

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

TULY LEPOLO
Petitioner,
vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
COUNTY OF CLARK, THE
HONORABLE MICHAEL P. VILLANI
DISTRICT COURT JUDGE – Dept. XIX,
Respondent,
and

THE HONORABLE DAVID BARKER,
SENIOR DISTRICT COURT JUDGE –
SITTING FOR Dept. XIX,
Respondent

and

THE STATE OF NEVADA,
Real Party in Interest,

No.

(DC. No. C-

Electronically Filed
Jul 29 2021 09:00 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

PETITION FOR WRIT OF MANDAMUS

ATTORNEYS FOR PETITIONER

W. JEREMY STORMS
Chief Deputy Special Public Defender
Nevada Bar #010772
JoNELL THOMAS
Special Public Defender
Nevada Bar #004771
330 South 3rd Street
Las Vegas, Nevada 89155
State of Nevada
(702) 455-6265

ATTORNEY FOR RESPONDENT

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
Regional Justice Center
200 Lewis Ave.
Las Vegas, Nevada 89155
(702) 671-2500

POINTS AND AUTHORITIES

A. ROUTING STATEMENT

NRAP 17 governs the division of cases between the Nevada Supreme Court and the Court of Appeals. NRAP 17(b) provides that certain cases shall “presumptively” be heard and decided by the court of appeals. “Pretrial writ proceedings challenging discovery orders or orders resolving motions in limine are presumptively assigned to the court of appeals.” NRAP 17(b)(14).

This matter arises from Petitioner’s unlawful pre-trial confinement. Petitioner was arrested on a “no bail” arrest warrant on October 28, 2019 and has remained in detention without bail. Under the Nevada Constitution, the Court cannot deny bail to a person arrested for an offense other than first degree murder *unless* the “proof is evident and the presumption great.” Nev. Const. Art. 1 § 7; *See also* NRS 178.484; *Sewall v. Eighth Judicial District Court*, 137 Nev. Adv. Op. 9, 481 P.3d 1249 (2021). By failing to review and weigh the present evidence in this case, the lower court failed to apply this standard when reaching its decision to issue “no bail” to Petitioner. Instead, the lower court improperly applied the factors outlined in *Valdez-Jimenez v. State*

to reach its decision to issue “no bail.” 136 Nev. Adv. Op. 20, 460 P.3d 976 (2020). Since claims deriving the confinement order do not implicate a discovery matter or involve a motion in limine, this case is not presumptively assigned to the Court of Appeals.

NRAP 17(a)(13-14) specifies that that the Supreme Court shall hear “matters raising as a principal issue a question of first impression involving the U.S. or Nevada Constitutions or common law; and matters raising as a principal issue a question of statewide public importance...” The issue presented here raises a constitutionally significant question of first impression and amounts to a matter of statewide importance. The lower court detained Petitioner unlawfully when it improperly conflated the standards regarding bail outlined in the Nevada Constitution and *Valdez-Jimenez* and issued “no bail” to Petitioner. Nev. Const. Art. 1 § 7; *See also* NRS 178.484; *Sewall v. Eighth Judicial District Court*, 137 Nev. Adv. Op. 9, 481 P.3d 1249 (2021); *Valdez-Jimenez v. State*, 136 Nev. Adv. Op. 20, 460 P.3d 976 (2020).

B. JURISDICTION

Pursuant to Nevada Revised Statute (“NRS”) 34.170, “a writ of mandamus shall issue in all cases where there is not a plain, speedy

and adequate remedy in the ordinary course of law.” A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust or station or to control an arbitrary or capricious exercise of discretion. See NRS 34.160; *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601 (1981).

C. STATEMENT OF FACTS

On April 3, 2016, a shooting was reported at 6501 W. Charleston Boulevard, the location of an apartment complex. Patrol officers arrived and found a deceased black female adult, later identified as Raquel Stapinski, dead on the ground between buildings 25 and 26. The investigation into Ms. Stapinski’s death revealed there were two families gathered that night. One family, the African American family, was being hosted by a Dana Foreman in building 25 for the purpose of celebrating her birthday. The other family, the Samoan family, was being hosted by Elaine Lepolo in building 26, with the family gathering to say goodbye to members of the family visiting from California who were about to head home.

The police investigation developed the following information:

Dana Foreman's son, Dwayne Armstrong wanted to fight Tut, Mr. Lepolo's son. Dana Foreman told investigators that Dwayne wanted to fight because "[t]he mother and the son jumped me." During the fight initiated by Dwayne Armstrong, his uncle, T-Loc, a.k.a, Henry Taylor, discharged a firearm. The two groups dispersed. At some time after this first shot, more shots were fired. The decedent, Stapinski, was in the cross-fire and was shot by .40 caliber bullets. No one would suggest that Ms. Stapinski, herself, had shot at the Samoan party but the evidence shows she was armed with a hammer, apparently prepared to engage in physical conflict. The State's forensic analysis of the scene concluded that the .40 caliber bullets came from the direction of the Samoan family. Multiple shell casings, live bullets and a disassembled extended magazine for a 9 mm handgun were found on the doorstep of the Dana Foreman residence. A .357 magnum was hidden in a charcoal bag in the backyard.

Neither family involved in the conflict gave information to the police that allowed them to identify who shot guns that day. One witness gave an account suggesting that a member of the Samoan family shot at members of the African American family after a pause in

the conflict between the parties. A witness reported a person getting a gun from an SUV found on scene with California plates. The State associates Tutaumua with that SUV. DNA found on the SUV in question as well the DNA of a trail of blood leaving the area of the incident allegedly matched “Tuly Lepolo,” a name associated by the State with Mr. Lepolo.

After the State charged Henry “T-Loc” Taylor for the shooting that occurred, his sister, Dana Foreman, the person this conflict centered around, identified Tutaumua as the person from the Samoan family who shot that day. Additionally, it is the defense’s understanding that Henry Taylor’s wife has also changed her story and identified Tutaumua as the shooter. Henry Taylor himself did not identify Tutaumua as the shooter.

D. STATEMENT OF PROCEDURAL HISTORY

On October 28, 2019, Mr. Tutaumua Lepolo was charged by way of criminal complaint with Open Murder with Use of a Deadly Weapon under the name “Tuly Lepolo.” Tutaumua was arrested on a “no bail” arrest warrant and since his detention, he has been held without bail. On January 6, 2020, Tutaumua unconditionally waived his preliminary

hearing and was bound over to District Court after an Amended Criminal Complaint was filed alleging a count of Assault with a Deadly Weapon in addition to the charged murder. On January 8th, 2020 an Information was filed alleging two counts: Count 1: Murder with Use of a Deadly Weapon; Count 2: Assault with a Deadly Weapon. *App., Vol.1*, 1-3. On January 21, 2020 Tutaumua plead not guilty. The case was assigned to Department XVII for Mr. Lepolo to waive or invoke his right to a speedy trial and have his trial set.

On January 27th, 2021, counsel filed “Motion for Defendant Lepolo’s Release on House Arrest or, in the Alternative, Motion to Set Reasonable Bail Pending Trial.” *App., Vol.1*, 4-15. The State filed a response to said motion on January 29th, 2021. *App., Vol.1*, 4-15. At the hearing held on these motions, Judge Villani denied the defendant’s request to set bail citing, “the facts of the case, and also that the potential harm to numerous people, I’m going to deny the motion on this particular matter.” *App., Vol.1*, 36. It should be noted that this decision was made on the same day this Court issuing *Sewall v. Eighth*

Judicial Dist. Court, 481 P.3d 1249 (2021), on March 4th, 2021, although the parties were not aware of the decision at the time of argument. ¹

Later, counsel for Mr. Lepolo filed a renewed motion for bail, citing the *Sewall* decision, on April 1st, 2021, arguing that it was inappropriate for the court to have used factors for the setting of bail as a basis to deny bail outright under Article 1 Section 7 of the Nevada Constitution. *App.*, *Vol.1*, 41-53. The State filed a timely response. *App.*, *Vol.1*, 54-69. At the time of argument for this renewed motion, on April 16th, 2021, the hearing was conducted by Senior District Court Judge, David Barker.² After hearing argument on the merits of setting bail in this case, Judge Barker denied³ Mr. Lepolo's motion stating the following reasons:

THE COURT: All right. Appreciate the argument from both sides.

The Court, having listened to arguments of counsel and reviewing the written motions, concludes no combination of monetary condition would be sufficient to reasonably ensure the Defendant's appearance and the safety to the community. I believe a no bail warrant is appropriate, in part based upon the

¹ The Court did not enter a written decision memorializing its decision.

² Judge Barker's finding of "proof evident, presumption great" in the *Sewall* matter was reversed by this Court in *Sewall v. Eighth Judicial Dist. Court*, 481 P.3d 1249 (2021).

³ The Court did not enter a written decision memorializing its decision.

minimum contacts the Defendant has with this community and the significant, and as stated, complex criminal history of the Defendant I believe, that offers a great concern of his—for the safety of the community. Based upon those concerns, the motion is denied.

App., Vol.1, 76-77

As Judge Barkers ruling was based entirely upon factors outside of the narrow grounds by which the Nevada Constitution allows the denial of bail, Mr. Lepolo appeals.

E. ARGUMENT

I. The law demands a heightened level of due process rights when a court decides to issue a detention order and infringes upon a person's individual liberty.

Under the Nevada Constitution, the Court cannot deny bail to a person arrested for first-degree murder *unless* the “proof is evident and the presumption great” that the defendant stands to be convicted at trial. Nev. Const. Art. 1 § 7; *See also* NRS 178.484. The State has the burden to show that the proof is evident, and the presumption is great that the defendant committed the charge. *Sewall v. Eighth Judicial District Court*, 137 Nev. Adv. Op. 9, 481 P.3d 1249 (1967). To meet this burden, the State must provide enough evidence to show that the presumption of guilt is “considerably greater than that required to

establish probable cause necessary to hold a person for an offense.” *Hanley v. State*, 85 Nev. 154, 161, 451 P.2d 538, 539 (1967). A court abuses its discretion when it denies a defendant bail based upon inferences and where the “connection between the evidence and charged crime is conjectural.” *Howard v. Sheriff*, 83 Nev. 48, 51-52, 422 P.2d at 539-540. In *Sewall v. Eighth Judicial District Court*, the Nevada Supreme Court found that the State did not meet its constitutional burden to warrant an issuance of “no bail.” 137 Nev. Adv. Op. 9, 481 P.3d 1249. Upon reaching this decision, the Court then ordered the District Court to hold an adversarial hearing pursuant to *Valdez-Jimenez* for setting of reasonable bail. Under *Valdez-Jimenez*, an adversarial hearing must weigh evidence regarding factors such as a person’s flight risk and danger to the community. 136 Nev. Adv. Op. 20, 460 P.3d 976 (2020). Thus, this Court has identified how the first process requires an evidentiary examination regarding the ability of the State to prove the elements of first-degree murder while the latter requires an examination of factors related to a person’s flight risk and danger to the community.

Despite the distinctions between these two processes of bail determination in first-degree murder cases, both processes place a person's liberty at risk, and therefore, should trigger heightened procedural due process requirements. In particular, the Supreme Court has found that the Constitution requires "an intermediate standard of proof—'clear and convincing evidence'—when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere money.' *Addington v. Texas*, 441 U.S. 418, 424-425 (1979). In *Valdez-Jimenez*, this Court found that the State had the burden to prove by clear and convincing evidence that there were no less restrictive means to bail that could minimize a person's flight risk or danger to the community. 136 Nev. Adv. Op. 20, 460 P.3d 976 (2020). This Court reasoned that the liberty interests at stake in bail proceedings were of such importance that these interests triggered the procedural evidentiary standard of "clear and convincing evidence." *Valdez v. Jimenez*, 36 Nev. Adv. Op. 20, 460 P.3d 976 (2020). Additionally, if bail were determined by clear and convincing evidence to be necessary, then the judge must make findings of fact and state his reasons for the bail amount on the record. *Id.*

In cases involving first degree murder, the accused are subject to denial of bail when “proof is evident and the presumption great.” Nev. Const. Art. 1 § 7; *See also* NRS 178.484. The potential for the denial of bail in these types of cases places a defendant’s liberty at stake in exactly the same way as any other defendant discussed in *Valdez-Jimenez*. For this reason, the Petitioner’s liberty interests at stake demand the same due process protections that are afforded to those accused of any other crime. The District Court must assess the State’s evidence in compliance with the standard of “clear and convincing evidence” in order to decide whether or not “proof is evident and the presumption great,” justifying a “no bail” order in first degree murder cases.

In the lower court, the State improperly argued that Petitioner should be denied bail because the “proof is evident and the presumption great.” The State argued they had met this standard because 1) Petitioner’s DNA was found at the scene, 2) three witnesses were able to identify Petitioner as the shooter, and 3) Petitioner was a danger to the community due to his criminal record. App. Vol I, p. 26. The State’s reasoning improperly conflates the two differentiated bail processes. In

particular, a person's danger to the community is an assessment that occurs under a *Valdez-Jimenez* hearing to determine bail amount, not when determining whether or not the proof is evident and the presumption great. Here, Petitioner was outright denied bail by the District Court for *Valdez-Jimenez* considerations. The District Court reasoned that "based upon the minimum contacts the Defendant has with this community and the significant, and as stated, complex criminal history of the Defendant I believe, that offers a great concern of his—for the safety of the community. Based upon those concerns, the motion is denied.." App. Vol. I, pp. 76-77. Therefore, the District Court conflated the schema under *Valdez-Jimenez* with Article 1 Section 7 of the Nevada Constitution as has been recently interpreted by this Court in *Sewall v. Eighth Judicial Dist. Court*, 481 P.3d 1249, 1250 (2021). It should be noted that Senior District Court Judge Barker's ruling in the *Sewall* matter was reversed and he also sat and ruled on the bail matter which is the subject of this appeal.

Additionally, the District Court failed to appropriately weigh the evidence in its decision to issue no bail. The State argues that the court is granted "broad discretion in determining the amount of proof

necessary to the determination.” App. Vol I, p. 26; *See In re Wheeler*, 81 Nev. 495, 406, P.2d 713 (1965). This assessment is incorrect, however, in light of *Valdez-Jimenez* in which this Court decided that a “clear and convincing evidence” standard in the determination of bail was essential for the protection of one’s liberty interests. 136 Nev. Adv. Op. 20, 460 P.3d 976 (2020). The District Court’s decision demonstrates the level of unregulated discretionary power in determining the level of proof required to deny bail to those accused of first-degree murder. In accordance with the U.S. Supreme Court and *Valdez-Jimenez*, the State should have had the burden to prove to the court by “clear and convincing evidence” that Petitioner committed first degree murder in order to hold Petitioner without bail. For these reasons, this Court should order District Court to assess Petitioner’s bail status in compliance with the evidentiary standard laid out in *Valdez-Jimenez*, or, at minimum, conduct an analysis under Article 1 Section 7 of the Nevada Constitution looking strictly at what the Constitution allows as a basis to deny bail.

///

///

II. The plain-language meaning of Article 1 Section 7 of the Nevada Constitution weighs in favor of using a clear and convincing evidence standard when bail is denied outright.

The plain-language definition of “proof is evident” and “presumption great” demands the clear and convincing standard. In particular, “evident” means manifest, plain, clear, obvious, apparent, and notorious. *Ex Parte Gragg*, 149 Tex. Crim. 10, 191 S.W.2d 32 (1945) (American Jurisprudence Second Ed.) Therefore, “proof is evident” or “presumption great” demands evidence that is “*clear and strong*, and which leads well-guarded, dispassionate judgment to conclusion that accused committed offense.” Proof *Evident or Presumption Great*, Black’s Law Dictionary. Clear and convincing evidence is evidence which creates an abiding conviction that the truth of the factual contention is highly probable. *Colorado v. New Mexico*, 467 U.S. 310, 316. Under this standard, the state was required to show enough evidence to create an abiding conviction that was highly probable Petitioner committed first degree murder with use of a deadly weapon.

Moreover, this Court’s previous rulings on the evidence necessary for a district court to deny bail under Article 1 Section 7 of the Nevada Constitution, point to the same conclusion. “The quantum of proof

necessary to establish the presumption of guilt” for purposes of defeating a bail request “is considerably greater than that required to establish the probable cause necessary to hold a person answerable for an offense,” *Hanley v. State*, 85 Nev. 154, 161, 451 P.2d 852, 857 (1969), but less than what is required at trial to prove guilt beyond a reasonable doubt, *Wheeler*, 81 Nev. at 500, 406. A district court abuses its discretion when it arrives at the conclusion to deny bail “by stacking inference upon inference” and where the connection between the evidence and charged crime is conjectural. *Howard*, 83 Nev. at 51-52. *See also Sewall*, 481 P.3d 1249, 1251-52 (Nev. 2021). However, the state failed to do so, and the court failed to properly apply the evidentiary standard necessary to detain Petitioner.

III. Nevada caselaw has been inconsistent in articulating the standard applicable to the State’s evidence when it asks that bail be denied under Article 1 Section 7 of the Nevada Constitution.

Historically, this Court has articulated “proof is evident” and “presumption great” as something that is “at least higher than probable cause.” *Hanley v. State*, 85 Nev. 154, 451 P.2d 852 (1965). Courts across the country have enacted three different approaches to determine the level of proof needed to establish that “proof is evident.” In particular,

courts have employed either 1) a probable cause standard, 2) a more than probable cause but less than beyond reasonable doubt standard, or 3) a beyond reasonable doubt standard. *Browne v. People of Virgin Islands*. The majority of states have adopted the more than probable cause but less than beyond reasonable doubt standard (a standard most akin to the clear and convincing evidence standard) *Id.* Similarly, this court has articulated “proof is evident” and “presumption great” as something that is “at least higher than probable cause.” *Hanley v. State*, 85 Nev. 154, 451 P.2d 852 (1965).

In the past, judges have considered themselves to have broad discretion in determining the level of proof needed to determine whether or not “proof is evident” or “presumption great.” *In re Wheeler*, 81 Nev. 495, 406 P.2d 713 (1965). This perception of broad discretion has allowed district courts to improperly characterize the evidentiary standard of proof needed to detain an accused. Prior to *Valdez-Jimenez*, Nevada courts similarly failed to follow federal and constitutional standards regarding bail. *Valdez-Jimenez* has since set the precedent in Nevada to require courts to use a clear and convincing evidentiary standard when determining or denying bail. For these reasons, this

court should find that clear and convincing evidence was required to detain Petitioner in this case as is required in *all* other cases when the court seeks to infringe upon an accused's liberty interests. Moreover, the District Court should be directed to conduct a bail hearing in accordance with Article 1 Section 7 of the Nevada Constitution and *Valdez-Jimenez*, as the hearing held conflated the standard and proof of those two distinct aspects of bail determination when the accused faces a first-degree murder charge.

DATED this 7th day of July, 2021.

RESPECTFULLY SUBMITTED BY:



W. JEREMY STORMS
Nevada Bar #010772

VERIFICATION

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

W. JEREMY STORMS, being first duly sworn, deposes and says:

1. That I am an attorney duly licensed to practice law in the State of Nevada
and a deputy for the Special Public Defender, appointed counsel for Petitioner;

2. I have read the foregoing Petition for Writ of Mandamus, and knows the contents therein and as to those matters they are true and correct and as to those matters based on information and belief I am informed and believe them to be true;

3. That Tut Lepolo, Petitioner has no other remedy at law available, and that the only means to address this issue is through the instant writ;

4. That Counsel signs this verification on behalf of Tut Lepolo, under
Petitioner's direction and authorization.

Further your Affiant sayeth naught

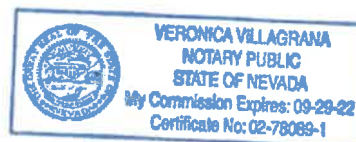


W. Jeremy Storms

SUBSCRIBED AND SWORN to before me

this 27th day of July, 2021.

NOTARY PUBLIC in and for



CERTIFICATE OF COMPLIANCE


1. I hereby certify this writ complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(9) because this writ has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point font of the Century Schoolbook style.
2. I further certify that this writ complies with the page and type-volume limitations of NRAP 21(d) because, excluding the parts of the writ exempted by NRAP 32(c)(2), it is either proportionally spaced, has a typeface of 14 points or more, and contains 3371 words.
3. Finally, I hereby certify that I have read this appellate writ, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this writ complies with all applicable Nevada Rules of Appellate Procedure, in particular, NRAP 21, 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 on is to be found. I understand that I may be subject to sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 27th day of July, 2021.

RESPECTFULLY SUBMITTED:

/s/ W. JEREMY STORMS



W. JEREMY STORMS
Chief Deputy Special Public Defender
Nevada Bar No. 10772
330 S. Third Street, No. 800
Las Vegas NV 89101
702-455-6265
Attorney for Lepolo

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on July 27, 2021, a copy of the foregoing Petition for Writ of Mandamus was filed with the Nevada Supreme Court. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

Clark County District Attorney's Office
Regional Justice Center
200 Lewis Ave., 3rd Floor
Las Vegas, NV 89155

I further certify that on 7/27/2021, a copy of the foregoing Writ was mailed to the following:

The Honorable Michael P. Villani
Eighth Judicial District Court, Department XIX
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89101

The Honorable David Barker
Eighth Judicial District Court, Senior Judge
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89101

RESPECTFULLY SUBMITTED BY:

/s/ W. JEREMY STORMS



W. JEREMY STORMS
Chief Deputy Special Public Defender
Attorney for Lepolo