

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re Christopher Lee White,

Petitioner,

On Habeas Corpus.

Case No. S248125

SUPREME COURT
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Fourth District Court of Appeal, Division One, Case No. D073054
San Diego County Superior Court Case No. SCN376029

PETITIONER'S OPENING BRIEF ON THE MERITS

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Baradaran and McIntyre, *Predicting Violence*
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Voter Information Guide, Gen Elec. (Nov. 4, 2008) passim

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Petitioner's Opening Brief on the Merits

Petitioner Christopher White respectfully submits this Opening Brief on the Merits.

Issues on Review

The court ordered briefing and argument on the following issues:

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),¹ of the California Constitution – or, in the alternative, whether these provisions may be reconciled.
2. What standard of review applies to the review of denial of bail?
3. Did the Court of Appeal err in affirming the trial court's denial of bail?

¹ References to the constitutional provisions of article I, sections 12 and article I, section 28 shall be cited as "section 12" and "section 28."

Introduction

The California Constitution has guaranteed the right to bail² since its inception in 1849. Article I, section 12 requires release on bail for noncapital crimes with two very limited exceptions. Article I, section 28, the “Victim’s Bill of Rights,” does not mention section 12 or the right to bail it confers. Subdivision (f)(3) of section 28 does, however, state that a person “may” be released on bail in noncapital cases and that, “in setting, denying or reducing bail” the court shall consider factors such as victim and public safety. (Cal. Const. art. I, § 28, subd. (f)(3).)

Interpreting article I, section 28, subdivision (f)(3) as conferring discretion on the courts to deny bail would operate as an implied repeal of the centuries-old right to bail. There is a strong presumption against implied repeal, and it should and can be avoided by reconciling the two constitutional provisions. There is no evidence the electorate intended to repeal section 12 in enacting the amendments to section 28. Instead, the voters intended to have the courts consider victim safety in setting and granting bail as provided in section 12. This interpretation does not conflict with section 12 and it effectuates voter intent.

The trial court in this case denied bail to White under section 12, subdivision (b). This exception to bail is permitted only if there is substantial evidence of the accused’s guilt and it is established by clear and convincing evidence that there is a substantial likelihood the accused’s release would result in great bodily harm to others. (Cal. Const. art. I §12, subd. (b).) The Court of Appeal affirmed the trial court’s order, applying a deferential standard of review. (*In re White* (2018) 21 Cal.App.5th 18.)

² “The right to bail” is synonymous with the right to pretrial liberty. Thus, “bail” includes monetary bail and non-monetary conditions of release.

The guarantee of pretrial liberty is a significant constitutional right. Therefore, the denial of this fundamental liberty interest should be subject to an independent, de novo review by the appellate court. De novo review promotes consistency and uniformity in the rules governing the deprivation of the constitutional right of liberty.

The trial court erred in denying White's right to bail under section 12, subdivision (b). To deprive White of his liberty under this exception, there must be substantial evidence to support the charged offense of attempted kidnap to commit rape. The record does not support this finding. White was with his friend Owens standing by his truck after spending time at the beach. Owens suddenly ran up and grabbed a 15-year-old girl with no encouragement from White. White's shocked reaction to Owens' assault was consistent with that of an uninvolved person witnessing a friend's sudden and unexpected commission of a crime. No criminal intent can be inferred from White's hesitancy to intervene. After White apologized to the girl for his friend's behavior, he said "go in the house," but it was unclear to whom this was directed— the victim or Owens, though White's apology and Owens' inaction suggests it was directed to the girl. There is no substantial evidence of White's aiding Owens in this assault; the evidence is consistent with White's innocence.

The state also utterly failed to establish by clear and convincing evidence that there was a substantial likelihood White would cause great bodily harm to others if he was released on bail. White, a 27-year old man with no prior criminal record and no history of violence, did not inflict great bodily injury on anyone, nor is there any evidence that he would inflict great bodily injury if he was released on bail. The crime alone, aiding and abetting an unarmed felony assault, is not predictive of future violence. The facts of this case did not justify denial of bail under subdivision (b) of

section 12.

The state implicitly admitted this by offering White a plea bargain that resulted in his immediate release on summary probation. In the prosecutor's view, White only presented an imminent danger to the public while he asserted his constitutional right to a jury trial. The use of public safety as a pretext to punish the accused and coerce a guilty plea is not an imaginary danger; this case is a vivid reminder of why the right to bail is viewed as essential to due process.

Denying bail to an accused with no criminal record for aiding an unarmed felony assault would fill the jails with pretrial detainees and seriously dilute the invaluable constitutional guarantee of pretrial liberty afforded by section 12. The courts must protect the fundamental right to pretrial liberty by strictly limiting no-bail detention of the presumptively innocent.

Statement of the case

Christopher White was arrested on July 28, 2017, and charged with co-defendant Jeremy Owens with attempted kidnaping with intent to commit rape (Pen. Code³ §§ 664/ 209, subd. (b)), assault with intent to commit rape (§ 220, subd. (a)(1)), contact with a minor with intent to commit a sexual offense (§ 288.3, subd. (a)) and false imprisonment (§§ 236 and 237, subd. (a).) All the offenses arise out of an assault occurring on July 26, 2017.

White was arraigned, pled not guilty and was detained without bail at the arraignment.

³ All statutory references are to the Penal Code unless otherwise stated.

A preliminary hearing was held on October 4 and 5, 2017.⁴ Before the hearing, White filed letters from family and friends attesting to his character for non-violence in support of his bail request.⁵ At the end of the preliminary hearing, the court bound White over for trial on all counts and conducted a hearing on White's request for bail. (Exh. B, pp. 190, 192-195.)

The defense requested release on bail of \$50,000, identifying these factors supporting release: (i) White's support and lifelong ties to the community in Arizona, where White planned to live with his parents pending trial; (ii) White's gainful employment before his arrest as a cable installer; (iii) White's willingness to abide by any conditions of release set by the court, including stay away orders; (iv) White's lack of any prior criminal record; and (iv) White's significantly less culpable role in the offense conduct, carrying a maximum sentence of 9 years in state prison. White's parents were in attendance at the hearing and numerous family members wrote letters attesting to White's character for non-violence. (Exh. A; Exh. B, pp. 191-192.)

The prosecution requested detention for co-defendant Jeremy Owens, the perpetrator of the assault. As to White, the prosecutor stated that the court "is on sound legal ground to deny him bail," but submitted the issue to the court, in recognition that White "is not as culpable" as the co-defendant. (Exh. B., p. 195.)

The trial court found that "one defendant inflicted the acts of violence, the other person aided and abetted in that," and found "on the

⁴ The reporter's transcript of the October 4 and 5, 2017, preliminary hearing is attached to White's writ filed in the Court of Appeal as Exhibit B.

⁵ Attached to the writ as Exhibit A is White's request for bail with supporting letters.

basis of 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” and that “the individual at threat would be [the complaining witness] herself” and that “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 occurred in this case.” (Exh. B, p. 196.) The court ordered White detained without bail. (Exh. B, p. 196.)

On November 3, 2017, White filed a writ of habeas corpus in the Court of Appeal challenging his detention. The Court of Appeal requested an informal response from the District Attorney and White filed a reply. On December 11, 2017, the Court of Appeal issued an order to show cause, set a briefing schedule, and indicated oral argument would be deemed waived unless either party requested it, in which case it could not be held until two months later on February 12, 2018. The District Attorney filed a response on December 22, and requested oral argument. White filed a traverse on January 4, 2018, and did not request oral argument.

The case was argued and submitted on February 12, 2018. On February 23, 2018, at a readiness conference, the state confirmed its offer to have White plead guilty to an accessory to attempted kidnap (§ 32) with three years summary probation and one year local custody. With credit for the seven months he had served, White would be entitled to immediate release. White rejected the offer. (See, Exhibit A attached to the Request for Judicial Notice filed with this petition.)

In the meantime, four months after filing the writ, the Court of Appeal issued its March 6, 2018, decision denying the writ. White filed a petition for rehearing on March 12, arguing that the state’s continued detention of White constituted punishment and was not for the purpose of protecting the public, since the state was willing to release White

immediately if he pled guilty. White requested that the appellate court take judicial notice of the transcript of the readiness conference. The Court of Appeal denied the request for judicial notice and the rehearing petition.

White filed a petition for review, granted by this Court on May 23, 2018. This Court also granted White's request for judicial notice, but denied his request for immediate admission to bail.

Statement of facts

The evidence at the preliminary hearing established that, after White and Owens went to the beach, the two were standing by White's truck when Owens ran across the street and grabbed a 15-year-old girl, J.D., who was waxing her surfboard in front of her house. (Exh. B, pp. 28-30, 43.) She managed to break free of Owens. (Exh. B, p. 32.) She said "That's not cool. You guys can't do that." (Exh. B, p. 33.) White said "we're sorry" or "sorry" and J.D. backed away toward the gate, facing them. White remained standing by his truck. (Exh. p. 33, 54-56.) J.D. "had a feeling" that White was "almost kind of like the lookout guy." because he was "keeping his eye up and down the street." (Exh. B, p. 74.)

J.D. turned and opened the gate, and heard White say "go in the house." She assumed White directed this statement to Owens. (Exh. B, p. 34.) She locked the gate and went into her house. (Exh. B, pp. 34.) Owens and White left in the truck. (Exh. B, p. 34.)

White was arrested two days later. He repeatedly told the police that he did not know Owens was going to assault the girl and did not share Owens' intent. (See e.g., Exhs, C and D⁶, pp. 205, 210, 212, 223-224, 227, 229, 230, 234.) He told the police that he was in his truck near the beach

⁶ Exhibits C and D are the transcripts of the recorded police interviews of White introduced at the preliminary hearing.

drying off and relaxing after he went body surfing with Owens. (Exh. C, p. 210.) Owens commented that the girl across the street was pretty, but White did not think much of it because they “say that kind of stuff about girls all the time.” (Exh. C, p. 212.)

Owens ran up to the girl across the street and White thought Owens was “going to talk to her.” (Ex. C, pp. 205, 212.) He saw Owens grab J.D. and White said “yo, stop” and Owens stopped and looked “really confused.” (Exh, C, p. 206.) White said it happened fast. (Exh C., p. 213.) White said “sorry,” Owens ran back to the truck and White left in the truck with Owens. (Exh. C, p. 214.)

White asked Owens why he grabbed the girl and Owens said he did not know; “a primal instinct” came over him. (Exh. C., p. 214.) White told the police he thought Owens was “struggling with some mental health issues” and White had been looking for a therapist for him. (Exh. C, p. 206.)

At the station, two detectives interrogated White. The detectives suggested White was a “look out” and White appeared to agree that Owens said “hey watch out,” but White did not agree that he knew Owens was going to grab J. D. (Exh. D, 225, 249.) The police also had White agree that he may have said “go get her” to Owens, but White said he meant go talk to her. (Exh. D., p. 242-244.) Despite the police officers efforts to get White to confess, White consistently denied that he knew that Owens intended to grab J. D. (Exh. D, pp. 223-224, 227, 229, 230, 234.)

Argument

I. Article I, section 12 governs the accused's right to be released on bail pending trial. Article I, section 28 can be reconciled with section 12 to require the court to consider victim safety in setting bail and in determining whether detention is permitted under section 12's exceptions to the grant of bail.

A. Summary of argument.

Section 12 establishes a comprehensive scheme governing the right to bail, including limited and specific exceptions to the denial of bail, a standard and allocation of proof, factors that must be considered in setting bail, and provisions regarding own recognizance release. (Cal. Const., art. I, § 12.) It unambiguously guarantees the right to bail, except in very specific and limited circumstances.

The 2008 amendments to section 28, on the other hand, expanded the right of crime victims to receive notification of court hearings and provide input during phases of the criminal justice process, restricted the early release of sentenced inmates, and changed the procedures for granting and revoking parole. (Cal. Const. art. I, § 28.) It contains two provisions concerning bail, subdivisions (b)(3) and (f)(3). Article I, section 28, subdivision (b)(3) grants crime victims the right to “have the safety of the victim and the victim’s family considered in fixing the amount of bail and release conditions for the defendant.” (Cal. Const. art. I, § 28.)

Section 28, subdivision (f)(3) provides that “[a] person may be released on bail by sufficient sureties, except for capital crimes” and that, “in setting, reducing or denying bail,” the court “shall take into consideration” a number of factors, including victim safety. (Cal. Const. art. I, § 28, subd. (f)(3).)

The issue presented here is whether the voters’ purpose in enacting the 2008 amendments was to establish a broad range of “rights” for crime

victims, including a guarantee that crime victims' safety would be considered in making bail decisions under section 12, or whether the voters, by implication, meant to drastically alter a centuries-old constitutional law governing an accused's right to bail by repealing section 12. Familiar rules of statutory construction favor the former interpretation.

The law shuns implied repeals, and this result should be avoided, particularly where it involves the repeal of a historic fundamental right such as the right to bail under section 12. Section 28 may be harmonized with section 12 without sacrificing this important right to bail by construing it to require the court to consider victim safety in setting conditions of release and in determining whether the two limited exceptions to bail in section 12 apply. This interpretation of section 28 reflects the voters' intent and is consistent with subdivision (b)(3)'s pronouncement of the right the voters intended to grant to crime victims as a result of this initiative.

The history and the election materials in support of the amendments to section 28 support this interpretation. Nothing in the Legislative Analyst's analysis, the Attorney General's summary or the arguments for and against the initiative even mention section 12 or pretrial detention. There is no evidence the electorate intended to repeal section 12 or expand the limits on pretrial detention, and such an intent cannot be imputed in the absence of evidence.

B. Text of article I, section 12 and article I, section 28, subdivision (f)(3).

The bail and own recognizance provisions of section 12 establish the circumstances under which an accused has a constitutional right to be released on bail pending trial. Section 12 mandates release on bail except in three limited circumstances. It provides, in relevant part:

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

- a) Capital crimes when the facts are evident or the presumption great;⁷
- 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; 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 there is a substantial likelihood that the person would carry out the threat if released.

(Cal. Const. art I, § 12.)

Section 12 also allows a court to release an accused on his or her own recognizance, and requires that the court consider, in setting the amount of bail, "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." (Cal. Const., art. 1, § 12.)

Section 28, subdivision (f)(3) was the product of two ballot initiatives, Proposition 8 passed in 1982 and Proposition 9, passed in 2008. It provides:

⁷ The phrase "when the facts are evident or the presumption great" means there must be substantial evidence to support the defendant's commission of the crime. (*People v. Nordin* (1983) 143 Cal.App.3d 538, 543.)

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 considerations.

A person may be released on his or her own recognizance in the court's discretion, subject to the same factors considered in setting bail.

Before any person arrested for a serious felony may be released on bail, a hearing may be held before the magistrate or judge, and the prosecuting attorney and the victim shall be given notice and reasonable opportunity to be heard on the matter.

When a judge or magistrate grants or denies bail or release on a person's own recognizance, the reasons for that decision shall be stated in the record and included in the court's minutes.

C. Background to the enactment and amendments to section 12 and section 28.

To understand the relationship between section 12 and the bail provisions of section 28, some historical background regarding both constitutional provisions is necessary.

1. *The history of the constitutional right to bail under section 12.*

Although section 12 has been amended by initiative over the years, its guarantee of bail has been enshrined in the California Constitution since its adoption in 1849. (*People v. Tinder* (1862) 19 Cal. 539, 542 : Justice

Field (before he was a U.S. Supreme Court Justice) construed California's constitutional Right to Bail Clause as it appeared in 1849: "In all [cases, except capital cases where the proof is evident or presumption great], the admission to bail is a right which the accused can claim, and which no Judge or Court can properly refuse.") The predecessor to section 12, article I, section 6, provided that "[a]ll persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great. Excessive bail may not be required."

In 1974, the voters adopted recommendations proposed by the California Constitution Revision Commission to permit release on an accused's own recognizance, enacting article I, section 12. (*People v. Standish* (2006) 38 Cal.4th 858, 890.) Like its predecessor, section 12 proscribed governmental discretion to deny bail.⁸

2. *Proposition 8 and Proposition 4*

In 1982, the California electorate was presented with two competing propositions affecting the right to bail. Proposition 4 would amend section 12 to allow pretrial detention under very limited and specific circumstances. The amendment permitted detention where "(1) Acts of violence on another person are involved and [the] court finds substantial likelihood the person's release would result in great bodily harm to others" or "(2) The person has threatened another with great bodily harm and [the] court finds substantial likelihood the person would carry out the threat." (Ballot Pamp., Primary Elec. (June 8, 1982), summary prepared by the Attorney General.) The

⁸ Section 12, as amended in 1974, read, "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." (*Van Atta v. Scott* (1980) 27 Cal.3d 424, 452, n. 33.)

prosecution would be required to prove the exception applied by clear and convincing evidence. (*Ibid.*) The amendment also stated that, in fixing bail, the court must consider the seriousness of the offense, the person's previous criminal record, and the probability of appearance at trial. (*Ibid.*)

Proposition 8, the "Victims' Bill of Rights," proposed to repeal section 12 and substitute article I, section 28, subdivision (e) in its place. (*People v. Standish* (2006) 38 Cal.4th 858, 874.)

Both propositions passed. Because Proposition 8 would have repealed section 12, there was a direct conflict between Proposition 4 and the bail provisions of section 28 and the two could not be reconciled. (*People v. Standish, supra*, 38 Cal.4th at p. 877.) Therefore, the bail and own recognizance provisions in Proposition 8 "never became effective because a competing initiative measure on the same ballot (Proposition 4) garnered more votes than Proposition 8." (*People v. Standish, supra*, at pp. 874-875, and cases cited therein.) Thus, section 28, subdivision (e) never took effect.

3. *Proposition 9 and Marsy's Law*

In 2008, the electorate enacted by referendum Proposition 9, the "Victim's Bill of Rights Act of 2008: Marsy's Law." The new law amended section 28 of the California Constitution to grant enumerated legal rights to victims of crime, including the right to notice and an opportunity to be heard in criminal proceedings. One enumerated right is "to have the safety of the victim and the victim's family considered in fixing the amount of bail and release conditions for the defendant." (Cal. Const., art. I, § 28, subd. (b)(3).)

The invalidated section 28, subdivision (e) was renumbered as subdivision (f)(3) and amended to add the terms "safety of the victim" and strike out language that proscribed own recognizance release for those

individuals accused of a serious felony. Proposition 9, unlike Proposition 8, did *not* repeal section 12. The ballot pamphlet for the 2008 General Election contained the few minor changes to the invalid section 28, subdivision (e) in italics and strikeout type. The bulk of former section 28, subdivision (e) was set out in non-italics, erroneously informing voters that it was an existing part of our constitution, rather than an inoperative provision. (Cf. Cal. Elec. Code § 9086(f) [“provisions of [a] proposed measure differing from the existing laws affected shall be distinguished in print, so as to facilitate comparison”].)

The ballot materials for Proposition 9 made scarce mention of bail. The Legislative Analyst’s overview of Proposition 9 stated the measure would “amend the State constitution and various state laws to (1) expand the legal rights of crime victims and the payment of restitution by criminal offenders, (2) restrict the early release of inmates, and (3) change the procedures for granting or revoking parole.” (Voter Information Guide, Gen. Elec. (Nov. 4, 2008), analysis of Prop. 9 by Legislative Analyst, p. 58.)

The Legislative Analyst identified three “changes made” by Proposition 9: “restitution,” “notification and participation of victims in criminal justice proceedings,” and “other expansions of victims’ legal rights.” (Voter Information Guide, Gen. Elec. (Nov. 4, 2008), analysis of Prop. 9 by Legislative Analyst, at p. 59.) Among those “legal rights” expanded was “that the safety of a crime victim must be taken into consideration by judges in setting bail for persons arrested for crime.” (*Ibid.*)

The proponents argued the proposition “levels the playing field” by “guaranteeing crime victims the right to justice and due process.” (Voter Information Guide, Gen. Elec. (Nov. 4, 2008), analysis of Prop. 9 by

Legislative Analyst, at p. 62.) The proponents also stated the initiative would “require that a victim and their family’s safety must be considered by judges making bail decisions for accused criminals,” and argued crime victims should be notified of the accused’s pretrial release and parole hearings. (*Ibid.*)

The opponents argued that the law already permitted victims the “right to be notified if their offender is released,” and to participate in parole hearings and sentencing. The opponents contended that the proposition would create a costly “duplication of existing laws.” (Voter Information Guide, Gen. Elec. (Nov. 4, 2008), analysis of Prop. 9 by Legislative Analyst, at p. 62.)

D. The amendments to the bail provisions in section 28 reflect the voters’ intent to require courts consider victim safety in setting or granting bail under section 12, not to repeal section 12’s guarantee of bail or expand the strict limitations on pretrial detention.

If subdivision (f)(3) is interpreted to confer absolute discretion on the court to deny bail, it would directly conflict with section 12. Because there was no explicit repeal of section 12 contained in Proposition 9, the question here is whether the voters intended to implicitly repeal this fundamental constitutional right to bail by amending section 28.

In interpreting a constitutional provision enacted by the electorate, the court’s “paramount task is to ascertain the intent of those who enacted it.” (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1037, quoting *Thompson v. Department of Corrections* (2001) 25 Cal.4th 117, 122.) The court will interpret voter intent using the same principles that govern statutory construction. (*Ibid.*)

1. *An implied repeal of section 12 should be avoided.*

Rules of statutory construction require an attempt to reconcile statutory provisions relating to the same subject matter whenever possible in order to avoid conflict. (*Taxpayers to Limit Campaign Spending v. Fair Pol. Practices Com.* (1990) 51 Cal.3d 744, 747.) “The law shuns repeals by implication” (*Kennedy Wholesale, Inc. v. State Bd. of Equalization* (1991) 53 Cal.3d 245, 249, quoting *Board of Supervisors v. Lonergan* (1980) 27 Cal.3d 855, 868.) “Indeed, ‘[s]o strong is the presumption against implied repeals that when a new enactment conflicts with an existing provision, ‘[i]n order for the second law to repeal or supersede the first, the former must constitute a revision of the entire subject, so that the court may say that it was intended to be a substitute for the first.’” (Citations omitted.) (*Kennedy Wholesale, Inc. v. State Bd. of Equalization, supra*, 53 Cal.3d at p. 249.) An implied repeal should not be found unless “. . . the later provision gives undebatable evidence of an intent to supersede the earlier. . . .” (*Hays v. Wood* (1979) 25 Cal.3d 772, 784.)

The presumption against implied repeal applies with full force to partial repeals and amendments. “[A]ll presumptions are against a repeal by implication . . . , including partial repeals that occur when one statute implicitly limits another statute’s scope of operation.” (*Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830, 838.)

2. *Nothing in the text of section 28 indicates the voters intended to repeal section 12 or expand the limitations on pretrial detention.*

Section 28 does not mention section 12. The drafters of section 28 knew very well how to repeal section 12 because they had the example of Proposition 8, which contained an express repeal of section 12. (Ballot

Pamp., Primary Elec. (June 8, 1982) text of Prop. 8, § 2, p. 33.) And it is highly unlikely the voters would by mere implication overrule such a firmly established and fundamental right that has been in our Constitution since its inception. “[It] is not presumed that the legislature in the enactment of statutes intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication.” (*Brown v. Memorial Nat. Home Foundation* (1958) 162 Cal.App.2d 513, 537.)

The language of section 28, read as a whole, does not support an expansion on the limits of pretrial detention in section 12. Subdivision (b) of section 28 lists the enumerated “rights” granted to victims by the referendum. Subdivision (b)(3) pertains to bail, guaranteeing “the safety of the victim and the victim’s family [is] considered in fixing the amount of bail and release conditions for the defendant.” Notably, subdivision (b)(3) does not mention the granting or denying of bail. (Cal. Const. art I, § 28, subdivision (b)(3).)

The three primary purposes of the initiative were to provide crime victims with notification of and an opportunity to be heard in criminal proceedings, to restrict the early release of convicted inmates and to change the procedures for granting and revoking parole. (Cal. Const. art I, § 28.) It did not purport to overhaul section 12, and if it was intended to do so, it would have been mentioned in the initiative.

Moreover, the language of section 28, subdivision (f)(3) does not authorize an abandonment of the fundamental right to bail by vesting trial courts with the discretion to deny it. Stating that a person “may be released on bail” should be interpreted as meaning that a person “must” or “will” be released on bail consistent with section 12. This phrase does not explicitly or implicitly grant any new power to the court; it is an acknowledgment of