Case No. S248125

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re Christopher Lee White,

Petitioner,

On Habeas Corpus.

After a Decision by the Fourth District Court of Appeal, D073054
San Diego Superior Court, SCN376029,
Hon. Robert J. Kearney

APPLICATION TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF NO PARTY, AND PROPOSED AMICUS CURIAE BRIEF BY LEGAL SERVICES FOR PRISONERS WITH CHILDREN

Rita Himes, SBN 194926
LEGAL SERVICES FOR PRISONERS WITH CHILDREN
4400 Market Street
Oakland, CA 94608
(415) 625-7046
rita@prisonerswithchildren.org

Attorney for Legal Services for Prisoners with Children

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Under California Rules of Court, rule 8.520(f), Legal Services for Prisoners with Children (LSPC) requests leave to file the attached amicus curiae brie on the second issue on which the Court granted review: "What standard of review applies to review of the denial of bail?"

LSPC organizes communities impacted by the criminal justice system and advocates to release incarcerated people, to restore civil and human rights to the currently and formerly incarcerated, and to reunify families and communities. We assist incarcerated persons in challenging their convictions (which must be supported by findings proved beyond a reasonable doubt) and juvenile dependency orders removing children from their constructive custody or terminating their parental rights (which must be supported by findings proved by clear and convincing evidence).

On January 8, 2020, LSPC filed an application to file a late amicus brief in *In re Conservatorship of O.B.* (S254938), which presents the issue: "On appellate review in a conservatorship proceeding of a trial court order that must be based on clear and convincing evidence, is the reviewing court simply required to find substantial evidence to support the trial court's order or must it find substantial evidence from which the trial court could have made the necessary findings based on clear and convincing evidence?" We argued that, when an appellate court conducts substantial evidence review of a finding made by clear and convincing evidence, the court should take the heightened standard of proof into account, especially when the standard of proof derives from constitutional principles.

In this case, the Court will determine the appropriate standard of review for findings underlying a denial of bail pursuant to the California Constitution, article I, section 12, subdivision (b) (section 12(b)).

First, the trial court must find "the facts are evident or the presumption great." (§ 12(b).) Courts have interpreted this language to mean the court must find there is sufficient evidence to support a conviction on the charged offenses, as a court does when ruling on a motion for acquittal. The *trial court and court of appeal apply the same standard* of review on this question: whether the evidence presented at the bail hearing was sufficient to persuade a rational factfinder the essential elements of the charged offenses *beyond a reasonable doubt.*

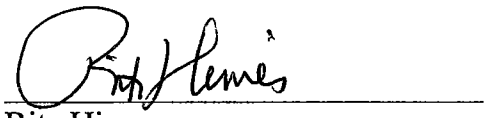
Second, in order to deny bail a trial court must find by clear and convincing evidence that "there is a substantial likelihood the person's release would result in great bodily harm to others." (§ 12(b).) We agree with Petitioner and amici American Civil Liberties Union organizations (ACLU) that this determination should be independently reviewed in the same manner as appellate courts review a ruling on suppression of evidence under the Fourth Amendment. (POB 37-41; ACLU 9, 12-16, 21-30.) That is, findings of "precursor facts" (ACLU 13, 21) should be reviewed for substantial evidence, and the application of legal standards to those facts reviewed independently.

However, we urge the Court to clarify that precursor facts be reviewed for substantial evidence *with the clear and convincing evidence standard of proof in mind.* Similarly, if the Court rejects independent review and adopts substantial evidence review for the second finding in its entirety, it should specify that the clear and convincing evidence standard must be taken into account.

There is currently a split in authority on whether heightened standards of proof are relevant under substantial evidence review generally. Our brief will assist the Court by (a) analyzing the development of the split in case law, which can be traced back to this Court's holdings in three equitable enforcement actions in the 1940s, and (b) proposing a logical and

consistent approach to the standard-of-review question that can be applied to any area of the law. Moreover, consideration of our amicus briefs in both this case and *Conservatorship of O.B.* will assist the Court in rendering consistent decisions.

Dated: January 13, 2020



Rita Himes
Counsel for Legal Services for
Prisoners with Children

PROPOSED AMICUS CURIAE BRIEF
OF LEGAL SERVICES FOR PRISONERS WITH CHILDREN

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INTRODUCTION

On January 8, 2020, LSPC filed an application to file a late amicus brief in *In re Conservatorship of O.B.* (S254938), which presents the following issue: "On appellate review in a conservatorship proceeding of a trial court order that must be based on clear and convincing evidence, is the reviewing court simply required to find substantial evidence to support the trial court's order or must it find substantial evidence from which the trial court could have made the necessary findings based on clear and convincing evidence?" We argued that, when an appellate court conducts substantial evidence review of a finding made by clear and convincing evidence, the court should take the heightened standard of proof (SOP) into account (i.e., apply SOP-conscious rather than SOP-blind substantial evidence review), especially when the standard of proof derives from constitutional principles. We urge the Court to take the same approach in this case.

Here, the Court will determine the appropriate standard of review for two separate findings that are required by California Constitution, article I, section § 12, subdivision (b) (section 12(b)) before a trial court can deny bail for a person charged with felony offenses involving acts of violence on another person or felony sexual assault offenses on another person.

First, the trial court must find "the facts are evident or the presumption great." (§ 12(b).) Courts have interpreted this language to mean the court must find there is sufficient evidence to support a conviction on the charged offenses, as a court does when ruling on a motion for acquittal. It is critical that this Court clarify that the *both the trial court and the court of appeal must take the beyond a reasonable doubt standard of proof into account* when assessing the sufficiency of the evidence, as has long been required by United States Supreme Court and California

Supreme Court precedent. (See *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319 & fns. 12-13; *People v. Johnson* (1980) 26 Cal.3d 557, 577-578 (*Johnson*).)

Second, in order to deny bail a trial court must find by clear and convincing evidence that "there is a substantial likelihood the person's release would result in great bodily harm to others." (§ 12(b).) We agree with Petitioner and amici American Civil Liberties Union organizations (ACLU) that this determination should be independently reviewed in the same manner as appellate courts review a ruling on suppression of evidence under the Fourth Amendment. (POB 37-41; ACLU 9, 12-16, 21-30.)[1] That is, findings of "precursor facts" (ACLU 13, 21) should be reviewed for substantial evidence, and the application of legal standards to those facts reviewed independently.

However, we urge the Court to clarify that precursor facts must be reviewed for substantial evidence *with the clear and convincing evidence standard of proof in mind* (i.e., SOP-conscious substantial evidence review). Similarly, if the Court rejects independent review and adopts substantial evidence review for the second finding in its entirety, it should specify that the clear and convincing evidence standard must be taken into account.

There is currently a split in authority about whether heightened standards of proof are relevant under substantial evidence review generally (i.e., whether substantial evidence review should be SOP-conscious or SOP-blind). In the final two sections of this brief (which largely duplicate our proposed amicus brief in *Conservatorship of O.B.* (S254938)), we analyze the development of the split in case law, which can be traced back

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[1] POB refers to Petitioner's Opening Brief; RB to Respondents' Brief; PRB to Petitioner's Reply Brief; and ACLU to the ACLU organizations' amicus curiae brief.

to this Court's holdings in three equitable enforcement actions in the 1940s, and propose a logical and consistent approach to the standard-of-review question that can be applied to any area of the law. Consideration of the issue in both this case and *Conservatorship of O.B.* will assist the Court in rendering consistent opinions.

There is no longstanding, uncontested line of California precedent that holds SOP-conscious substantial evidence review is improper. In fact, cases so holding can be traced back to equitable enforcement cases from the 1940s, and in that area of the law the cases are inconsistent before or after the 1940s. While hostility toward SOP-conscious review has crept in other areas of law, the issue has been continually contested.

The Court should reject SOP-blind substantial evidence in all cases as illogical and insufficiently protective of the constitutional principles or public policies that underlie heightened standards of proof. However, if the Court declines to adopt a uniform approach to the issue, it is critical that the Court insist on SOP-conscious review where a heightened standard of review derives from constitutional principles, as in this case.

ARGUMENT

I. In Choosing the Proper Standard of Review in this Case, the Court Should Separately Consider the Two Findings Required Under California Constitution, Article I, Section 12(b).

Respondents discuss the standard of review as if it would apply to a single determination made by the trial court under section 12(b) by clear and convincing evidence. (RB 21-30.) But section 12(b) requires two findings: (1) that "the facts are evident or the presumption great"; and (2) that "there is a substantial likelihood the person's release would result in great bodily harm to others." The clear and convincing evidence standard expressly applies only to the latter. (§ 12(b).)

Petitioner argues the substantial evidence standard applies to the first finding that "the facts are evident or the presumption great." (POB 35.) However, he fails to clarify that (a) the *trial court* applies the substantial evidence standard (i.e., assesses whether there is sufficient evidence to support a conviction) and the *court of appeal* independently applies the same standard on appeal; and (b) in doing so, both the trial court and the court of appeal must determine whether there is sufficient evidence to prove the crime *beyond a reasonable doubt.*

Petitioner and ACLU argue the second finding should be subject to independent review similar to review of a ruling on the suppression of evidence under the Fourth Amendment. (POB 37-41; ACLU 9, 12-16, 21-30.) That is, "precursor facts" (ACLU 13, 21) are reviewed for substantial evidence and the application of legal standards to those facts is decided *de novo*. We agree for the reasons stated in their briefs. However, we urge the Court to clarify that "the precursor facts" be reviewed for substantial evidence *with the clear and convincing evidence standard of proof in mind* (i.e., appellate courts should apply SOP-conscious substantial evidence review). Similarly, if the Court rejects independent review and adopts substantial evidence review for the second finding in its entirety, it should also require SOP-conscious review.

II. In Reviewing a Finding that "The Facts Are Evident or the Presumption Great," *Both the Trial Court and the Appellate Court* Must Determine Whether There is Sufficient Evidence to Prove the Charged Offenses *Beyond a Reasonable Doubt.*

Here, the Court of Appeal held, and Petitioner concedes (POB 35), that finding "the facts are evident and the presumption great" requires an assessment of the sufficiency of the prosecution's evidence to prove charged offenses. (See *In re White* (2018) 21 Cal.App.5th 18, 25 (*White*) [citing *In re Application of Weinberg* (1918) 177 Cal. 781, 782; *Ex parte Curtis* (1891) 92 Cal. 188, 189]; see *Weinberg*, at p. 782 ["[B]ail should be refused . . . when the evidence is such that a verdict of guilty based upon it would be sustained by a court"].)

This standard is similar to the standard the trial court applies to a motion for acquittal. (*White*, at p. 25, fn. 3 [citing *People v. Houston* (2014) 54 Cal.4th 1186, 1215 (*Houston*); *People v. Whisenhunt* (2008) 44 Cal.4th 174, 200 (*Whisenhunt*)].)

It is settled that, in making such sufficiency-of-evidence rulings, *a court is constitutionally required to take the beyond a reasonable doubt standard of proof into account*: "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime *beyond a reasonable doubt.*" (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319 [second emphasis added; review of conviction]; see *id.* at p. 319, fn. 12 [citing cases applying same standard to motions for acquittal]; *Anderson v. Liberty Lobby* (1986) 477 U.S. 242, 252 [holding same standard applies to motion for acquittal]; *People v. Zaragoza* (2016) 1 Cal.5th 21, 44 [review of conviction]; *Houston, supra,* 54 Cal.4th at p. 1215 [motion for acquittal]; *Whisenhunt, supra,* 44 Cal.4th at p. 200

[motion for acquittal]; see also *White, supra,* 21 Cal.App.5th at p. 25 [denial of bail; analogizing to motion for acquittal].)

On appeal of such a ruling, the appellate court makes the same inquiry as the trial court and owes no deference to the ruling below. (*People v. Dalton* (2019) 7 Cal.5th 166, 249 [review of denial of motion for acquittal; "The question is one of law, subject to independent review"]; see *White, supra,* 21 Cal.App.5th at p. 25, fn. 3.) That is, the appellate court makes its own independent determination of whether there is sufficient evidence in the record to persuade a rational factfinder the essential elements of the charged offenses have been proven beyond a reasonable doubt.

III. On Substantial Evidence Review of Precursor Facts Relevant to a "Substantial Likelihood the Person's Release Would Result in Great Bodily Harm to Others," Appellate Courts Must Take the *Clear and Convincing Evidence* Standard of Proof Into Account.

We agree with Petitioner and the ACLU that the second finding under section 12(b) should be independently reviewed in the manner appellate courts review rulings on suppression of evidence for Fourth Amendment violations: "We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment." (*People v. Glaser* (1995) 11 Cal.4th 354, 362; see *People v. Duff* (2014) 58 Cal.4th 527, 551 [similar standard of review for ruling on suppression of statements for violation of *Miranda v. Arizona* (1966) 384 U.S. 436]; *People v. Cromer* (2001) 24 Cal.4th 889, 900-901 [similar standard in reviewing finding of due diligence to locate missing witness before admitting prior testimony despite Confrontation Clause]; *McCoy v. Hearst Corp.* (1986) 42 Cal.3d 835, 842, 845-846 (*McCoy*) [similar standard on review of First Amendment-required actual malice finding in defamation action against public figure].) (See POB 37-38, 41; PRB 13-14; ACLU 13-16.)

We disagree with Respondent that substantial evidence review of the precursor factual findings should be conducted without regard to the clear and convincing evidence standard of proof. (See RB 21-23, 31.) Respondent relies on this Court's holdings in 1940s equitable enforcement actions – *Stromerson v. Averill* (1943) 22 Cal.2d 808, 811, 813-814 (*Stromerson*); *Beeler v. American Trust Co.* (1943) 24 Cal.2d 1, 3, 7 (*Beeler*); and *Viner v. Untrecht* (1945) 26 Cal.2d 261, 265-267 (*Viner*) – as well as cases and a treatise that cite or are traceable to those 1940s cases

(*Crail v. Blakeley* (1973) 8 Cal.3d 744, 750 (*Crail*); *In re Angelique C.* (2003) 113 Cal.App.4th 509, 519 (*Angelique C.*); *In re Mark L.* (2001) 94 Cal.App.4th 573, 580–581 (*Mark L.*); 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 371, pp. 428–429).

As explained in the next two sections (which largely duplicate our amicus brief in *Conservatorship of O.B.* (S254938)), the authorities cited by Respondent do not support the adoption of SOP-blind substantial evidence review in this case, regardless of whether substantial evidence review is adopted for precursor findings only or for the entire "substantial likelihood" determination under section 12(b).[2] SOP-blind review is especially inappropriate when constitutional rights are at stake. Here, the California Constitution *expressly* requires the "substantial likelihood" determination be made by clear and convincing evidence (§ 12(b)), and fundamental liberty interests under both the California and United States Constitutions are implicated (*United States v. Salerno* (1987) 481 U.S. 739, 750; *Van Atta v. Scott* (1980) 27 Cal.3d 424, 435, superseded by constitutional amendment on other grounds as stated in *In re York* (1995) 9 Cal.4th 1133, 1134, fn. 7).

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[2] SOP-conscious review should also be required under the recently enacted nonmonetary bail statutory scheme, Penal Code section 1320.20, subdivision (d)(1), as the clear and convincing evidence standard of proof clearly derives from the constitutional requirement of section 12(b).

IV. A Close Reading of Case Law Shows that Cases Applying SOP-Blind Substantial Evidence Review are Traceable to Weak Precedent in the Equitable Enforcement Context.

A. In the 1940s, this Court Adopted an SOP-Blind Approach in Equitable Enforcement Cases, But the Rule Has Not Been Consistently Followed.

1. The 1940s Cases Do Not State the Rule Clearly.

From 1943 to 1945, the California Supreme Court held in three equitable enforcement actions that an appellate court should not consider the heightened standard of proof in conducting substantial evidence review.[3] (See *Stromerson, supra,* 22 Cal.2d at pp. 811, 813-814 [claim that person holding absolute title to property in fact held it in trust for another]; *Beeler, supra,* 24 Cal.2d at pp. 3, 7 [claim that deed absolute in form was in fact an equitable mortgage]; *Viner, supra,* 26 Cal.2d at pp. 265-267 [same]; accord *National Auto. & Cas. Ins. Co. v. Industrial Acc. Commission* (1949) 34 Cal.2d 20, 25 [claim that contract should be reformed to reflect parol agreement].)

The language in each of the three opinions is ambiguous -- e.g., *Beeler* states, " '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' " (*Beeler, supra,* 24 Cal.2d at p. 7 [emphasis added; quoting *Wadleigh v. Phelps* (1906) 149 Cal. 627, 637 (*Wadleigh*)])[4] – but the import

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[3] We use "equitable enforcement action" as shorthand for an action in which a party seeks to enforce a parol agreement in contravention of or in the absence of written instrument or agreement.

[4] See also the following statements that are not inconsistent with SOP-conscious review. "The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court to determine, and if there is

of the opinions is made clear by the dissenting opinions by Justice Roger J. Traynor. In both *Stromerson* and *Beeler*, Justice Traynor wrote:

> While it rests primarily with the trial court to determine whether the evidence is clear and convincing, its finding is not necessarily conclusive, for in cases governed by the rule requiring such evidence 'the sufficiency of the evidence to support the finding should be considered by the appellate court *in the light of that rule*.' Sheehan v. Sullivan, 126 Cal. 189, 193; see, also, Moultrie v. Wright, 154 Cal. 520. In such cases it is the duty of the appellate court in reviewing the evidence to determine, not simply whether the trier of facts could reasonably conclude that it is more probable that the fact to be proved exists than that it does not, . . . but to determine whether the trier of facts could reasonably conclude that it is highly probable that the fact exists. When it hold [*sic*] that the trial court's finding must be governed by the same test with relation to substantial evidence as ordinarily applies in other civil cases, *the rule that the evidence must be clear and convincing becomes meaningless*. It is a contradiction that while the vitality of the rule is thus destroyed its soundness is not questioned. If, as in my opinion, the rule is sound, this court has erred in its pronouncements (see 25 Cal. Jur. 248; 2 Cal. Jur. 921) *declining to accept responsibility for its enforcement.*

(*Stromerson, supra,* 22 Cal.2d at pp. 817-818 [dis. opn., Traynor, J.; emphases added]; *Beeler, supra,* 24 Cal.2d at p. 33 [dis. opn., Traynor, J.; emphases added]; see also *Viner, supra,* 26 Cal.2d 273 [dis. opn., Traynor, J.; reaffirming position, but acknowledging battle was lost].)

In the first edition of California Procedure, published in 1954, Bernard E. Witkin cited these 1940s equitable enforcement cases as authority for a *general rule* of SOP-blind substantial evidence review:

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substantial evidence to support its conclusion, the determination is not open to review on appeal." (*Stromerson, supra,* 22 Cal.2d at p. 815; see also *Viner, supra,* 26 Cal.2d at p. 267 [quoting *Stromerson*].) "[W]hether 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." (*Beeler, supra,* 24 Cal.2d at p. 7.)

"[T]he [standard of proof] applies only in the trial court. The judge may reject a showing as not measuring up to the standard, but, if he decides in favor of the party with this heavy burden, the clear and convincing test *disappears*." (Witkin, Cal. Procedure (1954) Appeal § 84(2), pp. 2246-2247 [emphasis added].) (See Appx. to Br., Exh. A.)

In 1973, this Court reaffirmed the 1940s holdings in *Crail*, another equitable enforcement case. (*Crail, supra,* 8 Cal.3d at pp. 746-747 [claim that parol will should be enforced].) The Court stated its holding in somewhat more explicit language than in the earlier cases: "Th[e clear and convincing evidence] standard was adopted[] . . . for the edification and guidance of the trial court, and was not intended as a standard for appellate review." (*Id.* at p. 750; accord, *In re Marriage of Saslow* (1985) 40 Cal.3d 848, 863 [claim that parol evidence rebutted statutory presumption that property acquired before marriage was separate property; quoting *Crail*].)

2. The 1940s Cases Are Not Part of a Longstanding Line of Uncriticized Precedent.

As will be explained further *post*, nearly all of the more recent cases that that apply SOP-blind review -- mostly on issues other than equitable enforcement -- can be traced back to *Crail, supra,* 8 Cal.3d 744, or to the passage in Witkin, Cal. Procedure (1954), quoted *ante* (to the extent they can be traced back to any authoritative precedent at all). That is, they can all ultimately be traced back to the 1940s equitable enforcement cases.

But the strength of the 1940s holdings, even in the equitable enforcement context, is weakened by (a) inconsistency in the Court's approach before the 1940s; and (b) ambiguity in the language of the 1940s cases, which led to inconsistent later application of the rule.

As Justice Traynor noted in his dissents, before the 1940s cases this Court had adopted SOP-conscious review in equitable enforcement actions. (See *Sheehan v. Sullivan* (1899) 126 Cal. 189, 193 ["the sufficiency of the