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.

No. 76845

FILED

NOV 08 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER GRANTING MOTION

This petition for a writ of mandamus or habeas corpus challenges a district court order denying petitioner's motion to vacate a pretrial bail/detention order and seeks an order directing the district court to conduct an appropriate hearing to set the amount of bail. We ordered real party in interest to file an answer, which was filed on October 24, 2018. Petitioner has filed a motion for leave to file a reply on the grounds that the petition raises questions of statewide and constitutional import regarding the right to bail and pre-trial detention. Real party opposes the motion on the grounds that NRAP 21 and this court's order directing an answer do not provide for a reply.

Cause appearing, petitioner's motion for leave to file a reply in support of his petition for writ of habeas corpus or mandamus is granted. NRAP 27. The clerk shall file the reply received via e-flex on October 31, 2018.

It is so ORDERED.

Douglas, C.J.

cc: Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney

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REPLY IN SUPPORT OF PETITION FOR A WRIT HABEAS CORPUS OR, IN THE ALTERNATIVE, A WRIT OF MANDAMUS

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COMES NOW AARON FRYE, by and through his counsel, Deputy Public Defenders NANCY M. LEMCKE and CHRISTY L. CRAIG, and hereby submits the instant Reply in Support of Petition for a Writ of Habeas Corpus or, in the Alternative, a Writ Mandamus. This Reply is based on the following memorandum of points and authorities and all papers and pleadings in the separately filed Appendix.

Dated this 30th day of October, 2018.

PHILIP J. KOHN,
CLARK COUNTY PUBLIC DEFENDER
By: */s/ Nancy M. Lemcke*
NANCY M. LEMCKE, #5416
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Attorneys for PETITIONER

POINTS AND AUTHORITIES

I.

STATEMENT OF FACTS/PROCEDURAL HISTORY

Respondent discusses in detail Petitioner's alleged conduct and charges. Answer, p. 2-6. While arguably effective in predisposing this Court believe Petitioner to be a dangerous criminal, it never answers a critical question: So what about that $250,000 bail setting? Is Respondent saying that Petitioner, if disposed to adequate financial resources, is suitable for bailed release? Or is Respondent saying that, given Petitioner's assurances that he cannot pay the $250,000 sum, he must be jailed pending trial?

The absence of any concrete answer to this question illustrates one of the constitutionally significant flaws in a system that fails to require prosecutors to specify, on the record, whether they are seeking pretrial detention and fails to require proof that detention is the least restrictive means of assuring an accused's return to court and community safety. For the poor, the implications of a bail number standing in place of a transparent detention order are profound. This is because bail numbers invariably translate to orders of confinement for the poorest members of the Clark

County population. They are detention mechanisms dressed up as reasonable release conditions.

With his Mandamus Petition, Petitioner seeks to end this unlawful and insidious practice.

II.

JURISDICTION

Habeas relief is appropriate to remedy an unlawful detention, an assertion not disputed by Respondent

The United States Supreme Court has unequivocally stated that "[h]abeas corpus [is] the traditional writ for testing the lawfulness of a person's detention." Pet. of Johnson, 72 S. Ct. 1028, 1030 (1952) *citing* McNally v. Hill, 293 U.S. 131, 137 (1934), overruled in part by Peyton v. Rowe, 391 U.S. 54 (1968). *See* Price v. Johnston, 334 U.S. 266, 269 (1948) ("[t]he writ of habeas corpus . . . has been the judicial method of lifting undue restraints upon personal liberty"). See also Boumediene v. Bush, 553 U.S. 723, 771 (2008) (finding that the "privilege of habeas corpus" is used to "challenge the legality of . . . detention"). The Supreme Court has also found that habeas corpus is not procedurally limited for use in criminal cases (where the probable cause standard would presumably be used to challenge detention). Duncan v. Walker, 533 U.S. 167, 175–76 (2001). *See* Jones v. Cunningham, 371 U.S. 236, 242–43 (1963) (finding that conditions of parole

"enough to invoke the help of the Great Writ. Of course, that writ always could and still can reach behind prison walls and iron bars. But it can do more. It is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty").

Courts have additionally held that Habeas Corpus may be used to challenge pretrial confinement. See Narducci v. State, 952 So. 2d 622, 623–24 (Fla. 4th Dist. App. 2007) (citing Flores v. Cocalis, 453 So.2d 1198 (Fla. 4th DCA 1984)); Good v. Wille, 382 So.2d 408 (Fla. 4th DCA 1980); Dyson v. Campbell, 921 So.2d 692 (Fla. 1st DCA), *review denied,* 933 So.2d 520 (Fla.2006) ("[t]he setting of an excessive bond is the functional equivalent of setting no bond at all, and habeas corpus will lie in those circumstances"). See also People ex rel. Kuby ex rel. Jordan v. Merritt, 947 N.Y.S.2d 454, 455–56 (N.Y. App. Div. 1st Dept. 2012) (citing People ex rel. Rosenthal v. Wolfson, 48 N.Y.2d 230, 231–233 (N.Y. 1979)) (finding that the action of bail fixing is reviewable in a habeas corpus proceeding where "it appears that the constitutional or statutory standards inhibiting excessive bail or the arbitrary refusal of bail are violated"); Ex Parte Victorick, 453 S.W.3d 5, 11–12 (Tex. App.--Beaumont 2014) ("The proper method to challenge a

punitive bail condition is by filing either a motion to reduce bail or an application for a writ of habeas corpus for a bail reduction").

Respondent does not dispute this Court's authority to grant the habeas relief sought here. See generally, Answer, p. 6-8. Where a party allows an issue to stand unchallenged, this Court may infer a concession that the argument has merit. Colton v. Murphy, 71 Nev. 71, 72 (1955); NRAP 31(c). Accordingly, this Court should find that habeas relief is proper, should this Honorable Court find in Petitioner's favor on the merits of his claims.

Alternatively, mandamus relief is appropriate to ensure the lower court's compliance with a constitutionally sound pretrial detention inquiry

Respondent claims that "Petitioner is not entitled to this Court's extraordinary intervention because he has an adequate remedy at law." Answer, p. 7. That adequate remedy at law, according to Respondent, is Petitioner's "Motion to Vacate" filed with the lower court. Answer, p. 7. The ability to file a lower court motion does not amount to an 'adequate remedy at law.' Remedy at law speaks to the ability to prosecute claims before all available Nevada courts. This includes the appellate courts. See Thomas v. Eighth Judicial Dist. Court, 402 P.3d 619 (Nev. 2017) (holding that an appeal generally constitutes an adequate and speedy legal remedy) (internal citations omitted).

The only way for a detainee to seek review of his/her lower court confinement order is to prosecute an extraordinary appeal to this Honorable Court. This Court has rejected as moot challenges to pretrial detention orders deriving from cases ultimately resolved by negotiation. See, e.g., Sherard v. Eighth Jud. Dist. Ct., Supreme Court Case No. 76398 ("We deny the petition as moot because petitioner is no longer in custody and fails to demonstrate that the issue is capable of repetition yet evading review.") (citations omitted) September 14, 2018. So if Petitioner wants to avail himself of the appellate review to which he is entitled, he must do so pre-trial.

Additionally, even if Petitioner could prosecute claims regarding the lawfulness of his pretrial confinement in a post-trial appeal, the relief sought here is still warranted. As this Court has stated, "While an appeal generally constitutes an adequate and speedy remedy precluding writ relief, this Court may nonetheless intervene under circumstances of urgency or strong necessity, or when an important issue of law needs clarification and sound judicial economy and administration favor the granting of the petition." Thomas, 402 P.3d at 619 (internal quotations and citations omitted). The issues raised here are of profound significance in need of immediate review. This Court's resolution of the instant matter has the potential to reshape the

landscape of bail and pretrial detention determinations in Clark County. As such, judicial economy and the sound administration of justice favor resolution of the instant matter via the extraordinary relief sought here.

III.

SUMMARY OF ARGUMENT

The issue before this Honorable Court is one of *process*. Petitioner challenges the *process* by which *de facto* detention orders, cleverly disguised as bail settings, issue in Clark County. In the absence of the constitutionally required *process*, bail settings operating as detention orders, such as the $250,000 bail setting here, violate both Due Process and Equal Protection guarantees. They violate Due Process guarantees because, *inter alia*, they are set in the absence of an adversarial hearing at which the defense is present and at which prosecutors establish clear and convincing evidence that incarceration is the least restrictive way of assuring an accused's return to court and community safety. They violate Equal Protection guarantees because the end result – a bail number rather than a specifically-articulated, transparent detention order – operates as a release condition for the wealthy but a detention order for the poor.

The issue before this Court is *not* whether, on the merits, pretrial detention is the least restrictive means of assuring Petitioner's return to court

and community safety. That is a determination reserved for the trial court, applying the constitutionally required procedure outlined here, on remand.[1]

IV.

ARGUMENT

A. The Substantive and Procedural Due Process Protections Required by Salerno Apply to the States

Respondent asserts that U.S v. Salerno, 481 U.S. 739 (1987) is neither instructive nor controlling here. Answer, p. 8 ("The issue in *Salerno* involved the Federal Bail Reform Act… However, the State of Nevada is not governed by the 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."). With this, Respondent fails to understand the constitutional principles at work in Salerno, and their corresponding application to the states.

In Salerno, the U.S. Supreme Court considered a constitutional challenge to the federal Bail Reform Act. The Bail Reform Act allowed for the pre-trial detention of individuals charged with certain offenses once the government established, at an adversarial hearing, that no release conditions

[1] So Respondent's detailed accounting of Petitioner's purported criminal activity, while helpful in cultivating the perception that he is a really bad guy, bears no relevance to the issue at bar.

could reasonably assure community safety and the accused's return to court. 481 U.S. at 740. The Salerno Court held that, because of these procedural protections, the Bail Reform Act did not violate procedural due process guarantees. Id. The Salerno Court also found that, since the Bail Reform Act's pretrial detention scheme was narrowly tailored to achieve the important government interests of ensuring community safety and ameliorating flight risk, the Act did not violate substantive due process guarantees. Id.

The Due Process Clause – the constitutional provision at issue in Salerno -- was made applicable to the states via the Fourteenth Amendment to the U.S. Constitution. U.S.C.A. V, XIV; See Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489 (1964). So while the Federal Bail Reform Act certainly does not operate as controlling authority over Nevada's bail and pre-trial detention statutes, the constitutional principles articulated in Salerno do.[2]

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[2] Indeed, courts throughout the country have applied Salerno's substantive and procedural due process requirements in assessing the constitutionally of state pretrial detention protocols. See 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 v. Harris County, 251 F.Supp.3d 1052 (S.D. Tex. Apr. 28, 2017); Carlisle v. Desoto County, Mississippi, 2010 WL 3894114,

B. Detention Orders Are Subject To Exacting Constitutional Scrutiny

As set forth in Petitioner's Mandamus Petition, Salerno imposed two interlocking sets of requirements on preventative detention: substantive and procedural.[3] The procedural requirements are necessary to ensure that the substantive ones have been met.

Substantively, Salerno requires that pretrial detention survive heightened constitutional scrutiny. The government may deprive a presumptively innocent person of her physical liberty only if doing so is tailored to forward an important interest. Id. at 746–48. Therefore, the government may detain someone pretrial only if other, less restrictive means are incompatible with serving these important interests.

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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); 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).

[3] Id. at 746 ("This Court has held that the Due Process Clause protects individuals against two types of government action. So-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience' or interferes with rights 'implicit in the concept of ordered liberty.' When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. This requirement has traditionally been referred to as 'procedural' due process.").

Procedurally, Salerno held that orders of detention may be entered after rigorous procedures have been met. These procedures include, but are not necessarily limited to, a "full-blown adversary hearing," (Id. at 740); a heightened evidentiary standard (Id. at 751); and "written findings of fact and a written statement of reasons for a decision to detain." Id. Consistent with its reliance on procedural due-process cases (Id. at 746) (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)), Salerno insists on procedures that are sufficient to ensure that any preventative detention be consistent with *substantive* due process.

1. Pretrial Detention Requires the State to Demonstrate Necessity as a Matter of Substantive Due Process

Because a person's "interest in liberty" is "fundamental," the Supreme Court held that it is a "'general rule' of substantive due process that the government may not detain a person prior to a judgment of guilt in a criminal trial." Salerno, 481 U.S. at 750, 749. Like other constitutional rights, however, the right to pretrial liberty is not absolute: the government may deprive a person of her right to pretrial liberty if the government's interest is sufficiently compelling and the deprivation is narrowly tailored -- meaning that pretrial detention is necessary because alternatives are inadequate -- to serve that interest. Salerno, 481 U.S. at 749, 751 (describing the government interest in preventing serious pretrial crime as "compelling"

and the statute as "careful[ly] delineat[ing] . . . the circumstances under which detention will be permitted"); Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (holding that the government may not infringe "'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.").

Every court to consider the question has held that the government must demonstrate that its "infringement [of pretrial liberty] is narrowly tailored to serve a compelling state interest." Lopez-Valenzuela, 770 F.3d 772, 780 (9th Cir. 2014) (en banc); see also Reem v. Hennessy, No. 17-CV-06628-CRB, 2017 WL 6765247, at *1 (N.D. Cal. Nov. 29, 2017) ("The due process clauses of the Fifth and Fourteenth Amendments bar pretrial detention unless detention is necessary to serve a compelling government interest."); ODonnell v. Harris County, 251 F.Supp.3d 1052, 1156-57 (S.D. Tex. Apr. 28, 2017) (holding that government action infringing pretrial liberty must be the least restrictive means necessary to serve court appearance and community safety); In re Humphrey, 19 Cal. App. 5th 1006, 1028, 1037 (Cal. App. 1st Dist. 2018) (holding that a person may be detained only if "no less restrictive alternative will satisfy" the government's interests because pretrial detention is permissible "only to the degree

necessary to serve a compelling governmental interest"); Brangan v. Commonwealth, 80 N.E.3d 949, 962 (Mass. 2017) (holding that pretrial detention is permissible if "such detention is demonstrably necessary" to meet a compelling interest).

Respondent cites U.S. v. McConnell, 842 F.2d 105, 110 (5th Cir. 1988) for the proposition that a money-bail order is not unconstitutional merely because someone cannot pay it. Answer, p. 24. But that case supports *Petitioner's* argument: as the Fifth Circuit recently explained, McConnell held that a court must explain why a "'particular financial requirement is a *necessary* part of the conditions for release' when setting a bond that a detainee cannot pay." ODonnell v. Harris County, 892 F.3d 147, 160 (5th Cir. 2018) (quoting McConnell, 842 F.2d at 110). Indeed, McConnell stands for the unremarkable proposition -- explained in several other cases -- that an unaffordable money-bail order is equivalent to an order of detention, and that it therefore must be necessary to serve the government's compelling interests.

Similarly, other courts have used the strict scrutiny language to describe the findings required to justify an order to pay unattainable financial conditions. O'Donnell, 251 F. Supp. 3d at 1140 ("[P]retrial detention of indigent defendants who cannot pay a financial condition of

release is permissible only if the court finds, based on evidence and in a reasoned opinion, either that the defendant is not indigent and is refusing to pay in bad faith, or that no less restrictive alternative can reasonably meet the government's compelling interest"); Id. at 1145 (requiring a finding that wealth-based detention "is the only reasonable way to assure the arrestee's appearance at hearings and law-abiding behavior before trial"); Brangan, 80 N.E.3d at 965 (holding that an order requiring an unattainable condition must explain why "the defendant's risk of flight is so great that no alternative, less restrictive financial or nonfinancial conditions will suffice to assure his or her presence at future court proceedings"); Humphrey, 19 Cal. App. 5th at 1026 (same).

2. Adequate Procedural Safeguards Are Required Prior to Ordering Pretrial Detention as a Matter of Procedural Due Process

Respondent claims that lower courts may issue detention orders in the absence of the accused and in the absence of an adversarial hearing on the issue of pre-trial detention. Answer, p. 8 ("Petitioner argues that, before bail is set, an adversarial hearing is required. This is without merit."). With this, Respondent suggests that detention orders can issue in the absence of procedural due process protections. This is false.

Procedural-due-process analysis "proceeds in two steps: We first ask whether there exists a liberty or property interest of which a person has been deprived, and if so we ask whether the procedures followed by the State were constitutionally sufficient." Swarthout v. Cooke, 562 U.S. 216, 219 (2011) (citing Ky. Dep't of Corr. v. Thompson, 490 U.S. 454, 460 (1989)). Petitioner satisfies the first step of the procedural-due-process inquiry because, as explained above, he is being deprived of the "fundamental" "interest in [pretrial] liberty." Salerno, 481 U.S. at 750.

The second step of the procedural-due-process analysis -- determining the procedures required for a valid pretrial detention order -- proceeds under the Mathews v. Eldridge three-part balancing test, pursuant to which a court must consider, for each procedure: (1) "the private interest" at issue, (2) "the risk of an erroneous deprivation" absent the additional safeguard, and (3) the state's interest in not providing it. 424 U.S. 319, 335 (1976).

The balancing of the Mathews factors here establishes that, at a hearing to determine whether a person will be detained prior to trial, the government must provide notice of the critical issues; an inquiry into ability to pay if a financial condition is contemplated; an adversarial hearing at which the arrestee is represented by counsel and has an opportunity to be heard, to present evidence, and to confront evidence offered by the

government; an impartial decision-maker; meaningful consideration of less restrictive alternatives to pretrial detention; and, if the decision-maker issues a transparent or de facto order of detention, findings on the record by clear and convincing evidence that detention is necessary to serve a compelling government interest, and a statement of reasons explaining the decision.

a. When Requiring Financial Conditions, the Court Must Conduct an Inquiry in to Ability to Pay and Make on-the-Record Findings Concerning Ability to Pay.

As a constitutional matter, there are two fundamentally different kinds of financial conditions of release: those that the arrestee can pay, and those that the arrestee cannot pay. A court may not enter an order of release without knowing whether the order will operate as an order of detention. For that reason, procedural due process requires an inquiry into ability to pay.

As a threshold matter, when a court contemplates requiring a secured financial condition of pretrial release, it must provide procedures adequate to determine whether the monetary condition will operate as a detention order. The Supreme Court, the Fifth Circuit, and the Southern District of Texas have held that, if the government seeks to condition physical liberty on a payment, due process requires notice that financial information will be collected and of the nature and significance of the financial information; an inquiry into the person's ability to pay; and findings on the record as to

whether the person has the ability to pay. See Turner v. Rogers, 564 U.S. 431, 447 (2011) (applying the Mathews test and holding that, before the state may jail a person for not paying child support, the government must provide notice that ability to pay is a "critical issue," an opportunity to be heard, and "an express finding by the court that the defendant has the ability to pay"); Bearden v. Georgia, 461 U.S. 660, 673 (1983) (holding that, before the state can revoke probation for nonpayment, it must inquire into whether the nonpayment was willful); U.S. v. Payan, 992 F.2d 1387, 1396 (5th Cir. 1993) (the "court must inquire into the reasons" the person did not pay and determine whether she willfully refused to pay.); ODonnell, 251 F. Supp. 3d at 1144–45 (concluding that Harris County's automatic use of secured money bail, without an inquiry into ability to pay, presents an intolerably high risk of erroneous deprivation of a fundamental right, and that the County failed to demonstrate an interest in not providing these procedural safeguards); Id. at 1161 (requiring an inquiry into ability to pay and notice to arrestees about the significance of the financial information they are asked to provide). If, after notice and inquiry into ability to pay, a court determines that the person cannot pay the contemplated financial condition, then further procedures are required before the court may order the person detained.

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b. Prospective Detainees Must Be Provided Notice, an Adversarial Hearing, an Impartial Decisionmaker, and Findings on the Record Before a Detention Order Can Issue

If, after an inquiry into ability to pay as described above, a court imposes an order of release that a person cannot pay, then it has imposed an order of detention. An order of detention requires additional procedural safeguards to prevent against the erroneous deprivation of a person's fundamental right to freedom of movement.

The procedures due process requires prior to the deprivation of *any* liberty interest are well established.[4] Most of them apply even in the post-conviction context, where a person's liberty interest is less than that of the Petitioner, who is presumptively innocent. In Gagnon v. Scarpelli, 411 U.S. 778, 786 (1973), the Supreme Court explained what due process requires at a probation revocation hearing for a person whose liberty interest has been diminished by a criminal conviction: (a) "notice" of the critical issues to be decided at the hearing; (b) "disclosure" of the evidence presented by the

[4] Respondent devotes considerable briefing to the notion that the Eighth Amendment does not require individualized hearings before bail is set. Answer, p. 10 (citing Fields v. Henry County, 701 F.3d 180, 185 (6th Cir. 2012; and Galen v. County of Los Angeles, 477 F.3d 652, 662 (9th Cir. 2007)). But Petitioner does not assert that the Eighth Amendment requires a particular process. The process demanded by Petitioner is compelled by the Due Process and Equal Protection Clauses.

government at the hearing; (c) an "opportunity to be heard in person and to present witnesses and documentary evidence"; (d) "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)"; (e) a "neutral and detached" factfinder; and (f) findings and reasons on the record of "the evidence relied on." See also Morrissey v. Brewer, 408 U.S. 471, 489 (1972) (holding that "the minimum requirements of due process" require the same six procedural protections in the context of parole revocation of a convicted and sentenced person); Turner v. Rogers, 564 U.S. 431, 447 (2011) (requiring "notice to the defendant that 'ability to pay' is a critical issue," the opportunity to be heard, and findings on the record); see also, e.g., Fuentes v. Shevin, 407 U.S. 67, 80 (1972) ("Parties whose rights are to be affected are entitled to be heard."); Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal., 508 U.S. 602, 617 (1993) ("[D]ue process requires a 'neutral and detached judge in the first instance.'" (quoting Ward v. Village of Monroeville, 409 U.S. 57, 61–62 (1972))); Wolff v. McDonnell, 418 U.S. 539, 564–65 (1974) (requiring a statement of reasons for revocation of good-time credits). Because a bail hearing implicates the fundamental right to bodily liberty prior to trial, each of these safeguards is required.

Notably, Respondent cites Woods v. City of Michigan, 940 F.2d 275, 285 (7th Cir. 1991) for the proposition that federal constitution does not require a hearing before a bail/detention order can issue. Answer, p. 11. Respondent claims that in Woods, "The Seventh Circuit… 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.'" Answer, p. 11. This is false.

Woods involved a civil rights lawsuit brought by a misdemeanor arrestee against various city and county officials, including police officers. Id. at 275. Woods claimed that officials unlawfully required him to post bond following his arrest for reckless driving in contravention of a state statute prohibiting bonded release for individuals charged with that offense. Id. This, Woods argued, violated his due process rights, thereby entitling to civil recompense.

The Woods Court held that, while "satisfied that Woods has pleaded an non-frivolous constitutional claim which is sufficient to invoke the district court's federal question jurisdiction," the Court "need not determine whether there is one because, we find, as did the district court, that Woods has sued the wrong defendants in the first place." Id. at 282. So the Seventh Circuit actually held nothing about the process that need be afforded an

arrestee before a bail setting can occur. The quote Respondent cites, claiming it to be from the majority opinion, is simply dicta from a concurring opinion. Id. at 285. Accordingly, Woods fails to undermine the process demanded by Petitioner and required by the U.S. Constitution.

c. The State Must Prove by Clear and Convincing Evidence that an Arrestee is Either a Flight Risk or a Danger to the Community.

When the government seeks to infringe the fundamental right to bodily liberty prior to or absent a criminal conviction, the government also bears a heightened evidentiary burden. As the Supreme Court explained in its seminal procedural-due-process decision in Addington v. Texas, 441 U.S. 418 (1979), the deprivation of the fundamental right to bodily liberty requires a heightened standard of proof beyond a mere preponderance to ensure the accuracy of the decision. Since Addington, the Supreme Court has never permitted application of a standard lower than "clear and convincing" evidence in any context in which bodily liberty is at stake. And the Conference of Chief Justices, whose membership includes the chief judicial officer of all 50 states and the District of Columbia, has emphasized that arrestees detained due to inability to pay money bail are entitled to the same procedural safeguards afforded to arrestees who are detained pursuant to transparent orders of detention. See Brief of Conference of Chief Justices

as Amicus Curiae in Support of Neither Party, ODonnell, 2018 WL 2465481 (No. 17-20333), 2017 WL 3536467, at *35 (5th Cir. Aug. 9, 2017).

In Addington, the Supreme Court held that, under the Due Process Clause, the standard of proof required before a person can be confined in state custody for mental illness based on the possibility of future dangerousness must be "equal to or greater than" the "clear and convincing" evidentiary standard. Id. at 433. Applying the Mathews balancing test, the Court first articulated the government's interest: "to protect the community from the dangerous tendencies of some who are mentally ill." Id. at 426. However, the Court explained: "Since the preponderance standard creates the risk of increasing the number of individuals erroneously committed, it is at least unclear to what extent, if any, the state's interests are furthered by using a preponderance standard in such commitment proceedings." Id. The Court then balanced the important private interests and concluded that "the individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence." Id. at 427.

In determining what the appropriate due process standard was above a mere preponderance, the Court explained that requiring proof "beyond a

reasonable doubt" was too stringent, particularly because of the non-punitive nature of the commitment and because, "given the uncertainties of psychiatric diagnosis, it may impose a burden the state cannot meet and thereby erect an unreasonable barrier to needed medical treatment." Id. at 432. The Court explained that in other contexts, such as deportation and denaturalization, it had consistently required the intermediate "clear and convincing" standard of proof to protect against erroneous deprivations of particularly important individual interests. Id. at 424. The "clear and convincing" standard enables the government to achieve its interest when it has a convincing basis but rigorously protects the fundamental individual rights at stake. Id.

The Court has reached the same conclusion in every other context in which a person's bodily liberty is at stake. See Santosky v. Kramer, 455 U.S. 745, 756 (1982) ("This Court has mandated an intermediate standard of proof—'clear and convincing evidence' -- when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money."); Cruzan by Cruzan v. Dir., Missouri Dep't of Health, 497 U.S. 261, 282–83 (1990) (explaining that the Court has required the clear and convincing evidence standard in deportation proceedings, denaturalization proceedings, civil commitment proceedings,

proceedings for the termination of parental rights, in cases involving allegations of civil fraud, and in a variety of other kinds of civil cases implicating important interests).

In its next seminal case on the evidentiary standard required for deprivation of bodily liberty, the Court struck down, on due process grounds, Louisiana's statutory scheme for perpetuating the confinement of those acquitted on the basis of insanity in criminal trials. Foucha v. Louisiana, 504 U.S. 71, 82–83 (1992). The Court held that although "[t]he State may confine a mentally ill person if it shows by clear and convincing evidence that the individual is mentally ill and dangerous, [h]ere, the State has not carried that burden." Id. at 80 (quotation and citation omitted). In reaching this holding, Foucha relied on Salerno, 481 U.S. at 749, explaining that the Court had upheld the federal statute's preventive detention mechanism in part because it required findings of dangerousness by the longstanding "clear and convincing" standard. Foucha held: "Unlike the sharply focused scheme at issue in Salerno, the Louisiana scheme of confinement is not carefully limited. Under the state statute, Foucha is not now entitled to an adversary hearing at which *the State must prove by clear and convincing evidence* that he is demonstrably dangerous to the community." 504 U.S. at 81 (emphasis added). Foucha concluded with a

reminder about the doctrinal importance of the "clear and convincing" standard: "[F]reedom from physical restraint being a fundamental right," administrative detention must remain the "carefully limited exception" in our society. Id. at 86, 83.

Lower courts, interpreting Salerno, have consistently required clear and convincing evidence to justify detaining a person prior to trial. Lopez-Valenzuela stuck down the Arizona pretrial detention statute in part because the Arizona law, unlike the federal Bail Reform Act, did not require the government to prove by clear and convincing evidence that an individual arrestee's detention was necessary. 770 F.3d at 784–85. As the Ninth Circuit explained, one of the features that Salerno explicitly relied on was that the Act required the government "to prove by 'clear and convincing evidence' that the individual presented 'a demonstrable danger to the community' and that 'no conditions of release c[ould] reasonably assure the safety of the community.'" Id. at 785. Most recently, in Humphrey, the California Court of Appeal held under the federal Constitution that "[i]f [a] court concludes that an amount of bail the defendant is unable to pay is required to ensure his or her future court appearances, it may impose that amount only upon a determination by clear and convincing evidence that no less restrictive alternative will satisfy that purpose." 19 Cal. App. 5th at 1037. And many

other states have similarly required clear-and-convincing evidence under their own law. See, e.g., State v. Ingram, 165 A.3d 797, 803, 805 (N.J. 2017); State v. Butler, No. 2011–K–0879, 2011 WL 12678268 (La. App. 4th Cir. July 28, 2011), *writ not considered*, 75 So. 3d 442 (La. 2011); Wheeler v. State, 864 A.2d 1058, 1065 (Md. App. 2005); Brill v. Gurich, 965 P.2d 404, 409 (Okla. 1998); Lynch v. U.S., 557 A.2d 580, 581 (D.C. 1989), *and compare* Aime v. Com., 611 N.E.2d 204, 212-14 (Mass. 1993) (striking down preventive detention statute because it did not require the "clear and convincing" burden of proof), *with* Mendonza v. Com., 673 N.E.2d 22, 30 (Mass. 1996) (upholding successor statute and holding that "clear and convincing" evidence standard is required for pretrial detention decisions based on a prediction of future dangerousness).

The intermediate standard of "clear and convincing" evidence should apply regardless of whether the government seeks to detain a person pretrial based on a purported risk of danger to the community or a purported risk of flight because the private right at stake is the same. And the Supreme Court has already held in Santosky, Addington, and Foucha that fundamental private interests require a heightened burden of proof before the government can infringe them, because those interests are "particularly important" and "more substantial than mere loss of money." Santosky, 455 U.S. at 756.

There is no compelling reason that "the degree of confidence our society thinks [it] should have in the correctness of factual conclusions," Id. at 755, should be *lower* when the question is whether a person poses a risk of flight than when the question is whether the person poses a danger to other people in the community.

Analogous case law from the immigration context, where the liberty interest is considered more constrained than in the pretrial context, supports this conclusion. See Singh v. Holder, 638 F.3d 1196, 1203, 1204 (9th Cir. 2011) (requiring clear and convincing evidence regardless of whether the government seeks detention based on flight or dangerousness because "due process places a heightened burden of proof [where] the individual interests at stake . . . are both particularly important and more substantial than mere loss of money."); Lora v. Shanahan, 804 F.3d 601 (2d Cir. 2015) (same), *vacated and remanded on other grounds*, 138 S. Ct. 1260 (2018).

Only one court appears to have addressed in depth whether the standard of proof the government must satisfy to detain someone due to a concern about flight risk is the same as the standard when the concern is community safety. In Kleinbart v. U.S., 604 A.2d 861, 868 (D.C. 1992), the D.C. Court of Appeals held that the "clear and convincing" evidence standard should apply to determinations about whether to order pretrial

detention based on flight risk. The court explained that "[a] defendant's liberty interest is no less -- and thus requires no less protection -- when the risk of his or her flight, rather than danger, is the basis for justifying detention without right to bail." Id. at 870. The court therefore held: "Although the federal Bail Reform Act could be construed -- purely as a matter of statutory construction -- to require only a preponderance standard in risk of flight cases . . . we believe that Salerno's emphasis on the clear and convincing evidence standard to sustain the constitutionality of that statute as applied to danger necessarily carries over, as a requirement of due process, to risk of flight cases." Id. This analysis has been adopted by the American Bar Association's Criminal Justice Standards.[5]

In U.S. v. Motamedi, 767 F.2d 1403 (9th Cir. 1985), a pre-Salerno case, the Ninth Circuit held that the government failed to prove by a "clear preponderance" of the evidence that the defendant was a flight risk and reversed an order of pretrial detention. In the process, the court held that the *statutory* standard for determining flight risk under the Bail Reform Act was

[5] ABA Standard 10-5.8 explains that the "clear and convincing" standard applies to decisions relating to dangerousness and risk of flight. Courts have long looked to the Standards for guidance when answering constitutional questions about the appropriate balance between individual rights and public safety in the field of criminal justice. See, e.g., Padilla v. Kentucky, 559 U.S. 356, 367 (2010); Strickland v. Washington, 466 U.S. 668, 688-89 (1984); U.S. v. Teague, 953 F.2d 1525, 1533 n.10 (11th Cir. 1992).

a "clear preponderance of the evidence" as opposed to the "clear and convincing" standard later upheld in Salerno for the question of dangerousness. Id. at 1406. In reversing the lower court's detention order, the Ninth Circuit made "no attempt to analyze the constitutional ramifications of its decision." Id. at 1412 (Boochever, J., concurring and dissenting in part). Judge Boochever, however, addressed the constitutional question, applying the Mathews balancing test. Id. at 1413–15. He explained:

> [T]he consequences to the defendant from an erroneous pretrial detention are certain and grave. The potential harm to society, although also significant, is speculative, because pretrial detention is based on the possibility, rather than the certainty, that a particular defendant will fail to appear. Moreover, society's interest in increasing the probability of detention is undercut by the fact that it has no interest in erroneously detaining a defendant who can give reasonable assurances that he will appear. I conclude therefore that the injury to the individual from an erroneous decision is greater than the potential harm to society, and that under Addington due process requires that society bear a greater portion of the risk of error: the government must prove the facts supporting a finding of flight risk by clear and convincing evidence.

Id. at 1415.

Given the importance of this legal question to pretrial justice in this country, the case law on the proper standard of proof when determining flight risk is surprisingly thin, perhaps because appellate courts have difficulty resolving pretrial detention issues before cases become moot.

Indeed, the Supreme Court has not ruled on a constitutional issue relating to pretrial detention since Salerno in 1987. Although the issue should be uncontroversial in light of Addington and Foucha, and after balancing the Mathews factors, counsel has been unable to find precedent from any circuit addressing the question of whether, as a matter of due process, the "clear and convincing" standard[6] applies to determinations of pretrial detention based on a risk of flight.[7]

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[6] U.S. v. Cos, No. CR 05-1619 JB, 2006 WL 4061168, at *4 (D.N.M. Nov. 15, 2006), addressed a different question, not presented here: after what length of time does an initially valid order of pretrial detention cease to satisfy due process? In reaching its holding, the court in Cos noted that it could not find federal case law on the burden of proof required in the pretrial detention context: "In researching this issue, the Court has found only one judicial opinion considering which party bears the burden of proof when a court reviews the constitutionality of a pretrial detention." Id. (citing Motamedi).

[7] Counsel has found a number of federal cases after Motamedi that likewise apply a "preponderance" standard to risk of flight determinations as a matter of *statutory interpretation* under the Bail Reform Act, but none of those cases raised, analyzed, or decided the constitutional issue.

In Querubin v. Com., 795 N.E.2d 534 (Mass. 2003), the court considered the standard required for detention based solely on risk of flight and concluded, without balancing the Mathews factors, that a preponderance of the evidence is the appropriate standard. Id. at 544. That decision is not persuasive, first, because the decision was based on cases relying on statutory interpretation and not constitutional law. Second, Querubin's analysis was slim. The court stated in a footnote that, because pretrial detention is "limited and temporary," a lesser standard of proof is sufficient. Id. at 544 n.9. This assertion is unsound both because it is factually wrong (the period of pretrial detention is frequently significant in Clark County, as it is in this case) and because binding case law on the importance of bodily liberty and the devastating effects of brief periods of pretrial detention does

Thus, although the constitutional issue of what ultimate standard of proof must apply at a pretrial detention hearing appears to be one of first impression, the holdings and reasoning in Addington, Foucha, Santosky, Salerno, Lopez-Valenzuela, Kleinbart, and Humphrey demonstrate that the deprivation of the fundamental right to bodily liberty requires a heightened standard of proof with respect to consideration of alternatives to mitigate flight risk or alternatives to mitigate risk of danger to the community.[8]

C. The Lower Court Applied the Wrong Legal Standard and Provided Inadequate Protections, in Violation of Petitioner's Constitutional Rights

Because the lower court failed to require the State to show that pretrial detention was necessary to mitigate an unreasonable risk of flight or danger to the community, the court's order was substantively unconstitutional. And

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not require extended confinement to trigger the heightened standard. Finally, the Massachusetts court itself held in a different case, Aime, that due process requires the "clear and convincing" standard for pretrial detention based on dangerousness. Aime, 611 N.E.2d at 214.

[8] Although the formal rules of evidence need not apply at detention hearings, the findings of clear and convincing evidence on which the government relies for the incapacitation of a presumptively innocent person must meet minimal standards of reliability. See, e.g., United States v. LaFontaine, 210 F.3d 125, 131 (2d Cir. 2000) ("[W]hile the informality of bail hearings serves the demands of speed, the magistrate or district judge must also ensure the reliability of the evidence, by selectively insisting upon the production of the underlying evidence or evidentiary sources where their accuracy is in question." (quotation omitted)); U.S. v. Accetturo, 783 F.2d 382, 389 (3d Cir. 1986); U.S. v. Acevedo-Ramos, 755 F.2d 203, 207-08 (1st Cir. 1985); Reem, 2018 WL 1258137, at *3.

because the lower court did not give notice, hear evidence, or make findings concerning risk of flight and community danger, the court's order was procedurally unconstitutional.

Significantly, Nevada's bail/pretrial detention statutes do not provide for a hearing at which evidence is heard, findings made, and reasons given. Even worse, Nevada law burdens the accused with showing "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." NRS 178.4851. This runs afoul of due process principles in that it impermissibly shifts the burden of persuasion to the defense to show cause why conditioned release is appropriate; and it speaks only to the issue of release *without bail.*[9]

As the authority cited above makes clear, the constitutionally proper inquiry is whether conditioned (or unconditioned) release can satisfy the government's interest in protecting the community and assuring the defendant's return to court; and *the government bears the burden* of

[9] To the extent that NRS 178.4851undermines the protections required by federal constitution, NRS 178.4851 is unconstitutional. See U.S. v. Salerno, 481 U.S. at 750; Stack v. Boyle, 342 U.S. 1, 5, 72 S. Ct. 1 (1951); U.S. Const. amend. V, XIV; Nev. Const. Art. 1, § 8.

establishing that it does not before a defendant can be confined pretrial.[10] Since this did not happen here, this Honorable Court should grant the instant Petition and order that Petitioner be released unless the lower court finds, in a manner consistent with the Due Process Clause, that pretrial detention is necessary reasonably to ensure Petitioner's presence at trial or the safety of the community.

V.

CONCLUSION

Petitioner's $250,000 bail setting amounts to a *de facto* detention order as he can not pay that bail and, consequently, remains jailed at the Clark County Detention Center. Petitioner's bail was set upon execution of a post-indictment arrest warrant, in Petitioner's absence and in the absence of an adversarial detention hearing. The lower court found no fault with this process, and refused to correct it by conducting the constitutionally required detention inquiry. At no time during the pendency of these proceedings has a judge found clear and convincing proof, following an adversarial hearing,

[10] See also, Lopez-Valenzuela v. Arpaio, 770 F.3d at 785-86 (9th Cir. 2014) (*en banc*) (finding Arizona law establishing a blanket prohibition on pretrial release for any undocumented immigrants was unconstitutional because it did not require the state to offer convincing – and individualized – rationales for detention); Simpson v. Miller, 387 P.3d at 1277-78 (Ariz. 2017) (finding an Arizona statute unconstitutional that required pretrial detention on all sex-related charges because the statute did not provide for individualized determination of dangerousness).

that pretrial detention is the least restrictive means of assuring Petitioner's return to court and ensuring community safety. Petitioner's continued detention in the absence of such a determination violates his constitutional rights.

VI.

RELIEF REQUESTED

For the foregoing reasons, Petitioner requests that this Honorable Court issue a Writ of Mandamus directing Respondent Judge Jerry Wiese to grant his Habeas Petition/Motion to Vacate Detention Order. At a minimum, Petitioner requests that this Honorable Court enter an Order directing Respondent to vacate the current detention order and conduct the constitutionally required detention inquiry, if prosecutors elect to seek Petitioner's continued incarceration on remand.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 30th day of October, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM LAXALT
STEVEN S. OWENS

NANCY M. LEMCKE
CHRISTY L. CRAIG
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:

JERRY WIESE
District Court, Dept. XXX
200 Lewis Avenue
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BY */s/ Carrie M. Connolly*
Employee, Clark County Public Defender's Office