

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In Re CHRISTOPHER LEE WHITE

No. S248125

On

Habeas Corpus.

SUPREME COURT
FILED

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Deputy

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 SUPPLEMENTAL BRIEF
RE: SENATE BILL NO. 10 (2017-2018 REG. SESS.)**

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ISSUE PRESENTED

What effect, if any, does Senate Bill No. 10 (2017-2018 Reg. Sess.) have on the resolution of the issues presented by *In re Christopher White* (2018) 21 Cal.App.5th 18, 24 (*White*) (petn. rev. granted May 23, 2018; case no. S248125)?

INTRODUCTION

Although the lower court magistrate did not refer to California Constitution, Article I, section 12, when denying petitioner's motion for bail pending trial, the Court of Appeal correctly identified that constitutional section as the legal authority for the magistrate's ruling. (See *People v. Zapien* (1993) 4 Cal.4th 929, 976, superseded by statute on other grounds, [a trial ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason; if right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion].)

When petitioner's October 2017 motion for pre-trial bail was denied, Article I, section 12, expressly precluded the granting of pre-trial bail to a defendant accused of specific crimes. Under that section a defendant was to be denied bail when accused of capital crimes, accused of felony offenses involving acts of violence on another person or felony sexual assault offenses on another person when the defendant's release would result in great bodily harm to others, and when the defendant threatened another with great bodily harm with the substantial likelihood the defendant would carry out the threat if released. Here, petitioner was accused of committing three felony sexual assault offenses upon a female child.

Because the magistrate's October 2017 denial of petitioner's pre-trial bail motion preceded the August 28, 2018 enactment of Senate Bill No. 10, that ruling was not governed by the provisions of Senate Bill No.

10 and the correctness of that ruling should not be assessed in light of that bill. Notwithstanding this legal fact, even if the magistrate's ruling had been governed by Senate Bill No. 10, the ruling would not run afoul of those provisions because the bill authorizes a lower court to deny bail to a defendant who, like petitioner, is charged with a committing a violent felony within the meaning of Penal Code section 667.5, subdivision (c) (e.g., assault with intent to commit rape (Pen. Code, § 220, subd. (a)(1))), or who committed a felony offense with violence against a person, threatened violence, or with a likelihood of serious bodily injury (e.g., attempted kidnaping with intent to commit rape (Pen. Code, § 209, subd. (b)), contact with a minor with intent to commit a sexual offense (Pen. Code, § 288.3, subd. (a)) and false imprisonment (Pen. Code, §§ 236 & 237, subd. (a))). Additionally, the magistrate's finding was made based on clear and convincing evidence, a standard of review embodied in Senate Bill No. 10 to determine preventative pre-trial detentions, that no nonmonetary condition or combination of conditions of pretrial supervision would reasonably assure public safety (Pen. Code, § 1320.20, subd. (d)).

In short, the magistrate's denial of pre-trial bail to petitioner did not violate the provisions of Senate Bill No. 10 and, in any event, that ruling is consistent with the preventative pre-trial detention provisions within the bill.

STATEMENT OF CASE AND FACTS

On October 5, 2017, the lower court magistrate heard and considered preliminary hearing evidence of the underlying three sex-assault charges filed by the San Diego County District Attorney against petitioner and his co-defendant. At the conclusion of that hearing, the magistrate found the co-defendant to be the actual perpetrator of the crimes, petitioner to be the

aider and abettor to those crimes, and both were ordered to stand trial in the superior court.¹

The magistrate then considered petitioner’s motion for bail pending trial. The motion was denied based on the magistrate finding “on the basis of the clear and convincing evidence . . . there is a substantial likelihood that the release of [petitioner and his co-defendant] would result in great bodily harm to others.” (*White, supra*, 21 Cal.App.5th at p. 24.)

On March 6, 2018, in a published decision, the Court of Appeal denied petitioner’s habeas petition challenging the magistrate’s finding.

On August 28, 2018, the governor approved and signed Senate Bill No. 10 (pretrial release or detention) as new legislation to become effective on October 1, 2019.

DISCUSSION

I.

SENATE BILL NO. 10 (2017-2018 REG. SESS.) OVERVIEW

On August 28, 2018, the California Legislature approved, and the Governor signed SB10 [pretrial release or detention: pretrial services.]. Senate Bill No. 10 eliminates California’s current monetary bail system and replaces it with a risk-based pretrial system, commencing October 1, 2019. (Pen. Code, § 1320.6.)

Accordingly, the current statutory law related to bail set forth in title 10, chapter 1 of the Penal Code remains the law “until October 1, 2019, and

¹ Petitioner was bound over the San Diego County Superior Court for trial on the charges of attempted kidnaping with intent to commit rape (Pen. Code, § 209, subd. (b)), assault with intent to commit rape (Pen. Code, § 220, subd. (a)(1)), contact with a minor with intent to commit a sexual offense (Pen. Code, § 288.3, subd. (a)), and false imprisonment (Pen. Code, §§ 236 & 237, subd. (a)), of the same female victim. (*White, supra*, 21 Cal.App.5th at pp. 21, 23.)

as of that date is repealed.” (Pen. Code, § 1320.6.) At the same time, Senate Bill No. 10 has been enacted and its provisions are the law, albeit the risk-based pretrial system will not commence until October 1, 2019.

Under the new pretrial system, criminal defendants charged with misdemeanors will be booked and released. (Pen. Code, § 1320.8.) Defendants charged with felonies will be assessed using a “validated risk assessment tool.” Those defendants that are assessed as low or medium risk², will be released on their own recognizance or supervised recognizance prior to arraignment, with the least restrictive nonmonetary conditions that will reasonably assure public safety and the defendant’s return to court. (Legis. Counsel’s Dig., Sen. Bill No. 10 (2017-2018 Reg. Sess.), pp. 1-2.) Felony defendants classified as high risk, and who are charged with a violent felony as defined in subdivision (c) of Penal Code section 667.5, or who committed a felony offense with violence against a person, threatened violence, or with a likelihood of serious bodily injury, may be detained pending trial under the new system’s preventative detention, i.e., no bail, process when no condition or combination of conditions of pretrial supervision will reasonably assure public safety. (Pen. Code, §§ 1320.18 [prosecution’s motion for preventative detention of defendant pending trial], 1320.19 [preventative detention hearing-procedure], 1320.20 [rebuttable presumption defendant poses risk to public safety].)³ Under the new system the court is prohibited “from imposing a financial condition” or requiring a defendant “to pay for any nonmonetary

² Penal Code section 1320.7 enacted as part of Senate Bill No, 10 defines low and medium risk.

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.

condition,” as a requirement of the defendant’s pre-trial release. (Legis. Counsel’s Dig., Sen. Bill No. 10 (2017-2018 Reg. Sess.); Pen. Code, § 1320.13, subd. (e)(2).)

II.

SENATE BILL NO. 10 (2017-2018 REG. SESS.) IS TO BE GIVEN ONLY PROSPECTIVE APPLICATION

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).)

The text of Senate Bill No. 10 is silent on the question of retrospectivity. Also, several concluding provisions of the bill clearly indicate that 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 Senate Bill No. 10 procedures, “[c]ommencing October 1, 2019”, and not prior to that date. 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 Senate Bill No. 10, after October 2019.

III.

NOTWITHSTANDING THE PROSPECTIVE APPLICATION OF SENATE BILL NO. 10 (2017-2018 REG. SESS.), THE MAGISTRATE'S DENIAL OF PETITIONER'S PRE-TRIAL BAIL MOTION WAS CONSISTENT WITH THE PREVENTATIVE DETENTION PROVISIONS OF THE BILL

While Senate Bill No. 10, gives a court authority to order a defendant's pre-trial release under nonmonetary condition or combination of conditions when the release does not risk public safety and reasonably assures the defendant's appearance in court as required (See Pen. Code, §§ 1320.13 [court authority allowing defendant's pre-arraignment release], 1320.17 [court authority allowing defendant's release at arraignment]), the bill also authorizes a court to order a defendant into pre-trial preventative detention. Summarily, Senate Bill No. 10 requires a court to conduct a preventative detention hearing, in which evidence pertaining to that possible detention is to be presented by the parties, before ordering a defendant into preventative detention. (Pen. Code, § 1320.19.) If that evidence shows that no nonmonetary condition or combination of conditions will reasonably assure a defendant's release does not risk public safety or that the defendant will appear in court as required, Senate Bill No. 10 authorizes the court to commit the defendant to a preventative pre-trial

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.

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 Senate Bill No.10 provisions, required before ordering a defendant held in preventative detention, is that the magistrate in this case substantially complied with those procedures. At the preliminary hearing, the magistrate heard testimony from the girl victim and several investigating officers. (*White, supra*, 21 Cal.App.5th at p. 23.) After the testimony, the magistrate found petitioner was an aider and

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.

abettor of the attack on the victim and his co-defendant was the direct perpetrator. (*Ibid.*) As to petitioner, the magistrate found persuasive the following facts and inferences 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.*)

After receiving evidence and listening to argument, the magistrate 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." (*White, supra*, 21 Cal.App.5th at p. 24.) But the magistrate believed the circumstances justified remand without bail here and 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 [to the victim] 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.

(*Ibid.*)

Consistent with the provisions of Senate Bill No. 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)).

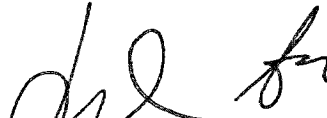
Thus, even though the magistrate in this case was not required to comply with the preventative detention provisions of Senate Bill No. 10, which was enacted ten months after petitioner made his motion for pre-trial bail, the magistrate's gathering and evaluation of that evidence is consistent with those provisions. That consistency includes the magistrate applying a clear and convincing standard of review to evaluating the evidence when ruling on petitioner's bail motion.

CONCLUSION

For the preceding reasons, respondent respectfully submits that the provisions of Senate Bill No. 10 are to have prospective effect and, on that basis, the newly enacted legislation is not applicable to this court's review of this case. Notwithstanding this point, even if the preventative detention provisions of the bill were to be applied in this case, the magistrate's receipt and consideration of evidence pertaining to petitioner's motion for pre-trial bail was consistent with those provisions and do not render the magistrate's ruling on that motion improper or invalid.

Dated: October 10, 2018


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CERTIFICATE OF WORD COUNT

I certify that this RESPONDENT'S SUPPLEMENTAL BRIEF RE:
SENATE BILL NO. 10 (2017-2018 REG. SESS.), including footnotes, and
excluding tables and this certificate, contains 2,364 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.

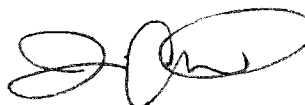
On October 10, 2018, a member of our office served a copy of the within **RESPONDENT'S SUPPLEMENTAL BRIEF RE: SENATE BILL NO. 10 (2017-2018 REG. SESS.)** to the interested parties in the within action by placing a true copy thereof enclosed in a sealed envelope, into the FEDEX drop box, addressed as follows:

Laura G. Schaefer 934 23rd Street San Diego, CA 92102-1914 <i>Attorney for Petitioner Christopher Lee White</i>	San Diego Superior Court North County Division Attn: Clerk of the Court/Appellate Division c/o Honorable Robert J. Kearny, Judge 325 S. Melrose Drive Vista, CA 92081
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I also served the following parties electronically via www.truefiling.com:

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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 October 10, 2018 at 330 West Broadway, San Diego, CA 92101.



Jerri D. Carter