

IN THE SUPREME COURT OF THE STATE OF NEVADA

DEREK JOHNSTON,
Petitioner,

vs,

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA, IN
AND FOR THE COUNTY OF CLARK, AND
THE HONORABLE MARY KAY
HOLTHUS, DISTRICT JUDGE

Respondent,

and

THE STATE OF NEVADA,
Real Party in Interest.

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CASE NO: 83968

D.C. NO: C-21-354689-1

**ANSWER TO EMERGENCY PETITION UNDER NRAP 27(e)
FOR A WRIT OF MANDAMUS**

COMES NOW, the State of Nevada, Real Party in Interest, by STEVEN B. WOLFSON, District Attorney, through his Chief Deputy District Attorney, ALEXANDER CHEN, on behalf of the above-named Real Party In Interest and submits this Answer to Emergency Petition Under NRAP 27(e) For A Writ of Mandamus in obedience to this Court's order directing Answer, filed December 28, 2021. This Answer is based on the following memorandum and all papers and pleadings on file herein.

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Dated 4th day of January, 2022.

Respectfully submitted,

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

BY */s/ Alexander Chen*

ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539
Office of the Clark County District Attorney

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

Petitioner Derek Johnston (hereinafter “Petitioner) has three active criminal cases that are being prosecuted in the Eighth Judicial District Court. His first case to enter the system was the instant felony case from which this Petition was filed. The case began in Las Vegas Justice Court with a filing of a Criminal Complaint on October 13, 2020 and an Arrest Warrant filed on November 18, 2020 for the crimes of Battery Resulting in Substantial Bodily Harm Constituting Domestic Violence and Malicious Destruction of Property. The crimes alleged in the Criminal Complaint were for acts committed on August 19, 2020. Per the terms of the Arrest Warrant, the Justice of the Peace ordered \$5,000 bail, mid-level electronic monitoring, and no contact with the victim.

Before the Arrest Warrant was filed in this case, Petitioner was arrested for another domestic violence battery charge on October 25, 2020. This case became Justice Court case 20CR030809. The incident again involved the same victim, and it included third-party witnesses and evidence showing that Petitioner had battered the victim. Petitioner posted a \$3,000 bond and was released from custody.

Petitioner was arrested on the warrant on December 2, 2020 and posted a \$5,000 bond with the two additional special conditions. He was released from custody the same day and ordered to appear on January 6, 2021 in Justice Court Department 15. On January 6, 2021, Petitioner was arraigned on the Criminal Complaint and he made a request to be removed from mid-level electronic monitoring. Over the State's objection, the Justice Court granted his request and set a preliminary hearing.

On March 24, 2021, Petitioner unconditionally waived his right to a preliminary hearing pursuant to a proposed plea negotiation and was bound over to District Court. PA 005. On March 31, 2021, Petitioner failed to appear at his Initial Arraignment in District Court, but his attorney managed to have the court continue the matter for his presence. Petitioner's Appendix ("PA") 020.

On April 12, 2021, Petitioner again was not present in court, but his counsel once again successfully had the matter continued until April 26, 2021. PA 021. On April 26, 2021, Petitioner was in court and began to enter his plea but then requested

additional time to talk with his attorney. PA 022. The court did not accept the plea at that time and continued the matter until May 3, 2021. On May 3, 2021, Petitioner failed to appear in court or via the Bluejeans audiovisual program. The court then issued a bench warrant. PA 023.

After multiple court appearances, including the withdrawal of his attorney, petitioner successfully convinced the district court to quash his warrant on June 2, 2021. PA 026. During a status check on July 7, 2021, it was determined that Petitioner was not going to follow through with the original negotiations so he was re-arraigned on an Amended Information, and a status check date for July 26, 2021 was set. PA 027.

However before the next status check date, on July 16 the State filed a Motion to Remand Defendant Pursuant to NRS 178.487. PA 028. The request to have Petitioner remanded was based upon a domestic battery that took place at the Orleans Hotel on January 26, 2021 with the same victim of this case. Petitioner was charged by way of Criminal Complaint with Battery Constituting Domestic Violence (Justice Court case 2ICR021016). An Arrest Warrant was issued on June 3, 2021. On June 30, 2021, Johnston filed a Motion to Quash Arrest Warrant. On July 7, 2021, Petitioner was not present for the hearing on the Motion. The State asked that Petitioner be remanded because he picked up this case while out on another case and he violated the no contact order in the instant case by picking up the new case. The

hearing was passed to July 20, 2021, with an order that the arrest warrant stands, and Petitioner must be present at the next hearing. On July 20, 2021, Petitioner was remanded and released with mid-level electronic monitoring.

At the hearing on July 26, 2021, Petitioner requested that mid-level electronic monitoring be reinstated. The State argued that he be revoked with \$50,000 bail and high level electronic monitoring (aka “house arrest”). Ultimately the District Court decided to impose high level electronic monitoring as an added condition with a continued no contact with the victim order. A trial date was then set for January of 2022.

Less than a month after being placed on high level electronic monitoring, the Las Vegas Metropolitan Police Department, who manages the electronic monitoring program, placed Petitioner into custody for violating the terms of high level electronic monitoring. Based upon the violations, the State filed a subsequent motion to have Petitioner remanded because he was not complying with the terms of his release. Conversely, Petitioner filed a motion to be released from custody.

The parties appeared back in District Court on September 13, 2021 where Petitioner requested some additional information. The Court ordered that Petitioner temporarily be held without bail pending an evidentiary hearing for the violation of house arrest rules.

On October 11, 2021, a partial evidentiary hearing was held. On October 13, 2021, the Court ordered that although it was finding Petitioner in violation of the terms of house arrest, the court was going to order that he remain on house arrest.

It is worth noting that before the District Court reinstated Petitioner on house arrest, Petitioner filed an Emergency Petition for Writ of Mandamus regarding his custody status with this Court on October 7, 2021, and this Court ordered the State to respond within 7 days from October 8, 2021. Although the State hurried to file its response by October 11, 2021, on the same day, the District Court held its hearing and reinstated Petitioner so the emergency petition that Petitioner filed was denied for being moot. Respondent's Appendix ("RA") 4-5.

Then on November 13, 2021, the LVMPD House Arrest Program again sent a letter to the District Court indicating that Petitioner had failed to abide by the rules of the program. The letter went on to explain difficulties that it was having supervising Petitioner. Based upon his violations, it had remanded Petitioner into custody.

As mentioned throughout this long and tortured history, Petitioner has three active cases currently, one of which he committed while he was out on two previously filed cases. On December 9, 2021, in case 20-CR-030809, the State indicated to the Justice Court that the witness was unavailable for the upcoming misdemeanor jury trial. The Justice Court granted the continuance but released

Petitioner on his own recognizance and removed him from his mid level electronic monitoring. The court also told Petitioner to stay out of trouble and have no contact with the victim.

Then on December 22, 2021, Petitioner filed the instant petition. At no point has Petitioner sought a ruling, such as the last time he filed a petition, seeking to have his client released by the District Court.

SUMMARY OF THE ARGUMENT

Petitioner has filed what appears to be an omnibus petition for writ of mandamus. This Court should deny the instant petition for writ of mandamus because he has an adequate remedy at law to bring the case before the district court. Second, there is no legal requirement that a Valdez-Jimenez hearing be conducted every time that a defendant has violated a condition of his bail. Finally, this Court should not invalidate the electronic monitoring programs and the rules associated with them.

LEGAL ARGUMENT

I. A WRIT SHOULD NOT BE GRANTED BECAUSE HE HAS AN ADEQUATE REMEDY AT LAW

“[M]andamus and prohibition are extraordinary remedies, and the decision of whether a petition will be entertained lies within the discretion of this court.” Hickey v. Eighth Jud. Dist. Court, 105 Nev. 729, 731, 782 P.2d 1336, 1338 (1989).

However, extraordinary relief will not issue “where the petitioner has a plain, speedy

and adequate remedy, such as an appeal, in the ordinary course of law.” Id. at 731, 782 P.2d at 1338. The petitioner carries “the burden of demonstrating that extraordinary relief is warranted.” Pan, 120 Nev. at 228, 88 P.3d at 844; *see also* NRAP 21(a).

Petitioner in this case has not addressed the detention in front of the court that imposed his condition of high level electronic monitoring. Rather than seeking relief from the district court (where he previously prevailed), he bypassed any normal process and sought recourse through this Court.

On November 13, 2021, Petitioner was remanded for violating the terms of his house arrest. On November 15, 2021, the district court, notified both the State as well as Petitioner’s counsel via email that he had been remanded, but that a letter from house arrest had not been received yet. Petitioner’s counsel responded by saying “I am currently in trial in DC20. Please let me know if the Court is placing the matter on Calendar.” RA 1. Petitioner’s counsel noticeably asked the question “if” a hearing would be set, and did not actually request a hearing even knowing that his client had been remanded. Shortly thereafter, the district court received and distributed to the parties the violation letter dated November 13, 2021. PA 240-241. A hearing on the matter was neither requested by Petitioner nor set by the district court. Then Petitioner filed the instant petition without ever seeking clarification or a ruling from the district court.

Petitioner's ultimate request is that this Court issue an order directing the district court to release him from custody pending a judicial determination on any violations that has committed while out on bail. The State in part agrees that this matter should be decided by the district court. However, the requested writ requiring him, and presumably any other person on bail that is alleged to have violated a condition of bail, to be released pending a final determination should not be issued. In fact if anything, Petitioner has shown that he has struggled with the conditions of his bail. The remedy, even if temporary, to a lack of compliance should not be lifting the requirement in its entirety.

II. UPON THE DISTRICT COURT CONDUCTING A HEARING, THIS ISSUE SHOULD BECOME MOOT

Once the decision is made, however, the matter will become moot and this court has generally declined to hear a moot case. Personhood Nev. v. Bristol, 126 Nev. 599, 602 , 245 P.3d 572, 574 (2010).

The first time that Petitioner filed a petition for writ of mandamus in October of 2021, this Court declined to entertain the petition because Petitioner had not demonstrated that extraordinary writ relief was appropriate. RA 4-5. This Court took consideration of the fact that the district court was set to have a hearing regarding his violation of bail conditions.

There is no difference with the circumstances today than there was in October when this Court denied his petition. The district court does need to make a ruling.

Whether the matter was not placed on calendar because there was no request or there was judicial oversight, a decision regarding Petitioner's violations and the consequences of them does need to be made. However, such a decision by the district court does not require this Court's extreme intervention.

III. PETITIONER CONFLATES A PERSON'S PERFORMANCE ON RELEASE CONDITIONS WITH A PERSON'S ENTITLEMENT TO BAIL

In the petition, Petitioner expresses outrage at the entire system of house arrest and its implementation. However, a court's imposition of release conditions and the enforcement of those conditions is not the same as a Valdez-Jimenez hearing.

Petitioner seemingly conflates various issues related to bail and this Court's Valdez-Jimenez holding. Valdez-Jimenez called for a prompt hearing after arrest and detention, which took place in this case. However, Petitioner is now arguing that being detained for violating the conditions of release is a new arrest calling for a separate Valdez-Jimenez hearing. He argues that "[T]his Court has recently declared that there must be a prompt adversarial evidentiary hearing within 72 hours of arrest and detention." Petition, p. 10. He cites 460 P.3d, 976, 985, and 987 for this proposition.

Not only does the Valdez-Jimenez decision not say this, but the Valdez-Jimenez decision was regarding initial bail amounts, not subsequent bail or release conditions. Specifically, the "prompt" hearing mandated by this Court pertained to

custody after arrest. Id., at 165, 460 P.3d 985. The courts that decided Petitioner's release conducted a Valdez-Jimenez hearing, and Petitioner was released from custody with conditions.

When considering bail or conditions of release, courts have multiple options at their disposal. The courts have presumably been trained and informed about the different levels of monitoring that are available. Here in Clark County, the electronic monitoring happens to be run by a division of the Las Vegas Metropolitan Police Department.

By imposing any level of electronic monitoring, the court is de facto approving the rules that accompany that level of monitoring. Absent a removal of a specific condition, the rules that accompany the monitoring get imposed as a condition of release. The court, by placing someone on any level of monitoring, is also acknowledging the program that has been set up by LVMPD. There is no other group or agency that operates an electronic monitoring release program in Clark County.

However, what Petitioner is arguing is that the rules which have been put into place, as part of a condition of release, cannot be enforced absent a separate and subsequent judicial order. In what Petitioner calls a "unilateral, arbitrary" act of authority, he takes issue that he can be placed into custody for violating the conditions of his release. Petition, p. 10. Essentially he is arguing that courts should

release him from custody and can provide conditions for his release but not allow the agency to enforce them.

Petitioner makes the argument that NRS 178.4851 does not allow the agency to remand a person who violates the conditions of his bail. However, this is not how the statute reads. NRS 178.4851(9) requires that when a court imposes a condition of release, a law enforcement officer is permitted to arrest the person if there is probable cause to believe that the person has violated a condition of release.

This happened here. The house arrest officers took Petitioner into custody because he failed to maintain contact with his supervising officer and failed to provide a urine sample for a drug test. PA 240-241. In the letter explaining why he was remanded, the officer goes into more detail about the reasons for his violations. The officer had probable cause that Petitioner had violated his release conditions and took him into custody and contacted the district court. There is nothing improper about this scenario.

This situation is not the situation that was covered in the Valdez-Jimenez decision. Here, Petitioner was given bail and added conditions for his release. He received the benefit of a Valdez-Jimenez hearing where the court decided that he should be released to the highest level of monitoring. In fact as recent as October of 2021, Petitioner *asked* to being reinstated to house arrest. The district court found

him in violation of the rules, but it still gave him the benefit of the doubt by allowing him to remain on house arrest.

Yet despite receiving the release condition that he wanted, he now argues that the agency tasked with enforcing the rules of the program is not allowed to do so. When a person such as himself has violated the terms of his release, he seems to be arguing that a new Valdez-Jimenez hearing needs to take place but there is simply no authority for this.

To equate what happened in this case as an “arrest” would be an overly broad application of the term. For instance, a defendant that has been placed on probation may be placed in custody for violating his terms. However, placing that defendant in custody does not constitute an arrest with the equivalent rights that are afforded to individuals arrested upon probable cause that are not on probation. *See Anaya v. State*, 96 Nev. 119, 606 P.2d 156 (parole and probation revocations are not criminal prosecutions and the full panoply of constitutional protections for defendants do not apply).

Here, Petitioner was placed into custody because the agency administering his house arrest had probable cause that he was in violation of his conditions. He ignored contact with his house arrest officer and then refused to provide a urine sample. He was not arrested for a new crime, instead he was only remanded into custody to determine if he is still a suitable candidate for release.

IV. PETITIONER IS ASKING THIS COURT TO CREATE LAW BY IMPOSING INTERMEDIARY SANCTIONS FOR BAIL VIOLATIONS

There are no such thing as intermediary sanctions during pretrial release.

Instead, there are rules that individuals that are out of custody are ordered to follow. They are not ordered to follow just some of the rules. The district court imposing the conditions knows of the conditions, including those that are associated with electronic monitoring.

A rule is not a rule if it lacks any authority to be enforced. The rule in essence would become merely advisory. Yet despite there being absolutely no authority for the imposition of intermediate sanctions, Petitioner wants this Court to issue a writ of mandamus where there is no law that compels the district court to do what this individual is asking.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the Emergency Petition Under NRAP 27(e) For A Writ of Mandamus be denied.

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Dated this 4th day of January, 2022.

Respectfully submitted,

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BY */s/ Alexander Chen*

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AFFIDAVIT

I certify that the information provided in this Answer to Emergency Petition Under NRAP 27(e) For A Writ of Mandamus is true and complete to the best of my knowledge, information and belief.

Dated this 4th day of January, 2022.

BY */s/ Alexander Chen*

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this Answer to Emergency Writ complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page and type-volume limitations of NRAP 21(d) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 2,924 words and 256 lines of text and does not exceed 15 pages.
3. **Finally, I hereby certify** that I have read this Answer to Emergency Writ, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 4th day of January, 2022.

Respectfully submitted

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BY */s/ Alexander Chen*

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on January 4, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

ALEXANDER CHEN
Chief Deputy District Attorney

I also certify that on January 4, 2022, a copy of this document was sent via Facsimile machine to T. Augustus Claus, Esq. at:

T. AUGUSTUS CLAUS
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I, further certify that on January 4, 2022, a copy was sent via email to District Court, Department 18's Judicial Executive Assistant for Judge Mary Kay Holthus:

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