

IN THE SUPREME COURT OF THE STATE OF NEVADA

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. 76417
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REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS
(challenging constitutionality of pre-trial bail/confinement order;
relief requested as soon as practicable)

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JOSE VALDEZ-JIMINEZ)	Case No. 76417
Petitioner,)	
)	Dist. Ct. C-18-332277-1
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COMES NOW JOSE VALDEZ-JIMENEZ, by and through his counsel, Deputy Public Defenders NANCY M. LEMCKE and CHRISTY L. CRAIG, and hereby submits the instant Reply in Support of Petition for a Writ of Mandamus. This Reply is based on the following memorandum

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

Dated this 16thth day of October, 2018.

PHILIP J. KOHN,
CLARK COUNTY PUBLIC DEFENDER

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

POINTS AND AUTHORITIES

I.

STATEMENT OF FACTS/PROCEDURAL HISTORY

Respondent alleges that Petitioner is a “prolific thief, well known in the retail community” who “repeated [his theft] scheme 12 days after” his arrest and release on the first offense with which he is currently charged. Answer, p. 3. If true, this should animate a willingness on the part of prosecutors to meet the constitutionally-conferred burden required to detain an arrestee pre-trial. Instead, by defending the unconstitutional bail protocol long employed by Clark County, Respondent keeps the Court and Petitioner guessing as to what prosecutors intended with the \$40,000 bail they demanded of the lower court(s). Is Respondent saying that Petitioner, if disposed to adequate financial resources, is suitable for bailed release? Or is Respondent saying that, given Petitioner’s repeated assurances that he cannot pay the \$40,000 sum, prosecutors want Petitioner detained pending trial?

The absence of any concrete answer to this question illustrates one of the constitutionally significant flaws in a system that fails to require prosecutors to specify, on the record, whether they are seeking pretrial detention and fails to require proof that detention is the least restrictive

means of assuring an accused's return to court and community safety. For the poor, the implications of a bail number standing in place of a transparent detention order are profound. This is because bail numbers invariably translate to orders of confinement for the poorest members of the Clark County population. They are detention mechanisms dressed up as reasonable release conditions.

With his Mandamus Petition, Petitioner seeks to end this unlawful and insidious practice.

II.

JURISDICTION

“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 office, trust or station² or to control an arbitrary or capricious exercise of discretion.³

¹ NRS 33.170

² See NRS 34.160

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

Respondent claims that “Petitioner is not entitled to this Court’s extraordinary intervention because he has an adequate remedy at law.” Answer, p. 5. But Respondent fails to identify *what* that remedy is.⁴

The only way for a detainee to seek review of his/her lower court confinement order is to prosecute an extraordinary appeal to this Honorable Court. This Court has rejected as moot challenges to pretrial detention orders when the case from which the challenged detention order derives resolves prior to this Court’s intervention. See, e.g., Sherard v. Eighth Jud. Dist. Ct., Supreme Court Case No. 76398 (“We deny the petition as moot because petitioner is no longer in custody and fails to demonstrate that the issue is capable of repetition yet evading review.”) (citations omitted) September 14, 2018. So if Petitioner wants to avail himself of the appellate review to which he is entitled, he must do so pre-trial. In other words, he has no remedy at law for the constitutional violations occasioned by his current bail setting other than through the relief sought here.

⁴ Respondent suggests that filing a motion in the lower court requesting release amounts to an adequate remedy at law (“Indeed, Petitioner took advantage of one such remedy [at law] by filing his Motion to Vacate.” Answer, p. 5). This misapprehends “remedy at law.” Remedy at law speaks to the ability to prosecute claims before all available Nevada courts. This includes the appellate courts. Filing a lower court motion for which there is no available post-trial appellate review (see Sherard v. Eighth Jud. Dist. Ct., Supreme Court Case No. 76398) does not amount to an adequate remedy at law.

III.

SUMMARY OF ARGUMENT

The issue before this Honorable Court is one of *process*. Petitioner challenges the *process* by which *de facto* detention orders, cleverly disguised as bail settings, issue in Clark County. In the absence of the constitutionally required *process*, bail settings operating as detention orders, such as the \$40,000 bail setting here, violate both Due Process and Equal Protection guarantees. They violate Due Process guarantees because, *inter alia*, they are set in the absence of an adversarial hearing at which the defense is present and at which prosecutors establish clear and convincing evidence that incarceration is the least restrictive way of assuring an accused's return to court and community safety. They violate Equal Protection guarantees because the end result – a bail number rather than a specifically-articulated, transparent detention order – operates as a release condition for the wealthy but a detention order for the poor.

The issue before this Court is *not* whether, on the merits, pretrial detention is the least restrictive means of assuring Petitioner's return to court

and community safety. That is a determination reserved for the trial court, applying the constitutionally required procedure outlined here, on remand.⁵

IV.

ARGUMENT

A. The Substantive and Procedural Due Process Protections Required by Salerno Apply to the States

Respondent asserts that U.S v. Salerno, 481 U.S. 739 (1987) is neither instructive nor controlling here. Answer, p. 6-7 (“The issue in *Salerno* involved the Federal Bail Reform Act... However, the State of Nevada is not governed by the United States Code or the Federal Bail Reform Act of 1984. Thus, *Salerno* does not mandate the procedural requirements of a ‘full blown adversarial hearing’ except when a federal court applies the Bail Reform Act.”). With this, Respondent fails to understand the constitutional principles at work in Salerno, and their corresponding application to the states.

In Salerno, the U.S. Supreme Court considered a constitutional challenge to the federal Bail Reform Act. The Bail Reform Act allowed for the pre-trial detention of individuals charged with certain offenses once the government established, at an adversarial hearing, that no release conditions

⁵ So Respondent’s rhetoric about Petitioner’s purported criminal enterprises, while helpful in cultivating the perception that he is a really bad guy in need of pretrial restraint, bears no relevance to the issue at bar.

could reasonably assure community safety and the accused's return to court. 481 U.S. at 740. The Salerno Court held that, because of these procedural protections, the Bail Reform Act did not violate procedural due process guarantees. Id. The Salerno Court also found that, since the Bail Reform Act's pretrial detention scheme was narrowly tailored to achieve the important government interests of ensuring community safety and ameliorating flight risk, the Act did not violate substantive due process guarantees. Id.

The Due Process Clause – the constitutional provision at issue in Salerno -- was made applicable to the states via the Fourteenth Amendment to the U.S. Constitution. U.S.C.A. V, XIV; See Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489 (1964). So while the Federal Bail Reform Act certainly does not operate as controlling authority over Nevada's bail and pre-trial detention statutes, the constitutional principles articulated in Salerno do.⁶

⁶ Indeed, courts throughout the country have applied Salerno's substantive and procedural due process requirements in assessing the constitutionality of state pretrial detention protocols. 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,

B. Detention Orders Are Subject To Exacting Constitutional Scrutiny

As set forth in Petitioner's Mandamus Petition, Salerno imposed two interlocking sets of requirements on preventative detention: substantive and procedural.⁷ The procedural requirements are necessary to ensure that the substantive ones have been met.

Substantively, Salerno requires 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 forward an important interest. Id. at 746–48. Therefore, the government may detain someone pretrial only if other, less restrictive means are incompatible with serving these important interests.

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).

⁷ Id. at 746 (“This Court has held that the Due Process Clause protects individuals against two types of government action. So-called ‘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.’ When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. This requirement has traditionally been referred to as ‘procedural’ due process.”).

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 740); a heightened evidentiary standard (Id. at 751); 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 (1976)), Salerno insists on procedures that are sufficient to ensure that any preventative detention be consistent with *substantive* due process.

1. Pretrial Detention Requires the State to Demonstrate Necessity as a Matter of Substantive Due Process

Because a person’s “interest in liberty” is “fundamental,” the Supreme Court held that it is a “‘general rule’ of substantive due process that the government may not detain a person prior to a judgment of guilt in a criminal trial.” Salerno, 481 U.S. at 750, 749. Like other constitutional rights, however, the right to pretrial liberty is not absolute: the government may deprive a person of her right to pretrial liberty if the government’s interest is sufficiently compelling and the deprivation is narrowly tailored -- meaning that pretrial detention is necessary because alternatives are inadequate -- to serve that interest. Salerno, 481 U.S. at 749, 751 (describing the government interest in preventing serious pretrial crime as “compelling”

and the statute as “careful[ly] delineat[ing] . . . the circumstances under which detention will be permitted”); Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (holding that the government may not infringe “‘fundamental’ liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.”).

Every court to consider the question has held that the government must demonstrate that its “infringement [of pretrial liberty] is narrowly tailored to serve a compelling state interest.” Lopez-Valenzuela, 770 F.3d 772, 780 (9th Cir. 2014) (en banc); see also Reem v. Hennessy, No. 17-CV-06628-CRB, 2017 WL 6765247, at *1 (N.D. Cal. Nov. 29, 2017) (“The due process clauses of the Fifth and Fourteenth Amendments bar pretrial detention unless detention is necessary to serve a compelling government interest.”); ODonnell v. Harris County, 251 F.Supp.3d 1052, 1156-57 (S.D. Tex. Apr. 28, 2017) (holding that government action infringing pretrial liberty must be the least restrictive means necessary to serve court appearance and community safety); In re Humphrey, 19 Cal. App. 5th 1006, 1028, 1037 (Cal. App. 1st Dist. 2018) (holding that a person may be detained only if “no less restrictive alternative will satisfy” the government’s interests because pretrial detention is permissible “only to the degree

necessary to serve a compelling governmental interest”); Brangan v. Commonwealth, 80 N.E.3d 949, 962 (Mass. 2017) (holding that pretrial detention is permissible if “such detention is demonstrably necessary” to meet a compelling interest).

Respondent cites U.S. v. McConnell, 842 F.2d 105, 110 (5th Cir. 1988) for the proposition that a money-bail order is not unconstitutional merely because someone cannot pay it. But that case supports *Petitioner’s* argument: as the Fifth Circuit recently explained, McConnell held that a court must explain why a “‘particular financial requirement is a *necessary* part of the conditions for release’ when setting a bond that a detainee cannot pay.” ODonnell v. Harris County, 892 F.3d 147, 160 (5th Cir. 2018) (quoting McConnell, 842 F.2d at 110). Indeed, McConnell stands for the unremarkable proposition -- explained in several other cases -- that an unaffordable money-bail order is equivalent to an order of detention, and that it therefore must be necessary to serve the government’s compelling interests.

Similarly, other courts have used the strict scrutiny language to describe the findings required to justify an order to pay unattainable financial conditions. O’Donnell, 251 F. Supp. 3d at 1140 (“[P]retrial detention of indigent defendants who cannot pay a financial condition of

release is permissible only if the court finds, based on evidence and in a reasoned opinion, either that the defendant is not indigent and is refusing to pay in bad faith, or that no less restrictive alternative can reasonably meet the government's compelling interest"); Id. at 1145 (requiring a finding that wealth-based detention "is the only reasonable way to assure the arrestee's appearance at hearings and law-abiding behavior before trial"); Brangan, 80 N.E.3d at 965 (holding that an order requiring an unattainable condition must explain why "the defendant's risk of flight is so great that no alternative, less restrictive financial or nonfinancial conditions will suffice to assure his or her presence at future court proceedings"); Humphrey, 19 Cal. App. 5th at 1026 (same).

2. Adequate Procedural Safeguards Are Required Prior to Ordering Pretrial Detention as a Matter of Procedural Due Process

Respondent claims that lower courts may issue detention orders in the absence of the accused and in the absence of an adversarial hearing on the issue of pre-trial detention. Answer, p. 6 ("Petitioner argues that, before bail is set, an adversarial hearing is required. This is without merit."). With this, Respondent suggests that detention orders can issue in the absence of procedural due process protections. This is false.

Procedural-due-process analysis “proceeds in two steps: We first ask whether there exists a liberty or property interest of which a person has been deprived, and if so we ask whether the procedures followed by the State were constitutionally sufficient.” Swarthout v. Cooke, 562 U.S. 216, 219 (2011) (citing Ky. Dep’t of Corr. v. Thompson, 490 U.S. 454, 460 (1989)). Petitioner satisfies the first step of the procedural-due-process inquiry because, as explained above, he is being deprived of the “fundamental” “interest in [pretrial] liberty.” Salerno, 481 U.S. at 750.

The second step of the procedural-due-process analysis -- determining the procedures required for a valid pretrial detention order -- proceeds under the Mathews v. Eldridge three-part balancing test, pursuant to which a court must consider, for each procedure: (1) “the private interest” at issue, (2) “the risk of an erroneous deprivation” absent the additional safeguard, and (3) the state’s interest in not providing it. 424 U.S. 319, 335 (1976).

The balancing of the Mathews factors here establishes that, at a hearing to determine whether a person will be detained prior to trial, the government must provide notice of the critical issues; an inquiry into ability to pay if a financial condition is contemplated; an adversarial hearing at which the arrestee is represented by counsel and has an opportunity to be heard, to present evidence, and to confront evidence offered by the

government; an impartial decision-maker; meaningful consideration of less restrictive alternatives to pretrial detention; and, if the decision-maker issues a transparent or de facto order of detention, findings on the record by clear and convincing evidence that detention is necessary to serve a compelling government interest, and a statement of reasons explaining the decision.

a. When Requiring Financial Conditions, the Court Must Conduct an Inquiry in to Ability to Pay and Make on-the-Record Findings Concerning Ability to Pay.

As a constitutional matter, there are two fundamentally different kinds of financial conditions of release: those that the arrestee can pay, and those that the arrestee cannot pay. A court may not enter an order of release without knowing whether the order will operate as an order of detention. For that reason, procedural due process requires an inquiry into ability to pay.

As a threshold matter, when a court contemplates requiring a secured financial condition of pretrial release, it must provide procedures adequate to determine whether the monetary condition will operate as a detention order. The Supreme Court, the Fifth Circuit, and the Southern District of Texas have held that, if the government seeks to condition physical liberty on a payment, due process requires notice that financial information will be collected and of the nature and significance of the financial information; an inquiry into the person's ability to pay; and findings on the record as to

whether the person has the ability to pay. See Turner v. Rogers, 564 U.S. 431, 447 (2011) (applying the Mathews test and holding that, before the state may jail a person for not paying child support, the government must provide notice that ability to pay is a “critical issue,” an opportunity to be heard, and “an express finding by the court that the defendant has the ability to pay”); Bearden v. Georgia, 461 U.S. 660, 673 (1983) (holding that, before the state can revoke probation for nonpayment, it must inquire into whether the nonpayment was willful); U.S. v. Payan, 992 F.2d 1387, 1396 (5th Cir. 1993) (the “court must inquire into the reasons” the person did not pay and determine whether she willfully refused to pay.); ODonnell, 251 F. Supp. 3d at 1144–45 (concluding that Harris County’s automatic use of secured money bail, without an inquiry into ability to pay, presents an intolerably high risk of erroneous deprivation of a fundamental right, and that the County failed to demonstrate an interest in not providing these procedural safeguards); Id. at 1161 (requiring an inquiry into ability to pay and notice to arrestees about the significance of the financial information they are asked to provide). If, after notice and inquiry into ability to pay, a court determines that the person cannot pay the contemplated financial condition, then further procedures are required before the court may order the person detained.

b. Prospective Detainees Must Be Provided Notice, an Adversarial Hearing, an Impartial Decisionmaker, and Findings on the Record Before a Detention Order Can Issue

If, after an inquiry into ability to pay as described above, a court imposes an order of release that a person cannot pay, then it has imposed an order of detention. An order of detention requires additional procedural safeguards to prevent against the erroneous deprivation of a person's fundamental right to freedom of movement.

The procedures due process requires prior to the deprivation of *any* liberty interest are well established. Most of them apply even in the post-conviction context, where a person's liberty interest is less than that of the Petitioner, who is presumptively innocent. In Gagnon v. Scarpelli, 411 U.S. 778, 786 (1973), the Supreme Court explained what due process requires at a probation revocation hearing for a person whose liberty interest has been diminished by a criminal conviction: (a) "notice" of the critical issues to be decided at the hearing; (b) "disclosure" of the evidence presented by the government at the hearing; (c) an "opportunity to be heard in person and to present witnesses and documentary evidence"; (d) "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)"; (e) a "neutral and detached" factfinder; and (f) findings and reasons on the record of "the

evidence relied on.” See also Morrissey v. Brewer, 408 U.S. 471, 489 (1972) (holding that “the minimum requirements of due process” require the same six procedural protections in the context of parole revocation of a convicted and sentenced person); Turner v. Rogers, 564 U.S. 431, 447 (2011) (requiring “notice to the defendant that ‘ability to pay’ is a critical issue,” the opportunity to be heard, and findings on the record); see also, e.g., Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (“Parties whose rights are to be affected are entitled to be heard.”); Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal., 508 U.S. 602, 617 (1993) (“[D]ue process requires a ‘neutral and detached judge in the first instance.’” (quoting Ward v. Village of Monroeville, 409 U.S. 57, 61–62 (1972))); Wolff v. McDonnell, 418 U.S. 539, 564–65 (1974) (requiring a statement of reasons for revocation of good-time credits). Because a bail hearing implicates the fundamental right to bodily liberty prior to trial, each of these safeguards is required.

c. The State Must Prove by Clear and Convincing Evidence that an Arrestee is Either a Flight Risk or a Danger to the Community.

When the government seeks to infringe the fundamental right to bodily liberty prior to or absent a criminal conviction, the government also bears a heightened evidentiary burden. As the Supreme Court explained in

its seminal procedural-due-process decision in Addington v. Texas, 441 U.S. 418 (1979), the deprivation of the fundamental right to bodily liberty requires a heightened standard of proof beyond a mere preponderance to ensure the accuracy of the decision. Since Addington, the Supreme Court has never permitted application of a standard lower than “clear and convincing” evidence in any context in which bodily liberty is at stake. And the Conference of Chief Justices, whose membership includes the chief judicial officer of all 50 states and the District of Columbia, has emphasized that arrestees detained due to inability to pay money bail are entitled to the same procedural safeguards afforded to arrestees who are detained pursuant to transparent orders of detention. See Brief of Conference of Chief Justices as Amicus Curiae in Support of Neither Party, ODonnell, 2018 WL 2465481 (No. 17-20333), 2017 WL 3536467, at *35 (5th Cir. Aug. 9, 2017).

In Addington, the Supreme Court held that, under the Due Process Clause, the standard of proof required before a person can be confined in state custody for mental illness based on the possibility of future dangerousness must be “equal to or greater than” the “clear and convincing” evidentiary standard. Id. at 433. Applying the Mathews balancing test, the Court first articulated the government’s interest: “to protect the community from the dangerous tendencies of some who are mentally ill.” Id. at 426.

However, the Court explained: “Since the preponderance standard creates the risk of increasing the number of individuals erroneously committed, it is at least unclear to what extent, if any, the state’s interests are furthered by using a preponderance standard in such commitment proceedings.” Id. The Court then balanced the important private interests and concluded that “the individual’s interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence.” Id. at 427.

In determining what the appropriate due process standard was above a mere preponderance, the Court explained that requiring proof “beyond a reasonable doubt” was too stringent, particularly because of the non-punitive nature of the commitment and because, “given the uncertainties of psychiatric diagnosis, it may impose a burden the state cannot meet and thereby erect an unreasonable barrier to needed medical treatment.” Id. at 432. The Court explained that in other contexts, such as deportation and denaturalization, it had consistently required the intermediate “clear and convincing” standard of proof to protect against erroneous deprivations of particularly important individual interests. Id. at 424. The “clear and convincing” standard enables the government to achieve its interest when it

has a convincing basis but rigorously protects the fundamental individual rights at stake. Id.

The Court has reached the same conclusion in every other context in which a person's bodily liberty is at stake. See Santosky v. Kramer, 455 U.S. 745, 756 (1982) ("This Court has mandated an intermediate standard of proof—'clear and convincing evidence' -- when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.'"); Cruzan by Cruzan v. Dir., Missouri Dep't of Health, 497 U.S. 261, 282–83 (1990) (explaining that the Court has required the clear and convincing evidence standard in deportation proceedings, denaturalization proceedings, civil commitment proceedings, proceedings for the termination of parental rights, in cases involving allegations of civil fraud, and in a variety of other kinds of civil cases implicating important interests).

In its next seminal case on the evidentiary standard required for deprivation of bodily liberty, the Court struck down, on due process grounds, Louisiana's statutory scheme for perpetuating the confinement of those acquitted on the basis of insanity in criminal trials. Foucha v. Louisiana, 504 U.S. 71, 82–83 (1992). The Court held that although "[t]he State may confine a mentally ill person if it shows by clear and convincing

evidence that the individual is mentally ill and dangerous, [h]ere, the State has not carried that burden.” Id. at 80 (quotation and citation omitted). In reaching this holding, Foucha relied on Salerno, 481 U.S. at 749, explaining that the Court had upheld the federal statute’s preventive detention mechanism in part because it required findings of dangerousness by the longstanding “clear and convincing” standard. Foucha held: “Unlike the sharply focused scheme at issue in Salerno, the Louisiana scheme of confinement is not carefully limited. Under the state statute, Foucha is not now entitled to an adversary hearing at which *the State must prove by clear and convincing evidence* that he is demonstrably dangerous to the community.” 504 U.S. at 81 (emphasis added). Foucha concluded with a reminder about the doctrinal importance of the “clear and convincing” standard: “[F]reedom from physical restraint being a fundamental right,” administrative detention must remain the “carefully limited exception” in our society. Id. at 86, 83.

Lower courts, interpreting Salerno, have consistently required clear and convincing evidence to justify detaining a person prior to trial. Lopez-Valenzuela stuck down the Arizona pretrial detention statute in part because the Arizona law, unlike the federal Bail Reform Act, did not require the government to prove by clear and convincing evidence that an individual

arrestee's detention was necessary. 770 F.3d at 784–85. As the Ninth Circuit explained, one of the features that Salerno explicitly relied on was that the Act required the government “to prove by ‘clear and convincing evidence’ that the individual presented ‘a demonstrable danger to the community’ and that ‘no conditions of release c[ould] reasonably assure the safety of the community.’” Id. at 785. Most recently, in Humphrey, the California Court of Appeal held under the federal Constitution that “[i]f [a] court concludes that an amount of bail the defendant is unable to pay is required to ensure his or her future court appearances, it may impose that amount only upon a determination by clear and convincing evidence that no less restrictive alternative will satisfy that purpose.” 19 Cal. App. 5th at 1037. And many other states have similarly required clear-and-convincing evidence under their own law. See, e.g., State v. Ingram, 165 A.3d 797, 803, 805 (N.J. 2017); State v. Butler, No. 2011–K–0879, 2011 WL 12678268 (La. App. 4th Cir. July 28, 2011), *writ not considered*, 75 So. 3d 442 (La. 2011); Wheeler v. State, 864 A.2d 1058, 1065 (Md. App. 2005); Brill v. Gurich, 965 P.2d 404, 409 (Okla. 1998); Lynch v. U.S., 557 A.2d 580, 581 (D.C. 1989), *and compare* Aime v. Com., 611 N.E.2d 204, 212–14 (Mass. 1993) (striking down preventive detention statute because it did not require the “clear and convincing” burden of proof), *with* Mendonza v. Com., 673 N.E.2d 22, 30

(Mass. 1996) (upholding successor statute and holding that “clear and convincing” evidence standard is required for pretrial detention decisions based on a prediction of future dangerousness).

The intermediate standard of “clear and convincing” evidence should apply regardless of whether the government seeks to detain a person pretrial based on a purported risk of danger to the community or a purported risk of flight because the private right at stake is the same. And the Supreme Court has already held in Santosky, Addington, and Foucha that fundamental private interests require a heightened burden of proof before the government can infringe them, because those interests are “particularly important” and “more substantial than mere loss of money.” Santosky, 455 U.S. at 756. There is no compelling reason that “the degree of confidence our society thinks [it] should have in the correctness of factual conclusions,” Id. at 755, should be *lower* when the question is whether a person poses a risk of flight than when the question is whether the person poses a danger to other people in the community.

Analogous case law from the immigration context, where the liberty interest is considered more constrained than in the pretrial context, supports this conclusion. See Singh v. Holder, 638 F.3d 1196, 1203, 1204 (9th Cir. 2011) (requiring clear and convincing evidence regardless of whether the

government seeks detention based on flight or dangerousness because “due process places a heightened burden of proof [where] the individual interests at stake . . . are both particularly important and more substantial than mere loss of money.”); Lora v. Shanahan, 804 F.3d 601 (2d Cir. 2015) (same), *vacated and remanded on other grounds*, 138 S. Ct. 1260 (2018).

Only one court appears to have addressed in depth whether the standard of proof the government must satisfy to detain someone due to a concern about flight risk is the same as the standard when the concern is community safety. In Kleinbart v. U.S., 604 A.2d 861, 868 (D.C. 1992), the D.C. Court of Appeals held that the “clear and convincing” evidence standard should apply to determinations about whether to order pretrial detention based on flight risk. The court explained that “[a] defendant’s liberty interest is no less -- and thus requires no less protection -- when the risk of his or her flight, rather than danger, is the basis for justifying detention without right to bail.” Id. at 870. The court therefore held: “Although the federal Bail Reform Act could be construed -- purely as a matter of statutory construction -- to require only a preponderance standard in risk of flight cases . . . we believe that Salerno’s emphasis on the clear and convincing evidence standard to sustain the constitutionality of that statute as applied to danger necessarily carries over, as a requirement of due

process, to risk of flight cases.” Id. This analysis has been adopted by the American Bar Association’s Criminal Justice Standards.⁸

In U.S. v. Motamedi, 767 F.2d 1403 (9th Cir. 1985), a pre-Salerno case, the Ninth Circuit held that the government failed to prove by a “clear preponderance” of the evidence that the defendant was a flight risk and reversed an order of pretrial detention. In the process, the court held that the *statutory* standard for determining flight risk under the Bail Reform Act was a “clear preponderance of the evidence” as opposed to the “clear and convincing” standard later upheld in Salerno for the question of dangerousness. Id. at 1406. In reversing the lower court’s detention order, the Ninth Circuit made “no attempt to analyze the constitutional ramifications of its decision.” Id. at 1412 (Boochever, J., concurring and dissenting in part). Judge Boochever, however, addressed the constitutional question, applying the Mathews balancing test. Id. at 1413–15. He explained:

⁸ ABA Standard 10-5.8 explains that the “clear and convincing” standard applies to decisions relating to dangerousness and risk of flight. Courts have long looked to the Standards for guidance when answering constitutional questions about the appropriate balance between individual rights and public safety in the field of criminal justice. See, e.g., Padilla v. Kentucky, 559 U.S. 356, 367 (2010); Strickland v. Washington, 466 U.S. 668, 688-89 (1984); U.S. v. Teague, 953 F.2d 1525, 1533 n.10 (11th Cir. 1992).

[T]he consequences to the defendant from an erroneous pretrial detention are certain and grave. The potential harm to society, although also significant, is speculative, because pretrial detention is based on the possibility, rather than the certainty, that a particular defendant will fail to appear. Moreover, society's interest in increasing the probability of detention is undercut by the fact that it has no interest in erroneously detaining a defendant who can give reasonable assurances that he will appear. I conclude therefore that the injury to the individual from an erroneous decision is greater than the potential harm to society, and that under Addington due process requires that society bear a greater portion of the risk of error: the government must prove the facts supporting a finding of flight risk by clear and convincing evidence.

Id. at 1415.

Given the importance of this legal question to pretrial justice in this country, the case law on the proper standard of proof when determining flight risk is surprisingly thin, perhaps because appellate courts have difficulty resolving pretrial detention issues before cases become moot. Indeed, the Supreme Court has not ruled on a constitutional issue relating to pretrial detention since Salerno in 1987. Although the issue should be uncontroversial in light of Addington and Foucha, and after balancing the Mathews factors, counsel has been unable to find precedent from any circuit addressing the question of whether, as a matter of due process, the “clear and

convincing” standard⁹ applies to determinations of pretrial detention based on a risk of flight.¹⁰

Thus, although the constitutional issue of what ultimate standard of proof must apply at a pretrial detention hearing appears to be one of first impression, the holdings and reasoning in Addington, Foucha, Santosky,

⁹ U.S. v. Cos, No. CR 05-1619 JB, 2006 WL 4061168, at *4 (D.N.M. Nov. 15, 2006), addressed a different question, not presented here: after what length of time does an initially valid order of pretrial detention cease to satisfy due process? In reaching its holding, the court in Cos noted that it could not find federal case law on the burden of proof required in the pretrial detention context: “In researching this issue, the Court has found only one judicial opinion considering which party bears the burden of proof when a court reviews the constitutionality of a pretrial detention.” Id. (citing Motamedi).

¹⁰ Counsel has found a number of federal cases after Motamedi that likewise apply a “preponderance” standard to risk of flight determinations as a matter of *statutory interpretation* under the Bail Reform Act, but none of those cases raised, analyzed, or decided the constitutional issue.

In Querubin v. Com., 795 N.E.2d 534 (Mass. 2003), the court considered the standard required for detention based solely on risk of flight and concluded, without balancing the Mathews factors, that a preponderance of the evidence is the appropriate standard. Id. at 544. That decision is not persuasive, first, because the decision was based on cases relying on statutory interpretation and not constitutional law. Second, Querubin’s analysis was slim. The court stated in a footnote that, because pretrial detention is “limited and temporary,” a lesser standard of proof is sufficient. Id. at 544 n.9. This assertion is unsound both because it is factually wrong (the period of pretrial detention is frequently significant in Clark County, as it is in this case) and because binding case law on the importance of bodily liberty and the devastating effects of brief periods of pretrial detention does not require extended confinement to trigger the heightened standard. Finally, the Massachusetts court itself held in a different case, Aime, that due process requires the “clear and convincing” standard for pretrial detention based on dangerousness. Aime, 611 N.E.2d at 214.

Salerno, Lopez-Valenzuela, Kleinbart, and Humphrey demonstrate that the deprivation of the fundamental right to bodily liberty requires a heightened standard of proof with respect to consideration of alternatives to mitigate flight risk or alternatives to mitigate risk of danger to the community.¹¹

C. The Lower Court Applied the Wrong Legal Standard and Provided Inadequate Protections, in Violation of Petitioner's Constitutional Rights

Because the lower court failed to require the State to show that pretrial detention was necessary to mitigate an unreasonable risk of flight or danger to the community, the court's order was substantively unconstitutional. And because the lower court did not give notice, hear evidence, or make findings concerning risk of flight and community danger, the court's order was procedurally unconstitutional.

Substantively, the lower court appeared to believe that because Nevada has not enacted a statutory counterpart to the federal Bail Reform

¹¹ Although the formal rules of evidence need not apply at detention hearings, the findings of clear and convincing evidence on which the government relies for the incapacitation of a presumptively innocent person must meet minimal standards of reliability. *See, e.g., United States v. LaFontaine*, 210 F.3d 125, 131 (2d Cir. 2000) (“[W]hile the informality of bail hearings serves the demands of speed, the magistrate or district judge must also ensure the reliability of the evidence, by selectively insisting upon the production of the underlying evidence or evidentiary sources where their accuracy is in question.” (quotation omitted)); *U.S. v. Accetturo*, 783 F.2d 382, 389 (3d Cir. 1986); *U.S. v. Acevedo-Ramos*, 755 F.2d 203, 207-08 (1st Cir. 1985); *Reem*, 2018 WL 1258137, at *3.

Act, Nevada courts need not comply with the federal *constitutional* requirement that detention be ordered only if it is necessary. App. at 23 (“So the standard in Nevada is different... Our standard is good cause.”). Perhaps for this reason, the court did not find -- by clear and convincing evidence or otherwise -- that Petitioner posed *any* risk to the community or risk of flight. Instead, the court simply said that it had “considered the factors” enumerated in Nevada law and concluded that the money-bail amount would remain the same. This runs far afield from, if not afoul of, the standard the United States Constitution requires for a person to be detained without a criminal conviction.

Procedurally, the lower court said only that “the issue of procedural due process is covered by the [Nevada] statute [governing bail applications].” App. 24. Accordingly, the court heard no evidence, made no findings, and gave no reasons for reaffirming the initial bail/detention order. Instead, the court (inexplicably) said that Petitioner’s arguments regarding *substantive* due process were better directed to the Justice court.

Significantly, Nevada’s bail/pretrial detention statutes do not provide for a hearing at which evidence is heard, findings made, and reasons given. Even worse, Nevada law burdens the accused with showing “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 constitutional authority outlined above in that impermissibly shifts the burden of persuasion to the defense to show cause why conditioned release is appropriate; and it speaks only to the issue of release *without bail*.¹² As authority cited above 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 before a defendant can be confined pretrial.¹³

Finally the lower court concluded, *ipse dixit*, that Petitioner “is getting both procedural and substantive due process at this hearing.” App. 25. But the court ordered that Petitioner be jailed unless he pays an amount of

¹² To the extent that NRS 178.4851 obviates the constitutional protections required by the authority discussed herein, 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.

¹³ See also, Lopez-Valenzuela v. Arpaio, 770 F.3d at 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 at 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).

money beyond his means without satisfying the Constitution's standards for doing so. Thus, this Honorable Court should grant the instant Petition and order that Petitioner be released unless the lower court finds, in a manner consistent with the Due Process Clause, that pretrial detention is necessary reasonably to ensure Petitioner's presence at trial or the safety of the community.

V.

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. The lower court found no fault with this process, and refused to correct it by conducting the constitutionally required detention inquiry. 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 determination violates his constitutional rights.

VI.

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 October, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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NANCY M. LEMCKE
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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