

PETITIONERS' OPPOSITION TO
MOTION TO DISMISS

COMES NOW Petitioner JOSE VALDEZ-JIMENEZ, by and through his attorneys, NANCY LEMCKE, Deputy Clark County Public Defender, and CHARLES GERSTEIN, Esq., and hereby opposes Respondent's Motion to Dismiss his Petition pending before this Honorable Court.

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

DATED this 22nd day of July, 2019.

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I. INTRODUCTION

This case raises issues of fundamental importance for pretrial justice in Nevada. The harm endured by Petitioner Jose Valdez-Jimenez—pretrial detention without the substantive findings and procedural safeguards the Constitution requires—is common in the state’s lower courts. This Petition represents one 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 that violate the rights of the accused. No one ever inquires, on the record, whether an arrestee can pay a particular money-bail amount. Arrestees who cannot pay end up jailed. And they end up jailed without a judge finding that the person poses any danger to the community or a risk of flight, let alone finding sufficient proof that detention is the least restrictive means of reasonably mitigating any demonstrated flight risk and assuring community safety.

This practice is flagrantly unconstitutional under the United States Constitution and it will continue unabated without this Court’s review. Petitioner Valdez-Jimenez respectfully requests that this Honorable Court deny Respondent’s Motion to Dismiss his Petition as moot and resolve on the merits the legal claims that it contains.

II. ARGUMENT

Respondent seeks to dismiss the Petition of Jose Valdez-Jimenez from the consolidated action here because Mr. Valdez-Jimenez pleaded guilty on June 25, 2019, and is awaiting sentencing, which is currently scheduled for August 13, 2019. Respondent asserts that the guilty plea renders moot Petitioner's constitutional claims. Because this case is capable of repetition, yet evading review, this Court should deny Respondent's motion to dismiss.

This Honorable Court retains jurisdiction to hear this case because "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)). Both of those conditions are present here.

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

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 disposition of the person’s criminal case. Given the short and uncertain duration of criminal cases (which are limited by speedy trial laws and may resolve without notice on a plea bargain or dismissal at any time), this Court and courts across the country¹ routinely hold that challenges to systemic pretrial practices are justiciable after a petitioner’s trial or guilty plea. State v. Washoe Co. Public Defender, 105 Nev. 299, 301 (1989); Binegar v. District Court, 112 Nev. 544, 548 (1996) (finding that the issue presented fell within the capable of repetition, yet evading review exception “because it present[ed] a situation whereby an important question of law could not be decided because of its timing”).

This is because most pretrial confinement orders are short in duration—often 90 days or less. See generally Supplemental Appendix at 1-2; 3-213. 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, S.App. 1-2.

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 short duration of unlawful pretrial confinement orders makes it difficult, if not impossible, for this Honorable 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. S.App. 1-2. The district courts often defer ruling until transcripts of the justice court proceedings are produced. S.App. 1-2. This takes time: While some justice courts will sign orders directing expedited transcript production, others will not. S.App. 1-2. Once the district court has ruled, detainees may seek this Court's review. But this too takes time—time to collect transcripts, prepare a briefing submission, and assemble the accompanying appendix. Finally, for important systemic issues like those presented in this case, this Court needs time as well to consider the arguments, conduct oral argument, and craft an opinion. A case may be heard before unlawful pretrial detention ends only if everything described above is concluded before a detainee's criminal case is resolved, which can happen at any time, and often happens within a mere 90 days. Thus, absent application of the capable-of-repetition exception to the mootness doctrine, this Court will be deprived of its ability to enter much-needed legal holdings to remedy unconstitutional pretrial-detention practices by lower courts, practices that are ongoing every day.

Respondent argues the capable-of-repetition exception should not apply because this Court “cannot grant any effectual relief whatever in favor of the appellant.” Resp.’s Mot. at 4 (citing United States v. Strong, 489 F.3d 1055, 1059 (9th Cir. 2007)). But this 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. Indeed, this Court scheduled argument on the legality of the pretrial detention practices in these consolidated cases for several weeks after Petitioner’s scheduled trial.

Respondent correctly notes that Petitioner did not oppose the State’s request that the federal court dismiss his federal petition for mootness after his pretrial detention concluded. But unlike federal courts, 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, Bingear, 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).² This court therefore retains jurisdiction to hear the issues presented by Mr. Valdez-

² Federal courts also have a similar mootness exception for class action cases that covers important and systemic challenges akin to the one brought here. See Gerstein v. Pugh, 420 U.S. 103, 111 n.9 (1975)

Jimenez's petition, which otherwise evade this Court's review.

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

Despite Respondent's contention to the contrary, 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.

If this Honorable Court does not intervene now, the action challenged here will repeat every day. Respondent argues that any relief would be "fact-specific" to Mr. Valdez-Jimenez and "without widespread application to other cases." Resp.'s Mot. at 5. That is not true. The resolution of the legal issues in this case would answer basic questions about what substantive findings and procedural safeguards are required at bail hearings in Nevada. These questions have immediate and systemic application to bail proceedings in any person's case.

Moreover, over the past year, the Clark County Public Defender's Office made numerous challenges to detention orders materially identical to those at issue here (a small sampling of which is included in the Supplemental Appendix filed herewith). See generally S.App. 1-213. As these petitions reveal, the lower courts regularly fail to adhere to basic constitutional principles that other federal and state courts consider required. The lower courts are not conducting adversarial hearings or making findings

regarding the accused's financial means and ability to pay money bail. See Pet'r's Reply at 6-7; 15-16. For the indigent, the result is predictable and painful: they are confined pursuant to an unattainable money-bail order, which is technically an order of release but which is legally and practically equivalent to an order of detention. See, e.g., State v. Brown, 338 P.3d 1276, 1292 (N.M. 2014); Brangan v. Commonwealth, 80 N.E.3d 949, 964–65 (Mass. 2017); In re Humphrey, 19 Cal. App. 5th 1006, 1037 (Ct. App. 2018) (review pending); Caliste v. Cantrell, 329 F. Supp. 3d 296, 311 (E.D. La. 2018). These orders of pretrial detention are not made with any findings regarding the least restrictive means of addressing flight risk and community safety, let alone the constitutionally required finding that there exist no other alternatives available to reasonably protect the State's interests short of detaining a presumptively innocent person prior to trial. See Pet'r's Reply at 18-29. And because this adversarial inquiry is not occurring and because these findings are not made, lower courts are not applying the required evidentiary standards, or any standards, for determining the clear and convincing facts on which a finding of flight risk or danger must be predicated. See id. at 29-32. The result is illegal: pretrial detention even though the State has never demonstrated that such detention is necessary to serve any valid interest.

For Mr. Valdez-Jimenez, this illegal confinement lasted almost a year. And almost without exception, the unlawful detention protocol employed in Clark County continues unabated. This Court should hear this case on the merits.

III. CONCLUSION

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. Petitioner Jose Valdez-Jimenez respectfully requests that this Honorable Court deny Respondent's Motion to Dismiss his Petition and resolve his claims on the merits.

Dated this 22nd day of July, 2019.

Respectfully submitted,
DARIN IMLAY
CLARK COUNTY PUBLIC DEFENDER

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 22nd day of July, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service

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

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