

IN THE SUPREME COURT OF THE STATE OF NEVADA

TRAVIS BISH,

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 REPLY BRIEF

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No. 82295 Electronically Filed
Feb 10 2022 02:57 p.m.
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ARGUMENT IN REPLY

The Court has jurisdiction over this appeal

In its answering brief, the State contends that this Court lacks jurisdiction over this appeal. Respondent's Answering Brief ("RAB") at 11. This is incorrect.

As the State contends, "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, 1136 (1990). However, NRS 2.090(2) provides that the Supreme Court "has jurisdiction to review upon appeal . . . an order granting or refusing to grant an injunction or mandamus in the case provided for by law."

In the proceedings below, Mr. Bish filed his petition as an "Emergency Petition for Writ of Habeas Corpus, or in the Alternative, Petition for Writ of Mandamus, and Request for Emergency Hearing." *See* Joint Appendix at 29. To the extent the State argues that Mr. Bish did not petition for a writ of mandamus, this contention lacks merit. In his petition, Mr. Bish cited to NRS 34.160 and NRS 34.170, providing the circumstances under which a writ of mandamus should issue, and asserted that he had no other plain, speedy and adequate remedy in the course of

law. JA 36. The State, in its answer, also discussed the applicable law regarding the availability mandamus relief. JA 70. The district court, in its order denying Mr. Bish’s petition, also cited to NRS 34.160, ultimately determining that mandamus relief was not warranted in these circumstances. JA 89, *see also* JA 90 (finding that “there is no indication Judge Longley acted arbitrarily or capriciously”). Mr. Bish clearly petitioned the district court below for mandamus relief. Accordingly, this appeal falls within the plain language of NRS 2.090(2).

The State argues that the phrase “in the case provided for by law” in NRS 2.090 indicates that Mr. Bish must provide some other statutory authorization for this appeal. This argument defies logic. A writ of mandamus is available “to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station” or “to compel the admission of a party to the use and enjoyment of a right . . .” NRS 34.160. In other words, a writ of mandamus “compels a government body or official to perform a legally mandated act.” *Ashokan v. State, Dept of Insurance*, 109 Nev. 662, 665, 856 P.2d 244, 246 (1993). “Issuance of a writs is generally limited to situations where ‘there is not plain, speedy,

and adequate remedy in the ordinary course of law.” *Id.* (quoting NRS 34.170; NRS 34.330).

Further, Mr. Bish did bring a claim pursuant to “law.” In *Valdez-Jimenez v. Eighth Judicial District Court*, the Nevada Supreme Court found that pursuant to the due process clause of the United States and Nevada Constitutions, a judge “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.” 136 Nev. 155, 156, 460 P.3d 976, 980 (2020). This holding established new law regarding an individual’s liberty interest in avoiding unnecessary pretrial detention. Mr. Bish’s petition to the district court sought to compel the justice court to perform its legally-mandated duty under *Valdez-Jimenez*, and grant Mr. Bish an own recognizance release, given the State’s failure to prove the necessity of pretrial detention.

Accordingly, Mr. Bish sought a writ of mandamus at the district court in this case “as provided for by law.” The plain language of NRS 2.090(2) allows for an appeal of the district court’s denial of this petition. *See Savage v. Pierson*, 123 Nev. 86, 89, 157 P.3d 697, 699 (2007) (noting that

the Nevada Supreme Court will “ascribe to words their plain meaning, unless this meaning was clearly not intended”). Given the plain language of NRS 2.090, this Court has jurisdiction to decide this appeal.

This appeal is not moot

The State further asserts that this appeal is moot, because Mr. Bish filed this appeal after he had already negotiated with the State, and entered a plea to a reduced charge. The State further contends that Mr. Bish has waived any argument related to mootness, because he did not address this issue in his opening brief. RAB 21.

This argument lacks merit. Notably, while Mr. Bish entered a guilty plea of May 6, 2021, he plead guilty to attempted lewdness with a child, which is a probation-eligible offense. RA 16. Pursuant to negotiation, the parties were free to argue for an appropriate sentence, which, as defense counsel indicated at arraignment, could include a request for supervision in the community. Respondent’s Appendix (“RA”) 5-6. Because, at this juncture, Mr. Bish was not yet convicted, he could have posted bail, and demonstrated his amenability to community supervision, arguably putting himself into a better position to argue for probation at sentencing. *See Stack v. Boyle*, 342 U.S. 1, 4 (1951) (noting that the “traditional right to

freedom before *conviction* permits the unhampered preparation of a defense and serves to prevent the infliction of punishment prior to *conviction*”) (emphasis added). Notably, Mr. Bish was not sentenced to incarceration in the Nevada Department of Corrections until July 2, 2021, several months after Mr. Bish filed his opening brief in this case. RA 21-22.

In addition, this appeal is not moot because the issues raised by Mr. Bish are capable of repetition yet evading review. *Valdez-Jimenez* is instructive on this point. In *Valdez-Jimenez*, the Court addressed the question of “what process is constitutionally required when a district court sets bail in an amount that the defendant cannot afford, resulting in pretrial detention.” 460 P.3d at 980. There, the bail issue was moot “because petitioners have been convicted and are no longer subject to pretrial detention.” *Id.* Nonetheless, the Court elected to “reach the issue because it [was] a matter of public importance and is capable of repetition but evading review. *Id.*

In *Valdez-Jimenez*, the Court stated that “[e]ven where a case is moot” the Court “may consider it if it involves a matter of widespread importance that is capable of repetition, yet evading review.” 460 P.3d at

982 (internal quotation marks omitted). Mootness may be overcome, the Court explained, where “(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.* (internal quotation marks and citation omitted). Each of these factors were met in *Valdez-Jimenez*. The Court (1) found that “given the time restraints inherent in criminal cases, most bail orders are short in duration and the issues concerning bail and pretrial detention become moot once the case is resolved by dismissal, guilty plea, or trial”; (2) rejected the federal rule that recurrence must be specific to petitioners personally, and found that the question presented in that case “is likely to arise in the future with respect to the complaining party or *individuals who are similarly situated to the complainant*”; and (3) found the issues presented to be of “widespread importance” as they “affect many arrestees and involve the constitutionality of Nevada’s bail system.” *Id.* at 982-94 (citations omitted, italics added). The Court’s reasoning on all three factors is applicable here.

Moreover, this case presents a critical issue left unresolved by this Court’s prior holding in *Valdez-Jimenez*. Specifically, whether it is

appropriate for the State to primarily rely on the nature of the offense charged and the 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.

This question is important to the conduct of future *Valdez-Jimenez* hearings, and is highly likely to repeat in the future. Therefore, this Court should keep and decide this appeal to give guidance to lower courts, and should not dismiss this appeal as moot.

Mr. Bish was not required to produce evidence he was a low risk of flight or not a danger to the community

The State concedes, in its answering brief, that the formal rules of evidence do not apply at hearings pursuant to *Valdez-Jimenez*. RAB 25 (citing NRS 47.020(3)(b)). Further, *Valdez-Jimenez* plainly indicates that prior to imposing a de facto detention order through monetary bail, the State bears the burden of proving, by clear and convincing evidence, that this condition is the least restrictive means of reasonably assuring an arrestee's return to court and the safety of the community. 136 Nev. at 163-64, 460 P.3d at 985. As discussed further below, the State did not

meet its burden in this case, indicating that mandamus relief was appropriate in this instance.

The imposition of monetary bail, based solely on the nature and severity of the charges was a manifest abuse of discretion

As observed by the State, both Mr. Bish and the State are largely in agreement over the facts presented to the justice court: that Mr. Bish was a low risk on the Nevada Pretrial Risk Assessment, that he was employed in the community, and had a place to live that was away from the alleged victim in this case. RAB 32. The State contends this demonstrates that “the parties disagreed about the weight the evidence should receive in the justice court’s bail determination, not the nature of the evidence itself.” RAB 32.

This misses the crux of Mr. Bish’s argument: that only justification provided by the justice court for the imposition of monetary bail in this case was the risk of flight based solely on the nature of the charge itself. The district court clearly stated, in justifying the imposition of \$50,000 bail that “[w]hile 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 a lifetime in prison.” JA 23. The justice court provided no other justification for requiring monetary bail as a condition of Mr. Bish’s pretrial release. As argued in Mr. Bish’s opening brief, empirical studies indicate that the severity of any charged offense is not generally predictive of whether a defendant will flee or re-offend. *State v. Brown*, 338 P.3d 1276, 1292 (NM Sup. Ct. 2014). Persuasive federal case law indicates that to demonstrate a risk of flight, the State must show more than simply serious charges and a long potential sentence. *United States v. Friedman*, 837 F.2d 48, 48-49 (2d Cir. 1988).

The imposition of monetary bail, based solely on the nature of the charges serves to create a class-based system of criminal justice, in which those who can afford bail are released, and those defendants of limited financial means must remain in custody—even if all evidence presented to the court indicates that they are a “low risk” of danger to community or flight. This is an unjust result, and inconsistent with the principals expressed by this Court in *Valdez-Jimenez*: that bail is inappropriate when any other “nonmonetary conditions would be sufficient to reasonably ensure the defendant’s appearance or the safety of the community.” 136 Nev. at 164-65, 460 P.3d at 986.

Given the circumstance of this case, the decision of the justice court to impose monetary bail based solely on the seriousness of the charges was a manifest abuse of discretion, as was the district court's denial of Mr. Bish's petition for mandamus relief.

CONCLUSION

This case presents an important question that is capable of repetition yet evades review: whether a justice court may justify a de-facto pretrial detention order through the imposition of monetary bail based only on the nature of the charges and potential sentence. The imposition of a \$50,000 bail in this case was a manifest abuse of discretion, as was the district court's denial of Mr. Bish's petition for a writ of mandamus. Mr. Bish respectfully requests clarification from the Court on this important issue.

DATED this 10th day of February, 2022.

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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 2,660 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 February 2022.

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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 February 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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