IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSE VALDEZ-JIMENEZ,
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 Parties in Interest.

Case No. 76417

STATE'S RESPONSE TO AMICUS BRIEFS OF SOCIAL SCIENTISTS AND LAW PROFESSORS

LISA A RASMUSSEN, ESQ.
Law Office of Lisa Rasmussen
Nevada Bar #007491
601 South Tenth Street, Suite 100
Las Vegas, Nevada 89101
(702) 471-1436
Counsel for Social Scientists Amicus Curiae

FRANNY FORSMAN, ESQ.
Law Office of Franny Forsman
Nevada Bar #000014
1509 Becke Circle
Las Vegas, Nevada 89104
(702) 501-8728
Counsel for National Law Professors

CHARLES LEWIS GERSTEIN, ESQ.
Pro Hac Vice
OLEVIA BOYKIN, ESQ.
Civil Rights Corps.
910 17th Street, N.W., Ste. 200
Washington, D.C. 20006

Counsels for Petitioner

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

AARON D. FORD
Nevada Attorney General
Nevada Bar #007704
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Real Party In Interest

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STATE'S RESPONSE TO AMICUS BRIEFS OF SOCIAL SCIENTISTS AND LAW PROFESSORS

On August 1, 2019, this Court granted motions to file untimely amicus briefs of Law Professors and Social Scientists and gave the State just 15 days in which to respond. Within the time constraints allotted, the State now responds to amicus.

SOCIAL SCIENTISTS AMICUS BRIEF

The amicus brief of Social Scientists contains no legal argument or authority at all, but instead purports to summarize social and economic research on the effects of pretrial incarceration in general. As such, the brief introduces new facts and data into this mandamus proceeding which were not provided to the respective district court judges below and which bear little to no relation to the facts and circumstances

of these actual cases. Facts stated in counsel's brief will not supply a deficiency in the record. Sparks v. State, 96 Nev. 26, 29, 604 P.2d 802, 804 (1980), *citing* A Minor v. State, 85 Nev. 323, 454 P.2d 895 (1969). Furthermore, this Court does not act as a finder of fact. State v. Rincon, 122 Nev. 1170, 147 P.3d 233 (2006). This Court has a policy of declining to review factual issues that have neither been raised nor determined before a district judge. Gibbons v. State, 97 Nev. 520, 634 P.2d 1214 (1981), *citing* Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 623 P.2d 981 (1981).

Social Scientists address issues of racial and ethnic disparity in pretrial detention particularly among low-level or non-violent offenses, which are issues and circumstances not found in the present case at all. It is almost as if this amicus brief was drafted for another case somewhere else in the country and was imported wholesale into this case. The various statistics and studies cited pertain to other jurisdictions with circumstances not shown to exist in here in Clark County, Nevada, let alone in these two cases. None of the purported negative effects of pretrial detention have been alleged nor are at issue here. "An amicus curiae must accept the case before the reviewing court as it stands on appeal, with the issues as framed by the parties." 4 Am Jur 2d Amicus Curiae § 7 (2nd 2015); see also Tyler v. City of Manhattan, 118 F.3d 1400, 1403 (10th Cir. 1997) (declining to address previously unraised argument in amicus curiae brief because framing of the issues on appeal is "a prerogative more appropriately restricted to the litigants"); United States v. Board

of County Commissioners of the County of Otero, 184 F.Supp.3d 1097 (D.N.M. 2015) (Proposed amicus brief injected a new legal question into the litigation, did not present any argument related to the legal questions before the District Court on summary judgment, and thus was not of assistance to the Court).

LAW PROFESSORS AMICUS BRIEF

As to the amicus brief of Law Professors, the argument hinges on the supposed intersection of two lines of federal constitutional authority referred to as the Bearden line addressing wealth-based deprivations and the Salerno line which concerns pretrial preventative detention. While it is true that the Supreme Court has recognized some indigent-related constitutional claims raised by persons unable to pay court-related fees and fines in sentencing and post-conviction contexts, the Court has never recognized such claims in the pretrial bail context. See e.g., Bearden v. Georgia, 461 U.S. 660, 103 S.Ct. 2064 (1983). Nor has the Supreme Court ever held that money-bail systems are constitutionally invalid because indigent defendants have greater difficulty paying bail than other criminal defendants. Instead, the Supreme Court has generally viewed pretrial release of criminal defendants to be a regulatory, rather than a penal, matter, noting that the government may have legitimate interests in limiting pretrial release for certain types of defendants:

> Unless Congress expressly intended to impose punitive restrictions, the punitive/regulatory distinction turns on whether an alternative purpose to which the restriction may rationally be connected is assignable for it and whether it appears excessive in relation to the alternative purpose

> assigned to it. We conclude that the detention imposed by the Act falls on the regulatory side of the dichotomy. The legislative history ... indicates that Congress did not formulate the pretrial detention provisions as a punishment for dangerous individuals. Congress instead perceived pretrial detention as a potential solution to a pressing societal problem. There is no doubt that preventing danger to the community is a legitimate regulatory goal, nor are the incidents of pretrial detention excessive in relation to the regulatory goal Congress sought to achieve

United States v. Salerno, 481 U.S. 739, 747, 107 S.Ct. 2095, 2101 (1987). "[W]here wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages." Walker v. City of Calhoun, 901 F.3d 1245, 1261 (11th Cir. 2018), quoting San Antonio Independent School District, 411 U.S. 1, 93 S.Ct. 1278 (1973). The Supreme Court has never recognized a right to bail as absolute and there is no fundamental substantive due process right to be free from any form of wealth-based detention. O'Donnell v. Harris County, 892 F.3d 147, 163 (5th Cir. 2018). In the present cases, the State's interest in public safety and ensuring the defendant's appearance in court far outweighed any pretrial liberty interest minimally diminished by indigence.

CONCLUSION

Neither amicus brief in this case is particularly relevant nor helpful for addressing the facts and circumstances of these particular cases. There has been no showing of a violation of Due Process or Equal Protection which could warrant relief.

WHEREFORE, consistent with its position and briefing in this case, the State respectfully requests that mandamus be denied.

Dated this 16th day of August, 2019.

Respectfully submitted,

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

BY */s/ Steven S. Owens*
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155
(702) 671-2750

CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points of more, contains 917 words and does not exceed 30 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 16th day of August, 2019.

Respectfully submitted

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

BY */s/ Steven S. Owens*
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on August 16, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

NANCY M. LEMCKE
CHRISTY L. CRAIG
Deputy Public Defenders

LISA RASMUSSEN, ESQ.
FRANNY FORSMAN, ESQ.
Amicus Curiae

STEVEN S. OWENS
Chief Deputy District Attorney

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

HONORABLE MARK B. BAILUS
Eighth Judicial District Court, Dept. 18
Phoenix Building
330 S. Third Street, CTRM 110
Las Vegas, Nevada 89101

CHARLES LEWIS GERSTEIN, ESQ.
Pro Hac Vice
OLEVIA BOYKIN, ESQ.
Civil Rights Corps.
910 17th Street N.W., Ste. 200
Washington, D.C. 20006

/s/ E. Davis
Employee, Clark County
District Attorney's Office

SSO//ed