

IN THE SUPREME COURT OF THE STATE OF NEVADA

TRAVIS BISH,

Appellant,

v.

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

Respondent.

No. 82295

Electronically Filed
Jan 12 2022 03:15 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

RESPONDENT'S ANSWERING BRIEF

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_____ /

RESPONDENT'S ANSWERING BRIEF

I. STATEMENT OF JURISDICTION

There is a jurisdictional defect in this case. Appellant Travis Bish (“Bish”) appeals from a district court order denying a pretrial writ petition concerning a justice of the peace’s bail determination. The State previously filed a motion to dismiss this appeal. On July 13, 2021, a panel of the Nevada Supreme Court denied the State’s motion without prejudice.¹ The Court concluded that the arguments concerning jurisdiction were best resolved by the panel assigned to address the case on the merits and the

¹ This order and the related filings exist in the docket of this case and will occasionally be referred to throughout this brief and are not reproduced in the Respondent’s Appendix.

Court could consider the issue of jurisdiction and the appropriate procedural process as the Court's analysis of the merits proceeds. The jurisdictional defect is fatal to Bish's appeal and will be addressed in subsection A of this Brief.

II. STATEMENT OF THE CASE

On September 16, 2020, the State filed a criminal complaint in Sparks Justice Court charging Bish with one count of sexual assault against a child under the age of 14. Joint Appendix ("JA") 1-2. On September 18, 2020, a hearing was held in justice court to determine bail pursuant to *Valdez-Jimenez v. Eighth Judicial Dist. Court*, 136 Nev. 155, 460 P.3d 976 (2020). *See generally* JA 3-28. After hearing argument from the parties and testimony from the victim's mother, the justice of the peace, the Honorable Jessica Longley, set Bish's bail at \$50,000.00 bondable. *Id.* at 25.

On October 6, 2020, Bish filed an Emergency Petition for Writ of Habeas Corpus, or in the Alternative, Petition for Writ of Mandamus; and Request for Emergency Hearing with the Second Judicial District Court to challenge the bail determination made by Judge Longley. *See id.* at 29-47 (Petition), 48-62 (Exhibits). The district court ordered the State to respond to the Petition. *Id.* at 63-64. On October 19, 2020, the State filed its response defending the justice court's bail determination. *Id.* at 66-78. On

October 21, 2020, Bish filed a Reply in support of his Petition. *Id.* at 79-83. On December 3, 2020, the district court issued an order denying Bish's Petition. *Id.* at 87-92. On December 30, 2020, Bish filed a notice of appeal of the district court's order denying his Petition. *Id.* at 93-94.

Bish's appeal was docketed with the Nevada Supreme Court on January 8, 2021. After the case was docketed, the parties entered into negotiations below. On May 5, 2021, Bish pled guilty in district court to attempted lewdness with a child under 14 years of age, and sentencing was set out for completion of a psychosexual evaluation and a presentence investigation report. Respondent's Appendix ("RA"), 12.

On May 10, 2021, Bish filed his Opening Brief ("OB") in this case. On June 8, 2021, the State filed its Motion to Dismiss this appeal, as well as its Motion to Suspend/Stay the Briefing Schedule Pending the Resolution of the Motion to Dismiss. On June 16, 2021, Bish filed a Non-Opposition to the State's Motion to Suspend/Stay the Briefing Schedule Pending the Resolution of the Motion to Dismiss. The same day, the parties entered into a stipulation to extend Bish's time to file an opposition to the State's Motion to Dismiss.

On June 22, 2021, Bish filed his Opposition to the State's Motion to Dismiss. On June 25, 2021, the Court filed a procedural order approving

the parties' stipulation regarding the deadline for Bish's Opposition, setting a deadline for the State to Reply, and granting the State's motion to suspend the briefing schedule. The Court ordered that briefing would be suspended until further order of the Court. On June 29, 2021, the State filed its Reply in Support of the Motion to Dismiss.

On June 30, 2021, Bish appeared for sentencing in the district court. Bish was sentenced to a minimum term of 96 months to a maximum term of 240 months, with 290 days credit time served. JA, 21-22.

On July 13, 2021, the Court denied the State's Motion to Dismiss without prejudice and indicated the panel assigned may consider the issue of jurisdiction and the appropriate procedural process as its analysis of the merits proceeds.

Bish did not file a timely direct appeal from his judgment of conviction. On December 14, 2021, Bish filed a motion to reinstate the briefing schedule in this case. On December 15, 2021, the Court issued an order reinstating briefing.

III. ROUTING STATEMENT

This case is not presumptively assigned to either appellate court; thus, the Nevada Supreme Court may exercise its discretion to retain this matter or to assign it to the Court of Appeals. NRAP 17. Bish contends that

this case presents two principle issues of public importance and, therefore, the Supreme Court should retain the case. Bish claims that this case presents a question of whether the rules of evidence apply to bail hearings, but later in his brief cites NRS 47.020(3)(b) for the proposition that the rules of evidence do not apply to bail hearings. The State agrees that NRS 47.020(3)(b) is the Nevada statute on point and settles the issue; thus, there is no need for clarification by this Court. Bish's other contentions are specific to this case and not issues of public importance. As such, either appellate court could resolve the matters raised herein.

IV. STATEMENT OF ISSUES

- A. Whether Bish has shown that this Court has jurisdiction over this appeal?
- B. Whether the bail issues raised by Bish are moot because while the appeal was pending Bish pled guilty and been sentenced to prison?
- C. If the Court has jurisdiction over this appeal and if it determines that the issues raised herein are not moot, whether the district court manifestly abused its discretion by denying Bish's Petition concerning the justice court's bail determination?

V. STATEMENT OF FACTS

A. Justice Court Proceedings.

On September 16, 2020, the State filed a Criminal Complaint in Sparks Justice Court charging Bish with one count of sexual assault against a child under the age of 14 for placing his finger(s) inside A.I.'s vagina. JA,

1. The matter came before the Honorable Jessica Longley, on September 18, 2020, for a bail hearing pursuant to *Valdez-Jimenez, supra*.

The justice court had previously set a preliminary bail at \$30,000.00 bondable. *See* JA, 6-7. At the September 18, 2020 bail hearing, the State argued that Bish's bail should be raised to \$150,000.00. *Id.* at 7. In support of its request, the State presented argument and evidence, including testimony from the victim's mother, Ms. Johnson.

Ms. Johnson informed the justice court that she had been married to Bish at the time of the crime, but they had been separated, and that she shared one child with him. *Id.* at 9, 11, 13. Ms. Johnson had two other children, including the victim in this case, A.I. *Id.* Bish adopted A.I. *Id.* at 17. Bish acted as the primary caregiver for A.I. and her two siblings while Ms. Johnson was working. *Id.* at 9-10. A.I., who was 9 years old, began to have toddler-like tantrums and had a difficult time coping after Bish's abuse. *Id.* at 9-10, 15, 16. When asked about her thoughts regarding bail, Ms. Johnson responded:

... I think a \$30,000 bail really isn't that much for the nature of what's happened. I'm in the process of getting a TPO against him because they said if he does end up getting out today, then he would still be

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able to have contact with my younger two children, just not with me and my oldest. So it would worry me if he would be able to get out.

Id. at 11.

Ms. Johnson expressed concern about Bish's contact with her other children because her youngest child was a female and so is the child that Bish victimized in this case. *Id.* at 11-12. Prior to cross-examination of Ms. Johnson, Judge Longley asked Ms. Johnson if divorce proceedings had started and about marital assets. *Id.* at 13-15.

Bish's counsel requested an own recognizance release. *Id.* at 22. Bish's counsel suggested that Bish could live with his mother locally and that the court should impose a no contact order and GPS monitoring or house arrest as alternatives to guarantee that he would not flee and would not contact the victim in this case. *Id.* at 22-23.

Judge Longley inquired where Bish's mother lived, but Bish's counsel simply responded, "I believe that's here in Reno. I don't have that address." *Id.* at 23. Judge Longley also inquired about Bish's criminal history, which included a 2007 disturbing the peace arrest and a 2013 arrest for assault causing serious bodily injury, assault, and felony menacing with a real simulated weapon. *Id.* at 23-24. Bish's counsel reported that the assault charges had been deferred and dismissed. *Id.* at 24.

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Judge Longley denied the State's request for a bail increase to \$150,000 and found that under the circumstances of the case and the particular defendant, such a bail would "be excessive." *Id.* at 24-25. Judge Longley also denied Bish's request for a release on his own recognizance. *Id.* at 24-26. Judge Longley raised Bish's bail to \$50,000 bondable. *Id.* at 25. Judge Longley reasoned:

Hearing a little more about Mr. Bish's circumstances, he is employed. He does have family here, I do believe a lower bail than \$150,000 is necessary. However, I am still concerned because 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. If convicted, it's a mandatory prison offense with a minimum of 35 years and a maximum of lifetime in prison.

Id. at 25.

B. District Court Petition for Writ of Habeas Corpus, or in the Alternative, Petition for Writ of Mandamus: and Request for Emergency Hearing.

On October 6, 2020, eighteen (18) days after Bish's bail hearing in justice court, Bish filed an Emergency Petition for Writ of Habeas Corpus, or in the Alternative, Petition for Writ of Mandamus: and Request for Emergency Hearing ("Petition"). JA, 29-62. Bish argued that the justice court's decision amounted to a *de facto* detention order and requested that the district court vacate the justice court's order and instruct the justice court to issue a new order with instructions to release Bish on his own recognizance. *Id.* On October 12, 2020, the district court entered an order

directing the State to respond. *Id.* at 63-65. The State filed its Response on October 19, 2020. *Id.* at 66-78. On October 21, 2020, Bish filed his Reply and Request for Submission. *Id.* at 79-86.

On December 3, 2020, the district court issued an order denying Bish's Petition and his request for a hearing. *Id.* at 87-92. The district court cited the applicable legal standards in its order, including that a pretrial release decision is a matter within the discretion of the trial court and that when a writ of mandamus is pursued it is the petitioner's burden to demonstrate that relief is warranted. *Id.* at 88-89. The district court found, in relevant part:

... there is no indication Judge Longley acted arbitrarily or capriciously when setting Petitioner's bail at \$50,000.00, bondable. The Court finds Judge Longley considered all relevant factors pursuant to *Valdez-Jimenez* when determining Petitioner's bail amount. The Court finds Judge Longley determined Petitioner[']s bail amount following a 'full-blown adversarial hearing.' Specifically, the Court notes while the State requested an increase to \$150,000.00 bail, Judge Longley found that \$150,000.00 bail would be excessive in this case. Judge Longley ultimately concluded in light of the factors before her, the State had proved bail was necessary in this case to ensure Petitioner's future Court attendance in addition to protecting the safety of the victims and the community. Finding such, the Court hereby denies Petitioner's writ.

Id. at 90-91.

On December 30, 2020, Bish filed a Notice of Appeal. *Id.* at 93-94.

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VI. SUMMARY OF ARGUMENT

Bish received a prompt adversarial bail hearing in justice court, where he was given the opportunity to testify and make a case for the judge to lower the bail originally set when he was arrested. He sought review of that decision with the district court and relief was denied. Bish has not satisfied his burden to demonstrate why this Court should review the decision of the district court when it was acting in its appellate capacity over the justice court's bail decision. Put differently, Bish has not met his burden to prove that this Court has jurisdiction over his appeal.

Bish also entered into negotiations and was sentenced to prison while this appeal was pending; thus, his pre-plea bail is a moot issue. Bish entered his plea after his notice of appeal was filed, but before he filed his Opening Brief in this case. Yet, Bish failed to address or prove this case meets the exceptions to the mootness requirements in his Opening Brief and, therefore, any such arguments should be considered waived.

Finally, to the extent that this Court reviews Bish's arguments on the merits, he has not shown that the district court manifestly abused its discretion by denying his Petition. As such, the district court's order should be affirmed.

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VII. ARGUMENT

A. Bish has not met his burden to show that this Court has jurisdiction.

“We have consistently held that the right to appeal is statutory; where no statutory authority to appeal is granted, no right to appeal exists.”

Castillo v. State, 106 Nev. 349, 352, 792 P.2d 1133, 1135 (1990). It is the appellant’s burden to demonstrate that the appellate court has jurisdiction. *See e.g., Moran v. Bonneville Square Assocs.*, 117 Nev. 525, 527, 25 P.3d 898, 899 (2001) (noting that because the Court “is one of limited, appellate jurisdiction, we may not presume that we have jurisdiction over a docketed appeal” and that “the burden rests squarely upon the shoulders of a party seeking to invoke our jurisdiction” to establish jurisdiction to the Court’s satisfaction). In Bish’s Opening Brief he cited three authorities for jurisdiction: Rule 4(b) of the Nevada Rules of Appellate Procedure (“NRAP”), NRS 177.015(3), and NRS 2.090(2), but did not present cogent argument to support this Court invoking jurisdiction under any of the authorities he cited. Bish has not met his burden of establishing this Court’s jurisdiction and this appeal should be dismissed.

1. Bish did not appeal from a final judgment.

NRAP 4(b) and NRS 177.015(3) provide a criminal defendant the right to appeal from a final judgment. *See* NRAP 4(b); NRS 177.015(3);

Castillo v. State, 106 Nev. 349, 352, 792 P.2d 1133, 1135 (1990) (“[a]n appeal in a criminal case lies from the final judgment of the district court, not from an order finally resolving an issue in a criminal case”); *Sandstrom v. Dist. Ct.*, 121 Nev. 657, 660, 119 P.3d 1250, 1253 (2005) (explaining that NRS 177.015(3) “applies only to final judgments of conviction or verdicts in criminal cases”). This is not an appeal from a final judgment, as this appeal occurred approximately six months before the final judgment was entered in this case and concerns a singular order that occurred prior to the entry of Bish’s plea. *See* RA, 23-26. As such, Bish improperly cited to NRAP 4(b) and NRS 177.015(3) as the basis for jurisdiction in this case.²

2. Bish pursued a pretrial Petition for Writ of Habeas Corpus below and no appeal lies from an order denying such a Petition.

Bish styled his Petition below as a Petition for Writ of Habeas Corpus and cited authority from this Court and others to suggest that a writ of habeas corpus is the appropriate method to challenge excessive bail. *See* JA 29, 36. For example, in Bish’s Petition below he asserted, “[t]he Nevada Supreme Court has held that a writ of habeas corpus is the appropriate means of challenging excessive bail or conditions of release.” *Id.* at 36

² Bish implicitly conceded that NRAP 4(b) and NRS 177.015(3) do not support his claim of jurisdiction in his Opposition to the State’s Motion to Dismiss, as he did not address the State’s contentions on point and only focused his argument on NRS 2.090(2) to support his claim of jurisdiction.

(citations omitted). This is problematic for Bish’s jurisdictional argument because this Court has explicitly held that “[n]o appeal lies from an order of the district court denying a pretrial petition for writ of habeas corpus.”

Castillo, 10 Nev. at 352, 792 P.2d at 1135.

Bish preemptively attempted to circumvent the holding in *Castillo* by including a footnote in the jurisdictional statement of his Opening Brief, which notes that his appeal is limited to the district court’s order denying his mandamus petition and that he does not carry forward his habeas arguments. OB, pg. 1, n. 2. Yet, Bish only made habeas arguments below. Indeed, while Bish indicated that his Petition was alternatively one for mandamus in its title, the only authority he cited associated with a writ of mandamus was that a writ of mandamus may issue when there is no plain, speedy, or adequate remedy at law. JA, 36 (citing NRS 34.170). Bish did not cite or make an argument consistent with the other mandamus requirements in his brief, such as NRS 34.160 which discusses when a writ of mandamus may issue. Bish also did not include an affidavit to support a writ of mandamus, as required by NRS 34.170. *See* NRS 34.170 (“It shall be issued upon an affidavit, on the application of the party beneficially interested.”).

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Notably, Bish *did* comply with the procedural requirements to file a petition for writ of habeas corpus, such as the verification requirement. NRS 34.370 (discussing the verification requirements for a writ of habeas corpus); JA, 31 (Bish’s verification consistent with NRS 34.370)³. In other words, Bish may have included “writ of mandamus” in the title of his pleading, but it was in name only and he did not pursue such a writ below. *See* JA 29-47. This is akin to a scenario where an appellant makes an assertion on appeal or reference to a legal principle but does not support it with cogent authority or argument. This Court does not consider issues not properly argued or supported and finds new issues raised for the first time on appeal waived. *See e.g., Edwards v. Emperor’s Garden Rest.*, 122 Nev. 317, 330, n. 38, 130 P.3d 1280, 1288, n. 38 (2006) (declining to consider claims not cogently argued and not supported by relevant authority); *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (recognizing that arguments raised for the first time on appeal are waived).

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³ Bish cited NRS 53.045 for his verification support, but that statute simply allows a party to use an unsworn declaration in the place of an affidavit. However, the substance of the document addresses the requirements of the verification required by NRS 34.370 for a petition for writ of habeas corpus. The verification also refers to the Petition as simply a “Petition for Writ of Habeas Corpus” as well. JA, 31, ¶ 2.

Bish pursued a petition for writ of habeas corpus because, as he argued in the Petition itself, that is the remedy the Nevada Supreme Court has specified is appropriate when challenging bail. *See* JA, 36. Thus, Bish has appealed a pretrial order denying a petition for writ of habeas corpus and no such appellate right exists. *See Castillo*, 106 Nev. at 352, 792 P.2d at 1135. This Court should reject Bish’s attempt to change legal theories now in an effort to create jurisdiction over an appeal where none traditionally exists.

3. NRS 2.090 does not provide jurisdiction to this Court to consider Bish’s appeal.

Even if this Court determines that Bish complied with the petition for writ of mandamus filing requirements and argued the issue below (which it should not), Bish still has not shown that jurisdiction is appropriate. Bish points to NRS 2.090(2) as a last-ditch effort for this Court to entertain his appeal. Bish’s reliance on NRS 2.090(2) is misplaced.

NRS 2.090(2) provides, “[t]he Supreme Court has jurisdiction to review upon appeal... (2)... an order granting or refusing to grant an injunction or mandamus in the case *provided for by law*.” (*emphasis added*). The plain language of NRS 2.090(2) provides jurisdiction over orders granting or refusing to grant mandamus *only* as provided by other statutes. Yet, Bish contends that NRS 2.090(2) provides the Supreme

Court jurisdiction to review *any* appeal from an order granting or denying mandamus. If the legislature intended for this Court to have jurisdiction over any and all pretrial orders denying writs of habeas corpus or alternatively pretrial writs of mandamus from the justice courts and district courts, it would not need to include the phrase “provided for by law” at the end of the statutory provision. Put simply, Bish’s interpretation of NRS 2.090(2) improperly places an emphasis on certain words of the statute to the exclusion of others and should be rejected. *See e.g., Williams v. State Dept. of Corrections*, 133 Nev. 594, 596, 402 P.3d 1260, 1262 (2017) (“[t]his court avoids statutory interpretation that renders language meaningless or superfluous.”) (cleaned up)⁴.

In addition, Bish’s interpretation of NRS 2.090(2) cannot be harmonized with other statutes on point. *See Williams*, 133 Nev. at 596, 402 P.3d at 1262 (instructing that “whenever possible [the court] will interpret a rule or statute in harmony with other rules or statutes.”) (citation omitted). For example, Bish’s interpretation of NRS 2.090(2) is in direct contradiction of the plain language of NRS 177.015(3), which provides that “[t]he defendant only may appeal from a final judgment or

⁴ “Cleaned up” is used to indicate that internal quotation marks, alterations, and citations have been omitted. *See e.g., Redlin v. United States*, 921 F.3d 850, 860 (9th Cir. 2019).

verdict in a criminal case.” NRS 177.015(3). To the extent that there is a conflict between two statutes, the specific statute controls. *See Williams*, 133 Nev. at 601, 402 P.3d at 1265 (indicating that under the general/specific canon, the more specific statute takes precedence and controls). In other words, because this is an appeal from a pretrial order resolving a bail issue, and not a final judgment, this Court does not have jurisdiction to decide the issues presented pursuant to the plain language of the specific statute on point. *See* NRS 177.015(3); *see also Castillo*, 106 Nev. at 352, 792 P.2d at 1135 (“[a]n appeal in a criminal case lies from the final judgment of the district court, not from an order finally resolving an issue in a criminal case.”).

Finally, Bish’s interpretation of NRS 2.090(2) is also at odds with the Nevada Constitution and Nevada Supreme Court precedent interpreting the same. District courts in Nevada “have final appellate jurisdiction in cases arising in Justice Courts....” Nev. Const. art. 6, § 6. District courts also have the power to issue writs of habeas corpus and all writs necessary to complete the exercise of their jurisdiction. *Id.* In *Sellers v. Fourth Judicial Dist. Court*, the Nevada Supreme Court made it clear that writ relief is the *only* appropriate means to challenge a district court’s decision when it is acting in its appellate capacity. 119 Nev. 256, 257, 71 P.3d 495, 497 (2003) (“[b]ecause the district court has final appellate jurisdiction over cases arising in

justice[sic] court, Sellers cannot appeal to this court and *may seek relief only through a writ petition*) (*emphasis added*); *see also Southworth v. Eighth Judicial Dist. Court*, 134 Nev. 149, 151, 414 P.3d 311 (2018) (quoting the same from *Sellers*, 119 Nev. at 257, 71 P.3d at 497).

Moreover, this Court's recent bail decisions further demonstrate Bish's procedural and jurisdictional error. In *Valdez-Jimenez*, the defendants/petitioners did not pursue a direct appeal of a bail decision before judgment, like Bish attempted here. 136 Nev. 155, 157, 460 P.3d 976, 981 (2020). Instead, the defendants/petitioners filed petitions for writs of mandamus with the Nevada Supreme Court and requested its extraordinary intervention, which is discretionary. *See id.* ("Both defendants filed a petition for a writ of mandamus"); *see also Cote H. v. Eighth Judicial Dist. Ct.*, 124 Nev. 36, 39, 175 P.3d 906, 907-908 (2008) (emphasizing that writs of mandamus are extraordinary remedies, and the Nevada Supreme Court has complete discretion to decide whether to consider them). Even in the Court's most recent published decision regarding a pretrial bail determination, the defendant/petitioner filed a petition for writ of mandamus with the Nevada Supreme Court to challenge the lower court's bail decision. *See Sewall v. Eighth Judicial Dist. Court*, 137 Nev. Adv. Op. 9, 481 P.3d 1249, 1251 (2021) (explaining that after bail was

denied, Sewall petitioned the Nevada Supreme Court for a writ of mandamus).

In summary, Bish’s interpretation of NRS 2.090(2) is faulty in several respects. Bish does not cite any specific Nevada authority conferring jurisdiction to this Court over a district court’s order denying a writ of habeas corpus—which was titled alternatively as a writ of mandamus—when it involves a justice court’s bail decision. Bish invoked the appellate jurisdiction of the district court via his Petition while the matter was pending in justice court. *See* RA 25-26 (the Petition was filed and decided well before Bish was arraigned in district court on April 21, 2021). The district court decided the Petition well before the case was bound over and it obtained general jurisdiction over the matter. *See id.* at 87-92 (the Order denying was entered on December 3, 2020); *see also* RA 25-26. Therefore, the district court was acting in its appellate capacity when it decided this matter and Bish’s only avenue for challenging its decision was to file a writ with this Court, not a direct appeal. *See Sellers*, 119 Nev. at 257, 71 P.3d at 497. As such, Bish has failed to show that this Court has jurisdiction over this appeal, and it should be dismissed. *See Castillo v. State*, 106 Nev. at 352, 792 P.2d at 1135; *Moran*, 117 Nev. at 527, 25 P.3d at 899.

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B. The issues presented by Bish are moot and Bish has not proven that this Court should consider them.

While this appeal has been pending Bish entered into negotiations which resulted in a guilty plea and a prison sentence. Thus, the justice court's bail determination, and the district court's order declining to interfere with the same, are now moot because he is no longer subject to pretrial detention. *See Valdez-Jimenez*, 136 Nev. at 158, 460 P.3d at 981 (finding that the petitioner's pleas had made the issues presented moot, but finding the particular issues were capable of repetition, but evading review); *see also NCAA v. Univ. Nev.*, 97 Nev. 56, 58, 624 P.2d 10, 11 (1981) (“[c]ases presenting real controversies at the time of their institution may become moot by the happening of subsequent events.”).

The Nevada Supreme Court will generally decline to hear a moot case. “That general rule comports with our duty to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles of law which cannot affect the matter in issue before it.” *Valdez-Jimenez*, 136 Nev. at 158, 460 P.3d at 981. The Court may still consider a moot issue if it is a matter of widespread importance capable of repetition, yet evading review. *Id.* at 158, 460 P.3d at 982. “The party seeking to overcome mootness must prove that (1) the duration of the challenged action is

relatively short, (2) there is a likelihood that a similar issue will arise in the future, and (3) the matter is important.” *Id.*

Bish pleaded guilty in district court before he filed his Opening Brief in this case, yet Bish did not address the mootness factors or otherwise prove that this Court should still consider his appeal in his Opening Brief. *See* RA (arraignment date was May 5, 2021); OB (the Opening Brief was filed on May 10, 2021). The State is at a disadvantage due to Bish’s failure to present cogent argument or proof to overcome the mootness doctrine in his Opening Brief because it will not have an opportunity to respond if such is presented in Bish’s Reply. As such, this Court should decline to consider any such argument from Bish and find that he failed to meet his burden to overcome the mootness doctrine. *See LaChance v. State*, 130 Nev. 263, 277, n. 7, 321 P.3d 919, 929, n. 7 (2014) (noting that the Nevada Rules of Appellate Procedure do not allow litigants to raise new issues for the first time in a reply brief and declining to consider such an argument); *Edwards v. Emperor’s Garden Restaurant*, 122 Nev. 317, 330, n. 38, 130 P.3d 1280, 1288, n. 38 (2006) (declining to consider claims where the appellant “neglected his responsibility to cogently argue, and present relevant authority, in support of his appellate concerns”); *Browning v. State*, 120 Nev. 347, 354, 91 P.3d 39, 45 (2004) (“an appellant must present relevant

authority and cogent argument; issues not so presented need not be addressed by this court”) (cleaned up).

The issues presented in this case are not of the character of the issues presented in *Valdez-Jimenez, supra*. While Bish attempts to characterize his issues broadly as matters of public importance, the crux of his claim is that he disagrees with the specific bail determination made in his case. He was afforded the prompt adversarial hearing required by *Valdez-Jimenez, supra*, and his arguments on appeal concern specific issues only relevant to him and the manner that the State defended the justice court’s decision when he filed a Petition seeking review of the decision with the district court. The issues presented here are not of widespread public importance and, therefore, this Court should decline to consider the moot issues presented in this appeal.

C. To the extent that the Court considers the merits of Bish’s arguments on appeal, Bish has not demonstrated the district court manifestly abused its discretion by denying his Petition.

1. Standard of Review.

Bish contends that this case presents an issue of *de novo* review as to the rules of evidence that apply to a bail hearing. OB, pg. 12-13. As will be discussed below, this issue is already settled within Nevada law and does not require clarification or review.

Bish next contends that this Court should review the district court's denial of his Petition for an abuse of discretion. Bish cites to *Stockmeier v. Green*, 130 Nev. 1003, 1008, 340 P.3d 583, 586 (2014), to support his assertion that this Court reviews the denial of a petition for writ of mandamus for an abuse of discretion. Bish's reliance on *Stockmeier* is misplaced. Initially, as discussed in subsection A of this Brief, Bish filed a petition for writ of mandamus as an alternative to a petition for habeas corpus and did not comply with the requirements for a petition for mandamus or otherwise argue such before the district court. More importantly, though, *Stockmeier* did not concern the district court's review of a lower court's decision. 130 Nev. at 1005-1006, 340 P.3d at 585 (“[t]his case began when appellant Robert Leslie Stockmeier, an inmate at Lovelock Correctional Center, filed the underlying district court petition seeking mandamus and injunctive relief to compel respondent Tracey Green, in her capacity as Chief Medical Officer for the State of Nevada, to comply with NRS 209.382(1)(b)”). In other words, the case did not involve the district court acting in its appellate capacity on a petition requesting that it reverse a decision of a lower court.

If Bish filed a writ with this Court to seek review of the district court's decision over a justice court matter, this Court would generally decline

review unless Bish showed that “the district court has improperly refused to exercise its jurisdiction, has exceeded its jurisdiction, or has exercised its discretion in an arbitrary or capricious manner....” *Southworth*, 134 Nev. at 151, 414 P.3d at 313. Thus, to the extent that this Court finds it has jurisdiction and that the matter is not moot, despite Bish’s failure to argue as much, this Court’s review should be highly deferential to the district court and it should only consider whether the district court acted arbitrarily or capriciously or otherwise manifestly abused its discretion.

“An arbitrary or capricious exercise of discretion is one “founded on prejudice or preference rather than on reason.” *State v. Eighth Judicial Dist. Ct. (Armstrong)*, 127 Nev. 927, 931, 267 P.3d 777, 780 (2011) (cleaned up). “A manifest abuse of discretion is a clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule.” *Id.* at 931, 267 P.3d at 780 (citing *Blair v. Zoning Hearing Bd. of Tp. of Pike*, 676 A.2d 760, 761 (Pa.Commw.Ct.1996), for the proposition that “manifest 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.”).

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2. *The State agrees that Nevada’s rules of evidence do not apply at bail hearings, but Bish mistakenly contends that the State shifted the burden in this case.*

Bish repeatedly throughout his brief suggests that his case presents a matter of great importance because this Court should clarify what, if any, rules of evidence apply to a bail hearing. Yet, in the argument section of his brief Bish cites NRS 47.020(3)(b), which squarely puts the issue to rest. *See* OB, pg. 14. NRS 47.020(3)(b) provides that the evidence rules specified in Title 4 of the Nevada Revised Statutes “do not apply to ... [p]roceedings with respect to release on bail.” The State agrees that the rules of evidence do not apply at the bail proceedings. In other words, Bish attempts to create an issue of public importance where none exists.

Bish also contends that the State improperly shifted the burden to him and argued that he did not present evidence to support his proffer. OB, pg. 18. Bish is mistaken. While the State disagrees that improper burden shifting ever occurred,⁵ it is critical to note that Bish’s contention

⁵ The State’s argument in response to Bish’s Petition should be considered in context. The Court in *Valdez-Jimenez* indicated that at the bail hearing, the “defendant shall have the right to be represented by counsel and shall be afforded the right to testify *and present evidence*.” 136 Nev. at 166, 460 P.3d at 987. In its Response to Bish’s Petition, the State indicated that despite being given the opportunity Bish had not presented evidence to support some of his assertions, but the thrust of the State’s argument was to show the appellate court (the district court in this case) how Bish had not met his burden to prove that an abuse of discretion occurred or that

concerning burden shifting stems from the State's brief in response to his Petition in the district court. *See id.* (citing State's Resp. 9:4-9). Indeed, Bish does not contend that the State made an impermissible argument at the actual bail hearing. Bish did not like the result of his bail hearing, so he sought review to the district court and now urges this Court to find error in the manner the State defended the justice court's bail decision on appeal. The Court should decline Bish's invitation to allow him a second bite at the proverbial appellate apple when the bail hearing proceeded as required by *Valdez-Jimenez, supra*.⁶

Indeed, Bish had a prompt individualized hearing regarding bail in justice court on September 18, 2020. Bish was represented by counsel, testified, and made an argument for the court to release him on his own

intervention was required in the justice court's bail determination. *See* JA, 72-75. Put simply, the State was arguing about the burden on appeal, which was Bish's burden. Thus, the State did not impermissibly shift the burden in this case.

⁶ Bish's contention here is illustrative of why Bish could not meet the requirements to prove an exception to the mootness doctrine, even if he properly argued the mootness exceptions in his Opening Brief in the first instance. Bish takes issue with the argument of one deputy district attorney in response to his Petition. There is no indication that this type of argument has been repeated or, more importantly, that such an argument has been accepted by courts in this state in a manner attributable to error. While practice pointers from members of the bench are always helpful, one deputy's appellate argument to a district court is not the type of matter of public importance contemplated in this Court's exceptions to the mootness doctrine.

recognizance. The State argued for a significant bail increase and presented testimony from Bish's victim's mother to support its request. The State never contended that the rules of evidence applied during the justice court proceeding. The State did not otherwise challenge or object to Bish's proffers during the bail proceeding. *See* JA, 3-28. The justice court considered the information presented, inquired of the parties and witnesses to clarify issues, and made findings consistent with its ultimate bail decision. Put simply, Bish's bail hearing was exactly the type of individualized-adversarial-hearing contemplated by the Nevada Supreme Court when it decided *Valdez-Jimenez, supra*.

Even if the State made an improper argument to the district court when it was responding to Bish's Petition, Bish has not shown that the district court manifestly abused its discretion or arbitrarily or capriciously exercised its discretion by denying the same. The district court considered the briefing, the record, and relevant authority before finding that "Judge Longley considered all relevant factors pursuant to *Valdez-Jimenez* when determining [Bish's] bail amount" after a "full-blown adversarial hearing." JA, 90-91. Nothing in the record suggests that the district court overrode or misapplied the legal principles applicable to its review of the justice court's decision or that the district court's decision was the result of

partiality, prejudice, bias or ill will toward Bish. In other words, the district court's decision to deny Bish's Petition was not arbitrary or capricious and no manifest abuse of discretion occurred here. *See Armstrong*, 127 Nev. at 931, 267 P.3d at 780.

3. Bish's final argument for relief is simply an attempt to relitigate his Petition below and should not be entertained by this Court.

In Bish's final argument he contends that the State did not meet its burden of proving by clear and convincing evidence that detention was the least restrictive means of assuring his return to court and the safety of the community. OB, pg. 20-27. Therein, Bish does not cogently argue how the district court's decision was in error.⁷ Instead, Bish reiterates the argument he made to the district court in his Petition, as if this Court should consider his bail claim *de novo*. *See id.* As discussed in the standard of review section above, *de novo* review does not apply here. Instead, if this Court

⁷ The only assertion in the final section of Bish's Opening Brief with respect to the district court's alleged error was that "[t]he district court abused its discretion by upholding the justice court's order." OB, pg. 27. The Court should reject this contention outright because Bish failed to support his assertion with facts or analysis. His analysis was based on showing that the justice court should not have set bail at \$50,000.00, which is indicative of why this appeal is problematic. He is effectively seeking a second bite at the appellate apple, by having this Court independently review the justice court's decision for an abuse of discretion when the district court already conducted such a review and generally has final appellate authority over matters arising in justice courts.

reviews the merits of this case, its review should be highly deferential and focused on whether the district court's order denying Bish's Petition represented a manifest abuse of discretion or was arbitrary or capricious. In this vein, the Court should reject Bish's assignment of error.

Bish cites to non-binding precedent in an effort to show the justice court erred in this case. OB, pgs. 21-24. Bish contends that the bail set by the justice court has policy implications that are inconsistent with *Valdez-Jimenez* (OB, pg. 27), yet Bish does not actually analyze the alleged error in this case consistent with the guidance provided by the Nevada Supreme Court in *Valdez-Jimenez, supra*. Bish's decision in this regard is telling because the justice court set bail after conducting the analysis as instructed.

In *Valdez-Jimenez* the Nevada Supreme Court found that individuals accused of committing noncapital and non-first-degree-murder cases have a right to bail in a *reasonable* amount. 136 Nev. at 161, 460 P.3d at 984. The Court instructed that "[t]he amount of bail that is reasonable will depend on the circumstances of the individual" and "must not be in an amount greater than necessary to serve the State's interests." *Id.* at 162, 460 P.3d at 984. In addition, the Court held that for bail to be reasonable it must relate to "one of [the] two purposes [for bail]—to ensure the

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appearance of the accused at all stages of the proceedings or to protect the safety of the victim and the community.” *Id.*

In *Valdez-Jimenez*, the Court instructed that when determining whether bail is necessary, the lower court should “consider first whether, given the individual circumstances of the defendant, including his character and ties to the community, his or her criminal history, and the nature of a potential sentence for the alleged offenses, release on personal recognizance or subject to nonmonetary conditions would be sufficient to reasonably ensure the purposes of bail are met.” *Id.* at 164, 460 P.3d at 986. The Court also cited the factors found in NRS 178.4853 as relevant considerations. *Valdez-Jimenez*, 136 Nev. at 164, 460 P.3d at 986. The Court recognized that “there is no constitutional requirement that bail be in an amount the defendant can afford to pay,” but instructed lower courts to consider how much a defendant can afford before setting bail. *See id.* at 165, 460 P.3d at 986.

The justice court engaged in these inquiries and connected its decision to a purpose for bail—continued attendance at the proceedings. *See JA*, 13-15, 23-25. The justice court inquired about Bish’s financial assets during the hearing, his criminal history, and potential living arrangements away from the victim if he were to be released. *Id.* at 13-15,

23-24. The justice court heard testimony from the victim’s mother expressing concern for the safety of her children. *Id.* at 8-13. Importantly, at one point during the hearing, the justice court observed that least restrictive means would not be helpful to ensure Bish’s attendance. It indicated, “I’m not ordering G.P.S. because it’s actually been proven that it has no effect and it’s just an extra financial burden....” JA, 26. Here, Bish had a job and some resources, but was facing a significant and mandatory prison sentence if convicted. *Id.* at 21, 24-25. Bish had some criminal history involving violence and scored a 4 on the pretrial risk assessment tool, which is the top of the low-risk range. *See id.* at 21, 23-25.

The justice court conducted an independent review and its careful consideration and balance of Bish’s rights with the State’s interests is evident from the record. The justice court explicitly rejected the State’s request for \$150,000.00 bail because she found it was unnecessary and would be “excessive in this case due to his low risk of flight, his low risk of—or his low criminal history and the financial resources.” *Id.* at 24-25. Yet, the justice court expressed its concern about Bish’s risk of flight due to the nature of the charges and mandatory sentence structure, which would send him to prison for a minimum of 35 years to life if he was convicted. JA, 25.

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The justice court found that Bish had family in the community and a job, but its concern outweighed those considerations. *See id.*

The facts relied on by the justice court to determine bail—such as the nature of the charge, the potential sentence, Bish’s employment, connection to the community—were not in dispute between the parties at the hearing. Thus, Bish’s argument now concerning clear and convincing evidence to support the justice court’s decision misses the mark. Put differently, the parties disagreed about the weight the evidence should receive in the justice court’s bail determination, not the nature of the evidence itself. The justice court considered both parties’ bail requests and made a determination of bail consistent with its own balancing of the circumstances of Bish’s case and information about his financial resources.⁸ In other words, the justice court conducted the inquiry required by *Valdez-Jimenez, supra*, and set a reasonable bail after considering Bish’s unique circumstances.

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⁸ Interestingly, on appeal Bish asserts he could not afford \$50,000.00 bondable bail. Yet, he argued at the bail hearing that he was employed at Tesla and his employment was verified by Pretrial Services. JA, 21. Bish did not provide any further details regarding his finances during the hearing. The justice court concluded that Bish did have some financial resources; thus, the record does not establish that the justice court purposely set bail in an amount that Bish could not afford as he contends now.

Even if this Court may not agree with the amount of bail imposed, Bish has failed to show that he was entitled to relief. Put differently, Bish has failed to show that the district court erred in refusing to second-guess the lower court's bail decision. This is not a circumstance where Bish was denied a prompt bail hearing like the petitioners in *Valdez-Jimenez, supra*. Bish received his hearing and simply did not agree with the result, so he pursued relief with the district court. However, the district court was sitting in an appellate capacity, not considering Bish's bail request in the first instance. As such, the district court was required to give deference to the justice court's decision and its weighing of the credibility of witnesses and evidence. *Valdez-Jimenez*, 136 Nev. at 161, 460 P.3d at 984 (“[t]ypically, a pretrial release decision is a matter within the sound discretion of the trial court”); *see also State v. Rincon*, 122 Nev. 1170, 1177, 147 P.3d 233, 238 (2006) (emphasizing that the trial court is in “the best position to adjudge the credibility of the witnesses and the evidence, and unless this court is left with the definite and firm conviction that a mistake has been committed this court will not second guess the trier of fact”).

Consistent with these standards of review, the district court studied the record and concluded that the justice court complied with the legal requirements of *Valdez-Jimenez, supra*, and made the required findings.

JA, 90-91. As a result, the district court found that there was no abuse of discretion for it to correct. *See id.* This Court should agree to the extent it engages in the analysis contemplated by Bish’s appeal.

Moreover, the Court should not find error on the part of the district court. The district court’s decision to deny Bish’s Petition is entitled to even more deference than it afforded to the justice court. *See Armstrong*, 127 Nev. at 931, 267 P.3d at 780 (*citing Blair v. Zoning Hearing Bd. of Tp. of Pike*, 676 A.2d 760, 761 (Pa.Comm.w.Ct.1996), for the proposition that “manifest 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”). Even if Bish somehow proved that the district court should have granted him relief and his bail should have been lowered by the justice court (which he has not), such an error would amount to an error of judgment at most. Indeed, the district court cited the applicable legal principles, considered the record, and found that the lower court did not abuse its discretion when setting bail. *See JA*, 87-91. Bish has not argued or shown that the district court overrode or misapplied the law, or that its decision to deny his Petition was the result of partiality, prejudice, bias, or ill will. Nor would such an argument be supported by the

record here. As such, to the extent the Court considers the merits of Bish's argument, the district court's decision should be affirmed. *See Armstrong*, 127 Nev. at 931, 267 P.3d at 780.

VIII. CONCLUSION

Based on the foregoing, this appeal should be dismissed for lack of jurisdiction and/or because it presents moot issues. To the extent this Court considers the merits of Bish's arguments, the district court's order should be affirmed.

DATED: January 12, 2022.

CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

By: MARILEE CATE
Appellate Deputy

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 Microsoft Word 2013 in Georgia 14.

2. I further certify that this brief complies with the page limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it does not contain more than 14,000 words or 1,300 lines of text. It contains 8,162 words.

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 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

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the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: January 12, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on January 12, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Kathryn Reynolds
Deputy Public Defender

/s/ Destinee Allen
DESTINEE ALLEN