IN THE SUPREME COURT OF THE STATE OF NEVADA

TRAVIS BISH,

No. 82295

Appellant,

vs.

THE JUSTICE COURT FOR SPARKS TOWNSHIP, THE HON. JESSICA LONGLEY, BY AND THROUGH REAL PARTY IN INTEREST THE STATE OF NEVADA,

Respondent.
_____/

Appeal from Order Denying Petition for Writ of Mandamus
Case No. CR20-2911
The Second Judicial District Court of the State of Nevada
The Honorable Scott N. Freeman, District Judge

APPELLANT'S OPENING BRIEF

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I. STATEMENT OF JURISDICTION

The district court filed an order denying an emergency petition for writ of habeas corpus, or in the alternative, petition for writ of mandamus on December 3, 2020. JA 87-92.[1] Appellant, Travis Bish (Mr. Bish), timely filed a notice of appeal on December 30, 2020. JA 93-95. This Court's jurisdiction rests on Rule 4(b) of the Nevada Rules of Appellate Procedure (NRAP); NRS 177.015(3) (providing that a defendant may appeal from a final judgment or order in a criminal case); and NRS 2.090(2) (providing that the Supreme Court has jurisdiction to review on appeal an order granting or refusing to grant mandamus).[2]

II. ROUTING STATEMENT

The Nevada Supreme Court should keep and decide this appeal as it presents two principal issues that are questions of public importance. First, what rules of evidence apply at initial custody determination

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[1] "JA" in this Opening Brief stands for the Joint Appendix. Pagination conforms to NRAP 30(c)(1). Mr. Bish has separately transmitted, by U.S. Mail, a Motion to File Sealed Exhibits Under Seal, with an attached Supplemental Joint Appendix. This is referred to as "Supp. JA."

[2] This appeal is limited to the district court's order denying Mr. Bish's mandamus petition. This appeal does not carry forward Mr. Bish's habeas arguments.

hearings that occur pursuant to *Valdez-Jimenez v. Eighth Judicial District Court*, 136 Nev. 155, 460 P.3d 976 (2020)? Second, can the State rely primarily on the nature of the charge and potential sentence to meet its burden of proving by clear and convincing evidence that detention is the least restrictive means of reasonably ensuring the return of the defendant and the safety of the community? *See* NRAP 17(a)(11).

III. STATEMENT OF THE LEGAL ISSUES PRESENTED

Whether the State erroneously argued that formal rules of evidence apply at a bail hearing, impermissibly shifting the burden of proof to Mr. Bish to present affirmative evidence that he was not a risk of flight?

Whether the nature of the charge and potential sentence, without other evidence of risk, were sufficient to demonstrate that preventative detention was the least restrictive means of ensuring Mr. Bish's return to court and the safety of the community.

IV. STATEMENT OF THE CASE

This is an appeal from a district court order denying a petition for writ of mandamus in a criminal case.

Mr. Bish filed a petition for writ of mandamus, or in the alternative, a petition for writ of habeas corpus, in the Second Judicial District Court seeking judicial review of the justice court's mishandling of bail procedures in light of *Valdez-Jimenez*. JA 29-62 (Emergency

Petition for Writ of Habeas Corpus, or in the alternative, Petition for Writ of Mandamus; and Request for Emergency Hearing) (Petition). The district court ordered the State to file a written response, JA 63-65 (Order Directing State to Respond), and the State did so. See JA 66-78 (Response to Petitioner's Emergency Petition for Writ of Habeas Corpus, or in the alternative, Petition for Writ of Mandamus, and Request for Emergency Hearing) (Response). Mr. Bish filed a Reply on October 21, 2020. JA 79-83 (Reply). Mr. Bish filed a Request for Submission on October 27, 2020. JA 84-86 (Request for Submission).

The district court did not conduct a hearing, electing instead to "decide the instant Petition on the pleadings filed herein." JA 87 (Order Denying Emergency Petition for Writ of Habeas Corpus, or in the alternative, Petition for Writ of Mandamus; and Request for Emergency Hearing) (Order). It denied the petition. *Id.* at 87-92 (Order). Mr. Bish timely filed a notice of appeal. JA 93-95 (Notice of Appeal).

As of the filing of this brief, Mr. Bish's criminal case remains in the Justice Court for the Sparks Township. See JA 55 (Register of Actions (The State of Nevada v. Travis Bish) Case No. 20-SCR-01369) (Docket).

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V. STATEMENT OF FACTS

Mr. Bish is charged with one count of Sexual Assault Against a Child Under the Age of 14, a violation of NRS 200.366, a Category A felony, by way of a *Criminal Complaint* filed on September 16, 2020. JA 1-2 (Complaint). The Complaint alleges a single incident of sexual abuse against Mr. Bish's nine-year-old daughter that allegedly occurred on August 22, 2020. *Id.* The allegation was brought to the attention of law enforcement on August 22, 2020. Supp. JA 2-5 (PC Declaration).[3] On September 11, 2020, Mr. Bish participated in an interview with law enforcement at the Sparks Police Department. *Id.* He was permitted to leave the Police Department at the conclusion of the interview. *Id.* He was arrested without incident three days later, on September 14, 2020. *Id.*

On September 15, 2020, a justice of the peace set Mr. Bish's bail at $30,000 bondable. JA 53 (Bail Setting Form). Under information and belief, the justice of the peace set this bail based on the information

[3] Mr. Bish filed a Motion to File Supplemental Joint Appendix Under Seal (Supp. JA). The Supplemental Joint Appendix contains the PC Document and the Nevada Pretrial Risk Assessment (NPRA), which are filed confidentially in the justice and district courts due to the sensitive nature of the information contained therein.

available at the time, which was the PC Declaration and the Nevada Pretrial Risk Assessment ("NPRA"). Supp. JA 2-5 (PC Declaration); Supp. JA 7-8 (NPRA). Neither Mr. Bish, nor his counsel, nor a representative of the State were present for this initial setting of his conditions of release. JA 32 (Petition).

This case came before the same justice of the peace on September 18, 2020, for a bail hearing pursuant to *Valdez-Jimenez v. Eighth Judicial District Court*, 136 Nev. Adv. Op. 20, 460 P.3d 976 (2020). JA 55 (Docket). At the hearing, the State requested an increase in bail to $150,000. JA 7 (Transcript of Proceedings: Video-Recorded Hearing in State of Nevada v. Travis Bish, Sept. 18, 2020) (Transcript). The State argued that Mr. Bish poses a danger to any individual similarly situated to the alleged victim based on the allegations in this case. *Id.* at 6-7. The State argued that Mr. Bish poses a flight risk due solely to the nature of the charges. *Id.* Specifically, the State argued that Mr. Bish faces thirty-five years to life in prison if convicted and he does not want other individuals to know about his charges, because the bail hearing was trailed to the end of the calendar.[4] *Id.* The State acknowledged that Mr.

[4] Mr. Bish asserted in the Petition in the district court that Mr. Bish did

Bish's employment with Tesla at the time of his arrest had been verified. *Id.* at 7.

Ms. Johnson, the mother of the alleged victim, testified under oath at the hearing. *Id.* at 7-15. She testified that Mr. Bish is her husband and she has three children, ages 9, 7, and 4. *Id.* at 8, 12, 15. The alleged victim, the nine-year-old, is Mr. Bish's adopted daughter, and one of the other children is his biological child with Ms. Johnson. *Id.* at 11, 17. Ms. Johnson testified that she and Mr. Bish were separated at the time of this allegation and Mr. Bish assisted with caring for the children while Ms. Johnson was at work. *Id.* at 10, 13. Ms. Johnson testified that she had received some text messages from Mr. Bish and his mother prior to Mr. Bish's arrest, and she did not want the texts from the mother to continue. *Id.* at 12. Ms. Johnson told the Court that she was in the process of obtaining a temporary protection order against Mr. Bish. *Id.* at 11. Ms.

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not request that his case go last; his attorney did. JA 33 (Petition). Mr. Bish asserted below that it is the policy of the Washoe County Public Defender's Office to request that hearings involving allegations of sex crimes be handled last, because defendants charged with sex-related crimes face physical violence and persecution from other inmates at the jail when other inmates learn of sex-related charges. *Id.* This information was never contradicted or otherwise opposed by the State. JA 66-78 (Response).

Johnson further testified that, at the time of the hearing, she was in the process of applying for a protection order against Mr. Bish. *Id.* at 11. However, as of the filing of the Petition below on October 6, 2020, Ms. Johnson had not filed an application for a protection order against Mr. Bish, nor had any protection order been issued by any local court. JA 59-60 (Search Results of the Second Judicial District Court and Justice Courts of Reno and Sparks Townships).

Ms. Johnson testified that the alleged victim had regressed and had been engaging in toddler-like tantrums since the investigation in this case begun. JA 9-10 (Transcript). She testified that she does not think a bail in the amount of $30,000 is "much," given the allegations. *Id.* at 11. She testified that this case has impacted her and others, because now she must rely on friends to watch her children while she is at work. *Id.* at 12. She testified she did not believe that Mr. Bish thought about how his alleged actions affected other people. *Id.* at 13. She never testified that she believed a no-contact order would be insufficient to protect her children if Mr. Bish were released. *Id.* at 7-15.

Counsel for Mr. Bish argued that Mr. Bish scores in the low risk category (4) on the NPRA. *Id.* at 21; *see* Supp. JA 7-8 (NPRA). Pretrial

Services had already verified Mr. Bish's employment with Tesla at the time of his arrest. Supp. JA 7-8 (NPRA). Counsel for Mr. Bish made an offer of proof that Mr. Bish could live with his mother in the Reno area if released, which would not be with the alleged victim. JA 21. Counsel for the State confirmed that Mr. Bish's mother lives in the Reno area. *Id.* Counsel for Mr. Bish pointed out that Mr. Bish is thirty-one years old with almost no criminal history. *Id.* at 22-23. The evidence at the hearing as to Mr. Bish's criminal history is that his only prior contact with law enforcement occurred in Colorado over seven years ago. *Id.* at 24. In 2007, Mr. Bish had arrests for contempt and "public peace," which the State likened to disturbing the peace. *Id.* In 2013, he was arrested for assault causing serious bodily injury, felony menacing with a real/simulated weapon, and disorderly conduct/fighting, but the felony assault and menacing charges were deferred and dismissed. *Id.* He has no arrests or convictions for any crime similar to the allegations in this case or for any crime against a child. *Id.*

Counsel for Mr. Bish requested an own-recognizance release with conditions, including GPS monitoring and/or house arrest if the Court deemed those conditions necessary. *Id.* at 23. In response to a question

from the Judge, Mr. Bish stated that his mother does not own her own home. *Id.* at 24. At the time of the bail hearing, Mr. Bish had been in custody for five days on $30,000 bail and had not been able to bail out. JA 62 (Record of Arrest); JA 55 (Docket).

The Court increased Mr. Bish's bail to $50,000 bondable. JA 25 (Transcript). The Court also imposed the following conditions, in addition to posting money bail: no contact with anyone under the age of 18, obey all laws, including court orders and protection orders, Mr. Bish's mother cannot communicate with Ms. Johnson if Mr. Bish is living with his mother, and enhanced supervision by Pretrial Services. *Id.* at 25-26.

The justice court specifically held that Mr. Bish presents a low risk of flight. *Id.* at 25. However, the justice court found that there is still *some* risk of flight due to the seriousness of the charge. *Id.* The justice court further found that Mr. Bish has minimal criminal history, employment at the time of arrest, and family in the area (i.e., ties to the community). *Id.*

On October 6, 2020, counsel for Mr. Bish filed a petition in the district court seeking mandamus and habeas relief. JA 29-62 (Petition). Specifically, the petition asserted that the justice court erred by

detaining Mr. Bish pretrial without clear and convincing evidence that detention was the least restrictive means of reasonably ensuring his return to court and the safety of the community or alleged victim. *Id.* at 45-46.

In its response, the State argued that the justice of the peace considered all relevant bail factors and appropriately ordered that Mr. Bish be detained pretrial. JA 72 (Response). The State also argued that there was no evidence in the record that Mr. Bish presents a very low risk of flight, was employed at the time of arrest, and has family in the area. *Id.* at 74. However, the State's own attorney informed the justice court during the bail hearing that Mr. Bish "does have family in the community" and "I'm informed and believe that he is employed at Tesla." JA 6 (Transcript). The State's attorney further informed the Court that Mr. Bish's mother lives in the Reno area. *Id.* at 23. The State argued that Mr. Bish was required to present the testimony of witnesses or their affidavits at the hearing. JA 74 (Response). Lastly, the State argued that a pretrial writ petition was not an available remedy through which to challenge a lower court's custody determination. *Id.* at 70-72, 75.

In his reply, Mr. Bish addressed the appropriateness of a writ petition for challenging a lower court's custody determination, the evidentiary standard for bail hearings, and the specific facts the State attempted to challenge in its response. JA 80-82 (Reply).

The district court issued an order denying the petition without oral argument on December 3, 2020. JA 87-92 (Order). The district court appears to have adopted the State's argument that the defense was required to present evidence and witnesses at the bail hearing, implying that Mr. Bish could not rely on evidence that was already in the record or to which the State stipulated. *Id.* at 90. The district court summarily concluded that the justice of the peace did not abuse her discretion by preventively detaining Mr. Bish and failed to review de novo the application of *Valdez-Jimenez* to particular facts in this case. *Id.* at 90-91.

VI. SUMMARY OF ARGUMENT

During Mr. Bish's *Valdez-Jimenez* detention hearing, the State failed to prove, by clear and convincing evidence, that pretrial detention was the least restrictive means of reasonably ensuring Mr. Bish's return to court and the safety of the community and the alleged victim. The

district court abused its discretion in denying Mr. Bish's emergency petition for writ of mandamus regarding the pretrial detention order.

Specifically, the district court adopted an incorrect evidentiary standard for *Valdez-Jimenez* hearings, and improperly shifted the burden to Mr. Bish to present affirmative evidence or testimony indicating that he was a low risk of flight. Further, it was a clear error of law for the justice court to determine that the seriousness of the charge and the potential sentence, on their own, could support a finding of risk of flight that necessitated a de facto pretrial detention order. The denial of mandamus relief was an abuse of discretion under these circumstances.

VII. ARGUMENT

Standard of Review

This Court is called upon to clarify the application of principles adopted in *Valdez-Jimenez* and the rules of evidence that apply at those hearings. This issue presents a purely legal question, which this Court reviews *de novo*. *See Matter of Halverson*, 123 Nev. 493, 509, 169 P.3d 1161, 1172 (2007) ("We review purely legal issues … de novo"); *and id.* at 509 n.19 (citing *Milton v. State, Dep't of Prisons*, 119 Nev. 163, 164, 68

P.3d 895, 895 (2005) ("explaining that an argument that the district court applied the wrong legal standard raises a pure question of law, subject to de novo review"); *State v. Frederick*, 129 Nev. 251, 254, 299 P.3d 372, 375 (2013) (noting that pure questions of law are reviewed de novo).

The Nevada Supreme Court reviews the district court's denial of a petition for a writ of mandamus for an abuse of discretion. *Stockmeier v. Green*, 130 Nev. 1003, 1008, 340 P.3d 583, 586 (2014). "While review for abuse of discretion is ordinarily deferential, deference is not owed to legal error." *Matter of Aragon*, 136 Nev. Adv. Op. 75, 476 P.3d 465, 467 (Dec. 3, 2020).

Discussion

Formal rules of evidence do not apply at a bail hearing. The State impermissibly shifted the burden of proof to Mr. Bish by arguing that he had failed to produce affirmative evidence that he was not a flight risk.

The petition for writ of mandamus in this case challenged the justice court's *de facto* detention order, arguing that the justice court's decision was not based on clear and convincing evidence that detention was the least restrictive means of reasonably ensuring Mr. Bish's return to court and the safety of the community. In response to the petition, the State argued that there was no evidence in the record that Mr. Bish

presents a very low risk of flight, was employed at the time of arrest, and has family in the area. JA 74 (Response).

The Nevada Revised Statutes specifically exclude bail hearings from proceedings to which the rules of evidence and witnesses apply. NRS 47.020(3)(b) ("The other provisions of this title . . . do not apply to . . . Proceedings with respect to release on bail"). The standard practice, which has been upheld in both state and federal courts, is for the parties to rely on proffers of evidence and judicial admissions. *See, e.g., United States v. Martir*, 782 F.2d 1141, 1147 (2d Cir. 1986) (finding no error with a magistrate's reliance on a proffer to which no objection was made).

To proffer is "[t]o offer or tender (something, esp. evidence) for immediate acceptance." BLACK'S LAW DICTIONARY 570 (3d ed. 1996). "Judicial admissions are defined as deliberate, clear, unequivocal statements by a party about a concrete fact within that party's knowledge." *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co.*, 127 Nev. 331, 343, 255 P.3d 268, 276 (2011). Parties are bound by their judicial admissions. *Smith v. Zilverberg*, 137 Nev. Adv. Op. 7, at *5 n.6 (Mar. 4, 2021) ("Under the doctrine of judicial admissions, he is bound to that statement.").

"As in the case of other pretrial proceedings such as arraignments and probable cause determinations for warrants, bail hearings are typically informal affairs, not substitutes for trial or even for discovery." *United States v. LaFontaine*, 210 F.3d 125, 131 (2d Cir. 2000) (internal quotation marks and citations omitted)). "Often the opposing parties simply describe to the judicial officer the nature of their evidence; they do not actually produce it." *Id.* However, "while 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*." *Id.* (emphasis added); *see United States v. Acevedo-Ramos*, 755 F.2d 203, 208 (1st Cir. 1985) ("If the court is dissatisfied with the nature of the proffer [in a bail hearing], it can always, within its discretion, insist on direct testimony" (quoting H.R. Rep. No. 907, 91st Cong., 2d Sess. 182, 184 (1970))).

Reliance on proffers and judicial admissions has been upheld in Nevada. In *Application of Wheeler*, the Court noted that "information . . . may be received to aid the court" in determining conditions of release following a decision on whether a defendant charged with a capital

offense could be denied bail. 81 Nev. 495, 501, 406 P.2d 713, 716 (1965). At the bail hearing at issue, the prosecutor and defense counsel each commented on the defendant's criminal history and "referred to the fact that he was on bail from another state when the shooting at hand took place." *Id.*, 406 P.2d at 716. The Court found that it was "preferable that such information be presented by authenticated records (rather than by the prosecutor's comment) and marked as exhibits in evidence," but noted that "the failure to do so [was] of no moment here, for the information was conceded to be correct." *Id.*, 406 P.2d at 716. In *Cameron*, the district court relied on "information" that would not have been legally admissible evidence at a trial or preliminary hearing. *Cameron v. Eighth Jud. Dist. Ct. in & for Cty. of Clark*, 135 Nev. 214, 217, 445 P.3d 843, 845 (2019). "In setting the initial bail, the district court adopted the amount and conditions set by the justice court, which were premised on the justice court's review of Cameron's arrest report and criminal history, and on the State's arguments regarding Cameron's 10-year-old conviction for conspiracy to commit aggravated stalking." *Id.*, 445 P.3d at 845.

A stipulation to a fact negates the need to present evidence supporting that fact. *Gottwals v. Rencher*, 60 Nev. 35, 98 P.2d 481, 484

(1940) ("There is nothing unusual in such a stipulation of fact dispensing with formal proof. On the contrary, it is common practice to dispense with such proof by an agreed statement of facts"). Lastly, parties may argue reasonable inferences from facts. *Glover v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark*, 125 Nev. 691, 705, 220 P.3d 684, 694 (2009), *as corrected on denial of reh'g* (Feb. 17, 2010) ("Because of the State's burden of proving guilt beyond a reasonable doubt, defense attorneys must be permitted to argue all reasonable inferences from the facts in the record" (internal quotation marks and citation omitted)).

The Court's recent opinion, *Valdez-Jimenez*, did not alter these standards. *Valdez-Jimenez v. Eighth Jud. Dist. Ct. in & for Cty. of Clark*, 136 Nev. 155, 460 P.3d 976 (2020). In *Valdez-Jimenez*, the Court held that an arrestee has a right to a prompt bail hearing, within a reasonable time after arrest. *Id.* at 163-64, 460 P.3d at 985. At that bail hearing, the State must prove by clear and convincing evidence that the conditions of release it seeks are the least restrictive means of reasonably ensuring the arrestee's return to court and the safety of the community, including any victims. *Id.* at 166, 460 P.3d at 987. The arrestee has the rights to be represented by counsel, to present witnesses and evidence, and to testify.

Id., 460 P.3d at 987. The lower court "must make findings of fact and state its reasons for the bail decision on the record." *Id.*, 460 P.3d at 987. In rendering its decision, the lower court must consider the factors enumerated in NRS 178.4853. *Id.* at 156, 460 P.3d at 980.

The Court in *Valdez-Jimenez* did not discuss the rules of evidence that apply at bail hearings. The *Valdez-Jimenez* opinion did not create an affirmative burden on the defense to prove any fact material to release. Rather, the State must prove *its* burden by clear and convincing evidence, and the court must consider the information before it. *Id.* at 166, 460 P.3d at 987.

The State argues that no evidence was presented in support of Petitioner's arguments that: 1) he presents a very low risk of flight, 2) has family in the area, 3) ties to the community, 4) employment, and (5) a place to live with his mother in Reno if released, which would not be with the alleged victim. State's Resp. 9:4-9.

The low risk of flight is supported by the NPRA, which is part of the record, and it was a finding of fact made by the justice of the peace. *See* Supp. JA 7-8 (NPRA); JA 25 (Transcript) (statements from Judge Longley that "due to his low risk of flight" and "while it appears that there's a

very low risk of flight, there is still that risk of flight due to the nature of the charges").

Counsel for Mr. Bish made a proffer that Mr. Bish could live with his mother in Reno if released, in which the State joined. JA 21, 23 (Transcript). Further, the justice of the peace had an entire conversation with Mr. Bish about where he would live if released. *Id.* A defendant has the right to testify at the bail hearing. *Valdez-Jimenez*, 136 Nev. at 166, 460 P.3d at 987. The State never challenged the proffer or called into question its accuracy. *See* JA 3-28 (Transcript). The justice court discussed the imposition of a no-contact order between Mr. Bish and Ms. Johnson and the children. *Id.* at 15, 25-26. No one, including the State and Ms. Johnson, alleged that Mr. Bish would be unable to comply with a no-contact order if he lived with his mother. *Id.* at 3-28.

At the bail hearing, the *State* proffered that Mr. Bish was employed with Tesla. JA 7 (Transcript) ("I'm informed and believe that [Mr. Bish] is employed at Tesla"). Further, Pretrial Services verified Mr. Bish's employment, and this information is contained in the NPRA. Supp. JA 7-8 (NPRA). Lastly, the arguments that Mr. Bish has ties to the community and family in the area are reasonable inferences from facts in the record,

specifically that he is employed and has children and a mother living in Reno. JA 3-28 (Transcript).

The information about Mr. Bish's ties to the community came from the NPRA, which was created by Pretrial Services, testimony from Mr. Bish, testimony from the State's witness, Ms. Johnson, and the prosecutor's judicial admissions. JA 3-28 (Transcript); Supp. JA 7-8 (NPRA). Neither party contested the accuracy of any of that information at the bail hearing, and all of it was offered by the State. JA 3-28 (Transcript). To suppose that Mr. Bish bore the burden of producing additional evidence beyond this record impermissibly shifts the State's burden of proof set forth in *Valdez-Jimenez*.

The State could not rely solely upon the nature of the charge and potential sentence to demonstrate that preventative detention was the least restrictive means of ensuring Mr. Bish's return to court and the safety of the community.

The State did not meet its burden of proving by clear and convincing evidence that detention is the least restrictive means of reasonably assuring Mr. Bish's return to court and the safety of the community. The justice court specifically held that Mr. Bish poses a "very low risk" of flight, and made no finding that he posed a danger to the alleged victim

or the community. The essence of the State's argument below, the justice court's ruling, and the district court's decision is that detention is the least restrictive means to reasonably assure Mr. Bish's return to court and the safety of the community based solely on the charge and the potential prison sentence it carries.

"Neither the Constitution nor our rules of criminal procedure permit a judge to base a pretrial release decision solely on the severity of the charged offense." *State v. Brown*, 2014-NMSC-038, ¶ 52, 338 P.3d 1276, 1292 (NM Sup. Ct. 2014). "Prior convictions and other reliably determined facts relating to dangerousness may be relevant to [danger to the community if released], but the mere fact that the defendant is charged with a crime cannot be used as a basis for a determination of dangerousness." *United States v. Scott*, 450 F.3d 863, 874 n.15 (9th Cir. 2006).

"Bail is not pretrial punishment and is not to be set solely on the basis of an accusation of a serious crime." *Brown*, 338 P.3d at 1292. "As the United States Supreme Court has emphasized, '[t]o infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act.'" *Id.* (quoting *Stack v. Boyle*, 342 U.S. 1, 6 (1951)).

"Imprisonment to protect society from predicted but unconsummated offenses is . . . fraught with danger of excesses and injustice." *Williamson v. United States*, 184 F.2d 280, 282 (2d Cir. 1950). Therefore, judges "should exercise care not to give inordinate weight to the nature of the present charge in evaluating factors for the pretrial release decision." ABA STANDARDS, Standard 10–1.7, at 50.

"Empirical studies indicate that the severity of the charged offense does not predict whether a defendant will flee or reoffend if released pending trial." *Brown*, 338 P.3d at 1292 (citing Curtis E.A. Karnow, *Setting Bail for Public Safety*, 13 BERKELEY J. CRIM. L. 1, 14–16 (2008) (reviewing studies indicating that "evidence does not support the proposition that the severity of the crime has any relationship either to the tendency to flee or to the likelihood of re-offending"); Wayne LaFave, et al., CRIMINAL PROCEDURE, § 12.1(b), at 12 (3d ed. 2007) (citing studies and stating that the "likelihood of a forfeiture does not appear to depend upon the seriousness of the crime"). "Setting money bail based on the severity of the crime leads to either release or detention, determined by a defendant's wealth alone instead of being based on the factors

relevant to a particular defendant's risk of nonappearance or reoffense in a particular case." *Id.*

In *United States v. Friedman*, the defendant was charged in federal court with three counts alleging that he sent and received child pornography through the U.S. Mail. 837 F.2d 48, 48-49 (2d Cir. 1988). He also faced sexually motivated charges in state court based on allegations that while employed as "a computer teacher, . . . [he] had sodomized and sexually assaulted a number of his male students between the ages of eight and twelve." *Id.* at 49. The District Court "ruled that the evidence of Friedman's sexual abuse of children, his collection of pornography, the seriousness of his federal charges and the erosion of support for him in the community justified detention prior to trial." *Id.*

Mr. Friedman challenged the District Court's pretrial detention order through an appeal. *Id.* at 48. On appeal, the government argued "that Friedman present[ed] a serious risk of flight because of the nature of the charges against him, the strength of the government's case, the long sentence of incarceration he may receive, his age and the obloquy that he faces in his community." *Id.* at 49. Many of these arguments are

strikingly similar to the arguments made by the State during Mr. Bish's bail hearing. JA 6-7 (Transcript).

In *Friedman*, "it [was also] undisputed that Friedman [was] a life-long New York resident, that he ha[d] no prior criminal record, that he ha[d] no passport or known ability to evade surveillance, that he ha[d] worked gainfully in the New York area for twenty-five years prior to his arrest, and that he [was] married and has three children, all of whom live[d] in the New York area." 837 F.2d at 49-50. "Moreover, Friedman apparently took no steps to leave the jurisdiction after federal agents executed a search warrant at his home on November 3, 1987 and after he was arrested at home on state charges three weeks later." *Id.* at 50.

The Circuit Court reversed the District Court's detention order. *Id.* The Circuit Court noted that "[i]n other cases concerning risk of flight, we have required more than evidence of the commission of a serious crime and the fact of a potentially long sentence to support a finding of risk of flight." *Id.* Factors that support risk of flight included having "a number of aliases," moving between hotels, showing prior "skill in avoiding surveillance," having "hidden assets," and prior fugitive status ending in capture. *Id.*

In the present case, the State argued—and the justice court and district court apparently agreed—that Mr. Bish poses a risk of flight and danger to the community based solely on the nature of the charges and the long potential prison sentence he faces if convicted. JA 6-7, 25-26. The justice of the peace specifically concluded that Mr. Bish poses "a very low risk of flight." *Id.* at 25. This conclusion is supported by the evidence that Mr. Bish has family in the area, ties to the community, employment, minimal criminal history, and no failures to appear. *Id.* at 3-28. There was evidence that he could live with his mother in Reno if released, so he had a place to live that is not with the alleged victim. *Id.* at 23. One of the three children that lives with Ms. Johnson is Mr. Bish's biological child, which is further incentive for Mr. Bish to remain in the area. *Id.* at 11.

There is no evidence that Mr. Bish has ever failed to appear for court. More tellingly, the investigation in this case began on August 22, 2020. Supp. JA 1-5 (PC Declaration). Mr. Bish agreed to participate in an interview with Sparks Police officers on September 11, 2020, in which he was questioned about the allegations in this case. *Id.* at 4. Mr. Bish was permitted to leave the Police Department at the conclusion of the

interview. *Id.* He was arrested three days later, on September 14, 2020. *Id.* at 4-5. Just as in *Friedman*, Mr. Bish made no attempt to flee in between the time he was interviewed and his arrest. *Id.*

The State also failed to prove by clear and convincing evidence that Mr. Bish must be detained in order to protect the community and the alleged victim. Mr. Bish's criminal history is both minimal and remote. JA 23-24 (Transcript). He has no prior arrests for anything sexually motivated or for a crime against a child. *Id.* The alleged victim in this case is someone known to him, not a random child picked up off the street. Supp. JA 3 (PC Declaration). No evidence was presented that Mr. Bish poses any risk to the community at large if released. JA 3-28 (Transcript). As for danger to the alleged victim or similarly situated individuals, there was no evidence of abuse against the other two children in the household. *Id.* Further, the allegation in this case is of a single incident, not an ongoing course of conduct. JA 1-2 (Complaint); Supp. JA 2-5 (PC Declaration). Ms. Johnson never testified that Mr. Bish poses further danger to the alleged victim or the other children if released. JA 3-28 (Transcript). The Court imposed a no-contact order between Mr. Bish and anyone under the age of 18, including the alleged victim, and anyone

within Ms. Johnson's household. *Id.* at 25-26. The Court also ordered that Mr. Bish be placed on enhanced supervision with Pretrial Services if released. *Id.* at 26. What difference does the posting of $50,000 bail make to whether Mr. Bish can be trusted to follow those orders? A better indication is Mr. Bish's lack of significant criminal history and his cooperation with law enforcement during the investigation in this case.

The State failed to carry its burden of clear and convincing evidence that preventive detention is the least restrictive means of reasonably assuring that Mr. Bish returns to court and the protection of the community. The justice court manifestly abused its discretion in setting bail at $50,000, an amount that Mr. Bish cannot afford. The district court abused its discretion by upholding the justice court's order.

The justice court's reasoning results in one of two outcomes. First, anyone charged with a serious crime—such as the one with which Mr. Bish is charged—must be detained pretrial, regardless of how little risk of flight or danger to the community he poses. In the alternative, only those defendants who can afford to post a high monetary bail will be released. Neither result is acceptable under *Valdez-Jimenez* or federal constitutional case law.

VIII. CONCLUSION

Traditional rules of evidence do not apply at a bail hearing. The parties and the court are permitted to rely on proffers and judicial admissions. While it may be in a defendant's best interest to present affirmative evidence of ties to the community, *Valdez-Jimenez* imposes no affirmative burden on the defense to do so. Rather, it requires the State to prove by clear and convincing evidence that the conditions of release or detention it seeks are the least restrictive means of reasonably assuring the defendant's return to court and the safety of the community.

In this case, the State failed to prove by clear and convincing evidence that detention is the least restrictive means of reasonably ensuring Mr. Bish's return to court and the safety of the community. The justice court manifestly abused its discretion by preventively detaining him based solely on the nature of the charge against him. The district court erred by upholding the justice court's decision. Mr. Bish respectfully requests that this court reverse the order of the district court denying his emergency petition for a writ of mandamus.

DATED this 10th day of May, 2021.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief 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 Century in 14-point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, even including the parts of the brief though exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains a total of 6,974 words. NRAP 32(a) (7) (A) (i), (ii).

3. Finally, I hereby certify that I have read this appellate brief, 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 of the transcript or appendix where the matter relied upon 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 10th day of May 2021.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 10th day of May 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Jennifer P. Noble, Chief Appellate Deputy
Washoe County District Attorney's Office

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