IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In Re CHRISTOPHER LEE WHITE	No. S248125
On	
Habeas Corpus.	

Appeal from the Fourth Appellate District, Division One, Case No. D073054
Superior Court of San Diego County, Case No. SCN376029
The Honorable Robert J. Kearney, Judge

RESPONDENT'S CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS BY CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE AND AMERICAN CIVIL LIBERTIES UNION (CAL. RULES CRT., RULE 8.520(F)(7))

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Penal Code

California Constitution

SecondaryAuthorities

RESPONDENT'S SUMMARY RESPONSE TO ISSUES PRESENTED IN AMICUS CURIAE BRIEFS BY CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE AND AMERICAN CIVIL LIBERTIES UNION

A. Amicus Curiae Brief by California Attorneys for Criminal Justice

On October 17, 2018, this court granted California Attorneys for Criminal Justice ("CACJ") permission to file its amicus curiae brief in this case. (Docket, case no. S248125.) That brief argues four points: (1) California Constitution, Article I, section 1, guarantees citizens' liberty, but the fact-determining guidelines embodied in Article I, sections 12(b) and 12(c) (hereafter "section 12(b)" and "section 12(c)" respectively), do not protect that liberty guarantee (CACJ Amicus Brf., pp. 17-19), and the fact-determining guideline in Article I, section 28(f)(3) (hereafter "section 28(f)(3)") improperly limits citizens' liberty guarantee to crime victim concerns (CACJ Amicus Brf., pp. 20-21); (2) the fact-determining guidelines of section 12(b), 12(c) and 28(f)(3), do not assure that a court will abide by constitutional due process when denying bail to a criminally-charged defendant (CACJ Amicus Brf., pp. 24-25); (3) fact-determining guidelines of sections 12(b), 12(c) and 28(f)(3), encourages trial court speculation when deciding to deny a defendant bail (CACJ Amicus Brf., pp. 26-31); and (4) state Senate Bill No. 10 (hereafter "SB 10") (eff. Oct. 1, 2019), that repeals cash bonds as the exclusive bail mechanism (see Pen. Code, § 1320.6, et. seq.), improperly allows trial court speculation, when deciding to deny bail, about a defendant's risk of not appearing at future court dates or later offending (CACJ Amicus Brf., pp. 31-41).

CACJ's arguments should be rejected. The fact-determining guidelines of section 12(b), does not establish or encourage trial court speculation when denying bail to a qualified, criminally-charged defendant because its decision is applicable to a limited class of criminally-charged

defendants and must be based on clear and convincing evidence the defendant poses a danger to the community. Moreover, the trial court decision denying bail to a qualified defendant is reviewable for sufficiency of evidence which serves as a judicial check that the trial court decision is based on fact and not speculation.

Additionally, CACJ's SB-10 argument should be rejected. Because the magistrate's October 2017 denial of petitioner's pretrial bail motion preceded the August 28, 2018 enactment of Senate Bill No. 10, the ruling was not governed by the provisions of SB-10 and the correctness of that ruling should not be assessed based on that bill but by the law existing at the time of the ruling. Even if the magistrate's ruling had been governed by SB-10, the ruling would not run afoul of the bill because the bill authorizes a lower court to deny bail to a qualified defendant who, like petitioner, was charged with committing a violent sexual assault within the meaning of Penal Code section 667.5, subdivision (c), or charged with a committing violence against a person, threatened violence, or with the substantial likelihood of causing serious bodily injury. Additionally, the magistrate's finding was made based on clear and convincing evidence, a standard of review embodied in SB-10 to determine no bail pre-trial detentions.

B. Amicus Curiae Brief by American Civil Liberties Union Foundation

On January 9, 2019, this court granted the American Civil Liberties Union Foundation ("ACLU") permission to file its amicus curiae brief in this case. (Docket, case no. S248125.) That brief argues two points: (1) a trial court order denying bail to a qualified defendant must be reviewed de novo because the issue is a mixed question pertaining to a defendant's constitutional right to liberty and fact (ACLU Amicus Brf., pp. 12-26); and

(2) the court of appeal erred by applying a "substantial evidence" review standard in this case (ACLU Amicus Brf., pp. 27-33).

The issues raised by the ACLU should be rejected. The trial court's order denying bail to petitioner, who was shown by preliminary hearing evidence to be an active participant to a felony sexual assault, was based on the court's constitutional authority to deny bail to a class of defendants whom the Legislature and voters of this state recognize as particularly posing a threat to public safety and does not involve all criminally-charged defendants. As will be presented, *infra*, petitioner's argument to the preliminary hearing magistrate for reasonable bail, and that magistrate's later decision to deny petitioner bail were based on whether petitioner's actions prior to and encompassing his commission of the underlying felony sexual assault rendered him a threat to public safety and did not extend beyond the historical facts or require the trial court's consideration of constitutional principles and policies pertaining to granting bail. Because the trial court order denying bail was based on whether petitioner was a threat to public safety due to his actions, the court of appellant properly reviewed the denial of bail according to a substantial evidence standard of review and not by a de novo standard of review.

ARGUMENT

I.

THE FACT-DETERMINING GUIDELINE IN CALIFORNIA CONSTITUTION, ARTICLE I, SECTION 12(B), DOES NOT ESTABLISH OR ENCOURAGE TRIAL COURT SPECULATION WHEN DENYING BAIL TO A QUALIFIED DEFENDANT; ARGUMENTS BY CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE SHOULD BE REJECTED

The CACJ correctly note that California Constitution, Article I (hereafter "Article I"), provides all citizens of this state have, among other inalienable rights, a constitutional right to liberty (Cal. Const., Art. I, § 1).

(CACJ Amicus Brf., pp. 16-17.) In addition to defendants charged with capital crimes who may be denied bail (Cal. Const., Art. I, § 12(a)), Article I allows bail to be denied to a defendant who commits violent felonies or felony sexual assault upon other persons and clear and convincing evidence shows the substantial likelihood great bodily injury to others would result if the defendant were released (Cal. Const., Art. I, § 12(b)), and denied to a defendant who threatens others with great bodily harm and substantial likelihood exists would carry out the threat if released (Cal. Const., Art. I, § 12(c)).[1] CACJ interprets the latter two Article I provisions, allowing bail be denied to defendants charged with committing violent or sexual assault upon another, or threatening another with great bodily harm as resulting from baseless, politician-stoked public fear, rather than a result of the lawful amendment of the state constitution by its citizens. (See CACJ Amicus Brf., pp. 18-19; see CACJ Amicus Brf., pp. 21-22.)

Significantly, CACJ mis-characterizes a trial court's constitutional authority to deny bail to qualified, criminally-charged defendants as applying to "all people in California and more specifically to people who may be arrested," when Article I expressly limits a court's authority to deny bail to a limited class of qualified, criminally charged defendants and defendants charged with capital crimes. (CACJ Amicus Brf., p. 19.) At issue here is a court's authority under section 12(b) to deny bail to a

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[1] Respondent uses the terms "no bail" and "denied bail" instead of the synonym "preventive detention" which is used in California Senate Bill No. 10 (2017-2018 Reg. Sess.) to describe a trial court's denial of bail to a defendant. The changes in California's bail system by that bill was originally to become operative November 19, 2019. On January 16, 2019, a referendum challenging Senate Bill No. 10, qualified to be placed on California's November 3, 2020, General Election Ballot. (https://www.sacbee.com/news/state/california/article224682595.html) Because the text of the bill may change as a result of the referendum, "preventive detention" appearing in the bill will not be used in this Answer.

defendant who commits felony sexual assault upon other persons and clear and convincing evidence shows the substantial likelihood the defendant would cause great bodily injury to others if released. (Cal. Const., Art. I, § 12(b).)

A. Whether bail is granted to a defendant is not a federal constitutional right

In 1952, the United States Supreme Court addressed the issue of whether the Attorney General, as the executive head of the United States Immigration and Naturalization Service, had authority to continue detaining prohibited classes of foreign aliens in custody without bail. (*Carlson v. Landon* (1952) 342 U.S. 524, 526-527.) In the course of rejecting the foreign aliens' challenge that the Attorney General abused his authority by denying them bail pending determination of their deportability (*id.* at pp. 541-542), and the challenge that foreign aliens under deportation charges are entitled to the same reasonable bail accorded to this nation's citizens (*id.* at pp. 544-545), the high court summarized the historical genesis of bail in this country (*id.* at p. 545.)

The *Carlson* high court observed:

> The bail clause was lifted with slight changes from the English Bill of Rights Act. [Footnote omitted.] In England that clause has never been thought to accord a right to bail in all cases, [footnote omitted] but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept. [Footnote omitted.] The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus in criminal cases bail is not compulsory where the punishment may be death. [Footnote omitted.] Indeed, the very language of the Amendment fails to say all arrests must be bailable.

(*Carlson v. Landon*, *supra*, 342 U.S. at pp. 545-546.)

The *Carlson* court's conclusion pertaining to a defendant's right to bail, can be summarized as follows: 1) there is no constitutional right to bail, including in deportation cases; and 2) the enacting authority (in *Carlson* the enacting authority was Congress) has the power to deny bail entirely without violating any constitutional rights. (See *Ferreras v. Ashcroft* (S.D. NY. 2001)160 F.Supp.2d 617, 625 [Congress has authority to alter rights of resident aliens], citing *Carlson v. Landon*, *supra*, 342 U.S. 524.) The United States Supreme Court's *Carlson* holding, that there is no constitutional right to bail and that an enacting authority has the power to deny bail entirely without violating any constitutional rights is instructional.

The citizens of this state, through the state's voter initiative process, lawfully amended California Constitution, Article I, section 12(b). In 1994, the state's electorate voted on and approved Proposition 189 (entitled "bail exception-felony sexual assault Legislative Constitutional Amendment") which amended California Constitution, Article I, section 12(b), by adding that a defendant charged with committing a felony sexual assault crime upon another person may be excluded from being granted bail if the defendant's release posed a substantial likelihood that great bodily harm would result. (UC Hastings Scholarship Repository; Voter Information Guide for 1994, General Election, pp. 6-7, 18 (text of proposed law) (https://repository.uchastings.edu/ca_ballot_props/1091/).)[2] This

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[2] California Constitution, Article I, section 12(b) was amended by Proposition 189 as follows:

> SEC. 12. A person shall be released on bail by sufficient sureties,
> except for:
> . . . . .
> (b) Felony offenses involving acts of violence on another

amendment was in effect when the magistrate judge issued its October 5, 2017, order denying petitioner's motion for pre-trial bail. (*In re Christopher White* (2018) 21 Cal.App.5th 18, 23-24.)

In *In re Underwood* (1973) 9 Cal.3d 345, this court noted that *Carlson v. Landon*, *supra*, 342 U.S. 524, addressed the federal amendment to the Eighth Amendment (excessive bails shall not be required) and distinguished *Carlson* from then-California Constitution, Article I, section 6 (no bail for defendant charged with capital crime). The *Underwood* court noted that Article I, section 6, contained the provision that all persons shall be bailable except for a capital offense and that added provision distinguished the state constitution from the federal constitution. (*In re Underwood*, *supra*, 9 Cal.3d at p. 349.) The *Underwood* court ultimately held because the detention of persons dangerous to themselves or to others was not then contemplated by state statute or by the state constitution, denial of bail solely because of a petitioner's dangerous propensities was prohibited. (*Id.* at p. 351.)

After *Underwood*, and as set out in respondent's merits brief in this case, Proposition 4 (1982) and Proposition 189 (1994) created and amended Article I, section 12(b), by adding three classes to the defendants charged with capital crimes who could also be denied bail upon clear and convincing evidence they posed a danger to the community if released. The added class of defendants were those who committed violent acts on others,

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> 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;

(Italics in original.)

felony sexual assault on others, and who committed felony threats and posed a danger of carrying out those threats if released. (Resp. Merits Brf., pp. 8-10.) In light of the creation and amendment of section 12(b), which prohibits bail to qualified defendants charged with felony sexual assault, among other crimes, the *Underwood* bar to denying bail to defendants based on their threat to public, is no longer applicable.

By analogy and following the *Carlson* rationale that a legislature body has authority to enact law to prohibit bail to certain classes of defendants, so too, California voters, through the state's voter initiative process, have the authority to deny bail to a criminally-charged defendant who is accused of committing felony sexual assault upon another and clear and convincing evidence shows the substantial likelihood great bodily injury would result to others if the defendant were released (Cal. Const., Art. I, § 12(b)). The fact petitioner is a qualified defendant who came within the limited class of defendants for whom bail could be denied under section 12(b) if the facts are evident or the presumption great and clear and convincing evidence exists to a substantial likelihood his release would result in great bodily harm to another, does not transform review of this matter to a question of applying facts to a constitutional right. The issue addressed by the trial court and the appellate court in this case was not whether petitioner being denied bail infringed on his right to liberty. Rather, what was disputed by petitioner, and resolved by the trial court and reviewed by the court of appeal was whether evidence leading up to and surrounding his commission of felony sexual assault justified the trial court's decision to deny him bail within the meaning of section 12(b). Thus, because the trial court decided a mixed question of fact and whether those facts in light of section 12(b) rendered petitioner a risk to causing great bodily injury to others if released, review of the trial court's no-bail

decision in this case was properly pursuant to substantial evidence review to determine if that court abused its discretion when it denied bail to petitioner pending trial. A de novo review of the trial court's decision was not required by the appellate court.

B. California Constitution, Article I, section 12(b), guarantees due process to determining whether a defendant charged with committing sexual assault upon another receives bail

CACJ's argument, that section 12(b) does not provide a mechanism to ensure an eligible defendant, charged with committing sexual assault upon another, will receive adequate due process, e.g., is "not sufficiently robust to prove the due process cover for preventative detention," before being denied bail, should be rejected. (CACJ Amicus Brf., pp. 23-25.) Section 12(b) expressly holds that before an order denying bail is imposed, the trial court is to decide: 1) when the facts are evidence or the presumption great; and 2) the trial court finds by clear and convincing evidence that a substantial likelihood the defendant's release would result in great bodily harm to another. (Cal. Const., Art. I, § 12(b).) The terms "clear and convincing evidence", and "substantial likelihood" refer to fact-finding procedures frequently applied by jurists. Because those terms refer to legal practices frequently applied by jurists, the authors of the 1994 (Proposition 189), amendment of section 12(b) were not obliged to include a fact-finding procedure to be followed by jurists deciding whether to deny bail to defendants charged with felony sexual assault.

As to the term "clear and convincing evidence", the key element of that term is it must establish a high probability of the existence of the disputed fact, greater than proof by a preponderance of the evidence. (*People v. Mabini* (2001) 92 Cal.App.4th 654, 662.) This court, in 1981, recognized the importance of this element in *In re Angelia P.* (1981) 28

Cal.3d 908, when it stated, " '[c]lear and convincing' evidence requires a finding of high probability" (*id.* at p. 919), and expressly observed the "clear and convincing" standard of review was not new because the court described the test 80 years earlier "as requiring that the evidence be 'so clear as to leave no substantial doubt'; 'sufficiently strong to command the unhesitating assent of every reasonable mind.' " (*In re Angelia P., supra*, 28 Cal.3rd at p. 919, citing *Sheehan v. Sullivan* (1899) 126 Cal. 189, 193.)

Likewise, this court has long held the substantial likelihood test is an objective standard for the review of facts. (*In re Hamilton* (1999) 20 Cal.4th 273, 296.) As this court has explained, "substantial evidence" means that evidence which, when viewed in light of the entire record, is of solid probative value, maintains its credibility and inspires confidence that the ultimate fact it addresses has been justly determined. (*People v. Conner* (1983) 34 Cal.3d 141, 149.)

A statute must be definite enough to provide a standard of conduct for those whose activities are proscribed as well as standard for the ascertainment of guilt by the courts called upon the apply it. But a statute attacked for vagueness will be upheld if its terms may be reasonably certain by reference to its legislative purpose. (*People v. McCaughan* (1957) 49 Cal.2d 409, 414, superseded by change in Evidence Code, see *People v. Anderson* (2001) 25 Cal.4th 543, 572.) Moreover, courts may presume that an enacting body is deemed to be aware of existing laws and judicial constructions in effect at the time legislation is enacted. (*People v. Weidert* (1985) 39 Cal.3d 836, 844.) Thus, when an enacting body uses a word that has been construed judicially, courts can presume the word was intended in the sense placed on it by the courts. (See *Zilog, Inc. v. Superior Court* (2001) 86 Cal.App.4th 1309, 1318.)

Here, Proposition 189 amended section 12(b), allowing bail to be denied defendants charged with felony sexual assault upon another, informed the electorate that the constitutional amendment would add defendants charged with felony sexual assault crimes, whom courts could deny pre-trial bail:

> Proposal. This constitutional amendment would permit the courts to deny bail for a wider range of sexual offenses. Specifically, this measure would allow the courts to deny bail if a person is accused of committing any felony "sexual assault" offense.

(Supp. Ballot Pamp., Gen. Elec. (Nov. 8, 1994), Analysis by the Legislative Analyst Prop. 189, p. 7 (094).) Consequently, the terms "clear and convincing evidence" and "substantial likelihood", in section 12(b), are judicially construed standards of review the trial court is mandated to apply when determining whether to deny bail to a defendant charged with felony sexual assault crime.

Next, except where clearly indicated otherwise, the use of nontechnical words of a statute are to be given their usual, ordinary, and commonly understood meaning. (*Labarthe v. McRae* (1939) 35 Cal.App.2d 734, 738.) Here, the term "facts are evident or the presumptions great", in section 12(b) is capable of being understood by persons of common intelligence and it does not elude meaningful judicial review. Specifically, the term is not such that a person of common intelligence would be required to guess at its meaning or those of common intelligence would differ as to its application. To the contrary, by referencing common meaning, the term "facts are evident or the presumptions great" is readily understood to mean simply that the evidence in the record would be sufficient to sustain a conviction. (*In re Nordin* (1983) 143 Cal.App.3d j538, 543; see *In re Application of Weinberg* (1918) 177 Cal. 781, 782;

Cameron v. Johnson (1968) 390 U.S. 611, 615-616 [terms "obstruct" and "unreasonably interfere" plainly require no guessing at their meaning]; *People v. Flores* (2014) 227 Cal.App.4th 1070, 1074 ["unreasonable" is not impermissibly vague]; *In re Noreen G.* (2010) 181 Cal.App.4th 1359, 1375 [concept and term "physical custody" is capable of being understood by persons of common intelligence and does not elude meaningful judicial review].)

Other state courts have used lay definitions to define the term. In Texas, the term "evident" has been defined as clear and strong evidence that would lead to a well-guarded judgment. (*Beck v. State*, 648 S.W.2d 7, 9 (Tex.Crim.App.1983).) In Arizona, the term, "proof is evident, or presumption great" has been defined as "all of the evidence, fully considered by the court, makes it plain and clear to the understanding, and satisfactory and apparent to the well-guarded, dispassionate judgment of the court that the accused committed one of the offenses enumerated; it is substantial proof but not proof beyond a reasonable doubt. (*Simpson v. Owens* (2004) 204 Ariz 261, 274, 85 P.3d 478, 491.)

Finally, the trial court's decision to deny petitioner bail in this case was also based on the court's consideration of facts in context of the standards of review embodied in section 12(b) and conducted a bail hearing at which it considered petitioner's request for bail and supporting evidence (see Petn. Writ of Hab. Corpus, Exhibits, Exh. A (petitioner's motion for reasonable bail), and the prosecutor's objection to bail, pursuant to former Penal Code, section 1275 (setting, reducing or denying bail; considerations). That section dictated when 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. Absent a contrary showing, it must be presumed the trial court's denial of bail to petition was a cumulative result of the court's complying with the standard of review embodied in Article I, section 12(b), and the procedural processes of Penal Code section 1275. (See *People v. Coddington* (2000) 23 Cal.4th 529, 645 [it is presumed that the trial court knows and follows the law, until the contrary is shown]; *People v. Nance* (1991) 1 Cal.App.4th 1453, 1456 [trial court is presumed to have known and applied the correct statutory and case law in the exercise of its official duties].)

C. Provisions in Senate Bill No. 10 is not applicable to this case because the trial court decision occurred in October 2017, prior to the enactment of the bill and the bill expressly states that its provisions do not become effective until after October 1, 2019

When new legislation amends or adds statutory rights, the legislation is applied prospectively unless it is clear from statutory language or extrinsic sources that the Legislature intended retroactive application. (See *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 475 [application of Supreme Court interpretation of prior law that co-employee is not personally liable for sexual harassment cannot be changed by an amendment imposing liability, despite provision that the amendment is clarification of existing law, absent clear indication retroactive application intended].) Moreover, a new statute is presumed to operate prospectively absent an express declaration of retrospectivity or a clear indication that the electorate, or the Legislature, intended otherwise. (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 287; *People v. Hayes* (1989) 49 Cal.3d 1260, 1274.) The preceding principles are consistent with Penal Code section 3, which provides: "No part of [the Penal Code] is retroactive, unless expressly so declared." (Pen. Code, § 3 (prospective effect).)

As noted above, on January 16, 2019, a referendum challenging Senate Bill No. 10 (SB-10), qualified to be placed on California's November 3, 2020, General Election Ballot. (Resp. Answer, Arg. 1, *supra*, fn. 1.) Notwithstanding this fact, the text of SB-10 is silent on the question of retrospectivity but several concluding provisions of the bill clearly indicate the bill is to have prospective, not retroactive, effect. For example, newly enacted Penal Code section 1320.32 expressly provides that all references to "bail" in the Penal Code are to refer to SB-10 procedures, "[c]ommencing October 1, 2019", and not prior to that date.[3] Also, newly enacted Penal Code section 1320.33, subdivision (a), provides that a defendant released on bail prior to October 1, 2019, is to remain on bail pursuant to the terms of that original release.[4] Neither section requires a court to reconsider its pre-October 1, 2019, bail order in light of the provisions of SB-10, after October 2019.

Moreover, the magistrate's denial of bail to petitioner was consistent with the provisions of the SB-10. The bill requires a court to conduct a preventative detention hearing, e.g., no-bail hearing, in which evidence pertaining to that possible detention is to be presented by the parties, before ordering the defendant into preventative detention. (Pen. Code, § 1320.19.) If that evidence shows that no nonmonetary condition or combination of

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[3] Newly enacted Penal Code section 1320.32 states:

> Commencing October 1, 2019, all references in this code to "bail" shall refer to the procedures specified in this chapter.

[4] Newly enacted Penal Code section 1320.33, subdivision (a), states:

> Defendants released on bail before October 1, 2019, shall remain on bail pursuant to the terms of their release.

conditions will reasonably assure a defendant's release does not risk public safety or that the defendant will appear in court as required, SB-10 authorizes the court to commit the defendant to a preventative pre-trial detention. (Pen. Code, § 1320,18, subd. (d).)[5] The bill requires the court to consider whether clear and convincing evidence was presented before ordering a defendant be held in preventative detention. (Pen. Code, § 1320.20, subd. (d)(1).)[6]

The significance of the above SB-10 provisions is that the magistrate in this case substantially complied with those procedures. At the preliminary hearing, the magistrate heard testimony from the victim and

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[5] Newly enacted Penal Code section 1320.18, subdivision (d) states:

> If the court determines there is a substantial likelihood that no nonmonetary condition or combination of conditions of pretrial supervision will reasonably assure the appearance of the defendant at the preventive detention hearing or reasonably assure public safety prior to the preventive detention hearing, the court may detain the defendant pending a preventive detention hearing, and shall state the reasons for detention on the record.

[6] Newly enacted Penal Code section 1320.20, subdivision (d)(1) states:

> At the detention hearing, the court may order preventive detention of the defendant pending trial or other hearing only if the detention is permitted under the United States Constitution and under the California Constitution, and the court determines by clear and convincing evidence that no nonmonetary condition or combination of conditions of pretrial supervision will reasonably assure public safety or the appearance of the defendant in court as required. The court shall state the reasons for ordering preventive detention on the record.

several investigating officers describing petitioner's active role in assisting his co-defendant's felony sexual assault upon the victim. (*White*, *supra*, 21 Cal.App.5th at p. 23.) After the testimony, the magistrate found petitioner was an aider and abettor of the attack on the victim and his co-defendant was the direct perpetrator. (*Ibid.*) As to petitioner, the magistrate found persuasive from the victim's testimony: (1) petitioner and the co-defendant loitered in front of the victim's house without any legitimate purpose, (2) they stared at the victim in an abnormal manner, (3) petitioner told the co-defendant he should go into the house with the victim, (4) petitioner waited for co-defendant to come back from attacking the victim and drove away with him, and (5) petitioner behaved like a lookout during the attack. (*Ibid.*)

The magistrate then heard petitioner's request for bail. Petitioner's counsel argued that petitioner 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. (*White*, *supra*, 21 Cal.App.5th at p. 23.) The prosecution opposed. (*Ibid.*) The magistrate found the circumstances of the felony sexual assault upon the victim justified denial of bail to petitioner and his co-defendant. (*Id.* at p. 24.)

Consistent with the provisions of SB-10 pertaining to a preventative detention order being imposed on a defendant, the magistrate conducted a separate evidentiary hearing and received evidence (See Pen. Code, § 1320.19) and, after applying a clear and convincing standard of review to that evidence (See Pen. Code, § 1320.20, subd. (d)(1)), found petitioner's pre-trial release on bail would pose an unreasonable risk to public safety that no combination of conditions could quell (See Pen. Code, § 1320.18, subd. (d)). The magistrate's gathering and evaluation of evidence in deciding whether to deny bail is consistent with SB-10's provisions.

II.

BECAUSE THE TRIAL COURT'S DECISION TO DENY BAIL TO PETITIONER INVOLVED A MIXED QUESTION OF FACT AND LAW THAT DID NOT IMPLICATE A CONSTITUTIONAL RIGHT, THE COURT OF APPEAL PROPERLY APPLIED A SUFFICIENCY OF EVIDENCE STANDARD OF REVIEW; ARGUMENTS BY THE AMERICAN CIVIL LIBERTIES UNION SHOULD BE REJECTED

American Civil Liberties Union's (ACLU) interprets *United States v. McConney* (9th Cir. 1984) 728 F.2d 1195("*McConney*"), as the legal authority which required appellate review of the trial court's decision denying bail to petitioner to be de novo. ACLU contends the trial court's decision was a mixed question of fact and law which implicated petitioner's constitutional right to liberty. (ACLU Brf., Arg. 1, pp. 12-26.) ACLU concludes reversal in the *White* case is required because the trial court's denial of bail to petitioner resulted from it resolving a mixed question of fact and law implicating the petitioner's constitutional right to liberty, and the court of appeal erred by applying a substantial evidence standard of review to that decision instead of applying a de novo standard of review. (ACLU Brf., Arg. 2, pp. 27-34.).

ACLU's conclusion, that the *White* decision should be reversed, should be rejected. *McConney* does provide a guideline to state courts about the applicable standard of review to be applied to mixed questions of fact and law and mixed questions of fact and law constituting constitutional right. *McConney*, however, does not hold that the trial court's denial of bail to petitioner, who was an active participant to a felony sexual assault upon another, whose acts were evident and presumptions from which were great, was found by clear and convincing evidence to pose a substantial likelihood of danger to others if released, required application of a de novo standard of appellate review. As noted above, what was disputed by petitioner and

resolved by the trial court and reviewed by the appellate court was whether evidence leading up to and surrounding his commission of felony sexual assault justified the trial court decision to deny him bail within the meaning of section 12(b). That is, were the "facts evident or the presumption great" such that the court, "upon clear and convincing evidence", found there was "substantial likelihood" the petitioner's pre-trial release would result in great bodily injury to another. (Cal. Const., Art. I, § 12(b).) Because the trial court's decision was grounded on the substance and quality of petitioner's acts, review of the trial court's no-bail decision in this case was properly by the substantial evidence rule to determine if that court abused its discretion when it applied the facts to the applicable law. The trial court's decision and appellate court's affirmance of that decision did not run afoul of *McConney*.

To determine the standard of review to apply to mixed questions of law and fact a reviewing court must focus "on the nature of the inquiry required when [the reviewing court applies] the relevant rule of law to the facts as established." (*McConney, supra,* 728 F.2d at p. 1204.) The Ninth Circuit in *McConney* developed a functional analysis as a guide to selecting the proper standard of review for mixed questions. (*Id.* at p. 1204.) This court has found the *McConney* analysis helpful in deciding the proper standard of review for mixed questions. (*People v. Cromer (*2001) 24 Cal.4th 889, 899.) The *McConney* court noted three steps exist in deciding mixed fact-law questions, establishing the facts, selecting the applicable rule of law and applying the law to the facts. (*Id.* at p. 1200.) The standards of review for the first two steps are well settled, questions of fact are reviewed for substantial evidence and questions of law are reviewed de novo. (*Id.* at pp. 1200–1201; *People v. Mickey* (1991) 54 Cal.3d 612, 649

[questions of fact subject to review for substantial evidence is equivalent to federal "clearly erroneous" scrutiny].)

The *McConney* court noted the decision of what standard of review should be applied when reviewing a trial court's application of law to the facts may be determined by reference to the sound principles underlying settled rules of appellate review. (*McConney*, *supra*, 728 F.2d at p. 1202.) The *McConney* court observed, "[i]f the concerns of judicial administration—efficiency, accuracy, and precedential weight—make it more appropriate for a [trial] judge to determine whether the established facts fall within the relevant legal definition, we should subject his determination to deferential, [substantial evidence] review. If, on the other hand, the concerns of judicial administration favor the appellate court, we should subject the [trial] judge's finding to de novo review. Thus, in each case, the pivotal question is do the concerns of judicial administration favor the [trial] court or do they favor the appellate court." (*Ibid.*)

In *People v. Louis* (1986) 42 Cal.3d 969, this court applied the *McConney* guidelines in the context of a trial court's due diligence determination, presenting a mixed question of law and fact, should be subject to independent review. The *Louis* court concluded that "a trial court's due diligence determination, presenting a mixed question of law and fact, should be subject to independent review: " '[T]o decide if the facts satisfy the legal test of [due diligence] ... necessarily involves us in an inquiry that goes beyond the historical facts. [¶] The mixed question of [due diligence] is rooted in constitutional principles and policies. Like many such mixed questions, its resolution requires us to consider abstract legal doctrines, to weigh underlying policy considerations, and to balance competing legal interests . . . . [¶] This is a question that no amount of factfinding will answer . . . . [¶] When, as here, the application of law to

fact requires us to make value judgments about the law and its policy underpinnings, and when, as here, the application of law to fact is of clear precedential importance, the policy reasons for de novo review are satisfied and we should not hesitate to review the [trial] judge's determination independently.' " (*Id.* at p. 988, quoting *McConney*, *supra*, 728 F.2d at p. 1205, fn. omitted.) In 2001, this court ruled that its *Louis* decision was persuasive and in accordance with the United States Supreme Court's analysis of the standard of review for mixed questions of law and fact set forth in *Thompson v. Keohane* (1995) 516 U.S. 99 [, 111-116]. (*People v. Cromer*, *supra*, 24 Cal.4th at p. 900.)

Unlike *Louis*, however, petitioner in this case argued to the trial court and raised on appeal only factual questions: Were his acts leading to and surrounding the commission of the underlying felony sexual assault facts are "evident or presumptively great" and did the trial court properly find, by "clear and convincing evidence" that there was a "substantial likelihood" the petitioner's release would result in great bodily injury to another. In short, the trial court's decision was whether bail should be denied based on the danger petitioner posed to the community if released pre-trial and not value judgments about the no-bail law and its policy underpinnings.

A dangerousness determination is not rooted in constitutional principles and policies, does not require that a trial court consider abstract legal doctrines, weigh underlying policy considerations or balance competing legal interests. (*McConney*, *supra*, 728 F.2d at p. 1205.) Rather, a dangerousness determination is a factual inquiry guided by a trial court's review of the petitioner's criminal conviction history, disciplinary record and record of rehabilitation while incarcerated, and any other evidence the court in its discretion determines relevant. (See Pen. Code, § 1170.126,

subd. (g) [upon receiving petition for recall of sentence, court shall determine if petitioner poses an unreasonable risk of danger to public safety].) Because the trial court is vested with broad discretion in making the determination and in what evidence it considers, the question whether a petitioner poses an unreasonable risk of danger to public safety is highly fact-dependent, rendering such decisions of little precedential value in other cases with different fact patterns. The limited precedential value of such decisions, each of which stands upon its own facts, reduces the need for de novo review. (*McConney*, *supra*, 728 F.2d at p. 1201.) Thus, because the trial court's decision to deny bail to petitioner depended on it considering whether he posed a danger of causing great bodily injury to another if released, that decision was subject to an abuse of discretion, e.g., sufficiency of evidence, standard of review and not to a de novo standard of review.

Consequently, the court of appeal affirming the trial court decision to deny petition bail based on a sufficiency of evidence standard of review was proper.

CONCLUSION

For the preceding reasons, respondent respectfully requests that petitioner's Petition for Writ of Habeas Corpus be denied, the appellate court's substantial evidence review of the trial court decision be deemed proper and contrary arguments by the California Attorneys for Criminal Justice, and by the American Civil Liberties Union, in their respective Amicus Curiae Briefs be rejected.

Dated: March 11, 2019

Respectfully Submitted,

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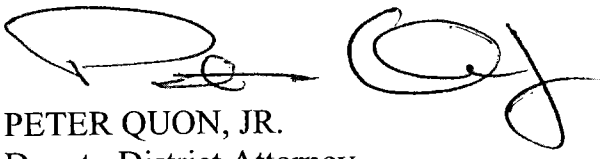

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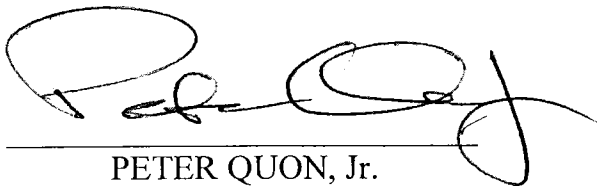
CERTIFICATE OF WORD COUNT

I certify that this **RESPONDENT'S CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS BY CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE AND AMERICAN CIVIL LIBERTIES UNION (CAL. RULES CRT., RULE 8.520(F)(7))** including footnotes, and excluding tables and this certificate, contains 6,322 words according to the computer program used to prepare it.



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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In Re CHRISTOPHER LEE WHITE On Habeas Corpus.	For Court Use Only Supreme Court No. S248125 Court of Appeal No. D073054 Superior Court No. CN376029

PROOF OF SERVICE

I, the undersigned, declare as follows:

I am employed in the County of San Diego, over eighteen years of age and not a party to the within action. My business address is 330 West Broadway, Suite 860, San Diego, CA 92101.

On March 11, 2019, a member of our office served a copy of the within **RESPONDENT'S CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS BY CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE AND AMERICAN CIVIL LIBERTIES UNION (CAL. RULES CRT., RULE 8.520(F)(7))** to the interested parties in the within action by placing a true copy thereof enclosed in a sealed envelope, into the FEDEX drop box, addressed as follows:

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I served John David Loy via mail with postage fully prepaid, in the United States Mail, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on March 11, 2019 at 330 West Broadway, San Diego, CA 92101.

Marites D. Balagtas