IN THE SUPREME COURT OF THE STATE OF NEVADA

AARON WILLARD FRYE,
Petitioner,

vs.

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

And
THE STATE OF NEVADA;
Real Party in Interest.

Electronically Filed
Oct 24 2018 08:38 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

CASE NO: 76845

ANSWER TO PETITION FOR WRIT OF MANDAMUS

COMES NOW, the State of Nevada, Real Party in Interest, by STEVEN B. WOLFSON, District Attorney, through his Chief Deputy, KRISTA D. BARRIE, on behalf of the above-named respondents and submits this Answer to Petition for Writ of Mandamus in obedience to this Court's order filed October 11, 2018, in the above-captioned case. This Answer is based on the following memorandum and all papers and pleadings on file herein.

Dated this 23rd day of October, 2018.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney

BY */s/ Krista D. Barrie*
KRISTA D. BARRIE
Chief Deputy District Attorney
Nevada Bar #010310

ROUTING STATEMENT

This appeal is not presumptively assigned to the Court of Appeals because it does not fall into one of the categories under NRAP 17(b).

QUESTION PRESENTED

Is this Court's extraordinary intervention warranted to reverse the district court's denial of Petitioner's Motion to Vacate Detention Order and Release Defendant from Custody?

STATEMENT OF THE CASE

On April 16, 2018, the State filed a Criminal Complaint charging Aaron Frye ("Petitioner") with one count of Burglary while in Possession of a Firearm (Category B Felony - NRS 205.060 - NOC 50426), four (4) counts of Robbery with Use of a Deadly Weapon (Category B Felony - NRS 200.380, 193.165 - NOC 50138), and one count of Carry Concealed Firearm or Other Deadly Weapon (Category C Felony - NRS 202.350 (1)(D)(3). I Appendix to Petition ("AP") 054–55. Bail was set at $40,000 for Counts 1–4 and $20,000 for Count 5, for a total of $180,000. I AP 054. On April 17, 2018, Petitioner was arraigned in Justice Court and his preliminary hearing was scheduled for May 1, 2018. I AP 055. On the same day, Petitioner and the State each made oral motions for bail; Petitioner moved that monetary bail be set at $50,000, and the State that it be set at $250,000. I AP 055. Following argument, the State's motion was granted and total bail was reset at $250,000 for all counts. I

AP 055. On May 1, 2018, the Preliminary Hearing was continued at defense counsel's request to May 15, 2015. I AP 055.

Prior to the reset Preliminary Hearing, the State obtained an Indictment against Petitioner in District Court. I AP 001. The Indictment charged Petitioner 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). I AP 001. Petitioner was arraigned on the Indictment on May 17, 2018. I AP 001.

On July 18, 2018, Petitioner filed a Motion to Vacate Detention Order and Release the Petitioner from Custody, asking that bail be set at $75,000. I AP 004–26. The State filed its Opposition on July 31, 2018. I AP 027–58. The District Court denied the Motion on August 2, 2018. I AP 059–71.

Petitioner filed the instant Petition for Writ of Mandamus ("Petition") on August 31, 2018. This Court ordered an answer to the Petition on October 11, 2018. The State responds as follows.

/ / /

/ / /

STATEMENT OF FACTS

On April 11, 2018, just before 5:00 p.m., Petitioner entered the Clark County Credit Union located at 9311 W. Sunset Las Vegas, NV. I Respondent's Appendix ("RA") 007. He approached the counter and made contact with employee Roland Miguel. I RA 007–08. Petitioner pulled out a semi-automatic handgun from the right side of his waistband, pointed it at Miguel and stated "give me your fifties and hundreds." I RA 009. Miguel tried to explain that he did not have any cash. I RA 009–10. Petitioner then moved onto Rochelle Dumlao and Mandy-Lynn Suyat, who were working their own windows. I RA 010–11. Petitioner was repeatedly told that they did not have anything. I RA 011. As Petitioner was demanding money from the employees, Maryann Valdez returned from the vault where she had been completing tasks necessary to close the business. I RA 011, 021–22. She saw Petitioner point a gun at teller Rochelle. I RA 22. Maryann instructed her co-workers to give Petitioner the "bait" money—currency whose numbers were previously recorded by the bank, which the bank keeps on hand for such occasions. I RA 010–11, 022–23. At that point, Petitioner went to each of the four (4) tellers and obtained $200 in bait money. I RA 012. When Valdez handed Petitioner her money, she also handed him a bank bag filled with one-dollar coins. I RA 012, 023–24.

Petitioner was identified after an investigation by Detectives Theodore Weirauch, Hubbard, and Tullio Pandullo, including a review of bank surveillance

footage and rental car records tied to the getaway vehicle. I RA 013–18, 026–33, 38–40. This led to a photo lineup, which Detective Pandullo showed to victim Roland Miguel on April 12, 2018. I RA 014–15, 039–41. The victim picked out Petitioner as the suspect with one-hundred percent certainty. I RA 015, 041.

Detective D. Jappe took Petitioner into custody that same day. I RA 041–42. Police found the bait money taken from the bank during the search incident to arrest. I RA 042. Detective Pandullo was present and provided a list of the serial numbers that were taken, comparing them to the twenty-five (25) $20 bills that were located in Petitioner's wallet. I RA 042. All twenty-five (25) were on the list that of the ones that were missing. I RA 042. These bills were photographed and impounded as evidence. I RA 042–43.

On April 12, 2018, Petitioner was interviewed by Detective Weirauch at Las Vegas Metropolitan Police Department ("LVMPD") Headquarters. I RA 032–35. Prior to questioning, Detective Weirauch advised him of his Miranda rights and Petitioner indicated that he understood them. I RA 032. Petitioner confessed that he had committed the robbery because he needed money "to get out of the hole" left by his gambling debts. I RA 033. He said he tried to find employment but had lost his identification and was unable to find work. I RA 033. He said he used a real gun, but does not know where that gun is now. I RA 034.

/ / /

ISSUE PRESENTED

Whether this Court's extraordinary intervention is warranted to reverse the district court's denial of Petitioner's Motion to Vacate Detention Order and Release Petitioner from Custody.

STANDARD FOR EXTRAORDINARY RELIEF

This Court may issue a writ of mandamus to compel the performance of an act which the law requires as a duty resulting from an office, trust, or station or to control a manifest abuse of or arbitrary or capricious exercise of discretion. NRS 34.160; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603–04, 637 P.2d 534, 536 (1981). This Court may issue a writ of prohibition to arrest the proceedings of any tribunal exercising judicial functions in excess of its jurisdiction. NRS 34.320; Hickey v. District Court, 105 Nev. 729, 731, 782 P.2d 1336, 1338 (1989).

Neither writ issues where the petitioner has a plain, speedy, and adequate remedy in the ordinary course of law. NRS 34.170; NRS 34.330; see also Hickey, 105 Nev. at 731, 782 P.2d 1336, 1338 (1989). This Court has previously emphasized the "narrow circumstances" under which mandamus or prohibition are available and has cautioned that extraordinary remedies are not a means for routine correction of error. State v. District Court (Riker), 121 Nev. 225, 112 P.3d 1070 (2005). The purpose of a writ of mandamus or prohibition is not simply to correct errors. Id.

/ / /

ARGUMENT

I. THIS COURT'S EXTRAORDINARY INTERVENTION IS NOT WARRANTED TO REVERSE THE DISTRICT COURT'S DENIAL OF PETITIONER'S MOTION TO VACATE DETENTION ORDER AND RELEASE FROM CUSTODY.

Petitioner asks this Court to exercise extraordinary intervention and reverse a district court's denial of his Motion to Vacate Detention Order and Release Defendant from Custody. In this regard, Petitioner asserts that the district court acted unconstitutionally in setting Petitioner's bail at $250,000 and then in denying Petitioner's Motion to Vacate Detention Order and Release Defendant from Custody ("Motion to Vacate"). Petition at 6–8. This fails, and the Petition should be denied.

A. PETITIONER HAS AN ADEQUATE REMEDY AT LAW.

Petitioner is not entitled to this Court's extraordinary intervention because he has an adequate remedy at law. Indeed, Petitioner took advantage of one such remedy by filing his Motion to Vacate. In denying that Motion, the district court found that the April 17, 2018 bail setting of $250,000 was not unreasonable, did not violate due process or equal protection, and was not an abuse of discretion by the judge who set it. I AP 067. Petitioner has not pointed to any urgent circumstances justifying this Court exercising its discretion to grant the extraordinary relief of ordering the district court to vacate its bail order. Thus, since Petitioner has adequate remedies available at law, this Petition should be denied.

B. CLARK COUNTY'S BAIL PROCEDURES ARE NOT UNCONSTITUTIONAL.

Petitioner has failed to establish that Clark County's bail procedures are unconstitutional. In support of this contention, Petitioner argues that, before bail is set, an adversarial hearing is required. Petition at 8, 13–25, 32–42. This is without merit.

First, Petitioner relies heavily on federal precedent examining the federal bail system—which includes a requirement that a neutral magistrate make an individualized determination "whether preventative detention is the least restrictive means of assuring community safety and ensuring the accused's return to court." U.S. v. Salerno, 481 U.S. 739 (1987). Petitioner claims that "the constitutionality of any moneyed bail system requires" the same. Petition at 24. Petitioner's reliance on Salerno is misguided.

The issue in Salerno involved the Federal Bail Reform Act of 1984. 18 U.S.C.S. sec. 3142. Under the Act, federal courts can 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." Salerno, 481 U.S. at 741. However, the State of Nevada is not governed by United States Code or the Federal Bail Reform Act of 1984. Thus, Salerno does not mandate the procedural requirements of a "full-blown adversarial hearing" except when a federal court applies the Bail Reform Act.

Indeed, Nevada has not adopted anything similar to the Bail Reform Act; instead, Nevada has enacted a statutory scheme that covers a defendant's procedural due process rights. See NRS 178.4851, 178.4853. Petitioner himself admits that the constitutional considerations underlying Salerno require some procedural protection, but that the procedure is "not limited to" the procedures laid out in Salerno. Petition at 35. Thus, Petitioner's contention that NRS 178.4851, governing pretrial release without bail, is unconstitutional because it "obviates the procedural requirements mandated by Salerno" is without merit. Petition at 40.

Moreover, the Salerno Court itself expressed a number of sentiments that cut against Petitioner's argument that Nevada is obligated to order the least restrictive means when considering a defendant's release. In fact, the Court specifically held that due process is not violated simply because there is pretrial detention. Indeed, there are many "exceptions to the 'general rule' of substantive due process that the government may not detain a person prior to a judgment of guilt in a criminal trial." 481 U.S. at 748–49. The Court further affirmed that "the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment." Id. (citing Bell v. Wolfish, 441 U.S. 520 (1979)). 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 reaffirmed that "the Government's regulatory interest in

community safety can, in appropriate circumstances, outweigh an individual's liberty interest." Id. at 748. In fact, the Salerno Court points out the limited nature of its own holding. Salerno, 481 U.S. at 750 (noting that "[t]he Bail Reform Act . . . narrowly focuses on a particularly acute problem in which the Government interests are overwhelming. The Act operates only on individuals who have been arrested for a specific category of extremely serious offenses.").

Second, Petitioner cannot establish that individualized bail hearings are constitutionally mandated before every single bail amount is set. Indeed, several federal Circuit Courts have examined this issue and found that there is no particular procedure required. For example, the Sixth Circuit held—a full quarter-century after Salerno was decided—that "nothing in the Eighth Amendment requires a particular type of 'process' or examination" before a defendant's bond is set. Fields v. Henry County, 701 F.3d 180, 185 (6th Cir. 2012); see also Galen v. County of Los Angeles, 477 F.3d 652, 662 (9th Cir. 2007) (refusing to hold that the bail amount "was excessive simply because the state failed to comply with a self-imposed procedural requirement, particularly where, as here, [the defendant] never requested a hearing before the Commissioner") (emphasis added). In Fields, the defendant turned himself in to the County Sherriff's Office upon learning he had a warrant. 701 F.3d at 182. The warrant was for a misdemeanor domestic assault due to allegations from the defendant's wife that the defendant choked and hit her, which left the victim with

a bloody lip, abrasions, and bruises. Id. Under Tennessee law, the defendant 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 before bail is set. Id. at 185.

Other Circuits have held similarly. The Seventh Circuit has held 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." Woods v. City of Michigan, 940 F.2d 275, 285 (7th Cir. 1991). The judge reasoned that due process would require this individualized hearing in certain circumstances, for example when the defendant argues his bail was set at an amount higher than necessary to assure he appears for court. Id. However, the bail amount was not at issue in Woods. Id. Furthermore, the judge concluded, "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. This shows that constitutionality of a bail-setting scheme is not tied to a process but to whether there is some process by which a defendant can challenge their bail setting.

In Clark County, Nevada, a Magistrate Judge 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 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 available. Then, a defendant can request a reduction in bail at, or after, their 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 hearing prior to setting bail is not required because Nevada's statutes provide defendants with an opportunity to be heard on custody status at their first court appearance.

Third, as the Sixth and Seventh Circuits has held, "there is nothing inherently wrong with bond schedules." Fields, 701 F.3d at 184; Woods, 940 F.2d at 285; see also Pugh v. Rainwater, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc). In Fields, that defendant argued the county's use of a bond schedule violated the Eighth Amendment. 701 F.3d at 183. The Sixth Circuit dismissed this argument and stated, "bond schedules are aimed at making sure that [d]efendants 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 also Stack v. Boyle,

342 U.S. 1, 5 (1951) (holding that one factor to determine if bail is excessive when the defendant's bail is "much higher than that usually imposed for offenses with like penalties").

Early this century, one court completed "exhaustive research" and only found one case where a bond schedule was found to be unconstitutional.[1] Terrell v. City of El Paso, 481 F.Supp.2d 757, 766 (W.D. Tex. 2007). However, the single 1970 case was not only outdated, as noticed by the 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 single holding was anomalous, and ultimately held the defendant failed to show a constitutional violation in the existence of the bail schedule. Id.

Petitioner cites a Fifth Circuit case to argue that an individualized determination is more appropriate than a bail schedule if a court wants to ensure the defendant's appearance at future court dates and/or ensure the safety of the community. Petition at 28–29. However, the Fifth Circuit firmly stated that bail schedules infringe on Due Process and Equal Protection rights only when there are no "meaningful consideration of other possible alternatives" apart from monetary bail. Pugh v. Rainwater, 572 F.2d 1053, 1057 (5th Cir. 1978). In Pugh, the Supreme Court of Florida adopted a new rule that enumerated different forms of release that

---

[1] Ackies v. Purdy, 322 F.Supp. 38 (D.C.Fla. 1970).

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 Pugh 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 the automatic result of indigent defendants being detained. Instead, a court could consider reasonable alternatives. Id. Indeed, the rule required courts to consider "all relevant factors" when making the determination as to which form of relief the defendant is granted. Id. Therefore, the new rule was not deemed unconstitutional. Id. at 1059.

Petitioner also cites several other distinguishable cases that examine bail

schedules and indigent defendants. Petition at 27–31. In one, an administrator for a deceased defendant's estate argued that the defendant had been jailed due to her inability to afford the small amount of bail money as required by the city's bail schedule. Jones v. City of Clanton, No. 15cv34-MHT, 2015 U.S. Dist. LEXIS 121879 at *1 (M.D. Ala. Sept. 14, 2015). The deceased defendant was 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, the defendant had to wait until the next court date, which was held only on Tuesday afternoons, and there were no 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. And since then, the city changed its 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) a cash bond will be required in situations where there is a warrant, and (3) release can be denied if the defendant is a risk of danger. Id. at 4–5. The court acknowledged that this new policy was constitutional. Id. at 8.

Unlike Jones, in Petitioner's case, 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 a defendant's bail prior to this hearing, a defendant

can request a reduction in bail the very next day. In addition, again unlike Jones where originally there were no options for an unsecured bond or own recognizance release, NRS 178.4851 provides alternatives to bail. Just like the City's new policy in Jones, Nevada's statutes provide for reasonable alternatives for bail, and a defendant can request a hearing on their bail at or after, their first court appearance.

Other cases Petitioner cites reflect a similar requirement—that "meaningful consideration of other possible alternatives for indigent pretrial detainees" is required. See, e.g., Williams v. Farrior, 626 F.Supp 983, 985 (S.D. Miss. 1986). However, not one of the cases Petitioner cites support his assertion that a hearing on these meaningful considerations must "precede" an initial bail setting. Petition at 31.[2]

Finally, as discussed in cases such as Pugh and Jones, 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).[3] The purpose of the bond schedule is to set bail for individuals facing

---

[2] Petitioner also cites several totally inapplicable cases. Petition at 36–38; see Simpson v. Miller, 387 P.3d 1270, 1276 (Ariz. 2017); Lopez-Valenzuela v. Arpaio, 770 F.3d 772, 781 (9th Cir. 2014). These concern unconstitutional state statutes that required pretrial detention for certain types of crimes or certain types of individuals. Nevada's bail statutes do not categorically ban bail—and thus require pretrial detention—even for first-degree murder (the only offense for which bail may be, but is not required to be, denied altogether). Simpson and Arpaio are simply not relevant.

[3] Petitioner spends significant time arguing for overall bail reform, based on arguments about the historical nature and development of bail. Petition at 17–26.

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 discussed in cases like Jones and Pugh, as long as 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" is constitutional.

In fact, Nevada statutes explicitly consider a defendant's procedural Due Process rights concerning this initial bail setting. "Where the Defendant can be admitted to bail without appearing personally before a Magistrate, the defendant must be so admitted with the least possible delay, and required to appear before a Magistrate at the earliest convenient time thereafter." NRS 171.178. An "Instant Bail Setting" through the bail schedule achieves this purpose by allowing a defendant to be released on bail prior to their initial arraignment. The setting is expedited to avoid the delay, and is a fail-safe procedure to make sure a defendant's rights are protected, which indeed satisfies Due Process.

Though the initial bail setting is determined based on a standardized bail schedule, a defendant retains the opportunity to have his custody status addressed at

---

However, as discussed supra, Petitioner has failed to establish that Nevada's bail system violates any constitutional principle. His arguments would be better presented to the legislature rather than this Court.

the initial arraignment the very next day. If a request is not made at this initial hearing, a defendant may bring a motion—such as the one brought in this case in the form of Petitioner's Motion to Vacate below—to address the defendant's status. Bail set prior to the initial arraignment merely provides an opportunity for the defendant to be released prior to a court appearance. Nevada law then affords the defendant the ability to request a bail reduction at the Initial Arraignment with their attorney. Therefore, bail set prior to the 72-hour hearing does not violate a defendant's constitutional or statutory rights because the defendant has several opportunities to be heard about bail once formal charges have been brought.

For all these reasons, Petitioner's assertion that Clark County's bail procedures are unconstitutional is without merit. As such, the Petition should be denied.

C. PETITIONER'S BAIL IS NOT UNCONSTITUTIONAL.

Petitioner argues that his bail is excessive—and that thus his Motion to Vacate should have been granted—because of his financial condition. Petition at 26–31, 42–43. However, Petitioner cannot demonstrate, given the State interests in setting this bail amount, that the $250,000 bail is excessive or that an own recognizance release would be appropriate.

In Nevada, a defendant's financial ability is only one statutory factor among four statutory that must be appropriately weighed in setting bail. NRS 178.498 states:

> 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 178.4853.

Thus, there are many factors to consider in setting bail that go far beyond the defendant's means.

Nevada's bail statutes reflect the important point that a defendant's means are not the only consideration in setting bail. Indeed, bail is not constitutionally "excessive" merely because a defendant is unable to pay the set bail amount. See, e.g., Galen v. County of Los Angeles, 477 F.3d 652, 661–62 (9th Cir. 2007) ("[T]he 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."); White v. Wilson, 399 F.2d 596, 598 (9th Cir. 1968) ("The mere fact that Petitioner may not have been able to pay the bail does not make it excessive."); Hodgdon v. United States, 365 F.2d 679, 687 (8th Cir. 1966) ("bail is not excessive merely because the [d]efendant is unable to pay it."); White v. United States, 330 F.2d 811, 814 (8th Cir. 1964) ("The purpose for bail cannot in all instances be served by only accommodating the [d]efendant's pocketbook and his desire to be free pending possible conviction.").

As Petitioner himself points out, various federal Circuit and district courts have held that it is only when a defendant is detained pretrial merely because they cannot post bail—when the safety of the community or mitigation of flight risk "could reasonably be assured by one of the alternate forms of release"—does that bail potentially become excessive. See, e.g., Pugh, 572 F.2d at 1058. But extensive precedent reveals that this examination concerns not some mathematical formula of a defendant's financial means proportional to the bail set, but rather the State interests supporting the bail amount.

Galen is one of the most current cases applicable to this examination. Galen, 477 F.3d at 652–62. There, the Ninth Circuit determined the defendant's bail was not excessive because "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 (emphasis added); see also Salerno, 481 U.S. at 754; 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.")

In Galen, police arrested the defendant for violating California's domestic violence statute and his bail amount was set at $50,000; however, the sergeant and deputies at the sheriff's station discussed a request to have bail increased. Id. at 656. They supported this increase based on 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, the defendant 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 was not excessive owing to the defendant ability to pay his set bail amount. Id. The Ninth Circuit dismissed this argument because bail is deemed "excessive" when it is set at an amount that is higher than necessary to achieve the State's or Government's purposes; the inquiry is not about whether the amount goes beyond the defendant's means. Id. at 661. The defendant argued his bail was excessive because the amount was 2,000 percent higher than the set default amount. Id. at 662. The Circuit Court dismissed this argument as well and determined, "excessiveness cannot be determined by a general 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 in light of the circumstances of the case. Id.

The rationale in Galen extends back decades. Forty years before Galen, the Ninth Circuit held that "the mere fact that Petitioner may not have been able to pay the bail does not make it excessive." White v. Wilson, 399 F.2d 596, 598 (9th Cir.

1968). In Wilson, 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 prosecution'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. Evidence supporting the increase was the defendant's prior record and the seriousness of the charged offense. Id.

The Eighth Circuit has also determined that "the purpose for bail cannot in all instances be served by only accommodating the [d]efendant's pocketbook and his desire to be free pending possible conviction." White v. United States, 330 F.2d 811, 814 (8th Cir. 1964). The defendant argued that his bail, set at $5,000, was excessive under the Eighth Amendment because of his financial status and loss of freedom while preparing 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 bail was irrelevant; therefore, bail was not excessive. Id.

According to the Fourth Circuit, the "primary purpose of bail is to ensure the presence of the accused at his trial." United States v. Wright, 483 F.2d 1068, 1069.

(4th Cir. 1973); see also Stack v. Boyle, 342 U.S. 1, 72 S. Ct. 1 (1951). In Wright, the defendant was charged with importing and possessing sixty-six (66) 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. However, the Fourth Circuit stated that a trial court makes the determination if 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 this situation, the amount of cocaine seized had a value of $7,500,000, and this was the largest shipment of drugs during this time period. Id. at 1070. Furthermore, the defendant was a flight risk based on the fact that he recently travelled outside of the United States, and the defendant was from Miami, Florida, which is a location that leads to an easy escape. Id. Finally, the district court 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 was not excessive in this case because the overall purpose of bail is to set it at an amount that would ensure the defendant's presence to stand trial. Id.

Following the standard articulated in these prior cases, the Fifth Circuit also held that "a bail setting is not constitutionally excessive merely because a [d]efendant is finically unable to satisfy the requirement." United States v. McConnell, 842 F.2d 105, 108; see Pugh, 572 F.2d at 1053. 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 his assets were frozen which meant he could not make bail at the set amount; the district court judge rejected this motion. Id. at 107. The trial court stated 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 106–08. The defendant's argument would require 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.

The cases presented above firmly demonstrate that bail is only excessive when bail 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 [d]efendant and safety of other persons and of the community." NRS 178.498. Petitioner's excessive bail contentions merely argue that bail is excessive due to financial inability to post it. However, as an initial matter, Petitioner has not actually demonstrated that he cannot post his $250,000 bail. See I AP 061. Moreover, as discussed supra, a defendant's ability or inability to post bail is not a primary factor in evaluating "excessiveness." Rather, 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. Here, the State's interest in protecting the community support a relatively high bail amount.

Further, 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 only 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). 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." See NRS 178.4853. 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.[4]

The factors in statutory bail considerations concern a defendant's future court appearances and with protecting the community from a defendant's future criminal activity. See NRS 178.484(11); NRS 178.4853.

In this case, Petitioner's record demonstrates that he cannot be trusted to appear and that, once released, he has a proven pattern of committing more crimes and thereby endangering the community. See I AP 57–58. A defendant's prior failure(s) to appear are an indication that a defendant poses a flight risk. Case law in other jurisdictions supports the view that prior failures to appear are an important factor in determining if a defendant poses a flight risk. For example, one district

[4] "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.

court ordered a defendant charged with illegal reentry of a removed alien to be detained before trial. United States v. Santos-Flores, 794 F.3d 1088, 1089 (9th Cir. 2015). The district court ordered his detention because if the court released the defendant under the Bail Reform Act, Immigration and Customs Enforcement ("ICE") would detain him and remove him from the country; therefore, the defendant would not appear for future court dates. Id. at 1090.

The Ninth Circuit disputed the reasoning of the district court, but upheld the detention order because the defendant was a flight risk. Id. at 1089. In support of the view that the defendant was a flight risk, the Ninth Circuit presented the following factors: "[the 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..." Id. at 1092. Regarding the prior failure to appear, the defendant failed to offer an explanation for his actions. Id. The Ninth Circuit determined there were no conditions that could reasonably assure the future presence of the defendant. Id. at 1093.

Similarly, in the First Circuit, a magistrate judge ordered a defendant to be detained prior to trial because he was a flight risk. United States v. Sullivan, No. 93-1856, 1993 U.S. App. LEXIS 24317, at 1 (1st Cir. Sep. 22, 1993). Evidence offered to support the defendant was a flight risk included his two Florida convictions for

failing to appear and a Massachusetts conviction for criminal default. Id. at 5. Additionally, the magistrate judge reviewed the defendant's employment status, residency, marital status, and additional factors. Id. at 6. The First Circuit found some positive factors in support of the defendant, but these factors were simply outweighed by the defendant's failures to appear. Id. at 7. Thus, the defendant was deemed a flight risk, and there was no condition that could be imposed to ensure his future appearances. Id. at 8.

Moreover, the Sixth Circuit determined the defendant would not appear at future court dates based on his prior failure to appear. United States v. Arhebamen, 69 F. App'x 683, 683 (6th Cir. 2003). The defendant was charged with one count for failure to appear in a prior criminal case, two counts of making false statements, one count of obstruction, and one count for a false claim of citizenship. Id. at 683–84. The magistrate judge determined the defendant was a flight risk based on his offenses involving fraud, and the defendant failed to appear while on bond; the district court affirmed the judge's determination. Id. at 684. Based on the defendant's prior failure to appear, the Sixth Circuit affirmed the lower courts' determinations that the defendant was a flight risk. Id.

The Tenth Circuit has also held the defendant was a flight risk, and the district court properly supported its finding when the court made the same conclusion. United States v. Smith, 647 Fed. Appx. 863, 866–67 (10th Cir. 2016). In that case,

the defendant was indicted on drug trafficking and money laundering charges, and the defendant challenged his pretrial detention and revocation of a release order. Id. at 864. Despite the defendant's contentions, the evidence in this case proved the defendant was a flight risk, because the defendant had prior failures to appear. Id. at 866. Therefore, the pretrial detention order for the defendant was properly supported. Id. at 867.

In contrast to the above cases, the District of Columbia Circuit Court determined that the lower court's record did not make it apparent the Defendant was a flight risk. United States v. Nwokoro, 651 F.3d 108, 110 (D.C.Cir. 2011). In that case, the defendant challenged his detention order and sought an own recognizance release. Id. at 109. During the defendant's pretrial detention hearing, an Internal Revenue Service agent testified that the defendant had "substantial assets in Nigeria" and these assets could allow the defendant to leave the country. Id. Contrary to this testimony, the defendant did not attempt to flee, had no history of failing to appear, and the lower court made no factual findings that determined the defendant could reach his assets. Id. at 110. Therefore, the district court did not sufficiently show why it believed the government had met its burden that the defendant was a flight risk, and the District of Columbia Circuit remanded the case to allow the lower court to make findings of fact. Id. at 111–12.

Furthermore, the best indicator of future behavior is past behavior. As one federal district court found, "past behavior best predicts future behavior and whether the court can rely on a [d]efendant's good faith promises." Id.; United States v. Vasconcellos, 519 F. Supp. 2d 311, 317 (N.D.N.Y. 2007) (citation omitted). The court stated that there are possible conditions that could be imposed to reduce a defendant's flight and potential danger; however, if a defendant's past behavior indicates that the community would not be safe or the defendant presented a flight risk, then the potential conditions are not enough to afford the defendant's release. Id. Focusing on one of the two defendants, the court found the defendant not only failed to comply with supervisory conditions, but also failed to appear at a court date, resulting in a warrant. Id. at 318.[5] Therefore, his past behavior indicated that he would be a flight risk and an endangerment to the community. Id. at 319. Prior failures to appear are an excellent indication that a defendant may not appear at a future court date, since past behavior is the best indicator of a defendant's future behavior. If a defendant previously failed to appear for a different offense, or failed to appear after release on bond, there is a strong likelihood that the defendant is a flight risk and will continue to not appear at future court dates. Therefore, a

[5] The defendant's 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.

defendant's prior failure(s) to appear should weigh on the determination that a defendant poses a flight risk and consequently, should not be released.

Here, Petitioner clearly cannot be trusted to appear to account for the charges against him on a low- or no-bail setting. Petitioner has at least one prior failure to appear on record. I AP 057. In addition, as the State pointed out to the district court that denied the Motion to Vacate, Petitioner has a history of absconding. I AP 64. He was convicted in 2013, and then fled the state only to be arrested on a fugitive warrant. Id. Finally, as Petitioner potentially faces large habitual criminal treatment, the risk that he will not appear is even greater. I AP 058, 064–65.

Moreover, Petitioner has ties out-of-state; based on his criminal history, including absconding from California to Nevada, Petitioner has connections to other states that exacerbate his risk of flight and failure to appear for future court dates. I AP 064.

Finally, Petitioner poses a risk to the community. [crime]. In addition, Petitioner's criminal history from California demonstrates his likelihood of reoffending if he were released pending charges: he has at least ten (10) felony convictions, including burglary and robbery—the crimes with which he is charged in this case. I AP 015–16.

As such, the bail setting took into account the statutory interests to be protected, including but not limited to Petitioner's flight risk and danger to the community. The instant bail is not excessive nor in any other way unconstitutional.

For all these reasons, this Court's extraordinary intervention is not warranted to reverse the district court's order. The district court set bail after considering the statutory factors and that bail is in no way excessive. As such, the Petition should be denied.

CONCLUSION

Based on the foregoing, the State respectfully requests that the Petition for Writ of Mandamus be DENIED.

Dated this 23rd day of October, 2018.

Respectfully submitted,

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

BY */s/ Krista D. Barrie*
KRISTA D. BARRIE
Chief Deputy District Attorney
Nevada Bar #010310
Office of the Clark County District Attorney
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

AFFIDAVIT

I certify that the information provided in this Answer to Petition for Writ of Mandamus is true and complete to the best of my knowledge, information and belief.

Dated this 23rd day of October, 2018.

BY */s/ Krista D. Barrie*
KRISTA D. BARRIE
Chief Deputy District Attorney
Nevada Bar #010310
Office of the Clark County District Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY AND AFFIRM that this document was filed electronically with the Nevada Supreme Court on October 23, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM PAUL LAXALT
Nevada Attorney General

NANCY M. LEMCKE
CHRISTY L. CRAIG
Deputy Public Defender

KRISTA D. BARRIE
Chief Deputy District Attorney

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 A. WIESE
Eighth Judicial District Court, Dept. XXX
Regional Justice Center, 14th Fl.
200 Lewis Avenue
Las Vegas, Nevada 89101

BY */s/ J. Garcia*
Employee, District Attorney's Office

KDB/Andrea Orwoll/jg