

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSE VALDEZ-JIMINEZ,

Petitioner,

vs.

**THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF CLARK;
AND THE HONORABLE MARK B.
BAILUS, DISTRICT JUDGE,**

Respondents,

and

THE STATE OF NEVADA,

Real Party In Interest.

Case Nos. 76417
Electronically Filed
Jun 18 2019 03:02 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

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.

Case Nos. 76845

NATHAN GRACE,
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF CLARK;
AND THE HONORABLE MICHAEL
VILLANI, DISTRICT JUDGE,
Respondents,

and

THE STATE OF NEVADA,
Real Party in Interest.

Case Nos. 76947

PETITIONERS' OPPOSITION TO
MOTION TO DISMISS

COMES NOW Petitioners AARON FRYE and NATHAN GRACE,
by and through their attorneys, NANCY LEMCKE, Deputy Clark County
Public Defender, and CHARLES GERSTEIN, Esq., and hereby oppose
Respondent's Motion to Dismiss their Petitions from the consolidated
Petitions pending before this Honorable Court.

This Opposition is based upon the following Memorandum and all
papers and pleadings on file herein.

DATED this 18th day of June, 2019.

DARIN IMLAY
CLARK COUNTY PUBLIC DEFENDER

By /s/ Nancy M. Lemcke
NANCY M. LEMCKE, #5416
Deputy Public Defender
309 So. Third Street, Suite #226
Las Vegas, Nevada 89155-2610
(702) 455-4685

/s/ Charles Gertstein
CHARLES GERTSTEIN, Esq.
(admitted *pro hac vice*)
CIVIL RIGHTS CORPS
910 17th Street NW, Suite 200
Washington, D.C. 20006
(202) 670-4809

I. ARGUMENT

Respondent seeks to dismiss the Petitions of Aaron Frye and Nathan Grace from the consolidated action here, which challenges the lawfulness of pretrial confinement orders. Mr. Frye pleaded guilty and is awaiting sentencing on July 16, 2019. Mr. Grace pleaded guilty and was sentenced on December 18, 2018. Respondent asserts that the guilty pleas render moot Petitioners' unlawful pretrial confinement claims. Because these cases are capable of repetition, yet evading review, this Court should deny Respondent's motion to dismiss.

This Court may consider a claim that is otherwise moot "if it involves a matter of widespread importance that is capable of repetition yet evading review." Personhood Nevada v. Bristol, 126 Nev. 599, 602 (2010). The "capable of repetition yet evading review" doctrine applies "when the duration of the challenged action is 'relatively short' and there is a likelihood that a similar issue will arise in the future.'" Traffic Control Servs. v. United Rentals, 120 Nev. 168, 171-72 (2004) (citing Binegar v. District Court, 112 Nev. 544, 548 (1996)). Unlike federal courts, see Murphy v. Hunt, 455 U.S. 478, 482-83 (1982), Nevada courts hear cases that are capable of repetition regardless of whether those cases are capable of repetition to the petitioner himself, Binegar, 112 Nev. at 549 (holding that

challenge to reciprocal-discovery statute was justiciable “because the defendant’s case will reach a verdict before this court can evaluate the statute” without discussion of whether statute will apply again to petitioner).

Challenges to pretrial practices in criminal cases are paradigmatically capable of repetition yet evading review: This Court may review an individual case before it becomes moot only if the Court can hear the case and issue a decision between a petitioner’s arrest and the final disposition of his criminal case. Given the short and uncertain duration of criminal cases (which may resolve without notice on a plea bargain at any time), this Court and courts across the country¹ routinely hold that challenges to pretrial practices are justiciable after a petitioner’s trial or guilty plea. Id.; State v. Washoe Co. Public Defender, 105 Nev. 299, 301 (1989).

This Court should decide this case because the legal issues it presents would otherwise evade this Court’s review, and because they are of widespread importance and are likely to arise in many future cases.

¹ State v. Wein, 417 P.3d 787, 791 (Ariz. 2018), cert. denied sub nom. Arizona v. Goodman, 139 S. Ct. 917 (2019); State v. Segura, 321 P.3d 140, 146 (N.M. App. 2014), overruled on other grounds by State v. Ameer, 2018-NMSC-030 ¶ 20 (N.M. 2018); State v. LeDoux, 770 N.W.2d 504, 511 (Minn. 2009); Smith v. Leis, 835 N.E.2d 5, 7 (Ohio 2005); Ex parte D.W.C., 1 S.W.3d 896, 896 (Tex. App. 1999); State v. Orlik, 595 N.W.2d 468, 470 (Wis. App. 1999); Mallery v. Lewis, 678 P.2d 19, 26 (Idaho 1983); United States v. Edwards, 430 A.2d 1321, 1324 n.2 (D.C. 1981); Wickham v. Fisher, 629 P.2d 896, 899 (Utah 1981).

The legal issues in this case evade this Court's review.

Most pretrial confinement orders are short in duration—often 90 days or less. See generally Exhibit A at 1-2. Many cases are resolved by trial or guilty plea within that time, id., and, in some cases, the issue of pretrial confinement resolves even quicker, as detainees are sometimes released from custody before sentencing pursuant to negotiations, id. at 2-3.

The short duration of unlawful pretrial confinement orders makes it difficult, if not impossible, for this Court to review those orders. After an unlawful detention order issues in justice court, the detainee may challenge that order only before the appropriate district court. Id. at 1. The district courts often defer ruling until transcripts of the justice court proceedings are produced. Id. at 1-2. This takes time: While some justice courts will sign orders directing expedited transcript production, others will not. Id. Once the district court has ruled, detainees may seek this Court's review. But this too takes time—time to prepare a briefing submission and the accompanying appendix. Finally, for complex issues like those presented in this case, this Court needs time as well. A case may be heard before it becomes moot only if everything described in the above paragraph is concluded before a detainee's criminal case is resolved, which can happen at any time, and often happens within a mere 90 days. Absent application of the capable-of-

repetition exception to the mootness doctrine, this Court will be deprived of its ability to give much needed guidance to lower courts on pretrial-detention issues.

Respondent's only arguments against the capable-of-repetition exception² are (1) that "[t]he relief requested by [petitioners] . . . can no longer be granted," and (2) that "the issue will not evade review . . . because Petitioner Valdez-Jimenez will remain as the only party for whom the Court can grant any relief." Resp.'s Mot. at 4. Respondent's first argument is tautological: In every case that falls within the capable-of-repetition exception, the relief originally requested is unavailable. Otherwise, there would be no need for an exception. And Respondent's second argument is based on a false premise: This Court has scheduled oral argument for after

² Respondent argues as a separate matter that "[b]y pleading guilty, Petitioners Frye and Grace have waived or forfeited their right to pursue a remedy for perceived errors occurring before they entered guilty pleas." Resp.'s Mot. at 5. Respondent relies on a line of cases, beginning with Tollett v. Henderson, 411 U.S. 258, 267 (1973), holding that guilty pleas waive challenges to the lawfulness of practices (such as searches and seizures, *id.*) that occurred prior to the guilty plea unless those practices influenced the voluntariness of the guilty plea. This argument fails. Respondent's cases involve defendants seeking to overturn guilty pleas on the basis of conduct that preceded them, *id.*; here, Petitioners do not (in this proceeding) challenge their convictions, but instead challenge their unlawful pretrial confinement, which is separate from (and cannot be raised as a defense in) their criminal prosecutions. *E.g.*, Gerstein v. Pugh, 420 U.S. 103, 108 n.9 (1975). And the capable-of-repetition doctrine allows this Court to consider Petitioners' challenges to their pre-conviction detention, which challenges are unaffected by Petitioners' subsequent guilty pleas.

Petitioner Valdez-Jimenez's currently scheduled criminal trial. By the time this Court hears this case, Petitioner Valdez-Jimenez will likely be in the same position as Petitioners Grace and Frye. This case falls within the capable-of-repetition exception, and this Court should hear it on the merits.

The legal issues in this case are of widespread importance, and the challenged actions continue to repeat.

The legal issues presented by this case are of widespread importance. Every person arrested in this State is entitled to a fair and constitutional bail determination, and the justice and district courts of this State need guidance from this Court on how to manage bail systems in compliance with the United States and Nevada Constitutions.

Absent this Court's intervention, the action challenged here will repeat. Over the past year, the Clark County Public Defender's Office prosecuted numerous challenges to detention orders similar, if not identical, to those at issue here (a random sampling of which is included in Exhibit A). See generally Exhibit A at 2-213.

As these petitions reveal, the lower courts regularly fail to conduct the constitutionally required bail inquiry compelled by, inter alia, United States v. Salerno, 481 U.S. 739 (1987). The lower courts often issue indictment warrants with money-bail orders in the absence of the accused and defense counsel. On those occasions where the accused and counsel are present to

be heard on the issue of custody, the courts do not require prosecutors to specify whether they are seeking detention or conditioned release when they make money-bail requests. The courts do not conduct adversarial hearings or make findings regarding the least restrictive means of managing flight risk and community safety. And the courts do not make findings regarding the accused's financial means and ability to pay money bail. For the indigent, the result is often the same: they end up confined pursuant to an unattainable money-bail order, which is legally and practically equivalent to an order of detention, without the findings and safeguards required by United States Constitution. Almost without exception, the unlawful detention protocol employed in Clark County continues unabated. This Court should hear this case on the merits.

II.

CONCLUSION

The Petitions of Mssrs. Frye and Grace represent two of the many habeas or mandamus challenges to Clark County's money-bail protocol brought by the Clark County Public Defender's Office. That protocol allows prosecutors to seek money-bail orders without accounting for the impact on an arrestee's custody status. No one ever inquires, on the record, whether an arrestee can pay a particular money-bail. Arrestees who cannot pay end up

jailed. And they end up jailed without a judge finding sufficient proof that detention is the least restrictive means of managing flight risk and assuring community safety. This practice violates the United States and Nevada Constitutions, and it will continue unabated without this Court's review. For this reason, Petitioners Frye and Grace respectfully request that this Honorable Court deny Respondent's Motion to Dismiss their Petitions as moot and resolve their claims on the merits.

Dated this 18th day of June, 2019.

Respectfully submitted,
DARIN IMLAY
CLARK COUNTY PUBLIC DEFENDER

By /s/ Nancy M. Lemcke
NANCY M. LEMCKE, #5416
Deputy Public Defender
309 So. Third Street, Suite #226
Las Vegas, Nevada 89155-2610
(702) 455-4685

/s/ Charles Gerstein
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(*pro hac vice*)
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Washington, D.C. 20006
(202) 670-4809

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 18th day of June, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service

List as follows:

AARON FORD
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:

HON. MARY KAY HOLTHUS
District Court, Dept. XVIII
200 Lewis Avenue
Las Vegas, NV 89101

HON. JERRY WIESE
District Court, Dept. XXX
200 Lewis Avenue
Las Vegas, NV 89101

HON. MICHAEL VILLANI
District Court, Dept. XVII
200 Lewis Avenue
Las Vegas, NV 89101

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

EXHIBIT A

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Hernandez, Julio, DC Case C-18-333932-W	132-189
Johnson, Cierra, DC Case C-18-334395-W	004-041
Mactler, Clancy, DC Case C-18-333496-W	094-131
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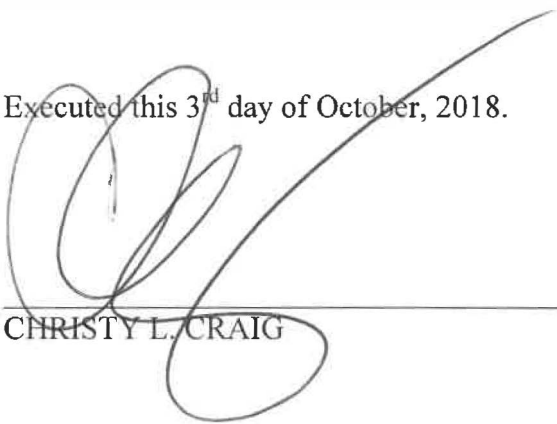
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8. We initiated this litigation first in various Clark County Justice Courts. When those challenges failed, we petitioned the District Courts for habeas and/or mandamus relief. Most of the District Courts required transcripts of the challenged Justice Court proceedings. While a few Justice Courts granted our requests for expedited transcript production, others did not. Accordingly, in addition to the several days it took to file and secure hearing dates for our District Court petitions, the hearings were often delayed due to a lack of timely produced Justice Court transcripts.
 9. We also challenged the propriety of bail settings initiated at grand jury indictment returns in the absence of the defendant and counsel. We challenged this practice, much like our challenges to the Justice Court bail settings/detention orders, by prosecuting habeas and/or mandamus petitions to the District Courts.
 10. Once a District Court habeas petition was denied in whole or in part, we then prepared habeas and/or mandamus petitions to the Nevada Supreme Court. Preparation of these briefing submissions was, and is, time consuming. Additionally, all Nevada Supreme Court petitions require preparation of an appropriate appendix consisting of relevant lower court records. This includes, amongst other things, transcripts of the lower court proceedings. Procurement of these transcripts often takes several days, if not longer.
 11. By the time the CCPD's Office could adequately prepare a matter for briefing to the Nevada Supreme Court, the defendant often obtained relief in the form of a negotiated resolution or otherwise. This meant that issues deriving from unlawful detention orders issued in Clark County routinely avoided review by the Nevada Supreme Court. But they nonetheless repeated.
 12. A sample of cases in which the CCPD brought constitutional challenges to Clark County's bail protocol that have avoided review by this court due to case resolution or other dispensation of relief include the following:
 13. Johnson, Cierra. DCT Case No. C-18-334395-W. JCT Case No. 18F14482X.
August 24, 2018: Emergency Petition for Writ of Habeas Corpus filed (challenging propriety of bail setting/detention order).
August 29, 2018: Petition denied.
September 5, 2018: Defendant released when prosecutors continued preliminary hearing.
 14. Couyette, Nache. DCT Case No. C-18-334261-1. JCT Case No. 18F13328X.
August 24, 2018, Motion to Vacate Detention Order Filed (challenging propriety of bail setting/detention order).
August 23, 2018: Defendant plead guilty.
August 28, 2018: Motion Denied.
September 04, 2018, Petition denied.

- 1 15. Mactler, Clancy Patrick. DCT Case No. C-18-333496-W. JCT Case No. 18F12108X.
2 July 17, 2018: Emergency Petition for Writ of Habeas Corpus filed (challenging
3 propriety of bail setting/detention order)
4 July 23, 2018: Petition denied as moot.
5 July 23, 2018: Defendant plead guilty.
- 6 16. Hernandez, Julio. DCT Case No. C-18-333932-W. JCT Case No. 18F14299X.
7 August 07, 2018: Emergency Petition for Writ of Habeas Corpus filed
8 (challenging propriety of bail setting/detention order).
9 August 10, 2018: Defendant released on medium level court ordered electric
10 monitoring.
11 August 24, 2018: Petition denied.
- 12 17. Resendez, Alfonso. DCT Case No. C- 18-332635-W. JCT Case No. 18M13923X.
13 June 08, 2018: Emergency Petition for Writ of Habeas Corpus filed (challenging
14 propriety of bail setting/detention order)
15 June 07, 2018, Defendant released when the criminal complaint had not been
16 filed.
17 August 08, 2018: Petition denied.

18 I declare under penalty of perjury that the foregoing is true and correct to the best of my
19 knowledge and belief. NRS 53.045.

20 Executed this 3rd day of October, 2018.

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23 CHRISTY L. CRAIG
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08/13/2018 Result: Motion Denied
 08/13/2018 **Minute Order - Department 03**
 08/13/2018 **Motion**
by Defense to vacate detention order and release the defendant from custody - Objection by State - Motion Denied
 08/13/2018 **Bail Reset - Cash or Surety**
Counts: 001; 002 - \$7,500.00/\$7,500.00 Total Bail
 08/13/2018 **Release Order - Court Ordered Bail AND House Arrest**
Counts: 001; 002
 08/13/2018 **Release Order - from Electronic Monitoring** (Judicial Officer: Pro Tempore, Judge)
 08/13/2018 **Future Court Date Stands**
08/21/18 at 930 am
 08/15/2018 **Ex Parte Order**
expedited ex parte order for transcript
 08/21/2018 **Preliminary Hearing** (9:30 AM) (Judicial Officer Letizia, Harmony)
In Custody
Parties Present
 Result: Matter Continued
 08/21/2018 **Side Bar Conference Held**
 08/21/2018 **Motion by Defense for an O.R. Release**
Objection by State - Denied
 08/21/2018 **Bail Stands - Cash or Surety**
Counts: 001; 002 - \$7,500.00/\$7,500.00 Total Bail
 08/21/2018 **Release Order - Court Ordered Bail AND House Arrest**
Counts: 001; 002
 08/21/2018 **Minute Order - Department 03**
 08/21/2018 **Motion to Continue - Defense**
Granted
 08/21/2018 **Transcript of Proceedings**
 09/05/2018 **Preliminary Hearing** (9:30 AM) (Judicial Officer Letizia, Harmony)
In Custody
Parties Present
 Result: Matter Continued
 09/05/2018 **Bustos Motion**
Granted State Witness was unavailable for today's hearing.
 09/05/2018 **Preliminary Hearing Date Reset**
 09/05/2018 **Release Order - Court Ordered EMP - Medium** (Judicial Officer: Letizia, Harmony)
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 09/05/2018 **Motion**
by Defense to have case dismissed - Denied
 09/05/2018 **Bail Condition**
Stay Away From Las Vegas Strip
 09/05/2018 **Motion by Defense for an O.R. Release**
with Electronic Monitoring - Granted
 09/05/2018 **Minute Order - Department 03**
 09/05/2018 **Motion to Continue - State**
Granted
 09/19/2018 **Preliminary Hearing** (9:30 AM) (Judicial Officer Letizia, Harmony)
Electronic Monitoring - Medium Level

Case Information

C-18-334395-W | In the Matter of the Petition of Cierra Johnson

Case Number	Court	Judicial Officer
C-18-334395-W	Department 10	Jones, Tierra
File Date	Case Type	Case Status
08/24/2018	Criminal Writ	Open

Party

Respondent	Active Attorneys ▼
State of Nevada	Attorney
	Albritton, Alicia A.
	Retained
	Lead Attorney
	Wolfson, Steven B
	Retained
Petitioner	Active Attorneys ▼
Johnson, Cierra	Attorney
	Craig-Rohan,
	Christy L.
	Retained
	Lead Attorney
	Public Defender
	Public Defender

Events and Hearings

08/24/2018 Petition ▼

Petition

Comment

Emergency Petition for Writ of Habeas Corpus or in the
Alternative, Motion to Vacate Detention Order

08/28/2018 Opposition ▼

Opposition - OPPS (CIV)

Comment

State's Opposition To Defendant's Emergency Petition For Writ
Of Habeas Corpus Or In The Alternative Motion To Vacate
Detention Order

08/29/2018 Petition ▼

Minutes - Petition

Judicial Officer

Jones, Tierra

Hearing Time

8:30 AM

Result

Denied

Comment

Petitioner's Emergency Petition for Writ of Habeas Corpus or, in the
Alternative, Motion to Vacate Detention Order (Custody Status Issue)

Parties Present ▲

Respondent

Attorney: Albritton, Alicia A.

Petitioner: Johnson, Cierra

Attorney: Craig-Rohan, Christy L.

09/06/2018 Order ▼

Order - ORDR (CIV)

Comment

Order Denying Defendant's Emergency Petition for Writ of
Habeas Corpus or, in the Alternative, Motion to Vacate Detention
Order

09/06/2018 Ex Parte Order ▼

Ex Parte Order - EXPR (CIV)

Comment
Expedited Ex Parte Order For Transcript

09/10/2018 Notice of Entry of Order ▼

Notice of Entry of Order - NEOJ (CIV)

Comment
Notice of Entry of Order

Financial

No financial information exists for this case.

Documents

Petition
Opposition - OPPS (CIV)
Minutes - Petition
Order - ORDR (CIV)
Ex Parte Order - EXPR (CIV)
Notice of Entry of Order - NEOJ (CIV)

Heather S. Linn
CLERK OF THE COURT

PHILIP J. KOHN, PUBLIC DEFENDER
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CHRISTY CRAIG, DEPUTY PUBLIC DEFENDER
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Attorneys for Defendant

DISTRICT COURT, LAS VEGAS
CLARK COUNTY, NEVADA

In the Matter of the Application of
CIERRA JOHNSON

for a Writ of Habeas Corpus.

DCT. CASE NO. C-
JCT. CASE NO. 18F14482X
DEPT. NO. X

C-18-334395-W

DATE:
TIME:

8-29-18 at 8:30 AM

EMERGENCY PETITION FOR WRIT OF HABEAS CORPUS OR, IN THE
ALTERNATIVE, MOTION TO VACATE DETENTION ORDER
(Custody status issue)

TO: The Honorable Judge of the Eighth Judicial District Court of
The State of Nevada, in and for the County of Clark

The Petition of CIERRA JOHNSON, submitted by Nancy M. Lemcke Deputy Public
Defender, as attorney for the above-captioned individual, respectfully affirms:

1. That she is a duly qualified, practicing and licensed attorney in the City of
Las Vegas, County of Clark, State of Nevada.

2. That Petitioner makes application for a Writ of Habeas Corpus or, in the
Alternative, a Writ of Mandamus/Prohibition; that the place where the Petitioner is imprisoned
actually or constructively imprisoned and restrained of his liberty is the Clark County Detention
Center; that the officer by whom he is imprisoned and restrained is Joe Lombardo, Sheriff.

3. That the imprisonment and restraint of said Petitioner is unlawful in that:
Petitioner was not afforded the constitutionally mandated detention hearing to which she is
entitled.

1 4. That Petitioner authorized the Clark County Public Defender's Office to
2 commence this action.

3 WHEREFORE, Petitioner prays that this Honorable Court issue an order directing
4 the County of Clark to issue a Writ of Habeas Corpus directed to the said Joe Lombardo, Sheriff,
5 commanding him to bring Petitioner before your Honor, and return the cause of his
6 imprisonment.

7 DATED this 24th day of August, 2018.

8
9 PHILIP J. KOHN
10 CLARK COUNTY PUBLIC DEFENDER

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12 By: /s/ Christy Craig
13 Christy Craig #6262
14 Deputy Public Defender
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 COMES NOW Petitioner, CIERRA JOHNSON, by and through her counsel, Christy
3 Craig, Deputy Clark County Public Defender, and submits the following Points and Authorities
4 in Support of the instant Emergency Petition for a Writ of Habeas Corpus or, in the Alternative,
5 Motion to Vacate Detention Order.

6 **FACTS AND PROCEDURAL HISTORY**

7 On August 5, 2018 Petitioner was arrested without a warrant on suspicion of Robbery
8 and Conspiracy to Commit Robbery. On August 6, 2018, Justice of the Peace Letizia reviewed
9 police reports and found probable cause for Petitioner's arrest. At the same time, in Petitioner's
10 absence and in the absence of a criminal complaint, Judge Letizia set bail in the amount of \$10,000.
11 Petitioner, an indigent defendant, could not pay that bail. Accordingly, she remained jailed at the
12 Clark County Detention Center.

13 On August 7, 2018, Petitioner was brought before Judge Letizia for an initial appearance.
14 Bail remained at \$10,000 with medium level electronic monitoring.

15 On August 13, 2018 Petitioner's Motion to Vacate Detention Order was heard. Petitioner
16 objected to her ongoing detention based upon (1) the unlawful manner in which the magistrate
17 issued the initial bail/detention order in Petitioner's absence; (2) the court's failure to make record
18 of the reasoning underlying the grant of bail with regard to statutory consideration including the
19 financial ability of the Petitioner to give bail and the relationship to community safety and ensuring
20 return to court and (3) the magistrate's refusal to conduct the constitutionally-required detention
21 hearing prior to issuing a de facto detention order.

22 Petitioner noted that she is currently unemployed (but could find employment if released),
23 unable to borrow funds from local friends and family and essentially without resources. The court
24 reduced bail to \$7,500 along with house arrest in the event she was able to post bail. The court
25 failed to make record of the reasoning underlying the grant of bail with regard to statutory
26 considerations including the financial ability of Petitioner to give bail and the relationship of the
27 bail amount set to community safety and ensuring return to court. The court acknowledged
28

1 unattainable bail setting noting “if she can’t make it, well then she’s going to remain in custody
2 until the time of the preliminary hearing.” (August 13 transcript, pg. 12, 19-20).

3 Cierra Johnson remains in custody at the Clark County Detention Center because
4 the current release conditions are unattainable. This amounts to a pretrial detention order. See
5 U.S. v. Mantecon-Zayas, 949 F.2d 548, 550 (1st Cir. 1991); ODonnell v. Harris County, 251
6 F.Supp.3d 1052, 1143-44 (S.D. Tex. Apr. 28, 2017) (holding that secured money bail set in an
7 amount that an arrestee cannot afford is constitutionally equivalent to an order of detention).
8 Pretrial detention orders violate due process unless they are preceded by a full-blown adversarial
9 hearing at which the State establishes clear and convincing evidence that preventative detention
10 is the least restrictive means of protecting the community and ensuring the accused’s appearance
11 in court. U.S. v. Salerno, 481 U.S. 739, 750, 107 S. Ct. 2095 (1987). They also violate equal
12 protection guarantees if, in the absence of such a hearing, bail is imposed as a release condition
13 and is unattainable. See ODonnell v. Harris Co., 251 F.Supp.3d 1052, 1143-44 (S.D. Tex. Apr.
14 28, 2017). (finding that the Equal Protection Clause prohibits pretrial detention solely because of
15 a defendant’s inability to afford bail). Notably, any release condition that exceeds a purported
16 threat posed by a particular defendant violates the Eighth Amendment’s prohibition on excessive
17 bail. Salerno, 481 U.S. at 754.

18 Petitioner’s current detention order is unlawful because 1) she did not receive a full-
19 blown adversarial hearing regarding her release in that the State did not show by clear and
20 convincing evidence that there are no release conditions that could reasonably mitigate danger to
21 the community and ensure the her appearance in court, (2) the court failed to make record of the
22 reasoning underlying the grant of bail with regard to statutory consideration including the
23 financial ability of Petitioner to give bail and the relationship to community safety and ensuring
24 return to court and 3) the unattainable bail setting did not take into consideration her ability to
25 pay bail.

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The current detention order violates Petitioner's constitutional rights in that:

I. At the Probable Cause Determination, the lower court issued a *de facto* detention order, without Petitioner's presence, by setting bail that Petitioner cannot make. This order violates Petitioner's Due Process and Equal Protection rights, as well as the constitutional prohibition on excessive bail, and Nevada law; and

II. At the Initial Appearance, the lower court issued a detention order without a full hearing on whether the State had demonstrated that detention was the least restrictive means of assuring community safety and ensuring the accused's return to court. This order violates Petitioner's Due Process and Equal Protection rights, as well as the constitutional prohibition on excessive bail, and Nevada law.

III. At the August 13, 2018 hearing on Petitioner's Motion To Vacate Detention Order the state failed to request preventative detention instead acquiescing to release with a bail a condition of release. The court failed make record of the reasoning underlying the grant of bail with regard to statutory consideration including the financial ability of the Petitioner to give bail and the relationship of the bail amount set to community safety and ensuring return to court instead issued a *de facto* detention order by setting bail that Petitioner cannot make. This order violates Petitioner's Due Process and Equal Protection rights, as well as the constitutional prohibition on excessive bail, and Nevada law.

LEGAL STANDARD

As set forth more fully below, Petitioner's incarceration is unlawful. Pursuant to NRS 34.360, "Every person unlawfully committed, detained, confined or restrained of his or her liberty . . . may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment or restraint." Additionally, under NRS 33.170, "a writ of mandamus shall issue in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law." A writ of mandamus is available to compel the performance of an act which the law requires as a duty

1 resulting from an office, trust or station¹ or to control an arbitrary or capricious exercise of
2 discretion.² With the instant Emergency Petition, Petitioner seeks a Writ of Habeas Corpus
3 directing the Clark County Sherriff to release her from custody unless this Court finds, following
4 an adversarial hearing, clear and convincing evidence that preventative detention is the least
5 restrictive means of assuring Petitioner's return to court and assuring community safety.

6 SUMMARY OF ARGUMENT

7 The protocol by which pretrial detention orders are promulgated in Clark County is
8 unlawful. First, the procedure by which a criminal matter is subject to a probable cause review
9 following arrest is unlawful. This includes determinations regarding pretrial detention, which are
10 decided in the absence of the accused and often involve use of a standardized bail schedule.
11 Second, Clark County's ongoing, systemic use of bail as a tool of pretrial *confinement* rather
12 than *release* is also unlawful. There are two principal constitutional problems with detaining a
13 person prior to trial simply because he cannot make a monetary payment: (1) jailing someone
14 solely because he cannot pay a sum of money without making a finding that he is able to pay
15 infringes a fundamental right solely on the basis of wealth in violation of the Equal Protection
16 and Due Process Clauses; and (2) jailing someone on an unattainable financial condition violates
17 the Constitution because it deprives a presumptively innocent person of the fundamental right to
18 liberty without complying with the substantive and procedural requirements of a valid order of
19 detention under the Due Process Clause. Jailing someone for failing to pay a sum of money
20 requires a procedurally proper finding that the person is able, but refuses, to pay the specified
21 sum *or* that no release conditions exist to satisfy the government's compelling interest in
22 assuring community safety and ensuring the accused's return to court. Absent such a
23 procedurally proper hearing (the constitutionally mandated components of which are discussed
24 below) any *de facto* detention order, such as that at issue here, violates the Petitioner's
25 constitutional rights.

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27 ¹ See NRS 34.160

28 ² See Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981).

ARGUMENT

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

A. The Due Process Clause

The Due Process Clauses of the U.S. and Nevada Constitutions provide that “[n]o person shall . . . be deprived of life, liberty, or property without due process of law.” U.S. Const. amend. V;³ Nev. Const. Art. 1, §8. Due Process has two components: substantive and procedural. Substantive due process “prohibits states from infringing fundamental liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest.” Lawrence v. Texas, 539 U.S. 558, 593, 123 S. Ct. 2472 (2003). Procedural due process protects citizens “not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property.” Carey v. Phipps, 435 U.S. 247, 259, 98 S. Ct. 1042 (1978). Because the Due Process Clause of the Nevada Constitution mirrors that of its federal counterpart, Nevada “looks to federal precedent” for guidance in resolving due process claims. Hernandez v. Bennett-Haron, 128 Nev. 580, 587, 287 P.3d 305 (2012).

The essential elements of a procedural due process claim under the Fifth Amendment are “(1) a life, liberty, or property interest requiring protection under the Due Process Clause, and (2) a deprivation of that interest (3) without adequate process.” Fields v. Henry Co., 701 F.3d 180, 185 (6th Cir. 2012). “A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word ‘liberty’ . . . or [by] an expectation or interest created by the state law or policies”. Wilkinson v. Austin, 545 U.S. 209, 221, 125 S. Ct. 2384 (2005) (citation omitted). Freedom of movement, including the right to travel, has long been recognized as a liberty interest which cannot be restricted without due process of law. City of Chicago v. Morales, 527 U.S. 41, 54, 119 S. Ct. 1849 (1999) (citing Kent v. Dulles, 357 U.S. 116, 78 S. Ct. 1113 (1958) (noting that freedom of movement is “a part of our heritage”)). Accordingly, any restraint on pretrial liberty implicates due process protections. Those protections require “adequate process”. In the context of a pretrial detention order, “adequate process” requires a

³ The Fifth Amendment Due Process Clause was made applicable to the states via the Fourteenth Amendment to the U.S. Constitution. U.S. Const. amend, V, XIV. See Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489 (1964)

1 hearing before a neutral fact-finder and an opportunity for the accused to be heard “at a
2 meaningful time and in a meaningful manner.” Mathews v. Eldridge, 424 U.S. 319, 333-34, 96
3 S. Ct. 893 (1976) (citations omitted).

4 **B. Equal Protection Clause**

5 The Equal Protection Clause of the U.S. and Nevada Constitutions prohibits the
6 government from denying individuals equal protection of the laws. U.S. Const. amend. XIV;
7 Nev. Const. Art. 1, § 1 and Art. IV, § 21. The Equal Protection Clause may be invoked to
8 analyze the governmental actions that draw distinctions based upon specific characteristics or
9 impinge on an individual’s exercise of a fundamental right. See Skinner v. Oklahoma, 316 U.S.
10 535, 62 S. Ct. 1110 (1942). While the Equal Protection Clause permits the states some discretion
11 in enacting laws which affect some groups of citizens differently than others, a statute or practice
12 is unconstitutional if the “classification rests on grounds wholly irrelevant to the achievement of
13 the State’s objective.” McGowan v. Maryland, 366 U.S. 420, 425-26, 81 S. Ct. 1101 (1961).

14 **C. Excessive Bail Clause and Nevada’s Statutory Bail Scheme**

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

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

- 26 1. The length of residence in the community;
- 27 2. The status and history of employment;

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

NRS 178.4853.

II. The Justice Court's Failure Conduct an Appropriate Adversarial Hearing at Which Petitioner Was Present and Find That Preventative Detention Was Necessary Violated Petitioner's Constitutional Rights

The Due Process Clauses of the Nevada Constitution provide that "[n]o person shall ... be deprived of life, liberty, or property without due process of law." U.S. Const. amend. V; Nev. Const. Art. 1, § 8. Due Process requires a hearing before a neutral fact-finder and an opportunity to be heard "at a meaningful time and in a meaningful manner," before an individual is deprived of a fundamental right or property interest. Mathews v. Eldridge, 424 U.S. 319, 333-34, 96 S. Ct. 893 (1976) (citations omitted). Freedom of movement has long been recognized as a liberty interest which cannot be restricted without due process of law. City of Chicago v. Morales, 527 U.S. 41, 54, 119 S. Ct. 1849 (1999) (citing Kent v. Dulles, 357 U.S. 116, 78 S. Ct. 1113 (1958)). Accordingly, the issue of pretrial detention must be resolved in a manner that comports with due process.

As set forth below, due process requires that the issue of pretrial confinement be resolved via a robust, "adversarial" hearing at which a neutral magistrate makes an individualized determination whether preventative detention is the least restrictive means of

1 assuring community safety and ensuring the accused's return to court. U.S. v. Salerno, 481 U.S.
2 739, 107 S. Ct. 2095 (1987).

3 This did not happen here. The reviewing magistrate in the instant matter set bail at a 48
4 Hour PC Review at which neither Petitioner nor her counsel was present. The magistrate set
5 bail using only a police report, NPR and a temporary custody record. The magistrate considered
6 no information regarding Petitioner's financial means, background, or character (and likely
7 relied on a standardized bail schedule utilized in Clark County). Accordingly, based on the
8 authority set forth herein, the instant bail setting violated Petitioner's constitutional and
9 statutory rights.

10 **III. The Magistrate's Detention Order Was Unlawful as it Was Issued Absent an**
11 **Adversarial Hearing at Which Prosecutors Established Clear and Convincing**
12 **Evidence that Pretrial Detention is the Least Restrictive Means of Assuring**
Petitioner's Return to Court and Ensuring Community Safety.

13 **A. Introduction -- Clark County's Systematic Use of Bail as a Mechanism of Pretrial**
14 **Detention is Unlawful**

15 **1. Clark County's Bail System**

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

27 **2. The History and Evolution of Bail in the United States**
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1 “Bail” is not equivalent to “money bail.” “Bail” means *release* before trial. Although
2 common in recent years, the sentence “the Defendant is held on \$10,000 bail” is a contradiction:
3 as a historical matter, being “held on bail” was impossible. Timothy R. Schnacke, U.S. Dep’t of
4 Justice – Nat’l Inst. for Corr., Fundamentals of Bail: A Resource Guide for Pretrial Practitioners
5 and a Framework for American Pretrial Reform 1 (Aug. 2014).⁶ As the CATO Institute has
6 explained, since well before the Magna Carta, bail has been understood as a device to *free*
7 defendants pretrial. See Brief for Amicus Curiae CATO Inst, Walker v. City of Calhoun, Ga.,
8 No. 16-10521, at 3 (11th Cir. 2016).⁷

9 “Money bail” is the practice of requiring a defendant to forfeit money if they do not
10 appear for trial. Money bail can be either secured or unsecured. A secured money bail system
11 requires the defendant to deposit money before they are released; an unsecured money bail
12 system allows the defendant to be released without depositing any money so long as they
13 promise to pay if they fail to appear.

14 As Chief Judge Rosenthal of the U.S. District Court for the Southern District of Texas
15 recently summarized in her comprehensive discussion of the history of the American bail system,
16 ODonnell v. Harris Co., 251 F.Supp.3d 1052, 1068 (S.D. Tex. 2017),⁸ bail originated in
17 medieval England “as a device to free untried prisoners.” Daniel J. Freed & Patricia M. Wald,
18 Bail in the U.S.: 1964 1 (1964). The Statue of Westminster, enacted by the English Parliament in
19 1275, listed the offenses that would be bailable and provided criteria for determining whether
20 someone should be released. These criteria included the strength of the evidence against the
21 accused and the severity of the accused’s criminal history. See June Carbone, Seeing Through
22 the Emperor’s New Clothes: Rediscovery of Basic Principles in the Administration of Bail, 34
23 Syracuse L. Rev. 517, 523-26 (1983); Note, Bail: An Ancient Practice Reexamined, 70 Yale L.J.
24 966 (1961). In 1679, Parliament adopted the Habeas Corpus Act to ensure that an accused could

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27 ⁶ Available at http://www.clebp.org/images/2014-11-05_final_bail_fundamentals_september_8_2014.pdf.

⁷ Available at <https://object.cato.org/sites/cato.org/files/pubs/pdf/walker-v-city-of-calhoun.pdf>.

⁸ Aff’d as modified, 882 F.3d 528 (5th Cir. 2018).

1 obtain a timely bail hearing. And the English Bill of Rights, enacted in 1679, prohibited
2 excessive bail. See Carbone, supra, at 528.

3 The American States continued this tradition. Beginning with the Pennsylvania
4 Constitution of 1682, 48 states, including Nevada, have protected, by constitution or statute, a
5 right to bail “by sufficient sureties, except for capital offenses when the proof is evident or the
6 presumption great.” Matthew J. Hegreness, America’s Fundamental and Vanishing Right to Bail,
7 55 Ariz. L. Rev. 909, 916 (2013).

8 As the U.S. District Court for the Southern District of Texas recently explained in its
9 detailed opinion striking down Harris County’s money bail practices, “[h]istorians and jurists
10 confirm that from the medieval period until the early American republic, a bail bond was
11 typically based on an individualized assessment of what the arrestee or his surety *could pay* to
12 assure appearance and secure release.” ODonnell, 251 F.Supp.3d at 1069 (emphasis added). The
13 court explained the English practice at the time of the ratification of the U.S. Constitution: “‘The
14 rule is, where the offence is prima facie great, to require good bail; moderation nevertheless is to
15 be observed, and such bail only is to be required as the party is able to procure; for otherwise the
16 allowance of bail would be a mere colour for imprisoning the party on the charge.’” Id. (quoting
17 1 J. Chitty, A Practical Treatise on the Criminal Law 88-89 (Philadelphia ed. 1819)).

18 Jurisdictions across America began to depart from the original understanding of bail in
19 the middle of the 20th Century. And in the last two decades, the use of unaffordable secured
20 money bail has increased in scope and severity. In 1996, 59% of felony defendants had to meet a
21 financial condition to regain their liberty pretrial. Timothy C. Hart & Brian A. Reaves, U.S.
22 Dep’t of Justice, Felony Defendants in Large Urban Counties, 1996, at 17-18 (1999).⁹ By 2009,
23 that percentage had climbed to 72%. Brian A Reaves, U.S. Dep’t of Justice, Felony Defendants
24 in Large Urban Counties, 2009-Statistical Tables, at 15, 20 (2013).¹⁰ In 1990, the majority of
25 felony defendants who were not detained while their cases were pending were released without
26 financial conditions. In 2009, only 23% of felony defendants who were not detained while their

27 ⁹ Available at <https://www.bjs.gov/content/pub/pdf/fdluc96.pdf>.

28 ¹⁰ Available at <https://www.bjs.gov/content/pub/pdf/fdluc09.pdf>.

cases were pending were released without financial conditions. And the average amount of money required to be paid as a condition of release has increased. Vera Inst of Justice, Incarceration's Front Door: The Misuse of Jails in America, 29 (Feb. 2015).¹¹ By 2009, about half of felony defendants subject to financial conditions of release could not meet them and remained in custody until the disposition of their cases. Felony Defendants, 2009-Statistical Tables, at 17.

The routine use of unaffordable secured money bail resulted in a "crisis." See U.S. v. Salerno, 481 U.S. 739, 742, 107 S. Ct. 2095 (1987) (describing "a bail crisis in the federal courts"); Caleb Foote, The Coming Constitutional Crisis in Bail: 1, 113 U. Pa. L. Rev. 959, 971 (1965). Two distinct evils of the secured money bail system provoked the crisis: It imperiled public safety by allowing potentially dangerous defendants to be released without any consideration of their dangerousness, and it worked an "invidious discrimination" against those who could not pay. See, e.g., Williams v. Illinois, 399 U.S. 235, 242, 90 S. Ct. 2018 (1970). Over 50 years ago, Attorney General Robert Kennedy led a successful movement to reform bail in the federal courts. Kennedy testified:

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

Testimony on Bail Legislation before S. Judiciary Subcomm. on Const. Rights and Improvements in Judicial Machinery (Aug. 4, 1964).¹²

One of the results of the movement to reform the bail system in the 1960s was the virtual elimination of cash bonds in the District of Columbia and in all Federal courts. The Bail Reform

¹¹ Available at https://storage.googleapis.com/vera-web-assets/downloads/Publications/incarcerations-front-door-the-misuse-of-jails-in-america/legacy_downloads/incarcerations-front-door-report_02.pdf.

¹² Available at <http://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/08-04-1964.pdf>.

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

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

In this case, at the initial arraignment the state failed to request (and the neutral magistrate failed to require the state to decide) preventative detention and made no showing by clear and convincing evidence that pretrial detention is the least restrictive means by which to ensure community safety and return to court. The court failed to require “rigorous process” demanded in order to detain pretrial detainees. Instead the court simply defaulted to maintaining the bail set at the 48 hour PC review.

1 **B. Any Bail Setting Exceeding That Which Petitioner Can Pay, in the Absence of the**
2 **Appropriate Hearing and Findings, Violates Petitioner's Constitutional and**
3 **Statutory Rights.**

4 **1. Jailing Petitioner For the Inability to Make a Monetary Payment Violates the**
5 **Equal Protection and Due Process Clauses of the U.S. and Nevada Constitutions**

6 The principle that jailing the poor because they cannot pay a sum of money is
7 unconstitutional has deep roots in American constitutional law. See Williams v. Illinois, 399 U.S.
8 235, 241, 90 S. Ct. 2018 (1970) (“[T]he Court has had frequent occasion to reaffirm allegiance to
9 the basic command that justice be applied equally to all persons”); Douglas v. California, 372
10 U.S. 353, 355, 83 S. Ct. 814 (1963) (condemning the “evil” of “discrimination against the
11 indigent”); Griffin v. Illinois, 351 U.S. 12, 19, 76 S. Ct. 585 (1956) (“There can be no equal
12 justice where the kind of trial a man gets depends on the amount of money he has”); see also
13 Mayer v. City of Chicago, 404 U.S. 189, 193, 92 S. Ct. 410 (1971).

14 These principles have been applied in a variety of contexts in which a government jailed
15 someone because of her inability to make a monetary payment. In Tate v. Short, 401 U.S. 395,
16 91 S. Ct. 668 (1971), the U.S. Supreme Court held that “the Constitution prohibits the State from
17 imposing a fine as a sentence and then automatically converting it into a jail term solely because
18 the defendant is indigent and cannot forthwith pay the fine in full.” Id. at 398. In Bearden v.
19 Georgia, 461 U.S. 660, 103 S. Ct. 2064 (1983), the Court explained that to “deprive [a]
20 probationer of his conditional freedom simply because, through no fault of his own he cannot
21 pay [a] fine... would be contrary to the fundamental fairness required by the Fourteenth
22 Amendment.” Id. at 672-73.

23 For pretrial arrestees, the rights at stake are even more significant because the arrestees’
24 liberty is not diminished by a criminal conviction; they are presumed innocent. Justice Douglas
25 framed the basic question that applies to pretrial detainees: “To continue to demand a substantial
26 bond which the defendant is unable to secure raises considerable problems for the equal
27 administration of the law” Bandy v. U.S., 81 S. Ct. 197, 197-98 (1960) (Douglas, J., in
28 chambers). The Supreme Court Justice further espoused “Can an indigent be denied freedom,

1 where a wealthy man would not, because he does not happen to have enough property to pledge
2 for his freedom?" Id.

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

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

14 Pugh, 572 F.2d at 1058 (5th Cir. 1978).¹³ Indeed, "[t]he incarceration of those who cannot
15 [afford a cash payment], without meaningful consideration of other possible alternatives,
16 infringes on both due process and equal protection requirements." Id. at 1057;¹⁴ see also
17 Williams v. Farrior, 626 F.Supp. 983, 985 (S.D. Miss. 1986) ("For the purposes of the
18 Fourteenth Amendment's Equal Protection Clause, it is clear that a bail system which allows
19 only monetary bail and does not provide for any meaningful consideration of other possible
20 alternatives for indigent pretrial detainees infringes on both equal protection and due process
21 requirements.").

22
23 ¹³ Rainwater further explained that it refused to require a priority to be given in all cases – including those of the
24 non-indigent – to non-monetary conditions of release. The court noted that, at least for wealthier people, some might
25 actually prefer monetary bail over release with certain other conditions, and that the court would not invalidate a
state Rule that allowed for those other conditions in appropriate cases. Pugh v. Rainwater, 572 F.2d 1053, 1057 (5th
Cir. 1978).

26 ¹⁴ Four circuit judges dissented in Rainwater. Although they agreed with the constitutional principles announced by
27 the majority that the Constitution forbids jailing the poor when they cannot afford monetary bail, they were
28 concerned about the majority's faith in the Florida courts not to apply the new state Rule in unconstitutional ways to
detain the indigent. Pugh v. Rainwater, 572 F.2d 1053, 1067 (5th Cir. 1978) ("I cannot escape the conclusion that
the majority has chosen too frail a vessel for such a ponderous cargo of human rights.") (Simpson, J., dissenting).

1 The U.S. Justice Department recently endorsed this view, asserting that “[i]ncarcerating
2 individuals solely because of their inability to pay for their release, whether through the
3 payment of fines, fees, or a cash bond, violates the Equal Protection Clause of the Fourteenth
4 Amendment.” Jones v. City of Clanton, 2015 WL 5387219, at *4 (M.D. Ala. Sept. 14, 2015);
5 see also Varden v. City of Clanton, Civ. No. 15–34, Docket. No. 26 at 1 (M.D. Ala. Feb. 13,
6 2015). The Justice Department reasoned that a secured money bail schedule, like the one
7 utilized in Clark County, “do[es] not account for individual circumstances of the accused” and
8 it “essentially mandate[s] pretrial detention for anyone who is too poor to pay the
9 predetermined fee.” Jones, 2015 WL 5387219, at *9.

10 Accordingly, several federal district courts have held that state laws setting a particular
11 monetary bail amount without individualized considerations of indigency violate the Due
12 Process Clause. See, e.g., Rodriguez v. Providence Cmty. Corr., Inc., 155 F.Supp.3d 758, 767-
13 70 and n. 10 (M.D. Tenn. 2015) (granting class-wide preliminary injunction enjoining state
14 policy requiring monetary payment for probations to obtain release pending a revocation
15 hearing “without an inquiry into the individual’s ability to pay the bond and whether alternative
16 methods of ensuring attendance at revocation hearings would be adequate”); Williams v.
17 Farrior, 626 F.Supp. 983, 985 (S.D. Miss. 1986) (“[I]t is clear that a bail system which allows
18 only monetary bail and does not provide for any meaningful consideration of other possible
19 alternatives for indigent pretrial detainees infringes on both equal protection and due process
20 requirements.”); Buffin v. City and Co. of San Francisco, No. 15-CV-04959-YGR, 2018 WL
21 424362 at *7 (N.D. Cal. Jan. 16, 2018); cf. Abdi v. Nielson, No. 1:17-CV-0721 EAW, 2018
22 WL 798747, at *4 (W.D.N.Y. Feb. 9, 2018).

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

2. Jailing Petitioner Without a Robust Hearing on, and Specific Findings Concerning, his Dangerousness and Risk of Flight Simply Because He Cannot Pay Secured Money Bail Violates the Due Process Clauses of the U.S. and Nevada Constitutions

The right to pretrial liberty is “fundamental.” U.S. v. Salerno, 481 U.S. 739, 750, 107 S. Ct. 2095 (1987); see also Zadvydas v. Davis, 533 U.S. 678, 690, 121 S. Ct. 2491 (2001) (“Freedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that [the Due Process] Clause protects”); Foucha v. Louisiana, 504 U.S. 71, 80, 112 S. Ct. 1780 (1992) (“Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.”); U.S. v. Montalvo-Murillo, 495 U.S. 711, 716, 110 S. Ct. 2072 (1990) (holding that release prior to trial is a “vital liberty interest”). Because “[f]reedom from bodily restraint is a fundamental liberty interest,” any deprivation of that liberty must withstand heightened constitutional scrutiny, which generally requires that the deprivation be narrowly tailored to further a compelling government interest. See, e.g., Lopez-Valenzuela v. Arpaio, 770 F.3d 772, 781 (9th Cir. 2014) (en banc) (applying strict scrutiny to strike down Arizona bail law that required detention after arrest for undocumented immigrants accused of certain offenses). For that reason, the Salerno Court applied exacting scrutiny to a presumptively innocent person's loss of pretrial liberty and required that the government employ rigorous procedures to protect that liberty. See Salerno, 481 U.S. at 746 (describing “procedural due process” restrictions on pretrial detention, and citing Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893 (1976)).

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

12 To meet this standard, a court must find on the record that the detainee presents a risk of
13 flight or danger to the community and that no conditions or combination of conditions alternative
14 to detention could reasonably mitigate that danger. Salerno, 481 U.S. at 750. In Salerno, the U.S.
15 Supreme Court considered a facial challenge to the federal Bail Reform Act. That Act permits
16 the government to detain people found to be highly dangerous, after an individualized “full
17 blown adversary hearing,” and only where the “Government... convince[s] a neutral
18 decisionmaker by clear and convincing evidence that no conditions of release can reasonably
19 assure the safety of the community . . .” 481 U.S. at 740. The Supreme Court subjected the Bail
20 Reform Act to heightened judicial scrutiny, holding that the government may detain individuals
21 before trial only where that detention is carefully limited to serve a ‘compelling’ government
22 interest. Id. at 746.

23 Salerno imposed two interlocking sets of requirements on preventative detention:
24 substantive and procedural. Id. at 746. The U.S. Supreme Court explained that the “Due Process
25 Clause protects individuals against two types of government action”. Id. First, “‘substantive due
26 process’ prevents the government from engaging in conduct that ‘shocks the conscience’ or
27 interferes with rights ‘implicit in the concept of ordered liberty.’” Id. Secondly, if a “government
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1 action depriving a person of life, liberty, or property survives substantive due process scrutiny,”
2 a court must subsequently determine whether the government action satisfies “procedural due
3 process” by having the governmental action “implemented in a fair manner”. The procedural
4 requirements are necessary to ensure that the substantive ones have been met.

5 Substantively, Salerno required that pretrial detention survive heightened constitutional
6 scrutiny. The government may deprive a presumptively innocent person of her physical liberty
7 only if doing so is tailored to advance a compelling interest. Id. at 746-48. Therefore, the
8 government may detain someone pretrial only if other, less restrictive means are available to
9 serve the state’s interests.

10 Procedurally, Salerno held that orders of detention may be entered after rigorous
11 procedures have been met. These procedures include, but are not necessarily limited to, a “full-
12 blown adversary hearing.” Id. at 750; a heightened evidentiary standard of proof of
13 dangerous/flight risk by “clear and convincing evidence,” Id. at 751; consideration of alternative
14 conditions or release; Id. at 741; and “written findings of fact and a written statement of reasons
15 for a decision to detain.” Id. Consistent with its reliance on procedural due process cases, Id. at
16 746 (citing Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893 (1976)), Salerno insists on
17 procedures that are sufficient to ensure that any preventive detention be consistent with
18 substantive due process.

19 Following Salerno, courts across the country have made clear that pretrial detention
20 protocols must be consistent with both procedural and substantive due process. See Simpson v.
21 Miller, 387 P.3d 1270, 1276 (Ariz. 2017) (“[I]t is clear from Salerno and other decisions that the
22 constitutionality of a pretrial detention scheme turns on whether particular procedures satisfy
23 substantive due process standards”); see also Lopez-Valenzuela v. Arpaio, 770 F.3d 772, 781
24 (9th Cir. 2014) (en banc) (applying strict scrutiny to strike down an Arizona law that required
25 detention after arrest without individualized consideration of an arrestee’s circumstances);
26 ODonnell v. Harris County, 251 F.Supp.3d 1052 (S.D. Tex. Apr. 28, 2017); Carlisle v. Desoto
27 County, Mississippi, 2010 WL 3894114, at *5 (N.D. Miss. Sept. 30, 2010) (holding that because
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1 a “compelling state interest” was required for pretrial detention, the plaintiff’s rights were
2 violated if he was jailed without consideration of non-financial alternatives); Williams v. Farrior,
3 626 F.Supp. 983, 986 (S.D. Miss. 1986) (holding that a state’s pretrial detention scheme must
4 meet “strict judicial scrutiny” because of the fundamental rights at issue).

5 In Simpson v. Miller, 367 P.3d 1270 (Az. 2017), the Arizona Supreme Court considered
6 a state constitutional amendment that required the pretrial detention of people charged with
7 “sexual assault, sexual conduct with a minor under fifteen years of age or molestation of a child
8 under fifteen years of age when the proof is evident or the presumption great.” Simpson, 387
9 P.3d at 1273. Arizona procedures required a “full-blown adversary hearing” before someone was
10 detained pretrial under this provision, but the hearing was to determine only whether the proof
11 was evident that the defendant committed the alleged offense; trial courts did not inquire into
12 dangerousness or risk of flight separately. The Arizona Supreme Court subjected this provision
13 to “heightened scrutiny” under the Due Process Clause of the U.S. Constitution. Id. at 1277.
14 Although it concluded that “heightened scrutiny” and “strict scrutiny” are not necessarily
15 identical, and that Salerno applied the former rather than the latter, the court nonetheless
16 concluded that Arizona’s preventative detention regime failed the constitutional test. Id. at 1278.
17 The court opined that the state must either provide individualized determinations of
18 dangerousness for every person detained pretrial or “if the state chooses not to provide such
19 determinations, its procedure would have to serve as a convincing proxy for unmanageable flight
20 risk or dangerousness.” Id. at 1277 (quotation marks and citation omitted). The court held that
21 Arizona’s procedures were insufficient because nothing about the crimes with which the
22 defendant was charged served as a convincing proxy for unmanageable risk of flight or
23 dangerousness.

24 In Lopez-Valenzuela, the Ninth Circuit Court of Appeals considered an Arizona law that
25 categorically denied pretrial release to any arrestee who was an undocumented immigrant to the
26 U.S. The court applied “strict scrutiny” to the Arizona law, relying on Salerno, 770 F.3d at 786.
27 Under strict scrutiny, the court concluded, the law could not survive. “Whether a categorical
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denial of bail for noncapital offenses could *ever* withstand heightened scrutiny is an open question,” the court noted. *Id.* at 785 (emphasis added). But the court concluded that a blanket prohibition on pretrial release for undocumented immigrants clearly could not survive heightened scrutiny. *Id.* To detain a presumptively innocent person prior to trial, the court reasoned, the state must offer convincing – and individualized – rationales. *Id.* at 786.

Nevada law contains a conceptual framework for detention inquiries but omits the procedural protections required by *Salerno*. NRS 178.4851 provides that criminal defendants may be released without bail upon a showing of good cause that the court “can impose conditions on the person that will adequately protect the health, safety, and welfare of the community and ensure that the person will appear at all times and places ordered by the court.” NRS 178.4851. This runs afoul of *Salerno* in that it burdens the defense with establishing ‘good cause’ for release, and speaks only to the issue of release *without bail*.¹⁵ Indeed, as *Salerno* 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 establishing that it does not before a defendant can be detained pretrial (i.e., held pursuant to unattainable release conditions).¹⁶

While NRS 178.4853 sets forth factors bearing on the issue of pretrial release,¹⁷ those factors must be considered in the context of the inquiry required by *Salerno*. So Nevada courts

¹⁵ To the extent that NRS 178.4851 obviates the procedural requirements mandated by *Salerno*, it 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.

¹⁶ See also, *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 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 1270, 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).

¹⁷ The statutory factors are: 1) The length of residence in the community; 2) The status and history of employment; 3) Relationships with the person’s spouse and children, parents or other family members and with close friends; 4) Reputation, character and mental condition; 5) Prior criminal record, including, without limitation, any record of appearing or failing to appear after release on bail or without bail; 6) The identity of responsible members of the community who would vouch for the reliability of the person; 7) The nature of the offense with which the person is charged, the apparent probability of conviction and the likely sentence, insofar as these factors relate to the risk of not appearing; 8) The nature and seriousness of the danger to the alleged victim, any other person or the community that would be posed by the person’s release; 9) The likelihood of more criminal activity by the person after release;

1 should consider the factors outlined in NRS 178.4583 when assessing the need for preventative
2 detention and, in cases where a preventative detention request has been denied, when fashioning
3 release conditions minimally necessary to protect the community and ensure a defendant's return
4 to court. This may include consideration of bail as a *release condition* to the extent it is
5 minimally necessary to ensure a defendant's return to court and/or protect the community.
6 However, "When financial conditions are warranted, the least restrictive conditions principle
7 requires that an unsecured bond be considered first." ABA Standards for Crim. Justice (3rd Ed.)
8 Pretrial Release (2007), Std. 10-1.4(c) (commentary) at 43-44.¹⁸ This requires individualized
9 consideration of a defendant's unique circumstances, including "individualized considerations of
10 indigency." Weatherspoon, 2018 WL 1053548, at *14-15.

11 As set forth above, Petitioner's initial bail setting at the PC Review, which operated as a
12 *de facto* detention order, was issued in the absence of the constitutionally required hearing,
13 inquiry, and findings outlined in Salerno. No hearing was required by the neutral magistrate at
14 the initial arraignment.

15 It was not until the August 13 hearing that the court finally made a record. The state did
16 not ask for or seek preventative detention instead acquiescing to release and the conditions of
17 release. The state requested that the bail remain at \$10,000.

18 The court noted Petitioner's criminal history at length but failed to make a record make
19 record of the reasoning underlying the grant of bail with regard to statutory consideration
20 including the financial ability of Petitioner to give bail and the relationship of the amount set to
21 community safety and ensuring return to court.

22 At no point did a Court find, after an adversarial hearing, clear and convincing proof that
23 jailing Petitioner was the least restrictive means of assuring her return to court and community
24 safety. Accordingly, Petitioner's current detention order violates her Due Process rights.

25
26 and 10) Any other factors concerning the person's ties to the community or bearing on the risk that the person may
willfully fail to appear.

27 ¹⁸ https://nvcourts.gov/Conferences/District_Judges/Documents/The_History_of_Bail_-_DJ_Conf/) and available at:
28 https://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_blk.html#10-1.4.

3. **Jailing Petitioner Pursuant to a Bail Setting That Fails to Account for Her Ability to Pay Violates the Excessive Bail Clauses of the Federal and State Constitutions as Well as Nevada Law**

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

The Eighth Amendment prohibits release conditions exceeding a purported threat posed by a particular defendant. Salerno, 481 U.S. at 754 (requiring that “the Government’s proposed conditions of release or detention not be excessive in light of the perceived evil”). Bail and/or release conditions are “excessive” if they exceed that which is minimally necessary to ensure the accused’s appearance in court and protect the community against future dangerousness. Stack v. Boyle, 342 U.S. 1, 5, 72 S. Ct. 1 (1951); U.S. v. Karper, 847 F.Supp.2d 350, 362 (N.D.N.Y. 2011). Thus, if a Court were to determine that preventative detention is not necessary to ameliorate Petitioner’s risk of flight and danger to the community, any release conditions (of which bail is one) must be (1) attainable; and (2) minimally necessary to protect the community and ensure Petitioner’s return to court. Anything exceeding that amounts to a violation of the Excessive Bail Clauses of the federal and state constitutions, as well as Nevada law.

CONCLUSION

Petitioner’s \$7,5000 bail setting amounts to a *de facto* detention order as she cannot pay that amount and, consequently, remains jailed at the Clark County Detention Center. Based upon the foregoing, Petitioner respectfully requests that this Honorable Court grant the instant Petition and vacate her current detention order in favor of an order directing her release from the custody of the Clark County Sheriff. Alternatively, Petitioner requests that this Honorable Court issue a Writ of Mandamus directing the lower court to vacate the instant detention order and to

1 conduct a full, adversarial detention hearing that complies with Nevada statutory procedures as
2 well as the U.S. and Nevada constitutions.

3 DATED this 24th day of August, 2018.

4 PHILIP J. KOHN
5 CLARK COUNTY PUBLIC DEFENDER

6
7 By: /s/ Christy Craig
8 CHRISTY CRAIG, #6262
9 Deputy Public Defender
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3 **CERTIFICATE OF ELECTRONIC SERVICE**

4 I hereby certify that service of the above and foregoing EMERGENCY PETITION FOR
5 WRIT OF HABEAS CORPUS OR, IN THE ALTERNATIVE, PETITION FOR WRIT OF
6 MANDAMUS was served via email to the Clark County District Attorney's Office at
7 motions@clarkcountynyda.com, Las Vegas Justice Court Department 3 at
8 Adriana.Martinez@ClarkCountyNV.gov and Thomas.Boyd@ClarkCountyNV.gov, District
9 Court Department 9 at dept09lc@clarkcountycourts.us and SanzoD@clarkcountycourts.us,
10 District Court Department 10 at Dept10LC@clarkcountycourts.us and Tess Driver at
11 DriverT@clarkcountycourts.us

12
13 By /s/ Kayleigh Lopatic

14 An employee of the Clark County Public
15 Defender's Office
16
17
18
19
20
21
22
23
24

25 Case Name: Cierra Johnson

26 Case No. 18F14482X

27 Dept No. JC3/DC9/10
28

EXHIBIT A

**Justice Court, Las Vegas Township
Clark County, Nevada**

Department: PC

Court Minutes



L009771300

PC18F14482X State of Nevada vs. JOHNSON, CIERRA PEJAY

**8/6/2018 9:00:00 AM Initial Appearance Justice
Court (PC Review)**

Result: Signing Completed

**PARTIES
PRESENT:**

Judge: Letizia, Harmony
Court Clerk: Boyd, Thomas

PROCEEDINGS

Hearings: 8/7/2018 8:30:00 AM: 72 Hour Hearing

Added

Events: Probable Cause Found

Bail Reset - Cash or Surety

Counts: 001; 002 - \$10,000.00/\$10,000.00 Total Bail

**Release Order - Court Ordered Bail AND EMP -
Medium**

(Release Order - Court Ordered Bail AND Electronic Monitoring - Medium Level)

**Justice Court, Las Vegas Township
Clark County, Nevada**

Department: 03

Court Minutes



L009780015

18F14482X State of Nevada vs. JOHNSON, CIERRA PEJAY

Lead Atty: Public Defender

8/7/2018 8:30:00 AM Initial Appearance (In Custody)

Result: Matter Heard

PARTIES PRESENT:	State Of Nevada Attorney Defendant	Albritton, Alicia Shaygan-Fatemi, Kambiz JOHNSON, CIERRA PEJAY
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Judge:	Letizia, Harmony
Court Reporter:	MacDonald, Kit
Court Clerk:	Boyd, Thomas

PROCEEDINGS

Attorneys:	Public Defender	JOHNSON, CIERRA PEJAY	Added
	Shaygan-Fatemi, Kambiz	JOHNSON, CIERRA PEJAY	Added
Hearings:	8/21/2018 9:30:00 AM: Preliminary Hearing		Added
Events:	Criminal Complaint <i>Filed in Open Court</i> Initial Appearance Completed <i>Defendant Advised of Charges on Criminal Complaint, Waives Reading of Criminal Complaint</i> Public Defender Appointed Bail Stands - Cash or Surety Amount: \$10,000.00 <i>Counts: 001; 002 - \$10,000.00/\$10,000.00 Total Bail</i> Release Order - Court Ordered Bail AND EMP - Medium <i>(Release Order - Court Ordered Bail AND Electronic Monitoring - Medium Level)</i>		

NEVADA PRETRIAL RISK (NPR) ASSESSMENT

Assessment Date: 8/5/2018

Assessor: Agavni Martirosyan

County: Clark

Defendant's Name: CIERRA JOHNSON

DOB:

AGE: 23

Case/Booking #: 18F14482X

8/23/1994

Dept #: 3

Address: 1937 GREGORY ST

Contact Phone #: (702) 689-7900

of Current Charges: 2

City: LAS VEGAS

State: NV Zip: 89106

Most Serious Charge: Robbery

Total Bail at booking: 25,000

SCORING ITEMS

SCORE

1. Does the Defendant Have a Pending Pretrial Case at Booking?

No If yes, list case # and jurisdiction:

0

2. Age at First Arrest (include juvenile arrests)

First Arrest Date 3/27/13

20 yrs and under

2

3. Prior Misdemeanor Convictions (past 10 years)

Six or more

2

4. Prior Felony/Gross Misd. Convictions (past 10 years)

One or more

1

5. Prior Violent Crime Convictions (past 10 years)

None

0

6. Prior FTAs (past 24 months)

Two or more FTA Warrants

2

7. Substance Abuse (past 10 years)

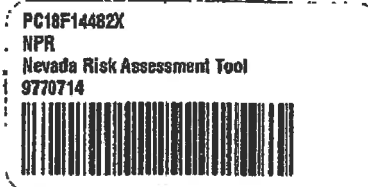
Other

0

8. Mitigating Verified Stability Factors (limit of -2 pts. total deduction)

If 1, 2, or 3 applicable

-1



TOTAL SCORE:

6

Risk Level: Moderate Risk, 6 Points

OVERRIDE?: ☐ Yes ☒ No

Override Reason(s):

If Other, explain:

Final Recommended Risk Level:

☐ LOW

☒ MODERATE

☐ HIGHER

Supervisor/Designee Signature _____

Date: 8/5/2018

Felony convictions:

YEAR	STATE	CHARGE
16	NV	ATT GL

Misdemeanor Convictions: 10

FTAS: 6

Detainers: NONE

Pending Cases: NONE

07/27/2018 to vacate detention order and release the defendant from custody
Opposition to Motion
 07/30/2018 to vacate detention order and release the defendant from custody
Motion (8:30 AM) (Judicial Officer Letizia, Harmony)
In Custody
Parties Present
 Result: Motion Denied
 07/30/2018 **Minute Order - Department 03**
 07/30/2018 **Motion**
by Defense to vacate the detention order and release the defendant from custody - Opposition by State - Motion Denied
 07/30/2018 **Future Court Date Stands**
08/02/18 at 930 am
 07/30/2018 **Bail Reset - Cash or Surety**
Counts: 001; 002 - \$20,000.00/\$20,000.00 Total Bail
 07/30/2018 **Release Order - Court Ordered Bail AND EMP - Medium** (Judicial Officer: Letizia, Harmony)
(Release Order - Court Ordered Bail AND Electronic Monitoring - Medium Level)
 08/02/2018 **Preliminary Hearing** (9:30 AM) (Judicial Officer Letizia, Harmony)
In Custody
Parties Present
 Result: Matter Heard
 08/02/2018 **Preliminary Hearing Date Reset**
 08/02/2018 **Bail Stands - Cash or Surety**
Counts: 001; 002 - \$20,000.00/\$20,000.00 Total Bail
 08/02/2018 **Release Order - Court Ordered Bail AND EMP - Medium** (Judicial Officer: Letizia, Harmony)
(Release Order - Court Ordered Bail AND Electronic Monitoring - Medium Level)
 08/02/2018 **Minute Order - Department 03**
 08/10/2018 **Ex Parte Order**
for transcript
 08/17/2018 **Transcript of Proceedings**
 08/21/2018 **Preliminary Hearing** (9:30 AM) (Judicial Officer Letizia, Harmony)
In Custody
Parties Present
 Result: Bound Over
 08/21/2018 **Unconditional Bind Over to District Court**
Defendant unconditionally waives right to Preliminary Hearing. Defendant Bound Over to District Court as Charged. Defendant to Appear in the Lower Level Arraignment Courtroom A.
 08/21/2018 **Case Closed - Bound Over**
 08/21/2018 **District Court Appearance Date Set**
Aug 23 2018 10:00AM: In Custody
 08/21/2018 **Bail Stands - Cash or Surety**
Counts: 001; 002 - \$20,000.00/\$20,000.00 Total Bail
 08/21/2018 **Release Order - Court Ordered Bail AND EMP - Medium** (Judicial Officer: Letizia, Harmony)
(Release Order - Court Ordered Bail AND Electronic Monitoring - Medium Level)
 08/21/2018 **Minute Order - Department 03**
 08/21/2018 **Certificate, Bindover and Order to Appear**

Case Information

C-18-334261-1 | State of Nevada vs Nache Couyette

Case Number	Court	Judicial Officer
C-18-334261-1	Department 9	Togliatti, Jennifer
File Date	Case Type	Case Status
08/21/2018	Felony/Gross Misdemeanor	Open

Party

Plaintiff	Active Attorneys ▼
State of Nevada	Attorney Thomson, Megan
	Lead Attorney Wolfson, Steven B
Defendant	Active Attorneys ▼
Couyette, Nache	Attorney Craig-Rohan, Christy L. Retained
DOB	
XX/XX/XXXX	
Gender	
Male	
Race	Lead Attorney
Black	Public Defender Public Defender
Height	
5' 7"	
Weight	Attorney
125 lbs	Phenix, Shannon L. Retained
Address	
5400 S MARYLAND	
13/24	
LAS VEGAS NV 89109	

Charge

Charges
Couyette, Nache

	Description	Statute	Level	Date
1	ATTEMPT ROBBERY	200.380	Felony	07/19/2018

Events and Hearings

08/21/2018 Criminal Bindover - Confidential ▼

Criminal Bindover - Confidential

08/21/2018 Criminal Bindover Packet Las Vegas Justice Court ▼

Criminal Bindover

08/22/2018 Information ▼

Information - INFM (CRM)

Comment
Information

08/23/2018 Initial Arraignment ▼

Original Type
Initial Arraignment

Minutes - Initial Arraignment

Judicial Officer
De La Garza, Melisa

10:00 AM

Result

Plea Entered

Parties Present ▲

Defendant: Couyette, Nache

Attorney: Public Defender

Attorney: Phenix, Shannon L.

08/23/2018 Motion to Vacate ▼

Motion to Vacate - MVAC (CRM)

Comment

Motion To Vacate Detention Order Or Hold De Novo Detention
Hearing

08/23/2018 Guilty Plea Agreement ▼

Guilty Plea Agreement

08/27/2018 Opposition ▼

Opposition - OPPS (CRM)

Comment

State's Opposition to Defendant's Motion to Vacate Detention
Order and Release the Defendant from Custody

08/28/2018 Petition for Writ of Habeas Corpus ▼

Minutes - Petition for Writ of Habeas Corpus

Judicial Officer

Togliatti, Jennifer

Hearing Time

9:00 AM

Result

Denied

Comment

Defendant's Motion To Vacate Detention Order Or to Hold De Novo
Detention Hearing

Parties Present ▲

Defendant: Couyette, Nache

Attorney: Craig-Rohan, Christy L.

Plaintiff: State of Nevada

Attorney: Thomson, Megan

08/29/2018 Recorders Transcript of Hearing ▼

Recorder's Transcript of Hearing - RTRAN (CRM)

Comment

Recorder's Transcript Re: Defendant's Motion to Vacate
Detention Order to Hold De Novo Detention Hearing - August 28,
2018

08/31/2018 Ex Parte Order ▼

Ex Parte Order - EXPR (CRM)

Comment

Expedited Ex Parte Order For Transcript

09/04/2018 Decision ▼

Decision

Judicial Officer

Togliatti, Jennifer

Hearing Time

3:00 AM

Result

Denied

Comment

Defendant's Motion To Vacate Detention Order Or to Hold De Novo
Detention Hearing

10/11/2018 Sentencing ▼

Judicial Officer

Togliatti, Jennifer

Hearing Time

9:00 AM

Financial

No financial information exists for this case.

Documents

- Criminal Bindover - Confidential
- Criminal Bindover
- Information - INFM (CRM)
- Motion to Vacate - MVAC (CRM)
- Guilty Plea Agreement
- Opposition - OPPS (CRM)
- Recorders Transcript of Hearing - RTRAN (CRM)
- Minutes - Petition for Writ of Habeas Corpus
- Ex Parte Order - EXPR (CRM)
- Decision
- Minutes - Initial Arraignment

1 MOT
2 PHILIP J. KOHN, PUBLIC DEFENDER
3 NEVADA BAR NO. 0556
4 CHRISTY CRAIG, DEPUTY PUBLIC DEFENDER
5 NEVADA BAR NO. 6262
6 PUBLIC DEFENDERS OFFICE
7 309 South Third Street, Suite 226
8 Las Vegas, Nevada 89155
9 Telephone: (702) 455-4685
10 Facsimile: (702) 455-5112
11 craigcl@clarkcountynv.gov
12 *Attorneys for Defendant*



ORIGINAL

FILED

2018 JUL 24 P 2:23

JUSTICE COURT
LAS VEGAS NEVADA
BY _____
DEPUTY

JUSTICE COURT, LAS VEGAS
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

v.

NACHE COUYETTE, #5208685

Defendant,

CASE NO. 18F13328X

DEPT. NO. 3

DATE: July 30, 2018
TIME: 8:30 a.m.

**MOTION TO VACATE DETENTION ORDER
AND RELEASE THE DEFENDANT FROM CUSTODY**

COMES NOW, the Defendant, Nache Couyette, by and through, Christy Craig, Deputy Public Defender, and moves this Honorable Court for an order vacating Nache Couyette's current detention order and releasing him on his own recognizance or, in the alternative, pursuant to attainable conditions "minimally necessary" to protect the community and ensure his return to court.

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

DATED this 24th day of July, 2018.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: /s/Christy Craig
CHRISTY CRAIG, #6262
Deputy Public Defender

18F13328X
MOF
Motion
9720959



[illegible]

I, CHRISTY CRAIG, hereby declare as follows:

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

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

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

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

EXECUTED this 24th day of July, 2018.

/s/Christy Craig
CHRISTY CRAIG, #6262
Deputy Public Defender

1 take into consideration his ability to pay bail. As a result, this Court should release Defendant on
2 Intensive Supervision.

3 Nache Couyette is in custody at the Clark County Detention Center because his current
4 release conditions are unattainable. This amounts to a pretrial detention order. See U.S. v.
5 Mantecon-Zayas, 949 F.2d 548, 550 (1st Cir. 1991); ODonnell v. Harris Co., 251 F.Supp.3d
6 1052, 1143-44 (S.D. Tex. Apr. 28, 2017) (holding that secured money bail set in an amount that
7 an arrestee cannot afford is constitutionally equivalent to an order of detention). Pretrial
8 detention orders violate due process unless they are preceded by a full-blown adversarial hearing
9 at which the State establishes clear and convincing evidence that preventative detention is the
10 least restrictive means of protecting the community and ensuring the accused's appearance in
11 court. U.S. v. Salerno, 481 U.S. 739, 750, 107 S. Ct. 2095 (1987). They also violate equal
12 protection guarantees and the excessive bail clause if, in the absence of such a hearing, bail is
13 imposed as a release condition and is unattainable. See ODonnell, 251 F.Supp.3d at 1143-44
14 (finding that the Equal Protection Clause prohibits pretrial detention solely because of a
15 defendant's inability to afford bail); Salerno, 481 U.S. at 754.

16
17 **II. Due Process Principles Prohibit Pretrial Detention Unless the State Establishes by**
18 **Clear and Convincing Evidence that Preventative Detention is the Least Restrictive**
19 **Means of Ensuring Defendant's Return to Court and Community Safety**

20 The Due Process Clauses of the U.S. and Nevada Constitutions provide that "[n]o person
21 shall . . . be deprived of life, liberty, or property without due process of law." U.S. Const. amend.
22 V; Nev. Const. Art. 1, §8.¹ Pretrial liberty is a fundamental right. U.S. v. Salerno, 481 U.S. at
23 750. For that reason, a presumptively innocent person's loss of pretrial liberty is subject to
24 "heightened constitutional scrutiny" and must be preceded by rigorous procedures designed to
25 ensure protection of that liberty. Id. at 746. Where the State is seeking to detain a defendant
26 pretrial, the defendant is entitled to substantive and procedural due process. Id.

27 ¹ Because the Due Process Clause of the Nevada Constitution mirrors that of its federal counterpart, Nevada "looks
28 to federal precedent" for guidance in resolving due process claims. Hernandez v. Bennett-Haron, 128 Nev. 580, 587,
287 P.3d 305 (2012).

1 In order to deprive a presumptively innocent person of her physical liberty, due process
2 requires that the State demonstrate 1) by “clear and convincing evidence” at a “full-blown
3 adversarial hearing” that the defendant presents an “identified and articulable threat” to the
4 community or presents a risk of flight and 2) *no conditions or combination of conditions*
5 *alternative to detention* could reasonably mitigate that danger based on an individualized
6 consideration of defendant’s unique circumstances. *Id.* at 750-51 (emphasis added);² see also
7 Weatherspoon v. Oldham, 2018 WL 1053548, at *14-15, *17 (W.D. Tenn. Feb. 26, 2018). A
8 state court procedure that does not require as much violates due process. See, e.g., Rodriguez v.
9 Providence Cmty. Corr., Inc., 155 F.Supp.3d 758, 767-70 and n. 10 (M.D. Tenn. 2015); Jones v.
10 City of Clanton, No. 215CV34-MHT, 2015 WL 5387219, at *2 (M.D. Ala. Sept. 14, 2015)
11 (holding that the “use of a secured bail schedule to detain a person . . . without an individualized
12 hearing regarding the person’s indigence and the need for bail or alternatives to bail, violates the
13 Due Process Clause”). In this case, the Justice Court minutes reflect that \$60,000 bail is standard
14 bail for these charges with \$40,000 for count 1 and \$20,000 for count 2. It is noted that at the
15 time standard bail was set, no criminal complaint had yet been filed so no “counts” had yet been
16 prepared. Instead the bail setting simply reflected the arrest report prepared by the police.

17 Nevada law reflects this basic *concept* but omits the procedural protections required by
18 Salerno. NRS 178.4851 provides that criminal defendants may be released without bail upon a
19 showing of good cause that the court “can impose conditions on the person that will adequately
20 protect the health, safety, and welfare of the community and ensure that the person will appear at
21 all times and places ordered by the court.” NRS 178.4851. This runs afoul of Salerno in that it
22 burdens the defense with establishing ‘good cause’ for release, and speaks only to the issue of

23 ² Substantive due process requires that pretrial detention survive “heightened constitutional scrutiny” and the
24 government may only detain where that detention is carefully limited to serve a “compelling” government interest.
25 Salerno, 481 U.S. at 746. As a result, the government may detain someone pretrial only if other, less restrictive
26 means are not available to serve the state’s interests. *Id.*; U.S. v. Karper, 847 F. Supp. 2d 350, 362 (N.D.N.Y. 2011)
27 (finding release conditions cannot exceed that which is minimally necessary to ensure the accused’s appearance in
28 court and protect the community against future dangerousness). Procedural due process requires rigorous procedures
be met to detain someone pretrial, including, but not limited to, a “full-blown adversary hearing,” a heightened
evidentiary standard of proof of dangerousness/flight risk by “clear and convincing evidence,” consideration of
alternative conditions or release, and “written findings of fact and a written statement of reasons for a decision to
detain.” Salerno, 481 U.S. at 741, 750-51.

1 release *without bail*.³ Indeed, as Salerno makes clear, the constitutionally proper inquiry is
2 whether conditioned (or unconditioned) release can satisfy the government's interest in
3 protecting the community and assuring the defendant's return to court; and *the government bears*
4 *the burden* of establishing that it does not before a defendant can be detained pretrial (i.e., held
5 pursuant to unattainable release conditions).⁴

6 While NRS 178.4853 sets forth factors bearing the issue of pretrial release,⁵ those factors
7 must be considered in the context of the inquiry required by Salerno. So courts should consider
8 the factors outlined in NRS 178.4583 when assessing the need for preventative detention and, in
9 cases where a preventative detention request has been denied, when fashioning release
10 conditions minimally necessary to protect the community and ensure a defendant's return to
11 court.

12 This analysis of the conditions minimally necessarily includes consideration of whether
13 bail should be imposed or why bail would alleviate the government's demonstrated concerns
14 about a defendant's release. However, "When financial conditions are warranted, the least
15 restrictive conditions principle requires that an unsecured bond be considered first." ABA
16 Standards for Crim. Justice (3rd Ed.) Pretrial Release (2007), Std. 10-1.4(c) (commentary) at 43-

19 ³ To the extent that NRS 178.4851 obviates the procedural requirements mandated by Salerno, it is unconstitutional.
20 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;
21 Nev. Const. Art. 1, § 8.

22 ⁴ See also, Lopez-Valenzuela v. Arpaio, 770 F.3d 772, 785-86 (9th Cir. 2014) (*en banc*) (finding Arizona law
23 establishing a blanket prohibition on pretrial release for any undocumented immigrants was unconstitutional because
24 it did not require the state to offer convincing – and individualized – rationales for detention); Simpson v. Miller,
25 387 P.3d 1270, 1277-78 (Ariz. 2017) (finding an Arizona statute unconstitutional that required pretrial detention on
26 all sex-related charges because the statute did not provide for individualized determination of dangerousness).

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

1 44.⁶ This requires individualized consideration of a defendant's unique circumstances, including
2 "individualized considerations of indigency." Weatherspoon, 2018 WL 1053548, at *14-15.

3
4 **III. Equal Protection Principles Prohibit Bail Settings that Fail to Account for an**
5 **Accused's Financial Means**

6 The Equal Protection Clause of the U.S. and Nevada Constitutions⁷ prohibits the pretrial
7 detention of defendants solely because of their inability to afford bail.⁸ Weatherspoon v. Oldham,
8 2018 WL 1053548, at *6 (W.D. Tenn. Feb. 26, 2018); Jones, 2015 WL 5387219, at *4; Pugh v.
9 Rainwater, 572 F.2d at 1058 (5th Cir. 1978) (holding that "pretrial confinement for inability to
10 post money bail" for a defendant "whose appearance at trial could reasonably be assured by one
11 of the alternate forms of release . . . would constitute imposition of an excessive restraint . . .").
12 The U.S. Justice Department recently endorsed this view, asserting that "[i]ncarcerating
13 individuals solely because of their inability to pay for their release . . . violates the Equal
14 Protection Clause []". Jones, 2015 WL 5387219, at *4. See also NRS 178.498(2) (requiring a
15 court setting "reasonable bail" to consider "the financial ability of the defendant to give bail").

16 These decisions establish that requiring money bail as a release condition in an amount
17 impossible for the defendant to pay is equivalent to a detention order, "which is only appropriate
18 when the state shows and the court finds that no condition or combination of conditions of
19 release could satisfy the purposes of bail, to assure the defendant's appearance at trial or hearing
20 and the safety of the public." Weatherspoon, 2018 WL 1053548, at *6 (additional citations
21 omitted). Thus, in order to withstand constitutional scrutiny, unattainable money bail settings
22 must be preceded by an adversarial hearing at which the court determines the least restrictive
23 means of ameliorating an accused's risk of flight and danger to the community. Absent this, an

24 ⁶ Discussed at Nevada S.Ct. Judicial Conference (
25 https://nvcourts.gov/Conferences/District_Judges/Documents/The_History_of_Bail_-_DJ_Conf/) and available at:
26 https://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_blk.html#10-1.4.

27 ⁷ U.S. Const. amend. XIV; Nev. Const. Art. 1, § 1 and Art. IV, § 21.

28 ⁸ The U.S. Supreme Court has also held that release conditions that exceed a purported threat posed by a particular defendant violate the "excessive bail" clause of the Eighth Amendment. Salerno, 481 U.S. at 754; see also U.S. Const. amend. VIII; Nev. Const. Art. 1 § 6-7; NRS 178.484(1) (stating "a person arrested for an offense other than murder of the first degree must be admitted to bail").

1 unattainable release condition – such as an unattainable bail setting – operates as a *de facto*
2 detention order that discriminates on the basis of wealth. This violates equal protection
3 guarantees.

4 **IV. This Court Must Vacate the Instant Detention Order and Release Defendant With**
5 **Conditions Minimally Required to Protect the Community and Ensure His Return to**
6 **Court**

7 Nache Couyette's current detention order is unlawful. The State has not established, and
8 no court has found, that preventative detention is the least restrictive means of assuring Nache
9 Couyette's return to court and protecting the community. Instead, Nache Couyette is being
10 detained under a random bail number that may relate to the instant charge(s) and the
11 standardized bail schedule utilized in Clark County, but not Nache Couyette. Consequently,
12 while Nache Couyette cannot make that bail, a similarly situated wealthy person could. Thus,
13 under the authority set forth above, Nache Couyette's detention order violates his due process,
14 equal protection, and excessive bail guarantees. As such, this Court must vacate the current
15 detention order and release Nache Couyette from custody.

16 This Court should release Nache Couyette on the least restrictive means of ensuring
17 court appearance and that he is not a danger to the community.

18 The Nevada Risk Assessment ("NPR") is that he represents a Low Risk of non-
19 appearance or danger to the community if the Court were to release him. Notably, a detainee
20 poses a flight risk only if, by a preponderance of the evidence, there exists a current indication
21 that they may intentionally evade the criminal justice system. According to the NPR, he has no
22 prior FTAs.

23 **CONCLUSION**

24 Based upon the foregoing, Nache Couyette, respectfully requests that this Honorable
25 Court vacate the current detention order and release him on Intensive Supervision unless this
26 court concludes, in writing, after an adversarial hearing, that the State established clear and
27 convincing evidence that pretrial detention is the least restrictive means of assuring Nache
28

1 Couyette's return to court and ensuring community safety. Additionally Petitioner requests that
2 if this court determines that release with bail as a condition of release that it make a record
3 pursuant to NRS 178.498 as to the basis for the amount set and its relationship to Petitioner's
4 ability to give bail.

5 DATED this 24th day of July, 2018.

6 PHILIP J. KOHN
7 CLARK COUNTY PUBLIC DEFENDER

8
9 By: /s/Christy Craig
10 CHRISTY CRAIG, #6262
11 Deputy Public Defender
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NOTICE OF MOTION

TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Plaintiff:

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

DATED this 24th day of July, 2018.

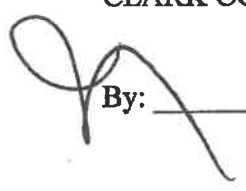
PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: /s/Christy Craig
CHRISTY CRAIG, #6262
Deputy Public Defender

RECEIPT OF COPY

RECEIPT OF COPY of the above and foregoing MOTION TO VACATE DETENTION ORDER AND RELEASE THE DEFENDANT FROM CUSTODY is hereby acknowledged this 24 day of July, 2018.

CLARK COUNTY DISTRICT ATTORNEY

By: 

Case Name: Nache Couyette

Case No. 18F13328X

Dept No. 3

EXHIBITS

NEVADA PRETRIAL RISK (NPR) ASSESSMENT

Assessment Date: 7/19/2018

Assessor: Johnny Dewitt

County: Clark

Defendant's Name: NACHE COUYETTE

DOB: 3/13/1998

AGE: 20

Case/Booking #: 18F13328X

Dept #: 03

Address: UNABLE TO VERIFY

Contact Phone #:

of Current Charges: 2

City:

State: Zip:

Most Serious Charge: Robbery, e/dw

Total Bail at booking: \$60,000.00

SCORING ITEMS

SCORE

1. Does the Defendant Have a Pending Pretrial Case at Booking?

No If yes, list case # and jurisdiction:

0

2. Age at First Arrest (include juvenile arrests)
20 yrs and under

First Arrest Date 09/02/2017

2

3. Prior Misdemeanor Convictions (past 10 years)
One to five

1

4. Prior Felony/Gross Misd. Convictions (past 10 years)
None

0

5. Prior Violent Crime Convictions (past 10 years)
None

0

6. Prior FTAs (past 24 months)
None

0

7. Substance Abuse (past 10 years)
Other

0

8. Mitigating Verified Stability Factors (limit of -2 pts. total deduction)
If 1, 2 and 3 not applicable

0

TOTAL SCORE:

3

Risk Level: Low Risk, 3 Points

OVERRIDE?: ☐ Yes

☒ No

Override Reason(s):

If Other, explain:

Final Recommended Risk Level:

☒ LOW

☐ MODERATE

☐ HIGHER

Supervisor/Designee Signature _____

Date: 7/19/2018

Revised 8.2017

Felony convictions:

YEAR	STATE	CHARGE
N/A	N/A	N/A

Misdemeanor Convictions: 1

FTAS: 0

Detainers: 0

Pending Cases: 0

Revised 8.2017

**Justice Court, Las Vegas Township
Clark County, Nevada**

Court Minutes

Department: 03

18F13328X State of Nevada vs. COUYETTE, NACHE

Lead Atty: Public Defender

**7/23/2018 8:30:00 AM Initial Appearance (In
Custody)**

Result: Matter Heard

PARTIES PRESENT:	State Of Nevada Attorney Defendant	Thomson, Megan Doyle, Patricia Denise COUYETTE, NACHE
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Judge:	Letizia, Harmony
Court Reporter:	MacDonald, Kit
Court Clerk:	Boyd, Thomas

PROCEEDINGS

Attorneys:	Doyle, Patricia Denise COUYETTE, NACHE	Added
	Public Defender COUYETTE, NACHE	Added
Hearings:	8/2/2018 9:30:00 AM: Preliminary Hearing	Added
Events:	Criminal Complaint <i>Filed in Open Court</i> Initial Appearance Completed <i>Defendant Advised of Charges on Criminal Complaint, Waives Reading of Criminal Complaint</i> Public Defender Appointed Bail Stands - Cash or Surety Amount: \$60,000.00 <i>Counts: 001; 002 - \$60,000.00/\$60,000.00 Total Bail</i>	

Justice Court, Las Vegas Township

STANDARD BAIL SCHEDULE

Effective May 26, 2025

FELONIES

CATEGORY A.....NO BAIL – SET IN COURT

CATEGORY B:

MAXIMUM TERM OF IMPRISONMENT GREATER THAN 10 YEARS.....\$20,000

EXCEPTIONS:

ATTEMPTED CATEGORY A FELONY.....NO BAIL – SET IN COURT

DUI RESULTING IN SBH OR DEATH.....NO BAIL – SET IN COURT

MAXIMUM TERM OF IMPRISONMENT 10 YEARS.....\$10,000

MAXIMUM TERM OF IMPRISONMENT LESS THAN 10 YEARS.....\$5,000

EXCEPTION:

DUI 3RD OR SUBSEQUENT OFFENSE.....\$20,000

CATEGORY C*.....\$5,000

EXCEPTION:

BATTERY DV-SBH (NO DW)/STRANGULATION/3RD OFFENSE.....\$15,000

CATEGORY D AND E.....\$3,000

GROSS MISDEMEANORS*.....\$2,000

MISDEMEANORS*.....\$1,000

EXCEPTIONS:

BATTERY DV.....\$3,000

BATTERY DV 2ND.....\$5,000

DUI.....\$2,000

DUI 2ND.....\$5,000

*VIOLATIONS OF PROTECTION ORDER.....\$15,000

ANY ADDITIONAL PENALTY PURSUANT TO

NRS 193.161 (School Property), 193.162 (Assistance of Child),

193.163 (Handgun Containing Metal-Penetrating Bullets),

193.165 (Use of Deadly Weapon), 193.166 (Felony in Violation of Protection Order),

193.167 (60 or Older/Vulnerable Person), 193.1675 (Certain Characteristics)

193.168 (Gang), 193.1685 (Terrorism), 453.3335, 453.3345, 453.3351, or 453.3353

(certain violations involving controlled substances under certain circumstances)

UNLESS ELEMENT OF THE CRIME.....DOUBLE STANDARD AMOUNT



PHILIP J. KOHN, PUBLIC DEFENDER
NEVADA BAR NO. 0556
CHRISTY CRAIG, DEPUTY PUBLIC DEFENDER
NEVADA BAR NO. 6262
CLARK COUNTY PUBLIC DEFENDER'S OFFICE
309 South Third Street, Suite 226
Las Vegas, Nevada 89155
Telephone: (702) 455-4685
Facsimile: (702) 455-5112
craigcl@clarkcountynv.gov
Attorneys for Defendant

DISTRICT COURT, LAS VEGAS
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

v.

NACHE COUYETTE, #5208685.

DCT. CASE NO. C-18-334261-1
JCT. CASE NO. IX
DEPT. NO.

DATE: August 28, 2018
TIME: 9:00

MOTION TO VACATE DETENTION ORDER OR
TO HOLD DE NOVO DETENTION HEARING

COMES NOW, the Defendant, Nache Couyette, by and through, Christy Craig, Deputy Public Defender, and moves this Honorable Court for an order vacating Nache Couyette's current detention order and releasing him on his own recognizance or, in the alternative, pursuant to attainable conditions "minimally necessary" to protect the community and ensure his return to court.

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

DATED this 23rd day of August, 2018.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: /s/Christy Craig
CHRISTY CRAIG, #6262
Deputy Public Defender

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 COMES NOW Petitioner, XLX, by and through her counsel, Christy Craig, Deputy Clark
3 County Public Defender, and submits the following Points and Authorities in Support of the
4 instant Emergency Petition for a Writ of Habeas Corpus or, in the Alternative, Motion to Vacate
5 Detention Order.

6 **FACTS AND PROCEDURAL HISTORY**

7 Nache Couyette is in custody at the Clark County Detention Center because his
8 current release conditions are unattainable. This amounts to a pretrial detention order. See U.S.
9 v. Mantecon-Zayas, 949 F.2d 548, 550 (1st Cir. 1991); ODonnell v. Harris County, 251
10 F.Supp.3d 1052, 1143-44 (S.D. Tex. Apr. 28, 2017) (holding that secured money bail set in an
11 amount that an arrestee cannot afford is constitutionally equivalent to an order of detention).
12 Pretrial detention orders violate due process unless they are preceded by a full-blown adversarial
13 hearing at which the State establishes clear and convincing evidence that preventative detention
14 is the least restrictive means of protecting the community and ensuring the accused's appearance
15 in court. U.S. v. Salerno, 481 U.S. 739, 750, 107 S. Ct. 2095 (1987). They also violate equal
16 protection guarantees if, in the absence of such a hearing, bail is imposed as a release condition
17 and is unattainable. See ODonnell v. Harris Co., 251 F.Supp.3d 1052, 1143-44 (S.D. Tex. Apr.
18 28, 2017). (finding that the Equal Protection Clause prohibits pretrial detention solely because of
19 a defendant's inability to afford bail). Notably, any release condition that exceeds a purported
20 threat posed by a particular defendant violates the Eighth Amendment's prohibition on excessive
21 bail. Salerno, 481 U.S. at 754.

22 On July 19, 2018, Petitioner was arrested without a warrant on suspicion of Robbery and
23 Burglary. On July 20, 2018, Justice of the Peace Walsh reviewed police reports and found probable
24 cause for Petitioner's arrest. At the same time, in Petitioner's absence and in the absence of a
25 criminal complaint, the magistrate set bail in the amount of \$60,000 which is standard bail.
26 Petitioner, an indigent defendant, could not pay that bail. Accordingly, he remained jailed at the
27 Clark County Detention Center.

1 On July 23, 2018, Petitioner was brought before Judge Letizia for an initial appearance. Bail
2 remained at \$60,000.

3 On July 24th, 2018, Petitioner filed a Motion To Vacate Detention Order objecting to
4 Petitioner's ongoing detention based upon (1) the unlawful manner in which the magistrate issued
5 the initial bail/detention order in Petitioner's absence; and (2) the magistrate's refusal to conduct the
6 constitutionally-required detention hearing prior to issuing a *de facto* detention order.

7 On July 30, 2018 the lower court acknowledged that Petitioner's custody status was not
8 addressed at the July 23, 2018 hearing.

9 While the court heard arguments, the state failed to prove by clear and convincing evidence
10 that preventative detention is the least restrictive means of ensuring community safety and
11 Petitioner's return to court. In the absence of such a finding by clear and convincing evidence,
12 Petitioner's continued incarceration violates his constitutional and statutory rights.

13 The lower court noted it had reviewed a financial affidavit provided by the jail (which is not
14 available to the defense) that indicated that he was employed part-time. The court inexplicably
15 failed to address Petitioner's salary or his expenses instead lowering bail to \$20,000 rather than the
16 original \$60,000.

17 The lower court failed to make record of the reasoning underlying the grant of bail with
18 regard to statutory consideration including the financial ability of the Petitioner to give bail and the
19 relationship of the \$20,000 bail to community safety and ensuring return to court.

20 Mr. Couyette's current detention order is unlawful because 1) the State did not show by
21 clear and convincing evidence that there are no release conditions that could reasonably mitigate
22 danger to the community and ensure the his appearance in court, and 3) the unattainable bail
23 setting did not take into consideration his ability to pay bail. As a result, this Court should release
24 Defendant on an own recognizance release ("OR"). Since the last hearing the lower court, Mr.
25 Couyette has applied and been accepted at Shannon West Homeless Youth Center. The facility
26 will provide him with stable housing, substance abuse and mental health treatment. Prior to his
27
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1 arrest, he was working at B.G. Staffing. He will continue to work doing maintenance upon
2 release earning a minimum wage salary.

3 Mr. Couyette is twenty (20) years old with no prior felony or gross misdemeanor
4 convictions. According to the Nevada Pretrial Risk ("NPR") assessment, he has one
5 misdemeanor conviction and no failures to appear ("FTA"). Additionally, Mr. Couyette has no
6 prior crimes of violence within the past ten years, in fact he has no felony or gross misdemeanor
7 convictions at all. The NPR assessment was 3 points putting him at a low risk meaning he
8 should be considered for an OR release.

9 Mr. Couyette is a Las Vegas native. He has several family members that live in Las
10 Vegas who have been supportive throughout is case, including his mother. Additionally, Mr.
11 Couyette has two children, one of whom who lives locally, and one child on the way. Mr.
12 Couyette contributes financially to care for his children and is planning to seek formal custody
13 arrangements through Family Court.

14 Finally, Mr. Couyette unconditionally waived his right to a preliminary hearing on
15 August 21, 2018, to enter a guilty plea in District Court to one (1) count of Attempt Robbery, a
16 Category B felony. In exchange for his guilty plea, the State has agreed to make no
17 recommendation at the time of sentencing.

18 STATEMENT OF THE ISSUES

19 The current detention order violates Petitioner's constitutional rights in that:

20 I. At the Probable Cause Determination, the lower court issued a *de facto* detention
21 order, without Petitioner's presence, by setting bail that Petitioner cannot make pursuant to a
22 standardized bail schedule. This order violates Petitioner's Due Process and Equal Protection rights,
23 as well as the constitutional prohibition on excessive bail, and Nevada law;

24 II. At the Initial Appearance, the lower court issued a detention order despite the State's
25 failure to demonstrate that detention was the least restrictive means of assuring community safety
26 and ensuring the accused's return to court. This order violates Petitioner's Due Process and Equal
27 Protection rights, as well as the constitutional prohibition on excessive bail, and Nevada law.

1 III. The lower court failed to make a record of the reasoning underlying the grant of bail
2 with regard to statutory considerations established by NRS 178.498, including the financial ability
3 of the defendant to give bail and the relationship of the amount of bail to community safety and
4 ensuring return to court.

5 IV. That Petitioner is requesting that this court hold a constitutionally and statutorily
6 appropriate detention hearing.

7
8 **SUMMARY OF ARGUMENT**

9 The protocol by which pretrial detention orders are promulgated in Clark County is
10 unlawful. First, the procedure by which a criminal matter is subject to a probable cause review
11 following arrest is unlawful. This includes determinations regarding pretrial detention, which are
12 decided in the absence of the accused and often involve use of a standardized bail schedule.
13 Second, Clark County's ongoing, systemic use of bail as a tool of pretrial *confinement* rather
14 than *release* is also unlawful. There are two principal constitutional problems with detaining a
15 person prior to trial simply because he cannot make a monetary payment: (1) jailing someone
16 solely because he cannot pay a sum of money without making a finding that he is able to pay
17 infringes a fundamental right solely on the basis of wealth in violation of the Equal Protection
18 and Due Process Clauses; and (2) jailing someone on an unattainable financial condition violates
19 the Constitution because it deprives a presumptively innocent person of the fundamental right to
20 liberty without complying with the substantive and procedural requirements of a valid order of
21 detention under the Due Process Clause. Jailing someone for failing to pay a sum of money
22 requires a procedurally proper finding that the person is able, but refuses, to pay the specified
23 sum *or* that no release conditions exist to satisfy the government's compelling interest in
24 assuring community safety and ensuring the accused's return to court. Absent such a
25 procedurally proper hearing (the constitutionally mandated components of which are discussed
26 below) any *de facto* detention order, such as that at issue here, violates the Petitioner's
27 constitutional rights.

ARGUMENT

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

A. The Due Process Clause

The Due Process Clauses of the U.S. and Nevada Constitutions provide that “[n]o person shall . . . be deprived of life, liberty, or property without due process of law.” U.S. Const. amend. V;³ Nev. Const. Art. 1, §8. Due Process has two components: substantive and procedural. Substantive due process “prohibits states from infringing fundamental liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest.” Lawrence v. Texas, 539 U.S. 558, 593, 123 S. Ct. 2472 (2003). Procedural due process protects citizens “not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property.” Carey v. Phipps, 435 U.S. 247, 259, 98 S. Ct. 1042 (1978). Because the Due Process Clause of the Nevada Constitution mirrors that of its federal counterpart, Nevada “looks to federal precedent” for guidance in resolving due process claims. Hernandez v. Bennett-Haron, 128 Nev. 580, 587, 287 P.3d 305 (2012).

The essential elements of a procedural due process claim under the Fifth Amendment are “(1) a life, liberty, or property interest requiring protection under the Due Process Clause, and (2) a deprivation of that interest (3) without adequate process.” Fields v. Henry Co., 701 F.3d 180, 185 (6th Cir. 2012). “A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word ‘liberty’ . . . or [by] an expectation or interest created by the state law or policies”. Wilkinson v. Austin, 545 U.S. 209, 221, 125 S. Ct. 2384 (2005) (citation omitted). Freedom of movement, including the right to travel, has long been recognized as a liberty interest which cannot be restricted without due process of law. City of Chicago v. Morales, 527 U.S. 41, 54, 119 S. Ct. 1849 (1999) (citing Kent v. Dulles, 357 U.S. 116, 78 S. Ct. 1113 (1958) (noting that freedom of movement is “a part of our heritage”)). Accordingly, any restraint on pretrial liberty implicates due process protections. Those protections require “adequate process”. In the context of a pretrial detention order, “adequate process” requires a

³ The Fifth Amendment Due Process Clause was made applicable to the states via the Fourteenth Amendment to the U.S. Constitution. U.S. Const. amend, V, XIV. See Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489 (1964)

1 hearing before a neutral fact-finder and an opportunity for the accused to be heard “at a
2 meaningful time and in a meaningful manner.” Mathews v. Eldridge, 424 U.S. 319, 333-34, 96
3 S. Ct. 893 (1976) (citations omitted).

4 **B. Equal Protection Clause**

5 The Equal Protection Clause of the U.S. and Nevada Constitutions prohibits the
6 government from denying individuals equal protection of the laws. U.S. Const. amend. XIV;
7 Nev. Const. Art. 1, § 1 and Art. IV, § 21. The Equal Protection Clause may be invoked to
8 analyze the governmental actions that draw distinctions based upon specific characteristics or
9 impinge on an individual’s exercise of a fundamental right. See Skinner v. Oklahoma, 316 U.S.
10 535, 62 S. Ct. 1110 (1942). While the Equal Protection Clause permits the states some discretion
11 in enacting laws which affect some groups of citizens differently than others, a statute or practice
12 is unconstitutional if the “classification rests on grounds wholly irrelevant to the achievement of
13 the State’s objective.” McGowan v. Maryland, 366 U.S. 420, 425-26, 81 S. Ct. 1101 (1961).

14 **C. Excessive Bail Clause and Nevada’s Statutory Bail Scheme**

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

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

- 26 1. The length of residence in the community;
- 27 2. The status and history of employment;

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

NRS 178.4853.

In this case, Mr. Couyette unconditionally waived his right to a preliminary hearing on August 21, 2018, to enter a guilty plea in District Court to one (1) count of Attempt Robbery, a Category B felony. In exchange for his guilty plea, the State has agreed to make no recommendation at the time of sentencing. The plea does not require mandatory prison sentence in fact, he will be able to request probation at sentencing. The favorable negotiation increases Mr. Couyette's likelihood of returning to court.

Mr. Couyette has one misdemeanor in his criminal history. As a lifelong resident he has significant ties to the community, including his parents and children. He has employment which will be available for him to return to upon release.

Finally, Mr. Couyette has been accepted at Shannon West Homeless Youth Center. The facility will provide him with stable housing, substance abuse and mental health treatment indicating a commitment to accepting treatment increasing the likelihood of success in the event he is granted probation.

A. The Justice Court's Failure Conduct an Appropriate Adversarial Hearing at Which Petitioner Was Present and Find That Preventative Detention Was Necessary Violated Petitioner's Constitutional Rights

1 The Due Process Clauses of the Nevada Constitution provide that “[n]o person shall . . .
2 be deprived of life, liberty, or property without due process of law.” U.S. Const. amend. V;
3 Nev. Const. Art. 1, § 8. Due Process requires a hearing before a neutral fact-finder and an
4 opportunity to be heard “at a meaningful time and in a meaningful manner,” before an
5 individual is deprived of a fundamental right or property interest. Mathews v. Eldridge, 424
6 U.S. 319, 333-34, 96 S. Ct. 893 (1976) (citations omitted). Freedom of movement has long
7 been recognized as a liberty interest which cannot be restricted without due process of law. City
8 of Chicago v. Morales, 527 U.S. 41, 54, 119 S. Ct. 1849 (1999) (citing Kent v. Dulles, 357 U.S.
9 116, 78 S. Ct. 1113 (1958)). Accordingly, the issue of pretrial detention must be resolved in a
10 manner that comports with due process.

11 As set forth below, due process requires that the issue of pretrial confinement be
12 resolved via a robust, “adversarial” hearing at which a neutral magistrate makes an
13 individualized determination whether preventative detention is the least restrictive means of
14 assuring community safety and ensuring the accused’s return to court. U.S. v. Salerno, 481 U.S.
15 739, 107 S. Ct. 2095 (1987). This did not happen here. The reviewing magistrate in the instant
16 matter set bail at a 48 Hour PC Review at which neither Petitioner nor his counsel was present.
17 The magistrate set bail using only a police report and a temporary custody record. The
18 magistrate considered no information regarding Petitioner’s financial means, background, or
19 character (and likely relied on a standardized bail schedule utilized in Clark
20 County). ⁶Accordingly, based on the authority set forth herein, the instant bail setting violated
21 Petitioner’s constitutional and statutory rights.

22 **III. The Magistrate’s Detention Order Was Unlawful as it Was Issued Absent an**
23 **Adversarial Hearing at Which Prosecutors Established Clear and Convincing**
24 **Evidence that Pretrial Detention is the Least Restrictive Means of Assuring**
Petitioner’s Return to Court and Ensuring Community Safety.

25 **A. Introduction -- Clark County’s Systematic Use of Bail as a Mechanism of Pretrial**
26 **Detention is Unlawful**

27 ⁶ The lower court did indicate receiving a financial affidavit from the jail. It is not clear from the record when it was
28 received by the court.

1 **1. Clark County's Bail System**

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

13 **2. The History and Evolution of Bail in the United States**

14 "Bail" is not equivalent to "money bail." "Bail" means *release* before trial. Although
15 common in recent years, the sentence "the Defendant is held on \$10,000 bail" is a contradiction:
16 as a historical matter, being "held on bail" was impossible. Timothy R. Schnacke, U.S. Dep't of
17 Justice – Nat'l Inst. for Corr., Fundamentals of Bail: A Resource Guide for Pretrial Practitioners
18 and a Framework for American Pretrial Reform 1 (Aug. 2014).⁷ As the CATO Institute has
19 explained, since well before the Magna Carta, bail has been understood as a device to *free*
20 defendants pretrial. See Brief for Amicus Curiae CATO Inst, Walker v. City of Calhoun, Ga.,
21 No. 16-10521, at 3 (11th Cir. 2016).⁸

22 "Money bail" is the practice of requiring a defendant to forfeit money if they do not
23 appear for trial. Money bail can be either secured or unsecured. A secured money bail system
24 requires the defendant to deposit money before they are released; an unsecured money bail
25 system allows the defendant to be released without depositing any money so long as they
26 promise to pay if they fail to appear.

27 ⁷ Available at http://www.clebp.org/images/2014-11-05_final_bail_fundamentals_september_8,_2014.pdf.

28 ⁸ Available at <https://object.cato.org/sites/cato.org/files/pubs/pdf/walker-y-city-of-calhoun.pdf>.

1 As Chief Judge Rosenthal of the U.S. District Court for the Southern District of Texas
2 recently summarized in her comprehensive discussion of the history of the American bail system,
3 ODonnell v. Harris Co., 251 F.Supp.3d 1052, 1068 (S.D. Tex. 2017),⁹ bail originated in
4 medieval England “as a device to free untried prisoners.” Daniel J. Freed & Patricia M. Wald,
5 Bail in the U.S.: 1964 1 (1964). The Statue of Westminster, enacted by the English Parliament in
6 1275, listed the offenses that would be bailable and provided criteria for determining whether
7 someone should be released. These criteria included the strength of the evidence against the
8 accused and the severity of the accused’s criminal history. See June Carbone, Seeing Through
9 the Emperor’s New Clothes: Rediscovery of Basic Principles in the Administration of Bail, 34
10 Syracuse L. Rev. 517, 523-26 (1983); Note, Bail: An Ancient Practice Reexamined, 70 Yale L.J.
11 966 (1961). In 1679, Parliament adopted the Habeas Corpus Act to ensure that an accused could
12 obtain a timely bail hearing. And the English Bill of Rights, enacted in 1679, prohibited
13 excessive bail. See Carbone, *supra*, at 528.

14 The American States continued this tradition. Beginning with the Pennsylvania
15 Constitution of 1682, 48 states, including Nevada, have protected, by constitution or statute, a
16 right to bail “by sufficient sureties, except for capital offenses when the proof is evident or the
17 presumption great.” Matthew J. Hegreness, America’s Fundamental and Vanishing Right to Bail,
18 55 Ariz. L. Rev. 909, 916 (2013).

19 As the U.S. District Court for the Southern District of Texas recently explained in its
20 detailed opinion striking down Harris County’s money bail practices, “[h]istorians and jurists
21 confirm that from the medieval period until the early American republic, a bail bond was
22 typically based on an individualized assessment of what the arrestee or his surety *could pay* to
23 assure appearance and secure release.” ODonnell, 251 F.Supp.3d at 1069 (emphasis added). The
24 court explained the English practice at the time of the ratification of the U.S. Constitution: “The
25 rule is, where the offence is prima facie great, to require good bail; moderation nevertheless is to
26 be observed, and such bail only is to be required as the party is able to procure; for otherwise the

27
28 ⁹ Aff’d as modified, 882 F.3d 528 (5th Cir. 2018).

allowance of bail would be a mere colour for imprisoning the party on the charge.” Id. (quoting 1 J. Chitty, A Practical Treatise on the Criminal Law 88-89 (Philadelphia ed. 1819)).

Jurisdictions across America began to depart from the original understanding of bail in the middle of the 20th Century. And in the last two decades, the use of unaffordable secured money bail has increased in scope and severity. In 1996, 59% of felony defendants had to meet a financial condition to regain their liberty pretrial. Timothy C. Hart & Brian A. Reaves, U.S. Dep’t of Justice, Felony Defendants in Large Urban Counties, 1996, at 17-18 (1999).¹⁰ By 2009, that percentage had climbed to 72%. Brian A Reaves, U.S. Dep’t of Justice, Felony Defendants in Large Urban Counties, 2009-Statistical Tables, at 15, 20 (2013).¹¹ In 1990, the majority of felony defendants who were not detained while their cases were pending were released without financial conditions. In 2009, only 23% of felony defendants who were not detained while their cases were pending were released without financial conditions. And the average amount of money required to be paid as a condition of release has increased. Vera Inst of Justice, Incarceration’s Front Door: The Misuse of Jails in America, 29 (Feb. 2015).¹² By 2009, about half of felony defendants subject to financial conditions of release could not meet them and remained in custody until the disposition of their cases. Felony Defendants, 2009-Statistical Tables, at 17.

The routine use of unaffordable secured money bail resulted in a “crisis.” See U.S. v. Salerno, 481 U.S. 739, 742, 107 S. Ct. 2095 (1987) (describing “a bail crisis in the federal courts”); Caleb Foote, The Coming Constitutional Crisis in Bail: 1, 113 U. Pa. L. Rev. 959, 971 (1965). Two distinct evils of the secured money bail system provoked the crisis: It imperiled public safety by allowing potentially dangerous defendants to be released without any consideration of their dangerousness, and it worked an “invidious discrimination” against those who could not pay. See, e.g., Williams v. Illinois, 399 U.S. 235, 242, 90 S. Ct. 2018 (1970).

¹⁰ Available at <https://www.bjs.gov/content/pub/pdf/fdluc96.pdf>.

¹¹ Available at <https://www.bjs.gov/content/pub/pdf/fdluc09.pdf>.

¹² Available at https://storage.googleapis.com/vera-web-assets/downloads/Publications/incarcerations-front-door-the-misuse-of-jails-in-america/legacy_downloads/incarcerations-front-door-report_02.pdf.

1 Over 50 years ago, Attorney General Robert Kennedy led a successful movement to reform bail
2 in the federal courts. Kennedy testified:

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

9 Testimony on Bail Legislation before S. Judiciary Subcomm. on Const. Rights and
10 Improvements in Judicial Machinery (Aug. 4, 1964).¹³

11 One of the results of the movement to reform the bail system in the 1960s was the virtual
12 elimination of cash bonds in the District of Columbia and in all Federal courts. The Bail Reform
13 Act “assure[d] that all persons, regardless of their financial status, [would] not needlessly be
14 detained pending their appearance to answer charges . . . when detention serves neither the ends
15 of justice nor the public interest.” Bail Reform Act of 1966, Pub. L. No. 89-465, § 2, 80 Stat.
16 214, 214 (repealed in 1984). In 1984, Congress updated the Bail Reform Act as part of the
17 Comprehensive Crime Control Act. See Bail Reform Act of 1984, 18 U.S.C. §§ 3141-50. Federal
18 courts and the courts of the District of Columbia transitioned to a rigorous, evidence-based
19 system of non-financial conditions that remains in place today. If the government believes that a
20 defendant cannot be released pretrial because she is too dangerous or too likely to flee, the
21 government may seek an order of detention, but only after it has satisfied the court, at a “full-
22 blown adversarial hearing,” that no condition or combination of conditions could assure the
23 defendant’s appearance at trial and the safety of the community. Salerno, 481 U.S. at 750.
24 Indeed, *the constitutionality of any moneyed bail system requires as much in order to meet
25 constitutional muster. Id.* at 750-55.

26 Thus, the government may not detain someone just because he does not have enough
27 money, nor may the government use money to detain *sub rosa* people it believes to be

28 ¹³ Available at <http://www.justice.gov/sites/default/files/as/legacy/2011/01/20/08-04-1964.pdf>.

1 dangerous. 18 U.S.C. § 3143(c)(2) (“The judicial officer may not impose a financial condition
2 that results in the pretrial detention of the person”). Although courts may detain defendants
3 pending trial, they may not do so without rigorous process. As Chief Judge Rosenthal of the U.S.
4 District Court for the Southern District of Texas recently concluded, “[t]he federal history of bail
5 reform confirms that bail is a mechanism of pretrial release, not of preventative detention.”
6 ODonnell, 251 F.Supp. 3d at 1070.

7 **B. Any Bail Setting Exceeding That Which Petitioner Can Pay, in the Absence of the**
8 **Appropriate Hearing and Findings, Violates Petitioner’s Constitutional and**
9 **Statutory Rights.**

10 **1. Jailing Petitioner For the Inability to Make a Monetary Payment Violates the**
11 **Equal Protection and Due Process Clauses of the U.S. and Nevada Constitutions**

12 The principle that jailing the poor because they cannot pay a sum of money is
13 unconstitutional has deep roots in American constitutional law. See Williams v. Illinois, 399 U.S.
14 235, 241, 90 S. Ct. 2018 (1970) (“[T]he Court has had frequent occasion to reaffirm allegiance to
15 the basic command that justice be applied equally to all persons”); Douglas v. California, 372
16 U.S. 353, 355, 83 S. Ct. 814 (1963) (condemning the “evil” of “discrimination against the
17 indigent”); Griffin v. Illinois, 351 U.S. 12, 19, 76 S. Ct. 585 (1956) (“There can be no equal
18 justice where the kind of trial a man gets depends on the amount of money he has”); see also
19 Mayer v. City of Chicago, 404 U.S. 189, 193, 92 S. Ct. 410 (1971).

20 These principles have been applied in a variety of contexts in which a government jailed
21 someone because of her inability to make a monetary payment. In Tate v. Short, 401 U.S. 395,
22 91 S. Ct. 668 (1971), the U.S. Supreme Court held that “the Constitution prohibits the State from
23 imposing a fine as a sentence and then automatically converting it into a jail term solely because
24 the defendant is indigent and cannot forthwith pay the fine in full.” Id. at 398. In Bearden v.
25 Georgia, 461 U.S. 660, 103 S. Ct. 2064 (1983), the Court explained that to “deprive [a]
26 probationer of his conditional freedom simply because, through no fault of his own he cannot
27 pay [a] fine... would be contrary to the fundamental fairness required by the Fourteenth
28 Amendment.” Id. at 672-73.

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

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

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

20 Pugh, 572 F.2d at 1058 (5th Cir. 1978).¹⁴ Indeed, "[t]he incarceration of those who cannot
21 [afford a cash payment], without meaningful consideration of other possible alternatives,
22 infringes on both due process and equal protection requirements." Id. at 1057;¹⁵ see also

23 ¹⁴ Rainwater further explained that it refused to require a priority to be given in all cases – including those of the
24 non-indigent – to non-monetary conditions of release. The court noted that, at least for wealthier people, some might
25 actually prefer monetary bail over release with certain other conditions, and that the court would not invalidate a
state Rule that allowed for those other conditions in appropriate cases. Pugh v. Rainwater, 572 F.2d 1053, 1057 (5th
Cir. 1978).

26 ¹⁵ Four circuit judges dissented in Rainwater. Although the agreed with the constitutional principles announced by
27 the majority that the Constitution forbids jailing the poor when they cannot afford monetary bail, they were
28 concerned about the majority's faith in the Florida courts not to apply the new state Rule in unconstitutional ways to
detain the indigent. Pugh v. Rainwater, 572 F.2d 1053, 1067 (5th Cir. 1978) ("I cannot escape the conclusion that
the majority has chosen too frail a vessel for such a ponderous cargo of human rights.") (Simpson, J., dissenting).

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

6 The U.S. Justice Department recently endorsed this view, asserting that “[i]ncarcerating
7 individuals solely because of their inability to pay for their release, whether through the
8 payment of fines, fees, or a cash bond, violates the Equal Protection Clause of the Fourteenth
9 Amendment.” Jones v. City of Clanton, 2015 WL 5387219, at *4 (M.D. Ala. Sept. 14, 2015);
10 see also Varden v. City of Clanton, Civ. No. 15–34, Docket. No. 26 at 1 (M.D. Ala. Feb. 13,
11 2015). The Justice Department reasoned that a secured money bail schedule, like the one
12 utilized in Clark County, “do[es] not account for individual circumstances of the accused” and
13 it “essentially mandate[s] pretrial detention for anyone who is too poor to pay the
14 predetermined fee.” Jones, 2015 WL 5387219, at *9.

15 Accordingly, several federal district courts have held that state laws setting a particular
16 monetary bail amount without individualized considerations of indigency violate the Due
17 Process Clause. See, e.g., Rodriguez v. Providence Cmty. Corr., Inc., 155 F.Supp.3d 758, 767-
18 70 and n. 10 (M.D. Tenn. 2015) (granting class-wide preliminary injunction enjoining state
19 policy requiring monetary payment for probations to obtain release pending a revocation
20 hearing “without an inquiry into the individual’s ability to pay the bond and whether alternative
21 methods of ensuring attendance at revocation hearings would be adequate”); Williams v.
22 Farrior, 626 F.Supp. 983, 985 (S.D. Miss. 1986) (“[I]t is clear that a bail system which allows
23 only monetary bail and does not provide for any meaningful consideration of other possible
24 alternatives for indigent pretrial detainees infringes on both equal protection and due process
25 requirements.”); Buffin v. City and Co. of San Francisco, No. 15-CV-04959-YGR, 2018 WL
26 424362 at *7 (N.D. Cal. Jan. 16, 2018); cf. Abdi v. Nielson, No. 1:17-CV-0721 EAW, 2018
27 WL 798747, at *4 (W.D.N.Y. Feb. 9, 2018).

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

13 Bail, if set, must be tailored to the Petitioner’s financial resources with the amount set
14 as necessary to reasonable assure return to court and community safety thereby complying
15 with Nevada statutes and the US and NV Constitutions.

16 **2. Jailing Petitioner Without a Robust Hearing on, and Specific Findings**
17 **Concerning, his Dangerousness and Risk of Flight Simply Because He Cannot**
18 **Pay Secured Money Bail Violates the Due Process Clauses of the U.S. and**
19 **Nevada Constitutions**

19 The right to pretrial liberty is “fundamental.” U.S. v. Salerno, 481 U.S. 739, 750, 107 S.
20 Ct. 2095 (1987); see also Zadvydas v. Davis, 533 U.S. 678, 690, 121 S. Ct. 2491 (2001)
21 (“Freedom from imprisonment – from government custody, detention, or other forms of physical
22 restraint – lies at the heart of the liberty that [the Due Process] Clause protects”); Foucha v.
23 Louisiana, 504 U.S. 71, 80, 112 S. Ct. 1780 (1992) (“Freedom from bodily restraint has always
24 been at the core of the liberty protected by the Due Process Clause from arbitrary governmental
25 action.”); U.S. v. Montalvo-Murillo, 495 U.S. 711, 716, 110 S. Ct. 2072 (1990) (holding that
26 release prior to trial is a “vital liberty interest”). Because “[f]reedom from bodily restraint is a
27 fundamental liberty interest,” any deprivation of that liberty must withstand heightened
28

1 constitutional scrutiny, which generally requires that the deprivation be narrowly tailored to
2 further a compelling government interest. See, e.g., Lopez-Valenzuela v. Arpaio, 770 F.3d 772,
3 781 (9th Cir. 2014) (en banc) (applying strict scrutiny to strike down Arizona bail law that
4 required detention after arrest for undocumented immigrants accused of certain offenses). For
5 that reason, the Salerno Court applied exacting scrutiny to a presumptively innocent person's
6 loss of pretrial liberty and required that the government employ rigorous procedures to protect
7 that liberty. See Salerno, 481 U.S. at 746 (describing "procedural due process" restrictions on
8 pretrial detention, and citing Matthews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893 (1976)).

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

20 To meet this standard, a court must find on the record that the detainee presents a risk of
21 flight or danger to the community and that no conditions or combination of conditions alternative
22 to detention could reasonably mitigate that danger. Salerno, 481 U.S. at 750. In Salerno, the U.S.
23 Supreme Court considered a facial challenge to the federal Bail Reform Act. That Act permits
24 the government to detain people found to be highly dangerous, after an individualized "full
25 blown adversary hearing," and only where the "Government... convince[s] a neutral
26 decisionmaker by clear and convincing evidence that no conditions of release can reasonably
27 assure the safety of the community . . ." 481 U.S. at 740. The Supreme Court subjected the Bail
28

1 Reform Act to heightened judicial scrutiny, holding that the government may detain individuals
2 before trial only where that detention is carefully limited to serve a ‘compelling’ government
3 interest. Id. at 746.

4 Salerno imposed two interlocking sets of requirements on preventative detention:
5 substantive and procedural. Id. at 746. The U.S. Supreme Court explained that the “Due Process
6 Clause protects individuals against two types of government action”. Id. First, “‘substantive due
7 process’ prevents the government from engaging in conduct that ‘shocks the conscience’ or
8 interferes with rights ‘implicit in the concept of ordered liberty.’” Id. Secondly, if a “government
9 action depriving a person of life, liberty, or property survives substantive due process scrutiny,”
10 a court must subsequently determine whether the government action satisfies “procedural due
11 process” by having the governmental action “implemented in a fair manner”. The procedural
12 requirements are necessary to ensure that the substantive ones have been met.

13 Substantively, Salerno required that pretrial detention survive heightened constitutional
14 scrutiny. The government may deprive a presumptively innocent person of her physical liberty
15 only if doing so is tailored to advance a compelling interest. Id. at 746-48. Therefore, the
16 government may detain someone pretrial only if other, less restrictive means are available to
17 serve the state’s interests.

18 Procedurally, Salerno held that orders of detention may be entered after rigorous
19 procedures have been met. These procedures include, but are not necessarily limited to, a “full-
20 blown adversary hearing.” Id. at 750; a heightened evidentiary standard of proof of
21 dangerous/flight risk by “clear and convincing evidence,” Id. at 751; consideration of alternative
22 conditions or release; Id. at 741; and “written findings of fact and a written statement of reasons
23 for a decision to detain.” Id. Consistent with its reliance on procedural due process cases, Id. at
24 746 (citing Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893 (1976)), Salerno insists on
25 procedures that are sufficient to ensure that any preventive detention be consistent with
26 substantive due process.

1 Following Salerno, courts across the country have made clear that pretrial detention
2 protocols must be consistent with both procedural and substantive due process. See Simpson v.
3 Miller, 387 P.3d 1270, 1276 (Ariz. 2017) (“[I]t is clear from Salerno and other decisions that the
4 constitutionality of a pretrial detention scheme turns on whether particular procedures satisfy
5 substantive due process standards”); see also Lopez-Valenzuela v. Arpaio, 770 F.3d 772, 781
6 (9th Cir. 2014) (en banc) (applying strict scrutiny to strike down an Arizona law that required
7 detention after arrest without individualized consideration of an arrestee’s circumstances);
8 ODonnell v. Harris County, 251 F.Supp.3d 1052 (S.D. Tex. Apr. 28, 2017); Carlisle v. Desoto
9 County, Mississippi, 2010 WL 3894114, at *5 (N.D. Miss. Sept. 30, 2010) (holding that because
10 a “compelling state interest” was required for pretrial detention, the plaintiff’s rights were
11 violated if he was jailed without consideration of non-financial alternatives); Williams v. Farrior,
12 626 F.Supp. 983, 986 (S.D. Miss. 1986) (holding that a state’s pretrial detention scheme must
13 meet “strict judicial scrutiny” because of the fundamental rights at issue).

14 In Simpson v. Miller, 367 P.3d 1270 (Az. 2017), the Arizona Supreme Court considered
15 a state constitutional amendment that required the pretrial detention of people charged with
16 “sexual assault, sexual conduct with a minor under fifteen years of age or molestation of a child
17 under fifteen years of age when the proof is evident or the presumption great.” Simpson, 387
18 P.3d at 1273. Arizona procedures required a “full-blown adversary hearing” before someone was
19 detained pretrial under this provision, but the hearing was to determine only whether the proof
20 was evident that the defendant committed the alleged offense; trial courts did not inquire into
21 dangerousness or risk of flight separately. The Arizona Supreme Court subjected this provision
22 to “heightened scrutiny” under the Due Process Clause of the U.S. Constitution. Id. at 1277.
23 Although it concluded that “heightened scrutiny” and “strict scrutiny” are not necessarily
24 identical, and that Salerno applied the former rather than the latter, the court nonetheless
25 concluded that Arizona’s preventative detention regime failed the constitutional test. Id. at 1278.
26 The court opined that the state must either provide individualized determinations of
27 dangerousness for every person detained pretrial or “if the state chooses not to provide such
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1 determinations, its procedure would have to serve as a convincing proxy for unmanageable flight
2 risk or dangerousness.” Id. at 1277 (quotation marks and citation omitted). The court held that
3 Arizona’s procedures were insufficient because nothing about the crimes with which the
4 defendant was charged served as a convincing proxy for unmanageable risk of flight or
5 dangerousness.

6 In Lopez-Valenzuela, the Ninth Circuit Court of Appeals considered an Arizona law that
7 categorically denied pretrial release to any arrestee who was an undocumented immigrant to the
8 U.S. The court applied “strict scrutiny” to the Arizona law, relying on Salerno. 770 F.3d at 786.
9 Under strict scrutiny, the court concluded, the law could not survive. “Whether a categorical
10 denial of bail for noncapital offenses could *ever* withstand heightened scrutiny is an open
11 question,” the court noted. Id. at 785 (emphasis added). But the court concluded that a blanket
12 prohibition on pretrial release for undocumented immigrants clearly could not survive
13 heightened scrutiny. Id. To detain a presumptively innocent person prior to trial, the court
14 reasoned, the state must offer convincing – and individualized – rationales. Id. at 786.

15 Nevada law contains a conceptual framework for detention inquiries but omits the
16 procedural protections required by Salerno. NRS 178.4851 provides that criminal defendants
17 may be released without bail upon a showing of good cause that the court “can impose
18 conditions on the person that will adequately protect the health, safety, and welfare of the
19 community and ensure that the person will appear at all times and places ordered by the court.”
20 NRS 178.4851. This runs afoul of Salerno in that it burdens the defense with establishing ‘good
21 cause’ for release, and speaks only to the issue of release *without bail*.¹⁶ Indeed, as Salerno
22 makes clear, the constitutionally proper inquiry is whether conditioned (or unconditioned)
23 release can satisfy the government’s interest in protecting the community and assuring the
24 defendant’s return to court; and *the government bears the burden* of establishing that it does not

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26
27 ¹⁶ To the extent that NRS 178.4851 obviates the procedural requirements mandated by Salerno, it is unconstitutional.
28 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.

1 before a defendant can be detained pretrial (i.e., held pursuant to unattainable release
2 conditions).¹⁷

3 While NRS 178.4853 sets forth factors bearing on the issue of pretrial release,¹⁸ those
4 factors must be considered in the context of the inquiry required by Salerno. So Nevada courts
5 should consider the factors outlined in NRS 178.4583 when assessing the need for preventative
6 detention and, in cases where a preventative detention request has been denied, when fashioning
7 release conditions minimally necessary to protect the community and ensure a defendant's return
8 to court. This may include consideration of bail as a *release condition* to the extent it is
9 minimally necessary to ensure a defendant's return to court and/or protect the community.
10 However, "When financial conditions are warranted, the least restrictive conditions principle
11 requires that an unsecured bond be considered first." ABA Standards for Crim. Justice (3rd Ed.)
12 Pretrial Release (2007), Std. 10-1.4(c) (commentary) at 43-44.¹⁹ This requires individualized
13 consideration of a defendant's unique circumstances, including "individualized considerations of
14 indigency." Weatherspoon, 2018 WL 1053548, at *14-15.

15 As set forth above, Petitioner's bail setting, which operated as a *de facto* detention order,
16 was issued in the absence of the constitutionally required hearing, inquiry, and findings outlined
17 in Salerno. At no point did a Court find, after an adversarial hearing, clear and convincing proof
18 that jailing Petitioner was the least restrictive means of assuring his return to court and

19 ¹⁷ See also, Lopez-Valenzuela v. Arpaio, 770 F.3d 772, 785-86 (9th Cir. 2014) (*en banc*) (finding Arizona law
20 establishing a blanket prohibition on pretrial release for any undocumented immigrants was unconstitutional because
21 it did not require the state to offer convincing – and individualized – rationales for detention); Simpson v. Miller,
387 P.3d 1270, 1277-78 (Ariz. 2017) (finding an Arizona statute unconstitutional that required pretrial detention on
22 all sex-related charges because the statute did not provide for individualized determination of dangerousness).

23 ¹⁸ The statutory factors are: 1) The length of residence in the community; 2) The status and history of employment;
24 3) Relationships with the person's spouse and children, parents or other family members and with close friends; 4)
25 Reputation, character and mental condition; 5) Prior criminal record, including, without limitation, any record of
26 appearing or failing to appear after release on bail or without bail; 6) The identity of responsible members of the
community who would vouch for the reliability of the person; 7) The nature of the offense with which the person is
charged, the apparent probability of conviction and the likely sentence, insofar as these factors relate to the risk of
not appearing; 8) The nature and seriousness of the danger to the alleged victim, any other person or the community
that would be posed by the person's release; 9) The likelihood of more criminal activity by the person after release;
and 10) Any other factors concerning the person's ties to the community or bearing on the risk that the person may
willfully fail to appear.

27 ¹⁹ https://nvcourts.gov/Conferences/District_Judges/Documents/The_History_of_Bail_-_DJ_Conf/ and available at:
28 https://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_blk.html#10-1.4.

community safety. Accordingly, Petitioner's current detention order violates her Due Process rights.

3. Jailing Petitioner Pursuant to a Bail Setting That Fails to Account for Her Ability to Pay Violates the Excessive Bail Clauses of the Federal and State Constitutions as Well as Nevada Law

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

The Eighth Amendment prohibits release conditions exceeding a purported threat posed by a particular defendant. Salerno, 481 U.S. at 754 (requiring that "the Government's proposed conditions of release or detention not be excessive in light of the perceived evil"). Bail and/or release conditions are "excessive" if they exceed that which is minimally necessary to ensure the accused's appearance in court and protect the community against future dangerousness. Stack v. Boyle, 342 U.S. 1, 5, 72 S. Ct. 1 (1951); U.S. v. Karper, 847 F.Supp.2d 350, 362 (N.D.N.Y. 2011). Thus, if a Court were to determine that preventative detention is not necessary to ameliorate Petitioner's risk of flight and danger to the community, any release conditions (of which bail is one) must be (1) attainable; and (2) minimally necessary to protect the community and ensure Petitioner's return to court. Anything exceeding that amounts to a violation of the Excessive Bail Clauses of the federal and state constitutions, as well as Nevada law.

CONCLUSION

Petitioner's \$20,000 bail setting amounts to a *de facto* detention order as he cannot pay that amount and, consequently, remains jailed at the Clark County Detention Center. Thereafter, Petitioner filed a Motion to Vacate her detention order, arguing that her bail setting derived from an unconstitutional procedure. The presiding Justice of the Peace denied the Motion and refused

1 to conduct a constitutionally proper detention hearing, thereby ordering Petitioner's continued
2 detention.

3 Additionally, the lower court failed to make record of the reasoning underlying the grant
4 of bail with regard to statutory consideration including the financial ability of the Petitioner to
5 give bail and the relationship of the amount, \$20,000 to community safety and ensuring return to
6 court.

7 Bail, if set, must be tailored to the Petitioner's financial resources with the amount set as
8 necessary to reasonable assure return to court and community safety thereby complying with
9 Nevada statutes and the US and NV Constitutions.

10 In light of the lower court's failure to hold a constitutionally and statutorily appropriate
11 hearing and the Petitioner's new circumstances Petitioner respectfully requests that this
12 Honorable Court conduct an appropriate detention hearing.

13 Accordingly, Petitioner respectfully requests that this Honorable Court grant the instant
14 Petition and vacate his current detention order, and release him with attainable release conditions
15 unless this court concludes, after an adversarial hearing, that prosecutors established clear and
16 convincing evidence that pretrial detention is the least restrictive means of assuring Petitioner's
17 return to court and ensuring community safety.

18 DATED this 23rd day of August, 2018.

19 PHILIP J. KOHN
20 CLARK COUNTY PUBLIC DEFENDER

21 By: /s/ Christy Craig
22 CHRISTY CRAIG, #6262
23 Deputy Public Defender
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YOU WILL PLEASE TAKE NOTICE that the foregoing EMERGENCY PETITION FOR WRIT OF HABEAS CORPUS OR, IN THE ALTERNATIVE, MOTION TO VACATE DETENTION ORDER will be heard on the 28th day of August, 2018, at 9:00 a.m. in Department No. IX of the District Court.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

CERTIFICATE OF ELECTRONIC SERVICE

By /s/ Kayleigh Lopatic

26

EXHIBIT A

CASE No. 18F13328X

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District Court C Case Number: **C334261**  
District Court Case Number: **C-18-334261-1**  
ITAG Booking Number: **1800037818**  
ITAG Case ID: **2005483**  
Metro Event Number: **1807190514**  
Other Agency Number: **1807190514**  
**180719000514**

**Lead Attorneys**  
**Public Defender**  
*Public Defender*  
702-455-4685(W)

Date  
07/19/2018  
07/19/2018

|            |        |
|------------|--------|
| 07/24/2018 | Motion |
|------------|--------|

07/27/2018 to vacate detention order and release the defendant from custody  
Opposition to Motion  
 07/30/2018 to vacate detention order and release the defendant from custody  
Motion (8:30 AM) (Judicial Officer Letizia, Harmony)  
In Custody  
Parties Present  
 Result: Motion Denied  
 07/30/2018 Minute Order - Department 03  
 07/30/2018 Motion  
by Defense to vacate the detention order and release the defendant from custody - Opposition by State - Motion Denied  
 07/30/2018 Future Court Date Stands  
08/02/18 at 930 am  
 07/30/2018 Bail Reset - Cash or Surety  
Counts: 001; 002 - \$20,000.00/\$20,000.00 Total Bail  
 07/30/2018 Release Order - Court Ordered Bail AND EMP - Medium (Judicial Officer: Letizia, Harmony )  
(Release Order - Court Ordered Bail AND Electronic Monitoring - Medium Level)  
 08/02/2018 Preliminary Hearing (9:30 AM) (Judicial Officer Letizia, Harmony)  
In Custody  
Parties Present  
 Result: Matter Heard  
 08/02/2018 Preliminary Hearing Date Reset  
 08/02/2018 Bail Stands - Cash or Surety  
Counts: 001; 002 - \$20,000.00/\$20,000.00 Total Bail  
 08/02/2018 Release Order - Court Ordered Bail AND EMP - Medium (Judicial Officer: Letizia, Harmony )  
(Release Order - Court Ordered Bail AND Electronic Monitoring - Medium Level)  
 08/02/2018 Minute Order - Department 03  
 08/10/2018 Ex Parte Order  
for transcript  
 08/17/2018 Transcript of Proceedings  
 08/21/2018 Preliminary Hearing (9:30 AM) (Judicial Officer Letizia, Harmony)  
In Custody  
Parties Present  
 Result: Bound Over  
 08/21/2018 Unconditional Bind Over to District Court  
Defendant unconditionally waives right to Preliminary Hearing. Defendant Bound Over to District Court as Charged. Defendant to Appear in the  
Lower Level Arraignment Courtroom A.  
 08/21/2018 Case Closed - Bound Over  
 08/21/2018 District Court Appearance Date Set  
Aug 23 2018 10:00AM: In Custody  
 08/21/2018 Bail Stands - Cash or Surety  
Counts: 001; 002 - \$20,000.00/\$20,000.00 Total Bail  
 08/21/2018 Release Order - Court Ordered Bail AND EMP - Medium (Judicial Officer: Letizia, Harmony )  
(Release Order - Court Ordered Bail AND Electronic Monitoring - Medium Level)  
 08/21/2018 Minute Order - Department 03  
 08/21/2018 Certificate, Bindover and Order to Appear



07/02/2018 *Counts: 001; 002; 003 - \$5,000.00/\$5,000.00 Total Bail*  
**Release Order - Court Ordered Bail AND House Arrest**  
*Counts: 001; 002; 003*

07/02/2018 **Minute Order - Department 11**

07/02/2018 **CTRAK Case Modified**  
*Jurisdiction/DA;*

07/03/2018 **CANCELED 72 Hour Hearing (7:30 AM)** (Judicial Officers Pro Tempore, Judge, Miller, James Joseph)  
*Criminal Complaint Filed*  
*In custody*

07/03/2018 **Initial Appearance (7:30 AM)** (Judicial Officers Pro Tempore, Judge, Miller, James Joseph)  
*Parties Present*  
 Result: Matter Heard

07/03/2018 **Defendant not Transported**  
*Medical Refusal*

07/03/2018 **Criminal Complaint**  
*Filed in open court*

07/03/2018 **Court Continuance**  
*for Defendant's presence and Initial Appearance*

07/03/2018 **Bail Reset - Cash or Surety**  
*Counts: 001; 002 - \$5,000.00/\$5,000.00 Total Bail*

07/03/2018 **Release Order - Court Ordered due to no complaint filed** (Judicial Officer: Pro Tempore, Judge )  
*Counts: 999*

07/03/2018 **Release Order - Court Ordered Bail AND House Arrest**  
*Counts: 001; 002*

07/03/2018 **Minute Order - Department 11**

07/05/2018 **Initial Appearance (7:30 AM)** (Judicial Officer Goodman, Eric)  
*In Custody*  
*Parties Present*  
 Result: Matter Heard

07/05/2018 **Initial Appearance Completed**  
*Defendant advised of Charges on Criminal Complaint, Waives Reading of Criminal Complaint*

07/05/2018 **Public Defender Appointed**

07/05/2018 **Motion by Defense for an O.R. Release**  
*Denied*

07/05/2018 **Bail Stands - Cash or Surety**  
*Counts: 001; 002 - \$5,000.00/\$5,000.00 Total Bail*

07/05/2018 **Release Order - Court Ordered Bail AND House Arrest**  
*Counts: 001; 002*

07/05/2018 **Minute Order - Department 11**

07/06/2018 **Motion**  
*to vacate detention order and release the defendant from custody*

07/10/2018 **Motion (7:30 AM)** (Judicial Officers Stoberski, Holly S., Pro Tempore, Judge)  
*In Custody*  
*Parties Present*  
 Result: Motion Denied

07/10/2018 **Motion**  
*by Defense to vacate detention order and release Defendant. Defense requests to hold a constitutional hearing for setting bail. Oral argument to said motion by State. Court treats motion as to reconsider bail setting - motion DENIED at this time*

07/10/2018 **Future Court Date Stands**  
*7/19/18 at 9 am*

07/10/2018 **Bail Stands - Cash or Surety**  
*Counts: 001; 002 - \$5,000.00/\$5,000.00 Total Bail*

07/10/2018 **Release Order - Court Ordered Bail AND House Arrest**  
*Counts: 001; 002*

07/10/2018 **Minute Order - Department 11**

07/10/2018 **Motion**  
*by Defense for transcript - motion granted Defense to submit an order.*

07/10/2018 **Transcript of Proceedings**  
*taken on 7/10/18, filed on 7/13/18, rsp*

07/12/2018 **Ex Parte Order**  
*EXPEDITED EX PARTE ORDER FOR TRANSCRIPT SIGNED BY JUDGE. kh*

07/19/2018 **Preliminary Hearing (9:00 AM)** (Judicial Officers Pro Tempore, Judge, Miller, James Joseph)  
*In Custody*  
*Parties Present*  
 Result: Bound Over

07/19/2018 **Unconditional Bind Over to District Court**  
*Defendant unconditionally waives right to Preliminary Hearing. Defendant Bound Over to District Court as Charged. Defendant to Appear in the Lower Level Arraignment Courtroom A.*

07/19/2018 **District Court Appearance Date Set**  
*Jul 23 2018 10:00AM: In Custody*

07/19/2018 **Case Closed - Bound Over**

07/19/2018 **Bail Stands - Cash or Surety**  
*Counts: 001; 002 - \$5,000.00/\$5,000.00 Total Bail*

07/19/2018 **Release Order - Court Ordered Bail AND House Arrest**  
*Counts: 001; 002*

07/19/2018 **Minute Order - Department 11**

07/19/2018 **Certificate, Bindover and Order to Appear**

07/19/2018 **Certificate, Bindover and Order to Appear**

Case Information

C-18-333496-W | In the Matter of the Petition of Clancy Mactler

|               |               |                     |
|---------------|---------------|---------------------|
| Case Number   | Court         | Judicial Officer    |
| C-18-333496-W | Department 3  | Herndon, Douglas W. |
| File Date     | Case Type     | Case Status         |
| 07/17/2018    | Criminal Writ | Dismissed           |

Party

|                 |                   |
|-----------------|-------------------|
| Respondent      | Active Attorneys▼ |
| Nevada State Of | Lead Attorney     |
|                 | Wolfson, Steven B |
|                 | Retained          |

|                 |                   |
|-----------------|-------------------|
| Petitioner      | Active Attorneys▼ |
| Mactler, Clancy | Lead Attorney     |
|                 | Public Defender   |
|                 | Retained          |

Events and Hearings

07/17/2018 Petition for Writ of Habeas Corpus ▼

Petition for Writ of Habeas Corpus



Comment

Emergency Petition for Writ of habeas Corpus or in the Alternative , Petition for Writ of Mandamus

07/23/2018 Petition for Writ of Habeas Corpus ▼

Petition for Writ of Habeas Corpus

Judicial Officer

Smith, Douglas E.

Hearing Time

8:00 AM

Result

Moot

Comment

Emergency Petition for Writ of Habeas Corpus or, In the Alternative, Petition for Writ of Mandamus

07/26/2018 Order ▼

Order - ORDR (CIV)

Comment

Order

07/30/2018 Notice of Entry of Order ▼

Notice of Entry of Order - NEOJ (CIV)

Comment

Notice of Entry of Order

08/07/2018 Order to Statistically Close Case ▼

Order to Statistically Close Case - OSCC (CIV)

Comment

Civil Order to Statistically Close Case

08/07/2018 Recorders Transcript of Hearing ▼

Recorders Transcript of Hearing - RTRAN (CIV)

Comment

RECORDER'S TRANSCRIPT OF PROCEEDINGS:  
EMERGENCY PETITION FOR WRIT OF HABEAS CORPUS  
OR, IN THE ALTERNATIVE, FORA WRIT OF MANDAMUS.  
HEARD ON JULY 23, 2018

## Financial

No financial information exists for this case.

## Documents

Petition for Writ of Habeas Corpus

Order - ORDR (CIV)

Notice of Entry of Order - NEOJ (CIV)

Order to Statistically Close Case - OSCC (CIV)

Recorders Transcript of Hearing - RTRAN (CIV)

Petition for Writ of Habeas Corpus

Case Information

C-18-333576-1 | State of Nevada vs Clancy Mactler

|               |                             |                   |
|---------------|-----------------------------|-------------------|
| Case Number   | Court                       | Judicial Officer  |
| C-18-333576-1 | Department 8                | Smith, Douglas E. |
| File Date     | Case Type                   | Case Status       |
| 07/19/2018    | Felony/Gross<br>Misdemeanor | Closed            |

Party

Plaintiff

State of Nevada

Active Attorneys▼

Lead Attorney

Wolfson, Steven B

Attorney

Einhorn, Kelsey R.

Defendant

Mactler, Clancy Patrick

Active Attorneys▼

Lead Attorney

Public Defender

Public Defender

DOB

XX/XX/XXXX

Gender

Male

Race

White

Height

6' 5"

Weight

205 lbs

Address

10838 ROSABELLA

LAS VEGAS NV 89141

Attorney

DeVaney-Sauter,

Kelli M.

Public Defender

Attorney

Schmidt, Robert J.

Retained

Charge

Charges  
Mactler, Clancy Patrick

|   | Description                                                     | Statute | Level  | Date       |
|---|-----------------------------------------------------------------|---------|--------|------------|
| 1 | POSSESSION OF CREDIT OR DEBIT CARD WITHOUT CARDHOLDER'S CONSENT | 205.690 | Felony | 06/29/2018 |

Events and Hearings

|                                                               |
|---------------------------------------------------------------|
| 07/19/2018 Criminal Bindover Packet Las Vegas Justice Court ▼ |
| Criminal Bindover                                             |
| 07/19/2018 Criminal Bindover - Confidential ▼                 |
| Criminal Bindover - Confidential                              |
| 07/20/2018 Information ▼                                      |
| Information - INFM (CRM)                                      |
| Comment<br>Information                                        |
| 07/23/2018 Initial Arraignment ▼                              |
| Initial Arraignment                                           |
| Judicial Officer<br>De La Garza, Melisa                       |

Hearing Time

10:00 AM

Result

Plea Entered

Parties Present▲

Defendant: Mactler, Clancy Patrick

Attorney: Schmidt, Robert J.

07/23/2018 Guilty Plea Agreement ▼

Guilty Plea Agreement

08/07/2018 Ex Parte Order ▼

Ex Parte Order - EXPR (CRM)

Comment

Expedited Ex Parte Order For Transcript

08/13/2018 Recorders Transcript of Hearing ▼

Recorders Transcript of Hearing - RTRAN (CRM)

Comment

Recorders Transcript of Hearing Re: Initial Arraignment

09/12/2018 Sentencing ▼

Minutes - Sentencing

Judicial Officer

Barker, David

Hearing Time

8:00 AM

Result

Defendant Sentenced

Comment

SENTENCING (USE PSI C332139)

Parties Present▲

Defendant: Mactler, Clancy Patrick

Attorney: DeVaney-Sauter, Kelli M.

Plaintiff: State of Nevada

Attorney: Einhorn, Kelsey R.

09/13/2018 PSI ▼

Comment

PSI FROM C332139 DATED 7/11/18

09/19/2018 Judgment of Conviction ▼

Judgment of Conviction - JOC (CRM)

Comment

JUDGMENT OF CONVICTION (PLEA OF GUILTY)

## Financial

No financial information exists for this case.

## Documents

Criminal Bindover

Criminal Bindover - Confidential

Information - INFM (CRM)

Guilty Plea Agreement

Initial Arraignment

Ex Parte Order - EXPR (CRM)

Recorders Transcript of Hearing - RTRAN (CRM)

Minutes - Sentencing

Judgment of Conviction - JOC (CRM)

1 PHILIP J. KOHN, PUBLIC DEFENDER  
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4 NEVADA BAR NO. 6262  
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FILED  
JUL 17 2018  
CLERK OF COURT

11 DISTRICT COURT, LAS VEGAS  
12 CLARK COUNTY, NEVADA

C-18-333496-W  
Dept. III

13 In the Matter of the Application of,

14 v.

15 CLANCY MACTLER,  
16 for a Writ of Habeas Corpus.

DCT. CASE NO.

JCT. CASE NO. 18F12108X

DEPT. NO.

DATE:

JULY 23, 2018

TIME:

8:00 AM

17 EMERGENCY PETITION FOR WRIT OF HABEAS CORPUS OR,  
18 IN THE ALTERNATIVE, PETITION FOR WRIT OF MANDAMUS

19 TO: The Honorable Judge of the Eighth Judicial District Court of  
20 The State of Nevada, in and for the County of Clark

21 The Petition of Clancy Mactler submitted by Christy Craig, Deputy Public Defender, as  
22 one of the attorneys for the above-captioned individual, respectfully affirms:

23 1. That she is a duly qualified, practicing, and licensed attorney in the City of  
24 Las Vegas, County of Clark, State of Nevada;

25 2. That Petitioner makes this emergency application for a Writ of Habeas  
26 Corpus or, in the alternative, a Writ of Mandamus; that the place where the Petitioner is  
27 imprisoned actually or constructively imprisoned and restrained of his liberty is the Clark County  
28 Detention Center; that the officer by whom he is imprisoned and restrained is Joe Lombardo,  
Sheriff;

3. That the imprisonment and restraint of said Petitioner is unlawful in that:  
(a) Petitioner is being held despite the government's failure to file a Criminal Complaint  
charging Petitioner with a crime; and (b) Petitioner was not afforded the constitutionally

1 mandated detention hearing to which he is entitled;

2 4. That Petitioner personally authorized his aforementioned attorney to  
3 commence this action.

4 WHEREFORE, Petitioner prays that this Honorable Court make an order  
5 directing the County of Clark to issue a Writ of Habeas Corpus directed to the said Joe  
6 Lombardo, Sheriff, commanding him to bring the Petitioner before your Honor, and return the  
7 cause of his imprisonment.

8 DATED this 16<sup>th</sup> day of July, 2018.

9  
10 PHILIP J. KOHN  
11 CLARK COUNTY PUBLIC DEFENDER

12  
13 By: /s/ Christy Craig  
14 Christy Craig, #6262  
15 Deputy Public Defender  
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1. I am an attorney licensed to practice law in the State of Nevada and I am one of the Deputy Public Defenders for the Clark County Public Defender's Office appointed to represent Petitioner Clancy Mactler in the present matter;

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

Pursuant to NRS 53.045, I declare under penalty of perjury that the foregoing is true and correct.

/s/ Christy Craig  
Christy Craig

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 COMES NOW the Petitioner, Clancy Mactler, by and through his counsel, Christy Craig,  
3 Deputy Clark County Public Defender, and submits the following Points and Authorities in  
4 Support of Defendant's Emergency Petition for a pretrial Writ of Habeas Corpus, or in the  
5 alternative, Writ of Mandamus.

6 **FACTS AND PROCEDURAL HISTORY**

7 On June 29, 2018, Las Vegas Metropolitan Police arrested Defendant Clancy Mactler  
8 alleging Ex-Felon failure to change address and Possession of the Credit/Debit Card of Another.

9 On July 1, 2018, Justice of the Peace Goodman reviewed police reports and found probable  
10 cause for Petitioner's arrest. At the same time, in Defendant's absence and in the absence of a  
11 criminal complaint, the Justice of the Peace set bail in the amount of \$5,000. Defendant, an indigent  
12 defendant, could not pay that bail. Accordingly, he remained jailed at the Clark County Detention  
13 Center.

14 On July 2, 2018 and July 3 Defendant was ill and did not attend court. On July 5, 2018,  
15 Defendant was brought before Judge, received the criminal complaint. The Pro Tem Judge kept  
16 bail at \$5,000.

17 On July 6, 2018 a Motion To Vacate Detention Order and Release Defendant From  
18 Custody. On July 10, 2018 Judge Pro Tem Stoberski heard the motion. The state explained that  
19 Petitioner had committed the instant offense while awaiting sentencing on another case so he lacks  
20 the capacity to stay out of trouble. Additionally he is likely to be sent to prison and has a criminal  
21 history. With those facts, the \$5,000 bail setting is low and should be raised to \$20,000 in order to  
22 encourage the Petitioner to return to court in the event he is released. The state noted that while the  
23 court should consider the person's economic standing it should reflect a number that is relative to  
24 their criminal history and provide an incentive to return to court. The state failed to argue why  
25 \$20,000 is a better incentive than \$5,000 for an indigent defendant.

26 Ultimately, the court found that the bail setting of \$5,000 was "appropriate taking into  
27 consideration, among other factors, the criminal complaint, the allegations that have been raised,  
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1 whether or not the defendant is a flight risk. In this particular case, he has had at least four prior  
2 failure to appear in court when he was told he was going to be here and looking at his past criminal  
3 history, whether or not he creates a danger to the community and again what the nature of the  
4 charges are. So in this particular case I find that \$5,000 is appropriate.”

5 Despite defense requests to do so, the court failed to consider defendant’s ability to give bail  
6 pursuant to NRS 178.498 and the court failed to make a record as to relationship between  
7 defendant’ ability to give bail and the actual amount set by the court.

8 Defense counsel objected to Petitioner’s ongoing detention based upon (1) the unlawful  
9 manner in which the magistrate issued the initial bail/detention order in Petitioner’s absence; and  
10 (2) the magistrate’s refusal to set bail in an amount that will reasonable ensure the appearance of the  
11 defendant and the safety of other persons, having regard to the financial ability of the defendant to  
12 give bail pursuant to NRS 178.498(b) and to make a record as the reasons for setting bail at \$5,000  
13 given Petitioner’s indigency.

14 Thus, Petitioner requests that this Honorable Court issue a Writ of Habeas Corpus directing  
15 the Clark County Sheriff to release Petitioner from custody. Alternatively, Petitioner requests that  
16 this Honorable Court issue a Writ of Mandamus directing the lower court to vacate the current bail  
17 setting and release Petitioner from custody or order the lower court to hold a detention hearing that  
18 comports with both US and Nevada Constitution and Nevada statutory requirements.

## 20 STATEMENT OF THE ISSUES

21 The current detention order violates Petitioner’s constitutional rights in that:

22 I. At the Probable Cause Determination, the lower court issued a *de facto* detention  
23 order, without Petitioner’s presence, by setting bail that Petitioner cannot make pursuant to a  
24 standardized bail schedule. This order violates Petitioner’s Due Process and Equal Protection rights,  
25 as well as the constitutional prohibition on excessive bail, and Nevada law;

26 II. At the detention hearing, the lower court issued a detention order with a \$5,000 bail  
27 setting without a discussion of or finding that the bail amount is set based on the judgment of the  
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1 magistrate that will reasonable ensure the appearance of the defendant and the safety of the  
2 community with the court considering the financial ability of the Petitioner to give bail.

### 3 BRIEF OVERVIEW

4 The protocol by which pretrial detention orders are promulgated in Clark County is  
5 unlawful. First, the procedure by which a magistrate defaults to detaining criminal defendants  
6 without a full hearing violates Federal and Nevada law. Second, Clark County's ongoing,  
7 systemic use of bail as a tool of pretrial *confinement* rather than *release* is also unlawful because:  
8 (a) jailing someone solely because he cannot pay a sum of money without making a finding that  
9 he is able to pay infringes a fundamental right solely on the basis of wealth in violation of the  
10 Equal Protection and Due Process Clauses; and (b) jailing someone on an unattainable financial  
11 condition violates the Constitution because it deprives a presumptively innocent person of the  
12 fundamental right to liberty without complying with the substantive and procedural requirements  
13 of a valid order of detention under the Due Process Clause. Finally, the common practice in  
14 Clark County of detaining arrestees after the Initial Appearance without formal charges being  
15 filed violates a detainee's constitutional and statutory rights.

### 16 LEGAL STANDARD AND AUTHORITY

#### 17 I. Writ of Habeas Corpus and/or Mandamus is the Proper Remedy

18 As set forth more fully below, Petitioner's current detention is unlawful. Pursuant to NRS  
19 34.360, "Every person unlawfully committed, detained, confined or restrained of his or her  
20 liberty . . . may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment  
21 or restraint." With the instant Emergency Petition, Petitioner seeks a writ of habeas corpus from  
22 the instant Court directing Petitioner's release from the unlawful custody of the Clark County  
23 Sheriff.

24 In the alternative, a petitioner may seek a writ of mandamus to "compel the performance  
25 of an act that the law requires . . . or to control an arbitrary or capricious exercise of discretion."  
26 Thomas v. Eighth Judicial Dist. Court, 402 P.3d 619, 623 (Nev. 2017); see also NRS 34.160. A  
27 Writ of Mandamus may be issued "where there is [no] plain, speedy and adequate remedy in the  
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1 ordinary course of law". NRS 34.170; Smith v. Eighth Judicial Dist. Court, 107 Nev. 674, 677,  
2 818 P.2d 849, 851 (1991). With the instant Emergency Petition, Petitioner seeks a writ of  
3 mandamus directing the lower court to vacate the current detention order and to conduct a full,  
4 adversarial detention hearing that complies with Nevada statutory procedures as well as the U.S.  
5 and Nevada constitutions.

## 6 **II. Constitutional Protections Violated by the Current Process in Clark County**

### 7 **A. The Due Process Clause**

8 The Due Process Clauses of the U.S. and Nevada Constitutions provide that "[n]o person  
9 shall ... be deprived of life, liberty, or property without due process of law." U.S. Const. amend.  
10 V;<sup>1</sup> Nev. Const. Art. 1, §8. Due Process requires a hearing before a neutral fact-finder and an  
11 opportunity to be heard "at a meaningful time and in a meaningful manner" before an individual  
12 is deprived of a fundamental right or property interest. Mathews v. Eldridge, 424 U.S. 319, 333-  
13 34, 96 S. Ct. 893 (1976) (citations omitted); see also Zadvydas v. Davis, 533 U.S. 678, 690, 121  
14 S. Ct. 2491 (2001) ("Freedom from imprisonment – from government custody, detention, or  
15 other forms of physical restraint – lies at the heart of the liberty that [the Due Process] Clause  
16 protects"); Foucha v. Louisiana, 504 U.S. 71, 80, 112 S. Ct. 1780 (1992) ("Freedom from bodily  
17 restraint has always been at the core of the liberty protected by the Due Process Clause from  
18 arbitrary governmental action"); U.S. v. Montalvo-Murillo, 495 U.S. 711, 716, 110 S. Ct. 2072  
19 (1990) (holding that release prior to trial is a "vital liberty interest"). Accordingly, the issue of  
20 pretrial detention must be resolved in a manner that comports with due process.

21 Pretrial liberty is a fundamental right. U.S. v. Salerno, 481 U.S. 739, 750, 107 S. Ct. 2095  
22 (1987). For that reason, a presumptively innocent person's loss of pretrial liberty is subject to  
23 "heightened constitutional scrutiny" and must be preceded by rigorous procedures designed to  
24 ensure protection of that liberty. Id. at 746. Where the State is seeking to detain a defendant  
25 pretrial, the defendant is entitled to substantive and procedural due process. Id. Because the Due  
26 Process Clause of the Nevada Constitution mirrors that of its federal counterpart, Nevada "looks

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

1 to federal precedent” for guidance in resolving due process claims. Hernandez v. Bennett-Haron,  
2 128 Nev. 580, 587, 287 P.3d 305 (2012).

3 The essential elements of a procedural due process claim under the Fifth Amendment are  
4 “(1) a life, liberty, or property interest requiring protection under the Due Process Clause, and (2)  
5 a deprivation of that interest (3) without adequate process.” Fields v. Henry Co., 701 F.3d 180,  
6 185 (6th Cir. 2012). “A liberty interest may arise from the Constitution itself, by reason of  
7 guarantees implicit in the word ‘liberty’ . . . or [by] an expectation or interest created by the state  
8 law or policies”. Wilkinson v. Austin, 545 U.S. 209, 221, 125 S. Ct. 2384 (2005) (citation  
9 omitted). Freedom of movement, including the right to travel, has long been recognized as a  
10 liberty interest which cannot be restricted without due process of law. City of Chicago v.  
11 Morales, 527 U.S. 41, 54, 119 S. Ct. 1849 (1999) (citing Kent v. Dulles, 357 U.S. 116, 78 S. Ct.  
12 1113 (1958) (noting that freedom of movement is “a part of our heritage”)). Accordingly, any  
13 restraint on pretrial liberty implicates procedural due process protections. Those protections  
14 require “adequate process”. In the context of a pretrial detention order, “adequate process”  
15 requires rigorous procedures be met to detain someone pretrial, including, but not limited to, a  
16 “full-blown adversary hearing,” a heightened evidentiary standard of proof of  
17 dangerousness/flight risk by “clear and convincing evidence,” consideration of alternative  
18 conditions or release, and “written findings of fact and a written statement of reasons for a  
19 decision to detain.” Salerno, 481 U.S. at 741, 750-51.

20 Substantive due process “prohibits states from infringing fundamental liberty interests,  
21 unless the infringement is narrowly tailored to serve a compelling state interest.” Lawrence v.  
22 Texas, 539 U.S. 558, 593, 123 S. Ct. 2472 (2003). In a pretrial detention context, substantive due  
23 process requires that detention survive “heightened constitutional scrutiny” and the government  
24 may only detain where that detention is carefully limited to serve a “compelling” government  
25 interest. Salerno, 481 U.S. at 746. As a result, the government may detain someone pretrial only  
26 if other, less restrictive means are not available to serve the state’s interests. Id.; U.S. v. Karper,  
27 847 F. Supp. 2d 350, 362 (N.D.N.Y. 2011) (finding release conditions cannot exceed that which  
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1 is minimally necessary to ensure the accused's appearance in court and protect the community  
2 against future dangerousness).

### 3 **B. Equal Protection Clause**

4 The Equal Protection Clause of the U.S. and Nevada constitutions<sup>2</sup> prohibits the  
5 government from denying individuals equal protection of the laws. The Equal Protection Clause  
6 may be invoked to analyze the governmental actions that draw distinctions based upon specific  
7 characteristics or impinge on an individual's exercise of a fundamental right. See Skinner v.  
8 Oklahoma, 316 U.S. 535, 62 S. Ct. 1110 (1942). While the Equal Protection Clause permits the  
9 states some discretion in enacting laws which affect some groups of citizens differently than  
10 others, a statute or practice is unconstitutional if the "classification rests on grounds wholly  
11 irrelevant to the achievement of the State's objective." McGowan v. Maryland, 366 U.S. 420,  
12 425-26, 81 S. Ct. 1101 (1961).

13 In the context of bail, the Equal Protection Clause prohibits the pretrial detention of  
14 defendants solely because of their inability to afford bail. Weatherspoon v. Oldham, 2018 WL  
15 1053548, at \*6 (W.D. Tenn. Feb. 26, 2018); Jones, 2015 WL 5387219, at \*4; Pugh v. Rainwater,  
16 572 F.2d at 1058 (5th Cir. 1978) (holding that "pretrial confinement for inability to post money  
17 bail" for a defendant "whose appearance at trial could reasonably be assured by one of the  
18 alternate forms of release . . . would constitute imposition of an excessive restraint . . .").

### 19 **C. Excessive Bail Clause and Nevada's Statutory Bail Scheme**

20 The Eighth Amendment to the U.S. Constitution states, in part, that "excessive bail shall  
21 not be required." Similarly, the Nevada Constitution mandates that all defendants "shall be  
22 bailable by sufficient sureties" and that bail shall not be "excessive". Nev. Const. Art. 1, §§ 6-7.  
23 The constitutional right to bail is codified in Nevada statute, which requires that "a person  
24 arrested for an offense other than murder of the first degree must be admitted to bail." NRS  
25 178.484(1).

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28 <sup>2</sup> U.S. Const. amend. XIV; Nev. Const. Art. 1, § 1 and Art. IV, § 21.

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

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

23 NRS 178.4853.

### 24 **III. Specific Constitutional Concerns Regarding Clark County's Systematic and 25 Unlawful Use of Bail as a Mechanism of Pretrial Detention**

#### 26 **A. Clark County's Bail System**

27 Clark County uses bail as a mechanism of pretrial detention. When an individual is  
28 arrested, Clark County courts do not resolve the issue of pretrial confinement without regard to  
bail. The courts typically set bail based upon the offense or offenses charged, often relying on a  
standardized bail schedule. The result is that well-resourced defendants are able to buy their  
freedom, while the poor languish in jail. When bail becomes an unattainable release condition, it  
becomes a mechanism of preventative detention. And preventative detention is only allowed  
when a court concludes, after an adversarial hearing, that prosecutors established clear and



1 convincing evidence that pretrial detention is the least restrictive means of assuring community  
2 safety and the defendant's return to court. Absent such a finding, any release condition – of  
3 which bail is one – must be attainable. This means that bail must be set in an amount a defendant  
4 can pay.

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

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

14 “Money bail” is the practice of requiring a defendant to forfeit money if they do not  
15 appear for trial. Money bail can be either secured or unsecured. A secured money bail system  
16 requires the defendant to deposit money before they are released; an unsecured money bail  
17 system allows the defendant to be released without depositing any money so long as they  
18 promise to pay if they fail to appear.

19 As Chief Judge Rosenthal of the U.S. District Court for the Southern District of Texas  
20 recently summarized in her comprehensive discussion of the history of the American bail system,  
21 ODonnell v. Harris Co., 251 F.Supp.3d 1052, 1068 (S.D. Tex. 2017),<sup>5</sup> bail originated in  
22 medieval England “as a device to free untried prisoners.” Daniel J. Freed & Patricia M. Wald,  
23 Bail in the U.S.: 1964 1 (1964). The Statue of Westminster, enacted by the English Parliament in  
24 1275, listed the offenses that would be bailable and provided criteria for determining whether  
25 someone should be released. These criteria included the strength of the evidence against the

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27 <sup>3</sup> Available at [http://www.clebp.org/images/2014-11-05\\_final\\_bail\\_fundamentals\\_september\\_8,\\_2014.pdf](http://www.clebp.org/images/2014-11-05_final_bail_fundamentals_september_8,_2014.pdf).

<sup>4</sup> Available at <https://object.cato.org/sites/cato.org/files/pubs/pdf/walker-v-city-of-calhoun.pdf>.

28 <sup>5</sup> Aff’d as modified, 882 F.3d 528 (5th Cir. 2018).

1 accused and the severity of the accused's criminal history. See June Carbone, Seeing Through  
2 the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail, 34  
3 Syracuse L. Rev. 517, 523-26 (1983); Note, Bail: An Ancient Practice Reexamined, 70 Yale L.J.  
4 966 (1961). In 1679, Parliament adopted the Habeas Corpus Act to ensure that an accused could  
5 obtain a timely bail hearing. And the English Bill of Rights, enacted in 1679, prohibited  
6 excessive bail. See Carbone, *supra*, at 528.

7 The American States continued this tradition. Beginning with the Pennsylvania  
8 Constitution of 1682, 48 states, including Nevada, have protected, by constitution or statute, a  
9 right to bail "by sufficient sureties, except for capital offenses when the proof is evident or the  
10 presumption great." Matthew J. Hegreness, America's Fundamental and Vanishing Right to Bail,  
11 55 Ariz. L. Rev. 909, 916 (2013).

12 As the U.S. District Court for the Southern District of Texas recently explained in its  
13 detailed opinion striking down Harris County's money bail practices, "[h]istorians and jurists  
14 confirm that from the medieval period until the early American republic, a bail bond was  
15 typically based on an individualized assessment of what the arrestee or his surety *could pay* to  
16 assure appearance and secure release." ODonnell, 251 F.Supp.3d at 1069 (emphasis added). The  
17 court explained the English practice at the time of the ratification of the U.S. Constitution: "'The  
18 rule is, where the offence is prima facie great, to require good bail; moderation nevertheless is to  
19 be observed, and such bail only is to be required as the party is able to procure; for otherwise the  
20 allowance of bail would be a mere colour for imprisoning the party on the charge.'" Id. (quoting  
21 1 J. Chitty, A Practical Treatise on the Criminal Law 88-89 (Philadelphia ed. 1819)).

22 Jurisdictions across America began to depart from the original understanding of bail in  
23 the middle of the 20<sup>th</sup> Century. And in the last two decades, the use of unaffordable secured  
24 money bail has increased in scope and severity. In 1996, 59% of felony defendants had to meet a  
25 financial condition to regain their liberty pretrial. Timothy C. Hart & Brian A. Reaves, U.S.  
26 Dep't of Justice, Felony Defendants in Large Urban Counties, 1996, at 17-18 (1999).<sup>6</sup> By 2009,

27  
28 <sup>6</sup> Available at <https://www.bjs.gov/content/pub/pdf/fdluc96.pdf>.

1 that percentage had climbed to 72%. Brian A Reaves, U.S. Dep't of Justice, Felony Defendants  
2 in Large Urban Counties, 2009-Statistical Tables, at 15, 20 (2013).<sup>7</sup> In 1990, the majority of  
3 felony defendants who were not detained while their cases were pending were released without  
4 financial conditions. In 2009, only 23% of felony defendants who were not detained while their  
5 cases were pending were released without financial conditions. And the average amount of  
6 money required to be paid as a condition of release has increased. Vera Inst of Justice,  
7 Incarceration's Front Door: The Misuse of Jails in America, 29 (Feb. 2015).<sup>8</sup> By 2009, about half  
8 of felony defendants subject to financial conditions of release could not meet them and remained  
9 in custody until the disposition of their cases. Felony Defendants, 2009-Statistical Tables, at 17.

10 The routine use of unaffordable secured money bail resulted in a "crisis." See U.S. v.  
11 Salerno, 481 U.S. 739, 742, 107 S. Ct. 2095 (1987) (describing "a bail crisis in the federal  
12 courts"); Caleb Foote, The Coming Constitutional Crisis in Bail: 1, 113 U. Pa. L. Rev. 959, 971  
13 (1965). Two distinct evils of the secured money bail system provoked the crisis: It imperiled  
14 public safety by allowing potentially dangerous defendants to be released without any  
15 consideration of their dangerousness, and it worked an "invidious discrimination" against those  
16 who could not pay. See, e.g., Williams v. Illinois, 399 U.S. 235, 242, 90 S. Ct. 2018 (1970).  
17 Over 50 years ago, Attorney General Robert Kennedy led a successful movement to reform bail  
18 in the federal courts. Kennedy testified:

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

26 <sup>7</sup> Available at <https://www.bjs.gov/content/pub/pdf/fdluc09.pdf>.

27 <sup>8</sup> Available at [https://storage.googleapis.com/vera-web-assets/downloads/Publications/incarcerations-front-door-the-misuse-of-jails-in-america/legacy\\_downloads/incarcerations-front-door-report\\_02.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/incarcerations-front-door-the-misuse-of-jails-in-america/legacy_downloads/incarcerations-front-door-report_02.pdf).

1 Testimony on Bail Legislation before S. Judiciary Subcomm. on Const. Rights and  
2 Improvements in Judicial Machinery (Aug. 4, 1964).<sup>9</sup>

3 One of the results of the movement to reform the bail system in the 1960s was the virtual  
4 elimination of cash bonds in the District of Columbia and in all Federal courts. The Bail Reform  
5 Act “assure[d] that all persons, regardless of their financial status, [would] not needlessly be  
6 detained pending their appearance to answer charges . . . when detention serves neither the ends  
7 of justice nor the public interest.” Bail Reform Act of 1966, Pub. L. No. 89-465, § 2, 80 Stat.  
8 214, 214 (repealed in 1984). In 1984, Congress updated the Bail Reform Act as part of the  
9 Comprehensive Crime Control Act. See Bail Reform Act of 1984, 18 U.S.C. §§ 3141-50. Federal  
10 courts and the courts of the District of Columbia transitioned to a rigorous, evidence-based  
11 system of non-financial conditions that remains in place today. If the government believes that a  
12 defendant cannot be released pretrial because she is too dangerous or too likely to flee, the  
13 government may seek an order of detention, but only after it has satisfied the court, at a “full-  
14 blown adversarial hearing,” that no condition or combination of conditions could assure the  
15 defendant’s appearance at trial and the safety of the community. Salerno, 481 U.S. at 750.  
16 Indeed, *the constitutionality of any moneyed bail system requires as much in order to meet*  
17 *constitutional muster. Id.* at 750-55.

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

26  
27 <sup>9</sup> Available at <http://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/08-04-1964.pdf>.

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

3                   The principle that jailing the poor because they cannot pay a sum of money is  
4                   unconstitutional has deep roots in American constitutional law. See Williams v. Illinois, 399 U.S.  
5                   235, 241, 90 S. Ct. 2018 (1970) (“[T]he Court has had frequent occasion to reaffirm allegiance to  
6                   the basic command that justice be applied equally to all persons”); Douglas v. California, 372  
7                   U.S. 353, 355, 83 S. Ct. 814 (1963) (condemning the “evil” of “discrimination against the  
8                   indigent”); Griffin v. Illinois, 351 U.S. 12, 19, 76 S. Ct. 585 (1956) (“There can be no equal  
9                   justice where the kind of trial a man gets depends on the amount of money he has”); see also  
10                  Mayer v. City of Chicago, 404 U.S. 189, 193, 92 S. Ct. 410 (1971).

11                 These principles have been applied in a variety of contexts in which a government jailed  
12                 someone because of her inability to make a monetary payment. In Tate v. Short, 401 U.S. 395,  
13                 91 S. Ct. 668 (1971), the U.S. Supreme Court held that “the Constitution prohibits the State from  
14                 imposing a fine as a sentence and then automatically converting it into a jail term solely because  
15                 the defendant is indigent and cannot forthwith pay the fine in full.” Id. at 398. In Bearden v.  
16                 Georgia, 461 U.S. 660, 103 S. Ct. 2064 (1983), the Court explained that to “deprive [a]  
17                 probationer of his conditional freedom simply because, through no fault of his own he cannot  
18                 pay [a] fine... would be contrary to the fundamental fairness required by the Fourteenth  
19                 Amendment.” Id. at 672-73.

20                 For pretrial arrestees, the rights at stake are even more significant because the arrestees’  
21                 liberty is not diminished by a criminal conviction; they are presumed innocent. Justice Douglas  
22                 framed the basic question that applies to pretrial detainees: “To continue to demand a substantial  
23                 bond which the defendant is unable to secure raises considerable problems for the equal  
24                 administration of the law.” Bandy v. U.S., 81 S. Ct. 197, 197-98 (1960) (Douglas, J., in  
25                 chambers). The U.S. Supreme Court Justice further espoused “Can an indigent be denied  
26                 freedom, where a wealthy man would not, because he does not happen to have enough property  
27                 to pledge for his freedom?” Id.  
28

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

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

12 Pugh, 572 F.2d at 1058 (5th Cir. 1978).<sup>10</sup> Indeed, "[t]he incarceration of those who cannot  
13 [afford a cash payment], without meaningful consideration of other possible alternatives,  
14 infringes on both due process and equal protection requirements." *Id.* at 1057;<sup>11</sup> see also  
15 Williams v. Farrior, 626 F.Supp. 983, 985 (S.D. Miss. 1986) ("For the purposes of the  
16 Fourteenth Amendment's Equal Protection Clause, it is clear that a bail system which allows  
17 only monetary bail and does not provide for any meaningful consideration of other possible  
18 alternatives for indigent pretrial detainees infringes on both equal protection and due process  
19 requirements").

20 The U.S. Justice Department recently endorsed this view, asserting that "[i]ncarcerating  
21 individuals solely because of their inability to pay for their release, whether through the  
22 payment of fines, fees, or a cash bond, violates the Equal Protection Clause of the Fourteenth

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

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

1 Amendment.” Jones v. City of Clanton, 2015 WL 5387219, at \*4 (M.D. Ala. Sept. 14, 2015);  
2 see also Varden v. City of Clanton, Civ. No. 15–34, Docket. No. 26 at 1 (M.D. Ala. Feb. 13,  
3 2015). The Justice Department reasoned that a secured money bail schedule, like the one  
4 utilized in Clark County, “do[es] not account for individual circumstances of the accused” and  
5 it “essentially mandate[s] pretrial detention for anyone who is too poor to pay the  
6 predetermined fee.” Jones, 2015 WL 5387219, at \*9.

7 Accordingly, several federal district courts have held that state laws setting a particular  
8 monetary bail amount without individualized considerations of indigency violate the Due  
9 Process Clause. See, e.g., Rodriguez v. Providence Cmty. Corr., Inc., 155 F.Supp.3d 758, 767-  
10 70 and n. 10 (M.D. Tenn. 2015) (granting class-wide preliminary injunction enjoining state  
11 policy requiring monetary payment for probations to obtain release pending a revocation  
12 hearing “without an inquiry into the individual’s ability to pay the bond and whether alternative  
13 methods of ensuring attendance at revocation hearings would be adequate”); Williams v.  
14 Farrior, 626 F.Supp. 983, 985 (S.D. Miss. 1986) (“[I]t is clear that a bail system which allows  
15 only monetary bail and does not provide for any meaningful consideration of other possible  
16 alternatives for indigent pretrial detainees infringes on both equal protection and due process  
17 requirements.”); Buffin v. City and Co. of San Francisco, No. 15-CV-04959-YGR, 2018 WL  
18 424362 at \*7 (N.D. Cal. Jan. 16, 2018); cf. Abdi v. Nielson, No. 1:17-CV-0721 EAW, 2018  
19 WL 798747, at \*4 (W.D.N.Y. Feb. 9, 2018).

20 These decisions make clear that requiring money bail as a release condition in an  
21 amount impossible for the defendant to pay is equivalent to a detention order, “which is only  
22 appropriate when the state shows and the court finds that no condition or combination of  
23 conditions of release could satisfy the purposes of bail, to assure the defendant’s appearance at  
24 trial or hearing and the safety of the public.” Weatherspoon v. Oldham, 2018 WL 1053548, at  
25 \*6 (W.D. Tenn. Feb. 26, 2018) (additional citations omitted). Thus, in order to withstand  
26 constitutional scrutiny, unattainable money bail settings must be preceded by a hearing at  
27 which the court determines the least restrictive means of ameliorating an accused’s risk of  
28

1 flight and danger to the community. Absent such a determination, an unattainable release  
2 condition – such as an unattainable bail setting – operates as a *de facto* detention order that  
3 discriminates on the basis of wealth. Weatherspoon v. Oldham, 2018 WL 1053548, at \*6 (W.D.  
4 Tenn. Feb. 26, 2018). This violates equal protection and due process guarantees.

## 5 ARGUMENT

### 6 I. At the Probable Cause Determination, the Lower Court Violated Petitioner's Rights 7 by Defaulting to Preventive Detention

#### 8 A. The Court's Decision to Preventatively Detain Petitioner Pretrial without a Full, 9 Adversarial Hearing Violated Petitioner's Due Process Rights

10 In order to deprive a presumptively innocent person of her physical liberty, due process  
11 requires that the State demonstrate 1) by “clear and convincing evidence” at a “full-blown  
12 adversarial hearing” that the defendant presents an “identified and articulable threat” to the  
13 community or presents a risk of flight<sup>12</sup> and 2) *no conditions or combination of conditions*  
14 *alternative to detention* could reasonably mitigate that danger based on an individualized  
15 consideration of defendant's unique circumstances.<sup>13</sup> U.S. v. Salerno, 481 U.S. 739, 750-51  
16 (1987) (emphasis added); see also Weatherspoon v. Oldham, 2018 WL 1053548, at \*14-15, \*17  
17 (W.D. Tenn. Feb. 26, 2018). A state court procedure that does not require as much violates due  
18 process. See, e.g., Rodriguez v. Providence Cmty. Corr., Inc., 155 F.Supp.3d 758, 767-70 and n.  
19 10 (M.D. Tenn. 2015); Jones v. City of Clanton, No. 215CV34-MHT, 2015 WL 5387219, at \*2  
20 (M.D. Ala. Sept. 14, 2015) (holding that the “use of a secured bail schedule to detain a person . .  
21 . without an individualized hearing regarding the person's indigence and the need for bail or  
22 alternatives to bail, violates the Due Process Clause”); Simpson v. Miller, 387 P.3d 1270, 1276  
23 (Ariz. 2017) (“[I]t is clear from Salerno and other decisions that the constitutionality of a pretrial  
24 detention scheme turns on whether particular procedures satisfy substantive due process  
25 standards”); see also Lopez-Valenzuela v. Arpaio, 770 F.3d 772, 781 (9th Cir. 2014) (en banc)

26  
27 <sup>12</sup> These procedural protections are mandated by the constitutional right to *Procedural Due Process*. U.S. v. Salerno,  
481 U.S. 739, 741, 750-51 (1987) (emphasis added).

28 <sup>13</sup> This protection is mandated by the constitutional right to *Substantive Due Process*. Id. at 746.



1 (applying strict scrutiny to strike down an Arizona law that required detention after arrest  
2 without individualized consideration of an arrestee's circumstances); ODonnell, 251 F.Supp.3d  
3 1052; Williams v. Farrior, 626 F.Supp. 983, 986 (S.D. Miss. 1986) (holding that a state's pretrial  
4 detention scheme must meet "strict judicial scrutiny" because of the fundamental rights at issue).

5 As a result, due process mandates that a magistrate makes an individualized  
6 determination whether preventative detention is the least restrictive means of assuring  
7 community safety and ensuring the accused's return to court. Salerno, 481 U.S. 739. This did not  
8 happen in this case.

9 Here, the reviewing magistrate set bail at a 48 Hour Probable Cause Review at which  
10 neither Petitioner nor her counsel was present. In doing so, the lower court defaulted to detaining  
11 Petitioner without a "full-blown adversarial hearing," without "clear and convincing evidence"  
12 that the defendant presents an "identified and articulable threat" to the community or presents a  
13 risk of flight, and without a request from the State for preventive detention. Instead, the  
14 magistrate *sua sponte* ruled that detention was appropriate after a review of only a police report  
15 and a temporary custody record. As a result, the lower court's detention order at the Probable  
16 Cause Determination violates due process. The detention order should be vacated and Petitioner  
17 should be released.

#### 18 **B. The Court's Setting of Unattainable Bail Does Not Alleviate the Due Process** 19 **Violation**

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

1 detained pending trial . . . , then that defendant should not be permitted any bail at all. Otherwise  
2 the defendant is entitled to release on bail, and excessive bail cannot be required.”).

3 To set bail in an amount that is *unattainable*, a court must find, on the record, by “clear  
4 and convincing evidence” after a “full-blown adversarial hearing” that 1) the defendant presents  
5 an “identified and articulable threat” to the community or presents a risk of flight and 2) no  
6 conditions or combination of conditions alternative to detention could reasonably mitigate that  
7 danger based on an individualized consideration of defendant’s unique circumstances. U.S. v.  
8 Salerno, 481 U.S. 739, 750-51 (1987) (emphasis added) (requiring that a magistrate setting bail  
9 in an unattainable amount for a defendant must make an individualized determination whether  
10 bail is the least restrictive means of assuring community safety and ensuring the accused’s return  
11 to court); ODonnell, 251 F.Supp.3d at 1143-44; Jones v. City of Clanton, No. 215CV34-MHT,  
12 2015 WL 5387219, at \*2 (M.D. Ala. Sept. 14, 2015) (holding that the “use of a secured bail  
13 schedule to detain a person . . . without an individualized hearing regarding the person’s  
14 indigence and the need for bail or alternatives to bail, violates the Due Process Clause”); Carlisle  
15 v. Desoto County, Mississippi, 2010 WL 3894114, at \*5 (N.D. Miss. Sept. 30, 2010) (holding  
16 that because a “compelling state interest” was required for pretrial detention, the plaintiff’s rights  
17 were violated if he was jailed without consideration of non-financial alternatives).

18 This did not happen in this case. As discussed above, the reviewing magistrate set bail  
19 according to a standard bail schedule at a 48 Hour Probable Cause Review at which neither  
20 Petitioner nor her counsel was present. In doing so, the lower court defaulted to detaining  
21 Petitioner on unattainable bail without a “full-blown adversarial hearing,” without “clear and  
22 convincing evidence” that the defendant presents an “identified and articulable threat” to the  
23 community or presents a risk of flight, and without a request from the State for preventive  
24 detention. As a result, the lower court’s bail setting at the Probable Cause Determination violates  
25 due process. The unattainable bail setting amounts to a detention order. It should be vacated and  
26 Petitioner should be released.

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

3           In the context of bail, the Equal Protection Clause prohibits the pretrial detention of  
4 defendants solely because of their inability to afford bail. Lopez-Valenzuela v. Arpaio, 770 F.3d  
5 772, 781 (9th Cir. 2014) (en banc) (applying strict scrutiny to strike down an Arizona law that  
6 required detention after arrest without individualized consideration of an arrestee's  
7 circumstances); Pugh v. Rainwater, 572 F.2d at 1058 (5th Cir. 1978) (holding that "pretrial  
8 confinement for inability to post money bail" for a defendant "whose appearance at trial could  
9 reasonably be assured by one of the alternate forms of release . . . would constitute imposition of  
10 an excessive restraint . . ."); Weatherspoon v. Oldham, 2018 WL 1053548, at \*6 (W.D. Tenn.  
11 Feb. 26, 2018); ODonnell v. Harris County, 251 F.Supp.3d 1052 (S.D. Tex. Apr. 28, 2017);  
12 Jones, 2015 WL 5387219, at \*4; Carlisle v. Desoto County, Mississippi, 2010 WL 3894114, at  
13 \*5 (N.D. Miss. Sept. 30, 2010) (holding that because a "compelling state interest" was required  
14 for pretrial detention, the plaintiff's rights were violated if he was jailed without consideration of  
15 non-financial alternatives).

16           These decisions make clear that requiring money bail as a release condition in an  
17 amount impossible for the defendant to pay is equivalent to a detention order, "which is only  
18 appropriate when the state shows and the court finds that no condition or combination of  
19 conditions of release could satisfy the purposes of bail, to assure the defendant's appearance at  
20 trial or hearing and the safety of the public."<sup>14</sup> Weatherspoon v. Oldham, 2018 WL 1053548, at  
21 \*6 (W.D. Tenn. Feb. 26, 2018) (additional citations omitted). Thus, in order to withstand  
22 constitutional scrutiny, unattainable money bail settings must be preceded by a hearing at  
23 which the court determines the least restrictive means of ameliorating an accused's risk of  
24 flight and danger to the community. Absent such a determination, an unattainable release  
25 condition – such as an unattainable bail setting – operates as a *de facto* detention order that

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

discriminates on the basis of wealth. Weatherspoon v. Oldham, 2018 WL 1053548, at \*6 (W.D. Tenn. Feb. 26, 2018). This violates equal protection and due process guarantees.

**II. At the Initial Appearance, the Lower Court Violated Petitioner's Rights by Failing to Conduct a Full Hearing Regarding Petitioner's Detention Before Defaulting to Incarceration**

**A. The Court's Decision to Preventatively Detain Petitioner Pretrial without a Full, Adversarial Hearing Violated Petitioner's Due Process Rights at the July 5<sup>th</sup> Hearing**

In order to deprive a presumptively innocent person of her physical liberty, due process requires that the State demonstrate 1) by "clear and convincing evidence" at a "full-blown adversarial hearing" that the defendant presents an "identified and articulable threat" to the community or presents a risk of flight<sup>15</sup> and 2) *no conditions or combination of conditions alternative to detention* could reasonably mitigate that danger based on an individualized consideration of defendant's unique circumstances.<sup>16</sup> U.S. v. Salerno, 481 U.S. 739, 750-51 (1987) (emphasis added); see also Weatherspoon v. Oldham, 2018 WL 1053548, at \*14-15, \*17 (W.D. Tenn. Feb. 26, 2018). A state court procedure that does not require as much violates due process. See, e.g., Rodriguez v. Providence Cmty. Corr., Inc., 155 F.Supp.3d 758, 767-70 and n. 10 (M.D. Tenn. 2015); Jones v. City of Clanton, No. 215CV34-MHT, 2015 WL 5387219, at \*2 (M.D. Ala. Sept. 14, 2015) (holding that the "use of a secured bail schedule to detain a person . . . without an individualized hearing regarding the person's indigence and the need for bail or alternatives to bail, violates the Due Process Clause"); Simpson v. Miller, 387 P.3d 1270, 1276 (Ariz. 2017) ("[I]t is clear from Salerno and other decisions that the constitutionality of a pretrial detention scheme turns on whether particular procedures satisfy substantive due process standards"); see also Lopez-Valenzuela v. Arpaio, 770 F.3d 772, 781 (9th Cir. 2014) (en banc) (applying strict scrutiny to strike down an Arizona law that required detention after arrest without individualized consideration of an arrestee's circumstances); ODonnell, 251 F.Supp.3d

<sup>15</sup> These procedural protections are mandated by the constitutional right to *Procedural Due Process*. U.S. v. Salerno, 481 U.S. 739, 741, 750-51 (1987) (emphasis added).

<sup>16</sup> This protection is mandated by the constitutional right to *Substantive Due Process*. Id. at 746.

1 1052; Williams v. Farrior, 626 F.Supp. 983, 986 (S.D. Miss. 1986) (holding that a state's pretrial  
2 detention scheme must meet "strict judicial scrutiny" because of the fundamental rights at issue).

3 Nevada law reflects this basic *concept* but omits the procedural protections required by  
4 Salerno. NRS 178.4851 provides that criminal defendants may be released without bail upon a  
5 showing of good cause that the court "can impose conditions on the person that will adequately  
6 protect the health, safety, and welfare of the community and ensure that the person will appear at  
7 all times and places ordered by the court." NRS 178.4851. This runs afoul of Salerno in that it  
8 burdens the defense with establishing 'good cause' for release, and speaks only to the issue of  
9 release *without bail*.<sup>17</sup> Indeed, as Salerno makes clear, the constitutionally proper inquiry is  
10 whether conditioned (or unconditioned) release can satisfy the government's interest in  
11 protecting the community and assuring the defendant's return to court; and *the government bears*  
12 *the burden* of establishing that it does not before a defendant can be detained pretrial (i.e., held  
13 pursuant to unattainable release conditions).

14 While NRS 178.4853 sets forth factors bearing the issue of pretrial release,<sup>18</sup> those  
15 factors must be considered in the context of the inquiry required by Salerno. So courts should  
16 consider the factors outlined in NRS 178.4583 when assessing the need for preventative  
17 detention and, in cases where a preventative detention request has been denied, when fashioning  
18 release conditions minimally necessary to protect the community and ensure a defendant's return  
19 to court.

20 Here, the magistrate *sua sponte* ordered the continued detention of Petitioner without a  
21 "full-blown adversarial hearing," without "clear and convincing evidence" that Petitioner

22 <sup>17</sup> To the extent that NRS 178.4851 obviates the procedural requirements mandated by Salerno, it is unconstitutional.  
23 See Salerno, 481 U.S. at 750; Stack, 342 U.S. at 5; U.S. Const. amend. V, XIV; Nev. Const. Art. 1, § 8.

24 <sup>18</sup> The statutory factors are: 1) The length of residence in the community; 2) The status and history of employment;  
25 3) Relationships with the person's spouse and children, parents or other family members and with close friends; 4)  
26 Reputation, character and mental condition; 5) Prior criminal record, including, without limitation, any record of  
27 appearing or failing to appear after release on bail or without bail; 6) The identity of responsible members of the  
28 community who would vouch for the reliability of the person; 7) The nature of the offense with which the person is  
charged, the apparent probability of conviction and the likely sentence, insofar as these factors relate to the risk of  
not appearing; 8) The nature and seriousness of the danger to the alleged victim, any other person or the community  
that would be posed by the person's release; 9) The likelihood of more criminal activity by the person after release;  
and 10) Any other factors concerning the person's ties to the community or bearing on the risk that the person may  
willfully fail to appear.

1 presents an “identified and articulable threat” to the community or presents a risk of flight, and  
2 without a request from the State for preventive detention. Instead, the magistrate *sua sponte* ruled  
3 that detention was appropriate. As a result, the lower court’s detention order violates due  
4 process.

5 **B. The Court’s Decision to Set Bail at \$5,000 Without “Having Regard” To The**  
6 **Financial Ability of the Defendant To Give Bail Pursuant to NRS 178.498 At The**  
7 **July 10<sup>th</sup> Hearing Is A Violation Of Petitioner’s Rights.**

8 Upon Petitioner’s filing of a Motion seeking to vacate the detention order, the court did  
9 hear some limited argument. The state did not seek preventative detention. The state sought to  
10 increase bail claiming a high bail is an incentive for the indigent Petitioner to return to court in  
11 the event he was able to make bail. The state argued that Petitioner’s criminal record, facts of  
12 the case and likelihood of conviction but suggested that the amount functioned as an incentive  
13 and that higher amounts led to greater incentives. The state and the court ignored the  
14 requirement of NRS 178.498 which requires that the court consider the financial ability of the  
15 defendant to give bail when setting the amount. This requires the court to recognize that a “low”  
16 bail for a poor person is appropriate and for rich people a higher bail would be appropriate and  
17 both will ensure return to court.  
18

19  
20 **C. The Court’s Setting of Unattainable Bail Does Not Alleviate the Due Process**  
21 **Violation**

22 An order setting unattainable conditions of release is equivalent to an order of detention.  
23 U.S. v. Mantecon-Zayas, 949 F.2d 548, 550 (1st Cir. 1991); U.S. v. Leathers, 412 F.2d 169, 171  
24 (D.C. Cir. 1969) (“[T]he setting of bond unreachable because of its amount would be tantamount  
25 to setting no conditions at all.”); ODonnell v. Harris County, 251 F.Supp.3d 1052, 1143-44 (S.D.  
26 Tex. Apr. 28, 2017) (holding that secured money bail set in an amount that an arrestee cannot  
27 afford is constitutionally equivalent to an order of detention); State v. Brown, 338 P.3d 1276  
28 (N.M. 2014). Thus, it must be narrowly tailored in order to survive heightened constitutional

1 scrutiny. See Brown, 338 P.3d at 1292 (“Intentionally setting bail so high as to be unattainable is  
2 simply a less honest method of unlawfully denying bail altogether . . . If a defendant should be  
3 detained pending trial . . . , then that defendant should not be permitted any bail at all. Otherwise  
4 the defendant is entitled to release on bail, and excessive bail cannot be required.”).

5 To set bail in an amount that is *unattainable*, a court must find, on the record, by “clear  
6 and convincing evidence” after a “full-blown adversarial hearing” that 1) the defendant presents  
7 an “identified and articulable threat” to the community or presents a risk of flight and 2) no  
8 conditions or combination of conditions alternative to detention could reasonably mitigate that  
9 danger based on an individualized consideration of defendant’s unique circumstances. U.S. v.  
10 Salerno, 481 U.S. 739, 750-51 (1987) (emphasis added); ODonnell, 251 F.Supp.3d at 1143-44;  
11 Jones v. City of Clanton, No. 215CV34-MHT, 2015 WL 5387219, at \*2 (M.D. Ala. Sept. 14,  
12 2015) (holding that the “use of a secured bail schedule to detain a person . . . without an  
13 individualized hearing regarding the person’s indigence and the need for bail or alternatives to  
14 bail, violates the Due Process Clause”); Carlisle v. Desoto County, Mississippi, 2010 WL  
15 3894114, at \*5 (N.D. Miss. Sept. 30, 2010) (holding that because a “compelling state interest”  
16 was required for pretrial detention, the plaintiff’s rights were violated if he was jailed without  
17 consideration of non-financial alternatives).

18 Before setting bail in an unattainable amount, due process mandates that a magistrate  
19 makes an individualized determination whether preventative detention is the least restrictive  
20 means of assuring community safety and ensuring the accused’s return to court. Salerno, 481  
21 U.S. 739.

22 This did not happen in this case. As discussed above, the magistrate at the probable cause  
23 determination ordered the setting of unattainable bail, resulting in the continued detention of  
24 Petitioner without a “full-blown adversarial hearing,” without “clear and convincing evidence”  
25 that Petitioner presents an “identified and articulable threat” to the community or presents a risk  
26 of flight, and without a request from the State for preventive detention. Instead, the magistrate  
27 *sua sponte* ruled that detention was appropriate.

1 At the first appearance on July 5<sup>th</sup>, the bail stood. The magistrate failed to hold an  
2 adversarial hearing.

3 At the July 10<sup>th</sup> hearing, as a result of Petitioner's Motion, the court finally held a  
4 detention hearing, however the court failed to apply NRS 178.498(b) keeping bail at an  
5 unattainable \$5,000. As a result, the lower court's unattainable bail setting violates due process.  
6 The bail setting order should be vacated and Petitioner should be released.

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

9 In the context of bail, the Equal Protection Clause prohibits the pretrial detention of  
10 defendants solely because of their inability to afford bail. See Lopez-Valenzuela v. Arpaio, 770  
11 F.3d 772, 781 (9th Cir. 2014) (en banc) (applying strict scrutiny to strike down an Arizona law  
12 that required detention after arrest without individualized consideration of an arrestee's  
13 circumstances); Pugh v. Rainwater, 572 F.2d at 1058 (5th Cir. 1978) (holding that "pretrial  
14 confinement for inability to post money bail" for a defendant "whose appearance at trial could  
15 reasonably be assured by one of the alternate forms of release . . . would constitute imposition of  
16 an excessive restraint . . ."); Weatherspoon v. Oldham, 2018 WL 1053548, at \*6 (W.D. Tenn.  
17 Feb. 26, 2018); ODonnell v. Harris County, 251 F.Supp.3d 1052 (S.D. Tex. Apr. 28, 2017);  
18 Jones, 2015 WL 5387219, at \*4; Carlisle v. Desoto County, Mississippi, 2010 WL 3894114, at  
19 \*5 (N.D. Miss. Sept. 30, 2010) (holding that because a "compelling state interest" was required  
20 for pretrial detention, the plaintiff's rights were violated if he was jailed without consideration of  
21 non-financial alternatives).

22 These decisions make clear that requiring money bail as a release condition in an  
23 amount impossible for the defendant to pay is equivalent to a detention order, "which is only  
24 appropriate when the state shows and the court finds that no condition or combination of  
25 conditions of release could satisfy the purposes of bail, to assure the defendant's appearance at  
26 trial or hearing and the safety of the public."<sup>19</sup> Weatherspoon v. Oldham, 2018 WL 1053548, at

27 <sup>19</sup> The U.S. Supreme Court has also held that release conditions that exceed a purported threat posed by a particular  
28 defendant violate the "excessive bail" clause of the Eighth Amendment. Salerno, 481 U.S. at 754; see also U.S.



1 \*6 (W.D. Tenn. Feb. 26, 2018) (additional citations omitted). Thus, in order to withstand  
2 constitutional scrutiny, unattainable money bail settings must be preceded by a hearing at  
3 which the court determines the least restrictive means of ameliorating an accused's risk of  
4 flight and danger to the community. Absent such a determination, an unattainable release  
5 condition – such as an unattainable bail setting – operates as a *de facto* detention order that  
6 discriminates on the basis of wealth. Weatherspoon v. Oldham, 2018 WL 1053548, at \*6 (W.D.  
7 Tenn. Feb. 26, 2018). This violates equal protection and due process guarantees.

8 Here, the lower court set an unattainable bail amount without considering Petitioner's  
9 ability to pay that bail in violation of Nevada statute and U.S. Constitutional law.

10 **RELIEF REQUESTED**

11 Based upon the foregoing, Petitioner respectfully requests that this Honorable Court grant  
12 the instant Petition and vacate his current detention order in favor of an order directing his  
13 release from the custody of the Clark County Sheriff. Alternatively, Petitioner requests that this  
14 Honorable Court issue a Writ of Mandamus directing the lower court to vacate the instant  
15 detention order and to conduct a full, adversarial detention hearing that complies with Nevada  
16 statutory procedures as well as the U.S. and Nevada constitutions.

17 DATED this 16<sup>th</sup> day of July, 2018.

18 PHILIP J. KOHN  
19 CLARK COUNTY PUBLIC DEFENDER

20 By /s/ Christy Craig  
21 Christy Craig, #6262  
22 Deputy Public Defender  
23  
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27 Const. amend. VIII; Nev. Const. Art. 1 § 6-7; NRS 178.484(1) (stating "a person arrested for an offense other than  
28 murder of the first degree must be admitted to bail").

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YOU WILL PLEASE TAKE NOTICE that the foregoing PETITION FOR WRIT OF HABEAS CORPUS will be heard on the \_\_\_\_\_ day of \_\_\_\_\_, 2018, at \_\_\_\_\_:\_\_\_\_\_ a.m. in Department No. \_\_\_\_\_ of the District Court.

PHILIP J. KOHN  
CLARK COUNTY PUBLIC DEFENDER

## NOTICE OF MOTION

YOU WILL PLEASE TAKE NOTICE that the foregoing PETITION FOR WRIT OF HABEAS CORPUS will be heard on the 23 day of JULY, 2018, at 8:00 a.m. in Department No. 8 of the District Court. Pursuant to EDJC rule 3.4 (b)

**DATED** this 16<sup>th</sup> day of July, 2018.

By /s/ Christy Craig  
Christy Craig, #6262  
Deputy Public Defender

**CERTIFICATE OF ELECTRONIC SERVICE**

I hereby certify that service of the above and forgoing EMERGENCY PETITION FOR WRIT OF HABEAS CORPUS OR, IN THE ALTERNATIVE, PETITION FOR WRIT OF MANDAMUS was served via email to the Clark County District Attorney's Office at [motions@clarkcountynyda.com](mailto:motions@clarkcountynyda.com) and JUSTICE COURT DEPARTMENT 11 at [Kasondra.Hilton@clarkcountynv.gov](mailto:Kasondra.Hilton@clarkcountynv.gov) and [Rissa.Powers@clarkcountynv.gov](mailto:Rissa.Powers@clarkcountynv.gov) on this 16<sup>th</sup> day of July, 2018.

By /s/ Patty Barber-Bair

An employee of the Clark County Public  
Defender's Office

Case Name: Clancy Patrick Mactler

Case No. 18F12108X

Dept No. 11



08/06/2018 **Bail Stands - Cash or Surety**  
*Counts: 001; 002; 003; 004 - \$25,000.00/\$25,000.00 Total Bail*

08/06/2018 **Minute Order - Department 13**

08/06/2018 **Continued for Status Check on filing of Criminal Complaint**

08/06/2018 **Transcript of Proceedings**

08/09/2018 **Nevada Risk Assessment Tool**

08/09/2018 **Not Released NPR**

08/10/2018 **CANCELED Status Check on Filing of Criminal Complaint (7:30 AM)** (Judicial Officer Letizia, Harmony)  
*Criminal Complaint Filed*  
*In Custody*

08/10/2018 **Initial Appearance (7:30 AM)** (Judicial Officer Letizia, Harmony)  
*In Custody*  
*Parties Present*  
*Result: Matter Heard*

08/10/2018 **Criminal Complaint**  
*Filed in open Court*

08/10/2018 **Interpreter Present in Court**  
*Spanish*

08/10/2018 **Initial Appearance Completed**  
*Advised of Charges on Criminal Complaint, Waives Reading of Criminal Complaint*

08/10/2018 **Public Defender Appointed**

08/10/2018 **Discovery Given to Counsel in Open Court**

08/10/2018 **Motion by Defense for an O.R. Release**  
*with House Arrest - No Objection by State - Motion Granted*

08/10/2018 **Release Order - Court Ordered EMP - Medium** (Judicial Officer: Letizia, Harmony )  
*(Release Order - Court Ordered Electronic Monitoring - Medium Level)*

08/10/2018 **Bail Condition - SCRAM**  
*Defendant to be released Mid-Level EMP with SCRAM*

08/10/2018 **Status Check**  
*on Serious Offender Program*

08/10/2018 **Minute Order - Department 13**

08/13/2018 **SCRAM Report**  
*Install*

08/23/2018 **Status Check (7:30 AM)** (Judicial Officer Baucum, Suzan)  
*Mid-Level EMP with SCRAM*  
*Parties Present*  
*Result: Matter Heard*

08/23/2018 **Interpreter Present in Court**  
*Spanish*

08/23/2018 **Motion to Continue - Defense**  
*Motion Granted*

08/23/2018 **Status Check**  
*on Serious Offender Program*

08/23/2018 **Minute Order - Department 13**

09/27/2018 **Status Check (7:30 AM)** (Judicial Officer Baucum, Suzan)  
*Mid-Level EMP with SCRAM*

Case Information

C-18-333932-W | In the Matter of the Petition of Julio Hernandez

|               |               |                  |
|---------------|---------------|------------------|
| Case Number   | Court         | Judicial Officer |
| C-18-333932-W | Department 17 | Villani, Michael |
| File Date     | Case Type     | Case Status      |
| 08/07/2018    | Criminal Writ | Closed           |

Party

|                  |                     |
|------------------|---------------------|
| Respondent       | Active Attorneys ▼  |
| Nevada State of  | Lead Attorney       |
|                  | Moskal, Thomas J.   |
|                  | Retained            |
| Petitioner       | Active Attorneys ▼  |
| Hernandez, Julio | Attorney            |
|                  | Craig-Rohan,        |
|                  | Christy L.          |
|                  | Retained            |
|                  | Lead Attorney       |
|                  | Kohn, Philip J, ESQ |
|                  | Retained            |

Events and Hearings

08/07/2018 Petition ▼

## Petition

## Comment

Emergency Petition for Writ of Habeas Corpus, or, in the Alternative, Petition for Writ of Mandamus

08/08/2018 Return ▼

## Return - RET (CIV)

## Comment

State's Return to Emergency Peitition for Write of Habeas Corpus Or, In the Alternative, For a Writ of Mandamus

08/09/2018 Petition ▼

## Petition

## Minutes - Petition

## Judicial Officer

Villani, Michael

## Hearing Time

10:30 AM

## Result

Matter Continued

## Comment

Petitioner Julio Hernandez's Emergency Petition for Writ of Habeas Corpus, or, in the Alternative, Petition for Writ of Mandamus

## Parties Present ▲

Petitioner: Hernandez, Julio

Attorney: Craig-Rohan, Christy L.

## Respondent

Attorney: Moskal, Thomas J.

08/09/2018 Errata ▼

## Errata

## Comment

State's Errata to Pages 2-4, and 38 of the State's Return to Emergency Petition for Writ of Habeas Corpus or, in the Alternative, for a Writ of Mandamus

08/09/2018 Ex Parte Order ▼

## Ex Parte Order - EXPR (CIV)

## Comment

Expedited Order For Justice Court Transcript

08/10/2018 Reporters Transcript ▼

Reporters Transcript - TRAN (CIV)

Comment

Reporter's Transcript of Proceedings August 6, 2018

08/15/2018 Ex Parte Order ▼

Ex Parte Order - EXPR (CIV)

Comment

Expedited Ex Parte Order For Transcript

08/20/2018 Recorders Transcript of Hearing ▼

Recorders Transcript of Hearing - RTRAN (CIV)

Comment

Recorder's Transcript of Hearing: Petitioner Julio Hernandez's  
Emergency Petition for Writ of Habeas Corpus, or in the  
Alternative, for Writ of Mandamus Heard on August 9, 2018

08/20/2018 Recorders Transcript of Hearing ▼

Recorders Transcript of Hearing - RTRAN (CIV)

Comment

Recorder's Transcript of Hearing: Petitioner Julio Hernandez's  
Emergency Petition for Writ of Habeas Corpus, or in the  
Alternative, for Writ of Mandamus Heard on August 14, 2018

08/24/2018 Order ▼

Order - ORDR (CIV)

Comment

Order

08/30/2018 Notice of Entry of Order ▼

Notice of Entry of Order - NEOJ (CIV)

Comment

Notice of Entry of Order



**Financial**

No financial information exists for this case.

**Documents**

Petition

Return - RET (CIV)

Ex Parte Order - EXPR (CIV)

Errata

Reporters Transcript - TRAN (CIV)

Petition

Ex Parte Order - EXPR (CIV)

Minutes - Petition

Recorders Transcript of Hearing - RTRAN (CIV)

Recorders Transcript of Hearing - RTRAN (CIV)

Order - ORDR (CIV)

Notice of Entry of Order - NEOJ (CIV)

*Heather L. Smith*  
CLERK OF THE COURT

1 PHILIP J. KOHN, PUBLIC DEFENDER  
2 NEVADA BAR NO. 0556  
3 CHRISTY CRAIG, DEPUTY PUBLIC DEFENDER  
4 NEVADA BAR NO. 6262  
5 **PUBLIC DEFENDERS OFFICE**  
6 309 South Third Street, Suite 226  
7 Las Vegas, Nevada 89155  
8 Telephone: (702) 455-4685  
9 Facsimile: (702) 455-5112  
10 *Attorneys for Petitioner*  
11 *craigcl@clarkcountynv.gov*

7 **DISTRICT COURT, LAS VEGAS**  
8 **CLARK COUNTY, NEVADA**

9 In the Matter of the Application of,

11 v.

12 JULIO HERNANDEZ,  
13 for a Writ of Habeas Corpus.

DCT. CASE NO. **C-18-333932-W**

JCT. CASE NO. 18F14299X

DEPT. NO. **XVII**

DATE: *August 9, 2018*  
TIME: *10:30 a.m.*

15 **EMERGENCY PETITION FOR WRIT OF HABEAS CORPUS OR,**  
16 **IN THE ALTERNATIVE, PETITION FOR WRIT OF MANDAMUS**  
**(Custody Status Issue)**

17 TO: The Honorable Judge of the Eighth Judicial District Court of  
18 The State of Nevada, in and for the County of Clark

19 The Petition of Julio Hernandez submitted by Christy Craig, Deputy Public Defender, as  
20 attorney for the above-captioned individual, respectfully affirms:

21 1. That she is a duly qualified, practicing, and licensed attorney in the City of  
22 Las Vegas, County of Clark, State of Nevada;

23 2. That Petitioner makes this emergency application for a Writ of Habeas  
24 Corpus or, in the alternative, a Writ of Mandamus; that the place where the Petitioner is  
25 imprisoned actually or constructively imprisoned and restrained of his liberty is the Clark County  
26 Detention Center; that the officer by whom he is imprisoned and restrained is Joe Lombardo,  
27 Sheriff;

28 3. That the imprisonment and restraint of said Petitioner is unlawful in that:  
(a) Petitioner is being held despite the government's failure to file a Criminal Complaint

1 charging Petitioner with a crime; and (b) Petitioner was not afforded the constitutionally  
2 mandated detention hearing to which he is entitled;

3 4. That Petitioner personally authorized his aforementioned attorney to  
4 commence this action.

5 WHEREFORE, Petitioner prays that this Honorable Court make an order  
6 directing the County of Clark to issue a Writ of Habeas Corpus directed to the said Joe  
7 Lombardo, Sheriff, commanding him to bring the Petitioner before your Honor, and return the  
8 cause of his imprisonment.

9 DATED this 7<sup>th</sup> day of August, 2018.

10  
11 PHILIP J. KOHN  
12 CLARK COUNTY PUBLIC DEFENDER

13  
14 By: Christy Craig  
15 CHRISTY CRAIG, #6262  
16 Deputy Public Defender  
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 COMES NOW the Petitioner, Julio Hernandez, by and through his counsel, Christy  
3 Craig, Deputy Clark County Public Defender, and submits the following Points and Authorities  
4 in Support of Defendant's Emergency Petition for a pretrial Writ of Habeas Corpus, or in the  
5 alternative, Writ of Mandamus.

6 **FACTS AND PROCEDURAL HISTORY<sup>1</sup>**

7 As of this writing, Petitioner has no criminal charges pending. On August 2, 2018, Petitioner  
8 was arrested without a warrant on suspicion of DUI. On August 3, 2018, Justice of the Peace  
9 Letizia reviewed police reports and found probable cause for Petitioner's arrest. At the same time,  
10 in Petitioner's absence and in the absence of a criminal complaint, Judge Letizia set bail in the  
11 amount of \$25,000. Petitioner, an indigent defendant, could not pay that bail. Accordingly, he  
12 remained jailed at the Clark County Detention Center.

13 On August 6, 2018, Petitioner was brought before a Pro Tem Judge for an initial  
14 appearance. Prosecutors requested additional time to file a complaint. Defense counsel objected to  
15 Petitioner's ongoing detention based upon (1) the unlawful manner in which the magistrate issued  
16 the initial bail/detention order in Petitioner's absence; (2) the magistrate's continued detention order  
17 in the absence of a criminal complaint; and (3) the magistrate's refusal to conduct the  
18 constitutionally-required detention hearing prior to issuing a *de facto* detention order.<sup>2</sup> To date, no  
19 court has determined, following the filing of a criminal complaint, that preventative detention is the  
20 least restrictive means of ensuring community safety and Petitioner's return to court. In the absence  
21 of such a finding by clear and convincing evidence, Petitioner's continued incarceration violates his  
22 constitutional and statutory rights.

23 Over defense objection to the state's request for an additional time within which to file the  
24 criminal complaint, the court granted the state's request for more time within which to complete  
25 their administrative tasks while the Petitioner remains detained in jail on an unattainable bail. The  
26

27 <sup>1</sup> The transcript from this hearing has been requested, but to date has not been filed. As a result, the Facts and  
28 Procedural History section is based on the best recollection of counsel.

<sup>2</sup> Defense counsel filed a bench brief in support of its arguments with the court.

1 court set a status check date for August 10<sup>th</sup>, 2018 on the filing of charges, at which point the  
2 Defendant will have been held in custody with no complaint for 8 days.

3 Thus, Petitioner requests that this Honorable Court issue a Writ of Habeas Corpus directing  
4 the Clark County Sheriff to release Petitioner from custody. Alternatively, Petitioner requests that  
5 this Honorable Court issue a Writ of Mandamus directing the lower court to vacate the current bail  
6 setting and release Petitioner from custody.

### 7 STATEMENT OF THE ISSUES

8 The current detention order violates Petitioner's constitutional rights in that:

9 I. At the Probable Cause Determination, the lower court issued a *de facto* detention  
10 order, without Petitioner's presence, by setting bail that Petitioner cannot make pursuant to a  
11 standardized bail schedule. This order violates Petitioner's Due Process and Equal Protection rights,  
12 as well as the constitutional prohibition on excessive bail, and Nevada law;

13 II. The lower court's order for Petitioner's continued detention in the absence of a  
14 timely-filed criminal complaint establishing formal charges violates Petitioner's constitutional and  
15 statutory rights; and

16 III. At the Initial Appearance, the lower court issued a detention order based on standard  
17 bail without a full hearing on whether the State had demonstrated that detention was the least  
18 restrictive means of assuring community safety and ensuring the accused's return to court. This  
19 order violates Petitioner's Due Process and Equal Protection rights, as well as the constitutional  
20 prohibition on excessive bail, and Nevada law.

### 21 BRIEF OVERVIEW

22 The protocol by which pretrial detention orders are promulgated in Clark County is  
23 unlawful. First, the procedure by which a magistrate defaults to detaining criminal defendants  
24 without a full hearing violates Federal and Nevada law. Second, Clark County's ongoing,  
25 systemic use of bail as a tool of pretrial *confinement* rather than *release* is also unlawful because:  
26 (a) jailing someone solely because he cannot pay a sum of money without making a finding that  
27 he is able to pay infringes a fundamental right solely on the basis of wealth in violation of the  
28

Equal Protection and Due Process Clauses; and (b) jailing someone on an unattainable financial condition violates the Constitution because it deprives a presumptively innocent person of the fundamental right to liberty without complying with the substantive and procedural requirements of a valid order of detention under the Due Process Clause. Finally, the common practice in Clark County of detaining arrestees after the Initial Appearance without formal charges being filed violates a detainee's constitutional and statutory rights.

## LEGAL STANDARD AND AUTHORITY

### I. Writ of Habeas Corpus and/or Mandamus is the Proper Remedy

As set forth more fully below, Petitioner's current detention is unlawful. Pursuant to NRS 34.360, "Every person unlawfully committed, detained, confined or restrained of his or her liberty . . . may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment or restraint." With the instant Emergency Petition, Petitioner seeks a writ of habeas corpus from the instant Court directing Petitioner's release from the unlawful custody of the Clark County Sheriff.

In the alternative, a petitioner may seek a writ of mandamus to "compel the performance of an act that the law requires . . . or to control an arbitrary or capricious exercise of discretion." Thomas v. Eighth Judicial Dist. Court, 402 P.3d 619, 623 (Nev. 2017); see also NRS 34.160. A Writ of Mandamus may be issued "where there is [no] plain, speedy and adequate remedy in the ordinary course of law". NRS 34.170; Smith v. Eighth Judicial Dist. Court, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). With the instant Emergency Petition, Petitioner seeks a writ of mandamus directing the lower court to vacate the current detention order and to conduct a full, adversarial detention hearing that complies with Nevada statutory procedures as well as the U.S. and Nevada constitutions.

### II. Constitutional Protections Violated by the Current Process in Clark County

#### A. The Due Process Clause

The Due Process Clauses of the U.S. and Nevada Constitutions provide that "[n]o person shall . . . be deprived of life, liberty, or property without due process of law." U.S. Const. amend.

V;<sup>3</sup> Nev. Const. Art. 1, §8. Due Process requires a hearing before a neutral fact-finder and an opportunity to be heard “at a meaningful time and in a meaningful manner” before an individual is deprived of a fundamental right or property interest. Mathews v. Eldridge, 424 U.S. 319, 333-34, 96 S. Ct. 893 (1976) (citations omitted); see also Zadvydas v. Davis, 533 U.S. 678, 690, 121 S. Ct. 2491 (2001) (“Freedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that [the Due Process] Clause protects”); Foucha v. Louisiana, 504 U.S. 71, 80, 112 S. Ct. 1780 (1992) (“Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action”); U.S. v. Montalvo-Murillo, 495 U.S. 711, 716, 110 S. Ct. 2072 (1990) (holding that release prior to trial is a “vital liberty interest”). Accordingly, the issue of pretrial detention must be resolved in a manner that comports with due process.

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

The essential elements of a procedural due process claim under the Fifth Amendment are “(1) a life, liberty, or property interest requiring protection under the Due Process Clause, and (2) a deprivation of that interest (3) without adequate process.” Fields v. Henry Co., 701 F.3d 180, 185 (6th Cir. 2012). “A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word ‘liberty’ . . . or [by] an expectation or interest created by the state law or policies”. Wilkinson v. Austin, 545 U.S. 209, 221, 125 S. Ct. 2384 (2005) (citation omitted). Freedom of movement, including the right to travel, has long been recognized as a

<sup>3</sup> The Fifth Amendment Due Process Clause was made applicable to the states via the Fourteenth Amendment to the U.S. Constitution. U.S. Const. amend, V, XIV. See Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489 (1964)



1 liberty interest which cannot be restricted without due process of law. City of Chicago v.  
2 Morales, 527 U.S. 41, 54, 119 S. Ct. 1849 (1999) (citing Kent v. Dulles, 357 U.S. 116, 78 S. Ct.  
3 1113 (1958) (noting that freedom of movement is “a part of our heritage”)). Accordingly, any  
4 restraint on pretrial liberty implicates procedural due process protections. Those protections  
5 require “adequate process”. In the context of a pretrial detention order, “adequate process”  
6 requires rigorous procedures be met to detain someone pretrial, including, but not limited to, a  
7 “full-blown adversary hearing,” a heightened evidentiary standard of proof of  
8 dangerousness/flight risk by “clear and convincing evidence,” consideration of alternative  
9 conditions or release, and “written findings of fact and a written statement of reasons for a  
10 decision to detain.” Salerno, 481 U.S. at 741, 750-51.

11 Substantive due process “prohibits states from infringing fundamental liberty interests,  
12 unless the infringement is narrowly tailored to serve a compelling state interest.” Lawrence v.  
13 Texas, 539 U.S. 558, 593, 123 S. Ct. 2472 (2003). In a pretrial detention context, substantive due  
14 process requires that detention survive “heightened constitutional scrutiny” and the government  
15 may only detain where that detention is carefully limited to serve a “compelling” government  
16 interest. Salerno, 481 U.S. at 746. As a result, the government may detain someone pretrial only  
17 if other, less restrictive means are not available to serve the state’s interests. Id.; U.S. v. Karper,  
18 847 F. Supp. 2d 350, 362 (N.D.N.Y. 2011) (finding release conditions cannot exceed that which  
19 is minimally necessary to ensure the accused’s appearance in court and protect the community  
20 against future dangerousness).

#### 21 **B. Equal Protection Clause**

22 The Equal Protection Clause of the U.S. and Nevada constitutions<sup>4</sup> prohibits the  
23 government from denying individuals equal protection of the laws. The Equal Protection Clause  
24 may be invoked to analyze the governmental actions that draw distinctions based upon specific  
25 characteristics or impinge on an individual’s exercise of a fundamental right. See Skinner v.  
26 Oklahoma, 316 U.S. 535, 62 S. Ct. 1110 (1942). While the Equal Protection Clause permits the

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28 <sup>4</sup> U.S. Const. amend. XIV; Nev. Const. Art. 1, § 1 and Art. IV, § 21.

1 states some discretion in enacting laws which affect some groups of citizens differently than  
2 others, a statute or practice is unconstitutional if the “classification rests on grounds wholly  
3 irrelevant to the achievement of the State’s objective.” McGowan v. Maryland, 366 U.S. 420,  
4 425-26, 81 S. Ct. 1101 (1961).

5 In the context of bail, the Equal Protection Clause prohibits the pretrial detention of  
6 defendants solely because of their inability to afford bail. Weatherspoon v. Oldham, 2018 WL  
7 1053548, at \*6 (W.D. Tenn. Feb. 26, 2018); Jones, 2015 WL 5387219, at \*4; Pugh v. Rainwater,  
8 572 F.2d at 1058 (5th Cir. 1978) (holding that “pretrial confinement for inability to post money  
9 bail” for a defendant “whose appearance at trial could reasonably be assured by one of the  
10 alternate forms of release . . . would constitute imposition of an excessive restraint . . .”).

### 11 C. Excessive Bail Clause and Nevada’s Statutory Bail Scheme

12 The Eighth Amendment to the U.S. Constitution states, in part, that “excessive bail shall  
13 not be required.” Similarly, the Nevada Constitution mandates that all defendants “shall be  
14 bailable by sufficient sureties” and that bail shall not be “excessive”. Nev. Const. Art. 1, §§ 6-7.  
15 The constitutional right to bail is codified in Nevada statute, which requires that “a person  
16 arrested for an offense other than murder of the first degree must be admitted to bail.” NRS  
17 178.484(1).

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

- 23 1. The length of residence in the community;
- 24 2. The status and history of employment;
- 25 3. Relationships with the person’s spouse and children, parents or other family  
members and with close friends;
- 26 4. Reputation, character and mental condition;
- 27 5. Prior criminal record, including, without limitation, any record of appearing or  
failing to appear after release on bail or without bail;

6. The identity of responsible members of the community who would vouch for the reliability of the person;
7. The nature of the offense with which the person is charged, the apparent probability of conviction and the likely sentence, insofar as these factors relate to the risk of not appearing;
8. The nature and seriousness of the danger to the alleged victim, any other person or the community that would be posed by the person's release;
9. The likelihood of more criminal activity by the person after release; and
10. Any other factors concerning the person's ties to the community or bearing on the risk that the person may willfully fail to appear.

NRS 178.4853.

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

#### **A. Clark County's Bail System**

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

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

"Bail" is not equivalent to "money bail." "Bail" means *release* before trial. Although common in recent years, the sentence "the Defendant is held on \$10,000 bail" is a contradiction: as a historical matter, being "held on bail" was impossible. Timothy R. Schnacke, U.S. Dep't of Justice – Nat'l Inst. for Corr., Fundamentals of Bail: A Resource Guide for Pretrial Practitioners

1 and a Framework for American Pretrial Reform 1 (Aug. 2014).<sup>5</sup> As the CATO Institute has  
2 explained, since well before the Magna Carta, bail has been understood as a device to *free*  
3 defendants pretrial. See Brief for Amicus Curiae CATO Inst, Walker v. City of Calhoun, Ga.  
4 No. 16-10521, at 3 (11<sup>th</sup> Cir. 2016).<sup>6</sup>

5 “Money bail” is the practice of requiring a defendant to forfeit money if they do not  
6 appear for trial. Money bail can be either secured or unsecured. A secured money bail system  
7 requires the defendant to deposit money before they are released; an unsecured money bail  
8 system allows the defendant to be released without depositing any money so long as they  
9 promise to pay if they fail to appear.

10 As Chief Judge Rosenthal of the U.S. District Court for the Southern District of Texas  
11 recently summarized in her comprehensive discussion of the history of the American bail system,  
12 ODonnell v. Harris Co., 251 F.Supp.3d 1052, 1068 (S.D. Tex. 2017),<sup>7</sup> bail originated in  
13 medieval England “as a device to free untried prisoners.” Daniel J. Freed & Patricia M. Wald,  
14 Bail in the U.S.: 1964 1 (1964). The Statue of Westminster, enacted by the English Parliament in  
15 1275, listed the offenses that would be bailable and provided criteria for determining whether  
16 someone should be released. These criteria included the strength of the evidence against the  
17 accused and the severity of the accused’s criminal history. See June Carbone, Seeing Through  
18 the Emperor’s New Clothes: Rediscovery of Basic Principles in the Administration of Bail, 34  
19 Syracuse L. Rev. 517, 523-26 (1983); Note, Bail: An Ancient Practice Reexamined, 70 Yale L.J.  
20 966 (1961). In 1679, Parliament adopted the Habeas Corpus Act to ensure that an accused could  
21 obtain a timely bail hearing. And the English Bill of Rights, enacted in 1679, prohibited  
22 excessive bail. See Carbone, *supra*, at 528.

23 The American States continued this tradition. Beginning with the Pennsylvania  
24 Constitution of 1682, 48 states, including Nevada, have protected, by constitution or statute, a  
25 right to bail “by sufficient sureties, except for capital offenses when the proof is evident or the  
26

27 <sup>5</sup> Available at [http://www.clebp.org/images/2014-11-05\\_final\\_bail\\_fundamentals\\_september\\_8,\\_2014.pdf](http://www.clebp.org/images/2014-11-05_final_bail_fundamentals_september_8,_2014.pdf).

28 <sup>6</sup> Available at <https://object.cato.org/sites/cato.org/files/pubs/pdf/walker-v-city-of-calhoun.pdf>.

<sup>7</sup> Aff’d as modified, 882 F.3d 528 (5th Cir. 2018).

1 presumption great.” Matthew J. Hegreness, America’s Fundamental and Vanishing Right to Bail,  
2 55 Ariz. L. Rev. 909, 916 (2013).

3 As the U.S. District Court for the Southern District of Texas recently explained in its  
4 detailed opinion striking down Harris County’s money bail practices, “[h]istorians and jurists  
5 confirm that from the medieval period until the early American republic, a bail bond was  
6 typically based on an individualized assessment of what the arrestee or his surety *could pay* to  
7 assure appearance and secure release.” ODonnell, 251 F.Supp.3d at 1069 (emphasis added). The  
8 court explained the English practice at the time of the ratification of the U.S. Constitution: “‘The  
9 rule is, where the offence is prima facie great, to require good bail; moderation nevertheless is to  
10 be observed, and such bail only is to be required as the party is able to procure; for otherwise the  
11 allowance of bail would be a mere colour for imprisoning the party on the charge.’” *Id.* (quoting  
12 1 J. Chitty, A Practical Treatise on the Criminal Law 88-89 (Philadelphia ed. 1819)).

13 Jurisdictions across America began to depart from the original understanding of bail in  
14 the middle of the 20<sup>th</sup> Century. And in the last two decades, the use of unaffordable secured  
15 money bail has increased in scope and severity. In 1996, 59% of felony defendants had to meet a  
16 financial condition to regain their liberty pretrial. Timothy C. Hart & Brian A. Reaves, U.S.  
17 Dep’t of Justice, Felony Defendants in Large Urban Counties, 1996, at 17-18 (1999).<sup>8</sup> By 2009,  
18 that percentage had climbed to 72%. Brian A. Reaves, U.S. Dep’t of Justice, Felony Defendants  
19 in Large Urban Counties, 2009-Statistical Tables, at 15, 20 (2013).<sup>9</sup> In 1990, the majority of  
20 felony defendants who were not detained while their cases were pending were released without  
21 financial conditions. In 2009, only 23% of felony defendants who were not detained while their  
22 cases were pending were released without financial conditions. And the average amount of  
23 money required to be paid as a condition of release has increased. Vera Inst of Justice,  
24 Incarceration’s Front Door: The Misuse of Jails in America, 29 (Feb. 2015).<sup>10</sup> By 2009, about  
25

26 <sup>8</sup> Available at <https://www.bjs.gov/content/pub/pdf/dluc96.pdf>.

27 <sup>9</sup> Available at <https://www.bjs.gov/content/pub/pdf/dluc09.pdf>.

28 <sup>10</sup> Available at [https://storage.googleapis.com/vera-web-assets/downloads/Publications/incarcerations-front-door-the-misuse-of-jails-in-america/legacy\\_downloads/incarcerations-front-door-report\\_02.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/incarcerations-front-door-the-misuse-of-jails-in-america/legacy_downloads/incarcerations-front-door-report_02.pdf).

1 half of felony defendants subject to financial conditions of release could not meet them and  
2 remained in custody until the disposition of their cases. Felony Defendants, 2009-Statistical  
3 Tables, at 17.

4 The routine use of unaffordable secured money bail resulted in a “crisis.” See U.S. v.  
5 Salerno, 481 U.S. 739, 742, 107 S. Ct. 2095 (1987) (describing “a bail crisis in the federal  
6 courts”); Caleb Foote, The Coming Constitutional Crisis in Bail: 1, 113 U. Pa. L. Rev. 959, 971  
7 (1965). Two distinct evils of the secured money bail system provoked the crisis: It imperiled  
8 public safety by allowing potentially dangerous defendants to be released without any  
9 consideration of their dangerousness, and it worked an “invidious discrimination” against those  
10 who could not pay. See, e.g., Williams v. Illinois, 399 U.S. 235, 242, 90 S. Ct. 2018 (1970).  
11 Over 50 years ago, Attorney General Robert Kennedy led a successful movement to reform bail  
12 in the federal courts. Kennedy testified:

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

18 Testimony on Bail Legislation before S. Judiciary Subcomm. on Const. Rights and  
19 Improvements in Judicial Machinery (Aug. 4, 1964).<sup>11</sup>

20 One of the results of the movement to reform the bail system in the 1960s was the virtual  
21 elimination of cash bonds in the District of Columbia and in all Federal courts. The Bail Reform  
22 Act “assure[d] that all persons, regardless of their financial status, [would] not needlessly be  
23 detained pending their appearance to answer charges . . . when detention serves neither the ends  
24 of justice nor the public interest.” Bail Reform Act of 1966, Pub. L. No. 89-465, § 2, 80 Stat.  
25 214, 214 (repealed in 1984). In 1984, Congress updated the Bail Reform Act as part of the  
26 Comprehensive Crime Control Act. See Bail Reform Act of 1984, 18 U.S.C. §§ 3141-50. Federal

27 <sup>11</sup> Available at <http://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/08-04-1964.pdf>.

1 courts and the courts of the District of Columbia transitioned to a rigorous, evidence-based  
2 system of non-financial conditions that remains in place today. If the government believes that a  
3 defendant cannot be released pretrial because she is too dangerous or too likely to flee, the  
4 government may seek an order of detention, but only after it has satisfied the court, at a “full-  
5 blown adversarial hearing,” that no condition or combination of conditions could assure the  
6 defendant’s appearance at trial and the safety of the community. Salerno, 481 U.S. at 750.  
7 Indeed, *the constitutionality of any moneyed bail system requires as much in order to meet*  
8 *constitutional muster*. Id. at 750-55.

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

### 17 **C. Jailing an Arrestee For the Inability to Make a Monetary Bond Violates Equal** 18 **Protection**

19 The principle that jailing the poor because they cannot pay a sum of money is  
20 unconstitutional has deep roots in American constitutional law. See Williams v. Illinois, 399 U.S.  
21 235, 241, 90 S. Ct. 2018 (1970) (“[T]he Court has had frequent occasion to reaffirm allegiance to  
22 the basic command that justice be applied equally to all persons”); Douglas v. California, 372  
23 U.S. 353, 355, 83 S. Ct. 814 (1963) (condemning the “evil” of “discrimination against the  
24 indigent”); Griffin v. Illinois, 351 U.S. 12, 19, 76 S. Ct. 585 (1956) (“There can be no equal  
25 justice where the kind of trial a man gets depends on the amount of money he has”); see also  
26 Mayer v. City of Chicago, 404 U.S. 189, 193, 92 S. Ct. 410 (1971).

1        These principles have been applied in a variety of contexts in which a government jailed  
2 someone because of her inability to make a monetary payment. In Tate v. Short, 401 U.S. 395,  
3 91 S. Ct. 668 (1971), the U.S. Supreme Court held that “the Constitution prohibits the State from  
4 imposing a fine as a sentence and then automatically converting it into a jail term solely because  
5 the defendant is indigent and cannot forthwith pay the fine in full.” Id. at 398. In Bearden v.  
6 Georgia, 461 U.S. 660, 103 S. Ct. 2064 (1983), the Court explained that to “deprive [a]  
7 probationer of his conditional freedom simply because, through no fault of his own he cannot  
8 pay [a] fine... would be contrary to the fundamental fairness required by the Fourteenth  
9 Amendment.” Id. at 672-73.

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

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

26        We have no doubt that in the case of an indigent, whose appearance at trial could  
27 reasonably be assured by one of the alternate forms of release, pretrial  
28



1 confinement for inability to post money bail would constitute imposition of an  
2 excessive restraint...

3 Pugh, 572 F.2d at 1058 (5th Cir. 1978).<sup>12</sup> Indeed, "[t]he incarceration of those who cannot  
4 [afford a cash payment], without meaningful consideration of other possible alternatives,  
5 infringes on both due process and equal protection requirements." Id. at 1057;<sup>13</sup> see also  
6 Williams v. Farrior, 626 F.Supp. 983, 985 (S.D. Miss. 1986) ("For the purposes of the  
7 Fourteenth Amendment's Equal Protection Clause, it is clear that a bail system which allows  
8 only monetary bail and does not provide for any meaningful consideration of other possible  
9 alternatives for indigent pretrial detainees infringes on both equal protection and due process  
10 requirements").

11 The U.S. Justice Department recently endorsed this view, asserting that "[i]ncarcerating  
12 individuals solely because of their inability to pay for their release, whether through the  
13 payment of fines, fees, or a cash bond, violates the Equal Protection Clause of the Fourteenth  
14 Amendment." Jones v. City of Clanton, 2015 WL 5387219, at \*4 (M.D. Ala. Sept. 14, 2015);  
15 see also Varden v. City of Clanton, Civ. No. 15-34, Docket. No. 26 at 1 (M.D. Ala. Feb. 13,  
16 2015). The Justice Department reasoned that a secured money bail schedule, like the one  
17 utilized in Clark County, "do[es] not account for individual circumstances of the accused" and  
18 it "essentially mandate[s] pretrial detention for anyone who is too poor to pay the  
19 predetermined fee." Jones, 2015 WL 5387219, at \*9.

20 Accordingly, several federal district courts have held that state laws setting a particular  
21 monetary bail amount without individualized considerations of indigency violate the Due  
22 Process Clause. See, e.g., Rodriguez v. Providence Cmty. Corr., Inc., 155 F.Supp.3d 758, 767-  
23 70 and n. 10 (M.D. Tenn. 2015) (granting class-wide preliminary injunction enjoining state

24 <sup>12</sup> Rainwater further explained that it refused to require a priority to be given in all cases – including those of the  
25 non-indigent – to non-monetary conditions of release. The court noted that, at least for wealthier people, some might  
26 actually prefer monetary bail over release with certain other conditions, and that the court would not invalidate a  
27 state Rule that allowed for those other conditions in appropriate cases. Pugh v. Rainwater, 572 F.2d 1053, 1057 (5th  
28 Cir. 1978).

<sup>13</sup> Four circuit judges dissented in Rainwater. Although they agreed with the constitutional principles announced by  
the majority that the Constitution forbids jailing the poor when they cannot afford monetary bail, they were  
concerned about the majority's faith in the Florida courts not to apply the new state Rule in unconstitutional ways to  
detain the indigent. Pugh v. Rainwater, 572 F.2d 1053, 1067 (5th Cir. 1978) ("I cannot escape the conclusion that  
the majority has chosen too frail a vessel for such a ponderous cargo of human rights.") (Simpson, J., dissenting).

1 policy requiring monetary payment for probations to obtain release pending a revocation  
2 hearing “without an inquiry into the individual’s ability to pay the bond and whether alternative  
3 methods of ensuring attendance at revocation hearings would be adequate”); Williams v.  
4 Farrior, 626 F.Supp. 983, 985 (S.D. Miss. 1986) (“[I]t is clear that a bail system which allows  
5 only monetary bail and does not provide for any meaningful consideration of other possible  
6 alternatives for indigent pretrial detainees infringes on both equal protection and due process  
7 requirements.”); Buffin v. City and Co. of San Francisco, No. 15-CV-04959-YGR, 2018 WL  
8 424362 at \*7 (N.D. Cal. Jan. 16, 2018); cf. Abdi v. Nielson, No. 1:17-CV-0721 EAW, 2018  
9 WL 798747, at \*4 (W.D.N.Y. Feb. 9, 2018).

10 These decisions make clear that requiring money bail as a release condition in an  
11 amount impossible for the defendant to pay is equivalent to a detention order, “which is only  
12 appropriate when the state shows and the court finds that no condition or combination of  
13 conditions of release could satisfy the purposes of bail, to assure the defendant’s appearance at  
14 trial or hearing and the safety of the public.” Weatherspoon v. Oldham, 2018 WL 1053548, at  
15 \*6 (W.D. Tenn. Feb. 26, 2018) (additional citations omitted). Thus, in order to withstand  
16 constitutional scrutiny, unattainable money bail settings must be preceded by a hearing at  
17 which the court determines the least restrictive means of ameliorating an accused’s risk of  
18 flight and danger to the community. Absent such a determination, an unattainable release  
19 condition – such as an unattainable bail setting – operates as a *de facto* detention order that  
20 discriminates on the basis of wealth. Weatherspoon v. Oldham, 2018 WL 1053548, at \*6 (W.D.  
21 Tenn. Feb. 26, 2018). This violates equal protection and due process guarantees.

## 22 ARGUMENT

### 23 I. At the Probable Cause Determination, the Lower Court Violated Petitioner’s Rights 24 by Defaulting to Preventive Detention

#### 25 A. The Court’s Decision to Preventatively Detain Petitioner Pretrial without a Full, 26 Adversarial Hearing Violated Petitioner’s Due Process Rights

1 In order to deprive a presumptively innocent person of her physical liberty, due process  
2 requires that the State demonstrate 1) by “clear and convincing evidence” at a “full-blown  
3 adversarial hearing” that the defendant presents an “identified and articulable threat” to the  
4 community or presents a risk of flight<sup>14</sup> and 2) *no conditions or combination of conditions*  
5 *alternative to detention* could reasonably mitigate that danger based on an individualized  
6 consideration of defendant’s unique circumstances.<sup>15</sup> U.S. v. Salerno, 481 U.S. 739, 750-51  
7 (1987) (emphasis added); see also Weatherspoon v. Oldham, 2018 WL 1053548, at \*14-15, \*17  
8 (W.D. Tenn. Feb. 26, 2018). A state court procedure that does not require as much violates due  
9 process. See, e.g., Rodriguez v. Providence Cmty. Corr., Inc., 155 F.Supp.3d 758, 767-70 and n.  
10 10 (M.D. Tenn. 2015); Jones v. City of Clanton, No. 215CV34-MHT, 2015 WL 5387219, at \*2  
11 (M.D. Ala. Sept. 14, 2015) (holding that the “use of a secured bail schedule to detain a person . .  
12 . without an individualized hearing regarding the person’s indigence and the need for bail or  
13 alternatives to bail, violates the Due Process Clause”); Simpson v. Miller, 387 P.3d 1270, 1276  
14 (Ariz. 2017) (“[I]t is clear from Salerno and other decisions that the constitutionality of a pretrial  
15 detention scheme turns on whether particular procedures satisfy substantive due process  
16 standards”); see also Lopez-Valenzuela v. Arpaio, 770 F.3d 772, 781 (9th Cir. 2014) (en banc)  
17 (applying strict scrutiny to strike down an Arizona law that required detention after arrest  
18 without individualized consideration of an arrestee’s circumstances); ODonnell, 251 F.Supp.3d  
19 1052; Williams v. Farrior, 626 F.Supp. 983, 986 (S.D. Miss. 1986) (holding that a state’s pretrial  
20 detention scheme must meet “strict judicial scrutiny” because of the fundamental rights at issue).

21 As a result, due process mandates that a magistrate makes an individualized  
22 determination whether preventative detention is the least restrictive means of assuring  
23 community safety and ensuring the accused’s return to court. Salerno, 481 U.S. 739.

24 This did not happen in this case. Here, the reviewing magistrate set bail at a 48 Hour  
25 Probable Cause Review at which neither Petitioner nor her counsel was present. In doing so, the  
26

27 <sup>14</sup> These procedural protections are mandated by the constitutional right to *Procedural Due Process*. U.S. v. Salerno,  
481 U.S. 739, 741, 750-51 (1987) (emphasis added).

28 <sup>15</sup> This protection is mandated by the constitutional right to *Substantive Due Process*. Id. at 746.

1 lower court defaulted to detaining Petitioner without a “full-blown adversarial hearing,” without  
2 “clear and convincing evidence” that the defendant presents an “identified and articulable threat”  
3 to the community or presents a risk of flight, and without a request from the State for preventive  
4 detention. Instead, the magistrate *sua sponte* ruled that detention was appropriate after a review  
5 of only a police report and a temporary custody record. As a result, the lower court’s detention  
6 order at the Probable Cause Determination violates due process. The detention order should be  
7 vacated and Petitioner should be released.

8 **B. The Court’s Setting of Unattainable Bail Does Not Alleviate the Due Process**  
9 **Violation**

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

21 To set bail in an amount that is *unattainable*, a court must find, on the record, by “clear  
22 and convincing evidence” after a “full-blown adversarial hearing” that 1) the defendant presents  
23 an “identified and articulable threat” to the community or presents a risk of flight and 2) no  
24 conditions or combination of conditions alternative to detention could reasonably mitigate that  
25 danger based on an individualized consideration of defendant’s unique circumstances. U.S. v.  
26 Salerno, 481 U.S. 739, 750-51 (1987) (emphasis added) (requiring that a magistrate setting bail  
27 in an unattainable amount for a defendant must make an individualized determination whether  
28

1 bail is the least restrictive means of assuring community safety and ensuring the accused's return  
2 to court); ODonnell, 251 F.Supp.3d at 1143-44; Jones v. City of Clanton, No. 215CV34-MHT,  
3 2015 WL 5387219, at \*2 (M.D. Ala. Sept. 14, 2015) (holding that the "use of a secured bail  
4 schedule to detain a person . . . without an individualized hearing regarding the person's  
5 indigence and the need for bail or alternatives to bail, violates the Due Process Clause"); Carlisle  
6 v. Desoto County, Mississippi, 2010 WL 3894114, at \*5 (N.D. Miss. Sept. 30, 2010) (holding  
7 that because a "compelling state interest" was required for pretrial detention, the plaintiff's rights  
8 were violated if he was jailed without consideration of non-financial alternatives).

9 This did not happen in this case. As discussed above, the reviewing magistrate set bail at  
10 a 48 Hour Probable Cause Review at which neither Petitioner nor her counsel was present. In  
11 doing so, the lower court defaulted to detaining Petitioner on unattainable bail without a "full-  
12 blown adversarial hearing," without "clear and convincing evidence" that the defendant presents  
13 an "identified and articulable threat" to the community or presents a risk of flight, and without a  
14 request from the State for preventive detention. As a result, the lower court's bail setting at the  
15 Probable Cause Determination violates due process. The unattainable bail setting amounts to a  
16 detention order. It should be vacated and Petitioner should be released.

### 17 **C. The Setting of Unattainable Bail Resulting in Detention Violates the Equal** 18 **Protection Clause**

19 In the context of bail, the Equal Protection Clause prohibits the pretrial detention of  
20 defendants solely because of their inability to afford bail. Lopez-Valenzuela v. Arpaio, 770 F.3d  
21 772, 781 (9th Cir. 2014) (en banc) (applying strict scrutiny to strike down an Arizona law that  
22 required detention after arrest without individualized consideration of an arrestee's  
23 circumstances); Pugh v. Rainwater, 572 F.2d at 1058 (5th Cir. 1978) (holding that "pretrial  
24 confinement for inability to post money bail" for a defendant "whose appearance at trial could  
25 reasonably be assured by one of the alternate forms of release . . . would constitute imposition of  
26 an excessive restraint . . ."); Weatherspoon v. Oldham, 2018 WL 1053548, at \*6 (W.D. Tenn.  
27 Feb. 26, 2018); ODonnell v. Harris County, 251 F.Supp.3d 1052 (S.D. Tex. Apr. 28, 2017);  
28

1 Jones, 2015 WL 5387219, at \*4; Carlisle v. Desoto County, Mississippi, 2010 WL 3894114, at  
2 \*5 (N.D. Miss. Sept. 30, 2010) (holding that because a “compelling state interest” was required  
3 for pretrial detention, the plaintiff’s rights were violated if he was jailed without consideration of  
4 non-financial alternatives).

5 These decisions make clear that requiring money bail as a release condition in an  
6 amount impossible for the defendant to pay is equivalent to a detention order, “which is only  
7 appropriate when the state shows and the court finds that no condition or combination of  
8 conditions of release could satisfy the purposes of bail, to assure the defendant’s appearance at  
9 trial or hearing and the safety of the public.”<sup>16</sup> Weatherspoon v. Oldham, 2018 WL 1053548, at  
10 \*6 (W.D. Tenn. Feb. 26, 2018) (additional citations omitted). Thus, in order to withstand  
11 constitutional scrutiny, unattainable money bail settings must be preceded by a hearing at  
12 which the court determines the least restrictive means of ameliorating an accused’s risk of  
13 flight and danger to the community. Absent such a determination, an unattainable release  
14 condition – such as an unattainable bail setting – operates as a *de facto* detention order that  
15 discriminates on the basis of wealth. Weatherspoon v. Oldham, 2018 WL 1053548, at \*6 (W.D.  
16 Tenn. Feb. 26, 2018). This violates equal protection and due process guarantees.

17 **D. District Court Has Issued Orders Requiring Justice Court To Hold Adversarial**  
18 **Hearings And To Make A Record As To The Basis For The Amount Of Bail Which**  
19 **Cannot Be Done At 48 Hour Hearing Outside The Presence Of Defendant**

20 The Eighth Judicial District Court has granted several Petitions filed on behalf of  
21 defendants for which the Justice Court failed to consider the defendant’s ability to give bail when  
22 setting bail pursuant to NRS 178.498. In the Matter of the Application of Habib Abdulkarim C-  
23 18-333246 the District Court ordered that the Justice of the Peace must “make a record of the  
24 reasoning underlying the grant of bail with regard to statutory considerations established by NRS  
25

26 <sup>16</sup> The U.S. Supreme Court has also held that release conditions that exceed a purported threat posed by a particular  
27 defendant violate the “excessive bail” clause of the Eighth Amendment. Salerno, 481 U.S. at 754; see also U.S.  
28 Const. amend. VIII; Nev. Const. Art. 1 § 6-7; NRS 178.484(1) (stating “a person arrested for an offense other than  
murder of the first degree must be admitted to bail”).

1 178.498, including the financial ability of the defendant to give bail and the relationship to  
2 community safety and ensuring return to court.”

3 In The Matter of the Application of Elijah Graise, C-18-333506, the District Court  
4 ordered that “Justice Court shall make a record of the reasoning underlying the grant of bail with  
5 regard to statutory considerations established by NRS 178.498 and NRS 178.4853, including the  
6 financial ability of the defendant to give bail.”

7 In The Matter of the Application of Lorenzo Bahe, C-18-332731, the District Court  
8 ordered Las Vegas Justice Court “to conduct full, adversarial detention hearing to determine  
9 whether bail is appropriate and if so, set an amount of bail which is the least restrictive means of  
10 assuring the Petitioner’s return to court and ensuring community safety.” The Court went on to  
11 order that “bail, if set, must be tailored to the Petitioner’s financial resources with the amount set  
12 as necessary to reasonable assure return to court and community safety thereby complying with  
13 Nevada statutes and the U.S. and Nevada Constitutions.”

14 The Justice Court is required to set bail pursuant to NRS 178.498 in an amount that is  
15 appropriate based on defendant’s financial ability to give bail. Further the Justice Court must  
16 make a record supporting its decision and the basis for the bail amount set.

17 Thus, when bail is set outside the presence of the Petitioner and without considering a  
18 detainee’s character and financial means the magistrate violates the accused’s constitutional and  
19 statutory rights. The 48 hour PC review is not an adversarial hearing because no one is present  
20 other than the magistrate. Setting bail outside the presence of the Petitioner, the magistrate is  
21 unable to consider “the financial ability of the defendant to give bail” and “the character of the  
22 defendant” a violation NRS 178.498.<sup>17</sup> Additionally, as noted in the District Court orders, the  
23 magistrate must make a record of the underlying reasoning upon which the bail amount is based  
24

25 <sup>17</sup> Pretrial detainees should not remain in custody simply because they are poor. Research indicates that  
26 imposing money bail does not improve the chances that a Detainee will return to court, nor does it protect  
27 the public because many high-risk Detainees have access to money and can post bond. Instead, it serves  
28 only to treat differently those who can and cannot access money. Incarceration can disrupt the positive  
factors in the Detainee’s life and lead to negative collateral consequences, including job loss, loss of  
residence, inability to care for children, and disintegration of other positive social relationships.

1 and the relationship of the bail amount in light of Petitioner's ability to give bail and how that  
2 amount relates to community safety and ensuring return to court. A PC review in chambers  
3 cannot meet the requirements of Nevada law or District Court orders.

4 Here, the lower court set an unattainable bail amount without considering Petitioner's  
5 ability to pay that bail in violation of Nevada statute and U.S. Constitutional law and as such is a  
6 violation of his Constitutional rights and Nevada law.

7 **II. Petitioner's Continued Detention in the Absence of a Timely-Filed Complaint**  
8 **Violates his Constitutional and Statutory rights**

9 NRS 171 codifies many of the pretrial procedural rights guaranteed criminal defendants.  
10 NRS 171.178(1) requires that, following arrest, the arresting officer bring the arrestee "before  
11 the magistrate who issued the warrant or the nearest available magistrate embowered to commit  
12 persons charged . . ." This must occur "within 72 hours after arrest, excluding nonjudicial  
13 days." NRS 171.178(3). "If an arrested person is not brought before a magistrate within 72  
14 hours after arrest . . . the magistrate: (a) shall give the prosecuting attorney an opportunity to  
15 explain the circumstances leading to the delay; and (b) may release the arrested person if he  
16 determines that the person was not brought before a magistrate without unnecessary delay."  
17 NRS 171.178(3).

18 At the initial appearance before a magistrate, Nevada law requires that "The magistrate  
19 or master shall inform the defendant of the complaint against him and of any affidavit filed  
20 therewith, of his right to retain counsel, of his right to request assignment of counsel if he is  
21 unable to obtain counsel, and of his right to have a preliminary examination." NRS 171.186.  
22 Further, the magistrate "shall also inform the defendant that he is not required to make a  
23 statement and that any statement made by him may be used against him" and the "magistrate  
24 shall allow the defendant reasonable time and opportunity to consult counsel, and shall admit  
25 the defendant to bail . . ." NRS 171.186; see also Havens v. Keller, No. CV-S-95-00680-PMP  
26 at 3 (D. Nev. Sept. 7, 1995) (stating "fundamental due process requires . . . a speedy initial  
27 appearance at which the accused is advised of the charges against him"). Otherwise, an arrestee  
28



1 must be booked and released until such time as the District Attorney decides whether and with  
2 what to charge them. See Huebner v. State, 103 Nev. 29, 33, 731 P.2d 1330 (1987) (stating that  
3 the “illegal detention of Huebner for three days beyond the statutorily prescribed period of  
4 seventy-two hours was reprehensible . . .”).

5       There is no statutory provision which allows a magistrate to detain an arrestee beyond  
6 the 72 Hour hearing without the filing of a complaint. Consequently, an arrestee must be  
7 released from custody if prosecutors fail to file a criminal complaint by the 72 Hour initial  
8 appearance. It goes without saying that prosecutors have a simple remedy to prevent an  
9 arrestee’s pretrial release – file a complaint.

10       Prior to 1995, Clark County engaged in the practice of detaining arrestees for up to  
11 eight (8) days before releasing them due to government’s failure to timely file charges. This  
12 policy was referred to as the “8-day kickout” rule or the pre-arraignment delay (“PAD”) policy.  
13 Several detainees subject to the PAD policy sued the Clark County Sheriff, Las Vegas Justice  
14 Court, and the Clark County Detention Center (CCDC), arguing that the PAD policy violated  
15 their constitutional rights. See Havens v. Keller, No. CV-S-95-00680-PMP at 3 (D. Nev. Sept.  
16 7, 1995).

17       In Havens, U.S. District Court Judge Philip Pro enjoined continued use of the PAD  
18 policy, stating that “fundamental due process requires that the accused be accorded a prompt  
19 determination of probable cause for the person’s arrest” and “a speedy initial appearance at  
20 which the accused is advised of the charges against him”. Id. at 3. Judge Pro stressed that the  
21 law regarding probable cause and initial appearances must be followed *as it was written*, and  
22 that there were no “exceptions” for reasons of expense or difficulties in complying with the  
23 law. Id. Judge Pro explained, “It is hardly novel to require Defendants, who are charged with  
24 enforcing the law, to themselves comply with the procedural requirements of the law.” Id. at  
25 27.

26       Two (2) years after Judge Pro entered the preliminary injunction, the U.S. District Court  
27 amended the order at the request of the parties to require “a probable cause determination be  
28

1 made within 48 hours of a person's arrest and that an initial appearance be conducted within 72  
2 hours after arrest, excluding non-judicial days . . ." See Havens, CV-S-95-00680-PMP at 6-7  
3 (D. Nev. July 29, 1997). The modified order imposed a requirement that Clark County comply  
4 with the U.S. Supreme Court's holding in Riverside v. McLaughlin, 500 U.S. 44, 111 S. Ct.  
5 1661 (1991) and the Nevada Supreme Court's ruling in Powell v. State, 113 Nev. 41, 930 P.2d  
6 1123 (1997).

7 Where a complaint is not filed at the initial appearance and an arrestee remains in  
8 custody, that individual suffers irreparable prejudice. See Barker v. Wingo, 407 U.S. 514, 531-  
9 33, 92 S. Ct. 2182 (1972). The "disadvantages for an accused who cannot obtain his release  
10 from pretrial incarceration are even more serious than the societal disadvantages of lengthy  
11 pretrial incarceration" because "the time spent in jail awaiting trial has a detrimental impact on  
12 the individual, often meaning loss of his job, disruption of his family life, enforced idleness,  
13 and curtailment of his ability to gather evidence, contact witnesses, or otherwise prepare his  
14 defense." Id. at 532-33. "While imposing such consequences on anyone who has not yet been  
15 convicted is serious, it is especially unfortunate to impose them on those persons who are  
16 ultimately found to be innocent." Id.; see also Baker v. McCollan, 443 U.S. 137, 153-154, 99 S.  
17 Ct. 2689 (1979) (noting that the "burdens of pretrial detention are substantial ones to impose on  
18 a presumptively innocent man, even when there is probable cause to believe he has committed  
19 a crime").

20 Criminal jurisprudence in the U.S. is rife with discussions of a person's liberty interest  
21 being central to the founding of this nation (and the basis of the rights enshrined in the  
22 constitution). "Freedom from incarceration is the 'paradigmatic liberty interest' under the due  
23 process clause." Fairley v. Luman, 281 F.3d 913, 917-18 (9th Cir. 2002); Oviatt v. Pearce, 954  
24 F.2d 1470, 1476 (9th Cir. 1992); Lee v. City of Los Angeles, 250 F.3d 668, 683 (9th Cir. 2001)  
25 (stating "an individual has a liberty interest in being free from incarceration absent a criminal  
26 conviction"). In Oviatt, the Ninth Circuit observed that, "Certainly freedom from incarceration  
27 is a vital liberty interest for those who have not been criminally convicted. It is a basic  
28

1 assumption with which we guide our lives: the state may not incarcerate any individual  
2 randomly and without specific protective procedures.” 954 F.2d at 1476; see also Riverside,  
3 500 U.S. at 56-57 (stating that “Prolonged detention based on incorrect or unfound suspicion  
4 may unjustly imperil a suspect’s job, interrupt his source of income, and impair his family  
5 relationship”).

6 For a time, Clark County abided by the order of the U.S. District Court and complied  
7 with the pretrial procedures of Section 171 of the Nevada Revised Statutes. NRS 171.178(3)  
8 (initial appearance before a magistrate within 72 hours); 171.178(4) (criminal complaint be  
9 filed “forthwith” at the initial appearance); 171.186 (magistrate must provide the defendant  
10 with the criminal complaint at the initial appearance); 171.196 (Justice Court must hold a  
11 preliminary hearing “within 15 days”). However, recent criminal prosecutions have seen a re-  
12 emergence of the “eight-day kick out” rule in a more subtle form. Arrestees are sometimes  
13 brought for a 72 Hour initial appearance at which no complaint has been filed, and none of the  
14 procedural protections conferred by NRS 171.186 are honored. Arrestees are held, in some  
15 cases, for days thereafter – unaware of allegations against them or the basis for the deprivation  
16 of their liberty. Counsel is often not appointed, and release requests are often not considered,  
17 until a complaint is filed. Similarly, detainees are often not advised of their rights – including  
18 the right to a preliminary hearing within 15 days – until a complaint is filed. As a result,  
19 defendants are frequently deprived of significant pretrial due process protections.

20 This is precisely what happened here. Petitioner was arrested on August 2, 2018. On  
21 August 6, 2018, he appeared before a justice of the peace. Despite the alleged serious nature of  
22 the charges, prosecutors failed to timely file a criminal complaint. Despite this, the magistrate  
23 refused to release Petitioner from custody, instead setting a total (unattainable) bail of \$25,000.  
24 Petitioner’s continued detention, together with the ongoing deprivation of the procedural rights  
25 conferred by NRS 171.186, violates his constitutional and statutory rights. Accordingly,  
26 Petitioner must be released from custody.

1 **III. At the Initial Appearance, the Lower Court Violated Petitioner's Rights by Failing**  
2 **to Conduct a Full Hearing Regarding Petitioner's Detention Before Defaulting to**  
3 **Incarceration**

4 **A. The Court's Decision to Preventatively Detain Petitioner Pretrial without a Full,**  
5 **Adversarial Hearing Violated Petitioner's Due Process Rights**

6 In order to deprive a presumptively innocent person of her physical liberty, due process  
7 requires that the State demonstrate 1) by "clear and convincing evidence" at a "full-blown  
8 adversarial hearing" that the defendant presents an "identified and articulable threat" to the  
9 community or presents a risk of flight<sup>18</sup> and 2) *no conditions or combination of conditions*  
10 *alternative to detention* could reasonably mitigate that danger based on an individualized  
11 consideration of defendant's unique circumstances.<sup>19</sup> U.S. v. Salerno, 481 U.S. 739, 750-51  
12 (1987) (emphasis added); see also Weatherspoon v. Oldham, 2018 WL 1053548, at \*14-15, \*17  
13 (W.D. Tenn. Feb. 26, 2018). A state court procedure that does not require as much violates due  
14 process. See, e.g., Rodriguez v. Providence Cmty. Corr. Inc., 155 F.Supp.3d 758, 767-70 and n.  
15 10 (M.D. Tenn. 2015); Jones v. City of Clanton, No. 215CV34-MHT, 2015 WL 5387219, at \*2  
16 (M.D. Ala. Sept. 14, 2015) (holding that the "use of a secured bail schedule to detain a person . .  
17 . without an individualized hearing regarding the person's indigence and the need for bail or  
18 alternatives to bail, violates the Due Process Clause"); Simpson v. Miller, 387 P.3d 1270, 1276  
19 (Ariz. 2017) ("[I]t is clear from Salerno and other decisions that the constitutionality of a pretrial  
20 detention scheme turns on whether particular procedures satisfy substantive due process  
21 standards"); see also Lopez-Valenzuela v. Arpaio, 770 F.3d 772, 781 (9th Cir. 2014) (en banc)  
22 (applying strict scrutiny to strike down an Arizona law that required detention after arrest  
23 without individualized consideration of an arrestee's circumstances); ODonnell, 251 F.Supp.3d  
24 1052; Williams v. Farrior, 626 F.Supp. 983, 986 (S.D. Miss. 1986) (holding that a state's pretrial  
25 detention scheme must meet "strict judicial scrutiny" because of the fundamental rights at issue).

26  
27 <sup>18</sup> These procedural protections are mandated by the constitutional right to *Procedural Due Process*. U.S. v. Salerno,  
481 U.S. 739, 741, 750-51 (1987) (emphasis added).

28 <sup>19</sup> This protection is mandated by the constitutional right to *Substantive Due Process*. Id. at 746.

1 Nevada law reflects this basic *concept* but omits the procedural protections required by  
2 Salerno. NRS 178.4851 provides that criminal defendants may be released without bail upon a  
3 showing of good cause that the court "can impose conditions on the person that will adequately  
4 protect the health, safety, and welfare of the community and ensure that the person will appear at  
5 all times and places ordered by the court." NRS 178.4851. This runs afoul of Salerno in that it  
6 burdens the defense with establishing 'good cause' for release, and speaks only to the issue of  
7 release *without bail*.<sup>20</sup> Indeed, as Salerno makes clear, the constitutionally proper inquiry is  
8 whether conditioned (or unconditioned) release can satisfy the government's interest in  
9 protecting the community and assuring the defendant's return to court; and *the government bears*  
10 *the burden* of establishing that it does not before a defendant can be detained pretrial (i.e., held  
11 pursuant to unattainable release conditions).

12 While NRS 178.4853 sets forth factors bearing the issue of pretrial release,<sup>21</sup> those  
13 factors must be considered in the context of the inquiry required by Salerno. So courts should  
14 consider the factors outlined in NRS 178.4583 when assessing the need for preventative  
15 detention and, in cases where a preventative detention request has been denied, when fashioning  
16 release conditions minimally necessary to protect the community and ensure a defendant's return  
17 to court.

18 Here, the magistrate *sua sponte* ordered the continued detention of Petitioner without a  
19 "full-blown adversarial hearing," without "clear and convincing evidence" that Petitioner  
20 presents an "identified and articulable threat" to the community or presents a risk of flight, and  
21 without a request from the State for preventive detention. Instead, the magistrate *sua sponte* ruled

22 <sup>20</sup> To the extent that NRS 178.4851 obviates the procedural requirements mandated by Salerno, it is unconstitutional.  
23 See Salerno, 481 U.S. at 750; Stack, 342 U.S. at 5; U.S. Const. amend. V, XIV; Nev. Const. Art. 1, § 8.

24 <sup>21</sup> The statutory factors are: 1) The length of residence in the community; 2) The status and history of employment;  
25 3) Relationships with the person's spouse and children, parents or other family members and with close friends; 4)  
26 Reputation, character and mental condition; 5) Prior criminal record, including, without limitation, any record of  
27 appearing or failing to appear after release on bail or without bail; 6) The identity of responsible members of the  
28 community who would vouch for the reliability of the person; 7) The nature of the offense with which the person is  
charged, the apparent probability of conviction and the likely sentence, insofar as these factors relate to the risk of  
not appearing; 8) The nature and seriousness of the danger to the alleged victim, any other person or the community  
that would be posed by the person's release; 9) The likelihood of more criminal activity by the person after release;  
and 10) Any other factors concerning the person's ties to the community or bearing on the risk that the person may  
willfully fail to appear.

1 that detention was appropriate. As a result, the lower court's detention order violates due  
2 process. The detention order should be vacated and Petitioner should be released.

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

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

16 To set bail in an amount that is *unattainable*, a court must find, on the record, by "clear  
17 and convincing evidence" after a "full-blown adversarial hearing" that 1) the defendant presents  
18 an "identified and articulable threat" to the community or presents a risk of flight and 2) no  
19 conditions or combination of conditions alternative to detention could reasonably mitigate that  
20 danger based on an individualized consideration of defendant's unique circumstances. U.S. v.  
21 Salerno, 481 U.S. 739, 750-51 (1987) (emphasis added); ODonnell, 251 F.Supp.3d at 1143-44;  
22 Jones v. City of Clanton, No. 215CV34-MHT, 2015 WL 5387219, at \*2 (M.D. Ala. Sept. 14,  
23 2015) (holding that the "use of a secured bail schedule to detain a person . . . without an  
24 individualized hearing regarding the person's indigence and the need for bail or alternatives to  
25 bail, violates the Due Process Clause"); Carlisle v. Desoto County, Mississippi, 2010 WL  
26 3894114, at \*5 (N.D. Miss. Sept. 30, 2010) (holding that because a "compelling state interest"

1 was required for pretrial detention, the plaintiff's rights were violated if he was jailed without  
2 consideration of non-financial alternatives).

3 Before setting bail in an unattainable amount, due process mandates that a magistrate  
4 makes an individualized determination whether preventative detention is the least restrictive  
5 means of assuring community safety and ensuring the accused's return to court. Salerno, 481  
6 U.S. 739. This did not happen in this case.

7 As discussed above, the magistrate *sua sponte* ordered the setting of unattainable bail,  
8 resulting in the continued detention of Petitioner without a "full-blown adversarial hearing,"  
9 without "clear and convincing evidence" that Petitioner presents an "identified and articulable  
10 threat" to the community or presents a risk of flight, and without a request from the State for  
11 preventive detention. Instead, the magistrate *sua sponte* ruled that detention was appropriate. As  
12 a result, the lower court's unattainable bail setting violates due process. The bail setting order  
13 should be vacated and Petitioner should be released.

#### 14 **C. The Setting of Unattainable Bail Resulting in Detention Violates the Equal** 15 **Protection Clause**

16 In the context of bail, the Equal Protection Clause prohibits the pretrial detention of  
17 defendants solely because of their inability to afford bail. See Lopez-Valenzuela v. Arpaio, 770  
18 F.3d 772, 781 (9th Cir. 2014) (en banc) (applying strict scrutiny to strike down an Arizona law  
19 that required detention after arrest without individualized consideration of an arrestee's  
20 circumstances); Pugh v. Rainwater, 572 F.2d at 1058 (5th Cir. 1978) (holding that "pretrial  
21 confinement for inability to post money bail" for a defendant "whose appearance at trial could  
22 reasonably be assured by one of the alternate forms of release . . . would constitute imposition of  
23 an excessive restraint . . ."); Weatherspoon v. Oldham, 2018 WL 1053548, at \*6 (W.D. Tenn.  
24 Feb. 26, 2018); ODonnell v. Harris County, 251 F.Supp.3d 1052 (S.D. Tex. Apr. 28, 2017);  
25 Jones, 2015 WL 5387219, at \*4; Carlisle v. Desoto County, Mississippi, 2010 WL 3894114, at  
26 \*5 (N.D. Miss. Sept. 30, 2010) (holding that because a "compelling state interest" was required  
27  
28

1 for pretrial detention, the plaintiff's rights were violated if he was jailed without consideration of  
2 non-financial alternatives).

3 These decisions make clear that requiring money bail as a release condition in an  
4 amount impossible for the defendant to pay is equivalent to a detention order, "which is only  
5 appropriate when the state shows and the court finds that no condition or combination of  
6 conditions of release could satisfy the purposes of bail, to assure the defendant's appearance at  
7 trial or hearing and the safety of the public."<sup>22</sup> Weatherspoon v. Oldham, 2018 WL 1053548, at  
8 \*6 (W.D. Tenn. Feb. 26, 2018) (additional citations omitted). Thus, in order to withstand  
9 constitutional scrutiny, unattainable money bail settings must be preceded by a hearing at  
10 which the court determines the least restrictive means of ameliorating an accused's risk of  
11 flight and danger to the community. Absent such a determination, an unattainable release  
12 condition – such as an unattainable bail setting – operates as a *de facto* detention order that  
13 discriminates on the basis of wealth. Weatherspoon v. Oldham, 2018 WL 1053548, at \*6 (W.D.  
14 Tenn. Feb. 26, 2018). This violates equal protection and due process guarantees.

#### 15 **D. The Lower Court Set a Bail Amount in Violation of Nevada Law**

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

23 In making this determination, the Court must consider: "(1) the nature and circumstances  
24 of the offense charged; (2) the financial ability of the defendant to give bail; (3) the character of  
25

26 <sup>22</sup> The U.S. Supreme Court has also held that release conditions that exceed a purported threat posed by a particular  
27 defendant violate the "excessive bail" clause of the Eighth Amendment. Salerno, 481 U.S. at 754; see also U.S.  
28 Const. amend. VIII; Nev. Const. Art. 1 § 6-7; NRS 178.484(1) (stating "a person arrested for an offense other than  
murder of the first degree must be admitted to bail").



1 the defendant; and (4) the factors listed in NRS 178.4853.” NRS 178.498. Significantly, an  
2 accused’s ability to give bail *must* be part of the bail analysis. See Stack v. Boyle, 342 U.S. 1, 4-  
3 5 (1951) (stating “Bail set at a figure higher than an amount reasonably calculated to fulfill [its]  
4 purpose is ‘excessive’ under the Eighth Amendment”); U.S. v. Polouzzi, 697 F. Supp. 2d 381,  
5 390 (E.D.N.Y. 2010) (“Bail conditions are unconstitutionally excessive if they impose restraints  
6 that are more than necessary to achieve the government’s interest [in] preventing risk of flight  
7 and danger to society…”). The U.S. Justice Department has declared that “[i]ncarcerating  
8 individuals solely because of their inability to pay for their release, whether through the payment  
9 of fines, fees, or a cash bond, violates the Equal Protection Clause of the Fourteenth  
10 Amendment.”<sup>23</sup> Jones v. City of Clanton, 2015 WL 5387219 at 4 (M.D. Ala. Sep. 14, 2015); see  
11 also Varden v. City of Clanton, Civ. No. 15–34, Dckt. No. 26 at 1 (M.D. Ala. Feb. 13, 2015).  
12 The Justice Department reasoned that a secured money bail schedule, like the one utilized in  
13 Clark County, “do[es] not account for individual circumstances of the accused” and it  
14 “essentially mandate[s] pretrial detention for anyone who is too poor to pay the predetermined  
15 fee.” Jones, 2015 WL 5387219 at 9. As a result, the Justice Department concluded that setting a  
16 bail without regard to the detainee’s financial ability to pay “amounts to mandating pretrial  
17 detention only for the indigent.” Id.

18 In this instance, the magistrate set bail when the Court had no information before it to set  
19 a bail amount other than the information provided by the police in an arrest report. Setting bail  
20 solely based on a criminal charge in a generic amount, not individualized to the defendant or the  
21 case is a violation of Petitioner’s rights. There is no association between a particular charge and a  
22 blanket “schedule” of money that would guarantee appearance at court or deter future criminal  
23 activity. These concerns can only be addressed on an individualized basis. Accordingly, while  
24 “utilization of a master bond schedule provides speedy and convenient release for those who

25  
26 <sup>23</sup> The following year, the Justice Department issued a “Dear Colleague Letter” advising state and local  
27 courts that due process and equal protection principles forbid using “bail or bond practices that cause  
28 indigent Detainees to remain incarcerated solely because they cannot afford to pay for their release.”  
Letter from Vanita Gupta to Colleagues at 2 (Mar. 14, 2016), available at  
<https://www.justice.gov/crt/file/832461/download>.

1 have no difficulty in meeting its requirements, [the] incarceration of those who cannot, without  
2 meaningful consideration of other possible alternatives, infringes on both due process and equal  
3 protection requirements.” Pugh v. Rainwater, 572 F.2d 1053, 1057 (5th Cir. 1978) (*en banc*).

4 Courts must tailor bail to a detainee’s financial resources, setting bail only as high as  
5 necessary to reasonably assure the detainee’s return to court. The amount that would provide a  
6 meaningful incentive to return to court differs for someone who lives on \$600 a month and  
7 someone who lives on \$6,000 a month. Bail is excessive and, therefore, unlawful when not  
8 adjusted to a pretrial detainee’s financial circumstances and not set at the minimum amount  
9 needed to ensure return to court. Stack, 342 U.S. at 4-5 (bail exceeding that necessary to achieve  
10 its purpose violates Eighth Amendment); see also, Salerno, 481 U.S. at 754 -55 (affirming Stack  
11 and holding that “[w]hen the Government has admitted that its only interest is in preventing  
12 flight, bail must be set by a court at a sum designed to ensure that goal, and no more”). Thus,  
13 when bail is set without considering a detainee’s character and financial means the magistrate  
14 violates the accused’s constitutional and statutory rights. In addition, in setting a bail, the  
15 magistrate who fails to consider “the financial ability of the defendant to give bail” and “the  
16 character of the defendant” violates NRS 178.498.<sup>24</sup>

17 As noted above, the Eighth Judicial District Court has granted several Petitions filed on  
18 behalf of defendants for which the Justice Court failed to consider the defendant’s ability to give  
19 bail when setting bail pursuant to NRS 178.498. The Justice of the Peace must “make a record  
20 of the reasoning underlying the grant of bail with regard to statutory considerations established  
21 by NRS 178.498, including the financial ability of the defendant to give bail and the relationship  
22 to community safety and ensuring return to court.”  
23  
24

25 <sup>24</sup> Pretrial detainees should not remain in custody simply because they are poor. Research indicates that  
26 imposing money bail does not improve the chances that a Detainee will return to court, nor does it protect  
27 the public because many high-risk Detainees have access to money and can post bond. Instead, it serves  
28 only to treat differently those who can and cannot access money. Incarceration can disrupt the positive  
factors in the Detainee’s life and lead to negative collateral consequences, including job loss, loss of  
residence, inability to care for children, and disintegration of other positive social relationships.

1 Thus, when bail is set outside the presence of the Petitioner and without considering a  
2 detainee's character and financial means the magistrate violates the accused's constitutional and  
3 statutory rights. The 48 hour PC review is not an adversarial hearing because no one is present  
4 other than the magistrate. Setting bail outside the presence of the Petitioner, the magistrate is  
5 unable to consider "the financial ability of the defendant to give bail" and "the character of the  
6 defendant" is a violation NRS 178.498.

7 Additionally, as noted in the District Court orders, the magistrate must make a record of  
8 the underlying reasoning upon which the bail amount is based and the relationship of the bail  
9 amount in light of Petitioner's ability to give bail and how that amount relates to community  
10 safety and ensuring return to court. A PC review in chambers cannot meet the requirements of  
11 Nevada law or District Court orders.

12 Here, the lower court set an unattainable bail amount without considering Petitioner's  
13 ability to pay that bail in violation of Nevada statute and U.S. Constitutional law and as such is a  
14 violation of his Constitutional rights and Nevada law.

15 **RELIEF REQUESTED**

16 Based upon the foregoing, Petitioner respectfully requests that this Honorable Court grant  
17 the instant Petition and vacate his current detention order in favor of an order directing his  
18 release from the custody of the Clark County Sheriff. Alternatively, Petitioner requests that this  
19 Honorable Court issue a Writ of Mandamus directing the lower court to vacate the instant  
20 detention order and to conduct a full, adversarial detention hearing that complies with Nevada  
21 statutory procedures as well as the U.S. and Nevada constitutions.

22 DATED this 7<sup>th</sup> day of August, 2018.

23 PHILIP J. KOHN  
24 CLARK COUNTY PUBLIC DEFENDER

25 By Christy Craig  
26 CHRISTY CRAIG, #6262  
27 Deputy Public Defender  
28

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YOU WILL PLEASE TAKE NOTICE that the foregoing PETITION FOR WRIT OF HABEAS CORPUS will be heard on the 9th day of August, 2018, at 10:30AM a.m. in Department No. XVII of the District Court. Pursuant to EDJC rule 3.4 (b)

DATED this 7<sup>th</sup> day of August, 2018.

By /s/ Christy Craig  
Christy Craig, #6262  
Deputy Public Defender

1 **CERTIFICATE OF ELECTRONIC SERVICE**

2 I hereby certify that service of the above and forgoing EMERGENCY PETITION  
3 FOR WRIT OF HABEAS CORPUS OR, IN THE ALTERNATIVE, PETITION FOR WRIT OF  
4 MANDAMUS was served via email to the Clark County District Attorney's Office at  
5 motions@clarkcountynv.gov and JUSTICE COURT DEPARTMENT 13 at  
6 Joey.Phillips@clarkcountynv.gov and Samara.Bush@clarkcountynv.gov on this 7<sup>th</sup> day of  
7 August, 2018.

8 By /s/ Patty Barber-Bair

9 An employee of the Clark County Public  
10 Defender's Office  
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25 Case Name: Julio Hernandez

26 Case No. 18F14299X

27 Dept No. 13  
28

# EXHIBITS

**CASE No. PC18F14299X**

2025年1月1日

**18080200295**

Counts: 001; 002; 003; 004 - \$25,000.00/\$25,000.00 Total Bail  
08/06/2018 Minute Order - Department 13  
08/06/2018 Continued for Status Check on filing of Criminal Complaint  
08/10/2018 Status Check on Filing of Criminal Complaint (7:30 AM) (Judicial Officer Baucum, Suzan)  
In Custody



**Justice Court, Las Vegas Township  
Clark County, Nevada**

Department: PC

**Court Minutes**



L009765018

**PC18F14299X State of Nevada vs. Hernandez, Julio**

**8/3/2018 9:00:00 AM Initial Appearance Justice  
Court (PC Review)**

**Result: Signing Completed**

**PARTIES  
PRESENT:**

**Judge:** Letizia, Harmony

**PROCEEDINGS**

**Hearings:** 8/6/2018 7:30:00 AM: 72 Hour Hearing

**Added**

**Events:** Probable Cause Found

**Bail Reset - Cash or Surety**

**Counts: 001; 002; 003; 004 - \$25,000.00/\$25,000.00 Total Bail**

**Justice Court, Las Vegas Township  
Clark County, Nevada**

Department: PC

**Court Minutes**



L009773130

**PC18F14299X State of Nevada vs. Hernandez, Julio**

**8/6/2018 7:30:00 AM 72 Hour Hearing (In Custody)**

**Result: Matter Heard**

**PARTIES**  
**PRESENT:** State Of Nevada Moskal, Tommy  
Defendant Hernandez, Julio

**Judge:** Pro Tempore, Judge

**Court Reporter:** Morichetti, R.

**Court Clerk:** Bush, Samara

**Pro Tempore:** Miller, James Joseph

**PROCEEDINGS**

**Hearings:** 8/10/2018 7:30:00 AM: Status Check on Filing of Criminal Complaint Added

**Events:** **72-Hour Hearing Completed**

**Interpreter Present in Court**

*Spanish*

**Counsel appeared as Friend of the Court**

*Public Defender*

**Motion to Continue - State**

*for 5 days - Objection by Defense - Motion Granted*

**Oral Motion**

*by State to Add House Arrest as a Condition of Bail - Objection by Defense - Motion Granted*

**Brief**

*by Public Defender - Filed in open Court*

**Motion by Defense for an O.R. Release**

*Motion Denied*

**Release Order - Court Ordered Bail AND House Arrest**

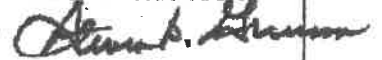
*Counts: 001; 002; 003; 004*

**Bail Stands - Cash or Surety**

*Amount: \$25,000.00*

*Counts: 001; 002; 003; 004 - \$25,000.00/\$25,000.00 Total Bail*

**Continued for Status Check on filing of Criminal Complaint**



1 PHILIP J. KOHN, PUBLIC DEFENDER  
2 NEVADA BAR NO. 0556  
3 CHRISTY CRAIG, DEPUTY PUBLIC DEFENDER  
4 NEVADA BAR NO. 6262  
5 PUBLIC DEFENDERS OFFICE  
6 309 South Third Street, Suite 226  
7 Las Vegas, Nevada 89155  
8 Telephone: (702) 455-4685  
9 Facsimile: (702) 455-5112  
10 *Attorneys for Petitioner*

DISTRICT COURT, LAS VEGAS

CLARK COUNTY, NEVADA

11 In the Matter of the Application of,

12 v.

13 LORENZO BAHE, #8425951  
14 for a Writ of Habeas Corpus.

DCT. CASE NO. C-18-332731-W  
JCT. CASE NO. 18F08560X  
DEPT. NO. VI

DATE:  
TIME:

ORDER GRANTING PETITION

15 This is a petition for a writ of mandamus challenging Las Vegas Justice Court's procedure by  
16 which a magistrate defaults to detaining criminal defendants without a full hearing violating Federal  
17 and Nevada law. Due Process requires a hearing before a neutral fact-finder and an opportunity to be  
18 heard "at a meaningful time and in a meaningful manner" before an individual is deprived of a  
19 fundamental right or property interest. Additionally, the use of standardized bail schedule without  
20 considering factors regarding the individual defendant and the nature of the crime charged is a  
21 violation of Petitioner's Due Process rights and a violation of NRS 178.498 which requires the Court  
22 to consider these factors.

FACTS AND PROCEDURAL HISTORY

23 On June 11, 2018, Petitioner, Lorenzo Bahe, was charged by way of a criminal complaint with  
24 Malicious Injury to Vehicle, a gross misdemeanor. He was taken into custody by the Justice Court  
25 magistrate with standard bail of \$2,000 set and noted that it was preventatively detaining Petitioner,  
26  
27  
28

1 The magistrate failed to conduct the constitutionally-required analysis of individualized factors to  
2 determine an appropriate bail setting.

3 **ORDER**

4 Petitioner's Writ of Mandamus is granted. Las Vegas Justice Court is ordered to vacate the  
5 instant detention order and to conduct a full, adversarial detention hearing to determine whether bail  
6 is appropriate and if so, set an amount of bail which is the least restrictive means of assuring the  
7 Petitioner's return to court and ensuring community safety.

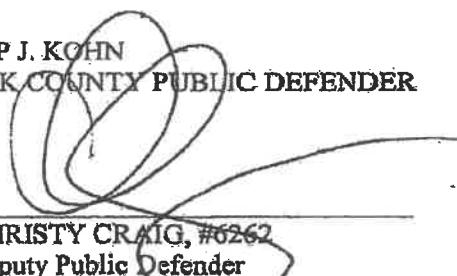
8  
9 Additionally, the use of standard bail schedule without consideration of individualized  
10 circumstances infringes on Petitioner's due process rights and Nevada law. Bail, if set, must be  
11 tailored to the Petitioner's financial resources with the amount set as necessary to reasonably assure  
12 return to court and community safety thereby complying with Nevada statutes and the U.S and  
13 Nevada Constitutions.

14 DATED this 15 day of June, 2018  
15

16  
17   
18  
19 JUDGE

20 Submitted by:  
21

22 PHILIP J. KOHN  
23 CLARK COUNTY PUBLIC DEFENDER

24  
25 By   
26 CHRISTY CRAIG, #6262  
27 Deputy Public Defender  
28

*Steven D. Grierson*

1 ORDER  
2 PHILIP J. KOHN, PUBLIC DEFENDER  
3 NEVADA BAR NO. 0556  
4 KRISTY S. HOLIDAY, DEPUTY PUBLIC DEFENDER  
5 NEVADA BAR NO. 13519  
6 PUBLIC DEFENDERS OFFICE  
7 309 South Third Street, Suite 226  
8 Las Vegas, Nevada 89155  
9 Telephone: (702) 455-4685  
10 Facsimile: (702) 455-5112  
11 Kristy.Clark@ClarkCountyNV.gov  
12 *Attorneys for Defendant*

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA, )

Plaintiff, )

v. )

SAMANTHA BOUCHER, )

Defendant, )

CASE NO. C-18-333128-W

DEPT. NO. XI

ORDER GRANTING PETITIONER'S EMERGENCY WRIT OF HABEAS CORPUS  
OR IN THE ALTERNATIVE, PETITION FOR WRIT OF MANDAMUS

GOOD CAUSE APPEARING THEREFOR, Petitioner's Writ is granted. In this matter,  
the lower court is hereby ordered to hold a constitutionally and statutorily appropriate pretrial  
detention hearing within 48 hours.

DATED 11<sup>th</sup> day of July, 2018.

*[Signature]*  
DISTRICT COURT JUDGE

Submitted by:

PHILIP J. KOHN  
CLARK COUNTY PUBLIC DEFENDER

By /s/Christy Craig  
Christy Craig, #6262  
Deputy Public Defender

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By: /s/Christy L. Craig - PD  
An employee of the  
Clark County Public Defender's Office

2

*Steven D. Grierson*

JUDGE RONALD J. ISRAEL  
EIGHTH JUDICIAL DISTRICT COURT  
DEPARTMENT 28  
Regional Justice Center  
200 Lewis Avenue, 15<sup>th</sup> Floor  
Las Vegas, Nevada 89155

DISTRICT COURT  
CLARK COUNTY, NEVADA

IN the Matter of the Application of

DCT. Case No.: C-18-333506-W  
JCT. Case No. 18F12875X

Dept.: XXVIII

v.

ELIJAH GRAISE, aka Ian Hickman for a  
Writ of Habeas Corpus

|                                                      |                                                      |
|------------------------------------------------------|------------------------------------------------------|
| <input type="checkbox"/> Voluntary Dismissal         | <input checked="" type="checkbox"/> Summary Judgment |
| <input type="checkbox"/> Involuntary Dismissal       | <input type="checkbox"/> Stipulated Judgment         |
| <input type="checkbox"/> Stipulated Dismissal        | <input type="checkbox"/> Default Judgment            |
| <input type="checkbox"/> Motion to Dismiss by Def(s) | <input type="checkbox"/> Judgment of Arbitration     |

**ORDER GRANTING PETITION IN PART AND DENYING IN PART**

The Court FINDS that Petitioner failed to demonstrate that emergency relief is required, but **GRANTS IN PART** and **DENIES IN PART** Petitioner's Writ of Mandamus.

It is **HEREBY ORDERED** that the Justice Court shall hold a hearing to consider all of the statutory factors of NRS 178.498 and NRS 178.4853 if such consideration did not take place at the 72 hour hearing in Justice Court Department 3 on July 17<sup>th</sup>, 2018.

It is further **ORDERED** that the Justice Court shall make a record of the reasoning underlying the grant of bail with regard to statutory considerations established by NRS 178.498 and NRS 178.4853, including the financial ability of the defendant to give bail.

Department XXVIII

Case Number: C-18-333506-W

JUDGE RONALD J. ISRAEL  
EIGHTH JUDICIAL DISTRICT COURT  
DEPARTMENT 28

JUDGE RONALD J. ISRAEL

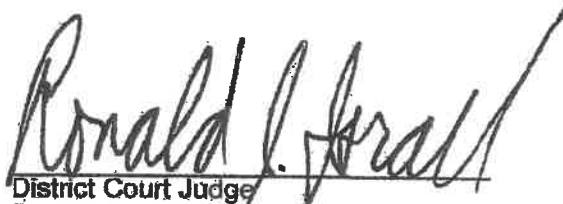
EIGHTH JUDICIAL DISTRICT COURT  
DEPARTMENT 28

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As to Petitioner's request for an order directing the Justice Court to release petitioner, the Petition is **HEREBY DENIED**.

**IT IS SO ORDERED.**

DATED: JULY 27, 2018

  
District Court Judge  
Ronald J. Israel  
Case No. C18-338506-W  
ORDER GRANTING PETITION IN PART AND  
DENYING IN PART

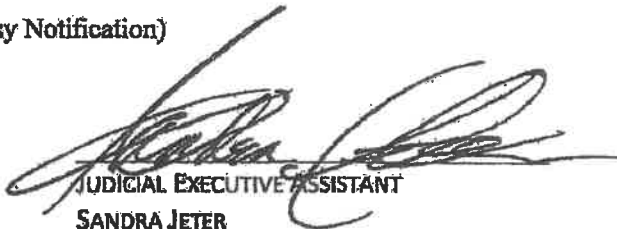


**CERTIFICATE OF SERVICE**

I hereby certify that on the 28<sup>th</sup> day of July, a copy of this **ORDER GRANTING PETITION IN PART AND DENYING IN PART** was placed in the attorney's folder maintained by the Clerk of the Court to the proper parties as follows:

THOMAS J. MOSKAL, ESQ.  
Deputy District Attorney  
Thomas.Moskal@clarkcountynyda.com (Courtesy Notification)

CHRISTY CRAIG, ESQ.  
Chief Deputy Public Defender  
craigcl@clarkcountynyv.gov (Courtesy Notification)



JUDICIAL EXECUTIVE ASSISTANT  
SANDRA JETER  
C-18-333506-W

*Steven D. Grierson*

1 PHILIP J. KOHN, PUBLIC DEFENDER  
2 NEVADA BAR NO. 0556  
3 CHRISTY CRAIG, DEPUTY PUBLIC DEFENDER  
4 NEVADA BAR NO. 6262  
5 PUBLIC DEFENDERS OFFICE  
6 309 South Third Street, Suite 226  
7 Las Vegas, Nevada 89155  
8 Telephone: (702) 455-4685  
9 Facsimile: (702) 455-5112  
10 *Attorneys for Petitioner*

6 DISTRICT COURT, LAS VEGAS

7 CLARK COUNTY, NEVADA

8 In the Matter of the Application of,

10 v.

11 HABIB ABDULKARIM,  
12 for a Writ of Mandamus.

DCT. CASE NO. C-18-333246-W  
JCT. CASE NO. 18F10731X  
DEPT. NO.

13 **ORDER GRANTING PETITIONER'S EMERGENCY PETITION FOR WRIT OF**  
14 **MANDAMUS**

15 The matter having come before the Court pursuant to the Defendant's Emergency  
16 Petition for Writ of Habeas Corpus or, in the Alternative, a Writ of Mandamus, and good cause  
17 appearing therefor,

18 IT IS HEREBY ORDERED that the above-referenced Petition for Writ of Mandamus is  
19 granted so that the Justice of the Peace make a record of the reasoning underlying the grant of  
20 bail with regard to statutory considerations established by NRS 178.498, including the financial  
21 ability of the defendant to give bail and the relationship to community safety and ensuring return  
22 to court.  
23

24 DATED this *23rd* day of July, 2018.

26 *Stefany A. Miley*  
27 DISTRICT COURT JUDGE  
28

JUDGE STEFANY A. MILEY

Submitted by:

PHILIP J. KOHN  
CLARK COUNTY PUBLIC DEFENDER

By

Christy Craig, #6262  
Deputy Public Defender

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**CERTIFICATE OF ELECTRONIC SERVICE**

A COPY of the above and foregoing ORDER GRANTING PETITIONER'S  
EMERGENCY PETITION FOR WRIT OF MANDAMUS was served via electronic e-filing to  
the Clark County District Attorney's Office at motions@clarkcountyda.com to JUSTICE  
COURT DEPARTMENT 2 at Lulu Muaina@clarkcountynv.gov and  
Stacey.Moore@clarkcountynv.gov and Carmen-Vazquez@clarkcountynv.gov and  
Chrystina.Contreras@clarkcountynv.gov on this 25<sup>th</sup> day of July, 2018.

By /s/ Patty Barber-Bair

An employee of the Clark County Public  
Defender's Office

Case Name: Habib Abdulkarim

Case No. C-18-333246-W

Dept No. XXIII





Parties Present  
 Result: Matter Heard  
 06/07/2018 **Motion to Continue - State**  
*no objections by the Defense - motion granted*  
 06/07/2018 **Continued for Status Check on filing of Criminal Complaint**  
 06/07/2018 **Release Order - Court Ordered due to no complaint filed** (Judicial Officer: Zimmerman, Ann E. )  
*Counts: 001*  
 06/07/2018 **No Contact with Victim**  
*Francisca Baltazar*  
 06/07/2018 **Minute Order - Department 08**  
 06/07/2018 **Official Court Date Slip**  
 06/11/2018 **Order for Transcript**  
 06/18/2018 **Transcript of Proceedings**  
 06/18/2018 **Transcript of Proceedings**  
 07/09/2018 **CANCELED Status Check on Filing of Criminal Complaint** (8:00 AM) (Judicial Officer Zimmerman, Ann E.)  
*Criminal Complaint Filed*  
*o/r*  
 07/09/2018 **Arraignment** (8:00 AM) (Judicial Officer Zimmerman, Ann E.)  
*O/R*  
 Parties Present  
 Result: Matter Heard  
 07/09/2018 **Criminal Complaint**  
*Filed in open Court*  
 07/09/2018 **Arraignment Completed**  
*Advised of Charges on Criminal Complaint, Waives Reading of Criminal Complaint*  
 07/09/2018 **Public Defender Appointed**  
 07/09/2018 **Plea of Not Guilty Entered**  
 07/09/2018 **Minute Order - Department 08**  
 08/28/2018 **Bench Trial** (1:30 PM) (Judicial Officer Zimmerman, Ann E.)  
*O/R*  
 Parties Present  
 Result: Matter Heard  
 08/28/2018 **Bench Trial Held**  
*Motion to Exclude Witnesses by Defense - Motion Granted States Witnesses: 1. Francisca Baltazar-Zarate - Witness Identified Defendant*  
 08/28/2018 **Oral Motion**  
*by State to dismiss pursuant to statute - Granted*  
 08/28/2018 **Matter dismissed by State pursuant to NRS 174.085**  
 08/28/2018 **Case Closed - Dismissed**  
 08/28/2018 **Judgment Entered**  
 08/28/2018 **Minute Order - Department 08**  
 08/28/2018 **Notice of Disposition and Judgment**

Case Information

C-18-332635-W | In the Matter of the Petition of Alfonso Resendez

|               |               |                     |
|---------------|---------------|---------------------|
| Case Number   | Court         | Judicial Officer    |
| C-18-332635-W | Department 9  | Togliatti, Jennifer |
| File Date     | Case Type     | Case Status         |
| 06/08/2018    | Criminal Writ | Closed              |

Party

|                   |                     |
|-------------------|---------------------|
| Respondent        | Active Attorneys ▼  |
| Nevada State of   | Attorney            |
|                   | Jones, Jr., John T. |
|                   | Retained            |
|                   | Lead Attorney       |
|                   | Wolfson, Steven B   |
|                   | Retained            |
|                   | Attorney            |
|                   | Rose, Laura Jean    |
|                   | Retained            |
| Petitioner        | Active Attorneys ▼  |
| Resendez, Alfonso | Lead Attorney       |
|                   | Public Defender     |
|                   | Retained            |
|                   | Attorney            |
|                   | Craig-Rohan,        |
|                   | Christy L.          |
|                   | Public Defender     |
|                   | Pro Se              |



## Events and Hearings

06/08/2018 Petition for Writ of Habeas Corpus ▼

Petition for Writ of Habeas Corpus

Comment

Emergency Petition for Writ of Habeas Corpus or, in the  
Alternative, Petition for Writ of Mandamus (Custody Status  
Issue)

06/19/2018 Petition for Writ of Habeas Corpus ▼

Minutes - Petition for Writ of Habeas Corpus

Minutes - Petition for Writ of Habeas Corpus

Minutes - Petition for Writ of Habeas Corpus

Judicial Officer

Togliatti, Jennifer

Hearing Time

9:00 AM

Result

Continued

Comment

Defendant's Emergency Petition for Writ of Habeas Corpus or, in the  
Alternative, Petition for Writ of Mandamus (Custody Status Issue)

Parties Present ▲

Petitioner: Resendez, Alfonso

Attorney: Craig-Rohan, Christy L.

Respondent: Nevada State of

Attorney: Jones, Jr., John T.

07/11/2018 Addendum ▼

Addendum - ADDM (CIV)

Comment

Addendum To Emergency Petition For Writ Of Habeas Corpus  
Or, In The Alternative, Petition For Writ Of Mandamus

07/27/2018 Decision ▼

Decision

Judicial Officer  
Togliatti, Jennifer

Hearing Time  
3:00 AM

Result  
Minute Order - No Hearing Held

Comment  
Defendant's Emergency Petition for Writ of Habeas Corpus, or, in the Alternative, for Writ of Mandamus

07/30/2018 Criminal Order to Statistically Close Case ▼

Criminal Order to Statistically Close Case - COSCC (CIV)

Comment  
Criminal Order to Statistically Close Case

08/08/2018 Order Denying ▼

Order Denying - ORDD (CIV)

Comment  
Order Denying Defendant's Emergency Petition for Writ of Habeas Corpus, or, in the Alternative, for Writ of Mandamus

08/08/2018 Ex Parte Order ▼

Ex Parte Order - EXPR (CIV)

Comment  
Ex Parte Order For Transcript

08/10/2018 Recorders Transcript of Hearing ▼

Recorders Transcript of Hearing - RTRAN (CIV)

Comment  
Recorder's Transcript Re: Defendant's Emergency Petition for Writ of Habeas Corpus or, in the Alternative, Petition for Writ of Mandamus (Custody Status Issue), Tuesday, July 10, 2018

08/17/2018 Notice of Entry of Order ▼

Notice of Entry of Order - NEOJ (CIV)

Comment  
Notice of Entry of Order

## Financial

No financial information exists for this case.

## Documents

Petition for Writ of Habeas Corpus  
Minutes - Petition for Writ of Habeas Corpus  
Minutes - Petition for Writ of Habeas Corpus  
Minutes - Petition for Writ of Habeas Corpus  
Addendum - ADDM (CIV)  
Decision  
Criminal Order to Statistically Close Case - COSCC (CIV)  
Order Denying - ORDD (CIV)  
Ex Parte Order - EXPR (CIV)  
Recorders Transcript of Hearing - RTRAN (CIV)  
Notice of Entry of Order - NEOJ (CIV)

PHILIP J. KOHN, PUBLIC DEFENDER  
NEVADA BAR NO. 0556  
ROBERT E. O'BRIEN, DEPUTY PUBLIC DEFENDER  
NEVADA BAR NO. 10944  
**PUBLIC DEFENDERS OFFICE**  
309 South Third Street, Suite 226  
Las Vegas, Nevada 89155  
Telephone: (702) 455-4685  
Facsimile: (702) 455-5112  
*Attorneys for Petitioner*

Electronically Filed  
06/08/2018

  
CLERK OF THE COURT

**DISTRICT COURT, LAS VEGAS**

**CLARK COUNTY, NEVADA**

In the Matter of the Application of,

v.

ALFONSO RESENDEZ,  
for a Writ of Habeas Corpus.

**C-18-332635-W**

DCT. CASE NO.

JCT. CASE NO. 18M13923X

DEPT. NO. IX

DATE:

TIME:

**EMERGENCY PETITION FOR WRIT OF HABEAS CORPUS OR,  
IN THE ALTERNATIVE, PETITION FOR WRIT OF MANDAMUS  
(Custody Status Issue)**

TO: The Honorable Judge of the Eighth Judicial District Court of  
The State of Nevada, in and for the County of Clark

The Petition of ALFONSO RESENDEZ submitted by Robert E. O'Brien, Deputy Public  
Defender, as attorney for the above-captioned individual, respectfully affirms:

1. That he is a duly qualified, practicing, and licensed attorney in the City of  
Las Vegas, County of Clark, State of Nevada;

2. That Petitioner makes this emergency application for a Writ of Habeas  
Corpus or, in the alternative, a Writ of Mandamus; that the place where the Petitioner is  
imprisoned actually or constructively imprisoned and restrained of his liberty is the Clark County  
Detention Center; that the officer by whom he is imprisoned and restrained is Joe Lombardo,  
Sheriff;

3. That the imprisonment and restraint of said Petitioner is unlawful in that:  
(a) Petitioner is being held despite the government's failure to file a Criminal Complaint  
charging Petitioner with a crime; and (b) Petitioner was not afforded the constitutionally

1 mandated detention hearing to which he is entitled;

2 4. That Petitioner personally authorized his aforementioned attorney to  
3 commence this action.

4 WHEREFORE, Petitioner prays that this Honorable Court make an order  
5 directing the County of Clark to issue a Writ of Habeas Corpus directed to the said Joe  
6 Lombardo, Sheriff, commanding him to bring the Petitioner before your Honor, and return the  
7 cause of his imprisonment.

8 DATED this 7<sup>th</sup> day of June, 2018.

9  
10 PHILIP J. KOHN  
11 CLARK COUNTY PUBLIC DEFENDER

12  
13 By: /s/ Robert O'Brien  
14 ROBERT O'BRIEN, #10944  
15 Deputy Public Defender  
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**DECLARATION**

ROBERT E. O'BRIEN makes the following declaration:

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

2. I make this Declaration in support of Petitioner's Petition for Writ of Habeas Corpus or, in the alternative, Writ of Mandamus;

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

4. That Petitioner, Alfonso Resendez, personally authorizes me to commence this action;

5. That Mr. Resendez represents that he cannot afford \$3,000 bail since he is currently indigent and not working.

Pursuant to NRS 53.045, I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 7<sup>th</sup> day of June, 2018.

/s/ Robert O'Brien  
Robert O'Brien

1                                   **MEMORANDUM OF POINTS AND AUTHORITIES**

2           COMES NOW the Petitioner, Alfonso Resendez, by and through his counsel, Robert  
3   O'Brien, Deputy Clark County Public Defender, and submits the following Points and  
4   Authorities in Support of Defendant's Emergency Petition for a pretrial Writ of Habeas Corpus,  
5   or in the alternative, Writ of Mandamus.

6                                   **FACTS AND PROCEDURAL HISTORY<sup>1</sup>**

7           As of this writing, Petitioner has no criminal charges pending. On June 4, 2018, Petitioner  
8   was arrested without a warrant on suspicion of Battery-Domestic Violence. (See Register of  
9   Actions, attached as Ex. A). On June 5, Justice of the Peace Ann Zimmerman reviewed police  
10   reports and found probable cause for Petitioner's arrest. (See Probable Cause Determination Just.  
11   Ct. Min., attached as Ex. B). At the same time, in Petitioner's absence and in the absence of a  
12   criminal complaint, Judge Zimmerman set bail in the amount of \$3,000. Petitioner, an indigent  
13   defendant, could not pay that bail. Accordingly, he remained jailed at the Clark County Detention  
14   Center.

15           On June 6, Petitioner was brought before Judge Zimmerman for an initial appearance. (See  
16   Initial Appearance Just. Ct. Min., attached as Ex. C). Prosecutors requested additional time to file a  
17   complaint. Defense counsel objected to Petitioner's ongoing detention based upon (1) the unlawful  
18   manner in which the magistrate issued the initial bail/detention order in Petitioner's absence; (2) the  
19   magistrate's continued detention order in the absence of a criminal complaint; and (3) the  
20   magistrate's refusal to conduct the constitutionally-required detention hearing prior to issuing a *de*  
21   *facto* detention order. To date, no court has determined, following the filing of a criminal complaint,  
22   that preventative detention is the least restrictive means of ensuring community safety and  
23   Petitioner's return to court. In the absence of such a finding by clear and convincing evidence,  
24   Petitioner's continued incarceration violates his constitutional and statutory rights.

25           Thus, Petitioner requests that this Honorable Court issue a Writ of Habeas Corpus directing  
26   the Clark County Sheriff to release Petitioner from custody. Alternatively, Petitioner requests that

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<sup>1</sup> The transcript from this hearing has been requested, but to date has not been filed. As a result, the Facts and  
28   Procedural History section is based on the best recollection of counsel.

1 this Honorable Court issue a Writ of Mandamus directing the lower court to vacate the current bail  
2 setting and release Petitioner from custody.

### 3 STATEMENT OF THE ISSUES

4 The current detention order violates Petitioner's constitutional rights in that:

5 I. At the Probable Cause Determination, the lower court issued a *de facto* detention  
6 order, without Petitioner's presence, by setting bail that Petitioner cannot make pursuant to a  
7 standardized bail schedule. This order violates Petitioner's Due Process and Equal Protection rights,  
8 as well as the constitutional prohibition on excessive bail, and Nevada law;

9 II. The lower court's order for Petitioner's continued detention in the absence of a  
10 timely-filed criminal complaint establishing formal charges violates Petitioner's constitutional and  
11 statutory rights; and

12 III. At the Initial Appearance, the lower court issued a detention order based on standard  
13 bail without a full hearing on whether the State had demonstrated that detention was the least  
14 restrictive means of assuring community safety and ensuring the accused's return to court. This  
15 order violates Petitioner's Due Process and Equal Protection rights, as well as the constitutional  
16 prohibition on excessive bail, and Nevada law.

### 17 BRIEF OVERVIEW

18 The protocol by which pretrial detention orders are promulgated in Clark County is  
19 unlawful. First, the procedure by which a magistrate defaults to detaining criminal defendants  
20 without a full hearing violates Federal and Nevada law. Second, Clark County's ongoing,  
21 systemic use of bail as a tool of pretrial *confinement* rather than *release* is also unlawful because:  
22 (a) jailing someone solely because he cannot pay a sum of money without making a finding that  
23 he is able to pay infringes a fundamental right solely on the basis of wealth in violation of the  
24 Equal Protection and Due Process Clauses; and (b) jailing someone on an unattainable financial  
25 condition violates the Constitution because it deprives a presumptively innocent person of the  
26 fundamental right to liberty without complying with the substantive and procedural requirements  
27 of a valid order of detention under the Due Process Clause. Finally, the common practice in  
28



Clark County of detaining arrestees after the Initial Appearance without formal charges being filed violates a detainee's constitutional and statutory rights.

## LEGAL STANDARD AND AUTHORITY

### I. Writ of Habeas Corpus and/or Mandamus is the Proper Remedy

As set forth more fully below, Petitioner's current detention is unlawful. Pursuant to NRS 34.360, "Every person unlawfully committed, detained, confined or restrained of his or her liberty . . . may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment or restraint." With the instant Emergency Petition, Petitioner seeks a writ of habeas corpus from the instant Court directing Petitioner's release from the unlawful custody of the Clark County Sheriff.

In the alternative, a petitioner may seek a writ of mandamus to "compel the performance of an act that the law requires . . . or to control an arbitrary or capricious exercise of discretion." Thomas v. Eighth Judicial Dist. Court, 402 P.3d 619, 623 (Nev. 2017); see also NRS 34.160. A Writ of Mandamus may be issued "where there is [no] plain, speedy and adequate remedy in the ordinary course of law". NRS 34.170; Smith v. Eighth Judicial Dist. Court, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). With the instant Emergency Petition, Petitioner seeks a writ of mandamus directing the lower court to vacate the current detention order and to conduct a full, adversarial detention hearing that complies with Nevada statutory procedures as well as the U.S. and Nevada constitutions.

### II. Constitutional Protections Violated by the Current Process in Clark County

#### A. The Due Process Clause

The Due Process Clauses of the U.S. and Nevada Constitutions provide that "[n]o person shall . . . be deprived of life, liberty, or property without due process of law." U.S. Const. amend. V;<sup>2</sup> Nev. Const. Art. 1, §8. Due Process requires a hearing before a neutral fact-finder and an opportunity to be heard "at a meaningful time and in a meaningful manner" before an individual is deprived of a fundamental right or property interest. Mathews v. Eldridge, 424 U.S. 319, 333-

<sup>2</sup> The Fifth Amendment Due Process Clause was made applicable to the states via the Fourteenth Amendment to the U.S. Constitution. U.S. Const. amend, V, XIV. See Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489 (1964)

34, 96 S. Ct. 893 (1976) (citations omitted); see also Zadvydas v. Davis, 533 U.S. 678, 690, 121 S. Ct. 2491 (2001) (“Freedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that [the Due Process] Clause protects”); Foucha v. Louisiana, 504 U.S. 71, 80, 112 S. Ct. 1780 (1992) (“Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action”); U.S. v. Montalvo-Murillo, 495 U.S. 711, 716, 110 S. Ct. 2072 (1990) (holding that release prior to trial is a “vital liberty interest”). Accordingly, the issue of pretrial detention must be resolved in a manner that comports with due process.

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

The essential elements of a procedural due process claim under the Fifth Amendment are “(1) a life, liberty, or property interest requiring protection under the Due Process Clause, and (2) a deprivation of that interest (3) without adequate process.” Fields v. Henry Co., 701 F.3d 180, 185 (6th Cir. 2012). “A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word ‘liberty’ . . . or [by] an expectation or interest created by the state law or policies”. Wilkinson v. Austin, 545 U.S. 209, 221, 125 S. Ct. 2384 (2005) (citation omitted). Freedom of movement, including the right to travel, has long been recognized as a liberty interest which cannot be restricted without due process of law. City of Chicago v. Morales, 527 U.S. 41, 54, 119 S. Ct. 1849 (1999) (citing Kent v. Dulles, 357 U.S. 116, 78 S. Ct. 1113 (1958) (noting that freedom of movement is “a part of our heritage”)). Accordingly, any restraint on pretrial liberty implicates procedural due process protections. Those protections

1 require “adequate process”. In the context of a pretrial detention order, “adequate process”  
2 requires rigorous procedures be met to detain someone pretrial, including, but not limited to, a  
3 “full-blown adversary hearing,” a heightened evidentiary standard of proof of  
4 dangerousness/flight risk by “clear and convincing evidence,” consideration of alternative  
5 conditions or release, and “written findings of fact and a written statement of reasons for a  
6 decision to detain.” Salerno, 481 U.S. at 741, 750-51.

7 Substantive due process “prohibits states from infringing fundamental liberty interests,  
8 unless the infringement is narrowly tailored to serve a compelling state interest.” Lawrence v.  
9 Texas, 539 U.S. 558, 593, 123 S. Ct. 2472 (2003). In a pretrial detention context, substantive due  
10 process requires that detention survive “heightened constitutional scrutiny” and the government  
11 may only detain where that detention is carefully limited to serve a “compelling” government  
12 interest. Salerno, 481 U.S. at 746. As a result, the government may detain someone pretrial only  
13 if other, less restrictive means are not available to serve the state’s interests. Id.; U.S. v. Karper,  
14 847 F. Supp. 2d 350, 362 (N.D.N.Y. 2011) (finding release conditions cannot exceed that which  
15 is minimally necessary to ensure the accused’s appearance in court and protect the community  
16 against future dangerousness).

### 17 **B. Equal Protection Clause**

18 The Equal Protection Clause of the U.S. and Nevada constitutions<sup>3</sup> prohibits the  
19 government from denying individuals equal protection of the laws. The Equal Protection Clause  
20 may be invoked to analyze the governmental actions that draw distinctions based upon specific  
21 characteristics or impinge on an individual’s exercise of a fundamental right. See Skinner v.  
22 Oklahoma, 316 U.S. 535, 62 S. Ct. 1110 (1942). While the Equal Protection Clause permits the  
23 states some discretion in enacting laws which affect some groups of citizens differently than  
24 others, a statute or practice is unconstitutional if the “classification rests on grounds wholly  
25 irrelevant to the achievement of the State’s objective.” McGowan v. Maryland, 366 U.S. 420,  
26 425-26, 81 S. Ct. 1101 (1961).

27  
28 <sup>3</sup> U.S. Const. amend. XIV; Nev. Const. Art. 1, § 1 and Art. IV, § 21.

1 In the context of bail, the Equal Protection Clause prohibits the pretrial detention of  
2 defendants solely because of their inability to afford bail. Weatherspoon v. Oldham, 2018 WL  
3 1053548, at \*6 (W.D. Tenn. Feb. 26, 2018); Jones, 2015 WL 5387219, at \*4; Pugh v. Rainwater,  
4 572 F.2d at 1058 (5th Cir. 1978) (holding that “pretrial confinement for inability to post money  
5 bail” for a defendant “whose appearance at trial could reasonably be assured by one of the  
6 alternate forms of release . . . would constitute imposition of an excessive restraint . . .”).

### 7 **C. Excessive Bail Clause and Nevada’s Statutory Bail Scheme**

8 The Eighth Amendment to the U.S. Constitution states, in part, that “excessive bail shall  
9 not be required.” Similarly, the Nevada Constitution mandates that all defendants “shall be  
10 bailable by sufficient sureties” and that bail shall not be “excessive”. Nev. Const. Art. 1, §§ 6-7.  
11 The constitutional right to bail is codified in Nevada statute, which requires that “a person  
12 arrested for an offense other than murder of the first degree must be admitted to bail.” NRS  
13 178.484(1).

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

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

10. Any other factors concerning the person's ties to the community or bearing on the risk that the person may willfully fail to appear.

NRS 178.4853.

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

#### **A. Clark County's Bail System**

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

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

"Bail" is not equivalent to "money bail." "Bail" means *release* before trial. Although common in recent years, the sentence "the Defendant is held on \$10,000 bail" is a contradiction: as a historical matter, being "held on bail" was impossible. Timothy R. Schnacke, U.S. Dep't of Justice – Nat'l Inst. for Corr., Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform 1 (Aug. 2014).<sup>4</sup> As the CATO Institute has explained, since well before the Magna Carta, bail has been understood as a device to *free* defendants pretrial. See Brief for Amicus Curiae CATO Inst, Walker v. City of Calhoun, Ga., No. 16-10521, at 3 (11<sup>th</sup> Cir. 2016).<sup>5</sup>

<sup>4</sup> Available at [http://www.clebp.org/images/2014-11-05\\_final\\_bail\\_fundamentals\\_september\\_8,\\_2014.pdf](http://www.clebp.org/images/2014-11-05_final_bail_fundamentals_september_8,_2014.pdf).

<sup>5</sup> Available at <https://object.cato.org/sites/cato.org/files/pubs/pdf/walker-v-city-of-calhoun.pdf>.

1       “Money bail” is the practice of requiring a defendant to forfeit money if they do not  
2 appear for trial. Money bail can be either secured or unsecured. A secured money bail system  
3 requires the defendant to deposit money before they are released; an unsecured money bail  
4 system allows the defendant to be released without depositing any money so long as they  
5 promise to pay if they fail to appear.

6       As Chief Judge Rosenthal of the U.S. District Court for the Southern District of Texas  
7 recently summarized in her comprehensive discussion of the history of the American bail system,  
8 ODonnell v. Harris Co., 251 F.Supp.3d 1052, 1068 (S.D. Tex. 2017),<sup>6</sup> bail originated in  
9 medieval England “as a device to free untried prisoners.” Daniel J. Freed & Patricia M. Wald,  
10 Bail in the U.S.: 1964 1 (1964). The Statue of Westminster, enacted by the English Parliament in  
11 1275, listed the offenses that would be bailable and provided criteria for determining whether  
12 someone should be released. These criteria included the strength of the evidence against the  
13 accused and the severity of the accused’s criminal history. See June Carbone, Seeing Through  
14 the Emperor’s New Clothes: Rediscovery of Basic Principles in the Administration of Bail, 34  
15 Syracuse L. Rev. 517, 523-26 (1983); Note, Bail: An Ancient Practice Reexamined, 70 Yale L.J.  
16 966 (1961). In 1679, Parliament adopted the Habeas Corpus Act to ensure that an accused could  
17 obtain a timely bail hearing. And the English Bill of Rights, enacted in 1679, prohibited  
18 excessive bail. See Carbone, *supra*, at 528.

19       The American States continued this tradition. Beginning with the Pennsylvania  
20 Constitution of 1682, 48 states, including Nevada, have protected, by constitution or statute, a  
21 right to bail “by sufficient sureties, except for capital offenses when the proof is evident or the  
22 presumption great.” Matthew J. Hegreness, America’s Fundamental and Vanishing Right to Bail,  
23 55 Ariz. L. Rev. 909, 916 (2013).

24       As the U.S. District Court for the Southern District of Texas recently explained in its  
25 detailed opinion striking down Harris County’s money bail practices, “[h]istorians and jurists  
26 confirm that from the medieval period until the early American republic, a bail bond was

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28 <sup>6</sup> Aff’d as modified, 882 F.3d 528 (5th Cir. 2018).

1 typically based on an individualized assessment of what the arrestee or his surety *could pay* to  
2 assure appearance and secure release.” ODonnell, 251 F.Supp.3d at 1069 (emphasis added). The  
3 court explained the English practice at the time of the ratification of the U.S. Constitution: ““The  
4 rule is, where the offence is prima facie great, to require good bail; moderation nevertheless is to  
5 be observed, and such bail only is to be required as the party is able to procure; for otherwise the  
6 allowance of bail would be a mere colour for imprisoning the party on the charge.”” Id. (quoting  
7 1 J. Chitty, A Practical Treatise on the Criminal Law 88-89 (Philadelphia ed. 1819)).

8 Jurisdictions across America began to depart from the original understanding of bail in  
9 the middle of the 20<sup>th</sup> Century. And in the last two decades, the use of unaffordable secured  
10 money bail has increased in scope and severity. In 1996, 59% of felony defendants had to meet a  
11 financial condition to regain their liberty pretrial. Timothy C. Hart & Brian A. Reaves, U.S.  
12 Dep’t of Justice, Felony Defendants in Large Urban Counties, 1996, at 17-18 (1999).<sup>7</sup> By 2009,  
13 that percentage had climbed to 72%. Brian A Reaves, U.S. Dep’t of Justice, Felony Defendants  
14 in Large Urban Counties, 2009-Statistical Tables, at 15, 20 (2013).<sup>8</sup> In 1990, the majority of  
15 felony defendants who were not detained while their cases were pending were released without  
16 financial conditions. In 2009, only 23% of felony defendants who were not detained while their  
17 cases were pending were released without financial conditions. And the average amount of  
18 money required to be paid as a condition of release has increased. Vera Inst of Justice,  
19 Incarceration’s Front Door: The Misuse of Jails in America, 29 (Feb. 2015).<sup>9</sup> By 2009, about half  
20 of felony defendants subject to financial conditions of release could not meet them and remained  
21 in custody until the disposition of their cases. Felony Defendants, 2009-Statistical Tables, at 17.

22 The routine use of unaffordable secured money bail resulted in a “crisis.” See U.S. v.  
23 Salerno, 481 U.S. 739, 742, 107 S. Ct. 2095 (1987) (describing “a bail crisis in the federal  
24 courts”); Caleb Foote, The Coming Constitutional Crisis in Bail: 1, 113 U. Pa. L. Rev. 959, 971

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26 <sup>7</sup> Available at <https://www.bjs.gov/content/pub/pdf/fdluc96.pdf>.

<sup>8</sup> Available at <https://www.bjs.gov/content/pub/pdf/fdluc09.pdf>.

27 <sup>9</sup> Available at [https://storage.googleapis.com/vera-web-assets/downloads/Publications/incarcerations-front-door-the-misuse-of-jails-in-america/legacy\\_downloads/incarcerations-front-door-report\\_02.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/incarcerations-front-door-the-misuse-of-jails-in-america/legacy_downloads/incarcerations-front-door-report_02.pdf).

1 (1965). Two distinct evils of the secured money bail system provoked the crisis: It imperiled  
2 public safety by allowing potentially dangerous defendants to be released without any  
3 consideration of their dangerousness, and it worked an “invidious discrimination” against those  
4 who could not pay. See, e.g., Williams v. Illinois, 399 U.S. 235, 242, 90 S. Ct. 2018 (1970).  
5 Over 50 years ago, Attorney General Robert Kennedy led a successful movement to reform bail  
6 in the federal courts. Kennedy testified:

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

12 Testimony on Bail Legislation before S. Judiciary Subcomm. on Const. Rights and  
13 Improvements in Judicial Machinery (Aug. 4, 1964).<sup>10</sup>

14 One of the results of the movement to reform the bail system in the 1960s was the virtual  
15 elimination of cash bonds in the District of Columbia and in all Federal courts. The Bail Reform  
16 Act “assure[d] that all persons, regardless of their financial status, [would] not needlessly be  
17 detained pending their appearance to answer charges . . . when detention serves neither the ends  
18 of justice nor the public interest.” Bail Reform Act of 1966, Pub. L. No. 89-465, § 2, 80 Stat.  
19 214, 214 (repealed in 1984). In 1984, Congress updated the Bail Reform Act as part of the  
20 Comprehensive Crime Control Act. See Bail Reform Act of 1984, 18 U.S.C. §§ 3141-50. Federal  
21 courts and the courts of the District of Columbia transitioned to a rigorous, evidence-based  
22 system of non-financial conditions that remains in place today. If the government believes that a  
23 defendant cannot be released pretrial because she is too dangerous or too likely to flee, the  
24 government may seek an order of detention, but only after it has satisfied the court, at a “full-  
25 blown adversarial hearing,” that no condition or combination of conditions could assure the  
26 defendant’s appearance at trial and the safety of the community. Salerno, 481 U.S. at 750.

27 <sup>10</sup> Available at <http://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/08-04-1964.pdf>.



1 Indeed, *the constitutionality of any moneyed bail system requires as much in order to meet*  
2 *constitutional muster. Id.* at 750-55.

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

### 11 **C. Jailing an Arrestee For the Inability to Make a Monetary Bond Violates Equal** 12 **Protection**

13 The principle that jailing the poor because they cannot pay a sum of money is  
14 unconstitutional has deep roots in American constitutional law. See Williams v. Illinois, 399 U.S.  
15 235, 241, 90 S. Ct. 2018 (1970) (“[T]he Court has had frequent occasion to reaffirm allegiance to  
16 the basic command that justice be applied equally to all persons”); Douglas v. California, 372  
17 U.S. 353, 355, 83 S. Ct. 814 (1963) (condemning the “evil” of “discrimination against the  
18 indigent”); Griffin v. Illinois, 351 U.S. 12, 19, 76 S. Ct. 585 (1956) (“There can be no equal  
19 justice where the kind of trial a man gets depends on the amount of money he has”); see also  
20 Mayer v. City of Chicago, 404 U.S. 189, 193, 92 S. Ct. 410 (1971).

21 These principles have been applied in a variety of contexts in which a government jailed  
22 someone because of her inability to make a monetary payment. In Tate v. Short, 401 U.S. 395,  
23 91 S. Ct. 668 (1971), the U.S. Supreme Court held that “the Constitution prohibits the State from  
24 imposing a fine as a sentence and then automatically converting it into a jail term solely because  
25 the defendant is indigent and cannot forthwith pay the fine in full.” Id. at 398. In Bearden v.  
26 Georgia, 461 U.S. 660, 103 S. Ct. 2064 (1983), the Court explained that to “deprive [a]  
27 probationer of his conditional freedom simply because, through no fault of his own he cannot  
28

1 pay [a] fine... would be contrary to the fundamental fairness required by the Fourteenth  
2 Amendment.” Id. at 672-73.

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

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

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

22 Pugh, 572 F.2d at 1058 (5th Cir. 1978).<sup>11</sup> Indeed, “[t]he incarceration of those who cannot  
23 [afford a cash payment], without meaningful consideration of other possible alternatives,

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26 <sup>11</sup> Rainwater further explained that it refused to require a priority to be given in all cases – including those of the  
27 non-indigent – to non-monetary conditions of release. The court noted that, at least for wealthier people, some might  
28 actually prefer monetary bail over release with certain other conditions, and that the court would not invalidate a  
state Rule that allowed for those other conditions in appropriate cases. Pugh v. Rainwater, 572 F.2d 1053, 1057 (5th  
Cir. 1978).

1 infringes on both due process and equal protection requirements.” Id. at 1057,<sup>12</sup> see also  
2 Williams v. Farrior, 626 F.Supp. 983, 985 (S.D. Miss. 1986) (“For the purposes of the  
3 Fourteenth Amendment’s Equal Protection Clause, it is clear that a bail system which allows  
4 only monetary bail and does not provide for any meaningful consideration of other possible  
5 alternatives for indigent pretrial detainees infringes on both equal protection and due process  
6 requirements”).

7 The U.S. Justice Department recently endorsed this view, asserting that “[i]ncarcerating  
8 individuals solely because of their inability to pay for their release, whether through the  
9 payment of fines, fees, or a cash bond, violates the Equal Protection Clause of the Fourteenth  
10 Amendment.” Jones v. City of Clanton, 2015 WL 5387219, at \*4 (M.D. Ala. Sept. 14, 2015);  
11 see also Varden v. City of Clanton, Civ. No. 15–34, Docket. No. 26 at 1 (M.D. Ala. Feb. 13,  
12 2015). The Justice Department reasoned that a secured money bail schedule, like the one  
13 utilized in Clark County, “do[es] not account for individual circumstances of the accused” and  
14 it “essentially mandate[s] pretrial detention for anyone who is too poor to pay the  
15 predetermined fee.” Jones, 2015 WL 5387219, at \*9.

16 Accordingly, several federal district courts have held that state laws setting a particular  
17 monetary bail amount without individualized considerations of indigency violate the Due  
18 Process Clause. See, e.g., Rodriguez v. Providence Cmty. Corr., Inc., 155 F.Supp.3d 758, 767–  
19 70 and n. 10 (M.D. Tenn. 2015) (granting class-wide preliminary injunction enjoining state  
20 policy requiring monetary payment for probations to obtain release pending a revocation  
21 hearing “without an inquiry into the individual’s ability to pay the bond and whether alternative  
22 methods of ensuring attendance at revocation hearings would be adequate”); Williams v.  
23 Farrior, 626 F.Supp. 983, 985 (S.D. Miss. 1986) (“[I]t is clear that a bail system which allows  
24 only monetary bail and does not provide for any meaningful consideration of other possible  
25

26 <sup>12</sup> Four circuit judges dissented in Rainwater. Although the agreed with the constitutional principles announced by  
27 the majority that the Constitution forbids jailing the poor when they cannot afford monetary bail, they were  
28 concerned about the majority’s faith in the Florida courts not to apply the new state Rule in unconstitutional ways to  
detain the indigent. Pugh v. Rainwater, 572 F.2d 1053, 1067 (5th Cir. 1978) (“I cannot escape the conclusion that  
the majority has chosen too frail a vessel for such a ponderous cargo of human rights.”) (Simpson, J., dissenting).

alternatives for indigent pretrial detainees infringes on both equal protection and due process requirements.”); Buffin v. City and Co. of San Francisco, No. 15-CV-04959-YGR, 2018 WL 424362 at \*7 (N.D. Cal. Jan. 16, 2018); cf. Abdi v. Nielson, No. 1:17-CV-0721 EAW, 2018 WL 798747, at \*4 (W.D.N.Y. Feb. 9, 2018).

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

## ARGUMENT

### **I. At the Probable Cause Determination, the Lower Court Violated Petitioner’s Rights by Defaulting to Preventive Detention and Standard Bail**

#### **A. The Court’s Decision to Preventatively Detain Petitioner Pretrial without a Full, Adversarial Hearing Violated Petitioner’s Due Process Rights**

In order to deprive a presumptively innocent person of her physical liberty, due process requires that the State demonstrate 1) by “clear and convincing evidence” at a “full-blown adversarial hearing” that the defendant presents an “identified and articulable threat” to the community or presents a risk of flight<sup>13</sup> and 2) *no conditions or combination of conditions alternative to detention* could reasonably mitigate that danger based on an individualized

<sup>13</sup> These procedural protections are mandated by the constitutional right to *Procedural Due Process*. U.S. v. Salerno, 481 U.S. 739, 741, 750-51 (1987) (emphasis added).

1 consideration of defendant's unique circumstances.<sup>14</sup> U.S. v. Salerno, 481 U.S. 739, 750-51  
2 (1987) (emphasis added); see also Weatherspoon v. Oldham, 2018 WL 1053548, at \*14-15, \*17  
3 (W.D. Tenn. Feb. 26, 2018). A state court procedure that does not require as much violates due  
4 process. See, e.g., Rodriguez v. Providence Cmty. Corr., Inc., 155 F.Supp.3d 758, 767-70 and n.  
5 10 (M.D. Tenn. 2015); Jones v. City of Clanton, No. 215CV34-MHT, 2015 WL 5387219, at \*2  
6 (M.D. Ala. Sept. 14, 2015) (holding that the "use of a secured bail schedule to detain a person . .  
7 . without an individualized hearing regarding the person's indigence and the need for bail or  
8 alternatives to bail, violates the Due Process Clause"); Simpson v. Miller, 387 P.3d 1270, 1276  
9 (Ariz. 2017) ("[I]t is clear from Salerno and other decisions that the constitutionality of a pretrial  
10 detention scheme turns on whether particular procedures satisfy substantive due process  
11 standards"); see also Lopez-Valenzuela v. Arpaio, 770 F.3d 772, 781 (9th Cir. 2014) (en banc)  
12 (applying strict scrutiny to strike down an Arizona law that required detention after arrest  
13 without individualized consideration of an arrestee's circumstances); ODonnell, 251 F.Supp.3d  
14 1052; Williams v. Farrior, 626 F.Supp. 983, 986 (S.D. Miss. 1986) (holding that a state's pretrial  
15 detention scheme must meet "strict judicial scrutiny" because of the fundamental rights at issue).

16 As a result, due process mandates that a magistrate makes an individualized  
17 determination whether preventative detention is the least restrictive means of assuring  
18 community safety and ensuring the accused's return to court. Salerno, 481 U.S. 739. This did not  
19 happen in this case. Here, the reviewing magistrate set bail at a 48 Hour Probable Cause Review  
20 at which neither Petitioner nor her counsel was present. In doing so, the lower court defaulted to  
21 detaining Petitioner without a "full-blown adversarial hearing," without "clear and convincing  
22 evidence" that the defendant presents an "identified and articulable threat" to the community or  
23 presents a risk of flight, and without a request from the State for preventive detention. Instead,  
24 the magistrate *sua sponte* ruled that detention was appropriate after a review of only a police  
25 report and a temporary custody record. As a result, the lower court's detention order at the  
26

27  
28 <sup>14</sup> This protection is mandated by the constitutional right to *Substantive Due Process*. Id. at 746.

1 Probable Cause Determination violates due process. The detention order should be vacated and  
2 Petitioner should be released.

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

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

16 To set bail in an amount that is *unattainable*, a court must find, on the record, by “clear  
17 and convincing evidence” after a “full-blown adversarial hearing” that 1) the defendant presents  
18 an “identified and articulable threat” to the community or presents a risk of flight and 2) no  
19 conditions or combination of conditions alternative to detention could reasonably mitigate that  
20 danger based on an individualized consideration of defendant’s unique circumstances. U.S. v.  
21 Salerno, 481 U.S. 739, 750-51 (1987) (emphasis added) (requiring that a magistrate setting bail  
22 in an unattainable amount for a defendant must make an individualized determination whether  
23 bail is the least restrictive means of assuring community safety and ensuring the accused’s return  
24 to court); ODonnell, 251 F.Supp.3d at 1143-44; Jones v. City of Clanton, No. 215CV34-MHT,  
25 2015 WL 5387219, at \*2 (M.D. Ala. Sept. 14, 2015) (holding that the “use of a secured bail  
26 schedule to detain a person . . . without an individualized hearing regarding the person’s  
27 indigence and the need for bail or alternatives to bail, violates the Due Process Clause”); Carlisle  
28 v. Desoto County, Mississippi, 2010 WL 3894114, at \*5 (N.D. Miss. Sept. 30, 2010) (holding

1 that because a “compelling state interest” was required for pretrial detention, the plaintiff’s rights  
2 were violated if he was jailed without consideration of non-financial alternatives).

3 This did not happen in this case. As discussed above, the reviewing magistrate set bail  
4 according to a standard bail schedule at a 48 Hour Probable Cause Review at which neither  
5 Petitioner nor her counsel was present. In doing so, the lower court defaulted to detaining  
6 Petitioner on unattainable bail without a “full-blown adversarial hearing,” without “clear and  
7 convincing evidence” that the defendant presents an “identified and articulable threat” to the  
8 community or presents a risk of flight, and without a request from the State for preventive  
9 detention. As a result, the lower court’s bail setting at the Probable Cause Determination violates  
10 due process. The unattainable bail setting amounts to a detention order. It should be vacated and  
11 Petitioner should be released.

### 12 **C. The Setting of Unattainable Bail Resulting in Detention Violates the Equal** 13 **Protection Clause**

14 In the context of bail, the Equal Protection Clause prohibits the pretrial detention of  
15 defendants solely because of their inability to afford bail. Lopez-Valenzuela v. Arpaio, 770 F.3d  
16 772, 781 (9th Cir. 2014) (en banc) (applying strict scrutiny to strike down an Arizona law that  
17 required detention after arrest without individualized consideration of an arrestee’s  
18 circumstances); Pugh v. Rainwater, 572 F.2d at 1058 (5th Cir. 1978) (holding that “pretrial  
19 confinement for inability to post money bail” for a defendant “whose appearance at trial could  
20 reasonably be assured by one of the alternate forms of release . . . would constitute imposition of  
21 an excessive restraint . . .”); Weatherspoon v. Oldham, 2018 WL 1053548, at \*6 (W.D. Tenn.  
22 Feb. 26, 2018); ODonnell v. Harris County, 251 F.Supp.3d 1052 (S.D. Tex. Apr. 28, 2017);  
23 Jones, 2015 WL 5387219, at \*4; Carlisle v. Desoto County, Mississippi, 2010 WL 3894114, at  
24 \*5 (N.D. Miss. Sept. 30, 2010) (holding that because a “compelling state interest” was required  
25 for pretrial detention, the plaintiff’s rights were violated if he was jailed without consideration of  
26 non-financial alternatives).

1        These decisions make clear that requiring money bail as a release condition in an  
2 amount impossible for the defendant to pay is equivalent to a detention order, “which is only  
3 appropriate when the state shows and the court finds that no condition or combination of  
4 conditions of release could satisfy the purposes of bail, to assure the defendant’s appearance at  
5 trial or hearing and the safety of the public.”<sup>15</sup> Weatherspoon v. Oldham, 2018 WL 1053548, at  
6 \*6 (W.D. Tenn. Feb. 26, 2018) (additional citations omitted). Thus, in order to withstand  
7 constitutional scrutiny, unattainable money bail settings must be preceded by a hearing at  
8 which the court determines the least restrictive means of ameliorating an accused’s risk of  
9 flight and danger to the community. Absent such a determination, an unattainable release  
10 condition – such as an unattainable bail setting – operates as a *de facto* detention order that  
11 discriminates on the basis of wealth. Weatherspoon v. Oldham, 2018 WL 1053548, at \*6 (W.D.  
12 Tenn. Feb. 26, 2018). This violates equal protection and due process guarantees.

13        **D. The Lower Court Set a Bail Amount Based on a Bail Schedule in Violation of**  
14        **Nevada Law**

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

22        In making this determination, the Court must consider: “(1) the nature and circumstances  
23 of the offense charged; (2) the financial ability of the defendant to give bail; (3) the character of  
24 the defendant; and (4) the factors listed in NRS 178.4853.” NRS 178.498. Significantly, an  
25 accused’s ability to give bail *must* be part of the bail analysis. See Stack v. Boyle, 342 U.S. 1, 4-

26        <sup>15</sup> The U.S. Supreme Court has also held that release conditions that exceed a purported threat posed by a particular  
27 defendant violate the “excessive bail” clause of the Eighth Amendment. Salerno, 481 U.S. at 754; see also U.S.  
28 Const. amend. VIII; Nev. Const. Art. 1 § 6-7; NRS 178.484(1) (stating “a person arrested for an offense other than  
murder of the first degree must be admitted to bail”).



5 (1951) (stating “Bail set at a figure higher than an amount reasonably calculated to fulfill [its] purpose is ‘excessive’ under the Eighth Amendment”); U.S. v. Polouzzi, 697 F. Supp. 2d 381, 390 (E.D.N.Y. 2010) (“Bail conditions are unconstitutionally excessive if they impose restraints that are more than necessary to achieve the government’s interest [in] preventing risk of flight and danger to society...”). The U.S. Justice Department has declared that “[i]ncarcerating individuals solely because of their inability to pay for their release, whether through the payment of fines, fees, or a cash bond, violates the Equal Protection Clause of the Fourteenth Amendment.”<sup>16</sup> Jones v. City of Clanton, 2015 WL 5387219 at 4 (M.D. Ala. Sep. 14, 2015); see also Varden v. City of Clanton, Civ. No. 15–34, Dckt. No. 26 at 1 (M.D. Ala. Feb. 13, 2015). The Justice Department reasoned that a secured money bail schedule, like the one utilized in Clark County, “do[es] not account for individual circumstances of the accused” and it “essentially mandate[s] pretrial detention for anyone who is too poor to pay the predetermined fee.” Jones, 2015 WL 5387219 at 9. As a result, the Justice Department concluded that setting a bail without regard to the detainee’s financial ability to pay “amounts to mandating pretrial detention only for the indigent.” Id.

In this instance, the magistrate set bail according to a standard bail schedule, without the presence of Petitioner or his counsel. As a result, the Court had no information before it to set a bail amount other than the information provided by the police in an arrest report. This is the definition of utilizing a bail schedule: setting bail solely based on a criminal charge in a generic amount, not individualized to the defendant or the case. There is no association between a particular charge and a blanket “schedule” of money that would guarantee appearance at court or deter future criminal activity. These concerns can only be addressed on an individualized basis. Accordingly, while “utilization of a master bond schedule provides speedy and convenient release for those who have no difficulty in meeting its requirements, [the] incarceration of those

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<sup>16</sup> The following year, the Justice Department issued a “Dear Colleague Letter” advising state and local courts that due process and equal protection principles forbid using “bail or bond practices that cause indigent Detainees to remain incarcerated solely because they cannot afford to pay for their release.” Letter from Vanita Gupta to Colleagues at 2 (Mar. 14, 2016), available at <https://www.justice.gov/crt/file/832461/download>.

1 who cannot, without meaningful consideration of other possible alternatives, infringes on both  
2 due process and equal protection requirements.” Pugh v. Rainwater, 572 F.2d 1053, 1057 (5th  
3 Cir. 1978) (*en banc*).

4 Courts must tailor bail to a detainee’s financial resources, setting bail only as high as  
5 necessary to reasonably assure the detainee’s return to court. The amount that would provide a  
6 meaningful incentive to return to court differs for someone who lives on \$600 a month and  
7 someone who lives on \$6,000 a month. Bail is excessive and, therefore, unlawful when not  
8 adjusted to a pretrial detainee’s financial circumstances and not set at the minimum amount  
9 needed to ensure return to court. Stack, 342 U.S. at 4-5 (bail exceeding that necessary to achieve  
10 its purpose violates Eighth Amendment); see also, Salerno, 481 U.S. at 754 -55 (affirming Stack  
11 and holding that “[w]hen the Government has admitted that its only interest is in preventing  
12 flight, bail must be set by a court at a sum designed to ensure that goal, and no more”). Thus,  
13 when bail is set utilizing a standardized bail schedule without considering a detainee’s character  
14 and financial means the magistrate violates the accused’s constitutional and statutory rights. In  
15 addition, in setting a standard bail, the magistrate fails to consider “the financial ability of the  
16 defendant to give bail” and “the character of the defendant” violates NRS 178.498.<sup>17</sup>

17 Here, the lower court set an unattainable bail amount without considering Petitioner’s  
18 ability to pay that bail in violation of Nevada statute and U.S. Constitutional law.

19 **II. Petitioner’s Continued Detention in the Absence of a Timely-Filed Complaint**  
20 **Violates his Constitutional and Statutory rights**

21 NRS 171 codifies many of the pretrial procedural rights guaranteed criminal defendants.  
22 NRS 171.178(1) requires that, following arrest, the arresting officer bring the arrestee “before  
23 the magistrate who issued the warrant or the nearest available magistrate embowered to commit  
24

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25 <sup>17</sup> Pretrial detainees should not remain in custody simply because they are poor. Research indicates that  
26 imposing money bail does not improve the chances that a Detainee will return to court, nor does it protect  
27 the public because many high-risk Detainees have access to money and can post bond. Instead, it serves  
28 only to treat differently those who can and cannot access money. Incarceration can disrupt the positive  
factors in the Detainee’s life and lead to negative collateral consequences, including job loss, loss of  
residence, inability to care for children, and disintegration of other positive social relationships.

persons charged . . .” This must occur “within 72 hours after arrest, excluding nonjudicial days.” NRS 171.178(3). “If an arrested person is not brought before a magistrate within 72 hours after arrest . . . the magistrate: (a) shall give the prosecuting attorney an opportunity to explain the circumstances leading to the delay; and (b) may release the arrested person if he determines that the person was not brought before a magistrate without unnecessary delay.” NRS 171.178(3).

At the initial appearance before a magistrate, Nevada law requires that “The magistrate or master shall inform the defendant of the complaint against him and of any affidavit filed therewith, of his right to retain counsel, of his right to request assignment of counsel if he is unable to obtain counsel, and of his right to have a preliminary examination.” NRS 171.186. Further, the magistrate “shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him” and the “magistrate shall allow the defendant reasonable time and opportunity to consult counsel, and shall admit the defendant to bail . . .” NRS 171.186; see also Havens v. Keller, No. CV-S-95-00680-PMP at 3 (D. Nev. Sept. 7, 1995) (stating “fundamental due process requires . . . a speedy initial appearance at which the accused is advised of the charges against him”). Otherwise, an arrestee must be booked and released until such time as the District Attorney decides whether and with what to charge them. See Huebner v. State, 103 Nev. 29, 33, 731 P.2d 1330 (1987) (stating that the “illegal detention of Huebner for three days beyond the statutorily prescribed period of seventy-two hours was reprehensible . . .”).

There is no statutory provision which allows a magistrate to detain an arrestee beyond the 72 Hour hearing without the filing of a complaint. Consequently, an arrestee must be released from custody if prosecutors fail to file a criminal complaint by the 72 Hour initial appearance. It goes without saying that prosecutors have a simple remedy to prevent an arrestee’s pretrial release – file a complaint.

Prior to 1995, Clark County engaged in the practice of detaining arrestees for up to eight (8) days before releasing them due to government’s failure to timely file charges. This

1 policy was referred to as the “8-day kickout” rule or the pre-arraignment delay (“PAD”) policy.  
2 Several detainees subject to the PAD policy sued the Clark County Sheriff, Las Vegas Justice  
3 Court, and the Clark County Detention Center (CCDC), arguing that the PAD policy violated  
4 their constitutional rights. See Havens v. Keller, No. CV-S-95-00680-PMP at 3 (D. Nev. Sept.  
5 7, 1995).

6 In Havens, U.S. District Court Judge Philip Pro enjoined continued use of the PAD  
7 policy, stating that “fundamental due process requires that the accused be accorded a prompt  
8 determination of probable cause for the person’s arrest” and “a speedy initial appearance at  
9 which the accused is advised of the charges against him”. Id. at 3. Judge Pro stressed that the  
10 law regarding probable cause and initial appearances must be followed *as it was written*, and  
11 that there were no “exceptions” for reasons of expense or difficulties in complying with the  
12 law. Id. Judge Pro explained, “It is hardly novel to require Defendants, who are charged with  
13 enforcing the law, to themselves comply with the procedural requirements of the law.” Id. at  
14 27.

15 Two (2) years after Judge Pro entered the preliminary injunction, the U.S. District Court  
16 amended the order at the request of the parties to require “a probable cause determination be  
17 made within 48 hours of a person’s arrest and that an initial appearance be conducted within 72  
18 hours after arrest, excluding non-judicial days . . .” See Havens, CV-S-95-00680-PMP at 6-7  
19 (D. Nev. July 29, 1997). The modified order imposed a requirement that Clark County comply  
20 with the U.S. Supreme Court’s holding in Riverside v. McLaughlin, 500 U.S. 44, 111 S. Ct.  
21 1661 (1991) and the Nevada Supreme Court’s ruling in Powell v. State, 113 Nev. 41, 930 P.2d  
22 1123 (1997).

23 Where a complaint is not filed at the initial appearance and an arrestee remains in  
24 custody, that individual suffers irreparable prejudice. See Barker v. Wingo, 407 U.S. 514, 531-  
25 33, 92 S. Ct. 2182 (1972). The “disadvantages for an accused who cannot obtain his release  
26 from pretrial incarceration are even more serious than the societal disadvantages of lengthy  
27 pretrial incarceration” because “the time spent in jail awaiting trial has a detrimental impact on  
28

1 the individual, often meaning loss of his job, disruption of his family life, enforced idleness,  
2 and curtailment of his ability to gather evidence, contact witnesses, or otherwise prepare his  
3 defense.” Id. at 532-33. “While imposing such consequences on anyone who has not yet been  
4 convicted is serious, it is especially unfortunate to impose them on those persons who are  
5 ultimately found to be innocent.” Id.; see also Baker v. McCollan, 443 U.S. 137, 153-154, 99 S.  
6 Ct. 2689 (1979) (noting that the “burdens of pretrial detention are substantial ones to impose on  
7 a presumptively innocent man, even when there is probable cause to believe he has committed  
8 a crime”).

9 Criminal jurisprudence in the U.S. is rife with discussions of a person’s liberty interest  
10 being central to the founding of this nation (and the basis of the rights enshrined in the  
11 constitution). “Freedom from incarceration is the ‘paradigmatic liberty interest’ under the due  
12 process clause.” Fairley v. Luman, 281 F.3d 913, 917-18 (9th Cir. 2002); Oviatt v. Pearce, 954  
13 F.2d 1470, 1476 (9th Cir. 1992); Lee v. City of Los Angeles, 250 F.3d 668, 683 (9th Cir. 2001)  
14 (stating “an individual has a liberty interest in being free from incarceration absent a criminal  
15 conviction”). In Oviatt, the Ninth Circuit observed that, “Certainly freedom from incarceration  
16 is a vital liberty interest for those who have not been criminally convicted. It is a basic  
17 assumption with which we guide our lives: the state may not incarcerate any individual  
18 randomly and without specific protective procedures.” 954 F.2d at 1476; see also Riverside,  
19 500 U.S. at 56-57 (stating that “Prolonged detention based on incorrect or unfound suspicion  
20 may unjustly imperil a suspect’s job, interrupt his source of income, and impair his family  
21 relationship”).

22 For a time, Clark County abided by the order of the U.S. District Court and complied  
23 with the pretrial procedures of Section 171 of the Nevada Revised Statutes. NRS 171.178(3)  
24 (initial appearance before a magistrate within 72 hours); 171.178(4) (criminal complaint be  
25 filed “forthwith” at the initial appearance); 171.186 (magistrate must provide the defendant  
26 with the criminal complaint at the initial appearance); 171.196 (Justice Court must hold a  
27 preliminary hearing “within 15 days”). However, recent criminal prosecutions have seen a re-  
28

emergence of the “eight-day kick out” rule in a more subtle form. Arrestees are sometimes brought for a 72 Hour initial appearance at which no complaint has been filed, and none of the procedural protections conferred by NRS 171.186 are honored. Arrestees are held, in some cases, for days thereafter – unaware of allegations against them or the basis for the deprivation of their liberty. Counsel is often not appointed, and release requests are often not considered, until a complaint is filed. Similarly, detainees are often not advised of their rights – including the right to a preliminary hearing within 15 days – until a complaint is filed. As a result, defendants are frequently deprived of significant pretrial due process protections.

This is precisely what happened here. Petitioner was arrested on June 4, 2018. On June 6, 2018, he appeared before a justice of the peace. Prosecutors failed to file a criminal complaint. Despite this, the magistrate refused to release Petitioner from custody, instead setting a total (unattainable) bail of \$3,000. Petitioner’s continued detention, together with the ongoing deprivation of the procedural rights conferred by NRS 171.186, violates his constitutional and statutory rights. Accordingly, Petitioner must be released from custody.

### **III. At the Initial Appearance, the Lower Court Violated Petitioner’s Rights by Failing to Conduct a Full Hearing Regarding Petitioner’s Detention Before Defaulting to Incarceration and Standard Bail**

#### **A. The Court’s Decision to Preventatively Detain Petitioner Pretrial without a Full, Adversarial Hearing Violated Petitioner’s Due Process Rights**

In order to deprive a presumptively innocent person of her physical liberty, due process requires that the State demonstrate 1) by “clear and convincing evidence” at a “full-blown adversarial hearing” that the defendant presents an “identified and articulable threat” to the community or presents a risk of flight<sup>18</sup> and 2) *no conditions or combination of conditions alternative to detention* could reasonably mitigate that danger based on an individualized consideration of defendant’s unique circumstances.<sup>19</sup> U.S. v. Salerno, 481 U.S. 739, 750-51

<sup>18</sup> These procedural protections are mandated by the constitutional right to *Procedural Due Process*. U.S. v. Salerno, 481 U.S. 739, 741, 750-51 (1987) (emphasis added).

<sup>19</sup> This protection is mandated by the constitutional right to *Substantive Due Process*. Id. at 746.

(1987) (emphasis added); see also Weatherspoon v. Oldham, 2018 WL 1053548, at \*14-15, \*17 (W.D. Tenn. Feb. 26, 2018). A state court procedure that does not require as much violates due process. See, e.g., Rodriguez v. Providence Cmty. Corr., Inc., 155 F.Supp.3d 758, 767-70 and n. 10 (M.D. Tenn. 2015); Jones v. City of Clanton, No. 215CV34-MHT, 2015 WL 5387219, at \*2 (M.D. Ala. Sept. 14, 2015) (holding that the “use of a secured bail schedule to detain a person . . . without an individualized hearing regarding the person’s indigence and the need for bail or alternatives to bail, violates the Due Process Clause”); Simpson v. Miller, 387 P.3d 1270, 1276 (Ariz. 2017) (“[I]t is clear from Salerno and other decisions that the constitutionality of a pretrial detention scheme turns on whether particular procedures satisfy substantive due process standards”); see also Lopez-Valenzuela v. Arpaio, 770 F.3d 772, 781 (9th Cir. 2014) (en banc) (applying strict scrutiny to strike down an Arizona law that required detention after arrest without individualized consideration of an arrestee’s circumstances); ODonnell, 251 F.Supp.3d 1052; Williams v. Farrior, 626 F.Supp. 983, 986 (S.D. Miss. 1986) (holding that a state’s pretrial detention scheme must meet “strict judicial scrutiny” because of the fundamental rights at issue).

Nevada law reflects this basic *concept* but omits the procedural protections required by Salerno. NRS 178.4851 provides that criminal defendants may be released without bail upon a showing of good cause that the court “can impose conditions on the person that will adequately protect the health, safety, and welfare of the community and ensure that the person will appear at all times and places ordered by the court.” NRS 178.4851. This runs afoul of Salerno in that it burdens the defense with establishing ‘good cause’ for release, and speaks only to the issue of release *without bail*.<sup>20</sup> Indeed, as Salerno 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 establishing that it does not before a defendant can be detained pretrial (i.e., held pursuant to unattainable release conditions).

<sup>20</sup> To the extent that NRS 178.4851 obviates the procedural requirements mandated by Salerno, it is unconstitutional. See Salerno, 481 U.S. at 750; Stack, 342 U.S. at 5; U.S. Const. amend. V, XIV; Nev. Const. Art. 1, § 8.

1 While NRS 178.4853 sets forth factors bearing the issue of pretrial release,<sup>21</sup> those  
2 factors must be considered in the context of the inquiry required by Salerno. So courts should  
3 consider the factors outlined in NRS 178.4583 when assessing the need for preventative  
4 detention and, in cases where a preventative detention request has been denied, when fashioning  
5 release conditions minimally necessary to protect the community and ensure a defendant's return  
6 to court.

7 Here, the magistrate *sua sponte* ordered the continued detention of Petitioner without a  
8 "full-blown adversarial hearing," without "clear and convincing evidence" that Petitioner  
9 presents an "identified and articulable threat" to the community or presents a risk of flight, and  
10 without a request from the State for preventive detention. Instead, the magistrate *sua sponte* ruled  
11 that detention was appropriate. As a result, the lower court's detention order violates due  
12 process. The detention order should be vacated and Petitioner should be released.

### 13 **B. The Court's Setting of Unattainable Bail Does Not Alleviate the Due Process** 14 **Violation**

15 An order setting unattainable conditions of release is equivalent to an order of detention.  
16 U.S. v. Mantecon-Zayas, 949 F.2d 548, 550 (1st Cir. 1991); U.S. v. Leathers, 412 F.2d 169, 171  
17 (D.C. Cir. 1969) ("[T]he setting of bond unreachable because of its amount would be tantamount  
18 to setting no conditions at all."); ODonnell v. Harris County, 251 F.Supp.3d 1052, 1143-44 (S.D.  
19 Tex. Apr. 28, 2017) (holding that secured money bail set in an amount that an arrestee cannot  
20 afford is constitutionally equivalent to an order of detention); State v. Brown, 338 P.3d 1276  
21 (N.M. 2014). Thus, it must be narrowly tailored in order to survive heightened constitutional  
22 scrutiny. See Brown, 338 P.3d at 1292 ("Intentionally setting bail so high as to be unattainable is

23 <sup>21</sup> The statutory factors are: 1) The length of residence in the community; 2) The status and history of employment;  
24 3) Relationships with the person's spouse and children, parents or other family members and with close friends; 4)  
25 Reputation, character and mental condition; 5) Prior criminal record, including, without limitation, any record of  
26 appearing or failing to appear after release on bail or without bail; 6) The identity of responsible members of the  
27 community who would vouch for the reliability of the person; 7) The nature of the offense with which the person is  
28 charged, the apparent probability of conviction and the likely sentence, insofar as these factors relate to the risk of  
not appearing; 8) The nature and seriousness of the danger to the alleged victim, any other person or the community  
that would be posed by the person's release; 9) The likelihood of more criminal activity by the person after release;  
and 10) Any other factors concerning the person's ties to the community or bearing on the risk that the person may  
willfully fail to appear.



1 simply a less honest method of unlawfully denying bail altogether . . . If a defendant should be  
2 detained pending trial . . . , then that defendant should not be permitted any bail at all. Otherwise  
3 the defendant is entitled to release on bail, and excessive bail cannot be required.”).

4 To set bail in an amount that is *unattainable*, a court must find, on the record, by “clear  
5 and convincing evidence” after a “full-blown adversarial hearing” that 1) the defendant presents  
6 an “identified and articulable threat” to the community or presents a risk of flight and 2) no  
7 conditions or combination of conditions alternative to detention could reasonably mitigate that  
8 danger based on an individualized consideration of defendant’s unique circumstances. U.S. v.  
9 Salerno, 481 U.S. 739, 750-51 (1987) (emphasis added); ODonnell, 251 F.Supp.3d at 1143-44;  
10 Jones v. City of Clanton, No. 215CV34-MHT, 2015 WL 5387219, at \*2 (M.D. Ala. Sept. 14,  
11 2015) (holding that the “use of a secured bail schedule to detain a person . . . without an  
12 individualized hearing regarding the person’s indigence and the need for bail or alternatives to  
13 bail, violates the Due Process Clause”); Carlisle v. Desoto County, Mississippi, 2010 WL  
14 3894114, at \*5 (N.D. Miss. Sept. 30, 2010) (holding that because a “compelling state interest”  
15 was required for pretrial detention, the plaintiff’s rights were violated if he was jailed without  
16 consideration of non-financial alternatives).

17 Before setting bail in an unattainable amount, due process mandates that a magistrate  
18 makes an individualized determination whether preventative detention is the least restrictive  
19 means of assuring community safety and ensuring the accused’s return to court. Salerno, 481  
20 U.S. 739. This did not happen in this case. As discussed above, the magistrate *sua sponte* ordered  
21 the setting of unattainable bail, resulting in the continued detention of Petitioner without a “full-  
22 blown adversarial hearing,” without “clear and convincing evidence” that Petitioner presents an  
23 “identified and articulable threat” to the community or presents a risk of flight, and without a  
24 request from the State for preventive detention. Instead, the magistrate *sua sponte* ruled that  
25 detention was appropriate. As a result, the lower court’s unattainable bail setting violates due  
26 process. The bail setting order should be vacated and Petitioner should be released.

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

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

These decisions make clear that requiring money bail as a release condition in an amount impossible for the defendant to pay is equivalent to a detention order, "which is only appropriate when the state shows and the court finds that no condition or combination of conditions of release could satisfy the purposes of bail, to assure the defendant's appearance at trial or hearing and the safety of the public."<sup>22</sup> Weatherspoon v. Oldham, 2018 WL 1053548, at \*6 (W.D. Tenn. Feb. 26, 2018) (additional citations omitted). Thus, in order to withstand constitutional scrutiny, unattainable money bail settings must be preceded by a hearing at which the court determines the least restrictive means of ameliorating an accused's risk of flight and danger to the community. Absent such a determination, an unattainable release condition – such as an unattainable bail setting – operates as a *de facto* detention order that

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<sup>22</sup> The U.S. Supreme Court has also held that release conditions that exceed a purported threat posed by a particular defendant violate the "excessive bail" clause of the Eighth Amendment. Salerno, 481 U.S. at 754; see also U.S. Const. amend. VIII; Nev. Const. Art. 1 § 6-7; NRS 178.484(1) (stating "a person arrested for an offense other than murder of the first degree must be admitted to bail").

discriminates on the basis of wealth. Weatherspoon v. Oldham, 2018 WL 1053548, at \*6 (W.D. Tenn. Feb. 26, 2018). This violates equal protection and due process guarantees.

**D. The Lower Court Set a Bail Amount Based on a Bail Schedule in Violation of Nevada Law**

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

In making this determination, the Court must consider: “(1) the nature and circumstances of the offense charged; (2) the financial ability of the defendant to give bail; (3) the character of the defendant; and (4) the factors listed in NRS 178.4853.” NRS 178.498. Significantly, an accused’s ability to give bail *must* be part of the bail analysis. See Stack v. Boyle, 342 U.S. 1, 4-5 (1951) (stating “Bail set at a figure higher than an amount reasonably calculated to fulfill [its] purpose is ‘excessive’ under the Eighth Amendment”); U.S. v. Polouzzi, 697 F. Supp. 2d 381, 390 (E.D.N.Y. 2010) (“Bail conditions are unconstitutionally excessive if they impose restraints that are more than necessary to achieve the government’s interest [in] preventing risk of flight and danger to society...”). The U.S. Justice Department has declared that “[i]ncarcerating individuals solely because of their inability to pay for their release, whether through the payment of fines, fees, or a cash bond, violates the Equal Protection Clause of the Fourteenth Amendment.”<sup>23</sup> Jones v. City of Clanton, 2015 WL 5387219 at 4 (M.D. Ala. Sep. 14, 2015); see also Varden v. City of Clanton, Civ. No. 15-34, Dckt. No. 26 at 1 (M.D. Ala. Feb. 13, 2015).

<sup>23</sup> The following year, the Justice Department issued a “Dear Colleague Letter” advising state and local courts that due process and equal protection principles forbid using “bail or bond practices that cause indigent Detainees to remain incarcerated solely because they cannot afford to pay for their release.” Letter from Vanita Gupta to Colleagues at 2 (Mar. 14, 2016), available at <https://www.justice.gov/crt/file/832461/download>.

1 The Justice Department reasoned that a secured money bail schedule, like the one utilized in  
2 Clark County, “do[es] not account for individual circumstances of the accused” and it  
3 “essentially mandate[s] pretrial detention for anyone who is too poor to pay the predetermined  
4 fee.” Jones, 2015 WL 5387219 at 9. As a result, the Justice Department concluded that setting a  
5 bail without regard to the detainee’s financial ability to pay “amounts to mandating pretrial  
6 detention only for the indigent.” Id.

7 Courts must tailor bail to a detainee’s financial resources, setting bail only as high as  
8 necessary to reasonably assure the detainee’s return to court. The amount that would provide a  
9 meaningful incentive to return to court differs for someone who lives on \$600 a month and  
10 someone who lives on \$6,000 a month. Bail is excessive and, therefore, unlawful when not  
11 adjusted to a pretrial detainee’s financial circumstances and not set at the minimum amount  
12 needed to ensure return to court. Stack, 342 U.S. at 4-5 (bail exceeding that necessary to achieve  
13 its purpose violates Eighth Amendment); see also, Salerno, 481 U.S. at 754 -55 (affirming Stack  
14 and holding that “[w]hen the Government has admitted that its only interest is in preventing  
15 flight, bail must be set by a court at a sum designed to ensure that goal, and no more”). Thus,  
16 when bail is set utilizing a standardized bail schedule without considering a detainee’s character  
17 and financial means the magistrate violates the accused’s constitutional and statutory rights. In  
18 addition, in setting a standard bail, the magistrate fails to consider “the financial ability of the  
19 defendant to give bail” and “the character of the defendant” violates NRS 178.498.<sup>24</sup>

20 Here, the lower court set an unattainable bail amount without considering Petitioner’s  
21 ability to pay that bail in violation of Nevada statute and U.S. Constitutional law.

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25 <sup>24</sup> Pretrial detainees should not remain in custody simply because they are poor. Research indicates that  
26 imposing money bail does not improve the chances that a Detainee will return to court, nor does it protect  
27 the public because many high-risk Detainees have access to money and can post bond. Instead, it serves  
28 only to treat differently those who can and cannot access money. Incarceration can disrupt the positive  
factors in the Detainee’s life and lead to negative collateral consequences, including job loss, loss of  
residence, inability to care for children, and disintegration of other positive social relationships.

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DATED this 7<sup>th</sup> day of June, 2018.

By /s/ Robert E. O'Brien  
Robert E. O'Brien, #10944  
Deputy Public Defender

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YOU WILL PLEASE TAKE NOTICE that the foregoing PETITION FOR WRIT OF HABEAS CORPUS will be heard on the 19th day of June, 2018, at 9:00 AM a.m. in Department No. IX of the District Court.

**PHILIP J. KOHN**  
**CLARK COUNTY PUBLIC DEFENDER**

## CERTIFICATE OF ELECTRONIC SERVICE

By /s/ Patty Barber-Bair  
An employee of the Clark County Public  
Defender's Office

**CERTIFICATE OF ELECTRONIC SERVICE**

I hereby certify that service of the above and forgoing EMERGENCY PETITION FOR WRIT OF HABEAS CORPUS OR, IN THE ALTERNATIVE, PETITION FOR WRIT OF MANDAMUS was served via email to JUSTICE COURT DEPARTMENT 8 at Julie.Olness-Weiner@clarkcountynv.gov and Lauren.Montrone@clarkcountynv.gov on this 8<sup>th</sup> day of June, 2018.

By /s/ Patty Barber-Bair

An employee of the Clark County Public  
Defender's Office

Case Name: Alfonso Resendez

Case No. 18M13923X

Dept No. 8