IN THE SUPREME COURT OF THE STATE OF NEVADA

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JOSE VALDEZ-JIMENEZ,
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE MARK BAILUS, DISTRICT JUDGE,

Respondent,

and

THE STATE OF NEVADA,
Real Party in Interest.

Case No.

Dist. Ct. C-18-332277-1

PETITION FOR WRIT OF MANDAMUS
(challenging constitutionality of pre-trial bail/confinement order; relief requested as soon as practicable)

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Docket 76417 Document 2018-27499

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSE VALDEZ-JIMINEZ Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE MARK BAILUS, DISTRICT JUDGE, Respondents, and THE STATE OF NEVADA, Real Party in Interest.	)	Case No. Dist. Ct. C-18-332277-1

<u>PETITION FOR WRIT OF MANDAMUS</u>
<u>(challenging constitutionality of pre-trial bail/confinement order; relief requested as soon as practicable)</u>

COMES NOW JOSE VALDEZ-JIMENEZ, by and through his counsel, Deputy Public Defenders NANCY M. LEMCKE and CHRISTY L. CRAIG, and hereby Petitions this Honorable Court for a Writ of Mandamus. This Petition is based on the following memorandum of points

and authorities and all papers and pleadings in the separately filed Appendix.

Dated this 18th day of July, 2018.

PHILIP J. KOHN,
CLARK COUNTY PUBLIC DEFENDER

By: _*/s/ Nancy M. Lemcke*_
NANCY M. LEMCKE, #5416
CHRISTY L. CRAIG, #6262
Attorneys for PETITIONER

AFFIDAVIT OF NANCY M. LEMCKE

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

NANCY M. LEMCKE, being first duly sworn, deposes and says:

1. I am an attorney duly licensed to practice law in the State of Nevada and is the Deputy Clark County Public Defender assigned to represent JOSE VALDEZ-JIMENEZ, in this matter.

2. Petitioner authorized the filing of the instant Petition for Writ of Prohibition/Mandamus.

3. Respondent, at all times mentioned herein, is the District Judge of Department 18 of the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark.

4. Mr. VALDEZ-JIMENEZ was subject to an unlawful pre-trial detention order. Since issues regarding unlawful pretrial confinement necessarily dissipate upon conviction, Mr. VALDEZ-JIMENEZ does not have a plain, speedy, and adequate remedy at law for the statutory and constitutional violations occasioned by the order entered below.

5. This case also presents important issues of first impression, as there exists little, if any, published Nevada authority addressing certain of the issues raised herein.

6. The government's case against Mr. VALDEZ-JIMENEZ will not be prejudiced by the extraordinary intervention sought here as Mr. VALDEZ-JIMENEZ's Mandamus Petition challenges only the constitutional propriety the detention order entered below.

I declare under penalty of perjury that the foregoing is true and correct. (NRS 53.045).

/s/ Nancy M. Lemcke
NANCY M. LEMCKE

SUBSCRIBED and SWORN to before me

This 18th day of July, 2018.

/s/ Carrie M. Connolly
NOTARY PUBLIC in and for said
County and State
Appt. No: 94-2602-1, Exp. 10/11/21

POINTS AND AUTHORITIES

I.

ROUTING STATEMENT

NRAP 17 governs the division of cases between the Nevada Supreme Court and the Court of Appeals. NRAP 17(b) provides that certain cases shall "presumptively" be heard and decided by the court of appeals. "Pretrial writ proceedings challenging discovery orders or orders resolving motions in limine are presumptively assigned to the court of appeals." NRAP 17(b)(14).

This matter arises from Petitioner's unlawful pre-trial confinement order, which was the product of a post-indictment arrest warrant executed by District Court Judge Elizabeth Gonzalez. Judge Gonzalez signed an arrest warrant fixing bail at $40,000 in Petitioner's absence. Since Petitioner cannot make that bail (as it bears no relation to his financial means), the $40,000 bail setting amounts to an order of detention. The assigned District Court declined to overturn or otherwise vacate this unlawful detention order. Since claims deriving the confinement order do not implicate a discovery matter or involve a motion in limine, this case is not presumptively assigned to the Court of Appeals.

NRAP 17(a)(13-14) specifies that that the Supreme Court shall hear "matters raising as a principal issue a question of first impression involving the U.S. or Nevada Constitutions or common law; and matters raising as a principal issue a question of statewide public importance…" The issue presented here raises a constitutionally significant question of first impression, and amounts to a matter of statewide importance. The lower court detained Petitioner unlawfully. Since the propriety of Petitioner's detention order amounts to a critical question of first impression in Nevada, the instant petition should be heard and decided by the Nevada Supreme Court.

II.

STATEMENT OF FACTS/PROCEDURAL HISTORY

Prosecutors allege that Petitioner stole leggings from Victoria's Secret on several occasions between February 23, 2018 and April 12, 2018. App. 5. Prosecutors charged Petitioner via indictment with five counts of Burglary, four counts of Grand Larceny, and one count of Participation in Organized Retail Theft, all felonies (some of the charges overlap, as the purported theft incidents give rise to dual charges of Burglary and Grand Larceny). App. 2; 5.

Based upon the indictment, prosecutors secured a warrant for Petitioner's arrest. App. 1-2. Clark County District Court Judge Elizabeth Gonzalez issued the arrest warrant. App. 1-2. The arrest warrant fixed Petitioner's bail in the amount of $40,000. App. 1-2. This bail setting occurred in Petitioner's absence. App. 1-2. Petitioner cannot make that bail and, consequently, remains jailed on the instant charges. App. 5.

Thereafter, Petitioner filed a Motion to Vacate Detention Order and Release Defendant from Custody. App. 3-11. Petitioner challenged the constitutional propriety of the $40,000 bail setting, which amounted to a *de facto* detention order. App. 3-11. Amongst other things, Petitioner complained that any bail setting that operates as a detention order – such as the $40,000 bail at issue here -- must be preceded by a hearing at which a judge concludes that pretrial detention is the least restrictive means of assuring Petitioner's return to court and ensuring community safety. App. 3-11.

On June 21, 2018, the date set for hearing on the matter, District Judge Mark Bailus denied Petitioner's Motion. App. 18-29. To date, no court has determined, following the filing of the indictment, that preventative detention is the least restrictive means of ensuring community safety and assuring Petitioner's return to court. In the absence of such a

finding by clear and convincing evidence, Petitioner's continued incarceration violates his constitutional and statutory rights. Thus, Petitioner requests that this Honorable Court issue a Writ of Mandamus directing the lower court to vacate the current detention order and conduct a constitutionally appropriate detention hearing, if the State elects to seek pretrial detention.

II.

ISSUE PRESENTED

1. Whether the Petitioner's initial detention order, issued as part of his arrest warrant in his absence and in the absence of an adversarial detention hearing, violated his constitutional and statutory rights?
2. Whether Petitioner's ongoing detention order, issued by trial court absent an adversarial hearing at which prosecutors established that preventative detention was the least restrictive means of assuring his return to court and ensuring community safety, violated his constitutional and statutory rights?

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III.

RELIEF SOUGHT

Petitioner prays that this Court issue a Writ of Mandamus directing Respondent Judge Mark Bailus to grant his Motion to Vacate Detention Order and Release Defendant from Custody. At a minimum, Petitioner requests that this Honorable Court enter an Order directing Respondent to vacate the current detention order and conduct the constitutionally required detention inquiry, if prosecutors elect to seek Petitioner's continued pretrial detention on remand.

IV.

JURISDICTION

Petitioner has no plain, speedy, and adequate remedy at law

Pursuant to NRS 33.170, "a writ of mandamus shall issue in all case where there is not a plain, speedy and adequate remedy in the ordinary course of law."[1] A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an

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[1] NRS 33.170

office, trust or station[2] or to control an arbitrary or capricious exercise of discretion.[3]

Petitioner does not have a plain, speedy and adequate remedy in the ordinary course of law for Respondent's refusal to grant his Emergency Petition for a Writ of Habeas Corpus or, in the Alternative, for a Writ of Mandamus. Petitioner was subject to an unlawful pre-trial detention order. Since issues regarding unlawful pretrial confinement necessarily dissipate upon conviction, Petitioner does not have a plain, speedy, and adequate remedy at law for the statutory and constitutional violations occasioned by the order entered below.

The issues raised here will continue to repeat and yet evade review unless decided by this Honorable Court.

Should Petitioner's lower court case be resolved prior to adjudication of the instant petition, Petitioner nonetheless urges this Honorable Court's intervention. A reviewing court may consider a claim that is otherwise moot "if it involves a matter of widespread importance that is capable of repetition yet evading review." Personhood Nevada v. Bristol, 126 Nev. 599, 602 (2010). The 'capable of repetition yet evading review' doctrine applies "when the duration of the challenged action is 'relatively short' and there is

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[2] See NRS 34.160

[3] See Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981).

a likelihood that a similar issue will arise in the future.'" Traffic Control Servs. v. United Rentals, 120 Nev. 168, 171-72 (2004) (citing Binegar v. District Court, 112 Nev. 544, 548 (1996)).

The issues raised herein are of widespread importance and will continue to repeat yet evade review. The challenged action here, Petitioner's continued detention in the absence of a constitutionally proper detention hearing, is exceedingly short. Moreover, by the time the claims prosecuted here are brought before a reviewing court, claimants have often obtained *de facto* relief in the form of a case negotiation or otherwise. Accordingly, the short duration of the challenged action here (i.e., the post-arrest confinement order in the absence of a timely and proper detention hearing), will preclude appellate review absent application of the 'capable of repetition yet evading review' exception to the mootness doctrine.

Additionally, the claims deriving from unlawful confinement orders like that issued here will – without question – continue to arise in the future. The instant detention order is not unique; it is of the sort issued regularly in Clark County. As such, application of the 'capable of repetition yet evading review' exception to the mootness doctrine is necessary to enjoin future unlawful detention orders similar to that at issue here.

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V.

SUMMARY OF ARGUMENT

The protocol by which pretrial detention orders are promulgated in Clark County is unlawful. First, the procedure by which a bail/detention order is issued following an indictment return is unlawful. Such detention orders, like that issued here pursuant to the instant arrest warrant, are decided in the absence of the accused and often involve use of a standardized bail schedule. Second, Clark County's ongoing, systemic use of bail as a tool of pretrial *confinement* rather than *release* is also unlawful. There are two principal constitutional problems with detaining a person prior to trial simply because he cannot make a monetary payment: (1) jailing someone solely because he cannot pay a sum of money without making a finding that he is able to pay infringes a fundamental right solely on the basis of wealth in violation of the Equal Protection and Due Process Clauses; and (2) jailing someone on an unattainable financial condition violates the Constitution because it deprives a presumptively innocent person of the fundamental right to liberty without complying with the substantive and procedural requirements of a valid order of detention under the Due Process Clause. Jailing someone for failing to pay a sum of money requires a procedurally proper finding that the person is able, but refuses, to

pay the specified sum *or* that no release conditions exist to satisfy the government's compelling interest in assuring community safety and ensuring the accused's return to court. Absent such a procedurally proper hearing (the constitutionally mandated components of which are discussed below) any *de facto* detention order, such as that at issue here, violates Petitioner's constitutional rights.

VI.

ARGUMENT

1. Constitutional Protections Violated by the Current Process in Clark County

A. The Due Process Clause

The Due Process Clauses of the U.S. and Nevada Constitutions provide that "[n]o person shall . . . be deprived of life, liberty, or property without due process of law." U.S. Const. amend. V;[4] Nev. Const. Art. 1, §8. Due Process has two components: substantive and procedural. Substantive due process "prohibits states from infringing fundamental liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest." Lawrence v. Texas, 539 U.S. 558, 593, 123 S. Ct. 2472 (2003). Procedural due process protects citizens "not from the deprivation, but from

[4] The Fifth Amendment Due Process Clause was made applicable to the states via the Fourteenth Amendment to the U.S. Constitution. U.S. Const. amend, V, XIV. See Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489 (1964)

the mistaken or unjustified deprivation of life, liberty, or property." Carey v. Piphus, 435 U.S. 247, 259, 98 S. Ct. 1042 (1978). Because the Due Process Clause of the Nevada Constitution mirrors that of its federal counterpart, Nevada "looks to federal precedent" for guidance in resolving due process claims. Hernandez v. Bennett-Haron, 128 Nev. 580, 587, 287 P.3d 305 (2012).

The essential elements of a procedural due process claim under the Fifth Amendment are "(1) a life, liberty, or property interest requiring protection under the Due Process Clause, and (2) a deprivation of that interest (3) without adequate process." Fields v. Henry Co., 701 F.3d 180, 185 (6th Cir. 2012). "A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty' . . . or [by] an expectation or interest created by the state law or policies". Wilkinson v. Austin, 545 U.S. 209, 221, 125 S. Ct. 2384 (2005) (citation omitted). Freedom of movement, including the right to travel, has long been recognized as a liberty interest which cannot be restricted without due process of law. City of Chicago v. Morales, 527 U.S. 41, 54, 119 S. Ct. 1849 (1999) (citing Kent v. Dulles, 357 U.S. 116, 78 S. Ct. 1113 (1958) (noting that freedom of movement is "a part of our heritage")). Accordingly, any restraint on pretrial liberty implicates due process protections. Those

protections require "adequate process". In the context of a pretrial detention order, "adequate process" requires a hearing before a neutral fact-finder and an opportunity for the accused to be heard at a meaningful time and in a meaningful manner. See U.S. v. Salerno, 481 U.S. 739, 746 (describing due process restrictions on pretrial detention, and citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

B. Equal Protection Clause

The Equal Protection Clause of the U.S. and Nevada Constitutions prohibits the government from denying individuals equal protection of the laws. U.S. Const. amend. XIV; Nev. Const. Art. 1, § 1 and Art. IV, § 21. The Equal Protection Clause may be invoked to analyze the governmental actions that draw distinctions based upon specific characteristics or impinge on an individual's exercise of a fundamental right. See Skinner v. Oklahoma, 316 U.S. 535, 62 S. Ct. 1110 (1942). While the Equal Protection Clause permits the states some discretion in enacting laws which affect some groups of citizens differently than others, a statute or practice is unconstitutional if the "classification rests on grounds wholly irrelevant to the achievement of the State's objective." McGowan v. Maryland, 366 U.S. 420, 425-26, 81 S. Ct. 1101 (1961).

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C. Excessive Bail Clause and Nevada's Statutory Bail Scheme

The Eighth Amendment to the U.S. Constitution states, in part, that "excessive bail shall not be required." U.S.C.A. VIII. Similarly, the Nevada Constitution mandates that all defendants "shall be bailable by sufficient sureties" and that bail shall not be "excessive". Nev. Const. Art. 1 § 6-7. The constitutional right to bail is codified in Nevada statute, which requires that "a person arrested for an offense other than murder of the first degree must be admitted to bail." NRS 178.484(1) (emphasis added).

Nevada Revise Statute 178.4851 provides that criminal defendants may be released without bail upon a showing of good cause that the court "can impose conditions on the person that will adequately protect the health, safety, and welfare of the community and ensure that the person will appear at all times and places ordered by the court." NRS 178.4851. This determination involves consideration of the following factors regarding the accused:

> 1. The length of residence in the community;
> 2. The status and history of employment;
> 3. Relationships with the person's spouse and children, parents or other family members and with close friends;
> 4. Reputation, character and mental condition;
> 5. Prior criminal record, including, without limitation, any record of appearing or failing to appear after release on bail or without bail;
> 6. The identity of responsible members of the community who would vouch for the reliability of the person;

> 7. The nature of the offense with which the person is charged, the apparent probability of conviction and the likely sentence, insofar as these factors relate to the risk of not appearing;
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> 8. The nature and seriousness of the danger to the alleged victim, any other person or the community that would be posed by the person's release;
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> 9. The likelihood of more criminal activity by the person after release; and
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> 10. Any other factors concerning the person's ties to the community or bearing on the risk that the person may willfully fail to appear.

NRS 178.4853.

2. Judge Gonzalez's Detention Order, Later Endorsed by Judge Bailus, Violated Petitioner's Constitutional Rights as it Was Issued Absent an Adversarial Hearing at Which Prosecutors Established Clear and Convincing Evidence that Pretrial Detention is the Least Restrictive Means of Assuring Petitioner's Return to Court and Ensuring Community Safety.

A. Introduction -- Clark County's Systematic Use of Bail as a Mechanism of Pretrial Detention is Unlawful

1. Clark County's Bail System

Clark County uses bail as a mechanism of pre-trial detention. When an individual is arrested, Clark County courts do not resolve the issue of pre-trial confinement without regard to bail. The courts typically set bail based upon the offense or offenses charged, often relying on a standardized bail schedule. The result is that well-resourced defendants are able to buy their freedom, while the poor languish in jail. When bail becomes an unattainable release condition, it becomes a mechanism of preventative detention. And

preventative detention is only allowed when a court concludes, after an adversarial hearing, that prosecutors established clear and convincing evidence that pretrial detention is the least restrictive means of assuring community safety and the defendant's return to court. Absent such a finding, any release condition – of which bail is one – must be attainable. This means that bail must be set in an amount a defendant can pay.

2. The History and Evolution of Bail in the United States

"Bail" is not equivalent to "money bail." "Bail" means *release* before trial. Although common in recent years, the sentence "the Defendant is held on $10,000 bail" is a contradiction: as a historical matter, being "held on bail" was impossible. Timothy R. Schnacke, U.S. Dep't of Justice – Nat'l Inst. for Corr., Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform 1 (Aug. 2014).[5] As the CATO Institute has explained, since well before the Magna Carta, bail has been understood as a device to *free* defendants pretrial. See Brief for Amicus Curiae CATO Inst, Walker v. City of Calhoun, Ga., No. 16-10521, at 3 (11th Cir. 2016).[6]

[5] *Available at* http://www.clebp.org/images/2014-11-05_final_bail_fundamentals_september_8,_2014.pdf.

[6] *Available at* https://object.cato.org/sites/cato.org/files/pubs/pdf/walker-v-city-of-calhoun.pdf.

"Money bail" is the practice of requiring a defendant to forfeit money if they do not appear for trial. Money bail can be either secured or unsecured. A secured money bail system requires the defendant to deposit money before they are released; an unsecured money bail system allows the defendant to be released without depositing any money so long as they promise to pay if they fail to appear.

As Chief Judge Rosenthal of the U.S. District Court for the Southern District of Texas recently summarized in her comprehensive discussion of the history of the American bail system, ODonnell v. Harris Co., 251 F.Supp.3d 1052, 1068 (S.D. Tex. 2017),[7] bail originated in medieval England "as a device to free untried prisoners." Daniel J. Freed & Patricia M. Wald, Bail in the U.S.: 1964 1 (1964).The Statue of Westminster, enacted by the English Parliament in 1275, listed the offenses that would be bailable and provided criteria for determining whether someone should be released. These criteria included the strength of the evidence against the accused and the severity of the accused's criminal history. See June Carbone, Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail, 34 Syracuse L. Rev. 517, 523-26 (1983); Note, Bail: An Ancient Practice Reexamined, 70 Yale L.J.

[7] Aff'd as modified, 882 F.3d 528 (5th Cir. 2018).

966 (1961). In 1679, Parliament adopted the Habeas Corpus Act to ensure that an accused could obtain a timely bail hearing. And the English Bill of Rights, enacted in 1679, prohibited excessive bail. See Carbone, *supra*, at 528.

The American States continued this tradition. Beginning with the Pennsylvania Constitution of 1682, 48 states, including Nevada, have protected, by constitution or statute, a right to bail "by sufficient sureties, except for capital offenses when the proof is evident or the presumption great." Matthew J. Hegreness, America's Fundamental and Vanishing Right to Bail, 55 Ariz. L. Rev. 909, 916 (2013).

As the U.S. District Court for the Southern District of Texas recently explained in its detailed opinion striking down Harris County's money bail practices, "[h]istorians and jurists confirm that from the medieval period until the early American republic, a bail bond was typically based on an individualized assessment of what the arrestee or his surety *could pay* to assure appearance and secure release." ODonnell, 251 F.Supp.3d at 1069 (emphasis added). The court explained the English practice at the time of the ratification of the U.S. Constitution: "'The rule is, where the offence is prima facie great, to require good bail; moderation nevertheless is to be observed, and such bail only is to be required as the party is able to procure;

for otherwise the allowance of bail would be a mere colour for imprisoning the party on the charge.'" Id. (quoting 1 J. Chitty, A Practical Treatise on the Criminal Law 88-89 (Philadelphia ed. 1819)).

Jurisdictions across America began to depart from the original understanding of bail in the middle of the 20th Century. And in the last two decades, the use of unaffordable secured money bail has increased in scope and severity. In 1996, 59% of felony defendants had to meet a financial condition to regain their liberty pretrial. Timothy C. Hart & Brian A. Reaves, U.S. Dep't of Justice, Felony Defendants in Large Urban Counties, 1996, at 17-18 (1999).[8] By 2009, that percentage had climbed to 72%. Brian A Reaves, U.S. Dep't of Justice, Felony Defendants in Large Urban Counties, 2009-Statistical Tables, at 15, 20 (2013).[9] In 1990, the majority of felony defendants who were not detained while their cases were pending were released without financial conditions. In 2009, only 23% of felony defendants who were not detained while their cases were pending were released without financial conditions. And the average amount of money required to be paid as a condition of release has increased. Vera Inst of Justice, Incarceration's Front Door: The Misuse of Jails in America, 29 (Feb.

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[8] *Available at* https://www.bjs.gove/content/pub/pdf/fdluc96.pdf.
[9] *Available at* https://www.bjs.gov/content/pub/pdf/fdluc09.pdf.

2015).[10] By 2009, about half of felony defendants subject to financial conditions of release could not meet them and remained in custody until the disposition of their cases. Felony Defendants, 2009-Statistical Tables, at 17.

The routine use of unaffordable secured money bail resulted in a "crisis." See U.S. v. Salerno, 481 U.S. 739, 742, 107 S. Ct. 2095 (1987) (describing "a bail crisis in the federal courts"); Caleb Foote, The Coming Constitutional Crisis in Bail: I, 113 U. Pa. L. Rev. 959, 971 (1965). Two distinct evils of the secured money bail system provoked the crisis: It imperiled public safety by allowing potentially dangerous defendants to be released without any consideration of their dangerousness, and it worked an "invidious discrimination" against those who could not pay. See, e.g., Williams v. Illinois, 399 U.S. 235, 242, 90 S. Ct. 2018 (1970). Over 50 years ago, Attorney General Robert Kennedy led a successful movement to reform bail in the federal courts. Kennedy testified:

> Bail has become a vehicle for systematic injustice. Every year in this country, thousands of persons are kept in jail for weeks and even months following arrest. They are not yet proven guilty. They may be no more likely to flee than you or I. But, nonetheless, most of them must stay in jail because, to be blunt, they cannot afford to pay for their freedom . . . Plainly or bail

[10] *Available at* https://storage.googleapis.com/vera-web-assets/downloads/Publications/incarcerations-front-door-the-misuse-of-jails-in-america/legacy_downloads/incarcerations-front-door-report_02.pdf.

> system has changed what is a constitutional right into an expensive privilege.

Testimony on Bail Legislation before S. Judiciary Subcomm. on Const. Rights and Improvements in Judicial Machinery (Aug. 4, 1964).[11]

One of the results of the movement to reform the bail system in the 1960s was the virtual elimination of cash bonds in the District of Columbia and in all Federal courts. The Bail Reform Act "assure[d] that all persons, regardless of their financial status, [would] not needlessly be detained pending their appearance to answer charges . . . when detention serves neither the ends of justice nor the public interest." Bail Reform Act of 1966, Pub. L. No. 89-465, § 2, 80 Stat. 214, 214 (repealed in 1984). In 1984, Congress updated the Bail Reform Act as part of the Comprehensive Crime Control Act. See Bail Reform Act of 1984, 18 U.S.C. §§ 3141-50. Federal courts and the courts of the District of Columbia transitioned to a rigorous, evidence-based system of non-financial conditions that remains in place today. If the government believes that a defendant cannot be released pretrial because she is too dangerous or too likely to flee, the government may seek an order of detention, but only after it has satisfied the court, at a "full-blown

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[11] *Available at* http://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/08-04-1964.pdf.

adversarial hearing," that no condition or combination of conditions could assure the defendant's appearance at trial and the safety of the community. Salerno, 481 U.S. at 750. Indeed, *the constitutionality of any moneyed bail system requires as much in order to meet constitutional muster.* Id. at 750-55.

Thus, the government may not detain someone just because she does not have enough money, nor may the government use money to detain *sub rosa* people it believes to be dangerous. See, e.g., 18 U.S.C. § 3143(c)(2) ("The judicial officer may not impose a financial condition that results in the pretrial detention of the person"). Although courts may detain defendants pending trial, they may not do so without rigorous process. As Chief Judge Rosenthal of the U.S. District Court for the Southern District of Texas recently concluded,"[t]he federal history of bail reform confirms that bail is a mechanism of pretrial release, not of preventative detention." O'Donnell, 251 F.Supp. 3d at 1070.

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B. Any Bail Setting Exceeding That Which Petitioner Could Pay, in the Absence of the Appropriate Hearing and Findings, Violated Petitioner's Constitutional and Statutory Rights.

1. Jailing Petitioner For the Inability to Make a Monetary Payment Violates the Equal Protection and Due Process Clauses of the U.S. and Nevada Constitutions

The principle that jailing the poor because they cannot pay a sum of money is unconstitutional has deep roots in American constitutional law. See Williams v. Illinois, 399 U.S. 235, 241, 90 S. Ct. 2018 (1970) ("[T]he Court has had frequent occasion to reaffirm allegiance to the basic command that justice be applied equally to all persons"); Douglas v. California, 372 U.S. 353, 355, 83 S. Ct. 814 (1963) (condemning the "evil" of "discrimination against the indigent"); Griffin v. Illinois, 351 U.S. 12, 19, 76 S. Ct. 585 (1956) ("There can be no equal justice where the kind of trial a man gets depends on the amount of money he has"); see also Mayer v. City of Chicago, 404 U.S. 189, 193, 92 S. Ct. 410 (1971).

These principles have been applied in a variety of contexts in which a government jailed someone because of her inability to make a monetary payment. In Tate v. Short, 401 U.S. 395, 91 S. Ct. 668 (1971), the U.S. Supreme Court held that "the Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in

full." Id. at 398. In Bearden v. Georgia, 461 U.S. 660, 103 S. Ct. 2064 (1983), the Court explained that to "deprive [a] probationer of his conditional freedom simply because, through no fault of his own he cannot pay [a] fine... would be contrary to the fundamental fairness required by the Fourteenth Amendment." Id.at 672-73.

For pretrial arrestees, the rights at stake are even more significant because the arrestees' liberty is not diminished by a criminal conviction; they are presumed innocent. Justice Douglas framed the basic question that applies to pretrial detainees: "To continue to demand a substantial bond which the defendant is unable to secure raises considerable problems for the equal administration of the law" Bandy v. U.S., 81 S. Ct. 197, 197-98 (1960) (Douglas, J., in chambers). The Supreme Court Justice further espoused "Can an indigent be denied freedom, where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom?" Id.

The Fifth Circuit answered that question in Pugh v. Rainwater, 557 F.2d 1189, 1190 (5th Cir. 1977) (*en banc*). A panel opinion struck down a Florida Rule of Criminal Procedure dealing with money bail because it unconstitutionally jailed indigent pretrial arrestees solely because they could not make a monetary payment. Id. The *en banc* court agreed with the

constitutional holding of the panel opinion, but reversed the panel's facial invalidation of the *entire* Florida Rule. The *en banc* court held that the Florida Rule did not on its face require Florida courts to set secured monetary bail for arrestees. But the court explained that, were this to happen to an indigent person, it would be unconstitutional:

> We have no doubt that in the case of an indigent, whose appearance at trial could reasonably be assured by one of the alternate forms of release, pretrial confinement for inability to post money bail would constitute imposition of an excessive restraint...

Pugh, 572 F.2d at 1058 (5th Cir. 1978).[12] Indeed, "[t]he incarceration of those who cannot [afford a cash payment], without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements." Id. at 1057;[13] see also Williams v. Farrior, 626

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[12] Rainwater further explained that it refused to require a priority to be given in all cases – including those of the non-indigent – to non-monetary conditions of release. The court noted that, at least for wealthier people, some might actually prefer monetary bail over release with certain other conditions, and that the court would not invalidate a state Rule that allowed for those other conditions in appropriate cases. Pugh v. Rainwater, 572 F.2d 1053, 1057 (5th Cir. 1978).

[13] Four circuit judges dissented in Rainwater. Although the agreed with the constitutional principles announced by the majority that the Constitution forbids jailing the poor when they cannot afford monetary bail, they were concerned about the majority's faith in the Florida courts not to apply the new state Rule in unconstitutional ways to detain the indigent. Pugh v. Rainwater, 572 F.2d 1053, 1067 (5th Cir. 1978) ("I cannot escape the conclusion that the majority has chosen too frail a vessel for such a ponderous cargo of human rights.") (Simpson, J., dissenting).

F.Supp. 983, 985 (S.D. Miss. 1986) ("For the purposes of the Fourteenth Amendment's Equal Protection Clause, it is clear that a bail system which allows only monetary bail and does not provide for any meaningful consideration of other possible alternatives for indigent pretrial detainees infringes on both equal protection and due process requirements.").

The U.S. Justice Department recently endorsed this view, asserting that "[i]ncarcerating individuals solely because of their inability to pay for their release, whether through the payment of fines, fees, or a cash bond, violates the Equal Protection Clause of the Fourteenth Amendment." Jones v. City of Clanton, 2015 WL 5387219, at *4 (M.D. Ala. Sept. 14, 2015); see also Varden v. City of Clanton, Civ. No. 15–34, Docket. No. 26 at 1 (M.D. Ala. Feb. 13, 2015). The Justice Department reasoned that a secured money bail schedule, like the one utilized in Clark County, "do[es] not account for individual circumstances of the accused" and it "essentially mandate[s] pretrial detention for anyone who is too poor to pay the predetermined fee." Jones, 2015 WL 5387219, at *9.

Accordingly, several federal district courts have held that state laws setting a particular monetary bail amount without individualized considerations of indigency violate the Due Process Clause. See, e.g., Rodriguez v. Providence Cmty. Corr., Inc., 155 F.Supp.3d 758, 767-70 and

n. 10 (M.D. Tenn. 2015) (granting class-wide preliminary injunction enjoining state policy requiring monetary payment for probations to obtain release pending a revocation hearing "without an inquiry into the individual's ability to pay the bond and whether alternative methods of ensuring attendance at revocation hearings would be adequate"); Williams v. Farrior, 626 F.Supp. 983, 985 (S.D. Miss. 1986) ("[I]t is clear that a bail system which allows only monetary bail and does not provide for any meaningful consideration of other possible alternatives for indigent pretrial detainees infringes on both equal protection and due process requirements."); Buffin v. City and Co. of San Francisco, No. 15-CV-04959-YGR, 2018 WL 424362 at *7 (N.D. Cal. Jan. 16, 2018); cf. Abdi v. Nielson, No. 1:17-CV-0721 EAW, 2018 WL 798747, at *4 (W.D.N.Y. Feb. 9, 2018).

These decisions make clear that requiring money bail as a release condition in an amount impossible for the defendant to pay is equivalent to a detention order, "which is only appropriate when the state shows and the court finds that no condition or combination of conditions of release could satisfy the purposes of bail, to assure the defendant's appearance at trial or hearing and the safety of the public." Weatherspoon v. Oldham, 2018 WL 1053548, at *6 (W.D. Tenn. Feb. 26, 2018) (additional citations omitted).

Thus, in order to withstand constitutional scrutiny, unattainable money bail settings must be preceded by a hearing at which the court determines the least restrictive means of ameliorating an accused's risk of flight and danger to the community. Absent such a determination, an unattainable release condition – such as an unattainable bail setting – operates as a *de facto* detention order that discriminates on the basis of wealth. Weatherspoon v. Oldham, 2018 WL 1053548, at *6 (W.D. Tenn. Feb. 26, 2018). This violates equal protection and due process guarantees.

2. **Jailing Petitioner Without a Robust Hearing on, and Specific Findings Concerning, his Dangerousness and Risk of Flight Simply Because He Cannot Pay Secured Money Bail Violates the Due Process Clauses of the U.S. and Nevada Constitutions**

The right to pretrial liberty is "fundamental." U.S. v. Salerno, 481 U.S. 739, 750, 107 S. Ct. 2095 (1987); see also Zadvydas v. Davis, 533 U.S. 678, 690, 121 S. Ct. 2491 (2001) ("Freedom 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"); Foucha v. Louisiana, 504 U.S. 71, 80, 112 S. Ct. 1780 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."); U.S. v. Montalvo-Murillo, 495 U.S. 711, 716, 110 S. Ct. 2072 (1990) (holding that release prior to trial is a "vital liberty interest"). Because "[f]reedom from bodily

restraint is a fundamental liberty interest," any deprivation of that liberty must withstand heightened constitutional scrutiny, which generally requires that the deprivation be narrowly tailored to further a compelling government interest. See, e.g., Lopez-Valenzuela v. Arpaio, 770 F.3d 772, 781 (9th Cir. 2014) (en banc) (applying strict scrutiny to strike down Arizona bail law that required detention after arrest for undocumented immigrants accused of certain offenses). For that reason, the Salerno Court applied exacting scrutiny to a presumptively innocent person's loss of pretrial liberty and required that the government employ rigorous procedures to protect that liberty. See Salerno, 481 U.S. at 746 (describing "procedural due process" restrictions on pretrial detention, and citing Matthews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893 (1976)).

An order setting unattainable conditions of release is equivalent to an order of detention. U.S. v. Mantecon-Zayas, 949 F.2d 548, 550 (1st Cir. 1991); U.S. v. Leathers, 412 F.2d 169, 171 (D.C. Cir. 1969) ("[T]he setting of bond unreachable because of its amount would be tantamount to setting no conditions at all."); ODonnell v. Harris County, 251 F.Supp.3d 1052, 1143-44 (S.D. Tex. Apr. 28, 2017) (holding that secured money bail set in an amount that an arrestee cannot afford is constitutionally equivalent to an order of detention); State v. Brown, 338 P.3d 1276 (N.M. 2014). Thus, it

must be narrowly tailored in order to survive heightened constitutional scrutiny. See Brown, 338 P.3d at 1292 ("Intentionally setting bail so high as to be unattainable is simply a less honest method of unlawfully denying bail altogether . . . If a defendant should be detained pending trial . . ., then that defendant should not be permitted any bail at all. Otherwise the defendant is entitled to release on bail, and excessive bail cannot be required.").

To meet this standard, a court must find on the record that the detainee presents a risk of flight or danger to the community and that no conditions or combination of conditions alternative to detention could reasonably mitigate that danger. Salerno, 481 U.S. at 750. In Salerno, the U.S. Supreme Court considered a facial challenge to the federal Bail Reform Act. That Act permits the government to detain people found to be highly dangerous, after an individualized "full blown adversary hearing," and only where the "Government... convince[s] a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community . . ." 481 U.S. at 740. The Supreme Court subjected the Bail Reform Act to heightened judicial scrutiny, holding that the government may detain individuals before trial only where that detention is carefully limited to serve a 'compelling' government interest. Id. at 746.

Salerno imposed two interlocking sets of requirements on preventative detention: substantive and procedural. Id. at 746. The U.S. Supreme Court explained that the "Due Process Clause protects individuals against two types of government action". Id. First, "'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience' or interferes with rights 'implicit in the concept of ordered liberty.'" Id. Secondly, if a "government action depriving a person of life, liberty, or property survives substantive due process scrutiny," a court must subsequently determine whether the government action satisfies "procedural due process" by having the governmental action "implemented in a fair manner". The procedural requirements are necessary to ensure that the substantive ones have been met.

Substantively, Salerno required that pretrial detention survive heightened constitutional scrutiny. The government may deprive a presumptively innocent person of her physical liberty only if doing so is tailored to advance a compelling interest. Id. at 746-48. Therefore, the government may detain someone pretrial only if other, less restrictive means are available to serve the state's interests.

Procedurally, Salerno held that orders of detention may be entered after rigorous procedures have been met. These procedures include, but are

not necessarily limited to, a "full-blown adversary hearing." Id. at 750; a heightened evidentiary standard of proof of dangerous/flight risk by "clear and convincing evidence," Id. at 751; consideration of alternative conditions or release; Id. at 741; and "written findings of fact and a written statement of reasons for a decision to detain." Id. Consistent with its reliance on procedural due process cases, Id. at 746 (citing Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893 (1976)), Salerno insists on procedures that are sufficient to ensure that any preventive detention be consistent with substantive due process.

Following Salerno, courts across the country have made clear that pretrial detention protocols must be consistent with both procedural and substantive due process. See Simpson v. Miller, 387 P.3d 1270, 1276 (Ariz. 2017) ("[I]t is clear from Salerno and other decisions that the constitutionality of a pretrial detention scheme turns on whether particular procedures satisfy substantive due process standards"); see also Lopez-Valenzuela v. Arpaio, 770 F.3d 772, 781 (9th Cir. 2014) (en banc) (applying strict scrutiny to strike down an Arizona law that required detention after arrest without individualized consideration of an arrestee's circumstances); ODonnell v. Harris County, 251 F.Supp.3d 1052 (S.D. Tex. Apr. 28, 2017); Carlisle v. Desoto County, Mississippi, 2010 WL 3894114,

at *5 (N.D. Miss. Sept. 30, 2010) (holding that because a "compelling state interest" was required for pretrial detention, the plaintiff's rights were violated if he was jailed without consideration of non-financial alternatives); Williams v. Farrior, 626 F.Supp. 983, 986 (S.D. Miss. 1986) (holding that a state's pretrial detention scheme must meet "strict judicial scrutiny" because of the fundamental rights at issue).

In Simpson, the Arizona Supreme Court considered a state constitutional amendment that required the pretrial detention of people charged with "sexual assault, sexual conduct with a minor under fifteen years of age or molestation of a child under fifteen years of age when the proof is evident or the presumption great." Simpson, 387 P.3d at 1273. Arizona procedures required a "full-blown adversary hearing" before someone was detained pretrial under this provision, but the hearing was to determine only whether the proof was evident that the defendant committed the alleged offense; trial courts did not inquire into dangerousness or risk of flight separately. The Arizona Supreme Court subjected this provision to "heightened scrutiny" under the Due Process Clause of the U.S. Constitution. Id. at 1277. Although it concluded that "heightened scrutiny" and "strict scrutiny" are not necessarily identical, and that Salerno applied the former rather than the latter, the court nonetheless concluded that

Arizona's preventative detention regime failed the constitutional test. Id. at 1278. The court opined that the state must either provide individualized determinations of dangerousness for every person detained pretrial or "if the state chooses not to provide such determinations, its procedure would have to serve as a convincing proxy for unmanageable flight risk or dangerousness." Id. at 1277 (quotation marks and citation omitted). The court held that Arizona's procedures were insufficient because nothing about the crimes with which the defendant was charged served as a convincing proxy for unmanageable risk of flight or dangerousness.

In Lopez-Valenzuela, the Ninth Circuit Court of Appeals considered an Arizona law that categorically denied pretrial release to any arrestee who was an undocumented immigrant to the U.S. The court applied "strict scrutiny" to the Arizona law, relying on Salerno. 770 F.3d at 786. Under strict scrutiny, the court concluded, the law could not survive. "Whether a categorical denial of bail for noncapital offenses could *ever* withstand heightened scrutiny is an open question," the court noted. Id. at 785 (emphasis added). But the court concluded that a blanket prohibition on pretrial release for undocumented immigrants clearly could not survive heightened scrutiny. Id. To detain a presumptively innocent person prior to

trial, the court reasoned, the state must offer convincing – and individualized – rationales. Id. at 786.

Thus, in order to deprive a presumptively innocent person of her physical liberty, due process requires that prosecutors demonstrate 1) by "clear and convincing evidence" at a "full-blown adversarial hearing" that the defendant presents an "identified and articulable threat" to the community or presents a risk of flight and 2) *no conditions or combination of conditions alternative to detention* could reasonably mitigate that danger based on an individualized consideration of defendant's unique circumstances. Id. at 750-51 (emphasis added);[14] see also Weatherspoon v. Oldham, 2018 WL 1053548, at *14-15, *17 (W.D. Tenn. Feb. 26, 2018). A state court procedure that does not require as much violates due process.

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[14] Substantive due process requires that pretrial detention survive "heightened constitutional scrutiny" and the government may only detain where that detention is carefully limited to serve a "compelling" government interest. Salerno, 481 U.S. at 746. As a result, the government may detain someone pretrial only if other, less restrictive means are not available to serve the state's interests. Id.; U.S. v. Karper, 847 F. Supp. 2d 350, 362 (N.D.N.Y. 2011) (finding release conditions cannot exceed that which is minimally necessary to ensure the accused's appearance in court and protect the community against future dangerousness). Procedural due process requires rigorous procedures be met to detain someone pretrial, including, but not limited to, a "full-blown adversary hearing," a heightened evidentiary standard of proof of dangerousness/flight risk by "clear and convincing evidence," consideration of alternative conditions or release, and "written findings of fact and a written statement of reasons for a decision to detain." Salerno, 481 U.S. at 741, 750-51.

See, e.g., Rodriguez v. Providence Cmty. Corr., Inc., 155 F.Supp.3d 758, 767-70 and n. 10 (M.D. Tenn. 2015); Jones v. City of Clanton, No. 215CV34-MHT, 2015 WL 5387219, at *2 (M.D. Ala. Sept. 14, 2015) (holding that the "use of a secured bail schedule to detain a person . . . without an individualized hearing regarding the person's indigence and the need for bail or alternatives to bail, violates the Due Process Clause").

Nevada law reflects this basic *concept* but omits the procedural protections required by Salerno. NRS 178.4851 provides that criminal defendants may be released without bail upon a showing of good cause that the court "can impose conditions on the person that will adequately protect the health, safety, and welfare of the community and ensure that the person will appear at all times and places ordered by the court." NRS 178.4851. This runs afoul of Salerno in that it burdens the defense with establishing 'good cause' for release, and speaks only to the issue of release *without bail.*[15] Indeed, as Salerno makes clear, the constitutionally proper inquiry is whether conditioned (or unconditioned) release can satisfy the government's interest in protecting the community and assuring the defendant's return to court; and *the government bears the burden* of establishing that it does not

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[15] To the extent that NRS 178.4851obviates the procedural requirements mandated by Salerno, it is unconstitutional. See U.S. v. Salerno, 481 U.S. at 750; Stack v. Boyle, 342 U.S. 1, 5, 72 S. Ct. 1 (1951); U.S. Const. amend. V, XIV; Nev. Const. Art. 1, § 8.

before a defendant can be detained pretrial (i.e., held pursuant to unattainable release conditions).[16]

While NRS 178.4853 sets forth factors bearing the issue of pretrial release,[17] those factors must be considered in the context of the inquiry required by Salerno. So Nevada courts should consider the factors outlined in NRS 178.4583 when assessing the need for preventative detention and, in cases where a preventative detention request has been denied, when fashioning release conditions minimally necessary to protect the community

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[16] See also, Lopez-Valenzuela v. Arpaio, 770 F.3d 772, 785-86 (9th Cir. 2014) (*en banc*) (finding Arizona law establishing a blanket prohibition on pretrial release for any undocumented immigrants was unconstitutional because it did not require the state to offer convincing – and individualized – rationales for detention); Simpson v. Miller, 387 P.3d 1270, 1277-78 (Ariz. 2017) (finding an Arizona statute unconstitutional that required pretrial detention on all sex-related charges because the statute did not provide for individualized determination of dangerousness).

[17] The statutory factors are: 1) The length of residence in the community; 2) The status and history of employment; 3) Relationships with the person's spouse and children, parents or other family members and with close friends; 4) Reputation, character and mental condition; 5) Prior criminal record, including, without limitation, any record of appearing or failing to appear after release on bail or without bail; 6) The identity of responsible members of the community who would vouch for the reliability of the person; 7) The nature of the offense with which the person is charged, the apparent probability of conviction and the likely sentence, insofar as these factors relate to the risk of not appearing; 8) The nature and seriousness of the danger to the alleged victim, any other person or the community that would be posed by the person's release; 9) The likelihood of more criminal activity by the person after release; and 10) Any other factors concerning the person's ties to the community or bearing on the risk that the person may willfully fail to appear.

and ensure a defendant's return to court. This may include consideration of bail as a *release condition* to the extent it is minimally necessary to ensure a defendant's return to court and/or protect the community. However, "When financial conditions are warranted, the least restrictive conditions principle requires that an unsecured bond be considered first." ABA Standards for Crim. Justice (3rd Ed.) Pretrial Release (2007), Std. 10-1.4(c) (commentary) at 43-44.[18] This requires individualized consideration of a defendant's unique circumstances, including "individualized considerations of indigency." Weatherspoon, 2018 WL 1053548, at *14-15.

As set forth above, Petitioner's bail setting, which operated as a *de facto* detention order, was issued in the absence of the constitutionally required hearing, inquiry, and findings outlined in Salerno. To date, no Court has found, after an adversarial hearing, clear and convincing proof that jailing Petitioner is the least restrictive means of assuring his return to court and community safety. Accordingly, the instant detention order violates Petitioner's Due Process rights.

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[18] Discussed at Nevada S.Ct. Judicial Conference (https://nvcourts.gov/Conferences/District_Judges/Documents/The_History_of_Bail_-_DJ_Conf/) and available at: https://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_blk.html#10-1.4.

3. Jailing Petitioner Pursuant to a Bail Setting That Fails to Account for His Ability to Pay Violates the Excessive Bail Clauses of the Federal and State Constitutions as Well as Nevada Law

As set forth above, the Eighth Amendment to the U.S. Constitution states, in part, that "excessive bail shall not be required." U.S.CA. VIII, XIV. Similarly, the Nevada Constitution mandates that all defendants "shall be bailable by sufficient sureties" and that bail shall not be "excessive". Nev. Const. Art. 1 §§ 6-7. The constitutional right to bail is similarly codified in Nevada statute, which requires that "a person arrested for an offense other than murder of the first degree must be admitted to bail." NRS 178.484(1).

The Eighth Amendment prohibits release conditions exceeding a purported threat posed by a particular defendant. Salerno, 481 U.S. at 754 (requiring that "the Government's proposed conditions of release or detention not be excessive in light of the perceived evil"). Bail and/or release conditions are "excessive" if they exceed that which is minimally necessary to ensure the accused's appearance in court and protect the community against future dangerousness. Stack v. Boyle, 342 U.S. 1, 5, 72 S. Ct. 1 (1951); U.S. v. Karper, 847 F.Supp.2d 350, 362 (N.D.N.Y. 2011).

Petitioner's $20,000 detention order for two misdemeanors far exceeded that which is necessary to protect the community and ensure his return to Court. Prosecutors never established that such a bail

setting/detention order was minimally necessary to ameliorate Petitioner's risk of flight and danger to the community. Accordingly, the instant bail/detention order amounts to a random number unrelated to any risk posed by Petitioner. This violates the Excessive Bail Clauses of the federal and state constitutions, as well as Nevada law.

VII.

CONCLUSION

Petitioner's $40,000 bail setting amounts to a *de facto* detention order as he can not pay that bail and, consequently, remains jailed at the Clark County Detention Center. Petitioner's bail was set upon execution of a post-indictment arrest warrant, in Petitioner's absence and in the absence of an adversarial detention hearing. Judge Bailus found no fault with this process, and refused to employ the constitutionally required pretrial detention protocol outlined above. Indeed, at no time during the pendency of these proceedings has a judge found clear and convincing proof, following an adversarial hearing, that pretrial detention is the least restrictive means of assuring Petitioner's return to court and ensuring community safety. Petitioner's continued detention in the absence of such a hearing and finding(s) violates his constitutional and statutory rights.

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VIII.

RELIEF REQUESTED

For the foregoing reasons, Petitioner requests that this Honorable Court issue a Writ of Mandamus directing Respondent Judge Mark Bailus to grant his Motion to Vacate Detention Order and Release Defendant from Custody. At a minimum, Petitioner requests that this Honorable Court enter an Order directing Respondent to vacate the current detention order and conduct the constitutionally required detention inquiry, if prosecutors elect to seek Petitioner's continued pretrial detention on remand.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 18 day of July, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM LAXALT
STEVEN S. OWENS

NANCY M. LEMCKE
CHRISTY L. CRAIG
HOWARD S. BROOKS

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

MARK BAILUS
District Court, Dept. XVIII
200 Lewis Avenue
Las Vegas, NV 89101

BY *__/s/ Carrie M. Connolly__*
Employee, Clark County Public
Defender's Office