

Nevada Supreme Court Breaks Chains of Cash Bail

BY JOHN J. PIRO, ESQ.

"In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 756 (1987).

In Nevada, the norm is what should be the exception: our jails house many people who have not been convicted of a crime solely because they could not afford to pay for their release.¹ Traditional cash bail has two main problems. First, it allows a prosecutor to disguise a detention request as an unattainable cash bail demand. That is, a prosecutor could clandestinely seek detention of a person accused of a crime by hiding their request behind manipulations of money amounts that the accused could not afford. Such a prosecutor's unaffordable money request would amount to a *de facto* detention order without the prosecutor being forced to admit the purpose of their requested amount. Second, people awaiting trial from a jail cell generally suffer worse case outcomes.² Faced with the risk of losing their jobs, housing and custody of their children, even innocent people are compelled to plead guilty simply to get out of jail as quickly

as possible. Most alarmingly, the harms of pretrial incarceration and the cash bail system fall disproportionately on communities of color, because those communities are more likely to be detained pretrial than similarly situated white people.³

The Nevada Supreme Court's decision in *Valdez-Jimenez v. Eighth Judicial District Court*, 136 Nev. Adv. Op. 20 (2020), sets a new north star for pretrial release hearings in Nevada to comport with constitutional due process principles. This 6-1 decision represents a big doctrinal shift away from how many Nevada courts have previously conducted pretrial release hearings, and sets a new course for equalizing disparities in pretrial detention.⁴

CONSTITUTIONAL CONSIDERATIONS

"The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin v. United States*, 156 U.S. 432, 453 (1895).

Despite this axiomatic principle, cash bail has traditionally been utilized to keep presumptively innocent people in jail

before trial. The prior practice of allowing excessive cash bail had the same practical effect of denying bail altogether; thus, eroding the presumption of innocence. Accordingly, bail set in an amount that a person is unable to afford because they are too poor violates basic due process guarantees, because incarceration results only for those too poor to pay for their release.

Valdez-Jimenez course-corrects the old way of conducting detention hearings in two critical ways: (1) courts must treat unattainable cash bail as de facto detention orders; and (2) prosecutors must demonstrate by clear and convincing evidence the need for detention when asking for unattainable cash bail. This change means prosecutors can no longer request, and judges can no longer set, arbitrary cash bail amounts without determining whether cash bail is necessary, and if so, what amount the person can afford. As a result, *Valdez-Jimenez* represents a big step toward eliminating wealth-based detention, and hearings in Nevada should now be conducted drastically differently.

DETENTION HEARING PROCEDURES NECESSARY TO COMPORT WITH DUE PROCESS

Prompt Hearing

Valdez-Jimenez holds that a person is constitutionally entitled to “a prompt individualized determination on his or her pretrial custody status.” Although the court left open the question of what “prompt” means, the weight of authority defines prompt as no later than 48 hours, and potentially, no later than 24 hours.⁵ For example, in *Gerstein v. Pugh*, 420 U.S. 103 (1975), the Supreme Court held that the constitution requires a prompt probable cause review for individuals subject to warrantless arrests. The term “prompt” was subsequently defined as *no later* than 48 hours following arrest. *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). Notably, *McLaughlin* specified that 48 hours was an *outer limit*—available only if a more expeditious review is not practicable.⁶ Following *McLaughlin*, multiple federal courts reviewing state and city detention protocols have held that detention hearings must occur within 48 hours of arrest, but only when the government, in the exercise of due diligence, cannot conduct the inquiry sooner.⁷

Should a Nevada county set a standardized bail schedule that allows a wealthy person to pay a fixed amount of money to secure immediate release, while a poor person must wait for a detention hearing, it may violate the Equal Protection Clause as wealth-based discrimination.⁸ In these cases, practitioners should argue for a detention hearing within 24 hours of arrest.

Adversarial Hearing

District judges may no longer make custody and cash bail determinations by reviewing a paper record of arrest without holding a hearing. Rather, judges must conduct a counseled adversarial hearing with robust due process protections. Given

the adversarial nature of this hearing, the accused should have access to any information prosecutors are using to form detention arguments.

The Prosecution Bears a Clear and Convincing Evidentiary Burden

Valdez-Jimenez makes clear that the accused no longer bears the burden for showing good cause as to why they should be released.⁹ Instead, prosecutors must now decide at the outset whether they will request detention or what conditions should be imposed upon release. Prosecutors now bear the burden of showing by clear and convincing evidence that every requested condition sought is the least restrictive means necessary to assure the accused’s appearance at a future court date and to protect community safety.

This clarification of the burden of proof repudiates the previous detention hearing procedures in Nevada, and breathes

new life into the constitutional principle, “liberty is the norm.” Moreover, it prevents a prosecutor from disguising a detention request as an unattainable cash bail demand. If prosecutors want a person detained, they must expressly seek detention, rather than requesting a money bail amount that functionally denies bail simply because the person is too poor to pay.

Release Factors Under NRS 178.4853 Must Still be Considered

When deciding release conditions, courts still must consider the factors set forth in NRS 178.4853, such as the person’s ties to the community, employment history, family relationships, prior record, charged offense, potential danger and other factors.¹⁰ After considering these factors, no bail should be set if the court finds that release on personal recognizance or nonmonetary conditions is sufficient to further the state’s compelling interests, as then any amount of cash bail would be excessive. Only when no combination of nonmonetary conditions is sufficient must the court determine a necessary amount of money bail.

These factors provide fertile ground to show that the clear and convincing evidence burden has not been met.

Cash Bail May Be a Condition of Release, but It Must be Tethered to an Accused’s Financial Resources After Certain Thresholds are Met

Monetary conditions may still be imposed, but only if prosecutors prove by clear and convincing evidence that no combination of nonmonetary conditions are sufficient. More importantly, if the court determines that cash bail is necessary, it *must* consider an accused’s financial resources when setting the amount of cash bail along with the factors set forth in NRS 178.498.¹¹ The monetary amount must be proven by clear and

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convincing evidence to be the least restrictive means necessary to ensure community safety and mitigate flight risk.

Consistent with the reasoning of *Valdez-Jimenez*, concerns about community safety should be addressed through nonmonetary release conditions, not by covertly setting cash bail so high that an accused cannot pay it. *See also* ABA Criminal Justice Standards Committee, Pretrial Release 17, Standard 10-5.3(b) (3d ed. 2007).

Courts Must Make Findings on the Record

At the end of the prompt, adversarial hearing, courts must now make findings of fact stating the reasons for the bail conditions on the record. Transcribed oral findings are sufficient as long as the findings provide a sufficient basis for the decision.

DETENTION COULD BE POSSIBLE

Although *Valdez-Jimenez* restricts the use of cash bail, preventative detention of an accused is possible, subject to heightened due process requirements.

The Nevada Constitution prohibits excessive bail, but also guarantees the right to bail for all offenses except murder. Nev. Const. art. I, §§ 7-8. But, if prosecutors are transparent in asking for detention, and during a full-blown adversarial hearing, they prove by clear and convincing evidence that no condition or combination of conditions of release will reasonably assure the accused's appearance in court or protect the community, then the carefully limited exception to liberty—detention—may be allowed. Practitioners must be ready to rebut prosecutors' assertions by showing the court that alternative, less-restrictive conditions will reasonably ensure the accused's appearance and safety of the community.

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The prior practice of unaffordable money bail kept indigent people in jail before trial merely because they were too poor to pay for their freedom. The Nevada Supreme Court corrected this insidious blight on Nevada's justice system in *Valdez-Jimenez* and illuminated a pathway forward by ensuring that pretrial detention hearings will now be substantive adversarial hearings with robust due process protections. This new path reinvigorates the presumption of innocence in Nevada and attempts to end the discriminatory treatment of the poor. Although the decision leaves open the question of promptness, *Valdez-Jimenez* equips practitioners with a host of tools to enforce the principle that "liberty is the norm" and detention is the carefully limited exception.

1. Criminal Justice Policy Program, Harvard Law School, *Bail Reform: A Guide for State and Local Policymakers*, 1 (2019).
2. *Id.* (citing Criminal Justice Policy Program, Harvard Law School, *Moving Beyond Money: A Primer On Bail Reform* 7 (2016)).
3. *Id.* (citing Stephen Demuth & Darrell Steffensmeier, *The Impact of Gender and Race-Ethnicity in the Pretrial Release Process*, 51 SOCIAL PROBLEMS 222, 222 (2004)).
4. It is important to make clear that bail and *cash bail* are not the same. Bail is a condition of release, and can be a nonmonetary condition as simple as an oral promise to appear at the required court dates. Bail, *Black's Law Dictionary* (11th ed. 2019). Cash bail on the other hand is an amount of money that may be imposed as a condition of release only if certain factors are met. *Id.*
5. In Clark County, the Criminal Justice Coordinating Council helped create an initial arraignment court in Las Vegas Justice Court that is able to hold a detention hearing within 12 hours after arrest.

6. Justice Scalia's dissent criticized the 48-hour limitation as "overly generous" because then-existing technology allowed for more expeditious review and concluded that the Fourth Amendment compelled a shorter time frame: no more than 24 hours. *McLaughlin*, 500 U.S. at 68–69 (citing *Bernard v. City of Palo Alto*, 699 F.2d 1023, 1025 (9th Cir. 1983); *McGill v. Parsons*, 532 F.2d 484, 485 (5th Cir. 1976); *Sanders v. Houston*, 543 F. Supp. 694, 701–03 (S.D. Tex. 1982); *Lively v. Cullinane*, 451 F. Supp. 1000, 1003–04 (D.D.C. 1978); *Dommer v. Hatcher*, 427 F. Supp. 1040, 1046 (N.D. Ind. 1975) (24-hour maximum; 48-hours if Sunday included), *rev'd in part on other grounds*, 653 F.2d 289 (7th Cir. 1981)).

7. See, e.g., *O'Donnell v. Harris County*, 892 F.3d 147, 160 (5th Cir. 2018) (citing *Gerstein*, 420 U.S. 103; *McLaughlin*, 500 U.S. at 56–57) ("We conclude that the federal due process right entitles detainees to a hearing within 48 hours."); *Walker v. City of Calhoun*, 901 F.3d 1245 (11th Cir. 2018); *Jones v. City of Clanton*, 2:15-cv-34-MHT, 2015 WL 5387219 (N.D. Ala. Sept. 14, 2015).
8. In *Pierce v. City of Velda City*, 4:15-cv-570-HEA, 2015 WL 10013006 (E.D. Mo. June 3, 2015), a federal district court enjoined Velda City's practice of holding detention hearings 48 hours after arrest for those too poor to pay a scheduled money bail amount, entering the following declaratory judgment:

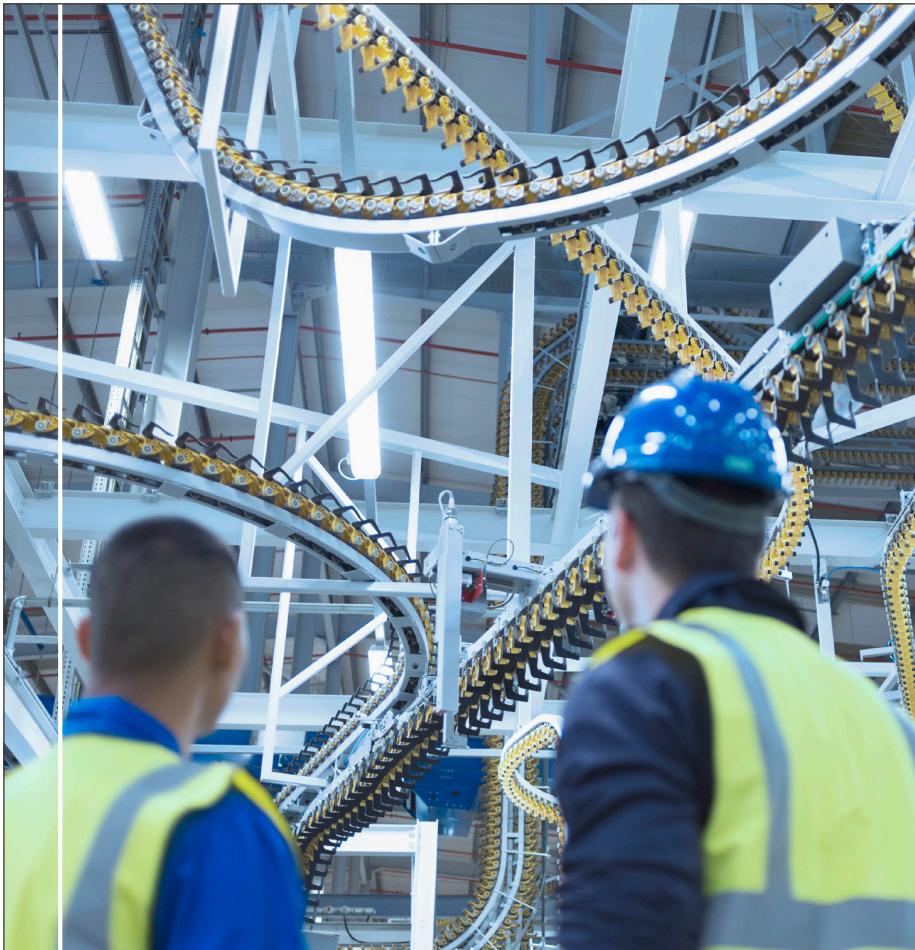
- a. The use of a secured bail schedule to set the conditions for release of a person in custody after arrest for an offense that may be prosecuted by Velda City implicates the protections of the Equal Protection Clause when such a schedule is applied to the indigent. No person may, consistent with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, be held in custody after an arrest because the person is too poor to post a monetary bond. *If the government generally offers prompt release from custody after arrest upon posting a bond pursuant to a schedule, it cannot deny prompt release from custody to a person because the person is financially incapable of posting such a bond.*

Id. at *1 (emphasis added). Accordingly, Velda City was ordered to hold detention hearings for detainees too poor to pay fixed money bail within 24 hours of arrest. *Id.*

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9. The “good cause” language in NRS 178.4851(1), which burdened individuals to show “good cause” why they should be released, was found unconstitutional:
 - a. Upon a showing of good cause, a court may release without bail any person entitled to bail if it appears to the court that it can impose conditions on the person that will adequately protect the health, safety and welfare of the community and ensure that the person will appear at all times and places ordered by the court. Such language undermined the right to non-excessive bail, excused Nevada courts from considering less restrictive conditions before determining that bail is necessary, and relieved prosecutors of their burden to prove by clear and convincing evidence that cash bail is necessary. Because the remainder of the statute can be given legal effect, the “good cause” language was severed from NRS 178.4851(1).
10. See NRS 178.4853.
11. See NRS 178.498



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