IN THE SUPREME COURT OF THE STATE OF NEVADA

ARTHUR LEE SEWALL, JR.,

Petitioner,

vs,

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE DAVID BARKER, SENIOR DISTRICT JUDGE,

Respondent,

and

THE STATE OF NEVADA,

Real Party In Interest.

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CASE NO: 81309

D.C. NO: C-18-330650-1

ANSWER TO PETITION FOR WRIT OF MANDAMUS

COMES NOW, the State of Nevada, Real Party in Interest, by STEVEN B. WOLFSON, District Attorney, through his Chief Deputy, JONATHAN E. VANBOSKERCK, on behalf of the above-named respondents and submits this Answer to Petition for Writ of Mandamus in obedience to this Court's order filed August 10, 2020 in the above-captioned case. This Answer is based on the following memorandum and all papers and pleadings on file herein.

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Dated this 13th day of August, 2020.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar # 001565

BY */s/ Jonathan E. VanBoskerck*
JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
Office of the Clark County District Attorney

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

Real Party in Interest does not dispute Petitioner's rendition of the procedural history in this case and adopts it. (Petition for Writ of Mandamus (Writ), filed June 12, 2020, p. 2-3).[1]

STATEMENT OF FACTS

The prosecution offered a detailed summary of the largely undisputed facts of this case below. (Petitioner's Appendix to the Petition, Volume I (PA), filed June

[1] However, the State does not adopt and specifically disputes Petitioner's characterization of any alleged admissions by Real Party in Interest and the sufficiency of the lower court's decision. (Petition for Writ of Mandamus, filed June 12, 2020, p. 2-3).

12, 2020, p. 22-31).[2] They are not reiterated here as they are largely undisputed and only relevant to the issues presented in this mandamus proceeding as general background information.

ARGUMENT

Invading the province of the District Court by reconsidering its bail determination is unwarranted. Judge Barker legitimately exercised his discretion by independently reviewing the facts of this case and determining that release from custody was prohibited by Article 1, Section 7 of the Nevada Constitution. Petitioner failed to create a meaningful record regarding the potential for catching COVID-19 while incarcerated so his naked assertions were properly rejected below. Indeed, based on the statistical evidence Petitioner is likely safer in custody than out. Further, judicial estoppel does not preclude the State from arguing against Petitioner's release from custody since the arguments offered by different prosecutors were not intended to sabotage the judicial process and amounted to individual subjective evaluations of the odds of a jury returning a verdict of guilty. Finally, Petitioner's challenge to the factual findings below is nothing more substantive than a case of sour grapes. Petitioner's specific complaints amount not

[2] Real Party in Interest has not created an appendix documenting these undisputed facts as they are largely not relevant to the issues before this Court, other than to provide general background information. Nevada Rules of Appellate Procedure (NRAP) Rule 30(b) ("Contents of the Appendix. … all matters not essential to the decision of issues presented by the appeal shall be omitted").

to challenges to the sufficiency of the findings or the record but to a self-serving disagreement with Judge Barker's ruling. As such, extraordinary relief should be denied.

I. STANDARD OF REVIEW

A court may issue a writ of mandamus to enforce "the performance of an act which the law enjoins as a duty especially resulting from an office . . . or to compel the admission of a party to the use and enjoyment of a right . . . to which he is entitled and from which he is unlawfully precluded by such inferior tribunal." NRS 34.160.

Mandamus will not lie to control discretionary action unless it is manifestly abused or is exercised arbitrarily or capriciously. Office of the Washoe County DA v. Second Judicial Dist. Court, 116 Nev. 629, 635, 5 P.3d 562, 566 (2000). Thus a writ of mandamus will only issue to control a court's arbitrary or capricious exercise of its discretion." Id. *citing* Marshall v. District Court, 108 Nev. 459, 466, 836 P.2d 47, 52 (1992); City of Sparks v. Second Judicial Dist. Court, 112 Nev. 952, 954, 920 P.2d 1014, 1015-1016 (1996); Round Hill Gen. Imp. Dist. V. Newman, 97 Nev. 601, 637 P.2d 534 (1981).

However, mere recitation of the standard does not do justice to the meaning of the rule:

> *An arbitrary or capricious exercise of discretion is one "founded on prejudice or preference rather than one reason,"* Black's Law Dictionary, 119 (9th ed. 2009) (defining "arbitrary"), *or "contrary to the evidence or established rules of law,"* id. at 239 (defining

> "capricious"). See generally, City Council v. Irvine, 102 Nev. 277, 279, 721 P.2d 371, 372 (1986) (concluding that "[a] city board acts arbitrarily and capriciously when it denies a license without any reason for doing so"). *A manifest abuse of discretion is "[a] clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule."* Steward v. McDonald, 330 Ark. 837, 953 S.W.2d 297, 300 (1997); see Jones Rigging and Heavy Hauling v. Parker, 347 Ark. 628, 66 S.W.3d 599, 602 (2002) (stating that a manifest abuse of discretion "is one exercised improvidently or thoughtlessly and without due consideration"); Blair v. Zoning Hearing Bd. of Tp. Pike, 676 A.2d 760, 761 (Pa.Commw.Ct. 1996) ("[M]anifest abuse of discretion does not result from a mere error in judgment, but occurs when the law is overridden or misapplied, or when the judgment exercised is manifestly unreasonable or the result of partiality, prejudice, bias or ill will.").

State v. Eighth Judicial District Court (Armstrong), 127 Nev. 927, 931-32, 267 P.3d 777, 780 (2011) (emphasis added).

II. JUDICIAL ESTOPPEL DOES NOT PRECLUDE REAL PARTY IN INTERESTS ARGUMENTS BELOW

Petitioner argues that "the State should not be permitted to argue conflicting theories[.]" Writ, p. 9. Specifically, Petitioner contends that "[t]he State should not be permitted to inform this Court that the prosecution has no case without Mr. Seawall's statement while informing the district court that the proof is evident and the presumption great that they can prove their case[.]" Id. Notwithstanding Petitioner's complaints, judicial estoppel is inapplicable since the arguments offered by different prosecutors were not intended to sabotage the judicial process and amounted to individual subjective evaluations of the facts.

The United States Supreme Court has held that courts should consider several factors in determining whether to apply the doctrine of judicial estoppel. These factors include: (1) whether a party's later position is "clearly inconsistent" with its original position; (2) whether the party has successfully persuaded a court of the earlier position, and (3) whether allowing the inconsistent position would allow the party to "derive an unfair advantage or impose an unfair detriment on the opposing party." New Hampshire v. Maine, 532 U.S. 742, 750-51, 121 S.Ct. 1808, 1815 (2001). However, "'[j]udicial estoppel is an extraordinary remedy' that should be cautiously applied only when 'a party's inconsistent position [arises] from intentional wrongdoing or an attempt to obtain an unfair advantage[.]" Mainor v. Nault, 120 Nev. 750, 765, 101 P.3d 308, 318 (2004), as corrected on denial of reh'g (Apr. 13, 2005) (quoting, Kitty-Anne Music Co. v. Swan, 112 Cal.App.4th 30, 4 Cal.Rptr.3d 796, 800 (2003) (first and second bracketed edits in original, third bracketed edit added, footnote omitted)). Petitioner also ignores the fundamental doctrinal tenet that "[j]udicial estoppel does not preclude changes in position not intended to sabotage the judicial process." Id. (footnote omitted).

The first factor does not warrant application of judicial estoppel. While different prosecutors did offer differing evaluations of the weight of the facts in this matter to this Court and District Court, those statements amounted to the subjective and individual judgments of those prosecutors. These subjective prognostications

regarding the worth of a case are simply not the kind of actions that warrant application of judicial estoppel. The doctrine should be reserved for intentional and bad faith assertions of inconsistent positions.

In re Sakarias, 35 Cal.4th 140, 106 P.3d 931 (CA. 2005), is an example of such misconduct. Sakarias involved two habeas petitioners who had been convicted and were sentenced to death for the same murder in different trials. 35 Cal.4th at 144, 106 P.3d at 934. Both were prosecuted by the same prosecutor. Id. at 145, 106 P.3d at 934. Intentional bad faith was found in the decision of that prosecutor to argue that each of the defendants personally inflicted the death blows on the victim. Id. Thus, Sakarias involved truly inconsistent positions—the death blows could not have been dealt by both defendants and the State argued exactly that in two separate proceedings in order to gain an unfair advantage. Comparing this case to Sakarias demonstrates the inapplicability of the doctrine here. The prosecutor in Sakarias took opposite positions of fact where only one could be correct. This is readily distinguishable from what happened here, where different prosecutors offered their own individualized and subjective evaluations of the strength of this case.

Equally instructive is Whaley v. Belleque, 520 F.3d 997 (9th Cir. 2008). Whaley involved a situation where the prosecution argued in federal court that a habeas petition was procedurally defaulted due to the failure to exhaust state remedies but argued in state court that the same claim was moot. Id. at 1001.

Particularly troubling to the Ninth Circuit was the fact that the prosecution attacked its own mootness argument with authority it was certainly aware of when it made the mootness argument. Id. at 1001-02. The Court saw this as a violation of "the elementary rules of legal ethics." Id. at 1002. Again, what transpired in Petitioner's case is completely different. Here, prosecutors offered differing subjective evaluations of the provability of this case while Whaley involved the intentional abandonment of a legal theory because it no longer fit the procedural context.

Russell v. Rolfs, 893 F.2d 1033 (9th Cir. 1990), is similar to Whaley. In Russell the State argued in federal court that federal review was inappropriate because the petitioner had an adequate and available remedy under state law but when the petitioner raised that remedy in state court the prosecution then argued that the claim was procedurally barred. Id. at 1037. As noted by the Ninth Circuit, the government's pleadings in state and federal court were inconsistent because on the one hand the state said a remedy was available and then on the other it said the same remedy was unavailable. Id. at 1037-38. Again, fundamentally distinguishable from the subjective beliefs about what a jury might do in this case.

Ultimately, the first factor does not warrant application of judicial estoppel. Each prosecutor was offering a best guess at what might happen while the jurists entertaining those arguments understood that those prosecutorial prognostications were guesses that could not be validated until the case was submitted to a jury.

Nor does the second factor support a finding of judicial estoppel. Since this Court affirmed the lower court's partial suppression of Petitioner's statement, the State clearly did not persuade this Court to adopt its earlier position.

The final factor is the least supportive of applying judicial estoppel. There is no indication that Real Party in Interest benefited from an unfair advantage or inflicted an unfair detriment upon Petitioner by making the representations at issue. Indeed, Petitioner himself made sure of this by specifically informing the lower court of the State's appellate arguments. PA 4-5, 13-20, 59-61, 66-68. Since the lower court was aware of the State's representations before this Court Petitioner cannot demonstrate prejudice. Judge Barker knew all the arguments the State presented on appeal and decided Petitioner's bail / release request based upon *his* independent evaluation of the facts of the case and the merits of the claims.

III. THE RECORD BELOW IS SUFFICIENT TO ALLOW REVIEW OF THE BAIL DETERMINATION

Petitioner complains that the District Court "failed to make the required factual findings under Valdez-Jimenez" and thus deprived him of "a meaningful bail hearing." Writ, p. 17. However, this claim is belied by the thorough record created below.

To the extent that Petitioner is complaining that District Court should have generated detailed written findings of fact and conclusions of law, he fails to identify the source for this alleged mandate. As such, this Court should decline to consider

his complaint. Edwards v. Emperor's Garden Rest., 122 Nev. 317, 330, n. 38, 130 P.3d 1280, n. 38 (2006) (court need not consider claims unsupported by relevant authority); State, Dept. of Motor Vehicles and Public Safety v. Rowland, 107 Nev. 475, 479, 814 P.2d 80, 83 (1991) (unsupported arguments are summarily rejected on appeal); Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court."); Randall v. Salvation Army, 100 Nev. 466, 470-71, 686 P.2d 241, 244 (1984) (court may decline consideration of issues lacking citation to relevant legal authority); Smith v. Timm, 96 Nev. 197, 606 P.2d 530 (1980) (mere citation to legal encyclopedia does not fulfill the obligation to cite to relevant legal precedent); Holland Livestock v. B & C Enterprises, 92 Nev. 473, 533 P.2d 950 (1976) (failure to offer citation to relevant legal precedent justifies affirmation of the judgment below).

Regardless, the record created below is sufficient to allow appellate review. The parties offered extensive pleadings. PA 1-64. The Court held a hearing where the parties presented all their arguments. PA 66-77. After entertaining argument, the judge placed what he believed to be the controlling factors on the record and thereby explained his decision. PA 77. The Court then memorialized the decision in a written order. Petitioner's Supplemental Appendix to the Petition for Writ of Mandamus (PSA), filed August 7, 2020, p. 1-3. As such Petitioner cannot

demonstrate a violation of due process or prejudice for any purpose. See, Daniel v. State, 119 Nev. 498, 508, 78 P.3d 890, 897 (2003) ("an appellant must demonstrate that the subject matter of the missing portions of the record was so significant that the appellate court cannot meaningfully review an appellant's contentions of error and the prejudicial effect of any error"). Indeed, the extent of the record belies Petitioner's contentions. Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002); Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

Ultimately, Petitioner's specific complaints demonstrate the folly of his argument. The only specific allegations challenging the factual findings offered by Petitioner are that the "court's findings were extremely short," that the decision was based upon "minimal facts" and that the Court ignored the State's appellate arguments. Writ, p. 17-18. These are not challenges to the sufficiency of the judicial finding or the record made to support that finding. Instead, they are a case of sour grapes. According to Petitioner the judge below failed to make adequate findings because he ultimately disagreed with Petitioner.

IV. DISTRICT COURT DID NOT MANIFESTLY ABUSE ITS DISCRETION OR DISPLAY BIAS OR FAVORITISM IN DENYING PETITIONER'S BAIL MOTION

Petitioner's demand for extraordinary relief from the denial of his bail motion ignores the discretionary nature of a bail decision. Indeed, Petitioner's Writ is largely a cut and paste job of his pleading below. Compare, Writ, p. 4-17 with PA

3-9, 58-63. Petitioner does nothing to address the standard for mandamus relief. He does not argue that Judge Barker made an arbitrary or capricious decision based on prejudice or preference or that he manifestly abused his discretion by adopting a clearly erroneous interpretation or application of law. Armstrong, 127 Nev. at 931-32, 267 P.3d at 780. Petitioner wants a "do over," something which is beyond the scope of mandamus because that would tread upon the wide discretion afforded to district courts in making bail determinations.

This Court's holding in Valdez-Jimenez v. 8th Judicial District, 136 Nev. __, 460 P.3d 976 (Nev. 2020), undeniably set forth new standards for the statutory considerations of setting bail in most cases. Lower courts must now first determine if bail is necessary, and if so, then the courts must set a reasonable amount of bail to ensure future appearances and to protect the community. The landmark decision eliminated the practice of setting arbitrary bail amounts and instead required courts to make particularized determinations for individual defendants. Valdez-Jimenez affirmed the constitutional and statutory right to reasonable bail in most cases. However, Valdez-Jimenez continued to recognize that decisions regarding bail are different for capital offenses or first-degree murder. The reason this Court's holding did not affect those classification of cases is because the Nevada Constitution does not guarantee bail in cases of first-degree murder.

Valdez-Jimenez expressly reaffirms from the outset that people charged with

first-degree murder do not have an automatic right to bail. 136 Nev. at __, 460 P.3d at 984. Indeed, this Court began its analysis by noting "[t]he right to reasonable bail is guaranteed by the Nevada Constitution for individuals who commit offenses other than capital offenses or first-degree murder." Id. The Court quoted the relevant provisions of the Nevada Constitution:

> Article 1, section 7 of the Nevada Constitution creates a right to bail before conviction: "All persons shall be bailable by sufficient sureties; *unless for Capital Offenses or murders punishable by life imprisonment without possibility of parole when the proof is evident or the presumption great*." Article 1, section 6 of the Nevada Constitution proscribes excessive bail, which we have explained means that "[b]ail must not be in a prohibitory amount, more than the accused can reasonably be expected under the circumstances to give, for if so it is substantially a denial of bail." Ex parte Malley, 50 Nev. 248, 253, 256 P. 512, 514 (1927) (quoting 6 C.J. *Bail* § 222 (1916)), *rejected on other grounds by* Wheeler, 81 Nev. 495, 406 P.2d 713. Thus, under our constitution, individuals such as petitioners, *who are accused of committing noncapital, non-first-degree-murder offenses*, have a right to bail in a reasonable amount. See id.; Wheeler, 81 Nev. at 498-99, 406 P.2d at 715.

Id. at __, 460 P.3d at 984 (emphasis added).

Thus, when it comes to the right to bail, the Valdez-Jimenez decision does not require bail where an individual is charged with a capital offense or first-degree murder. The Valdez-Jimenez Curt relied heavily on United States v. Salerno, 481 U.S. 739, 107 S.Ct. 2095 (1987), where the United States Supreme Court also concluded that bail is not required in all cases. In Salerno the United States Supreme Court came to the conclusion that the pretrial detention order was appropriate and

reversed the Court of Appeals, rejecting the argument that the Bail Reform Act of 1984 violated substantive due process because the detention it authorizes does not, according the United States Supreme Court, constitute impermissible punishment before trial. Specifically, the United States Supreme Court stated, "[w]e have repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest." Salerno, 481 U.S. at 748, 107 S.Ct. at 2102. The United States Supreme Court further stated, "[t]he government's interest in preventing crime by arrestees is both legitimate and compelling. De Veau v. Braisted, 363 U.S. 144, 155, 80 S.Ct. 1146, 1152, 4 L.Ed.2d 1109 (1960)." Id. at 749, 107 S.Ct. at 2103. In juxtaposing a defendant's liberty interest against community safety, the United States Supreme Court further concluded, "]o]n the other side of the scale, of course, is the individual's strong interest in liberty. We do not minimize the importance and fundamental nature of this right. But, as our cases hold, this right may, in circumstances where the government's interest is sufficiently weighty, be subordinated to the greater needs of society." Id. at 750-751, 107 S.Ct. at 2103.

Additionally, Valdez-Jimenez points to federal law. As such, it is worth noting that Petitioner would be presumed to be ineligible for bail under the Bail Reform Act of 1984. Beyond the procedure for the bail hearings, the federal law also provides guidance as to when bail is appropriate. Pursuant to 18 U.S.C. §

3142(e)(3)(B), where there is probable cause to believe a defendant used or possessed a firearm during a crime of violence, a presumption exists that no conditions exist that will reasonably assure the safety of the community and defendant's future appearance. Detention is therefore presumed where a defendant commits a crime of violence with a firearm. Id. There is probable cause to believe that Petitioner shot and killed the victim with a firearm. The Grand Jury found probable cause supporting that charge. Consequently, the presumption mandated by the very statute the Nevada Supreme Court cited to as guidance supports Petitioner's detention. That presumption is clearly valid based on the facts in this case and Petitioner's history. This presumption cannot be overcome by Petitioner based on the facts of this case and his history.

The United States Supreme Court also rejected the argument in Salerno that the Bail Reform Act of 1984 violated the Excessive Bail Clause of the Eighth Amendment. In so holding the Court pointed out that the often cited language from Stack v. Boyle, 342 U.S. 1, 5, 72 S.Ct. 1, 3 (1951), in which the Court stated that "[b]ail set at a figure higher than an amount reasonably calculated [to ensure the Defendant's presence at trial] is 'excessive' under the Eighth Amendment" is actually, "dictum." Salerno, 481 U.S. at 753, 107 S.Ct. at 2104-05. The Court went on to clarify by stating:

> The holding of Stack is illuminated by the Court's holding just four months later in Carlson v. Landon, 342 U.S. 524, 72 S.Ct. 525, 96 L.Ed.

> 547 (1952). In that case, remarkably similar to the present action, the detainees had been arrested and held without bail pending a determination of deportability. The Attorney General refused to release the individuals, "on the ground that there was reasonable cause to believe that [their] release would be prejudicial to the public interest and would endanger the welfare and safety of the United States." Id., at 529, 72 S.Ct., at 528–529 (emphasis added). The detainees brought the same challenge that respondents bring to us today: the Eighth Amendment required them to be admitted to bail. The Court squarely rejected this proposition:
>
> > "The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept. The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus, in criminal cases bail is not compulsory where the punishment may be death. Indeed, the very language of the Amendment fails to say all arrests must be bailable." Id., at 545–546, 72 S.Ct., at 536–537 (footnotes omitted).

Salerno, 481 U.S. at 753-54, 107 S.Ct. at 2105.

The United States Supreme Court summarized its rejection of the attack on the federal statute by stating, "[w]e are unwilling to say that this congressional determination, based as it is upon that primary concern of every government—a concern for the safety and indeed the lives of its citizens—on its face violates either the Due Process Clause of the Fifth Amendment or the Excessive Bail Clause of the Eighth Amendment." Salerno, 481 U.S. at 755, 107 S.Ct. at 2105-6.

Given that this is a first-degree murder case, Petitioner falls outside the

category of defendants who are required to have reasonable bail set. Regardless, Petitioner like all detained defendants, may still pursue release on bail and/or other reasonable conditions. Valdez-Jimenez laid out the specific analysis that must be done in determining bail:

> A Defendant who remains in custody following arrest is constitutionally entitled to a prompt individualized determination on his or her pretrial custody status. The individualized determination must be preceded by an adversarial hearing at which the Defendant is entitled to present evidence and argument concerning the relevant bail factors. The judge must consider the factors set forth in NRS 178.4853 and may impose bail only if the State proves by clear and convincing evidence that it is necessary to ensure the Defendant's presence at future court proceedings or to protect the safety of the community, including the victim and the victim's family.

Valdez-Jimenez, 136 Nev. at __, 460 P.3d at 980.

However, for defendants charged with first degree murder Article 1, section 7 of the Nevada Constitution prohibits bail where "the proof is evident or the presumption great." Accord, NRS 178.484(4) ("A person arrested for murder of the first degree may be admitted to bail unless the proof is evident or the presumption great by any competent court or magistrate authorized by law to do so in the exercise of discretion, giving due weight to the evidence and to the nature and circumstances of the offense"). This Court has previously examined the standards for the "proof is evident or the presumption great" language used in Article 1, section 7 of the Nevada Constitution. The cases that have discussed this language have focused on the facts of the underlying case, whether through live testimony or use of a prior transcript.

In In re Wheeler, the decision to withhold bail was based upon testimony at the bail hearing. 81 Nev. 495, 406 P.2d 713 (1965). The Court in Wheeler recognized that the lower courts are given broad discretion to make this decision, but that the decision must be based upon some competent evidence of a first-degree murder charge. Id., at 500, 716. In Jones v. Sheriff, Washoe County, there was also nothing more than a grand jury transcript in making a nonbailable determination. 89 Nev. 175, 509 P.2d 824 (1973). In Howard v. Sheriff of Clark County, the preliminary hearing transcript was reviewed. 83 Nev. 48, 51, 422 P.2d 538, 539 (1967). Ultimately, Howard held that only "evidence tending to show the elements of first-degree murder will allow the trial court to deny a bail application." Id. While in that case the Court determined that there was insufficient evidence presented of first-degree murder to deny bail, the same cannot be said of this case.

Applying the "the proof is evident or the presumption great" standard to this case, Judge Barker found that bail was prohibited by Article 1, Section 7 of the Nevada Constitution. Specifically, Judge Barker's discretionary evaluation of the facts of this cause caused him to believe "that proof is evident and the presumption great" because "the Defendant's DNA is found in this woman's vagina and rectum and a weapon – there's an argument that the weapon, the murder weapon used, is consistent with a weapon that Defendant owned." PA 77. This decision is consistent with the Nevada Constitution and the Valdez-Jimenez holding.

Indeed, there is even more evidence supporting a finding that "the proof is evident or the presumption great" in this case. The State pointed out below that:

> Specifically, the evidence has established that the Defendant, who claimed he did not know the victim, deposited his DNA inside her vagina and her rectum. Additionally, the victim was shot in the back of the head with firearm. No cartridge casing was found at the murder scene, consistent with a revolver being used to do the killing. Metro Forensic Scientist Anya Lester examined the expended bullet recovered on the cement floor at the murder scene. She determined the bullet to be consistent with a .357. The bullet passed through Iverson's head, which also suggests a powerful cartridge.
>
> Anya Lester was also able to provide a list of common firearms manufactured with rifling characteristics similar to those present on the bullet to include Ruger. When the Defendant was arrest on July 28, 1999, in San Diego for soliciting the undercover female detective, his Ruger .357 revolver was in his car. Defendant also had his Metro gun registration card for this same weapon when he was arrested. This same revolver had been impounded from the Defendant for safekeeping in 1995 when Metro responded to a domestic disturbance call involving Sewall. The gun was later released back to him.

PA 33.

The analysis should stop here since it was well within Judge Barker's discretion to conclude that the facts in this case met the "the proof is evident or the presumption great" standard. Valdez-Jimenez, 136 Nev. at __, 460 P.3d at 984 ("Typically, a pretrial release decision is a matter within the sound discretion of the trial court"); Ex Parte Wheeler, 81 Nev. 495, 500, 406 P.2d 713, 716 (1965) ("In evaluating the amount of proof needed to defeat bail the lower court is granted broad discretion"). Judge Barker specifically evaluated the facts of this case and found that Article 1, Section 7 precluded bail. PA 77. Judge Barker's discretion is entitled

to deference and should not be interfered with through an abuse of the writ of mandamus.

However, even if the lower court should have continued the analysis beyond Article 1, Section 7 bail was still appropriately denied. The Nevada Supreme Court, in Valdez-Jimenez, in addition to pointing to federal legislation, directed Nevada courts to the Nevada Revised Statutes on bail. NRS 178.498(1)-(4) sets forth factors for consideration in setting bail. NRS 178.4853 lists ten factors for consideration when considering release without bail. Although not necessary to Judge Barker's holding, the State provided a detailed analysis of those statutory factors as they apply to this case. PA 37-42.

This Court has always recognized that decisions regarding bail in lower courts are largely discretionary. While a district court is free to consider the factors of a first-degree murder case and set bail or even release a defendant, it certainly has the constitutional authority to deny any bail when proof is great or the presumption is evident that the defendant will be convicted of a first-degree murder charge. The record demonstrates that Judge Barker did not make an arbitrary or capricious decision based on prejudice or preference or manifestly abuse his discretion through adoption of a clearly erroneous interpretation or application of law. Armstrong, 127 Nev. at 931-32, 267 P.3d at 780.

V. DISTRICT COURT DID NOT MANIFESTLY ABUSE ITS DISCRETION OR DISPLAY BIAS OR FAVORITISM IN DENYING RELEASE BASED ON COVID-19

Petitioner believes he is entitled to release from custody based upon his naked speculation regarding COVID-19. He is wrong.

Notably, this Court has recently declined to grant mandamus relief to a mandamus petitioner alleging that the dangers of COVID-19 required his release from custody. Kerkorian v. Sisolak, Order Denying Petition, filed April 30, 2020, 462 P.3d 256 (Nev. 2020) (unpublished disposition). In Kerkorian this Court denied mandamus relief in part because:

> Based upon our review of the documents filed in this court, we decline to exercise our original jurisdiction as to the claims Kerkorian asserts on his own behalf for two interrelated reasons. First, the record is replete with contested issues of fact which this court, as an appellate tribunal, cannot call live witnesses to hearing to resolve. Second, given the conflicts in the facts asserted, we cannot say, as a matter of law, that the respondents have violated a clear and unmistakable legal duty to act, which is what the law requires for a writ of mandamus to issue from this court. Poulos v. Eighth Judicial Dist. Court, 98 Nev, 453, 455, 652 P.2d 1177, 1178 (1982) ("We have consistently attempted to reserve our discretion for those cases in which there was no question of act, and in which a clear question of law, dispositive of the suit, was presented for our review.").

Kerkorian, Order Denying Petition, p. 1, filed April 30, 2020.

Petitioner offers little more than naked speculation regarding the possibility of the spread of COVID-19 in the Clark County Detention Center (CCDC) and his personal susceptibility. Without supporting his assertion Petitioner contends that

"the conditions of a detention facility maximize virus transmission." Writ, p. 16. Petitioner nakedly suggests that his race, age and medical conditions increase his risk of contracting COVID-19. Id. Petitioner did not offer Judge Barker information from medical experts supporting his view that the potential for the spread of COVID-19 is maximized in a detention facility. Petitioner did nothing to substantiate his naked claims that he has asthma and is a diabetic. Nor does he offer this Court anything more. As such, his arguments should be rejected as the naked assertions they are. Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Consistent with Kerkorian, Petitioner's claim should be denied due to his failure to create a record.

Petitioner's unsubstantiated theory that virus transmission is maximized in correctional facilities is belied by reality. As for CCDC, the State argued below that Chief Judge Bell of the Eighth Judicial District Court has issued an order permitting the release of inmates on technical violations of supervision, inmates serving a sentence who are at high risk for illness, and inmates who have already served 75% of their sentence. PA 42. This surely decreases the risk of transmission by reducing the number of inmates. Further, looking at other Nevada correctional institutions, statistics establish that only 0.2 percent of inmates in the custody of the Nevada

Department of Corrections (NDOC) have tested positive for COVID-19.[3] In correctional facilities located in Clark County there are currently only five reported cases of COVID-19. Id. This is in comparison to 56,972 confirmed cases in Clark County, which represented 11.7 percent of those tested.[4] As such, Petitioner's claim that he is more likely to contract COVID-19 should she remain incarcerated is belied by the statistics. Indeed, given the current state of the pandemic, Petitioner is likely safer in CCDC.

Nor due Petitioner's personal risk factors warrant release. Petitioner contends that he is at high risk for contracting COVID-19 because he is "a 53 year old African American male, has been previously diagnosed with asthma and is a diabetic." Writ, p. 16. Petitioner will face these same risk factors whether in custody or released. As pointed out above, he is at higher risk of contracting COVID-19 if released so his risk factors are more threatening if he is not in custody. Indeed, Petitioner has

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[3] "Facilities with reported COVID-19 Cases, State of Nevada Department of Health and Human Services, last updated on August 10, 2020 at 9 AM (last accessed on August 10, 2020 at 3:58 PM) https://app.powerbigov.us/view?r=eyJrIjoiNDMwMDI0YmQtNmUyYS00ZmFjLWI0MGItZDM0OTY1Y2Y0YzNhIiwidCI6ImU0YTM0MGU2LWI4OWUtNGU2OC04ZWFhLTE1NDRkMjcwMzk4MCJ9.

[4] "COVID-19 (Coronavirus) State of Nevada Department of Health and Human Services, last updated on August 10, 2020 at 9:45 AM (last accessed on August 10, 2020 at 4:16 PM) https://app.powerbigov.us/view?r=eyJrIjoiMjA2ZThiOWUtM2FlNS00MGY5LWFmYjUtNmQwNTQ3Nzg5N2I2IiwidCI6ImU0YTM0MGU2LWI4OWUtNGU2OC04ZWFhLTE1NDRkMjcwMzk4MCJ9.

not even demonstrated that he would have medical insurance if released. Since it is likely that his underlying medical conditions would be go untreated out of custody, his danger from death or serious consequences from COVID-19 is again higher if he is released.

As to Petitioner's asthma, the State made Judge Barker aware that:

> recent data has shown that asthma is not a serious risk for Covid-19 patients as previously thought and reported. In fact, the New York Times and Physician's Weekly have both reported on the data obtained from New York City Covid-19 patients. What was found was asthma appeared to be underrepresented in the comorbidities reported for patients with COVID-19, showing that only about 5 percent of COVID-19 patients who have died had asthma.[5]

PA 42 (footnote in original but renumbered consistent with the footnote numbering in this pleading).

Ultimately, if Petitioner disputes the statistical evidence demonstrating that he is safer from COVID-19 in custody than out, he should pursue a 42 U.S.C. § 1983 action challenging the conditions of his confinement. See, McConnell v. State, 125 Nev. 243, 249, footnote 5, 212 P.3d 307, 311, footnote 5 (2009) (The correct way to challenge the mode of execution is a separate and independent 42 U.S.C. §1983 action). As this Court pointed out in Kerkorian habeas and mandamus are not appropriate for a COVID-19 challenge to the conditions of confinement. Kerkorian,

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[5] https://www.nytimes.com/2020/04/16/health/coronavirus-asthma-risk.html, https://www.physiciansweekly.com/asthma-not-common-in-covid-19-patients-who-have-died/

Order Denying Petition, p. 1, filed April 30, 2020. Indeed, doing so would allow the creation of a reviewable record, something this Court found to be determinative in Kerkorian.

CONCLUSION

WHEREFORE, the State respectfully requests that Petitioners demand for extraordinary relief be DENIED.

Dated this 13th day of August, 2020

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Jonathan E. VanBoskerck*
JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155
(702) 671-2750

AFFIDAVIT

I certify that the information provided in this mandamus petition is true and complete to the best of my knowledge, information and belief.

Dated this 13th day of August, 2020.

BY */s/ Jonathan E. VanBoskerck*

JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155
(702) 671-2750

CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this Answer to Mandamus Writ complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 21(d) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 5,888 words and 528 lines of text.
3. **Finally, I hereby certify** that I have read this Answer to Mandamus Writ, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 13th day of August, 2020.

Respectfully submitted

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Jonathan E. VanBoskerck*
JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on August 13, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

CHRISTOPHER R. ORAM, ESQ.
JOEL M. MANN, ESQ.
Counsels for Petitioner

JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney

I, further certify that on August 13, 2020, a copy was sent via email to District Court, Department Senior Judges:

ILEEN SPOOR - JEA
SpoorI@clarkcountycourts.us

BY */s/ E. Davis*
Employee, District Attorney's Office

JEV//ed