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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

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 BRIEF ON THE MERITS

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ISSUES PRESENTED

(1) Under what circumstances does the California Constitution permit bail to be denied in noncapital cases? Included is the question of what constitutional provision governs the denial of bail in noncapital cases - article I, section 12, subdivisions (b) and (c), or article I, section 28, subdivision (f)(3), of the California Constitution - or, in the alternative, whether these provisions may be reconciled.

(2) What standard of review applies to review of the denial of bail?

(3) Did the Court of Appeal err in affirming the trial court's denial of bail?

SUMMARY RESPONSE

Article I, section 12, subdivisions (b) and (c), and Article I, section 28, subdivision (f)(3), of the California Constitution, address the same subject matter of a trial court's authority to set, reduce, or deny pre-trial bail. While sections 12(b) and 12(c) are mandatory, section 28(f)(3) is discretionary. Under Section 12(b), a defendant who is charged with a violent felony or sexual felony offense and, by clear and convincing evidenced, is shown to pose a substantial likelihood to commit great bodily harm to others, may be denied bail. A non-capital defendant who is not so charged and who does not pose a substantial likelihood to commit great bodily harm to other is entitled to pre-trial bail by sufficient sureties. Under section 28(f)(3) a court is to consider public and victim safety, seriousness of the charged non-capital offense, defendant's criminal record and probability of defendant appearing at trial or hearing before setting, reducing, or denying bail. The preceding provisions of Article I, sections 12(b) and 28(f)(3) may be reconciled.

Next, the standard of review to be applied to the lower court's denial of petitioner's motion for pre-trial bail in this case is whether substantial evidence supports the judgment. A trial court's resolution of pure questions

of fact is accepted as final if that judgment is supported by substantial evidence. (*In re Richards* (2012) 55 Cal.4th 948, 960.) Independent appellate review of the lower court's judgment is not applicable in this case because the lower court judgment did not resolve a question of law and apply the law to the facts.

Finally, the Court of Appeal did not err by applying a substantial evidence standard of review to affirm the lower court's denial of petitioner's motion for pre-trial bail. The lower court's denial of petitioner's motion was based on its resolution of pure questions of disputed facts and whether clear and convincing evidence presented showed that petitioner, who was charged with violent felony and sexual felony offenses as delineated in Article I, section 12(b), posed a substantial likelihood of causing great bodily harm to others if released.

STATEMENT OF THE CASE[1]

Petitioner and his co-defendant, Jeremiah Owens, were charged by the San Diego County District Attorney of attempted kidnaping with intent to commit rape (Pen. Code, § 209, subd. (b)), assault with intent to commit rape (Pen. Code, § 220, subd. (a)(l)), 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.)

On October 5, 2017, the lower court magistrate found sufficient evidence was presented to bind over petitioner and Owens to superior court for trial. The magistrate found Owens to be the actual perpetrator of the charged crimes and petitioner to be an aider and abettor to those crimes.

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[1] Respondent's Statements of Case and Facts are drawn from the published decision *In re Christopher White* (2018) 21 Cal.App.5th 18 (*White*).

(*White, supra*, 21 Cal.App.5th at p. 23.) With respect to petitioner being an aider and abettor, the magistrate found persuasive that:

> (1) petitioner and Owens 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 Owens that Owens should go into the house with the victim, (4) petitioner waited for Owens 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 also read and considered petitioner's motion for bail pending trial. After listening to the parties' arguments pertaining to that request, the magistrate denied petitioner's request for bail pending trial. (*White, supra*, 21 Cal.App.5th at pp. 23-24.) While noting that holding an accused on a non-capital offense without bail would be unusual, the magistrate stated that the circumstances of the underlying crimes justified its denial of petitioner's pre-trial bail motion because:

> on the basis of the clear and convincing evidence that there is a substantial likelihood that the release of either [petitioner or Owens] would result in great bodily harm to others. I think the individuals [sic] at threat would be [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.

(*Id.* at p. 24.)

On November 3, 2017, petitioner filed a Petition for Writ of Habeas Corpus in the Court of Appeal challenging the magistrate's denial of his motion for pre-trial bail. (*White, supra*, 21 Cal.App.5th at p. 24.) The District Attorney filed its opposition to the habeas petition. On March 6, 2018, the Court of Appeal denied petitioner's habeas petition based on, in part, that sufficient evidence supported the magistrate's clear and convincing finding of proof that a substantial likelihood existed petitioner's

and Owens' pre-trial release would result in great bodily harm to others. (*White*, *supra*, 21 Cal.App.5th at pp. 29-31.)

On April 10, 2018, petitioner filed his Petition for Review in this court. (Case No. S248125.) The petition was granted on May 23, 2018. (*Ibid.*)

STATEMENT OF FACTS

Fifteen-year-old J.D. lived with her family near the beach in Encinitas, California. On July 26, 2017, she was staying with friends. 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. (*White*, *supra*, 21 Cal.App.5th at p. 21.)

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. (*White*, *supra*, 21 Cal.App.5th at p. 22.)

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. (*White*, *supra*, 21 Cal.App.5th at p. 22.)

J.D. grabbed some surfboard wax 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. (*White*, *supra*, 21 Cal.App.5th at p. 22.)

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." (*White*, *supra*, 21 Cal.App.5th at p. 22.)

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. (*White*, *supra*, 21 Cal.App.5th at p. 22.)

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. They drove quickly away. She started hyperventilating and crying. She called her parents, who told her to call the police. She called 911, and police responded. (*White*, *supra*, 21 Cal.App.5th at p. 22.)

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. (*White*, *supra*, 21 Cal.App.5th at p. 23.)

ARGUMENT

I.

CALIFORNIA CONSTITUTION, ARTICLE I, SECTIONS 12(b) AND 12(c), AUTHORIZE A COURT TO DENY BAIL IN FELONY, NON-CAPITAL CASES INVOLVING SEXUAL ASSAULT, VIOLENT ACTS UPON ANOTHER PERSON, AND MAKING BODILY HARM THREATS TO ANOTHER; SECTIONS 12(b) AND 12(c) SPECIFY NON-CAPITAL CRIMES FOR WHICH BAIL MAYBE DENIED; UNDER THE HARMONIOUS RULE, ARTICLE I, SECTION 28(f)(3), CONTAINS FACTORS A COURT IS TO CONSIDER WHEN SETTING OR DENYING BAIL

The relationship of the current California Constitution, Article I, sections 12(b) and 12(c) (hereafter "section 12(b)" and "section 12(c)" respectively), to Article I, section 28(f)(3) (hereafter "section 28(f)(3)"), are reconcilable with one another under the harmonious rule principle. That principle allows a court to harmonize statutes by considering them in the context of their statutory framework as a whole. Under the harmonious rule principle, sections 12(b) and 12(c), and 28(f)(3), do not conflict with one another. Sections 12(a), 12(b) and 12(c) mandate that a defendant who commits (1) a capital crime; (2) a violent felony crime; (3) sexual felony

assault upon another person, or; (4) threatens to commit great bodily harm, and poses a substantial likelihood to commit great bodily harm or to carry out the threat if released is excluded from pre-trial bail. Section 28(f)(3), which excludes a defendant charged with a capital crime from being released on pre-trial bail, gives discretionary authority to a court to set, reduce, or deny bail for a defendant after it considers public safety, the victim's safety, the seriousness of the charged crime, the defendant's criminal past, and the probability the defendant will appear at scheduled hearings and at trial. Thus, section 28(f)(3) does not conflict with the court's authority, under section 12(b), to deny pre-trial bail to a defendant charged with violent felony crimes against another person or charged with felony sexual assault.

A. Current Version of California Constitution, Article I, Sections 12(b) and 12(c), Was Created by the 1974 (Proposition 7), 1982 (Proposition 4), and 1994 (Proposition 189), Amendments of the State Constitution; None of Those Amendments Were Ruled To Be Invalid

From 1879 to November 1973, the California Constitution provided that, except for defendants charged with capital crimes, all persons were entitled to bail by sufficient sureties. That bail provision initially appeared as Article I [declaration of rights], section 6 [bail-unusual punishment-detention of witnesses], which read:

> SEC. 6. All persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed; nor shall cruel or unusual punishments be inflicted. Witnesses shall not be unreasonably detained, nor confined in any room where criminals are actually imprisoned.

(See California State Assembly, Office of the Chief Clerk, Statutes and Amendments to the Codes 1973 (https://clerk.assembly.ca.gov/content/statutes-and-amendments-codes-

1973) and California Constitution, as amended and in force, November 8, 1972, p. A-10 (https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1973/73Vol1_Constitution.pdf#page=7).)

In November 1974, the state's electorate voted on and enacted Proposition 7 (entitled "declaration of rights") which amended California Constitution, Article I [declaration of rights] by repealing section 6, the bail provision, renumbering the bail provision as section 12 to read as follows:

> That Section 12 of Article I be added, to read: SEC. 12. A person shall be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great. Excessive bail may not be required. [¶] A person may be released on his or her own recognizance in the court's discretion.

(UC Hastings Scholarship Repository; Voter Information Guide for 1974, General Election, pp. 26-27, 70-71 (text of proposed law) (https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1803&context=ca_ballot_props).) Additionally, the amendment gave courts authority to release a defendant on his or her own recognizance. (*Ibid.*)

In 1982, the state's electorate voted on and approved Proposition 4 (entitled "bail") which approved the amendment of California Constitution, Article I, section 12 (bail). The amendment restated defendants charged with capital crimes are excluded from people entitled to bail, and courts have authority to release a defendant on his or her own recognizance. (UC Hastings Scholarship Repository; Voter Information Guide for 1982, Primary, pp. 16, 17 (text of proposed law) (https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1917&context=ca_ballot_props).) Further, Proposition 4 added sections 12(b) and 12(c) which provided that a defendant charged with felony crimes involving acts of violence on another person or who threatens another person is excluded

from being granted bail if the defendant's release would pose a substantial likelihood of resulting in great bodily injury to another or the threat would be carried out:

Sec. 12. A person shall be released on bail by sufficient sureties, except for:

> . . . . .
> (b) Felony offenses involving acts of violence 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 that there is a substantial likelihood that the person would carry out the threat if released. . . .

(*Ibid.*)

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 (bail). That amendment restated that a defendant charged with capital crimes, charged with violent felony acts on another, or charged with threatening another with great bodily injury, is excluded from being granted bail. The amendment also restated that courts have discretion to release a defendant on his or her own recognizance. (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/).) Further, that amendment added to section 12(b) that a defendant charged with committing a felony sexual assault crime upon another person is

excluded from being granted bail if the defendant's release posed a substantial likelihood that great bodily harm would result:

SEC. 12. A person shall be released on bail by sufficient sureties, except for:

> . . . .
> (b) Felony offenses involving acts of violence on another person, *or felony sexual assault offenses on another person*, when the facts are evident or the presumption great and the court finds based upon clear and convincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others; . . .

(*Ibid;* italics in original.)

This most recent amendment of section 12(b) was in effect when the magistrate judge issued its October 5, 2017, order denying petitioner's motion for pre-trial bail. (*White*, *supra*, 21 Cal.App.5th at pp. 23-24.)

It is significant that the amendments to the bail provision ultimately embodied in Article I, section 12, did not change the mandatory directive of that section. The amendments gradually expanded the types of crimes for which a defendant, who is charged with those crimes, is to be excluded from being granted pre-trial bail to the current version of section 12(b). Section 12(b) authorized the lower court in this case to exclude petitioner from being granted pre-trial bail after finding, by clear and convincing evidence, that petitioner was an active aider and abettor to a violent felony or felony sexual assault on another, and that a substantial likelihood existed his release would result in great bodily harm to another.

B. The Current Version of California Constitution, Article I, Section 28(F)(3) Was Created By The 2008 (Proposition 9), Amendment of The State Constitution Which Has Not Been Ruled To Be Invalid

In 2008, the state's electorate voted on and approved Proposition 9 (entitled "criminal justice system-victims' rights-

parole-initiative constitutional amendment"), an initiative measure (Cal. Const., Art. II, § 8) that amended the state constitution and Penal Code and added sections to the Penal Code. (UC Hastings Scholarship Repository; Voter Information Guide for 2008, General Election, pp. 58-60, 128-130 (text of proposed law) (https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2265&context=ca_ballot_props).) The authors proffered Proposition 9 to the electorate because the 1982, Proposition 8, "Victim's Bill of Rights" measure, although passed by the electorate, was not effective.[2] (*Id.* at p. 128.) Germane to the instant bail issue, the 2008, Proposition 9 amended California Constitution, by adding Article I, section 28(f)(3) ("public safety bail") which: 1) excepted defendants charged with capital crimes from being released on bail by sufficient sureties, and 2) required a court's setting, reducing, or denying of bail to be based on consideration of the public's protection, the seriousness of charged offense, the defendant's criminal record and the probability of the defendant appearing at a future trial or court hearing. (*Id.* at p. 130.) Additionally, amended

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[2] The Findings and Declarations, section 3, in the 2008 Proposition 9, cited the ineffectiveness of the 1983 Proposition 8 as the reason for presenting Proposition 9:

> [Section] 3. The People of the State of California find that the "broad reform" of the criminal justice system intended to grant these basic rights mandated in the Victims' Bill of Rights initiative measure passed by the electorate as Proposition 8 in 1982 has not occurred as envisioned by the people. Victims of crime continue to be denied rights to justice and due process.

(UC Hastings Scholarship Repository; Voter Information Guide for 2008, General Election, p. 128 (text of proposed law).)

section 28(f)(3) required the victim's and public's safety to be primary factors when the court set, reduced, or denied bail:

> (3) Public Safety Bail. A person may be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great. Excessive bail may not be required. In setting, reducing or denying bail, the judge or magistrate shall take into consideration the protection of the public, the safety of the victim, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case. Public safety and the safety of the victim shall be the primary consideration considerations.

(*Ibid.*)

It is significant that section 28(f)(3) gives the court discretion to release a defendant, charged with a non-capital crime, on pre-trial bail but requires the court to consider specific factors, including public and the victim's safety, before setting, reducing or denying that bail.

Amended section 28(f)(3) was in effect when the magistrate judge issued its October 5, 2017, order denying petitioner's motion for pre-trial bail. (See *White*, *supra*, 21 Cal.App.5th at pp. 23-24.)

C. California Constitution, Article I, Sections 12(b), 12(c), and 28(f)(3), Concern the Same Subject Matter, i.e., , the Setting, and Denial of Bail, and Can Be Harmonized With One Another Such That The Text of Each Section Remains Unchanged

Notably, the 1974 (Proposition 7), 1982 (Proposition 4), and 1994 (Proposition 189), amendments of state constitution Article I, section 12, and the 2008 (Proposition 9) amendment of state constitution Article I, section 28, have not been ruled to be invalid or unconstitutional. Thus, when the trial court considered petitioner's motion for pre-trial bail in this case, section 12(b), which excludes a defendant from being bail eligible who is charged with violent

felony crimes upon others, or with felony sexual assault offenses upon others, and who pose a substantial likelihood of causing great bodily harm to others if released, was applicable to petitioner's case because he was charged with those class of crimes. Section 28(f)(3), which gives a court discretion to set or deny bail, is also applicable to petitioner's case because that section requires the court's consideration of specific facts before setting or denying bail.

It is also notable that sections 12(b) and 28(f)(3), concern the same subject matter: the setting or denial of bail. In particular, the no-bail provision of Article I, section 12, applicable to persons charged with violent felony crimes or with felony sexual crimes, was added to the constitution by the passage of Proposition 4 (bail) in the June 8, 1982, primary election. The Legislative Analyst described the Proposition 4 to the electorate as constitutionally broadening circumstances which the courts may deny bail in felony cases:

> Bail could be denied in felony cases involving acts of violence against another person when (a) the proof of guilt is evident or the presumption of guilt is great and (b) there is a substantial likelihood that the accused's release would result in great bodily harm to others; . . . .

(Ballot Pamp., Primary Elec. (June 8, 1982) Analysis by the Legislative Analyst Prop. 4, p. 16.)

Consistent with the Legislative Analyst's report, the "Argument in Favor of Proposition 4" noted the proposition would, "enable judges to refuse to release on bail persons accused of violent felonies in clear cases where the court finds based upon clear and convincing evidence that there is a substantial likelihood the defendant's release would result in great bodily harm to others." (Ballot Pamp., Primary Elec. (June 8, 1982) argument in favor of Prop., at p. 18.)

The preceding Proposition 4 material is significant because it shows the voters were told the intent of the proposition was to authorize judges to deny bail based on factors more than simply assuring the defendant's appearance at scheduled court dates. The measure authorized courts to consider the seriousness of the defendant's current offense and previous criminal record, and the proponents of the measure made it clear they intended that victim's and public safety should be primary considerations in bail decisions. (*People v. Standish* (2006) 38 Cal.4th 858, 875, citing Ballot Pamp., Primary Elec. (June 8, 1982) argument in favor of Prop. 4, at p. 18.)[3]

Similarly, the Legislative Analysis' summary of the 1994 Proposition 189 informed the electorate that passage of the proposition would add felony sexual assault as a crime for which a court would have authority to deny a charged defendant pre-trial bail. The electorate was told the court already had the authority to deny pre-trial bail to persons accused of a capital crime, or accused of committing a violent felony upon another or threatening another person with serious bodily injury and posing a substantial likelihood of being able to cause great bodily harm or carry out the threat if released. (Supp. Ballot Pamp., Gen. Elec. (Nov. 8, 1994) Analysis by the Legislative Analyst Prop. 189, p. 7(G94).) The Legislative Analyst told the electorate that the constitutional amendment of Proposition

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[3]In *People v. Standish*, *supra*, 38 Cal.4th 858, this court held because Proposition 4 garnered more votes than Proposition 8 which appeared on the same 1982 primary ballot, the bail provisions of Proposition 8 never became effective and the bail provisions of Proposition 4 prevailed. (*Id.*, at pp. 874-875.) The bail provisions of Proposition 8 proposed to repeal Article I, section 12, of the state constitution by substituting Article I, section 28, subdivision (e) that would have excepted persons who committed capital crimes from being released on bail by sufficient sureties. (See *Id.*, at pp. 877-878.)

189 would add the additional category of crimes, e.g. felony sexual assault crimes, for which a court could deny a defendant 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.

(*Id.*, Analysis by the Legislative Analyst Prop. 189, p. 7 (G94).)

Because the electorate was clearly told the purpose of Propositions 4 and 189 was to authorize courts to deny pre-trial bail to defendants charged with specific felony crimes, the electorate's passage of those propositions necessarily reflects the electorate's intent to give courts that authority.

The passage of Proposition 9 in 2008, which added section 28(f)(3) to the constitution, does not conflict with the court's authority, under section 12(b), to deny pre-trial bail to a defendant charged with violent felony crimes against another person or charged with felony sexual assault. Rather, section 28(f)(3) represents the electorate's intent that a court's discretionary decision to deny bail to a non-capital defendant must be based on its consideration of more than whether the accused will appear at future hearings or trial.

As petitioner correctly observes, neither the Attorney General's summary, the Legislative Analyst's analysis of Proposition 9 nor the text of the proposed amendment of California Constitution Article I, section 28, states or suggests that proposition was intended to repeal Article I, section 12 (bail). (Petn. Merits Brief at p. 17; see Ballot Pamp., General Elec. (Nov. 4, 2008), Official Title and Summary prepared by the Attorney General, pp. 58-61, and Text of Proposed Laws, Proposition 9, pp. 128-132.) The absence of text or suggestion by Proposition 9 that the purpose of the proposition was to repeal Article I, section 12, is significant.

This court has long recognized that the language used in a constitutional provision should be given its ordinary meaning, and "[i]f the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature (in the case of a statute) or of the voters (in the case of a provision adopted by the voters)." (*People v. Valencia* (2017) 3 Cal.5th 347, 357, citing *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) To that end, this court generally must "accord[ ] significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose," and have warned that "[a] construction making some words surplusage is to be avoided." (*People v. Valencia*, *supra*, 3 Cal.5th at p. 357, citing *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387.) At issue here is whether sections 12(b) and 28(f)(3) can be reconciled without changing the intent of those sections; the answer is yes.

A court is to construe two statutes dealing with the same subject in a way that harmonizes them to avoid conflict and avoid rendering any part of either statute surplusage, if feasible. (*Superior Dispatch, Inc. v. Insurance Corp. of New York* (2010) 181 Cal.App.4th 175, 189; see (Bright v. 99¢ Only Stores (2010) 189 Cal.App.4th 1472, 1477–1478 ["It is a 'basic rule of statutory construction [that]: insofar as possible, we must harmonize code sections relating to the same subject matter and avoid interpretations that render related provisions nugatory.' [Citation.]"] .) Likewise, it is a cardinal rule of construction that words or phrases are not to be viewed in isolation; instead, each is to be read in the context of the other provisions of the Constitution bearing on the same subject. (*Fields v. Eu* (1976) 18 Cal.3d 322, 328, citing *Wallace v. Payne* (1925) 197 Cal. 539, 544.) The goal is to harmonize all related provisions if it is reasonably possible to do so without distorting their apparent meaning, and in so doing to give effect to the scheme as a whole. (*Fields v. Eu, supra,* 18 Cal.3d at p. 328, citing in

part *Serrano v. Priest* (1971) 5 Cal.3d 584, 596.) Strained interpretation or construction leading to unreasonable or impractical results, is to be avoided. (*Fields v. Eu, supra,* 18 Cal.3d at p. 328, citing in part *Pollack v. Hamm* (1970) 3 Cal.3d 264, 273.)

Here, sections 12(b) and 28(f)(3) address the same subject matter: a trial court's authority to set, reduce, or deny pre-trial bail. Any differences between the two sections are reconcilable. Section 12(b) is a mandatory directive which directs, "[a] person shall be released on bail. . ., except for. . . capital crimes. . . felony offenses involving acts of violence . . ., or felony sexual assault offenses on another person, . . . 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. . .". (Cal. Const., Art. I, § 12(b) [emphasis added].) Section 28(f)(3) contains a discretionary provision which provides, "[a] person may be released on bail. . ., except for capital crimes. . ." and a mandatory requirement that "the judge or magistrate shall take into consideration" specific circumstances, e.g., public and victim safety, seriousness of the charged offense, defendant's criminal record and probability of defendant appearing at trial or hearing in the case, "[i]n setting, reducing or denying bail. . ." (Cal. Const., Art. I, § 28(f)(3) [emphasis added].)

Preliminarily, the California Constitution expressly provides that its provisions "are mandatory and prohibitory, unless by express words they are declared to be otherwise." (Cal. Const., Art. I, § 26 (constitution mandatory).) Section 12 contains the term "shall" in terms of a person being released on bail. But, in the same sentence, it also delineates exceptions to that mandatory language by the term "except for". In the context of section 12(b), respondent submits the combined effect of those terms is a mandatory action to specifically exclude, from the class of persons otherwise entitled to being released from bail, a person who is

charged with a violent felony offense or a sexual felony assault, and who is shown, by clear and convincing evidence, to pose a substantial likelihood of committing great bodily harm to another if released.

Respondent recognizes that, in the context of a statute, whether a particular statute is intended to impose a mandatory duty, rather than a mere obligation to perform a discretionary function, is a question of statutory interpretation for the courts. (*Creason v. Department of Health Services* (1998) 18 Cal.4th 623, 631.) In the context of statutory interpretation, the term "shall" generally connotes mandatory action and "may" a permissive action unless the context requires otherwise. (Govt. Code, § 14 (shall; may); *Roseville Community Hosp. v. State of California* (1977) 74 Cal.App.3d 583, 587–588, fn. 4.) A court examines the language, function and apparent purpose of each cited enactment to determine if any or each creates a mandatory duty. (See *Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490, 500.)

Here, the amendments and Legislative Analysis of what has become Article I, section 12, reveal the electorate who enacted those amendment intended the section be a mandatory act. As presented above, the 1982 Legislative Analysis of Proposition 4 told the electorate the proposition would enable judges to refuse to release on bail persons accused of violent felonies in clear cases where the court finds based upon clear and convincing evidence that there is a substantial likelihood the defendant's release would result in great bodily harm to others. (Ballot Pamp., Primary Elec. (June 8, 1982) argument in favor of Prop., at p. 18.) The 1994 Legislative Analysis of Proposition 189, that added the commission of sexual felony assault to the list of crimes for which bail could be denied under section 12, wrote the proposition "would permit the courts to deny bail for a wider range of sexual offenses," and "[s]pecifically, 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, at p. 7 (G94).) The preceding analysis by Legislative Analysts for propositions that amended section 12 to its current language make it clear the electorate understood that passage of the propositions amending section 12, required courts to deny pre-trial bail to a defendant who is charged with a violent felony crime or felony sexual assault and who is found, by clear and convincing evidence, would commit great bodily harm to others if released.

Next, sections 12(b) and 28(f)(3), can be reconciled. Under Section 12(b), a defendant who is charged with a violent felony or sexual felony offense and, by clear and convincing evidence, is shown to pose a substantial likelihood to commit great bodily harm to others, may be denied bail. Under section 28(f)(3) a court is to consider public and victim safety, seriousness of the charged non-capital offense, defendant's criminal record and probability of defendant appearing at trial or hearing before setting, reducing, or denying bail. These provisions of sections 12(b) and 28(f)(3) do not conflict with one another: The clear and convincing evidence standard applicable to a trial court's assessment of whether a defendant poses a substantial likelihood to commit great bodily harm to another does not preclude a court from considering public and victim safety, seriousness of the charged non-capital offense, the defendant's criminal record, and the probability of a defendant appearing at trial or scheduled hearing, as factors to making a clear and convincing factual finding.

Section 12(b), which excludes a defendant who is charged with a violent felony or sexual felony assault case from receiving bail when the court finds, by clear and convincing evidence the substantial likelihood the defendant's release would result in great bodily harm to others, does not conflict with section 28(f)(3). (Cal. Const., Art. I, § 12(b).) Section 28(f)(3) does not mandate that a defendant, who is charged with a violent felony

crime or with felony sexual assault and who poses a substantial likelihood of causing great bodily harm, is to be granted pre-trial bail. (Cal. Const., Art. I, § 28(f)(3).) The fact that section 28(f)(3) gives a court discretionary authority to grant pre-trial bail to a non-capital defendant does not conflict with section 12(b), which mandatorily precludes pre-trial bail being granted to such a defendant who, by clear and convincing evidence, is shown to pose a substantial likelihood of causing great bodily harm if released.

Lastly, section 12(b), requires the denial of a qualified non-capital defendant from receiving bail be based on the lower court's clear and convincing finding that the defendant's release presents a substantial likelihood that the defendant's release would result in great bodily harm to others. (Cal. Const., Art. I, § 12(b).) Section 28(f)(3) requires a court's setting, reduction, or denial of pre-trial bail be based on that court's consideration of public and victim safety, seriousness of the charged non-capital offense, defendant's criminal record and probability of defendant appearing at trial or hearing; those considerations do not conflict with a court making a clear and convincing evidentiary finding based on those factors. (Cal. Const., Art. I, § 28(f)(3).)

Thus, section 12(b) mandates a court's denial of pre-trial bail to a defendant who is found, by clear and convincing evidence and, like petitioner in this case, to have committed non-capital, violent felony crimes or felony sexual assault offenses on another person, and whose release poses a substantial likelihood of great bodily harm to others.[4] After the

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[4] Petitioner was charged with assault with intent to commit rape (Pen. Code, § 220, subd. (a)(l))), 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))). (*White, supra*, 21 Cal.App.5th at p. 21.)

magistrate found the preliminary hearing evidence supported the felony charges filed against petitioner, the court addressed his motion for bail pending trial. Based on the preliminary hearing evidence it had heard and the character letters offered by petitioner in support of his request for bail, the magistrate found clear and convincing evidence warranted the denial of his pre-trial bail motion because he was an active aider and abettor to the underlying charges. Those underlying charges were of the same class of crimes listed in section 12(b) which mandates the exclusion of defendants from being granted bail when clear and convincing evidence established a substantial likelihood of petitioner causing great bodily harm if released on bail.

II.

A REVIEWING COURT APPLIES A SUBSTANTIAL EVIDENCE STANDARD OF REVIEW WHEN DETERMINING THE PROPRIETY OF A TRIAL COURT'S DECISION, BASED ON CLEAR AND CONVINCING EVIDENTIARY PROOF, TO DENY A DEFENDANT PRE-TRIAL BAIL PENDING APPEAL WITHIN THE MEANING OF CALIFORNIA CONSTITUTION, ARTICLE I, SECTION 12(b)

California Constitution, Article I, section 12(b), explicitly provides that a person shall be released on bail by sufficient sureties except for "[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 upon clear and convincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others." (Underlined added.) At issue is what

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Respondent submits that assault with intent to commit rape, attempted kidnapping with intent to commit rape, contact with a minor with intent to commit a sexual offense, and false imprisonment are noncapital, violent felony crimes or felony sexual assault offenses on another person within the meaning of California Constitution, Article I, section 12(b).

standard of appellate review applies to determine a trial court's denial of bail based on clear and convincing evidentiary proof.

This court has held when "clear and convincing" evidentiary proof is used by a juvenile court when determining a reunification of family (see Welf. & Inst. Code, § 361.5), the sufficiency of evidence to establish a given fact is primarily a question for the trial court to determine and if there is substantial evidence to support the trial court's conclusion the determination is not open to appellate review. (See *Crail v. Blakely* (1973) 8 Cal.3d 744, 750, citing in support *Nat. Auto. & Cas. Co. v. Ind. Acc. Com.*, 34 Cal.2d 20, 25.)

As Witkins recognizes, when the law requires that a party produce more than an ordinary preponderance, he or she must establish a fact by "clear and convincing evidence." (9 Witkin, Cal. Procedure, supra, Appeal, § 371, p. 428, citing 1 Cal. Evidence (4th), Burden of Proof and Presumptions, §§ 38, 39.) In those cases, the "clear and convincing" standard applies only in the trial court. (*Id.* at p. 428.) The trial judge may reject a showing as not measuring up to the standard, but, if the judge decides in favor of the party with this heavy burden, the clear and convincing test disappears. (*Ibid*; *In re Angelique C.* (2003) 113 Cal.App.4th 509, 519; accord, *In re Mark L.* (2001) 94 Cal.App.4th 573, 580-581.) On appeal, the usual rule of conflicting evidence is applied, giving full effect to the respondent's evidence, however slight, and disregarding the appellant's evidence, however strong. (*Ibid*, citing in part, *Stromerson v. Averill* (1943) 22 Cal.2d 808, 815 [in action to quiet title, "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."], *Beeler v. American Trust Co.* (1944) 24 C.2d 1, 7 [in action determining land deed, "whether or not the evidence offered to

change the ostensible character of the instrument is clear and convincing is a question for the trial court to decide [citations]. In such case, as in others, the determination of that court in favor of either party upon conflicting or contradictory evidence is not open to review on appeal. [citations]. . . . the appellate court will not disturb the finding of the trial court to the effect that the deed is a mortgage, where there is substantial evidence warranting a clear and satisfactory conviction to that effect."], *Viner v. Untrecht* (1945) 26 C.2d 261, 267 [in the enforcement of a resulting trust, "[w]hether the evidence to prove the existence of the trust is clear, satisfactory 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."], and *Crail v. Blakely*, *supra*, 8 Cal.3d at p. 750.) This analysis should apply in this case.

This court defines a showing of "clear and convincing" evidence as requiring a finding of high probability by the fact finder consistent with the purposes delineated by the United States Supreme Court's statement in *Addington v. Texas* (1979) 441 U.S. 418, 423, that, "[t]he function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication' " and "[t]he standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." (*In re Angelia P.* (1981) 28 Cal.3d 908, 919, citing in support, *In re Winship* (1970) 397 U.S. 358, 370.)

As explained by the *Addington* court, the function of a standard of proof, as embodied in the Due Process Clause and in the realm of factfinding has produced three standards of proof for different types of cases. (*Addington v. Texas*, *supra*, 441 U.S. at p. 423.) The preponderance

of the evidence standard of review is applied in civil cases involving monetary disputes. (*Ibid.*) In criminal cases, the state is required to prove guilt beyond a reasonable doubt to exclude as nearly as possible the likelihood of an erroneous judgment. (*Ibid.*) The intermediate standard, which usually employs some combination of the words "clear," "cogent," "unequivocal," and "convincing," although less commonly used, are used in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant and used where the interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof. (*Id.* at p. 424.) The high court has used the "clear, unequivocal and convincing" standard of proof to protect particularly important individual interests in various civil cases. (*Ibid.*)

Thus, "clear and convincing" evidence requires a finding of high probability and requires 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.3d at p. 919, citing *Sheehan v. Sullivan* (1899) 126 Cal. 189, 193.)

In the context of a habeas corpus appeal, a reviewing court's standard of review is de novo with respect to questions of law and the application of the law to the facts. (*In re Hansen* (2014) 227 Cal.App.4th 906, 914.) However, a reviewing court accepts as final a superior court's resolution of pure questions of fact if the resolution of those questions is supported by substantial evidence. (*Ibid*, citing *In re Richards* (2012) 55 Cal.4th 948, 960.) Where the trial court did not hear evidence or make findings of fact, a reviewing court considers the trial court's order de novo. (*Ibid.*)

Petitioner's claim, that the Court of Appeal's affirmance of the trial court's judgment denying him pre-trial bail should be reversed because the appellate court's substantial review of the evidence conflicts with the decisions in *In re Nordin* (1983) 143 Cal.App.3d 538, and *In re Hochberg* (1970) 2 Cal.3d 870, should be rejected. (Petitioner Opening Brief-Merits (Petnr. Merits Brief), pp. 35-40.) He contends that the appellate review of the trial court's denial of bail should have been based on the appellate court's independent review of the presented evidence and not on it considering the substantial evidence supporting that judgment. (Petnr. Merits Brief, at p. 36.) His reliance on *Nordin* and *Hochberg*, for the proposition that the Court of Appeal should have exercised its independent review of issues is misplaced. *Nordin* and *Hochberg* are factually and legally distinguishable from this case. While the appellate court in *Nordin* recited that it "independently reviewed the record in that case and found clear and convincing evidence justifying" petitioner being denied bail, the *Nordin* court decision did not hold that appellate review of a trial court's denial of pre-trial bail was exclusively limited to an appellate court's independent review of evidence supporting the lower court's judgment. (*In re Nordin*, *supra*, 143 Cal.App.3d at p. 543.) Under the facts of that case, the *Nordin* court could have reached the same conclusion, e.g., that the defendant was properly denied pre-trial bail, based on the appellate court's consideration of substantial evidence supporting the trial court's ruling or based on its independent review of the record. Thus, *Nordin* does not stand for the proposition that appellate court review of a trial court judgment denying a defendant's pre-trial bail must be based exclusively on the appellate court's independent review of the evidence.

Petitioner's inference the *Nordin* decision was based on this court's *In re Hochberg*, *supra*, 2 Cal.3d 870, and *In re Bell* (1942) 19 Cal.2d 488, decisions finding that an appellate court should exercise its independent

review process to assess a trial court's denial of the defendant's pre-trial bail motion, should be rejected. (Petnr. Merits Brief, at p. 36.) Both *Hochberg* and *Bell* are inapplicable because they are factually and legally distinguishable from this case. The court of appeal in *Hochberg* issued an order to show cause in a habeas petition returnable before the superior court to determine if the defendant was denied the constitutional right to effective trial counsel. (*In re Hochberg*, *supra*, 2 Cal.3d at pp. 873-874.) The *Hochberg* decision noted that an appellate court is not designed to conduct evidentiary hearings whereas the superior court is designed for the trial of issues of fact. (*Ibid.*)

The superior court in *Hochberg* held an evidentiary hearing but, at the close of that hearing, the court declined to rule whether the defendant was denied the right to effective trial counsel and, instead, stated the defendant's appellate counsel had the opportunity to raise the constitutional contention on appeal and therefore the contention was not a ground for habeas relief and denied the writ. (*Id.* at p. 874.)

In response to the superior court's failure to address the habeas claim for which an evidentiary hearing had been conducted, the *Hochberg* court noted the two circumstances in which an appellate court is to exercise its independent examination of evidence. It held where the order to show cause is made returnable before the appellate court, issues of fact requiring an evidentiary hearing are framed, and the appellate court appoints a referee to conduct an evidentiary hearing and report his findings, the appellate court is to exercise its independent examination of the evidence. (*In re Hochberg*, *supra*, 2 Cal.3d at p. 873, fn. 2.) Its independent examination of the evidence would give respect to but not be bound by the referee's findings and conclusions, and would result in the court making its own determination of fact. (*Ibid*, citing *In re Branch* (1969) 70 Cal.2d 200, 203, fn. 1.)

The *Hochberg* court also noted an appellate court would exercise its independent examination of evidence if the appellate court's order to show cause was made returnable before the superior court and that court denies the writ of habeas corpus. In that case, the defendant may apply to the reviewing court for the writ and, upon receiving the defendant's renewed application for writ, the reviewing court is to make its independent examination and appraisal of the evidence that was taken in the superior court. (*In re Hochberg*, *supra*, 2 Cal.3d at p. 873, fn. 2, citing *In re Smiley* (1967), 66 Cal.2d 606, 611.)

Unlike in *Hochberg*, the Court of Appeal in this case did not order an evidentiary hearing of petitioner's motion for pre-trial bail be conducted by a referee or ask for a referee's report of findings to the court of appeal. (See *In re Hochberg*, *supra*, 2 Cal.3d at p. 873, fn. 2.) Nor did the Court of Appeal issue an order to show cause pertaining to petitioner's pre-trial bail motion to be made returnable to the superior court which denied the writ following an evidentiary hearing. (*Ibid.*) Because neither of these preceding circumstances occurred in this case, *Hochberg* does not support petitioner's contention that an appellate court may only exercise its independent review to assess the trial court's denial of petitioner's motion for pre-trial bail.

An objective reading of *In re Bell*, *supra*, 19 Cal.2d 488, reveals a similar conclusion should be reached here; the *Bell* decision does not mandate appellate review of a trial court's denial of a pre-trial bail motion is limited to an appellate court's independent review of the circumstances. *Bell* involved a county ordinance that prohibited labor picketing; a portion of the ordinance was deemed unconstitutional and another portion, prohibiting various violent acts, was clearly constitutional. (*Id.* at pp. 496-498.) The defendants' convictions were by general verdict and did not specify which part of the ordinance had been violated. (*Id.* at p. 500.) The *Bell* defendants exhausted their direct appeal rights without challenging the

ambiguity of the ordinance and later filed for habeas relief based on the ordinance being invalid. (*Id.* at p. 495.)

On review, the *Bell* court discussed, among other matters, the defendants' burden to prove their convictions were unconstitutional and invalid (*In re Bell*, *supra*, 19 Cal.2d at p. 501), and that proof included actual trial evidence and any necessary additional evidence bearing on the infringement of the defendants' constitutional rights (*id.* at pp. 501-504). Based on those principles, the *Bell* court reviewed the underlying trial evidence and additional evidence in the case and found the defendants' conduct exceeded the bounds of peaceful picketing and amounted to "forceful intimidation and constitutes violence." (*Id.* at pp. 504-505.) Because the court found the defendants failed to sustain their burden to prove they were not convicted of the one valid provision of the ordinance prohibiting acts of violence, their writ petition was denied and they were remanded into custody. (*Id.* at p. 505.)

While the *Bell* decision acknowledges that courts "can permit an independent review by habeas corpus of matters over which the trial court had jurisdiction, apart from any remedy by appeal" (*In re Bell*, *supra*, 19 Cal.2d at p. 493), the decision, like the *Hochberg* decision, does not support petitioner's contention that an appellate court should exercise only its independent review to assess the trial court's denial of petitioner's motion for pre-trial bail. Rather, *In re Richards* (2012) 55 Cal.4th 948 (*Richards*), establishes appellate review of a superior court habeas claim depends on whether the trial court's ruling resolved a question of law or a pure question of fact. (See *Id.* 55 Cal.4th at p. 960.)

Richards addressed a defendant's habeas claims that new evidence proved his innocence and that his murder conviction was based on false evidence given at trial. (*Richards*, *supra*, 55 Cal.4th at p. 952.) The superior court conducted an evidentiary hearing, found the new evidence pointed to

the defendant's innocence, and granted habeas relief. (*Ibid.*) The court of appeal disagreed. (*Ibid.*) The defendant's petition for review was granted. (*Ibid.*)

The *Richards* court described the two standards of appellate review applicable to determining the correctness of a trial court judgment. Appellate review is de novo when the trial court resolves questions of law and applies the law to the facts. (*Richards*, *supra*, 55 Cal.4th at p. 960, citing *In re Collins* (2001) 86 Cal.App.4th 1176, 1181.) On the other hand, a trial court's resolution of pure questions of fact is accepted as final if that judgment is supported by substantial evidence. (*Ibid.*)

As will be presented, *infra*, the trial court's denial of petitioner's pre-trial bail motion was based on the court finding, by clear and convincing evidence, petitioner posed a substantial likelihood that his pre-trial release would result in great bodily harm to others. (Petn. Exh. B, at pp. 186-187.)[5] This court's *Richards* decision holds that on appellate review of a trial court's resolution of pure questions of fact the question is whether the judgment is supported by substantial evidence. (*Richards*, *supra*, 55 Cal.4th at p. 960.) Because the lower court's finding was not the resolution of a question of law and the application of the law to the facts, the appropriate appellate standard of review was not the appellate court's de novo review of the lower court judgment. (*Ibid.*)

Petitioner's argument, that because the instant issue of his pre-trial release is a constitutional right the lower court judgment should be subject to de novo review, has no merit. (See Petn. Merit Brief, at pp. 10, 17, 19.)

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[5] Petitioner's Exhibits to Petition for Writ of Habeas Corpus and Request For Bail to the Court of Appeal contained the underlying, paginated, preliminary hearing transcript which was designated Exhibit B. Respondent will refer to the pages of that exhibit according to the court reporter-prepared pagination.

As will be presented below, *infra*, petitioner's motion for pre-trial bail to the lower court and his argument to this court, that he should have been granted pre-trial bail, is based entirely on his factual dispute of the evidence. (See Resp. Merits Brief, Arg. III.) Although the lower court relied on constitutional provision section 12(b), as its authority to deny petitioner pre-trial bail, the lower court's judgment was based on its assessment of the facts in this case to determine whether, based on the charged crimes, petitioner posed a substantial likelihood of causing great bodily harm if released. The lower court's judgment was entirely factual and subject to a substantial evidence review by the Court of Appeal.

III.

THE COURT OF APPEAL DID NOT ERR BY APPLYING A SUBSTANTIAL EVIDENCE STANDARD OF REVIEW WHEN DETERMINING THE CORRECTNESS OF THE TRIAL COURT'S DENIAL OF PETITIONER'S PRE-TRIAL BAIL MOTION; SUBSTANTIAL EVIDENCE WAS PRESENTED HE POSED A THREAT TO THE VICTIM AND TO PUBLIC SAFETY

The Court of Appeal did not err by applying a substantial evidence standard of review when determining the correctness of the lower court's denial of petitioner's pre-trial bail motion. Because the lower court's judgment resolved questions of fact, e.g., whether granting petitioner's request for pre-trial bail posed a risk to public safety or to the victim, the appellate court properly considered whether substantial evidence supported the lower court's judgment.

As noted, this court's *Richards* decision establishes when a trial court's ruling is the resolution of pure questions of fact, the correctness of that ruling is to be determined by whether it is supported by substantial evidence. (See *Richards*, *supra*, 55 Cal.4th at p. 960 ["We accept as final the superior court's resolution of pure questions of fact if they are supported by substantial evidence."].) Here, the Court of Appeal, reviewing

the trial court's denial of petitioner's motion for pre-trial bail, observed that as to felony offenses involving violent acts upon another or felony sexual assaults upon another, section 12(b) requires the trial court to determine whether "clear and convincing evidence" established a substantial likelihood the person's release would result in great bodily harm to others. (*White, supra*, 21 Cal.App.5th at p. 28-29.) The appellate court noted that section 12(b) does not set out the standard of review an appellate court is to apply when reviewing the trial court's judgment. (*Ibid.*) Addressing the standard of appellate review to determine the correctness of a trial court's judgment based on "clear and convincing" evidence, the Court of Appeal held, because the trial court's decision was "essentially factual", the Court of Appeal was to apply a substantial evidence standard of review to the trial court's judgment. (*Id.* at p. 29, citing *Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.) The Court of Appeal explained that the trial court is better able to weigh the underlying evidence germane to petitioner's commission of a felony offense involving acts of violence on another person, or felony sexual assault offenses on another person, and whether clear and convincing evidence established a substantial likelihood the person's release would result in great bodily harm to others. (*White, supra*, 21 Cal.App.5th at p. 30, citing in part *Crail v. Blakely, supra*, 8 Cal.3d at p. 750.) In light of the trial court having the better opportunity to make credibility determinations and resolve evidentiary conflict, the Court of Appeal concluded its limited responsibility was to view the trial court's ruling by considering the record in the light most favorable to the trial court's order, presuming the existence of every fact the trial court could reasonably have deduced from the evidence, and to resolve conflicts in the evidence in favor of upholding the lower court order. (*White, supra*, 21 Cal.App.5th at p. 29, citing *People v. Zaragoza* (2016) 1 Cal.5th 21, 45 ["sufficiently substantial" evidence was presented to uphold defendant's

convictions as the shooter], 46 [there was "substantial evidence" presented to connect defendant to the crime], 47 [the record "contained substantial evidence" the defendant did not commit the crimes by himself].)

The superior court in this case presided over the preliminary hearing at which the prosecutor presented evidence supporting the charged crimes. That evidence included testimony by the female child victim, J.D., and by investigating Detective Stephen Chambers. (See Petn. Exh. B, pp. 10-70 (victim J.D.), 107-147 (Det. Chambers).)

J.D.'s preliminary hearing testimony described how co-defendant Owens grabbed her neck when he ran up behind her, how Owens began pushing her face to the ground before she broke away from his grip, and that she heard petitioner shout at Owens to chase her into a nearby residence. She testified she thought petitioner was being a lookout for Owens. (Petn. Exh. B, pp. 29-33, 41, 44-46, 61-65.)

Detective Chambers testified he reviewed the transcript of petitioner's July 28, 2017, audio-recorded, noon-time, 17-minute interrogation with other police detectives about the underlying crimes. (Petn. Exh. B, pp. 118-121.) The detective also testified that he interrogated petitioner for 38 minutes, about 2:00 p.m. the same day concerning the underlying charges and that petitioner was evasive. (Petn. Exh. B, pp. 122-126.) The magistrate listened to the audio recordings of petitioner's interrogations which was identified in the preliminary hearing as Defendant's Exhibit A. (Petn. Exh. B, pp. 126-127.) Transcripts of the interviews were prepared and were exhibits to Petitioner's habeas petition to the Court of Appeal as Exhibit C (depicting the 17-minute interrogation) and Exhibit D (depicting the 38-minute interrogation). (Petn. Exh. C (Detective Rodriquez conversation with petitioner), Exh. D (Detectives

Rodriquez and Chambers conversation with petitioner); see Petn. Exh. B, pp. 127-130.)[6]

In his interviews with the detectives, petitioner admitted he had known co- defendant Owens for two years and, at the time of the underlying crimes, they are roommates. (Petn. Exh. C, at Bates pp. 206, 216.) Petitioner told detectives that earlier in the day on July 26, 2017, he and Owens were at the beach together and were pointing out girls to one another. During that time Owens talked about grabbing a girl "caveman" style; petitioner claimed he thought Owen was joking. (Petn. Exh. D, at Bates pp. 253-254.) Owens asked whether petitioner would stop Owens if Owens got carried away with a girl to which petitioner responded that he would stop Owens. (*Id.* at Bates pp. 238-240.)

Petitioner told investigators when he and Owens were later standing around petitioner's parked truck and saw J.D. in this case, petitioner and Owens commented to one another that she was a pretty cute girl (Petn. Exh. D, at Bates pp. 212, 221-222), and petitioner told Owens to "go and get her" (*id.* at Bates p. 243). Petitioner claimed his comment to Owens was only for Owens to talk to the victim. (*Id.* at Bates p. 245).

Petitioner told investigators that Owens told him, "hey watch out," or "watch this," and then ran to J.D. and grabbed her by the back of her

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[6] Petitioner's Exhibits C and D were filed in the Court of Appeal to support of his habeas petition. Respondent's copy of petitioner's Exhibits C and D do not bear page numbers. As a result, respondent inserted Bates numbers onto respondent's copy of petitioner's Exhibits to Petition for Writ of Habeas Corpus and Request For Bail to the Court of Appeal with the title page of that document designated Bates page "1".

As a consequence, respondent's copy of Exhibit C is numbered with Bates numbers "201-217" beginning with the page bearing "Exhibit C" as Bates page 201. Respondent's copy of Exhibit D is numbered with Bates numbers "218-256" beginning with the page bearing "Exhibit D" as Bates page 218. Respondent will refer to the pages of Exhibits C and D as "Bates pages."

neck. (Petn. Exh. C, at Bates pp. 205-206, 210, 213; Petn. Exh. D, at Bates pp. 223-224.) Petitioner claimed that when he realized what Owens was actually doing, petitioner shouted at Owens to "stop it" and Owens responded by releasing the victim and returning to petitioner's truck. (Petn. Exh. D, at Bates pp. 224, 227, 243.) Petitioner said that he then drove them away from the area. (Petn. Exh. C, at Bates p. 214; Petn. Exh. D, at Bates p. 243.)

Petitioner told investigators that when they were driving away, Owens said that he had a "primal urge" and "just went for it." Owens also said that he wanted to have sex with J.D. and thought about dragging her behind the gate to accomplish that act. (Petn. Exh. D, at Bates pp. 228, 254.)

Petitioner acknowledged to detectives that Owens asked him to be a lookout when Owens ran towards the victim. (Petn. Exh. D, at Bates p. 225.) Petitioner said even though he was not "okay" with Owens attacking the victim, petitioner did not report Owens' acts to police. (Petn. Exh. D, at Bates pp. 228-229.) Instead, petitioner talked to a friend about what occurred and decided to look for a therapist for Owens. (*Id.* at Bates pp. 229-230.) Petitioner admitted he was wrong by driving Owens away from the scene of the attack. (*Id.* at Bates p. 230.)

After hearing the preliminary hearing testimony, the trial court specifically found the minor, J.D. to be a credible witness and that petitioner's conduct leading up to J.D.'s attack established he aided and abetted co-defendant Owens. (Petn. Exh. B, at pp. 180-181.) Based on that preliminary hearing testimony, which included petitioner denying to detectives his knowing participation or assistance to co-defendant Owens' attack upon J.D., and petitioner's proffer of many letters from family and acquaintances attesting to his good character (see Petn. Exh. A, Motion for Reasonable Bail, pp. 1-5 (summary of letters in support)), the trial court

denied petitioner's request for pre-trial bail. The trial court acknowledged that, in the context of this non-capital case, a presumption exists that bail would be set for petitioner. (Petn. Exh. B at p. 186.) Notwithstanding that presumption, however, the lower court made its finding, stating:

> . . . In looking at this case and the facts of this case, I do believe the facts are evident, 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 substantial likelihood that the release of either of these gentlemen would result in great bodily harm to others. I think the individuals 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 in this case. So it is extremely unusual, but I do find under these particular facts that the burden is met. That both defendants will be held without bail continuing going forward.

(Petn. Exh. B., at pp. 186-187.)

In light of the preceding evidence, the Court of Appeal concluded a factual basis had been presented from which the lower court could reasonably infer that petitioner and Owens considered and planned the attack on the victim over an extended period of time. That evidence included the fact that petitioner acted as Owens's lookout and encouraged him to continue the attack after the victim initially fought him off, and that petitioner facilitated Owens's flight from the scene by driving him quickly away. (*White*, *supra*, 21 Cal.App.5th at p. 30.) The Court of Appeal reasoned the lower court could have found persuasive the victim's interpretation of petitioner's statement, "[g]et in the house," as petitioner's direction to Owens and encouraging Owens to continue the attack out of public view. (*Ibid.*) The Court of Appeal concluded that based on the circumstances of the attack, the lower court reasonably inferred Owens and

petitioner were highly dangerous, their orchestrated attack upon J.D. was deliberate, it occurred during the day on a heavily trafficked street, 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 lower court could reasonably infer that Owens intended to rape the victim, a devastatingly harmful injury, and petitioner knew it. (*Ibid.*)

The *Richards* decision supports the Court of Appeal review of the lower court's denial of pre-trial bail to petitioner. The lower court's denial of pre-trial bail to petitioner was based on its resolution of pure questions of fact: Would petitioner's pre-trial release on bail pose a substantial likelihood the person's release would result in great bodily harm to others. The correctness of that ruling, based on a pure question of fact, is to be determined by whether it is supported by substantial evidence. (See *Richards, supra*, 55 Cal.4th at p. 960 ["We accept as final the superior court's resolution of pure questions of fact if they are supported by substantial evidence."].) The Court of Appeal found substantial evidence supported the lower court's determination that, by clear and convincing evidence, petitioner's pre-trial release on bail posed a substantial likelihood his release would result in great bodily injury to others. The Court of Appeal decision should be affirmed.

CONCLUSION

For the preceding reasons, respondent respectfully requests the Court of Appeal's reasoned decision be affirmed.

Dated: November 13, 2018 Respectfully Submitted,

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District Attorney
MARK A. AMADOR
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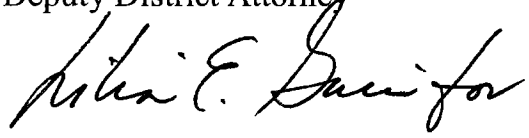
Deputy District Attorney

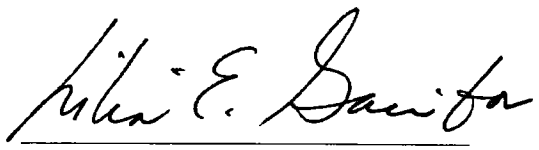


PETER QUON, JR.
Deputy District Attorney

Attorneys for Respondent, the People

CERTIFICATE OF WORD COUNT

I certify that this RESPONDENT'S BRIEF ON THE MERITS including footnotes, and excluding tables and this certificate, contains 11,371 words according to the computer program used to prepare it.



PETER QUON
Deputy District Attorney

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In Re CHRISTOPHER LEE WHITE Petitioner, 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 November 13, 2018, a member of our office served a copy of the within **RESPONDENT'S BRIEF ON THE MERITS** 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 ***Attorney for Petitioner*** ***Christopher Lee White***	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

I also served the following parties electronically via www.truefiling.com:

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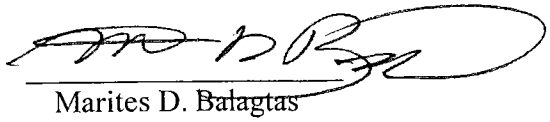
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on November 13, 2018 at 330 West Broadway, San Diego, CA 92101.



Marites D. Balagtas