd. (f)(3), added by initiative, Primary Elec. (June 8, 1982).) Our Supreme Court previously held that they did not go into effect when initially approved because a competing initiative, which added the exception to the right to bail at issue here, garnered more votes at the same election. (*People v. Standish, supra,* 38 Cal.4th at p. 877; *In re York* (1995) 9 Cal.4th 1133, 1140, fn. 4 (*York*).) In 2008, however, the electorate approved an initiative constitutional amendment that included the factors at issue here, with an added emphasis on the safety of victims. (Cal. Const., art. I, § 28, subd. (f)(3), amended by initiative, Gen. Elec. (Nov. 4, 2008).) Because our analysis in this opinion would not change based on consideration of these factors, we need not consider the effect of the 2008 amendment on California's bail system.

harm to others only if the defendant's failure to appear would somehow increase the likelihood of such harm.

Most relevant to the constitutional determination is evidence of violence or infliction of bodily harm in the defendant's criminal record or in connection with the charged offenses. Completed acts, attempts, and threats are all relevant to the court's inquiry. A court should be particularly attuned to facts that indicate whether past instances of violence or bodily harm were isolated events or would be expected to recur if the defendant were released on bail.

In order to deny bail, the trial court must find a "substantial likelihood" that the defendant's release would result in great bodily harm to others. (Cal. Const., art. I, § 12, subd. (b).) This standard requires more than a mere possibility, and it cannot be based on speculation about the general risk to public safety if a defendant is released. Great bodily harm to others must be a substantial likelihood. While the term "cannot . . . be reduced to a rigid formula susceptible to mechanical application" (*Nordin, supra*, 143 Cal.App.3d at p. 543), we observe that the standard requires more than simply a violent history. The

trial court must be convinced that future violence amounting to great bodily injury is substantially *likely* if the defendant were released on bail.[5]

Importantly, the trial court must make its finding of substantial likelihood by clear and convincing evidence. (Cal. Const., art. I, § 12, subd. (b).) " ' "Clear and convincing" evidence requires a finding of high probability.' [Citation.] The evidence must be ' "so clear as to leave no substantial doubt"; "sufficiently strong to command the unhesitating assent of every reasonable mind." ' " (*Nordin*, *supra*, 143 Cal.App.3d at p. 543; see *In re Angelia P.* (1981) 28 Cal.3d 908, 919.) As the trial court here recognized, it will be the "rare" and "unusual" case where a court is able to make this finding.

Although the parties do not directly address it, an important threshold question in this proceeding is the proper standard for our review. As the foregoing discussion shows, the court's finding on this element is essentially factual. The court must weigh the evidence, make credibility determinations, resolve evidentiary conflicts, and ultimately make a factual finding regarding whether there is a substantial likelihood the defendant's release would result in great bodily harm to others. As such, we apply the substantial

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[5] At oral argument, White contended that our interpretation of the constitutional standard should be informed by the presumption of innocence. But that presumption is a doctrine to be applied at trial; it has no application to the rights of a pretrial detainee. (*Bell v. Wolfish* (1979) 441 U.S. 520, 533; *York*, *supra*, 9 Cal.4th at p. 1148.) In fact, in bail proceedings, the historical rule has been that the defendant is presumed *guilty* after indictment. "[E]xcept for the purpose of a fair and impartial trial before a petit jury, the presumption of guilt arises against the prisoner upon the finding of an indictment against him." (*Ex parte Ryan* (1872) 44 Cal. 555, 558; see *Ex parte Duncan* (1879) 53 Cal. 410, 411.) This presumption appears to be reflected in the language of the constitutional requirement that the facts must be evident or the presumption—of guilt—great. (See *In re Application of Westcott* (1928) 93 Cal.App. 575, 576.)

evidence standard of review. (See *Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632 ["When the trial court has resolved a disputed factual issue, the appellate courts review the ruling according to the substantial evidence rule."].) The rationale behind this standard is clear. The trial court is better positioned to weigh the evidence and make credibility determinations; "we have nothing but the cold, unadorned words on the pages of the reporter's transcript." (*Escobar v. Flores* (2010) 183 Cal.App.4th 737, 749.) "The cold record cannot give the look or manner of the witnesses; their hesitations, their doubts, their variations of language, their precipitancy, their calmness or consideration. A witness may convince all who hear him testify that he is disingenuous and untruthful, and yet his testimony, when read, may convey a most favorable impression." (*Maslow v. Maslow* (1953) 117 Cal.App.2d 237, 243.) The trial court is better positioned to assess the weight and credibility of the evidence. Our deference is therefore appropriate.[6]

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6 We disagree with *Nordin, supra*, 143 Cal.App.3d at page 543, to the extent it holds that independent review is appropriate. To justify independent review, *Nordin* cites *In re Hochberg* (1970) 2 Cal.3d 870, 874, footnote 2, which discusses general procedural issues applicable to petitions for habeas corpus. *Hochberg* explains that when an appellate court issues an order to show cause returnable in superior court and the petitioner challenges the superior court's decision, "the reviewing court will make its independent examination and appraisal of the evidence that was taken in the superior court." (*Ibid.*) *Hochberg* does not speak to the myriad other situations where habeas review arises and other standards are used. We likewise do not believe that review for abuse of discretion is appropriate. Although the trial court's decision regarding the *amount* of bail is discretionary (*In re Christie* (2001) 92 Cal.App.4th 1105, 1107), the decision to remand a defendant without bail depends on a specific factual showing. We review this factual showing for substantial evidence.

As discussed above, our review for substantial evidence is limited in scope. We must view the record in the light most favorable to the court's order, presume the existence of every fact the court could reasonably have deduced from the evidence, and resolve any conflicts in the evidence in favor of upholding the order. (*Zaragoza, supra*, 1 Cal.5th at p. 45.) And, while reasonable inferences based on the evidence will support the court's order, unreasonable inferences or speculation will not. " 'While substantial evidence may consist of inferences, such inferences must be "a product of logic and reason" and "must rest on the evidence" [citation]; inferences that are the result of mere speculation or conjecture cannot support a finding [citations.].' " (*Kasparian v. County of Los Angeles* (1995) 38 Cal.App.4th 242, 260; see *People v. Morris* (1988) 46 Cal.3d 1, 21.)

While the trial court must be satisfied that the evidence supporting its finding is clear and convincing, we do not make the same determination. "That standard was adopted . . . for the edification and guidance of the trial court, and was not intended as a standard for appellate review. 'The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal.' " (*Crail v. Blakely* (1973) 8 Cal.3d 744, 750; see *In re Mark L.* (2001) 94 Cal.App.4th 573, 580–581.) The ultimate question for a reviewing court is whether any reasonable trier of fact could have made the challenged finding by clear and convincing evidence. (See *Zaragoza, supra*, 1 Cal.5th at p. 45.)

Based on the record, the trial court could reasonably have inferred that Owens did not act alone, that White and Owens considered and planned the attack on J.D. over an extended period of time, that White acted as Owens's lookout and encouraged him to continue the attack after J.D. initially fought him off, and that White facilitated Owens's flight from the scene by driving him quickly away. The trial court could have found persuasive J.D.'s interpretation of White's statement, "[g]et in the house," as directed to Owens and encouraging him to continue the attack out of public view. Based on the circumstances of the attack, the court could reasonably infer that Owens and White were highly dangerous. Their attack was deliberate, it occurred during the day on a heavily trafficked street, and it targeted a vulnerable stranger. They worked in concert to increase the odds of the attack's success. And although the attack was not completed, the trial court could reasonably infer that Owens intended to rape J.D., a devastatingly harmful injury, and White knew it.

Although such an attack can never be fully explained, the facts show no reason why J.D. in specific was targeted. The criminal intent that led to the attack could apply to any stranger. The trial court could therefore reasonably infer that White would likely attack again, either alone or in concert with another, if released on bail.

We acknowledge that White did not have a criminal record, he had established positive relationships with other individuals in his life, and he denied the allegations against him formally and in interviews with police. The charged offenses alleged violence against a single person, and they did not in fact result in great bodily harm.

Viewed as a whole, and even given our deferential standard of review, this record tests the bounds of what would sustain an order remanding a defendant without bail under the California Constitution. But, after thorough consideration, we conclude the evidence is sufficient to support the remand order here. The trial court could reasonably find that White acted so brazenly, so inexplicably, and so without regard for the laws and norms of society that there would be a substantial likelihood that his release would result in great bodily harm to others.

The trial court here found a substantial likelihood of great bodily harm to J.D. specifically and to other children in general. Because the record supports the trial court's finding that White's release would result in great bodily harm to others, we need not consider whether the evidence supported a finding of great bodily harm to J.D. specifically.[7] As explained above, based on the testimony of J.D. and the statements of others who observed White and Owens, the court could reasonably find that White and Owens deliberated over the attack over an extended period of time, that White agreed to act as a lookout during the attack, that White encouraged Owens to continue attacking J.D. by telling him to "[g]et in the house" even after she fought Owens off, and that White facilitated Owens's flight after the attack occurred. In addition to these facts, the court could reasonably view the circumstances of the attack as highly unusual. Owens

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[7] We note, however, that there was no evidence J.D. was specifically targeted or that she remained specifically under threat. Instead, the record shows that the risk of great bodily harm caused by White's release is to strangers, rather than a specific person known to White.

and White loitered on a well-trafficked street near the beach while watching J.D. It was daytime. People passed by, including one surfer who talked with J.D. Unrelated witnesses saw Owens and White, described them as "creepy," and worried that they would kidnap children. Despite the likelihood that someone would see them, they perpetrated a brazen attack on J.D.—and White specifically wanted the attack to continue. The trial court could reasonably find that the criminal impulse shared by Owens and White was so strong that White, either alone or in concert with another, would attack again if he were released. The evidence therefore supports the trial court's finding that there would be a substantial likelihood that White's release would result in great bodily harm to others.

White claims that his role was "limited" and the crime was "spontaneous." But the trial court could have reasonably found the opposite, as we discuss above. White argues that his statements to police were exculpatory, but the trial court could reasonably have found that White was not credible and was intent on minimizing his responsibility for the crime. The court could instead have inferred from White's admissions that he knew more

about Owens's actions than he acknowledged. White has not shown that the evidence did not support the court's order.[8]

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[8] Relying on *United States v. Salerno* (1987) 481 U.S. 739 (*Salerno*) and the recent opinion in *In re Humphrey* (2018) 19 Cal.App.5th 1006 (*Humphrey*), White appears to contend that the trial court was required to make a finding that no bail conditions or combination of bail conditions would be sufficient to protect public safety before ordering remand. We disagree. *Salerno* considered the constitutionality of a recently enacted federal bail statute, which allowed pretrial detention without bail under certain circumstances. (*Salerno,* at p. 741.) *Salerno* found the statute constitutional: "When the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, we believe that, consistent with the Due Process Clause, a court may disable the arrestee from executing that threat." (*Id.* at p. 751.) Although the statute requires a federal trial court to find that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community" before a defendant may be detained without bail, it does not apply to state court proceedings. (18 U.S.C. § 3142(e)(1); *Salerno,* at p. 742.) And *Salerno* did not imply that such a finding is required in state courts as a matter of federal constitution law. White has not shown it must be applied here. *Humphrey* considered whether and under what circumstances a trial court could constitutionally impose a bail requirement that exceeded a defendant's ability to pay. (*Humphrey,* at pp. 1015–1016.) It held that "a court which has not followed the procedures and made the findings required for an order of detention must, in setting money bail, consider the defendants ability to pay and refrain from setting an amount so beyond the defendant's means as to result in detention." (*Id.*, at p. 1037.) If the court finds that it must impose money bail in excess of the defendant's ability to pay, it must consider whether there are any less restrictive alternatives that would ensure his or her future court appearances. (*Ibid.*) Here, because the court did follow the procedures and make the constitutional findings required for an order of detention, and did not set money bail, *Humphrey* is inapposite.

DISPOSITION

The petition is denied.

BENKE, Acting P. J.

WE CONCUR:

NARES, J.

IRION, J.

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 4/10/2018 by Leah Toala, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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Supreme Court of California

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Case Number: **TEMP-S0G1GWQW**
Lower Court Case Number:

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