No. S248125

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re Christopher Lee White,

on Habeas Corpus.

Application for Leave to File *Amici* Brief and Proposed Brief of *Amici Curiae* ACLU of Northern California, ACLU of Southern California and ACLU of San Diego and Imperial Counties in Support of Petitioner Christopher Lee White

After Decision by the Court of Appeal
Fourth Appellate District, Division 1, Case No. D073054

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA, INC.
Kathleen Guneratne (SBN 250751)*
Micaela Davis (SBN 282195)
39 Drumm Street
San Francisco, CA 94111
Phone: (415) 621-2493
Email: kguneratne@aclunc.org

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF SAN DIEGO & IMPERIAL COUNTIES, INC.
David Loy (SBN 229235)
2750 5th Avenue #300
San Diego, CA 92101
Phone: (619) 232-2121
Email: davidloy@aclusandiego.org

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF SOUTHERN CALIFORNIA, INC.
Peter Eliasberg (SBN 189110)
1313 West 8th Street
Los Angeles, CA 90017
Phone: (213) 977-9500
Email: peliasberg@aclusocal.org

Attorneys for *Amici Curiae*

APPLICATION

Pursuant to Rule 8.520(f) of the California Rules of Court, the American Civil Liberties Union ("ACLU") of Northern California, ACLU of Southern California, and ACLU of San Diego and Imperial Counties (collectively "*Amici*") respectfully apply for permission to file the *Amici Curiae* brief contained herein.

The proposed *Amici Curiae* brief will address the Court's second and third questions about the proper standard of review that applies to review of the denial of bail and whether the Court of Appeal erred in this case in affirming the trial court's denial of bail to defendant White.

Amici are the three California affiliates of the national ACLU, a nationwide nonprofit, nonpartisan organization with more than 1.75 million members dedicated to preserving and protecting the principles of liberty and equality embodied in the state and federal Constitutions and related statutes. The ACLU of California entities, which together have an approximate membership of 300,000, have a longstanding interest in preserving the constitutional rights of persons involved in the criminal justice system and have often submitted amicus briefs to this Court in such cases. The ACLU of California affiliates have a strong interest in and familiarity with pretrial release law and policy in California and the limits on pretrial detention under the state and federal Constitutions.

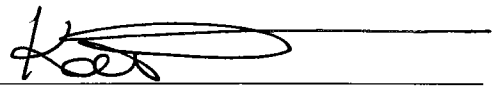
No party, or counsel for any party, in this matter has authored any

part of the accompanying proposed *Amici Curiae* brief, nor has any person or entity made any monetary contributions to fund the preparation or submission of this brief.

Dated: January 4, 2019

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA, INC.

By: 

Kathleen Guneratne

Attorneys for *Amici Curiae* ACLU of Northern California, ACLU of Southern California and ACLU of San Diego and Imperial Counties

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

INTRODUCTION

Amici submit this brief to address the Court's second and third questions: "What standard of review applies to the review of denial of bail? and "Did the Court of Appeal err in affirming the trial court's denial of bail?"[1]

The answer to the second question is that independent review, rather than "substantial evidence" review, is required for review of denial of bail because that review involves a mixed question of law and fact and one that implicates fundamental constitutional interests.

The answer to the third question is that the Court of Appeal erred in affirming the trial court's denial of bail. Article I, section 12 of the California Constitution ("Section 12") requires release on bail[2] for noncapital crimes with two extremely circumscribed exceptions. The trial

---

[1] *Amici* have already answered the Court's first question about the limits of preventive detention under the California Constitution and the reconciliation between Article I, sections 12(b) and (c) and 28(f)(3) of the California Constitution in an amicus brief filed in *In re Humphrey*, S247278, on October 9, 2018. *Amici* do not reprise those arguments here.

[2] *Amici* treat the concept of bail, as it has historically been construed, as conferring a right to release, rather than simply a right to have a monetary amount set, and as referring to both monetary and non-monetary conditions of release. *See, e.g.*, *Stack v. Boyle*, 342 U.S. 1, 4-5 (1951) (discussing bail in the context of the "traditional right to freedom before conviction" and "[t]he right to release before trial"); Timothy R. Schnacke, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform*, U.S. DOJ, Nat'l Inst. of Corrs., 19-35 (Sept. 2014), *available at*: https://nicic.gov/fundamentals-bail-resource-guide-pretrial-practitioners-and-framework-american-pretrial-reform.

court in this case denied petitioner Christopher White bail under Section 12, subdivision (b). This exception applies only to felony offenses involving acts of violence on another person, or felony sexual assault offenses on another person, when there is substantial evidence of the guilt of the accused and it is established by "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). The trial court erred in making this finding below, and the Court of Appeal, impermissibly applying a deferential standard of review, affirmed the trial court's denial of bail. *In re White*, 21 Cal. App. 5th 18, 29-31 (2018). Had the Court of Appeal applied the correct standard of de novo review, the court would have recognized that White's pretrial release was constitutionally compelled.

STATEMENT OF THE CASE

Defendant White was charged as an accomplice to an attempted kidnapping and assault with intent to commit rape and lesser related charges. The factual allegations are not in dispute. The evidence adduced at the preliminary hearing established that White stood nearby while the main perpetrator, Owens, allegedly tried to abduct a teenage girl. No weapon was used during the offense. According to the complaining witness's own testimony, White apologized to her during the incident. *Id.* at 22, Pet'r's Ex. B, 33. White denied having knowledge of Owens's intent to the police, with whom he cooperated. Pet'r's Exs. C and D, 205-206, 212, 223-224,

227, 229, 230, 234. However, the testimony also established probable cause to believe that, *inter alia*, White acted as lookout, served as a getaway driver, and said words that instigated Owens during the incident. *White,* 21 Cal. App. 5th at 21-24.

Taken as a whole, this evidence was likely sufficient to at least hold White to answer for the felony crimes charged in the complaint. *See* Cal. Pen. Code § 995. Whether it was enough to preventively detain White pending trial is another matter entirely—and the focus of this brief.

White sought reasonable bail after the preliminary hearing. A twenty-seven-year-old high-school graduate, White was employed as a cable installer prior to his arrest. He had many letters of support from family and friends and had lifelong ties in Arizona, which was where he planned to live with his parents pending trial. He was not on probation, parole or other supervised release at the time of this incident; in fact, he had no prior criminal history at all. Pet'r's Ex. A. White did not challenge the victim's credibility; rather he argued that the undisputed facts belied a shared criminal intent with the main perpetrator. He requested bail be set at $50,000. Pet'r's Ex. B, 183-86, 191-92.

The trial court detained both White and his co-defendant without bail, stating that "In looking at this case and the facts of the case . . . 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." *White*, 21 Cal. App. 5th at 24. In affirming the trial court's order, the Court of Appeal applied the deferential "substantial evidence" standard of review, *id.* at 25, which derives from the standard to determine whether evidence is sufficient at trial, under which "the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence that is, evidence which is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." *People v. Johnson*, 26 Cal. 3d 557, 578 (1980). Although the Court of Appeal acknowledged that this was a close call, it upheld the detention order. *White,* 21 Cal. App· 5th at 31. Had it applied the correct standard of independent review, it would have reversed. This ruling was constitutional error, and this Court should reverse.

ARGUMENT

I. Pretrial detention orders must be reviewed de novo because the determination about whether a defendant may be detained due to a finding of risk is a mixed question of law and fact implicating constitutional rights

A. Mixed questions of law and fact implicating constitutional rights demand de novo review

The United States Supreme Court has characterized mixed questions of law and fact this way: "[T]he historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant] statutory [or constitutional] standard, or to put it another way,

whether the rule of law as applied to the established facts is or is not violated." *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982).

Although not all instances of application of law to fact are subject to independent review, the seminal case from the United States Court of Appeal for the Ninth Circuit, *United States v. McConney*, which has been cited with approval multiple times by this Court, held that if the question of "whether the rule of law as applied to the established facts is or is not violated" requires the court "to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles, then the concerns of judicial administration will favor the appellate court, and the question should be classified as one of law and reviewed de novo." *United States v. McConney*, 728 F.2d 1195, 1203 (9th Cir. 1984) (en banc), *cert. denied*, 469 U.S. 824, 105 S. Ct. 101, 83 L. Ed. 2d 46, (internal citation omitted), *overruled on other grounds as recognized by United States v. Camou*, 773 F. 3d 932 (2014). This mixed question of fact and law stands in contrast to the precursor fact-finding, which lies more properly in the province of the trial court due to that court's superior ability to observe the demeanor of witnesses, make credibility determinations, and conduct other live inquiry available only to the trier of fact. *See, e.g., id.* at 1201.

McConney also held that "[t]he predominance of factors favoring de novo review is even more striking when the mixed question implicates

constitutional rights," because "[i]n cases involving such questions, the application of law to fact will usually require that the court look to the well defined body of law concerning the relevant constitutional provision." *Id.* at 1203. The court ultimately determined that as to whether exigent circumstances justified the violation of the knock and announce rule, "[t]he mixed question of exigency [was] rooted in constitutional principles and policies," the resolution of which required the court "to consider abstract legal doctrines, to weigh underlying policy considerations, and to balance competing legal interests," such as determining how to "strike a balance between two sometimes conflicting societal values—the safety of law enforcement officers and fourth amendment privacy interests." *Id.* at 1205. Thus, it held that the district court's determination was properly subject to independent review. *Id.*

The two California Supreme Court cases that have decided the applicable standard of review for mixed questions of law and fact implicating constitutional rights relied heavily on *McConney* in holding that independent review was required. In *People v. Louis*, the Court "appl[ied] the *McConney* functional analysis" in holding "that the issue of [a prosecutor's] due diligence in procuring a witness's attendance [which implicates the constitutional right of confrontation] is subject to independent review." *People v. Louis*, 42 Cal. 3d 969, 988 (1986). Although the *Louis* court did not issue a definitive ruling on the standard of

review, because it determined that it was not necessary to resolve the case in front of it, the Court revisited the issue in *People v. Cromer*. In affirming the reasoning in *Louis*, this Court further explained that the "trial court does not have a first-person vantage" in determining whether the prosecution's efforts to find a witness satisfy due diligence in the same way it would, for example, in determining juror bias or a defendant's competency to stand trial. *People v. Cromer*, 24 Cal. 4th 889, 901 (2001) (quoting *Thompson v. Keohane*, 516 U.S. 99, 114-15 (1995)). Nor did the Court find "a determination of due diligence so factually idiosyncratic and highly individualized as to lack any precedential value." *Id.* Instead, it held that the inquiry into due diligence in finding a witness "involve[d] . . . an inquiry that [went] beyond the historical facts," and instead was a mixed question "rooted in constitutional principles and policies," that required the Court "to consider abstract legal doctrines, to weigh underlying policy considerations, and to balance competing legal interests." *Id.* at 899-900 (quoting *McConney*, 728 F.2d at 1205). Thus, the trial court's application of the facts to the law in that case would be subject to independent review. *Id.*

The *Cromer* court also noted that its "conclusion that a trial court's due diligence determination is subject to independent review comports with [the] court's usual practice for review of mixed question determinations affecting constitutional rights." *Id.* at 901-02 (citing cases in which trial

court's determinations as to juror misconduct, voluntariness of confession, reasonableness of search, validity of *Miranda* waiver, and reasonableness of detention had all been held subject to independent review); *see also id.* at 898 (citing *Lilly v. Virginia*, 527 U.S. 116, 136 (1999) (holding that when determining questions about the admissibility of hearsay, "as with other fact-intensive, mixed questions of constitutional law, . . . '[i]ndependent review is . . . necessary . . . to maintain control of, and to clarify, the legal principles' governing the factual circumstances necessary to satisfy the protections of the Bill of Rights")). A review of the case law confirms that California courts generally review motions to suppress evidence obtained in violation of the Fourth Amendment under this standard and thereby apply de novo review. *See id.*; *see also People v. Leyba*, 29 Cal. 3d 591, 596-97 (1981) (reviewing a trial court's determination as to the reasonableness of a stop involved a two-step process—the first wherein the facts underlying the stop were adduced and which were afforded deferential review and the second wherein the appellate court exercised its independent judgment in measuring the found facts against the constitutional standard of reasonableness in the search context); *People v. Glaser*, 11 Cal. 4th 354, 362 (1995). Similarly, "[a] claim of ineffective assistance of counsel presents a mixed question of fact and law, which is generally subject to de novo review, especially where constitutional rights are implicated." *In re Alcox*, 137 Cal. App. 4th 657, 664–65 (2006), *as modified on denial of*

reh'g (Mar. 28, 2006), *rev. denied* (June 28, 2006) (citing *In re Resendiz*, 25 Cal. 4th 230, 248–250 (2001), *abrogated by Padilla v. Kentucky*, 559 U.S. 356 (2010)).

B. Pretrial detention orders impinge on constitutionally protected liberty interests

The standard of appellate review is vitally important in pretrial detention determinations. This Court has long recognized that the decision whether to detain a criminal defendant prior to trial is of great consequence, because "the detainee's liberty [is] a fundamental interest second only to life itself in terms of constitutional importance." *Van Atta v. Scott*, 27 Cal. 3d 424, 435 (1980), *superseded by statute as stated* in *In re York*, 9 Cal. 4th 1133, 1148 (1995); *People v. Olivas*, 17 Cal. 3d 236, 251 (1976) ("We conclude that personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and United States Constitutions."). The Court has explained that "a denial of pretrial release inflicts a direct 'grievous loss' upon the detainee" because the defendant remains confined in restrictive jail conditions with limited contact to visitors "often for periods of several months, despite the fact that there has been no determination of his guilt or innocence." *Van Atta v. Scott*, 27 Cal. 3d at 435 (internal citation omitted). As further noted by this Court, "other important deprivations which follow pretrial incarceration," include the impairment of attorney-client communications and the curtailment of a

defendant's ability to adequately prepare a defense, which can "impair[]" the "effectiveness of counsel's assistance and the detainee's right to a fair trial." *Id.* at 435-36 (citations omitted). The Court has further highlighted the critical consequences pretrial detention has on an individual outside the courtroom, including by "imperil[ing] his job, interrupt[ing] his source of income, and impair[ing] his family relationships." *Id.* at 436 (citing *Gerstein v. Pugh*, 420 U.S. 103, 114, 123 (1975)). Finally, the Court has acknowledged that "the burdens associated with pretrial detention are by no means limited to the detainee and his family," and that "[t]he total costs of pretrial confinement constitute a drain on public funds," including not only the costs associated with incarcerating individuals, but also ancillary costs, "such as welfare payments to families of detainees who lose their income." *Id.* at 436-37.

The United States Supreme Court has similarly long acknowledged the critical nature of a pretrial defendant's liberty interest and the severe consequences that attach to pretrial confinement in setting constitutional limits on pretrial detention. In holding that a judicial probable cause determination was necessary in the context of post-arrest detention, the Supreme Court observed that "the consequences of prolonged detention" can be "serious," including, as cited in *Van Atta*, that the detention "may imperil the suspect's job, interrupt his source of income, and impair his family relationships," in addition to negatively impacting his "ability to

assist in preparation of his defense." *Gerstein v. Pugh*, 420 U.S. at 114, 123; *see also Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 52, 55-56 (1991) (noting the importance of the defendant's interests in remaining free prior to trial in setting a 48-hour deadline for probable cause hearings). In a case involving a speedy trial claim, the Supreme Court explained that "[t]he time spent in jail awaiting trial has a detrimental impact on the individual," and "often means loss of a job" and "disrupt[ion of] family life," in addition to the defendant's being "hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense." *Barker v. Wingo*, 407 U.S. 514, 532–33 (1972).

Finally, the Supreme Court has made clear that due to the "fundamental nature of [the] right" to liberty, "liberty is the norm, and detention prior to trial" must be a "carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 750, 755 (1987) (setting forth this standard in the context of reviewing the constitutionality of the Federal Bail Reform Act); *see also Stack v. Boyle*, 342 U.S. 1, 4 (1951) (explaining that the "traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction . . . Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning"); *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 777 (9th Cir. 2014) (citing to precedent limiting pretrial detention in striking down a

pretrial detention statute that was not narrowly tailored to serve a compelling state interest). At bottom, the Supreme Court has consistently held that "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

Recent research provides empirical support for these long-held judicial principles. Academic studies have found that being subject to pretrial detention increases both the likelihood of conviction and the length of the ultimate sentence imposed. *See, e.g.*, Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711, 741–59, 787 (2017); Will Dobbie, Jacob Goldin & Crystal S. Yang, *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 Am. Econ. Rev. 201, 224-26, 234 (2018). The research also shows that detention can negatively impact defendants' future employment prospects, Dobbie et al., 227-32, 235, that pretrial detention can negatively impact the welfare and safety of the families and communities of criminal defendants. *See e.g.* Jocelyn Simonson, *Bail Nullification*, 115 Mich. L. Rev. 585, 612-21 (2017); Vera Institute of Justice, *Incarceration's Front Door: The Misuse of Jails in America* (Feb.

2015) at 5, 12-13.[3]

The significance of these studies is twofold. First, they confirm why freedom is so critical to presumptively innocent, pretrial detainees. Second, they reveal how overuse of pretrial detention can have the perverse effects of decreasing public safety and community welfare by eliminating support systems and destroying communities.[4]

In sum, the standard of review in this context is critical.

C. Determinations of pretrial release warrant independent appellate review

Here, although findings about historical facts—such as the facts underlying the charged offense, defendant's criminal history, statements made by the defendant and witnesses—are subject to deferential review, a court's determination that those facts mean there is a substantial likelihood that the defendant will harm another upon pretrial release involves a legal conclusion that exceeds simple fact-finding. As with the determination of exigency in *McConney*, the determination whether there is a level of dangerousness supporting pretrial detention requires the court to "strike a balance between two sometimes conflicting societal values"—here the

---

[3] *Available at*: https://www.vera.org/publications/incarcerations-front-door-the-misuse-of-jails-in-america

[4] *See e.g.* Brief of *Amicus Curiae* Crime Survivors for Safety and Justice, filed in *In re Humphrey*, S247278, Oct. 9, 2018; Brief of *Amici Curiae* National Law Professors of Criminal, Procedural and Constitutional Law, filed in *In re Humphrey*, S247278, Oct. 9, 2018.

defendant's due process liberty interest and the risk of harm to potential victims. *See McConney*, 728 F.2d at 1205.

The legal framework to be applied to a pretrial detention determination is animated by constitutional principles and policies. It includes the recognition that liberty is the norm, but also requires courts to strike a balance between freedom and other societal interests. In the pretrial release context, those principles should include the following: (1) pretrial detention should be rare; (2) any doubt should be resolved in favor of release; (3) a person should not be detained pretrial solely on generalizations about future criminality that lack any limiting principle or individualized basis; (4) no judge ought or need presume the truth of the charges for purposes of a bail determination. *See, e.g.*, *Salerno*, 481 U.S. at 755 ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."); *United States v. Motamedi*, 767 F.2d 1403, 1407 (9th Cir. 1985) ("In concluding that the Government's burden in denying bail on the basis of flight risk is that of the preponderance of the evidence, we are not unmindful of the presumption of innocence and its corollary that the right to bail should be denied only for the strongest of reasons"); *Truong Dinh Hung v. United States*, 439 U.S. 1326, 1329 (1978) (Brennan, J., in chambers) ("I am mindful that '[t]he command of the Eighth Amendment that [e]xcessive bail shall not be required . . . *at the very least* obligates judges passing upon the right to bail

to deny such relief only for the strongest of reasons.'" (internal citations omitted)); *White,* 21 Cal. App. 5th at 29 ("it will be the "rare" and "unusual" case where a court is able to make a finding authorizing detention); *United States v. Townsend*, 897 F.2d at 994 (citing *Herzog v. United States*, 75 S.Ct. 349, 351 (Douglas, Circuit Justice 1955) (doubts about the propriety of release are to be resolved in favor of defendants).

The claim that the finding that White's release would result in great bodily harm to others is a purely factual one is also unpersuasive as a matter of basic evidentiary rules. *Cf. White,* 21 Cal. App. 5th at 29, Resp. Brief on the Merits, 22. Assertions of fact can be proven true or false. Witnesses testify to facts in court. Here, for example, the alleged victim's statement that White and his co-defendant were staring at her before the incident is a fact. In crediting her testimony, the trial judge adopted this fact. However, a determination that, based on all of these facts, White's detention was permissible under the state constitution is a decidedly legal conclusion. No witness could competently testify to this in court: it would be an improper opinion, properly subject to objection as speculative or beyond the province of the witness. *See generally* Cal. Evid. Code § 702.

Moreover, this determination does not rely on a trial court's first-hand observation of witnesses or assessment of credibility; instead, once the trial court has found the underlying facts via witness testimony or evidence in the proceedings, the determination of risk requires a court "to

consider abstract legal doctrines, to weigh underlying policy considerations, and to balance competing legal interests," in applying the facts to the law. *People v. Cromer*, 24 Cal. 4th at 899-900 (quoting *McConney*, 728 F.2d at 1205, fn. omitted). Thus, it is unlike the types of conduct that remain properly evaluated by the trial court, such as determinations of whether a juror is biased or whether a defendant is not competent to stand trial. *See Cromer*, 24 Cal. 4th at 901. Instead, because pretrial detention orders implicate fundamental constitutional rights, robust appellate review is necessary.[5]

The conclusion that detention orders demand de novo appellate review under the California Constitution is buttressed by Ninth Circuit law holding that de novo review is appropriate for pretrial detention orders issued under the Federal Bail Reform Act. In *United States v. Motamedi*, the Ninth Circuit held that although it would review the lower court's factual findings in support of the detention order under a clearly erroneous

[5] This is not to be confused with review of a typical trial court order setting bail in a certain amount, which is reviewed for abuse of discretion. *In re Christie*, 92 Cal. App. 4th 1101, 1107 (2001). De novo review is only appropriate if a bail determination functions as a de facto detention order. *See In re Humphrey*, 19 Cal. App. 5th 1006, 1022 (2018) *rev. granted* (quoting *In re Taylor*, 60 Cal. 4th 1019, 1035 (2015) (where the material facts are undisputed and "the application of law to fact is predominantly legal, such as when it implicates constitutional rights and the exercise of judgment about the values underlying legal principles, [the appellate] court's review is de novo.")

standard, "[i]n a release determination ... the conclusion based on those factual findings presents a mixed question of fact and law," which "inquiry transcends the facts presented and requires both the consideration of legal principles and the exercise of sound judgment about the values which underly those principles." *United States v. Motamedi*, 767 F.2d 1403, 1405 (9th Cir. 1985) (citing *McConney*, 728 F.2d at 1202). The court further clarified that "[i]n reviewing a district court's order denying pretrial release, [it] must ensure not only that the factual findings support the conclusion reached, but also that the person's constitutional and statutory rights have been respected." *Id.* (citing *Truong Dinh Hung*, 439 U.S. at 1328-29). Thus, the court held that it "may make an independent examination of the facts, the findings, and the record to determine whether the pretrial detention order is consistent with those constitutional and statutory rights." *Id.* (citing *McConney*, 728 F.2d at 1202); *see also United States v. Townsend*, 897 F.2d 989, 994 (9th Cir. 1990) (citing *Motamedi* and *McConney* in holding that it would conduct an "independent examination of the record to determine whether the pretrial detention order [was] consistent with the defendant's constitutional and statutory rights and [would] arrive at [its] conclusion *de novo*").

Finally, considerations of judicial administration weigh in favor of de novo review. The application of law to fact here is of precedential importance. Development of a body of law is particularly critical at this

juncture in view of efforts to end the use of money bail and increased reliance on other objective factors to make pretrial release determinations. *See, e.g.*, S.B 10, 2017-2018 Reg. Sess. (Cal. 2018). As *McConney* held, mixed questions of law and fact involving constitutional rights "usually require that the court look to the well-defined body of law concerning the relevant constitutional provision." *McConney*, 728 F.2d at 1203. Appellate courts are far better positioned to develop this law than trial courts and well poised to ensure uniform application of the relevant constitutional provisions. There is a strong need for the appellate courts to provide a cohesive body of case law and independently review the decisions of overburdened trial courts that lack the luxury of time and multiple decisionmakers. *Id.* at 1201 (explaining that "appellate judges are freer to concentrate on legal questions because they are not encumbered, as are trial judges, by the vital, but time-consuming, process of hearing evidence," and noting the benefit of having "the judgment of at least three members of an appellate panel is brought to bear on every case"). The need for independent appellate review is particularly strong here, where constitutional rights are at issue.

Absent independent review, deference to trial court decisions would inevitably lead to factually similar pretrial detainees being afforded or denied liberty depending on which trial judge happened to hear their case. This would be a far cry from satisfying the protection of the Bill of Rights.