IN THE SUPREME COURT OF THE STATE OF NEVADA

AARON FRYE
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE JERRY WIESE, DISTRICT JUDGE,
Respondents,

and

THE STATE OF NEVADA,
Real Party in Interest.

Case No.

Dist. Ct. C-18-331986

APPENDIX TO PETITION

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Counsel for Real Party in Interest

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CASE NO. C-18-331986-1

State of Nevada vs Aaron Frye

Case Type:	**Felony/Gross Misdemeanor**
Date Filed:	**05/11/2018**
Location:	**Department 30**
Cross-Reference Case Number:	**C331986**
Defendant's Scope ID #:	**7019093**
Grand Jury Case Number:	**17CGJ052X**
ITAG Case ID:	**1984313**

PARTY INFORMATION

Defendant	**Frye, Aaron**	**Lead Attorneys** **Public Defender** *Public Defender* 702-455-4685(W)
Plaintiff	**State of Nevada**	**Steven B Wolfson** 702-671-2700(W)

CHARGE INFORMATION

Charges: Frye, Aaron	Statute	Level	Date
1. BURGLARY WHILE IN POSSESSION OF FIREARM	205.060.4	Felony	04/11/2018
2. ROBBERY WITH USE OF A DEADLY WEAPON	200.380	Felony	04/11/2018
3. ROBBERY WITH USE OF A DEADLY WEAPON	200.380	Felony	04/11/2018
4. ROBBERY WITH USE OF A DEADLY WEAPON	200.380	Felony	04/11/2018
5. ROBBERY WITH USE OF A DEADLY WEAPON	200.380	Felony	04/11/2018
6. CARRY CONCEALED FIREARM OR OTHER DEADLY WEAPON	202.350.1d1	Felony	04/11/2018
7. OWNERSHIP OR POSSESSION OF FIREARM BY PROHIBITED PERSON	202.360.1	Felony	04/11/2018

EVENTS & ORDERS OF THE COURT

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Parties Present
Minutes
Result: Matter Heard

05/11/2018 Warrant
Indictment Warrant

05/11/2018 Indictment
Indictment

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Result: Plea Entered

05/17/2018 **Indictment Warrant Return** (9:00 AM) (Judicial Officer Hardcastle, Kathy)
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Result: Matter Heard

05/17/2018 All Pending Motions (9:00 AM) (Judicial Officer Hardcastle, Kathy)
Parties Present
Minutes
Result: Matter Heard

05/22/2018 Reporters Transcript
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06/11/2018 Notice of Witnesses and/or Expert Witnesses
State's Notice of Witnesses and/or Expert Witnesses

06/11/2018 Notice
State's Notice of Intent to Seek Punishment as a Habitual Criminal

06/12/2018 Motion
Motion for Extension of Writ Deadline

06/20/2018 Opposition
State's Opposition to Defendant's Motion for Extension of Time to File Pretrial Petition for Writ of Habeas Corpus

06/21/2018 Motion (9:00 AM) (Judicial Officer Earley, Kerry)
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Parties Present
Minutes
Result: Granted

06/22/2018 Motion
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Reassigned From Judge Earley - Dept 4
07/10/2018 **Calendar Call** (8:30 AM) (Judicial Officer Wiese, Jerry A.)
07/10/2018 Reset by Court to 07/10/2018
Result: Matter Heard
07/10/2018 **Motion** (8:30 AM) (Judicial Officer Wiese, Jerry A.)
State of Nevada's Notice of Motion and Motion to Stay District Court Proceedings
07/03/2018 Reset by Court to 07/10/2018
Result: Motion Denied
07/10/2018 **Petition for Writ of Habeas Corpus** (8:30 AM) (Judicial Officer Wiese, Jerry A.)
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Result: Matter Continued
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Parties Present
Minutes
Result: Matter Heard
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Vacated - per Judge
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Receipt of Copy
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Parties Present
Minutes
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REGISTER OF ACTIONS

CASE NO. C-18-331986-1

State of Nevada vs Aaron Frye

Case Type:	**Felony/Gross Misdemeanor**
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EVENTS & ORDERS OF THE COURT

05/11/2018 Grand Jury Indictment (11:45 AM) (Judicial Officer Togliatti, Jennifer)

Minutes

05/11/2018 11:45 AM

- Patti Hayden, Grand Jury Foreperson, stated to the Court that at least twelve members had concurred in the return of the true bill during deliberation, but had been excused for presentation to the Court. State presented Grand Jury Case Number 17CGJ052X to the Court. COURT ORDERED, the Indictment may be filed and is assigned Case Number C-18-331986-1, Department IV. State requested a warrant, argued bail, and advised Deft is in custody. COURT ORDERED, $250,000.00 BAIL, INDICTMENT WARRANT ISSUED, and matter SET for Arraignment. COURT FURTHER ORDERED, Exhibits 1-16 to be lodged with the Clerk of the Court. COURT ADDITIONALLY ORDERED, Las Vegas Justice Court case no. 18F06620X DISMISSED per the State's request. I.W. (CUSTODY) 05-17-18 9:00 AM INITIAL ARRAIGNMENT (DEPT IV)

Parties Present

Return to Register of Actions

MOT
PHILIP J. KOHN, PUBLIC DEFENDER
NEVADA BAR NO. 0556
PANDORA L. LEVEN, DEPUTY PUBLIC DEFENDER
NEVADA BAR NO. 13525
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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, v. AARON FRYE, Defendant,	CASE NO. C-18-331986-1 DEPT. NO. XXX DATE: August 2, 2018 TIME: 8:30 a.m.

MOTION TO VACATE DETENTION ORDER AND RELEASE THE DEFENDANT FROM CUSTODY

COMES NOW, the Defendant, Aaron Frye, by and through, PANDORA L. LEVEN, Deputy Public Defender, and moves this Honorable Court for an order vacating Aaron Frye's current detention order and releasing him on his own recognizance or, in the alternative, order Mr. Fry's release with attainable conditions "minimally necessary" to protect the community and ensure Aaron Frye's return to court.

This Motion is based upon the attached Declaration of Counsel, any attached documents, argument of Counsel, and any information provided at the time set for hearing this motion.

DATED this 17th day of July, 2018.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: */s/Pandora L. Leven*
PANDORA L. LEVEN, #13525
Deputy Public Defender

DECLARATION OF PANDORA L. LEVEN

I, PANDORA L. LEVEN, hereby declare as follows:

1. I am an attorney licensed to practice law in the State of Nevada and I am a Deputy Public Defender for the Clark County Public Defender's Office appointed to represent Defendant Aaron Frye in the present matter;

2. I make this Declaration in support of Motion to Vacate Detention Order and Release the Defendant from Custody;

3. I am more than 18 years of age and am competent to testify as to the matters stated herein. I am familiar with the procedural history of the case and the substantive allegations made by the government. I also have personal knowledge of the facts stated herein or I have been informed of these facts and believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 17th day of July, 2018.

/s/Pandora L. Leven
PANDORA L. LEVEN, #13525
Deputy Public Defender

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF FACTS

Defendant Aaron Fry is currently awaiting trial for several counts of armed robbery. He has been ordered released, so long as he can post $250,000 bail. He and his family cannot gather enough money to post this bond. This amount was based only on the allegations and failed to consider any Mr. Frye's individual characteristics as required by law. After a Gjand Jury returned a True Bill, the Judge ordered this amount, without benefit of Mr. Frye's presence, his counsel's presence, any knowledge of Mr. Frye's ties to the community or any knowledge of Mr. Frye's financial situation. As such, Mr. Frye requests this Court consider the following information, and set bail in an attainable amount of $75,000.

Mr. Frye has significant ties to the community. He has some family and many friends that live here in the community. One of his cousins lives here locally with her two kids. Another of his cousins is here locally and works in the mobile food industry. If he is released Mr. Frye intends to live with his friend Kevin, until he can get his own apartment here locally. Although they are not here locally, Mr. Frye has family in both Texas and California that remain supportive of him. If his bond is reduced to $75,000 his mother and brother will help get the money together to post his bond. His brother is a business owner in Texas who is considering expanding his business to the Las Vegas area.

Mr. Frye has a two year old son who lives in California with the child's mother. Once he is able to get his own place in Las Vegas, his son and the mother of his child will move out here to stay with him until the completion of this case. Mr. Frye anticipates that he will be able to get his own place here rather quickly, as he has tax return money waiting for him, he just needs to get out and verify some information with the IRS (he needs to show proof of identity).

Although he is currently unemployed, due to his custody status, just prior to getting arrested, Mr. Frye anticipated obtaining employment through Uber. His car was being repaired, but he was ready to begin driving for Uber when the car was out of the shop. He believes he will

be able to obtain employment through Uber if he is released. Additionally, Mr. Frye has skills working in the music industry and will resume working in that industry as soon as he can.

BRIEF OVERVIEW

The protocol by which pretrial detention orders are promulgated in Clark County is unlawful. First, the procedure by which a judge defaults to detaining criminal defendants without a full hearing violates Federal and Nevada law. Second, Clark County's ongoing, systemic use of bail as a tool of pretrial *confinement* rather than *release* is also unlawful because: (a) jailing someone solely because he cannot pay a sum of money without making a finding that he is able to pay infringes a fundamental right solely on the basis of wealth in violation of the Equal Protection and Due Process Clauses; and (b) jailing someone on an unattainable financial condition violates the Constitution because it deprives a presumptively innocent person of the fundamental right to liberty without complying with the substantive and procedural requirements of a valid order of detention under the Due Process Clause.

I. Constitutional Protections Violated by the Current Process in Clark County

A. The Due Process Clause

The Due Process Clauses of the U.S. and Nevada Constitutions provide that "[n]o person shall . . . be deprived of life, liberty, or property without due process of law." U.S. Const. amend. V;[1] Nev. Const. Art. 1, §8. Due Process requires a hearing before a neutral fact-finder and an opportunity to be heard "at a meaningful time and in a meaningful manner" before an individual is deprived of a fundamental right or property interest. Mathews v. Eldridge, 424 U.S. 319, 333-34, 96 S. Ct. 893 (1976) (citations omitted); see also Zadvydas v. Davis, 533 U.S. 678, 690, 121 S. Ct. 2491 (2001) ("Freedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that [the Due Process] Clause protects"); Foucha v. Louisiana, 504 U.S. 71, 80, 112 S. Ct. 1780 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action"); U.S. v. Montalvo-Murillo, 495 U.S. 711, 716, 110 S. Ct. 2072

[1] The Fifth Amendment Due Process Clause was made applicable to the states via the Fourteenth Amendment to the U.S. Constitution. U.S. Const. amend, V, XIV. See Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489 (1964)

(1990) (holding that release prior to trial is a "vital liberty interest"). Accordingly, the issue of pretrial detention must be resolved in a manner that comports with due process.

Pretrial liberty is a fundamental right. U.S. v. Salerno, 481 U.S. 739, 750, 107 S. Ct. 2095 (1987). For that reason, a presumptively innocent person's loss of pretrial liberty is subject to "heightened constitutional scrutiny" and must be preceded by rigorous procedures designed to ensure protection of that liberty. Id. at 746. Where the State is seeking to detain a defendant pretrial, the defendant is entitled to substantive and procedural due process. Id. Because the Due Process Clause of the Nevada Constitution mirrors that of its federal counterpart, Nevada "looks to federal precedent" for guidance in resolving due process claims. Hernandez v. Bennett-Haron, 128 Nev. 580, 587, 287 P.3d 305 (2012).

The essential elements of a procedural due process claim under the Fifth Amendment are "(1) a life, liberty, or property interest requiring protection under the Due Process Clause, and (2) a deprivation of that interest (3) without adequate process." Fields v. Henry Co., 701 F.3d 180, 185 (6th Cir. 2012). "A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty' . . . or [by] an expectation or interest created by the state law or policies". Wilkinson v. Austin, 545 U.S. 209, 221, 125 S. Ct. 2384 (2005) (citation omitted). Freedom of movement, including the right to travel, has long been recognized as a liberty interest which cannot be restricted without due process of law. City of Chicago v. Morales, 527 U.S. 41, 54, 119 S. Ct. 1849 (1999) (citing Kent v. Dulles, 357 U.S. 116, 78 S. Ct. 1113 (1958) (noting that freedom of movement is "a part of our heritage")). Accordingly, any restraint on pretrial liberty implicates procedural due process protections. Those protections require "adequate process". In the context of a pretrial detention order, "adequate process" requires rigorous procedures be met to detain someone pretrial, including, but not limited to, a "full-blown adversary hearing," a heightened evidentiary standard of proof of dangerousness/flight risk by "clear and convincing evidence," consideration of alternative conditions or release, and "written findings of fact and a written statement of reasons for a decision to detain." Salerno, 481 U.S. at 741, 750-51.

Substantive due process "prohibits states from infringing fundamental liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest." Lawrence v. Texas, 539 U.S. 558, 593, 123 S. Ct. 2472 (2003). In a pretrial detention context, substantive due process requires that detention survive "heightened constitutional scrutiny" and the government may only detain where that detention is carefully limited to serve a "compelling" government interest. Salerno, 481 U.S. at 746. As a result, the government may detain someone pretrial only if other, less restrictive means are not available to serve the state's interests. Id.; U.S. v. Karper, 847 F. Supp. 2d 350, 362 (N.D.N.Y. 2011) (finding release conditions cannot exceed that which is minimally necessary to ensure the accused's appearance in court and protect the community against future dangerousness).

B. Equal Protection Clause

The Equal Protection Clause of the U.S. and Nevada constitutions[2] prohibits the government from denying individuals equal protection of the laws. The Equal Protection Clause may be invoked to analyze the governmental actions that draw distinctions based upon specific characteristics or impinge on an individual's exercise of a fundamental right. See Skinner v. Oklahoma, 316 U.S. 535, 62 S. Ct. 1110 (1942). While the Equal Protection Clause permits the states some discretion in enacting laws which affect some groups of citizens differently than others, a statute or practice is unconstitutional if the "classification rests on grounds wholly irrelevant to the achievement of the State's objective." McGowan v. Maryland, 366 U.S. 420, 425-26, 81 S. Ct. 1101 (1961).

In the context of bail, the Equal Protection Clause prohibits the pretrial detention of defendants solely because of their inability to afford bail. Weatherspoon v. Oldham, 2018 WL 1053548, at *6 (W.D. Tenn. Feb. 26, 2018); Jones, 2015 WL 5387219, at *4; Pugh v. Rainwater, 572 F.2d at 1058 (5th Cir. 1978) (holding that "pretrial confinement for inability to post money bail" for a defendant "whose appearance at trial could reasonably be assured by one of the alternate forms of release . . . would constitute imposition of an excessive restraint . . .").

[2] U.S. Const. amend. XIV; Nev. Const. Art. 1, § 1 and Art. IV, § 21.

C. Excessive Bail Clause and Nevada's Statutory Bail Scheme

The Eighth Amendment to the U.S. Constitution states, in part, that "excessive bail shall not be required." Similarly, the Nevada Constitution mandates that all defendants "shall be bailable by sufficient sureties" and that bail shall not be "excessive". Nev. Const. Art. 1, §§ 6-7. The constitutional right to bail is codified in Nevada statute, which requires that "a person arrested for an offense other than murder of the first degree must be admitted to bail." NRS 178.484(1).

Nevada Revised Statute 178.4851 provides that criminal defendants may be released without bail upon a showing of good cause that the court "can impose conditions on the person that will adequately protect the health, safety, and welfare of the community and ensure that the person will appear at all times and places ordered by the court." This determination involves consideration of the following factors regarding the accused:

1. The length of residence in the community;
2. The status and history of employment;
3. Relationships with the person's spouse and children, parents or other family members and with close friends;
4. Reputation, character and mental condition;
5. Prior criminal record, including, without limitation, any record of appearing or failing to appear after release on bail or without bail;
6. The identity of responsible members of the community who would vouch for the reliability of the person;
7. The nature of the offense with which the person is charged, the apparent probability of conviction and the likely sentence, insofar as these factors relate to the risk of not appearing;
8. The nature and seriousness of the danger to the alleged victim, any other person or the community that would be posed by the person's release;
9. The likelihood of more criminal activity by the person after release; and
10. Any other factors concerning the person's ties to the community or bearing on the risk that the person may willfully fail to appear.

NRS 178.4853.

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II. Specific Constitutional Concerns Regarding Clark County's Systematic and Unlawful Use of Bail as a Mechanism of Pretrial Detention

A. Clark County's Bail System

Clark County uses bail as a mechanism of pretrial detention. When an individual is arrested, Clark County courts do not resolve the issue of pretrial confinement without regard to bail. The courts typically set bail based upon the offense or offenses charged, often relying on a standardized bail schedule. The result is that well-resourced defendants are able to buy their freedom, while the poor languish in jail. When bail becomes an unattainable release condition, it becomes a mechanism of preventative detention. And preventative detention is only allowed when a court concludes, after an adversarial hearing, that prosecutors established clear and convincing evidence that pretrial detention is the least restrictive means of assuring community safety and the defendant's return to court. Absent such a finding, any release condition – of which bail is one – must be attainable. This means that bail must be set in an amount a defendant can pay.

B. The History and Evolution of Bail in the United States

"Bail" is not equivalent to "money bail." "Bail" means *release* before trial. Although common in recent years, the sentence "the Defendant is held on $10,000 bail" is a contradiction: as a historical matter, being "held on bail" was impossible. Timothy R. Schnacke, U.S. Dep't of Justice – Nat'l Inst. for Corr., Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform 1 (Aug. 2014).[3] As the CATO Institute has explained, since well before the Magna Carta, bail has been understood as a device to *free* defendants pretrial. See Brief for Amicus Curiae CATO Inst, Walker v. City of Calhoun, Ga., No. 16-10521, at 3 (11th Cir. 2016).[4]

"Money bail" is the practice of requiring a defendant to forfeit money if they do not appear for trial. Money bail can be either secured or unsecured. A secured money bail system requires the defendant to deposit money before they are released; an unsecured money bail

[3] *Available at* http://www.clebp.org/images/2014-11-05_final_bail_fundamentals_september_8,_2014.pdf.
[4] *Available at* https://object.cato.org/sites/cato.org/files/pubs/pdf/walker-v-city-of-calhoun.pdf.

system allows the defendant to be released without depositing any money so long as they promise to pay if they fail to appear.

As Chief Judge Rosenthal of the U.S. District Court for the Southern District of Texas recently summarized in her comprehensive discussion of the history of the American bail system, ODonnell v. Harris Co., 251 F.Supp.3d 1052, 1068 (S.D. Tex. 2017),[5] bail originated in medieval England "as a device to free untried prisoners." Daniel J. Freed & Patricia M. Wald, Bail in the U.S.: 1964 1 (1964).The Statue of Westminster, enacted by the English Parliament in 1275, listed the offenses that would be bailable and provided criteria for determining whether someone should be released. These criteria included the strength of the evidence against the accused and the severity of the accused's criminal history. See June Carbone, Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail, 34 Syracuse L. Rev. 517, 523-26 (1983); Note, Bail: An Ancient Practice Reexamined, 70 Yale L.J. 966 (1961). In 1679, Parliament adopted the Habeas Corpus Act to ensure that an accused could obtain a timely bail hearing. And the English Bill of Rights, enacted in 1679, prohibited excessive bail. See Carbone, *supra*, at 528.

The American States continued this tradition. Beginning with the Pennsylvania Constitution of 1682, 48 states, including Nevada, have protected, by constitution or statute, a right to bail "by sufficient sureties, except for capital offenses when the proof is evident or the presumption great." Matthew J. Hegreness, America's Fundamental and Vanishing Right to Bail, 55 Ariz. L. Rev. 909, 916 (2013).

As the U.S. District Court for the Southern District of Texas recently explained in its detailed opinion striking down Harris County's money bail practices, "[h]istorians and jurists confirm that from the medieval period until the early American republic, a bail bond was typically based on an individualized assessment of what the arrestee or his surety *could pay* to assure appearance and secure release." ODonnell, 251 F.Supp.3d at 1069 (emphasis added). The court explained the English practice at the time of the ratification of the U.S. Constitution: "'The

[5] Aff'd as modified, 882 F.3d 528 (5th Cir. 2018).

rule is, where the offence is prima facie great, to require good bail; moderation nevertheless is to be observed, and such bail only is to be required as the party is able to procure; for otherwise the allowance of bail would be a mere colour for imprisoning the party on the charge.'" Id. (quoting 1 J. Chitty, A Practical Treatise on the Criminal Law 88-89 (Philadelphia ed. 1819)).

Jurisdictions across America began to depart from the original understanding of bail in the middle of the 20th Century. And in the last two decades, the use of unaffordable secured money bail has increased in scope and severity. In 1996, 59% of felony defendants had to meet a financial condition to regain their liberty pretrial. Timothy C. Hart & Brian A. Reaves, U.S. Dep't of Justice, Felony Defendants in Large Urban Counties, 1996, at 17-18 (1999).[6] By 2009, that percentage had climbed to 72%. Brian A Reaves, U.S. Dep't of Justice, Felony Defendants in Large Urban Counties, 2009-Statistical Tables, at 15, 20 (2013).[7] In 1990, the majority of felony defendants who were not detained while their cases were pending were released without financial conditions. In 2009, only 23% of felony defendants who were not detained while their cases were pending were released without financial conditions. And the average amount of money required to be paid as a condition of release has increased. Vera Inst of Justice, Incarceration's Front Door: The Misuse of Jails in America, 29 (Feb. 2015).[8] By 2009, about half of felony defendants subject to financial conditions of release could not meet them and remained in custody until the disposition of their cases. Felony Defendants, 2009-Statistical Tables, at 17.

The routine use of unaffordable secured money bail resulted in a "crisis." See U.S. v. Salerno, 481 U.S. 739, 742, 107 S. Ct. 2095 (1987) (describing "a bail crisis in the federal courts"); Caleb Foote, The Coming Constitutional Crisis in Bail: 1, 113 U. Pa. L. Rev. 959, 971 (1965). Two distinct evils of the secured money bail system provoked the crisis: It imperiled public safety by allowing potentially dangerous defendants to be released without any consideration of their dangerousness, and it worked an "invidious discrimination" against those

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[6] *Available at* https://www.bjs.gove/content/pub/pdf/fdluc96.pdf.
[7] *Available at* https://www.bjs.gov/content/pub/pdf/fdluc09.pdf.
[8] *Available at* https://storage.googleapis.com/vera-web-assets/downloads/Publications/incarcerations-front-door-the-misuse-of-jails-in-america/legacy_downloads/incarcerations-front-door-report_02.pdf.

who could not pay. See, e.g., Williams v. Illinois, 399 U.S. 235, 242, 90 S. Ct. 2018 (1970). Over 50 years ago, Attorney General Robert Kennedy led a successful movement to reform bail in the federal courts. Kennedy testified:

> Bail has become a vehicle for systematic injustice. Every year in this country, thousands of persons are kept in jail for weeks and even months following arrest. They are not yet proven guilty. They may be no more likely to flee than you or I. But, nonetheless, most of them must stay in jail because, to be blunt, they cannot afford to pay for their freedom . . . Plainly or bail system has changed what is a constitutional right into an expensive privilege.

Testimony on Bail Legislation before S. Judiciary Subcomm. on Const. Rights and Improvements in Judicial Machinery (Aug. 4, 1964).[9]

One of the results of the movement to reform the bail system in the 1960s was the virtual elimination of cash bonds in the District of Columbia and in all Federal courts. The Bail Reform Act "assure[d] that all persons, regardless of their financial status, [would] not needlessly be detained pending their appearance to answer charges . . . when detention serves neither the ends of justice nor the public interest." Bail Reform Act of 1966, Pub. L. No. 89-465, § 2, 80 Stat. 214, 214 (repealed in 1984). In 1984, Congress updated the Bail Reform Act as part of the Comprehensive Crime Control Act. See Bail Reform Act of 1984, 18 U.S.C. §§ 3141-50. Federal courts and the courts of the District of Columbia transitioned to a rigorous, evidence-based system of non-financial conditions that remains in place today. If the government believes that a defendant cannot be released pretrial because she is too dangerous or too likely to flee, the government may seek an order of detention, but only after it has satisfied the court, at a "full-blown adversarial hearing," that no condition or combination of conditions could assure the defendant's appearance at trial and the safety of the community. Salerno, 481 U.S. at 750. Indeed, *the constitutionality of any moneyed bail system requires as much in order to meet constitutional muster*. Id. at 750-55.

[9] *Available at* http://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/08-04-1964.pdf.

Thus, the government may not detain someone just because she does not have enough money, nor may the government use money to detain *sub rosa* people it believes to be dangerous. 18 U.S.C. § 3143(c)(2) ("The judicial officer may not impose a financial condition that results in the pretrial detention of the person"). Although courts may detain defendants pending trial, they may not do so without rigorous process. As Chief Judge Rosenthal of the U.S. District Court for the Southern District of Texas recently concluded, "[t]he federal history of bail reform confirms that bail is a mechanism of pretrial release, not of preventative detention." ODonnell, 251 F.Supp. 3d at 1070.

C. Jailing an Arrestee For the Inability to Make a Monetary Bond Violates Equal Protection

The principle that jailing the poor because they cannot pay a sum of money is unconstitutional has deep roots in American constitutional law. See Williams v. Illinois, 399 U.S. 235, 241, 90 S. Ct. 2018 (1970) ("[T]he Court has had frequent occasion to reaffirm allegiance to the basic command that justice be applied equally to all persons"); Douglas v. California, 372 U.S. 353, 355, 83 S. Ct. 814 (1963) (condemning the "evil" of "discrimination against the indigent"); Griffin v. Illinois, 351 U.S. 12, 19, 76 S. Ct. 585 (1956) ("There can be no equal justice where the kind of trial a man gets depends on the amount of money he has"); see also Mayer v. City of Chicago, 404 U.S. 189, 193, 92 S. Ct. 410 (1971).

These principles have been applied in a variety of contexts in which a government jailed someone because of her inability to make a monetary payment. In Tate v. Short, 401 U.S. 395, 91 S. Ct. 668 (1971), the U.S. Supreme Court held that "the Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full." Id. at 398. In Bearden v. Georgia, 461 U.S. 660, 103 S. Ct. 2064 (1983), the Court explained that to "deprive [a] probationer of his conditional freedom simply because, through no fault of his own he cannot pay [a] fine... would be contrary to the fundamental fairness required by the Fourteenth Amendment." Id. at 672-73.

For pretrial arrestees, the rights at stake are even more significant because the arrestees' liberty is not diminished by a criminal conviction; they are presumed innocent. Justice Douglas framed the basic question that applies to pretrial detainees: "To continue to demand a substantial bond which the defendant is unable to secure raises considerable problems for the equal administration of the law." Bandy v. U.S., 81 S. Ct. 197, 197-98 (1960) (Douglas, J., in chambers). The U.S. Supreme Court Justice further espoused "Can an indigent be denied freedom, where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom?" Id.

The Fifth Circuit answered that question in Pugh v. Rainwater, 557 F.2d 1189, 1190 (5th Cir. 1977) (*en banc*). A panel opinion struck down a Florida Rule of Criminal Procedure dealing with money bail because it unconstitutionally jailed indigent pretrial arrestees solely because they could not make a monetary payment. Id. The *en banc* court agreed with the constitutional holding of the panel opinion, but reversed the panel's facial invalidation of the *entire* Florida Rule. The *en banc* court held that the Florida Rule did not on its face require Florida courts to set secured monetary bail for arrestees. But the court explained that, were this to happen to an indigent person, it would be unconstitutional:

> We have no doubt that in the case of an indigent, whose appearance at trial could reasonably be assured by one of the alternate forms of release, pretrial confinement for inability to post money bail would constitute imposition of an excessive restraint...

Pugh, 572 F.2d at 1058 (5th Cir. 1978).[10] Indeed, "[t]he incarceration of those who cannot [afford a cash payment], without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements." Id. at 1057;[11] see also

[10] Rainwater further explained that it refused to require a priority to be given in all cases – including those of the non-indigent – to non-monetary conditions of release. The court noted that, at least for wealthier people, some might actually prefer monetary bail over release with certain other conditions, and that the court would not invalidate a state Rule that allowed for those other conditions in appropriate cases. Pugh v. Rainwater, 572 F.2d 1053, 1057 (5th Cir. 1978).

[11] Four circuit judges dissented in Rainwater. Although the agreed with the constitutional principles announced by the majority that the Constitution forbids jailing the poor when they cannot afford monetary bail, they were concerned about the majority's faith in the Florida courts not to apply the new state Rule in unconstitutional ways to detain the indigent. Pugh v. Rainwater, 572 F.2d 1053, 1067 (5th Cir. 1978) ("I cannot escape the conclusion that the majority has chosen too frail a vessel for such a ponderous cargo of human rights.") (Simpson, J., dissenting).

Williams v. Farrior, 626 F.Supp. 983, 985 (S.D. Miss. 1986) ("For the purposes of the Fourteenth Amendment's Equal Protection Clause, it is clear that a bail system which allows only monetary bail and does not provide for any meaningful consideration of other possible alternatives for indigent pretrial detainees infringes on both equal protection and due process requirements").

The U.S. Justice Department recently endorsed this view, asserting that "[i]ncarcerating individuals solely because of their inability to pay for their release, whether through the payment of fines, fees, or a cash bond, violates the Equal Protection Clause of the Fourteenth Amendment." Jones v. City of Clanton, 2015 WL 5387219, at *4 (M.D. Ala. Sept. 14, 2015); see also Varden v. City of Clanton, Civ. No. 15–34, Docket. No. 26 at 1 (M.D. Ala. Feb. 13, 2015). The Justice Department reasoned that a secured money bail schedule, like the one utilized in Clark County, "do[es] not account for individual circumstances of the accused" and it "essentially mandate[s] pretrial detention for anyone who is too poor to pay the predetermined fee." Jones, 2015 WL 5387219, at *9.

Accordingly, several federal district courts have held that state laws setting a particular monetary bail amount without individualized considerations of indigency violate the Due Process Clause. See, e.g., Rodriguez v. Providence Cmty. Corr., Inc., 155 F.Supp.3d 758, 767-70 and n. 10 (M.D. Tenn. 2015) (granting class-wide preliminary injunction enjoining state policy requiring monetary payment for probations to obtain release pending a revocation hearing "without an inquiry into the individual's ability to pay the bond and whether alternative methods of ensuring attendance at revocation hearings would be adequate"); Williams v. Farrior, 626 F.Supp. 983, 985 (S.D. Miss. 1986) ("[I]t is clear that a bail system which allows only monetary bail and does not provide for any meaningful consideration of other possible alternatives for indigent pretrial detainees infringes on both equal protection and due process requirements."); Buffin v. City and Co. of San Francisco, No. 15-CV-04959-YGR, 2018 WL 424362 at *7 (N.D. Cal. Jan. 16, 2018); cf. Abdi v. Nielson, No. 1:17-CV-0721 EAW, 2018 WL 798747, at *4 (W.D.N.Y. Feb. 9, 2018).

These decisions make clear that requiring money bail as a release condition in an amount impossible for the defendant to pay is equivalent to a detention order, "which is only appropriate when the state shows and the court finds that no condition or combination of conditions of release could satisfy the purposes of bail, to assure the defendant's appearance at trial or hearing and the safety of the public." Weatherspoon v. Oldham, 2018 WL 1053548, at *6 (W.D. Tenn. Feb. 26, 2018) (additional citations omitted). Thus, in order to withstand constitutional scrutiny, unattainable money bail settings must be preceded by a hearing at which the court determines the least restrictive means of ameliorating an accused's risk of flight and danger to the community. Absent such a determination, an unattainable release condition – such as an unattainable bail setting – operates as a *de facto* detention order that discriminates on the basis of wealth. Weatherspoon v. Oldham, 2018 WL 1053548, at *6 (W.D. Tenn. Feb. 26, 2018). This violates equal protection and due process guarantees.

ARGUMENT

I. After the Grand Jury Returned a True Bill, the District Court Arbitrarily set Bail at $250,000 without any hearing, without Mr. Frye's presence, or his counsel's presence or input.

A. The Court's Decision to Preventatively Detain Mr. Frye Pretrial without a Full, Adversarial Hearing Violated Mr. Frye's Due Process Rights

In order to deprive a presumptively innocent person of her physical liberty, due process requires that the State demonstrate 1) by "clear and convincing evidence" at a "full-blown adversarial hearing" that the defendant presents an "identified and articulable threat" to the community or presents a risk of flight[12] and 2) *no conditions or combination of conditions alternative to detention* could reasonably mitigate that danger based on an individualized consideration of defendant's unique circumstances.[13] U.S. v. Salerno, 481 U.S. 739, 750-51 (1987) (emphasis added); see also Weatherspoon v. Oldham, 2018 WL 1053548, at *14-15, *17

[12] These procedural protections are mandated by the constitutional right to *Procedural* Due Process. U.S. v. Salerno, 481 U.S. 739, 741, 750-51 (1987) (emphasis added).
[13] This protection is mandated by the constitutional right to *Substantive* Due Process. Id. at 746.

(W.D. Tenn. Feb. 26, 2018). A state court procedure that does not require as much violates due process. See, e.g., Rodriguez v. Providence Cmty. Corr., Inc., 155 F.Supp.3d 758, 767-70 and n. 10 (M.D. Tenn. 2015); Jones v. City of Clanton, No. 215CV34-MHT, 2015 WL 5387219, at *2 (M.D. Ala. Sept. 14, 2015) (holding that the "use of a secured bail schedule to detain a person . . . without an individualized hearing regarding the person's indigence and the need for bail or alternatives to bail, violates the Due Process Clause"); Simpson v. Miller, 387 P.3d 1270, 1276 (Ariz. 2017) ("[I]t is clear from Salerno and other decisions that the constitutionality of a pretrial detention scheme turns on whether particular procedures satisfy substantive due process standards"); see also Lopez-Valenzuela v. Arpaio, 770 F.3d 772, 781 (9th Cir. 2014) (en banc) (applying strict scrutiny to strike down an Arizona law that required detention after arrest without individualized consideration of an arrestee's circumstances); ODonnell, 251 F.Supp.3d 1052; Williams v. Farrior, 626 F.Supp. 983, 986 (S.D. Miss. 1986) (holding that a state's pretrial detention scheme must meet "strict judicial scrutiny" because of the fundamental rights at issue).

As a result, due process mandates that the Court makes an individualized determination whether preventative detention is the least restrictive means of assuring community safety and ensuring the accused's return to court. Salerno, 481 U.S. 739. This did not happen in this case. Here, the Judge issued a warrant setting bail at $250,000 without any hearing whatsoever, without input from Mr. Frye and/or his counsel. In doing so, the Court defaulted to detaining Mr. Frye without a "full-blown adversarial hearing," without "clear and convincing evidence" that the defendant presents an "identified and articulable threat" to the community or presents a risk of flight, and without a request from the State for preventive detention. Instead, the magistrate *sua sponte* ruled that detention was appropriate. As a result, the Court's detention order at the violates due process. The detention order should be vacated and Mr. Frye should be released with $75,000 bond.

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B. The Court's Setting of Unattainable Bail Does Not Alleviate the Due Process Violation

An order setting unattainable conditions of release is equivalent to an order of detention. U.S. v. Mantecon-Zayas, 949 F.2d 548, 550 (1st Cir. 1991); U.S. v. Leathers, 412 F.2d 169, 171 (D.C. Cir. 1969) ("[T]he setting of bond unreachable because of its amount would be tantamount to setting no conditions at all."); ODonnell v. Harris County, 251 F.Supp.3d 1052, 1143-44 (S.D. Tex. Apr. 28, 2017) (holding that secured money bail set in an amount that an arrestee cannot afford is constitutionally equivalent to an order of detention); State v. Brown, 338 P.3d 1276 (N.M. 2014). Thus, it must be narrowly tailored in order to survive heightened constitutional scrutiny. See Brown, 338 P.3d at 1292 ("Intentionally setting bail so high as to be unattainable is simply a less honest method of unlawfully denying bail altogether . . . If a defendant should be detained pending trial . . . , then that defendant should not be permitted any bail at all. Otherwise the defendant is entitled to release on bail, and excessive bail cannot be required.").

To set bail in an amount that is *unattainable*, a court must find, on the record, by "clear and convincing evidence" after a "full-blown adversarial hearing" that 1) the defendant presents an "identified and articulable threat" to the community or presents a risk of flight and 2) no conditions or combination of conditions alternative to detention could reasonably mitigate that danger based on an individualized consideration of defendant's unique circumstances. U.S. v. Salerno, 481 U.S. 739, 750-51 (1987) (emphasis added) (requiring that a magistrate setting bail in an unattainable amount for a defendant must make an individualized determination whether bail is the least restrictive means of assuring community safety and ensuring the accused's return to court); ODonnell, 251 F.Supp.3d at 1143-44; Jones v. City of Clanton, No. 215CV34-MHT, 2015 WL 5387219, at *2 (M.D. Ala. Sept. 14, 2015) (holding that the "use of a secured bail schedule to detain a person . . . without an individualized hearing regarding the person's indigence and the need for bail or alternatives to bail, violates the Due Process Clause"); Carlisle v. Desoto County, Mississippi, 2010 WL 3894114, at *5 (N.D. Miss. Sept. 30, 2010) (holding that because a "compelling state interest" was required for pretrial detention, the plaintiff's rights were violated if he was jailed without consideration of non-financial alternatives).

This did not happen in this case. As discussed above, the reviewing Judge set bail after the Grand Jury returned a True Bill when neither Mr. Frye nor his counsel was present. In doing so, the lower court defaulted to detaining Mr. Frye on unattainable bail without a "full-blown adversarial hearing," without "clear and convincing evidence" that the defendant presents an "identified and articulable threat" to the community or presents a risk of flight, and without a request from the State for preventive detention. As a result, the Court's bail setting at the violates due process. The unattainable bail setting amounts to a detention order. It should be vacated and Mr. Frye should be released on a $75,000 bond.

C. The Setting of Unattainable Bail Resulting in Detention Violates the Equal Protection Clause

In the context of bail, the Equal Protection Clause prohibits the pretrial detention of defendants solely because of their inability to afford bail. Lopez-Valenzuela v. Arpaio, 770 F.3d 772, 781 (9th Cir. 2014) (en banc) (applying strict scrutiny to strike down an Arizona law that required detention after arrest without individualized consideration of an arrestee's circumstances); Pugh v. Rainwater, 572 F.2d at 1058 (5th Cir. 1978) (holding that "pretrial confinement for inability to post money bail" for a defendant "whose appearance at trial could reasonably be assured by one of the alternate forms of release . . . would constitute imposition of an excessive restraint . . ."); Weatherspoon v. Oldham, 2018 WL 1053548, at *6 (W.D. Tenn. Feb. 26, 2018); ODonnell v. Harris County, 251 F.Supp.3d 1052 (S.D. Tex. Apr. 28, 2017); Jones, 2015 WL 5387219, at *4; Carlisle v. Desoto County, Mississippi, 2010 WL 3894114, at *5 (N.D. Miss. Sept. 30, 2010) (holding that because a "compelling state interest" was required for pretrial detention, the plaintiff's rights were violated if he was jailed without consideration of non-financial alternatives).

These decisions make clear that requiring money bail as a release condition in an amount impossible for the defendant to pay is equivalent to a detention order, "which is only appropriate when the state shows and the court finds that no condition or combination of conditions of release could satisfy the purposes of bail, to assure the defendant's appearance at

trial or hearing and the safety of the public."[14] Weatherspoon v. Oldham, 2018 WL 1053548, at *6 (W.D. Tenn. Feb. 26, 2018) (additional citations omitted). Thus, in order to withstand constitutional scrutiny, unattainable money bail settings must be preceded by a hearing at which the court determines the least restrictive means of ameliorating an accused's risk of flight and danger to the community. Absent such a determination, an unattainable release condition – such as an unattainable bail setting – operates as a *de facto* detention order that discriminates on the basis of wealth. Weatherspoon v. Oldham, 2018 WL 1053548, at *6 (W.D. Tenn. Feb. 26, 2018). This violates equal protection and due process guarantees.

D. The Court Set a Bail Amount in Violation of Nevada Law

The Nevada Constitution mandates that all defendants "shall be bailable by sufficient sureties" and that bail shall not be "excessive". Nev. Const. Art. 1 §§ 6-7. The constitutional right to bail is similarly codified in Nevada statute, which requires that "a person arrested for an offense other than murder of the first degree must be admitted to bail." NRS 178.484(1). If the reviewing court determines that bail is appropriate, the court must set bail "in an amount which . . . will reasonably ensure the appearance of the defendant and the safety of other persons and of the community." NRS 178.498.

In making this determination, the Court must consider: "(1) the nature and circumstances of the offense charged; (2) the financial ability of the defendant to give bail; (3) the character of the defendant; and (4) the factors listed in NRS 178.4853." NRS 178.498. Significantly, an accused's ability to give bail *must* be part of the bail analysis. See Stack v. Boyle, 342 U.S. 1, 4-5 (1951) (stating "Bail set at a figure higher than an amount reasonably calculated to fulfill [its] purpose is 'excessive' under the Eighth Amendment"); U.S. v. Polouzzi, 697 F. Supp. 2d 381, 390 (E.D.N.Y. 2010) ("Bail conditions are unconstitutionally excessive if they impose restraints that are more than necessary to achieve the government's interest [in] preventing risk of flight and danger to society..."). The U.S. Justice Department has declared that "[i]ncarcerating

[14] The U.S. Supreme Court has also held that release conditions that exceed a purported threat posed by a particular defendant violate the "excessive bail" clause of the Eighth Amendment. Salerno, 481 U.S. at 754; see also U.S. Const. amend. VIII; Nev. Const. Art. 1 § 6-7; NRS 178.484(1) (stating "a person arrested for an offense other than murder of the first degree must be admitted to bail").

individuals solely because of their inability to pay for their release, whether through the payment of fines, fees, or a cash bond, violates the Equal Protection Clause of the Fourteenth Amendment."[15] Jones v. City of Clanton, 2015 WL 5387219 at 4 (M.D. Ala. Sep. 14, 2015); see also Varden v. City of Clanton, Civ. No. 15–34, Dckt. No. 26 at 1 (M.D. Ala. Feb. 13, 2015). The Justice Department reasoned that a secured money bail schedule, like the one utilized in Clark County, "do[es] not account for individual circumstances of the accused" and it "essentially mandate[s] pretrial detention for anyone who is too poor to pay the predetermined fee." Jones, 2015 WL 5387219 at 9. As a result, the Justice Department concluded that setting a bail without regard to the detainee's financial ability to pay "amounts to mandating pretrial detention only for the indigent." Id.

In this instance, the Court set bail without the presence of Mr. Frye nor his counsel. As a result, the Court had no information before it to set a bail amount other than the charges found by the Grand Jury. This is the definition of utilizing a bail schedule: setting bail solely based on a criminal charge in a generic amount, not individualized to the defendant or the case. There is no association between a particular charge and a blanket "schedule" of money that would guarantee appearance at court or deter future criminal activity. These concerns can only be addressed on an individualized basis. Accordingly, while "utilization of a master bond schedule provides speedy and convenient release for those who have no difficulty in meeting its requirements, [the] incarceration of those who cannot, without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements." Pugh v. Rainwater, 572 F.2d 1053, 1057 (5th Cir. 1978) (*en banc*).

Courts must tailor bail to a detainee's financial resources, setting bail only as high as necessary to reasonably assure the detainee's return to court. The amount that would provide a meaningful incentive to return to court differs for someone who lives on $600 a month and

[15] The following year, the Justice Department issued a "Dear Colleague Letter" advising state and local courts that due process and equal protection principles forbid using "bail or bond practices that cause indigent Detainees to remain incarcerated solely because they cannot afford to pay for their release." Letter from Vanita Gupta to Colleagues at 2 (Mar. 14, 2016), available at https://www.justice.gov/crt/file/832461/download.

someone who lives on $6,000 a month. Bail is excessive and, therefore, unlawful when not adjusted to a pretrial detainee's financial circumstances and not set at the minimum amount needed to ensure return to court. Stack, 342 U.S. at 4-5 (bail exceeding that necessary to achieve its purpose violates Eighth Amendment); see also, Salerno, 481 U.S. at 754 -55 (affirming Stack and holding that "[w]hen the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more"). Thus, when bail is set without considering a detainee's character and financial means the Court violates the accused's constitutional and statutory rights. In addition, in setting a standard bail, the magistrate fails to consider "the financial ability of the defendant to give bail" and "the character of the defendant" violates NRS 178.498.[16]

Here, the court set an unattainable bail amount without considering Mr. Frye's ability to pay that bail in violation of Nevada statute and U.S. Constitutional law. Mr. Frye's family has been unable to scrape together the money necessary to give a bondsman to secure his release. His family could, however, get together enough money for a bondsman to post a $75,000 bond. As such Mr. Frye is respectfully requesting this Court order Mr. Frye released on a $75,000 bond.

E. This Court Must Vacate the Instant Detention Order and Release Aaron Frye With Conditions Minimally Required to Protect the Community and Ensure His Return to Court

Aaron Frye's current detention order is unlawful. The State has not established, and no court has found, that preventative detention is the least restrictive means of assuring Aaron Frye's return to court and protecting the community. Instead, Aaron Frye is being detained under a random bail number that may relate to the instant charges, but not Aaron Frye. There was no hearing held where Mr. Frye or his counsel were present and the Court did not consider

[16] Pretrial detainees should not remain in custody simply because they are poor. Research indicates that imposing money bail does not improve the chances that a Detainee will return to court, nor does it protect the public because many high-risk Detainees have access to money and can post bond. Instead, it serves only to treat differently those who can and cannot access money. Incarceration can disrupt the positive factors in the Detainee's life and lead to negative collateral consequences, including job loss, loss of residence, inability to care for children, and disintegration of other positive social relationships.

Consequently, while Aaron Frye cannot make that bail, a similarly situated wealthy person could. Thus, under the authority set forth above, Aaron Frye's detention order violates his due process, equal protection, and excessive bail guarantees. As such, this Court must vacate the current detention order and release Aaron Frye from custody on a $75,000 bond.

Mr. Frye has ties to this community including his cousins and some friends. Additionally, he has a plan to establish a stable residence here and obtain employment here. Moreover, his family can and is willing to scrape together enough money to post a $75,000 bond, Mr. Frye respectfully requests this Court release Mr. Frye with a condition that he post $75,000 bond.

CONCLUSION

Based upon the foregoing, Aaron Frye, respectfully requests that this Honorable Court vacate the current detention order and release him with attainable release conditions unless this court concludes, in writing, after an adversarial hearing, that the State established clear and convincing evidence that pretrial detention is the least restrictive means of assuring Aaron Frye's return to court and ensuring community safety.

DATED this 17th day of July, 2018.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: */s/Pandora L. Leven*
PANDORA L. LEVEN, #13525
Deputy Public Defender

NOTICE OF MOTION

TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Plaintiff:

YOU WILL PLEASE TAKE NOTICE that the Public Defender's Office will bring the above and foregoing Motion on for hearing before the Court on the 2nd day of August, 2018 at 8:30 a.m.

DATED this 17th day of July, 2018.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: */s/Pandora L. Leven*
PANDORA L. LEVEN, #13525
Deputy Public Defender

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that service of the above and forgoing MOTION was served via electronic e-filing to the Clark County District Attorney's Office at motions@clarkcountyda.com on this 17th day of July, 2018.

By: */s/Kristina Byrd*
An employee of the
Clark County Public Defender's Office

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

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

AARON FRYE, aka,
Aaron Willard Frye, #7019093

Defendant.

CASE NO: C-18-331986-1

DEPT NO: XXX

STATE'S OPPOSITION TO DEFENDANT'S MOTION TO VACATE DETENTION ORDER AND RELEASE DEFENDANT FROM CUSTODY

DATE OF HEARING: August 2, 2018
TIME OF HEARING: 8:30 A.M.

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through NIMA AFSHAR, Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion to Vacate Detention Order and Release Defendant from Custody.

This opposition is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On April 16, 2018, the State filed a Criminal Complaint charging Defendant Aaron Frye ("Defendant") with five counts including Robbery with Use of a Deadly Weapon and Burglary while in Possession of a Firearm. Bail was set at $40,000 for counts 1-4 and $20,000 for count 5. On April 17, 2018, Defendant was arraigned in Justice Court and his preliminary hearing was scheduled for May 1, 2018. On the same day, Defendant and the State each made motions for bail – Defendant moved that monetary bail be set at $50,000, and the State that it be set at $250,000. Following argument, the State's motion was granted and total bail was reset at $250,000 for all counts.[1] See Exhibit 1. On May 1, 2018, the Preliminary Hearing was continued at defense counsel's request to May 15, 2015.

Prior to the reset Preliminary Hearing, the State served Marcum notice and obtained an Indictment against Defendant in District Court. The Indictment charged Defendant with: Count 1 – BURGLARY WHILE IN POSSESSION OF A FIREARM (Category B Felony - NRS 205.060 - NOC 50426); Counts 2-5 – ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.380, 193.165 - NOC 50138); Count 6 – CARRYING CONCEALED FIREARM OR OTHER DEADLY WEAPON (Category C Felony - NRS 202.350 (1)(d)(3) - NOC 51459); and Count 7 – OWNERSHIP OR POSSESSION OF FIREARM BY PROHIBITED PERSON (Category B Felony - NRS 202.360 - NOC 51460).

Defendant was arraigned on the Indictment on May 17, 2018, at which time Defendant invoked his right to a trial within 60 days. The Court stated that counsel had 21 days from the filing of the transcripts or Defendant's arraignment (whichever occurred last) to file any Pretrial Petition. The State reserved all procedural objections to the Court's ruling.

Transcripts of the grand jury proceedings were filed on May 22, 2018. Thus, based upon the Court's ruling, Defendant's deadline for filing the Writ would have been June 12,

[1] Contrary to Defendant's claim that the bail amount of $250,000 was set without the presence of Defendant, the $250,000 bail was first set in open court at the Initial Arraignment in Justice Court following motions and argument by both parties, including Defendant. Defendant and counsel were present. This amount was then affirmed by the District Court following its review of the record after the grand jury returned a true bill.

2018. On June 12, 2018, Defendant filed a Motion to Extend Writ Deadline. The Motion was granted. A Petition for Writ of Habeas Corpus was filed on June 26, 2018. On July 10, 2018, the State filed a Writ of Mandamus in the Nevada Supreme Court challenging the District Court's decision to grant the Motion to Extend Writ Deadline. Argument on the Petition for Writ of Habeas Corpus is set for October 23, 2018. Trial is set to begin on December 3, 2018.

On July 18, 2018, Defendant filed the instant Motion to Vacate Detention Order and Release the Defendant from Custody ("Motion"). The State responds herein.

STATEMENT OF FACTS

On April 11, 2018, at approximately 1659 hours, Defenant entered the Clark County Credit Union located at 9311 W. Sunset LV, NV. He approached the counter and made contact with employee Roland Miguel. Defendant pulled out a large frame semi-auto handgun from the right side of his waistband, pointed it at Miguel and stated "give me your fifties and hundreds." Miguel tried to explain that he didn't have anything. Defendant then moved onto Rochelle Dumlao and Mandy-Lynn Suyat, who were working their own windows. Defendant was repeatedly told that they didn't have anything. As Defendant was demanding money from the employees, Maryann Valdez returned from the vault where she had been completing tasks necessary to close the business. Maryann instructed one of her female co-workers to give Defendant the money. At that point, Defendant went to each of the four (4) tellers and obtained $200 in bait money (currency whose numbers were previously recorded by the bank). When Valdez handed Defendant her money, she also handed him a bank bag which contained several $1 coins.

Det, T. Weirauch P # 7465 reviewed stills from the banks surveillance and observed that the suspect was a black male adult, approximately 5'7 - 5'9 with a medium build. The suspect was wearing a white button-up short sleeve shirt, black pants, black shoes with white around the soles, and a black Arizona Cardinals hat with a red bill. There was also a black and gold sticker on the front part of the bill. The suspect was armed with a large frame semi-auto handgun that he had concealed in his right waistband.

On April 12, 2018, additional video surveillance was recovered and showed the suspect arriving and leaving in a Yellow Camaro with California plates 8AMX769.

Det. Pandullo P# 7884 researched the suspect's vehicle and learned that it was an Enterprise Rental vehicle and obtained the following information that the vehicle was rented by Defendant on March 8, 2018, at 11:33 a.m. from the location on West Sahara.
The vehicle rented was a 2018 Chevrolet Camaro, yellow in color bearing, California Plate No. 8AMX769 and VIN No. 1G1FB1RS7J0139213.

A records check showed an Aaron Frye (DOB: 06/16/77), with an ID # 7019093—Defendant. Physical descriptors were similar to the suspect's descriptors. When detectives made a comparison of Defendant's photograph to the suspect in the surveillance from the robbery, they noted that the appearances were also similar. Furthermore, a records check also showed Defendant had a misdemeanor warrant out for his arrest.

Det. Pandullo prepared and showed a line up to victim Roland Miguel (Teller) on 04/12/2018 at 16:30 Hours. The victim picked out Defendant as the suspect with 100 percent certainty.

Det. D. Jappe P # 9992 located the suspect vehicle on April 12, 2018, at 17:00 hours unoccupied parked at 6500 Vegas Dr. Las Vegas, Nevada on the street. He was able to conduct surveillance on the vehicle. He observed a male, later identified as Defendant, enter the vehicle by using a key, apparently move some items around, and then exit the vehicle. Defendant then got into a passenger seat of a 2002 Mercedes Benz. A vehicle stop was conducted on this vehicle and Defendant was taken into custody.

Det. Pandullo was present when Defendant was taken into custody and knew that the suspect had taken bait money. Det. Pandullo had a list of the serial numbers that were taken and compared those serial numbers to the twenty-five (25) $20 bills that were located in Defendant's wallet. All twenty-five (25) were on the list that of the ones that were missing. These bills were photographed and impounded as evidence.

On April 12, 2018, Defendant was interviewed by Det. Weirauch at LVMPD Headquarters. Prior to questioning, Det. Weirauch advised him of his Miranda rights and

Defendant indicated that he understood them. The interview was audio/video recorded. During the interview Defendant stated he robbed the bank because he had gambled away most of his money and that he needed the money to pay bills. He said he tried to find employment but had lost his identification and was unable to find work. He said he used a real gun, but does not know where that gun is now. He also said he was sorry for what he did.

During follow-up investigation, the suspect vehicle was searched. During the search, detectives located $1 coins in the vehicle. Those coins matched those taken during the robbery. Defendant was booked into the Clark County Detention Center and charged with various crimes related to the robbery.

ARGUMENT

I. CLARK COUNTY AND NEVADA STATUTES DO NOT VIOLATE DUE PROCESS

Defendant argues that Clark County and Nevada statutes somehow violate adequate due process. In particular, he argues that due process "requires a hearing before a neutral fact-finder and an opportunity for the accused to be heard 'at a meaningful time and in a meaningful manner.'" Motion at 4. As discussed below, this claim is without merit.

Defendant relies on Mathews v. Eldridge, 424 U.S. 319 (1976), to support this apparent due process right for arrested persons. See Motion at 7. Mathews, however, is a Supreme Court opinion dealing with the administration of Social Security benefits. See generally id.; see id. at 349, 96 S. Ct. at 910 ("We conclude that an evidentiary hearing is not required prior to the termination of disability benefits and that the present administrative procedures fully comport with due process."). Nothing about the facts of Mathews or even the law set forth in that case gives any guidance or relevant law to the issue of pretrial detention as argued by Defendant.

Rather, pretrial detention was addressed by the United States Supreme Court in two cases. First, in order to ensure that detentions resulting from warrantless arrests are justified, a neutral magistrate must find probable cause promptly after arrest. Gerstein v. Pugh, 420 U.S. 103 (1975). Next, in County of Riverside v. McLaughlin, the "prompt" standard in Gerstein

was clarified to mean that a probable cause determination must be made within 48 hours absent "a bona fide emergency or other extraordinary circumstance." 500 U.S. 44, 57 (1991).

That Defendant cites the inapplicable Mathews is puzzling given that Gerstein and McLaughlin, and not Mathews, form the backbone of what due process must be afforded to arrestees. Gerstein is the seminal case on the Constitutional requirement that a neutral magistrate must determine that probable cause exists promptly after an arrest. Contrary to what Defendant would have this Court believe, the Gerstein Court specifically held that the "Constitution does not require an adversary determination of probable cause." Id. at 120. Specifically, the Court's holding completely supports the practice of a judicial officers making a 48-hour probable cause determination based on a sworn police report and absent from any of the parties involved:

> [A]dversary safeguards are not essential for the probable cause determination required by the Fourth Amendment. The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings. This issue can be determined reliably without an adversary hearing. The standard is the same as that for arrest. That standard - - probable cause to believe the suspect has committed a crime – traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony, and the Court has approved these informal modes of proof.

Id.

The United States Supreme Court has not set a constitutional limit on detaining an arrested person after a judicial officer has determined that probable cause exists. In Gerstein, the matter before the Court was a Florida statute that allowed an arrested person to be held without an initial probable cause determination for up to 30 days. The Court, in balancing the State's interest in protecting the public with the individual's interest in liberty, held that the statute was unconstitutional only because of the prolonged delay in verifying probable cause. However, the Court did not deem the 30-day detention itself unconstitutional so long as the arrested person received some form of a probable cause hearing – even if it was a judicial officer's simple review of the police report.

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Furthermore, Gerstein specifically deferred to the individual States to decide how judges should review probable cause – and what safeguards could take place after the initial determination of probable cause. As the Court later clarified in McLaughlin, "the Fourth Amendment requires every State to provide prompt determinations of probable cause, but... the Constitution does not impose on the States a rigid procedural framework. Rather, individual States may choose to comply in different ways." Id. at 54.

Nevada sets forth a framework for processing criminal cases that complies with both the Constitutional and even aspirational requirements set forth by the United States Supreme Court. Traditionally, the standard used by the Clark County Justice Courts to initially detain a person in custody was to conduct a 48 hour probable cause hearing for an arrested person based solely on the submitted reports. Then, after the filing of charges, NRS 171.206 and NRS 172.155 further require that the State establishes probable cause either by use of an adversarial preliminary hearing or through a grand jury presentation.

II. 72-HOUR FIRST APPEARANCE BEFORE A MAGISTRATE IS A STATUTORY CREATION PROTECTIVE OF A DEFENDANT'S POST-ARREST RIGHTS

Defendant contends that there are insufficient procedural protections to safeguard a defendant's rights. However, the law governing an arrested person's first appearance before a magistrate is set forth in NRS 171.178, which reads, in relevant part:

> 1. [A] peace officer making an arrest under a warrant issued upon a complaint or without a warrant shall take the arrested person without unnecessary delay before the magistrate who issued the warrant or the nearest available magistrate empowered to commit persons charged with offenses against the laws of the State of Nevada.
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> . . .
>
> 3. If an arrested person is not brought before a magistrate within 72 hours after arrest, excluding nonjudicial days, the magistrate:

(a) Shall give the prosecuting attorney an opportunity to explain the circumstances leading to the delay; and
(b) May release the arrested person if he determines that the person was not brought before a magistrate without unnecessary delay.

4. When a person arrested without a warrant is brought before a magistrate, a complaint must be filed forthwith.

. . .

The purpose of NRS 171.178 is to prevent "all the evil implications of secret interrogation of persons accused of crime." Sheriff, Clark County v. Berman, 99 Nev. 102, 105-06 (1983). In other words, NRS 171.178 seeks to avert secret interrogations of those accused of committing crimes. Moreover, the promptness under NRS 171.178 aids to inform the accused of their privilege against self-incrimination. Brown v. Justice Court, 83 Nev. 272, 276 (1967).

Nevada Revised Statute 171.178(1) begins by calling for arrested persons to be brought before a magistrate "without unnecessary delay." While "unnecessary delay" has generally meant that the action should be performed with all the promptness possible under the circumstances, NRS 171.178(3) specifies that "unnecessary delay" generally means more than 72 hours. Nevada Revised Statute 171.178(3)(a) then requires that if there is a delay in bringing the **person** before a magistrate, then the prosecuting attorney must (a) explain the circumstances of the delay, and (b) the judge **may** (discretionary language) release the person if the person was not brought before a magistrate without necessary delay.

Thus, if the State fails to bring an arrested person before a magistrate within 72 hours, the prosecution shall be given a chance to explain the reasons behind the delay. If, based upon the judge's opinion the delay is unnecessary, the judge **may** release the arrested person. Significantly, NRS 171.178 does not **mandate** that an arrested person be released from custody even if the delay was in fact unnecessary. It simply gives the judge discretion to release the person in, essentially, a totality of circumstances analysis.

The legislative history behind NRS 171.178 is consistent with the State's interpretation. The 72-hour requirement was added in 1979 by Senate Bill 154 (hereinafter "SB 154"). SB

154 as introduced called for the appearance before a magistrate within 24 hours and the filing of a complaint within 48 hours after the initial appearance. If either of the time limits were not met, the bill required that the arrested person be released from custody. All of the language regarding the mandatory release of those arrested was eliminated by the time that SB 154 was passed by the legislature. The legislature ultimately decided that a judicial officer's discretion would be preferable to the proposed bill that ignored the complexities and realities of the criminal justice system best entertained case by case.

In its interpretation of NRS 171.178, the Nevada Attorney General reached the identical conclusion that failure to meet the statute's permissive language does not equate to an automatic release from custody. In a 1979 opinion issued by the Attorney General, the Attorney General points to a number of factors militating against the notion that the State must (1) bring the person before a magistrate and (2) file a complaint or risk having the person released without any further judicial review. 1979 Nev. Op. Atty. Gen. 134. Persuaded by the plain text that a magistrate "may" release the person, the Attorney General discredited the notion that NRS 171.178 requires arrested persons to be released. According to the Attorney General, "release is not mandatory under NRS 171.178 even if the delay was 'unnecessary.'" Id. As the opinion explains, "there may be other factors present in the case that might militate against release for delay, albeit unnecessary." Id.

The 72-hour requirement in NRS 171.178 appropriately places a check on the State's ability to arrest and detain individuals without temporal limit. The statute forces a prompt inquiry into the accused's custody status, and it allows the magistrate to make a decision based upon the totality of the circumstances including but not limited to factors enumerated by the prosecution, the crimes for which the person is being held, and any other information that the magistrate wishes to consider. Ultimately, NRS 171.178 empowers the magistrate with wide latitude to keep an arrested person in custody or grant release. Such a decision may be made without violating the rights of the arrested or the statutory requirements set forth in NRS 171.178.

Mere delay between arrest and arraignment without some additional showing of misconduct during the delay that causes prejudice to the accused does not deprive a court's ability to proceed with the case. Berman v. State, 99 Nev. 102, 106 (1983). For instance, the Nevada Supreme Court found no prejudice "where there has been no interrogation during the delay, and the accused has not confessed or made incriminating statements." Hueber v. State, 103 Nev. 29, 32 (1987) (citing Sheriff v. Berman, 99 Nev. 102 (1983)).

In this case, a Complaint was filed within 72 hours, Defendant received a timely 72-hour hearing in accordance with the above described procedure, the justice court reviewed and reset Defendant's release conditions at the first court date following argument by both parties, and no untoward police conduct has been alleged; the present defense argument is broad and *per se* systemic.

III. THE JUSTICE COURT HAS SUFFICIENT JURISDICTION TO SET BAIL OR IMPOSE CONDITIONS OF RELEASE

"A justice court has the direct authority granted to it by statute and also has limited inherent authority to act in a particular manner to carry out its authority granted by statute." Grace v. Eighth Jud. Dist. Ct., 375 P.3d 1017, 1020 (2016) (quoting State v. Sargent, 122 Nev. 210, 214 (2006)). A well-known canon of statutory interpretation is that the plain language of a statute is controlling unless there is ambiguity. Goudge v. State, 128 Nev. 548, 552 (2012). Nevada Revised Statute 178.484(11) explicitly, and in plain language, grants the authority to justice courts to set bail and conditions of release on *persons who have been arrested for any crime*, and not only those who are formally charged at arraignment.

> **Before releasing a person *arrested*** for any crime, **the court *may* impose** such reasonable conditions on the person as it deems necessary to protect the health, safety and welfare of the community and to ensure that the person will appear at all times and places ordered by the court, including, without limitation...

NRS 178.484(11)(emphasis added).

The statute unambiguously confers jurisdiction upon the courts to set bail and conditions of release *after arrest*. Interestingly, subsection 10 of that same statute permits the

courts to require "*a person arrested*" to surrender his passport before release. NRS 178.484(10). The legislature could have used a different term than "a person arrested," but did not. The term "arrest" is defined as "a seizure or forcible restraint, especially by legal authority" or "the taking or keeping of a person in custody by legal authority." Black's Law Dictionary, 10th Ed. Therefore, justice courts have express authority over "*a person arrested for any crime*" to set conditions of release to protect the community and to ensure the defendant's presence at future court dates.

In United States v. Cotton, 535 U.S. 625 (2002), the U.S. Supreme Court held that "defects in an indictment do not deprive a court of its power to adjudicate a case." Id. at 630. In doing so, the U.S. Supreme Court explicitly overruled its earlier decision in Ex Parte Bain, 121 U.S. 1 (1887), noting that Bain was "the progenitor of this view" that a defect in an indictment was a "jurisdictional defect." Cotton, 535 U.S. at 629. The Cotton Court explained that "Bain's elastic concept of jurisdiction is not what the term 'jurisdiction' means today, i.e., 'the courts' statutory or constitutional power to adjudicate a case.'" Id. at 630. According to the Cotton Court, Bain's concept of jurisdiction was the product of an era when the U.S. Supreme Court's power of review was limited to cases where the convicting court had no jurisdiction, and that the "desire to correct obvious constitutional violations led to a somewhat expansive notion of jurisdiction which was more a fiction than anything else." Id. at 629-30. Nevada has adopted Cotton's definition of jurisdiction. See Gregory Leon Banks v. State, 2017 Nev. Unpub. LEXIS 445 (2017) (stating that "the term jurisdiction means the statutory and constitutional power to adjudicate the case."); see also Gutierrez v. State, 2017 Nev. App. Unpub. LEXIS 24 (Nev. Ct. App. 2017) (citing Cotton, 535 U.S. at 630 ("The term jurisdiction means the statutory and constitutional power to adjudicate the case.")); see also Hager v. Williams, 2017 Nev. App. Unpub. LEXIS 505 (Nev. Ct. App. 2017) (citing Cotton, 535 U.S. at 630 ("The term jurisdiction means the statutory and constitutional power to adjudicate the case.")).

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The Supreme Court did not mandate adversarial 48-hour hearings. Moreover, the Nevada scheme provides for an additional and speedy preliminary hearing or grand jury proceeding that adds to the procedural safeguards and due process afforded to arrestees.

IV. "INSTANT BAIL SETTINGS" DO NOT VIOLATE A DEFENDANT'S CONSTITUTIONAL AND STATUTORY RIGHTS

Defendant argues that an adversarial hearing is *required* wherein the neutral magistrate makes an individualized determination whether preventative detention is the least restrictive means of assuring community safety and ensuring the defendant's return to court. By citing to catch phrases such as "preventative detention" and "least restrictive means," Defendant hopes to persuade this Court that those are fundamental rights of arrested individuals. This argument by Defendant is entirely erroneous and belied by current case law.

A. Due process does not require an individualized, robust, adversarial hearing for an initial bail setting

Defendant relies heavily upon U.S. v. Salerno, 481 U.S. 739 (1987), in arguing that he was entitled to an adversarial hearing. The issue in Salerno was with regards to the Federal Bail Reform Act of 1984. 18 U.S.C.S. § 3142. In that specific Act, federal courts could detain an arrestee pending trial "if the Government demonstrates by clear and convincing evidence after an adversary hearing that no release conditions will reasonably assure...the safety of any other person and the community." Id. at 741.

However, Salerno is inapposite. Salerno considered the constitutionality of the Federal Bail Reform Act of 1984, but the State of Nevada is not governed by the Federal Bail Reform Act. Moreover, the Court in Salerno expressed a number of sentiments that cut against Defendant's argument that the Court is obligated to order the least restrictive means when considering a Defendant's release. See id. at 748, 107 S. Ct. at 2102. In fact, Salerno specifically held that due process is not violated simply because there is pretrial detention. Id. (citing Bell v. Wolfish, 441 U.S. 520 (1979) ("the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment."). This is not

to say that the Salerno Court was unaware of the impact that pretrial detention can have on an arrested individual. However in weighing the interests of the arrestee versus society, the Court upheld that "the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest." Id. at 748, 107 S. Ct. at 2102.

Defendant's motion states as law that due process requires that the issue of pretrial confinement be resolved via a robust, "adversarial hearing." This again is wrong. The Bail Reform Act of 1984 provides for a statutorily created procedure that employs use of an adversarial hearing. However, just because there is a particular federal statute, it is erroneous and misleading to argue that due process and a specific federal statute are one and the same.

B. Individualized Bail Hearing

Defendant argues that an individualized determination is the only way to address the issues of (1) future appearances of the defendant, and (2) deterrence of future crime. Defendant is also concerned with a magistrate setting bail prior to Initial Arraignment, which is held the next day. These arguments are without merit. In fact, the bail setting process at that stage provides for the release of those who can make the bail before appearing in court while awaiting further developments. And, in any event, individualized bail hearings are not constitutionally-mandated. Instead, a defendant can request a reduction in bail at, or after, the initial arraignment. Upon request, a defendant's counsel may introduce factors supporting a reduction in bail, or, alternatively, an own recognizance release. The State is permitted to rebut this request by presenting additional factors. Ultimately, an individualized bail hearing prior to setting bail is neither required nor mandatory because Nevada statutes provide defendants with an opportunity to be heard on custody status at the first court appearance.

"[N]othing in the Eighth Amendment requires a particular type of 'process' or examination," before the defendant's bond is set. Fields v. Henry County, 701 F.3d 180, 185 (6th Cir. 2012); see Galen v. County of Los Angeles, 477 F.3d 652, 662 (9th Cir. 2007) (stating that the Court could not assume that the bail amount "was excessive simply because the state failed to comply with a self-imposed procedural requirement, particularly where, as here, Galen never requested a hearing before the Commissioner...").

In Fields, the defendant turned himself in to the County Sherriff's Office upon learning he had a warrant. Id. at 182. The warrant was for a misdemeanor domestic assault due to allegations from Fields' wife that Fields choked and hit her, which left the victim with a bloody lip, abrasions, and bruises. Id. Under Tennessee law, Fields had no right to post bail immediately after his arrest, and the officers told him that he would be able to post bail the next day. Id. The defendant complained that he should have had a "particularized examination" before his bond was set, and that his bail amount was the same as other defendants facing the same charge. Id. The Sixth Circuit determined this claim brought under the Eight Amendment failed because the Amendment does not require a particular process.[2]

In Clark County, a magistrate sets bail prior to a defendant's first court appearance to allow the defendant an opportunity to be released. If, for some reason, a defendant cannot or does not post bail, the defendant has an opportunity, the next day, to have his or her counsel make a request for an own recognizance release or bail reduction. Thus, an individualized hearing prior to a defendant's initial arraignment is not required, because Defendant's issue with bail being set by a magistrate judge is easily remedied at the 72 hour/initial arraignment hearing.

Defendant claims that bail was set "without the presence of Mr. Frye nor his counsel." Motion at 20. However, this claim is belied by the record. The $250,000 bail amount was first set by the magistrate at the initial arraignment in the presence of both Defendant and his counsel, and following argument from the parties. The District Court affirmed this bail amount after reviewing the record and determining that it was appropriate. Therefore, this claim should be denied.

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[2] The concurrence in Woods v. City of Michigan, 940 F.2d 275, 285 (7th Cir. 1991), stated that, whereas a defendant had a right under state law to be released without bail, the defendant did not "have a federal constitutionally protected right to a hearing before being deprived of that right." While due process would require an individualized hearing in certain circumstances—for example, when a defendant argues that his bail was set at an amount higher than necessary to assure appearance in court—such a high amount of bail was not at issue in Woods. Id. Furthermore, the concurrence concluded that "setting bail from a master bond schedule is not unconstitutional per se," and the issue of constitutionality is dependent on if the bail amount of the schedule was excessive for a particular defendant accused of a crime. Id.

C. Standardized Bail Schedules

Next, Defendant suggests that use of a bail schedule is unconstitutional. However, as the Sixth Circuit stated in Fields, "there is nothing inherently wrong with bond schedules." Fields v. Henry County, Tenn., 701 F.3d 180, 184 (6th Cir. 2012); see Pugh v. Rainwater, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc). In Fields, as in this case, the defendant argued that the county's use of a bond schedule was in violation of the Eighth Amendment. Id. at 183. The Sixth Circuit dismissed this argument, noting that "bond schedules are aimed at making sure that defendants who are accused of similar crimes receive similar bonds," and these schedules are used to ensure the defendant's appearance at future proceedings. Id. at 184; see, e.g., Stack v. Boyle, 342 U.S. 1, 5 (1951) (holding that one factor to determine if bail is excessive is when the defendant's bail is "much higher than that usually imposed for offenses with like penalties").

Moreover, the Sixth Circuit cited to Terrell v. City of El Paso, 481 F.Supp.2d 757 (W.D. Tex. 2007) where Terrell argued his bail of $1,000 was excessive because bail was set by a District Attorney using a bond schedule. Terrell at 766. Terrell further argued that a magistrate should have set his bail, but it was undisputed that the defendant could have waited until the next morning for the magistrate to make a determination. Id. The court completed "exhaustive research" and only found one case where a bond schedule was found to be unconstitutional, and that case was Ackies v. Purdy, 322 F.Supp. 38 (D.C.Fla. 1970). Id. However, this one case was not only outdated, as noticed by this court, but the problems with the bond schedule in that case had already been addressed since the opinion. Id. at 767. Therefore, the court determined the Ackies holding was anomalous, and ultimately held Terrell failed to show a constitutional violation. Id.

Defendant cites Pugh v. Rainwater for the proposition that an individualized determination is more appropriate to use than a bail schedule if a court wants to ensure the defendant's appearance at future court dates and/or to deter future criminal activity. However, in Rainwater, the Fifth Circuit firmly stated that bail schedules infringe on Due Process and Equal Protection rights *when there are no "meaningful consideration of other possible alternatives."* 572 F.2d 1053, 1057 (5th Cir. 1978). In this case, the Supreme Court of Florida

adopted a new rule that enumerated different forms of release that is under the definition of bail. Id. at 1055. Included in this rule was:

> (1) Personal recognizance of the defendant;
> (2) Execution of an unsecured appearance bond in an amount specified by the judge;
> (3) Placing the defendant in the custody of a designated person or organization agreeing to supervise him;
> (4) Placing restrictions on the travel, association, or place of abode of the defendant during the period of release;
> (5) Requiring the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof; or
> (6) Imposing any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the defendant return to custody after specified hours.

Id. at 1055.

The court held that detaining an indigent defendant merely because they cannot post bail, and "whose appearance at trial could reasonably be assured by one of the alternate forms of release," creates a situation where bail is excessive. Id. at 1058. However, the rule in Florida did not create this automatic result; instead, there were reasonable alternatives for a defendant to have bail. Id. As the court found, the rule required "all relevant factors" to be considered when making the determination as to which form of relief the defendant is granted. Id. Therefore, the new rule was not unconstitutional. Id. at 1059.

Defendant also cites to Jones v. City of Clanton, No. 2:15cv34-MHT, 2015 U.S. Dist. LEXIS 121879 (M.D. Ala. Sept. 14, 2015), but this case is distinguishable. In Jones, an administrator for Christy Dawn Varden's estate argued that the deceased defendant was jailed due to her inability to afford the small amount of bail money, as required by the city's bail schedule. Id. at 1. The defendant had been arrested for four misdemeanors, and her bail was set in accordance with a bail schedule that mandated $500 per misdemeanor arrest. Id. at 2. The court stated that if a defendant was unable to pay, she had to wait until the next court date, which court was held only on Tuesday afternoons, and there were not options for an unsecured bond or own recognizance release. Id. at 2-3. In the defendant's situation, she was arrested on a Tuesday, after the scheduled court hearing, and had to remain in custody until the following Tuesday. Id. at 3.

The city did release the defendant after learning about her lawsuit. Id. at 4. Since Jones' lawsuit, the city changed their policy by (1) allowing for an unsecured bond for misdemeanors, as long as the defendant does not have a warrant for failing to appear, (2) requiring a cash bond in situations where there is a warrant, and (3) denying a defendant's release if the defendant is a risk of danger. Id. at 4-5. The court acknowledged that this new policy was constitutional. Id. at 8.

The instant case is distinguished from Jones. Unlike in Jones, where the city held court hearings once a week, the Nevada Revised Statues require a defendant to have an Initial Arraignment within 72 hours of arrest. NRS 171.178. Even though a magistrate sets the defendant's bail prior to this hearing, a defendant can request a reduction in bail the very next day. Unlike in Jones, where there originally were no options for an unsecured bond or own recognizance release, NRS 178.4851 provides alternatives to bail. Just like the new policy in Jones, our state's statutes provide for reasonably alternatives for bail, and a defendant can request a hearing on their bail at, or after, their first court appearance.[3] Moreover, the policy initially at work in Jones required that the city not deviate from the set bail amount in the schedule – that deviation is allowed in Nevada where appropriate.

In Nevada, reasonable alternatives to bail exist in abundance, including an own recognizance release, house arrest, two levels of electronic monitoring, and conditions listed in NRS 178.484(11). The purpose of the bond schedule is to set bail for individuals facing similar crimes. At the Initial Arraignment, counsel still retains the ability to make requests for reasonable alternatives to posting a bond, including an own recognizance release or a reduction in the bail amount. As stated by Jones v. City of Clanton and Pugh v. Rainwater, as long as

[3] Defendant also mentions concerns the Justice Department stated in a "Dear Colleague Letter." Letter from Vanita Gupta to Colleagues (Mar. 14, 2016). Motion at 20. The overall concern of the Justice Department was court practices that incarcerated indigent defendants because of their inability to pay fines and fees. Regarding bail, the letter stated, "courts must not employ bail or bond practices that cause indigent defendants to remain incarcerated solely due to their inability to afford their release..." Id. at 2. However, the letter did not advocate release of defendants based only on financial considerations, and without any consideration of safety to the community. In particular, the letter made clear in footnote 2 that, "nothing in this letter is intended to suggest that courts may not preventively detain a defendant to secure the safety of the public or appearance of the defendant." Id. at 2. Although Defendant was not preventatively detained in this case, this footnote indicates that other factors should be considered in reviewing release. In this case, as will be discussed in detail below, bail was appropriate to secure the safety of the public.

there are reasonable alternatives for a defendant's release, the use of a bail schedule of does not infringe upon a defendant's constitutional rights. Accordingly, Clark County's use of a Bail Schedule during an "Instant Bail Setting" does not violate a defendant's constitutional rights.

V. BAIL IS NOT "EXCESSIVE" SIMPLY BECAUSE A DEFENDANT CANNOT AFFORD TO PAY

Defendant argues that bail in this case is excessive because of his financial ability. However, federal case law, upon which Defendant so heavily relies, makes clear that bail is not "excessive" merely because a defendant is unable to pay the set bail amount.

Particularly apposite in this case is Galen v. County of Los Angeles, 477 F.3d 652 (9th Cir. 2007). In Galen, the Ninth Circuit determined that Galen's bail was not excessive since "the plain meaning of 'excessive bail' does not require that it be beyond one's means, only that it be greater than necessary to achieve the purposes for which bail is imposed." Id. at 661.[4] Police arrested Galen for violating California's domestic violence statute, and the defendant's bail amount was $50,000; however, the Sergeant and Deputies at the Sheriff's station discussed a request to have bail increased. Id. at 656. The Sergeant and Deputies supported this increase based o n the facts that the defendant was an attorney and potentially could cause further harm to the victim. Id. Upon a request for an enhanced bail, the Bail Commissioner increased bail to $1,000,000. Id. at 657. Later, Galen arranged for his bail to be secured and filed a complaint about his enhanced bail. Id. at 657-59.

The district court stated, in support of the bail enhancement, that bail is deemed "excessive" when it is set at an amount that is higher than necessary to achieve the State's purposes. Id. at 661. Additionally, Galen argued his bail was excessive because the amount was 2,000 percent higher than the set default amount. Id. at 662. The Court dismissed this argument as well and determined that "excessiveness cannot be determined by a general

[4] See United States v. Salerno, 481 U.S. 739, 754 (1987); Jennings v. Abrams, 565 F. Supp. 137, 138 (S.D.N.Y. 1983) ("excessiveness of bail is an objective finding to be made according to the objective criteria...[defendant's] means is not one of them.")

mathematical formula, but rather turns on the correlation between the state interests a judicial officer seeks to protect and the nature and magnitude of the bail conditions imposed in a particular case." Id. Ultimately, the Ninth Circuit held that the defendant failed to prove his enhanced bail was excessive, and therefore not valid in light of the circumstances of the case. Id.

In White v. Wilson, the Ninth Circuit held that "the mere fact that petitioner may not have been able to pay the bail does not make it excessive." 399 F.2d 596, 598 (9th Cir. 1968). The State charged the defendant with Assault with a Deadly Weapon with intent to commit murder under Cal. Penal Code 217. Id. at 597. The defendant argued his bail was excessive owing to an increase in bail from $3,150 to $8,150 upon the State's motion. Id. at 597-98. The Ninth Circuit held his bail was not excessive due to the defendant's inability to pay. Id. at 598. Rather, the bail increase was supported by the defendant's prior record and the seriousness of the charged offense. Id. Therefore, the support for increasing bail was reasonable, and not excessive.

Similarly, in White v. United States, the Eighth Circuit Court of Appeals determined that "the purpose for bail cannot in all instances be served by only accommodating the defendant's pocketbook and his desire to be free pending possible conviction." 330 F.2d 811, 814 (8t. Cir. 1964). White argued that his bail, set at $5,000, was excessive under the 8th Amendment because of his financial status and loss of freedom to prepare for his case. Id. The Eighth Circuit held that the test to determine if bail is excessive is if bail is "'set at a figure higher than an amount reasonably calculated to ensure that the accused will stand trial and submit to sentence if convicted.'" Id. (citing Forest v. United States, 203 F.2d 83, 84 (8th Cir. 1953)). Based upon this test, the defendant's ability to afford the posted bail was irrelevant; therefore, bail was not excessive. Id.

Next, in United States v. Wright, the Fourth Circuit held that "primary purpose of bail is to insure the presence of the accused at his trial." 483 F.2d 1068, 1069 (4th Cir. 1973). See Stack v. Boyle, 342 U.S. 1, 72 S. Ct. 1 (1951). In Wright, the defendant was charged with importing and possessing sixty-six pounds of cocaine with the intent to distribute. Id. at 1068.

A district court judge set his bail at $250,000, and the defendant attempted to argue his financial status was an essential issue in determining excessiveness. Id. at 1070. The Fourth Circuit held that a trial court makes the determination about whether bail is excessive, and a judicial officer must consider several factors including "the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, and his record of appearance at past court proceedings." Id. at 1069. Based upon the record, the lower court properly weighed these factors when setting bail. Id. at 1069-70. In Wright, the amount of cocaine seized had a value of $7,500,000. Id. at 1070. Furthermore, the defendant was a flight risk based on the fact that he had recently traveled outside of the United States, and was from Miami, Florida, a location that leads to an easy escape. Id. Finally, the district judge considered the defendant's marital status, three children, and lack of criminal history; however, these factors did not outweigh the purpose of setting bail in the first place. Id. Accordingly, bail of $250,000 was not excessive in Wright despite the defendant's financial status, because the overall purpose of bail is to set bail at an amount that would ensure the defendant's presence to stand trial. Id.

The Fifth Circuit has also held that "a bail setting is not constitutionally excessive merely because a defendant is finically unable to satisfy the requirement." United States v. McConnell, 842 F.2d 105, 108; see also Pugh v. Rainwater, 572 F.2d 1053 (5th Cir. 1978). In McConnell, the defendant faced charges for bank fraud and conspiracy to commit bank fraud under 18 U.S.C. § 1344. Id. at 106. Initially, the federal magistrate ordered the defendant detained before trial, but the district court set aside the order and entered a $750,000 surety bond. Id. The defendant argued for a reduction in the amount to $250,000 due to the fact that his assets were frozen, which meant he could not make bail at the set amount; the district judge rejected this motion. Id. at 107. The trial court stated that bail was set to assure the presence of the defendant and the Fifth Circuit affirmed this reasoning. Id. at 108. Primarily, the defendant posed a flight risk based on his fugitive status at the time of the indictment, and he surrendered himself in Houston after he arrived on a flight from Mexico. Id. at 106-8. The

defendant's argument would have required the court to find that bail is excessive based on a consideration of the defendant's ability to post bail, and the court found this reasoning to be inconsistent with state law. Id. at 108. Therefore, as long as the record states a reasonable basis for setting bail at a certain amount, and this amount is not in excess of achieving the government's purpose, bail is not excessive. Id. at 110.

Defendant repeatedly contends that bail must be set at an amount that a defendant can afford, while ignoring the slew of federal case law holding that bail that is not in excess of achieving the government's purpose is, by definition, not excessive. Defendant's conflation of bail and preventative detention is based on the mistaken assumption that the only purpose of bail is to allow the defendant release rather than to protect the defendant and the community, and to secure the defendant's reappearance. Applying the logic that Defendant sets forth here would result in income being the only determinative factor in setting bail, regardless of risk to the community, risk to the defendant himself, or the likelihood of reappearnace.

The cases presented above firmly demonstrate that bail is only excessive when it is set at an amount that goes beyond the interests the State seeks to protect. Nevada has codified those purposes: "ensure the appearance of the defendant and safety of other persons and of the community." NRS 178.498. Bail is not meant to ensure a defendant's release at any cost—i.e., if a defendant cannot afford bail, the role of the Court is not to then keep lowering bail with no regard to the defendant's history or the facts of the case until it reaches an amount that a defendant can afford. Rather, the purpose of bail and other release conditions is to secure a defendant's reappearance and ensure the safety of the community. The Court must evaluate the State's purposes and additional statutory factors to determine if bail is set at an amount that goes beyond the State's interests. As long as this requirement is met, bail is not excessive.

VI. IN LIGHT OF THE STATUTORY FACTORS, DEFENDANT'S BAIL IS REASONABLE

Defendant claims bail must be tailored to the defendant's financial means, but this contention is directly contradictory to case law and statute. Bail must be set by a determination based on all statutory factors. See NRS 178.498. The defendant's financial ability is one factor

among other statutory factors that must be appropriately weighed. The overall purpose of bail in Nevada is to, "ensure the appearance of the defendant and the safety of other persons and of the community." NRS 178.498. Bail is excessive when it is set at an amount that is higher than necessary to achieve this purpose. See Stack v. Boyle, 342 U.S. 1, 72 S. Ct. 1 (1951). Bail should not be set based solely on a defendant's financial means; instead, bail is set based on our state's codified purposes with consideration given to statutory factors.

According to NRS 178.4851(1),

> upon a showing of good cause, a court may release without bail any person entitled to bail if it appears to the court that it can impose conditions on the person that will adequately protect the health, safety, and welfare of the community and ensure that the person will appear at all times and places ordered by the court...
>
> the court may impose such conditions as it deems necessary to protect the health, safety and welfare of the community and to ensure that the person will appear at all times and places ordered by the court, including, without limitation, any condition set forth in subsection 11 of NRS 178.484[5].

Additionally, Nevada Revised Statute 178.498 provides as follows regarding bail:

> If the defendant is admitted to bail, the bail must be set at an amount which in the judgment of the magistrate will reasonably ensure the appearance of the defendant and the safety of other persons and of the community, having regard to:
>
> 1. The nature and circumstances of the offense charged;
> 2. The financial ability of the defendant to give bail;
> 3. The character of the defendant; and
> 4. The factors listed in NRS 178.4843.

In NRS 178.4843, the Nevada Legislature has set out ten (10) factors the court, at a minimum, shall consider, in deciding "whether there is good cause to release a person without bail:"

> 1. The length of residence in the community;
> 2. The status and history of employment;
> 3. Relationships with the person's spouse and children, parents or other family members and with close friends;

[5] "11. Before releasing a person arrested for any crime, the court may impose such reasonable conditions on the person as it deems necessary to protect the health, safety and welfare of the community and to ensure that the person will appear at all times and places ordered by the court, including, without limitation: (a) Requiring the person to remain in this State or a certain county within this State; (b) Prohibiting the person from contacting or attempting to contact a specific person or from causing or attempting to cause another person to contact that person on the person's behalf; (c) Prohibiting the person from entering a certain geographic area; or (d) Prohibiting the person from engaging in specific conduct that may be harmful to the person's own health, safety or welfare, or the health, safety or welfare of another person." NRS 178.484.

4. Reputation, character and mental condition;
5. Prior criminal record, including, without limitation, any record of appearing or failing to appear after release on bail or without bail;
6. The identity of responsible members of the community who would vouch for the reliability of the person;
7. The nature of the offense with which the person is charged, the apparent probability of conviction and the likely sentence, insofar as these factors relate to the risk of not appearing;
8. The nature and seriousness of the danger to the alleged victim, any other person or the community that would be posed by the person's release;
9. The likelihood of more criminal activity by the person after release; and
10. Any other factors concerning the person's ties to the community or bearing on the risk that the person may willfully fail to appear.

NRS 178.4853. Several of the factors listed in the statute are concerned with the defendant's future court appearances, and any potential risks that the defendant may choose to willfully not appear at court dates.

Common sense dictates, and courts have held, that the best indicator of future behavior is past behavior. See, e.g., United States v. Vasconcellos, 519 F. Supp. 2d 311, 317 (N.D.N.Y. 2007) (citing U.S. v. Barnett, No. 5:03-CR-243, 2003 U.S. Dist. LEXIS 16253 (N.D.N.Y. Sept. 17, 2003) ("past behavior best predicts future behavior and whether the court can rely on a defendant's good faith promises.")). If a defendant has failed to appear for a traffic hearing, for example, the defendant is not then more likely to return for an attempt murder charge. The Vasconcellos Court noted that there are possible conditions that could be imposed in order to reduce a defendant's flight and potential danger; however, if a defendant's past behavior indicates the community would not be safe, or the defendant presents a flight risk, then the potential conditions are not enough to afford the defendant's release. Id. Focusing on one of the two defendants in Vasoncellos, the Court found that defendant Wilson not only failed to comply with supervisory conditions, he also failed to appear at a court date, which resulted in a warrant. Id. at 318.[6] Therefore, his past behavior indicated that he would be a flight risk and an endangerment to the community. Id. at 319; see also United States v. Smith, 647 Fed. Appx. 863, 866-67 (10th Cir. 2016) (holding that the defendant was a flight risk, and

[6] Defendant Vasconcellos' custody status was also considered in this case, and the court affirmed his release conditions which included a $150,000 bond. Id. at 319-20.

the district court properly supported its finding when the court made the same conclusion); United States v. Santos-Flores, 794 F.3d 1088, 1089, 1092 (9th Cir. 2015) (upholding the lower court's detention order because the defendant was a flight risk due to factors including "[defendant's] violation of the terms of his supervised release, his multiple unlawful entries into the United States, his prior failure to appear when required in state court, his use and possession of fraudulent identity documents..."); United States v. Arhebamen, 69 F.App'x 683, 683 (6th Cir. 2003) (affirming the lower courts' determinations that the defendant was a flight risk based on his prior failure to appear); United States v. Sullivan, No. 93-1856, 1993 U.S. App. LEXIS 24317, at 1, 5-8 (1st Cir. 1993) (holding that positive factors in favor of the defendant's reappearance were outweighed by negative factors including two prior failures to appear).

"The ultimate inquiry in each instance is what is necessary to reasonably assure defendant's presence at trial." Pugh v. Rainwater, 572 F.2d 1053, 1057 (5th Cir. 1978). Sometimes, what is necessary to reasonably assure a defendant's presence at trial is monetary bail. In this case, an examination of Defendant's past behavior in light of the factor set forth in NRS 178.4835 and NRS 178.484(11) indicate that a bail setting of $20,000 to protect the community and secure Defendant's reappearance was appropriate.

In this case, Defendant provided no verified address to Pretrial Services. Exhibit 2, at 1. He has extensive ties out-of-state, having spent at least 17 years in California. See Exhibit 2, at 2. He has a two-year-old child in California. Motion at 3. Although Defendant claims that the mother of his child will move to Las Vegas to be with him, she has not done so in the nearly four months that have passed since Defendant's arrest. See Motion at 3. Defendant's out-of-state ties are not limited to California: he also has immediate family in Texas. Motion at 3. Defendant's brother lives in Texas, owns a business there, and has no plans to move to Las Vegas. See Motion at 3 (noting that Defendant's brother is "considering" expanding his business to the Las Vegas "area."). Additionally, Defendant has one prior failure to appear. This is so even though he has two misdemeanor convictions and felony convictions that are less serious than the charges in this case. If Defendant failed to appear on matters that were

much less serious than this, he is not then more likely to appear in a case in which four of the seven charges require mandatory prison sentences and have a potential 30-year tail. See Vasconcellos, 519 F. Supp. 2d at 317. Most tellingly, in 2013, Defendant was convicted of Taking Vehicle without Owner's Consent in California. Defendant absconded to Nevada and, on May 14, 2015, Defendant was arrested in Las Vegas on a fugitive warrant from California. He was subsequently taken to California, where he was sentenced to four years in prison. Defendant was admitted to parole, and his parole expired shortly before he committed the crimes charged in this case.

The likelihood of more criminal activity was high. Before his arrest in this case, Defendant accrued 10 prior felony convictions spanning 17 years. These felony convictions include Robbery, Burglary, and firearms possession charges. The possibility of a prison sentence should he be convicted of any of these crimes has not deterred Defendant from repeatedly committing crimes. Additionally, Defendant has violated the conditions of parole on multiple occasions even though he faced going back to prison if he did so.

Defendant's out-of-state ties, his absonscion to Nevada after conviction of his tenth felony in California in 2013, that Defendant committed this crime after recently completing parole in another case, and the significant nature of the charges in this case all indicate that bail was appropriate to address the safety risk that Defendant poses to the community and to secure his reappearance. See NRS 178.484(11)(b), (c).

Defendant's information was available to the Justice Court—Defendant's prior convictions are listed on the Pretrial Risk Assessment, as is his prior failure to appear. The court heard argument from both parties and considered bail motions from both parties before resetting bail at the current amount at Defendant's first appearance in court. The Pretrial Risk Assessment reflects both Defendant's extensive out-of-state ties and the danger he poses to the community. Even a cursory examination of this record clearly demonstrates that means less restrictive than the current bail would not have been effective in this case, and would not have served to protect the community. Therefore, the Motion should be denied.

//

CONCLUSION

The State respectfully requests that Defendant's Motion to Vacate Detention Order and Release the Defendant from Custody be DENIED.

DATED this 31st day of July, 2018.

Respectfully submitted,

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

BY _____
NIMA AFSHAR
Deputy District Attorney
Nevada Bar #014157

CERTIFICATE OF ELECTRONIC TRANSMISSION

I hereby certify that service of the above and foregoing was made this 31st day of July, 2018, by electronic transmission to:

PANDORA LEVEN
Pandora.leven@clarkcountynv.gov

BY E Del Padre
E. DEL PADRE
Secretary for the District Attorney's Office

NA/ed/GCU

EXHIBIT "1"

REGISTER OF ACTIONS

CASE NO. 18F06620X

State of Nevada vs. FRYE, AARON

Case Type:	**Felony**
Date Filed:	**04/16/2018**
Location:	
Case Number History:	**PC18F06620X**
	18F06620X
ITAG Booking Number:	**1800019106**
ITAG Case ID:	**1976444**
Metro Event Number:	**1804113369**
Other Agency Number:	**1804113369**
	180411003369

PARTY INFORMATION

Defendant	**FRYE, AARON**	DOB: 06/16/1977	**Lead Attorneys** **Public Defender** *Public Defender* 702-455-4685(W)
State of Nevada	**State of Nevada**		

CHARGE INFORMATION

Charges: FRYE, AARON	**Statute**	**Level**	**Date**
1. Burglary while poss of gun/DW [50426]	205.060.4	Felony	04/12/2018
2. Robbery, e/dw [50138]	200.380	Felony	04/12/2018
3. Robbery, e/dw [50138]	200.380	Felony	04/12/2018
4. Robbery, e/dw [50138]	200.380	Felony	04/12/2018
5. Robbery, e/dw [50138]	200.380	Felony	04/12/2018
6. Carry conceal expl/gun/dang weap w/o prmt [51459]	202.350.1d1	Felony	04/12/2018

EVENTS & ORDERS OF THE COURT

DISPOSITIONS

05/15/2018 **Disposition** (Judicial Officer: Sciscento, Joseph S.)
5. Robbery, e/dw [50138]
Dismissed
2. Robbery, e/dw [50138]
Dismissed
3. Robbery, e/dw [50138]
Dismissed
4. Robbery, e/dw [50138]
Dismissed
1. Burglary while poss of gun/DW [50426]
Dismissed
6. Carry conceal expl/gun/dang weap w/o prmt [51459]
Dismissed

OTHER EVENTS AND HEARINGS

04/12/2018 **Standard Bail Set**
Ct1: $40000 Cash/$40000 Surety
04/12/2018 **CTRACK Track Assignment JC02**
04/12/2018 **Standard Bail Set**
Ct2: $40000 Cash/$40000 Surety
04/12/2018 **Standard Bail Set**
Ct3: $40000 Cash/$40000 Surety
04/12/2018 **Standard Bail Set**
Ct4: $40000 Cash/$40000 Surety
04/12/2018 **Standard Bail Set**
Ct5: $20000 Cash/$20000 Surety
04/12/2018 **Not Released NPR**
04/12/2018 Nevada Risk Assessment Tool
04/13/2018 Initial Appearance Justice Court (PC Review) (9:00 AM) (Judicial Officer Zimmerman, Ann E.)
Result: Signing Completed
04/13/2018 Probable Cause Review Packet - Initial Appearance Court
04/13/2018 **CTRACK Case Modified**
Jurisdiction/DA;
04/13/2018 **Probable Cause Found**
04/13/2018 **Bail Reset - Cash or Surety**
Counts: 001; 002; 003; 004; 005 - $0.00/$0.00 Total Bail Set In Court
04/13/2018 Minute Order - Initial Appearance

04/13/2018	**CTRACK Case Modified**
04/16/2018	Criminal Complaint
04/16/2018	Nevada Risk Assessment Tool
04/16/2018	**Not Released NPR**
04/17/2018	*CANCELED* **72 Hour Hearing** (7:45 AM) (Judicial Officer Sciscento, Joseph S.) *Vacated* *In Custody*
04/17/2018	Initial Appearance (7:45 AM) (Judicial Officer Sciscento, Joseph S.) *In Custody - NIC Count 6* Parties Present Result: Matter Heard
04/17/2018	**Initial Appearance Completed** *Advised of Charges on Criminal Complaint, Waives Reading of Criminal Complaint*
04/17/2018	**Public Defender Appointed**
04/17/2018	**Bail Argument Made**
04/17/2018	**Oral Motion** *By State to set bail at $250,000 total bail - Motion granted*
04/17/2018	**Oral Motion** *By Defense to set bail at $50,000 total bail - Motion denied*
04/17/2018	**Remand - Cash or Surety** *Counts: 001; 002; 003; 004; 005; 006 - $250,000.00/$250,000.00 Total Bail*
04/17/2018	Minute Order - Department 02
05/01/2018	Preliminary Hearing (9:00 AM) (Judicial Officer Sciscento, Joseph S.) *In Custody* Parties Present Result: Matter Heard
05/01/2018	**Motion to Continue - Defense** *Motion Granted*
05/01/2018	**Preliminary Hearing Date Reset** *Date Set At Defense Request*
05/01/2018	**Defense waives the 15 day rule**
05/01/2018	**Bail Stands - Cash or Surety** *Counts: 001; 002; 003; 004; 005; 006 - $250,000.00/$250,000.00 Total Bail*
05/01/2018	Minute Order - Department 02
05/15/2018	Preliminary Hearing (9:00 AM) (Judicial Officer Sciscento, Joseph S.) *In custody* Parties Present Result: Matter Heard
05/15/2018	**Case Closed - Dismissed Grand Jury**
05/15/2018	**Judgment Entered**
05/15/2018	**Release Order - Court Ordered due to dismissal** (Judicial Officer: Sciscento, Joseph S.) *Counts: 001; 002; 003; 004; 005; 006*
05/15/2018	Minute Order - Department 02
05/15/2018	Notice of Disposition and Judgment

EXHIBIT "2"

NEVADA PRETRIAL RISK (NPR) ASSESSMENT UPDATED

Assessment Date: **4/16/2018** Assessor: **Tavarius Bolden** County: **Clark**

Defendant's Name: **Aaron Frye** DOB: **6/16/1977** AGE: 40 Case/Booking #: **18F06620X** Dept. #: **2**

Address: **REFUSED INTERVIEW** Contact Phone #: # of Current Charges: **5**
City:
State: Zip:

Most Serious Charge: **Robbery, e/dw** Total Bail at booking: **NO BAIL**

SCORING ITEMS	SCORE
1. Does the Defendant Have a Pending Pretrial Case at Booking? **No** If yes, list case # and jurisdiction:	0
2. Age at First Arrest (include juvenile arrests) First Arrest Date **12/24/94** **20 yrs and under**	2
3. Prior Misdemeanor Convictions (past 10 years) **One to five**	1
4. Prior Felony/Gross Misd. Convictions (past 10 years) **One or more**	1
5. Prior Violent Crime Convictions (past 10 years) **None**	0
6. Prior FTAs (past 24 months) **One FTA Warrant**	1
7. Substance Abuse (past 10 years) **Other**	0
8. Mitigating Verified Stability Factors (limit of -2 pts. total deduction) **If 1, 2 and 3 not applicable**	0
TOTAL SCORE:	5

Risk Level: Moderate Risk, 5 Points **OVERRIDE?:** ☒ Yes ☐ No

Override Reason(s): Other

If Other, explain: IC VIOL CHRGS

Final Recommended Risk Level: Higher ☐ LOW ☐ MODERATE ☒ HIGHER

Supervisor/Designee Signature Yuta VM Arlington **Date:** 4/12/2018

18F06620X
NPR
Nevada Risk Assessment Tool
9303022

Revised 8.2017

Felony convictions:

YEAR	STATE	CHARGE
96	CA	ROBB
01	CA	FEL POSS FA
01	CA	FEL CCW
01	CA	CARRY LOADED F/A: SPEC CIRCUM
08	CA	BURG
08	CA	BURG
11	CA	BURG
11	CA	POSS BAD CHECK
13	CA	TVWOOC
13	CA	TVWOOC

Misdemeanor Convictions: **2**

FTAS: **1**

Detainers: **LVC MUNI COURT**

Pending Cases: **CA JUVI REC**

Revised 8.2017

DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA, Plaintiff, vs. AARON FRYE, Defendant.	CASE NO. C331986 DEPT. NO. XXX

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE JERRY A. WIESE, II

THURSDAY, AUGUST 2, 2018

AT 10:37 A.M.

LAS VEGAS, NEVADA

For the State: ELIZABETH MERCER, ESQ.
KELLEY FORE, ESQ.

For the Defendant: PANDORA LEVEN, ESQ.

REPORTED BY: KIMBERLY A. FARKAS, NV CCR No. 741

Kimberly A. Farkas, RPR, CRR
(702) 671-3633 • realtimetrialslv@gmail.com

LAS VEGAS, NEVADA, THURSDAY, AUGUST 2, 2018

P R O C E E D I N G S

* * * * * * *

THE MARSHAL: Recalling page 11, *State vs. Aaron Frye,* C331986.

MS. MERCER: Good morning, Your Honor. I'm not sure where Ms. Leven went. She's coming right now. Elizabeth Mercer for the State, and with me is a Kelley Fore, K-E-L-L-E-Y, and then the last name, F-O-R-E. She's being supervised by Tim Fattig, who is the person signed off to supervise her, and she's appearing pursuant to Rule 49.5.

THE COURT: Isn't that exciting?

MS. FORE: Yeah, I'm very excited. Thank you.

THE COURT: Good deal. It's on today for defendant's motion to vacate the detention order and release the defendant from custody. What do you want to argue?

MS. LEVEN: Your Honor, I did have an opportunity to read the State's opposition, so I'd like to start there. I'd just like to begin by pointing out what the State has failed to articulate is, one, that there are no conditions of release that -- or the State

has failed to allege that there's no way that Mr. Frye could be released. What they are saying is that it would be appropriate for him to get out of custody if he can post a $250,000 bond. They have made no representations as to why a $250,000 bond would better protect the community than a $75,000 bond, which he would be able to make. So if they are -- he is unable to make the $250,000 bond, which we know because he's still sitting in custody. But I don't understand, and the State has failed to articulate, any different purpose that would be accomplished by having the higher bond other than to preventively detain him. And they've conceded that they're not seeking preventative detention because they've conceded that bail is appropriate. That's the first thing I'd like to point out.

The second thing that I'd like to point out is that the State talks a lot about the proceedings in Justice Court. This is a new case. The proceedings in Justice Court were dismissed. This is here on a Grand Jury indictment. The bail hearing was made after the Grand Jury, without counsel present, without Mr. Frye present, after the Grand Jury returned a true bail.

We're asking for $75,000 in bond. We

understand the things the State has raised as concerns. And we agree that he should be released with a bond; however, it should be a bond that he is able to make. That's why we're asking for $75,000. The bondsman who posts that bond will just as surely supervise Mr. Frye as if Mr. Frye posts a $250,000 bond.

In both cases we're talking about very serious amounts of money. And so the difference as far as protecting the community or assuring his return to court is no better served by the bond that he cannot make than it would be by a bond that he can make. So we are requesting $75,000.

MS. MERCER: Your Honor, before she argues, the bulk of the State's position, I just want to point out, she keeps using this term "preventative detention." This is not the federal system where they're either detained or released to the streets. We have a statute that addresses the concerns that the Court is supposed to address, and it's the State's position that the $250,000 is appropriate even if he can't make it given the fact that he's a 10-time convicted felon who came here from California to commit an armed robbery at our banks. And I'm going to let her address the additional issues.

MS. FORE: This matter has already been

seen. Bail was set in Justice Court prior to being taken to Grand Jury and sent to District Court. On the day the defendant was arraigned in Justice Court, his preliminary hearing was scheduled. Both the defendant and the State made motions for bail. Defendant asked for $50,000 bail, but the Justice Court denied it and set the bail at $250,000.

The fact that the defendant cannot afford to pay bail does not make bail excessive. Case law in the Ninth Circuit supports that excessive bail does not require that it be beyond the means of the defendant, but rather is determined on the basis of the State's interest and the nature and the magnitude of the bail conditions imposed as applied in a particular case. Case law supports at *Wike v. Wilson,* (phonetic) and that's in the State's motion, the Court held that, in plain language, that the mere fact that the petitioner may not have been able to pay the bail does not make it excessive. The nature of the offense and the defendant's prior record as well as the State's interest in garnering community safety supported that the increase in bail was reasonable and not excessive.

Even if it's being requested and bail be reset, the $250,000 bail is reasonable given the likelihood of conviction of the defendant. In the

instant case the State has garnered video surveillance, eyewitnesses of community members, and defendant's confession, in addition to evidence tying him to the crime in his vehicle.

The Nevada Revised Statutes 178.483 identifies 10 factors that the Court should consider. Several of those factors relate to the safety and security of the community, the defendant's prior criminal record. And so that the State has considered the defendant's prior failure to appear in regards to two misdemeanors and felony convictions that are less serious in nature than the present charges, the State's position is that the defendant will not be more likely to appear at this case that is more serious, specifically when four of the seven charges require mandatory prison sentences for the potential for 30 years.

Additionally, the defendant has absconded in the past. In 2013, defendant was convicted of taking a vehicle without owner's consent in California. Defendant then absconded to Nevada, and was arrested around two years later in May of 2015, on a fugitive warrant from California.

Over the course of 17 years the defendant has accrued 10 prior felony convictions, including

robbery, burglary, and firearm possession charges. The potential sentence of life here without parole adds to him being a flight risk. Life without parole would be because of the 10 prior felony convictions.

So given the safety risk to the community, the nature of the charges alleged, and the defendant's past history of absconding, the defendant's ties to California and Texas, as well as the likelihood of further criminal activity, the State's position is that there's no needs less restrictive. For example, the ankle bracelets are very easy to remove. So there's no means less restrictive than the current bail to secure the State's interest in ensuring the presence of the accused as well as in protecting the community.

The motion to release defendant from custody should be denied.

MS. LEVEN: Yes, Your Honor. I'd like to touch on a couple things. The State's correct; this is not the federal system. Interestingly, though, the federal court decisions were based on due process and equal protection under the law, both constitutional rights that have been made applicable to the states.

The rulings under Salerno do not have to do with excessive bail. We did not argue that bail was excessive. We argued that bail in an amount that he

cannot make is tantamount to a preventative detention. It's basically if the Court sets a bail in an amount that is so high that the defendant cannot make it, the Court has, for all intents and purposes, ordered preventative detention, which, the State is correct, the Court does not have the authority to do. So before a Court may make that ruling that is tantamount or a defacto preventative detention, there is procedure that is required, and that's what we're arguing in regards to that.

As far as the case law on excessive bail, that's not what we're here arguing. That was not the argument we made in our brief. So why the State would respond to that is unclear.

I would also like to note the State relied on the likelihood of conviction in this case. I would note that we have filed a pretrial writ of habeas corpus alleging that they didn't even meet probable cause at the Grand Jury proceeding. However, rather than responding and allowing this Court to determine whether or not probable cause had even been established at that point, the State punted and took the issue to the Supreme Court as to whether we could file the writ. So while I don't agree with the State's contention that there is a high likelihood of conviction in this case,

based on the fact that I did file a pretrial writ of habeas corpus alleging that they didn't even meet the probable cause standard. And the Court, unfortunately, has been unable to review that because the State hasn't filed an opposition, so to speak, and has kicked it down the road.

Based on those things and the fact that the State still, standing here today, has not explained what the difference in supervision or protection to the community or likelihood to reappear, what exactly the difference of -- math is not my strong suit -- $175,000 difference in the amount of bail, what impact that will actually have on the community safety or Mr. Frye's likelihood to return to court, I think that it would be appropriate to set bail in a very high amount. $75,000 is not an amount of money to scoff at. But allow it to be in an amount that Mr. Frye can make, $75,000.

THE COURT: All right. So the fact that Mr. Frye can't make bail does not make it an unreasonable bail. I don't find that there's any violation of due process or equal protection clauses here. Bond was previously set by a competent judge. I don't find there was any abuse of discretion. In order to assure the defendant is present in court and to protect the community, and the other things that are

considered under the various statutes dealing with the amount of bond, I don't find that an amount of $250,000 is unreasonable. I'm going to deny the motion.

MS. MERCER: Thank you, Your Honor.

THE DEFENDANT: Your Honor, can I speak? Can I say something?

THE COURT: Is it going to be quick?

THE DEFENDANT: Yeah, it's gonna be quick. I heard everybody else get a chance to speak so I would just like a chance --

THE COURT: This is on for a motion. This is on for a motion. Motion is filed by an attorney on your behalf. I don't generally let you have a chance to speak, but go ahead.

THE DEFENDANT: Okay. Yeah. Right now, you know, I got a family. I got a son, you know what I'm saying. They make it seem like I premeditated to come out here to do what happened, you know what I'm saying. Like, that wasn't my intention. I have family out here.

MS. LEVEN: Mr. Frye, don't talk about the facts of the case.

THE DEFENDANT: I don't know. They're trying to make me look like I'm, like, a super bad guy or whatever. But, you know, I do music. I have -- I

have all kind of stuff going on for me right now. I had two houses out here, you know what I'm saying.

I had got shot by the police. The incident that they're talking about, I had got shot by the police. The police, they didn't say nothing about that, about the police --

THE COURT: You're talking about -- you're talking about specific facts. Here's what you need to understand. The only thing that's before me today is whether or not the $250,000 bail that was set by a different judge was wrong; okay. I can't find that it was wrong. Would I have imposed the same amount of bail? I don't know.

THE WITNESS: There's people that got murder that got the same -- that got less bail than me. It's people up in here that got murder that's up in here less, you know what I'm saying? Like, I didn't kill nobody or shoot anybody or anything like that or harm anybody. You know what I'm saying. I don't have no DVs or bust somebody upside the head. I don't have -- I don't have no -- I never been to jail for anything like that, when it comes to physically harming somebody, you know what I'm saying.

THE COURT: I understand, sir. This is a violent crime. I'm not going to change the bail at

this time.

THE DEFENDANT: Okay. So can I put in another motion to get it redone again? Because I'm losing stuff, you know what I'm saying.

THE COURT: Talk to you attorney about that --

THE DEFENDANT: I have a condo -- I have a condo out there in LA that I'm potentially going to lose. And I have a $70,000 car that a friend out here had, you know what I'm saying, that I left to him or whatever. And he's talking about -- he's telling me that he's paying my insurance and everything and paying everything on my car. Now he's talking about, oh, your car is missing; I don't know where it is. So I called the insurance company. He hasn't filed my insurance. I called the finance company. He hasn't --

THE COURT: This isn't quick. You're just going to keep going. You can talk to your attorney about what you can still file; okay. Today I'm going to deny the motion. Sorry.

THE DEFENDANT: Thank you, Judge.

MS. MERCER: Thank you, Your Honor.

(Proceedings concluded at 10:50 A.M.)

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ATTEST: FULL, TRUE, AND ACCURATE TRANSCRIPT OF PROCEEDINGS.

/S/ Kimberly A. Farkas, RPR, CRR

IN THE SUPREME COURT OF THE STATE OF NEVADA

AARON FRYE Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE JERRY WIESE, DISTRICT JUDGE, Respondents, and THE STATE OF NEVADA, Real Party in Interest.	Case No. Dist. Ct. C-18-331986

APPENDIX TO PETITION

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 31 day of August, 2018. Electronic Service of the

foregoing document shall be made in accordance with the Master Service List as follows:

ADAM LAXALT
STEVEN B. WOLFSON
NANCY M. LEMCKE
HOWARD S. BROOKS

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

Honorable Jerry Wiese
District Court, Department XXX
200 Lewis Avenue
Las Vegas, NV 89101

BY /s/ Carrie M. Connolly
Employee, Clark County Public Defender's Office