ARIZONA COURT OF APPEALS

DIVISION ONE

Robert Louis Hiskett, *Petitioner*, v. The Honorable Rick Lambert, Judge of the Superior Court of the State of Arizona in and for the County of Mohave, *Respondent Judge*, and The State of Arizona, ex rel. Matthew J. Smith, Mohave County Attorney, *Real Party in Interest.*	)	Court of Appeals Division One No. Mohave County Superior Court No. CR-2018-01854 **PETITION FOR SPECIAL ACTION**

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Robert Louis Hiskett sits in jail on a $100,000 secured bond he cannot afford, set without proper justification and in violation of his rights. This bail was set ostensibly as punishment for raising a constitutional challenge to an Arizona statute—A.R.S. § 13-3967(E)(1)—in the Mohave County Superior Court. Because swift action from this Court is necessary to remedy this injustice, Mr. Hiskett hereby petitions this Court to grant jurisdiction of this petition for special action and release him from the Mohave County Jail.

FACTS

On December 10, 2018, Mr. Hiskett appeared before Respondent Judge on a summons after being indicted on three counts of Sexual Conduct with a Minor Under Fifteen Years of Age as Dangerous Crimes Against Children, Class 2 Felonies. Exhibit 1, Appearance Order with Release Conditions. He pled not guilty, adamantly proclaiming his innocence, and was released on his own recognizance with an order that he not have contact with the alleged victim, not leave the state without prior court approval (the court later allowed Mr. Hiskett to travel to California for work purposes), not have any contact with any youth under the age of sixteen except for supervised visits with his own child, and be photographed and fingerprinted before the next court date. Pursuant to A.R.S. § 13-3967(E)(1), Respondent Judge also ordered that Mr. Hiskett "is to wear a GPS monitoring device within 48 hours of this setting and is responsible for all costs associated with it." *Id*.

Mr. Hiskett complied with every condition of release. He appeared as ordered at every court hearing and has been GPS monitored by the SCRAM company, which charges Mr. Hiskett nearly $400 per month. Mr. Hiskett is employed but had to move out of his home and is now supporting two households due to the condition that he have only supervised visits with his child. As such, Mr. Hiskett feared he would not be able to afford the cost of GPS monitoring while his case is pending and, as a result, be subject to incarceration. He therefore filed a Motion to Modify a Release Condition ("Motion") on April 17, 2019. Exhibit 2, Motion to Modify a Release Condition. In his Motion, Mr. Hiskett raised constitutional challenges to A.R.S. § 13-3967(E)(1) and further argued that Arizona law did not allow the cost of pretrial electronic location monitoring to be placed upon pretrial defendants.

Unfortunately, Mr. Hiskett's fear of incarceration was well founded. After hearing argument from Mr. Hiskett on his Motion and hearing that the State took "no position," Respondent Judge stated that he thought the State should have opposed Mr. Hiskett's Motion. Exhibit 3, Declaration of Jared G. Keenan.[1] Respondent Judge also said that the State should have opposed similar arguments made in two previous cases in the Mohave County Superior Court, *Elias Martinez v. Hon. Sipe/State*, No. 1 CA-SA 19-0034, and *Michael Lavar Brown v. Hon.*

[1] Petitioner will supplement the record with a copy of the hearing transcript as soon as it becomes available.

Sipe/State, No. 1 CA-SA 19-0035. *See* Exhibit 4, Order Accepting Special Action Jurisdiction; Granting Relief; Denying Oral Argument; and Denying Motion to Consolidate, No. 1 CA-SA 19-0034, and Order Accepting Special Action Jurisdiction; Granting Relief; and Denying Oral Argument, No. 1 CA-SA 19-0035.

Respondent Judge then discussed the factors listed in A.R.S. § 13-3967 that judges are required to consider when setting bail. Exhibit 3, Declaration of Jared G. Keenan. Respondent Judge gave little, if any, weight to all factors that favored Mr. Hiskett's right to pretrial liberty and specifically stated that he was giving the most weight to "[e]vidence that the accused poses a danger to others in the community." *Id.* Respondent Judge's analysis, however, was based solely on the charged crimes and failed to articulate any specific danger Mr. Hiskett may have posed. *Id.* Indeed, when asked for input, the State simply read the probable cause statement in the case—information Respondent Judge already considered when he released Mr. Hiskett on his own recognizance at his initial appearance. *Id.* Despite having no evidence that Mr. Hiskett posed a danger to others in the community, and without considering other alternatives, Respondent Judge vacated the order imposing pretrial electronic monitoring at Mr. Hiskett's expense, imposed a $100,000 secured bond, and sent Mr. Hiskett to jail in handcuffs. *Id.*

ISSUES FOR REVIEW

1. Did Respondent Judge abuse his discretion by ordering Mr. Hiskett held in jail on a $100,000 secured bond after Mr. Hiskett raised a constitutional challenge to a previously imposed pretrial release condition?

2. Did Respondent Judge err by rejecting Mr. Hiskett's constitutional and statutory claims raised in his Motion?

JURISDICTION

This Court may, in its discretion, exercise jurisdiction over a special action where there is no equally plain, speedy, and adequate remedy by appeal. Ariz. R. P. Spec. Act. 1(a). Here, Mr. Hiskett seeks review of Respondent Judge's decision to hold him in jail on an excessive bond that he cannot afford, despite his previous compliance with all pretrial release conditions. In such a situation, special action relief is the only remedy because pretrial release issues concerning A.R.S. § 13-3967 "will become moot if not reviewed by special action." *Haag v. Steinle*, 227 Ariz. 212, 214, ¶ 5 (App. 2011). Indeed, "*any* issues involving . . . pretrial incarceration or release will become moot once . . . trial begins." *Fragoso v. Fell*, 210 Ariz. 427, 429, ¶ 3 (App. 2005) (emphasis added).

Moreover, as this Court has found, special action review is "particularly appropriate" when a "purely legal issue is one of first impression and statewide importance and could readily recur in other cases." *Fragoso*, 210 Ariz. at 429, ¶ 3. The issues raised in Mr. Hiskett's underlying Motion and again in this Petition fit

these criteria. First, they are purely legal as they involve the interpretation and constitutionality of a state statute. Second, this case raises issues of first impression. And finally, they are of statewide importance as they affect everyone in the state charged with a crime requiring electronic monitoring pursuant to A.R.S. § 13-3967(E)(1) and who now face the real threat of incarceration if they raise a constitutional challenge to this statute. As such, special action review is both appropriate and necessary here.

ARGUMENT

I. RESPONDENT JUDGE ABUSED HIS DISCRETION BY ORDERING MR. HISKETT HELD IN JAIL ON A $100,000 SECURED BOND AFTER MR. HISKETT RAISED A CONSTITUTIONAL CHALLENGE TO A PREVIOUSLY IMPOSED PRETRIAL RELEASE CONDITION.

A. Respondent Judge erred in setting a $100,000 secured bond for Mr. Hiskett because he did not comply with A.R.S. § 13-3967 or the applicable rules, which violates the Arizona and U.S. Constitutions.

"[T]he Arizona Constitution, statutes, and rules restrict discretionary pretrial release conditions." *Samiuddin v. Nothwehr*, 243 Ariz. 204, 210, ¶ 18 (2017). To effectuate Arizona's prohibition on excessive bail, Ariz. Const. art. 2, § 15, Rules 7.2 and 7.3 and A.R.S. § 13–3967 "require release conditions to be 'the least onerous' and 'reasonable and necessary' to protect the community. *Id.* "Discerning the 'least onerous' release condition 'reasonable and necessary' to protect the public necessarily requires the judge to make an individualized determination." *Id.* at 211,

¶ 24. When a court faithfully applies Arizona's statutory and rule-based pretrial release scheme, it also satisfies substantive due process standards because the scheme "requires courts to tailor pretrial release conditions to be the least onerous, reasonable and necessary to effectuate the state's compelling interest in protecting 'other persons or the community.'" *Id.* at 210, ¶ 18 (citations omitted).

Respondent Judge failed to properly apply Arizona's pretrial release scheme when he set a $100,000 secured bond requirement over Mr. Hiskett's release. First, Respondent Judge entirely discounted all of the factors in A.R.S. § 13–3967(B) that favored allowing Mr. Hiskett to remain free on his own recognizance, and instead explicitly gave the greatest weight to the Judge's unsupported conclusion that Mr. Hiskett posed some unnamed risk to the community. Second, Respondent Judge made no individualized determination regarding Mr. Hiskett posing a danger to the community. Instead, his conclusion that there was such a danger was based solely on the nature of the crime charged. Courts may not presume dangerousness and order pretrial detention based on charge alone. *See State v. Wein*, 244 Ariz. 22, 28 (2018); *Samiuddin*, 243 Ariz. at 212, ¶ 25 *Simpson v. Miller*, 241 Ariz. 341, 349, ¶ 27 (2017).[2] Finally, it is evident that a $100,000 secured bond is not the least onerous

[2] The Arizona Supreme Court held in both *Wein* and *Simpson v. Miller* that a charge of sexual assault and sexual contact with a minor, respectively, did not amount to sufficient proxies for a risk of either flight or dangerousness such that charge alone could justify an order of pretrial detention. Pretrial detention can only be justified

means necessary to protect the community because Mr. Hiskett had already been out on his own recognizance for six months without incident before he was abruptly sent to jail.

The $100,000 secured bond also directly violates the Arizona and federal constitutional prohibitions against excessive bail because it is not reasonably calculated to protect the community or to secure his appearance in court. To the contrary, Mr. Hiskett voluntarily appeared in court on May 16 and every other time he was required to do so.

The right to pretrial liberty is fundamental. *Lopez-Valenzuela v. Arpaio,* 770 F.3d 772, 780 (9th Cir. 2014) (citations omitted). Any infringement on the right to pretrial liberty must therefore be narrowly tailored to serve a compelling state interest. *Id.* Respondent Judge violated Mr. Hiskett's fundamental right with his May 16 orders.

B. Respondent Judge's May 16, 2019 orders were the product of unconstitutional bias against Mr. Hiskett based on the outcome in previous cases raising the same issues.

"[D]ue process demands that the judge be unbiased." *Railey v. Webb*, 540 F.3d 393, 399 (6th Cir. 2008) (citing *In re Murchison*, 349 U.S. 133, 136 (1955)); *see also Bracy v. Gramley*, 520 U.S. 899, 904 (1997) ("Due Process Clause clearly requires

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by an individualized process and fact-specific findings of a risk not otherwise manageable by alternative conditions.

a fair trial in a fair tribunal[.]") (citation and internal quotation marks omitted); *Costa v. Mackey*, 227 Ariz. 565, 571, ¶ 12 (App. 2011) ("A defendant's right to a fair trial includes the right to a judicial officer who is fair and impartial.") (citation omitted). Respondent Judge's statements during the hearing on May 16, the manner in which he conducted the hearing, and his rulings, establish that his orders were the product of bias against Mr. Hiskett based on earlier cases in Mohave County in which other defendants raised similar constitutional challenges.

In *Brown* and *Martinez*, Mr. Hiskett's lawyers successfully challenged Mohave County's requirement that criminal defendants pay for their own mandatory electronic monitoring. In both cases, this Court ordered that public funds must be used to pay for pretrial electronic monitoring. Following this Court's decisions in those cases, the Mohave County Superior Court ordered that Mohave County must reimburse Mr. Brown and Mr. Martinez for the money they had already paid toward their electronic monitoring.

Respondent Judge made it clear during the hearing in this case that he was aware of the proceedings in *Brown* and *Martinez*. Further, Respondent Judge made it clear that he was unhappy that Mr. Hiskett and defendants Brown and Martinez had challenged the County's practice of requiring defendants to pay for their own monitoring and that he was very displeased with the State's decision to take no position on the challenges. Exhibit 3, Declaration of Jared G. Keenan.

Although adverse judicial decisions alone cannot generally demonstrate bias, the Respondent Judge himself made a record of his "extrajudicial source of bias." (citing *State v. Ellison*, 213 Ariz. 116, 129 ¶ 40 (2006) (citations omitted). This bias was apparently borne from the new requirement that the County, not criminal defendants, pay for electronic monitoring. *Cf. Cain v. City of New Orleans*, 281 F. Supp. 3d 624, 658 (E.D. La. 2017) (finding substantial conflict of interest where court budget got significant funding through judicially imposed fines and fees and stating that judges "would not be in this predicament if the state and city adequately funded" court budget). Indeed, Respondent Judge repeatedly claimed that although larger counties like "Maricopa and Pima" may be able to afford the cost of pretrial electronic monitoring, rural counties like Mohave cannot. Respondent Judge also expressed his concern that if A.R.S. § 13-3967(E)(1) were interpreted to require counties, not pretrial defendants, to bear the cost of electronic monitoring, it would "bankrupt" Mohave County.

Finally, Respondent Judge referenced this Court's statement in its orders in *Brown* and *Martinez* that "[t]his order is without prejudice to the paying public entity seeking to recover the expended funds at sentencing should the underlying criminal proceedings result in a criminal conviction" to claim that the recovery of expended funds would likely be impossible because those convicted would either not have money to pay or would simply fail to pay. Although concern for the financial straits

of Mohave County may be understood, this concern is not a basis to revoke an individual criminal defendant's release, particularly given the fundamental nature of pretrial liberty. Further, in expressing this concern immediately before revoking Mr. Hiskett's release, Respondent Judge demonstrated improper bias.

II. RESPONDENT JUDGE ERRED BY REJECTING MR. HISKETT'S CONSTITUTIONAL AND STATUTORY CLAIMS RAISED IN HIS MOTION.

From the outset of the May 16 hearing, Respondent Judge was clear that he did not want to address any of the issues raised in Mr. Hiskett's Motion. Exhibit 3, Declaration of Jared G. Keenan. Instead, Respondent Judge used the opportunity to impose new, harsher conditions of release. As such, Respondent Judge implicitly rejected all of Mr. Hiskett's constitutional and statutory claims raised in his Motion without addressing them. Because Respondent Judge's rejection of Mr. Hiskett's claims was in error, this Court should review the following claims on special action review.

A. Arizona law requires counties to pay the cost of pretrial electronic monitoring.

Even before Respondent Judge ordered a $100,000 secured bond requirement over Mr. Hiskett's freedom, Mr. Hiskett lived under threat of arrest and detention for his potential inability to make a financial payment to a private, for-profit company with whom the Mohave County Probation Department has contracted. Such a situation is not allowed by A.R.S. § 13-3967(E)(1). Arizona has recognized

in the post-conviction context that when the Legislature wants to impose fees on individual criminal defendants it must do so "expressly." *State v. Reyes*, 232 Ariz. 468, 472, ¶ 11 (App. 2013) (discussing fees imposed in the post-conviction context). For example, A.R.S. § 13-902 requires GPS or electronic monitoring of probationers convicted of certain offenses and explicitly allows courts to "impose a fee on the probationer to offset the cost of the monitoring device required by this subsection." A.R.S. § 13-902(G); *see also id.* (citing A.R.S. § 13-902(G)). Unlike § 13-902, § 13-3967(E)(1) does not expressly contemplate imposing a fee on individual pretrial defendants to offset the cost of pretrial electronic monitoring. In the absence of such an express authorization, no authority exists to pass these fees onto the individual.

The history of the location monitoring statute's passage corroborates this reading of § 13-3967. In *Haag v. Steinle*, the Arizona Supreme Court considered the minutes of the legislative committee hearing that amended § 13-3967 in 2002 "to mandate electronic monitoring, where available, as a release term for individuals accused of certain bailable sex offenses." 227 Ariz. 212, 214, ¶ 10 (App. 2011). The Court noted, "Senate Bill 1202 did not originally include the 'where available' language." *Id.* at 215, ¶ 11. According to the committee minutes, the phrase "where available" was added "so *counties* in which it is not available would not have an additional incurred cost." *Id.* (emphasis added). This concern with sparing counties additional costs logically rests on the assumption by committee members that, unless

the legislation expressly says otherwise, counties, not individual defendants, would cover the costs of location monitoring. When, as here, a county is unable (or unwilling) to provide funding for pretrial electronic monitoring pursuant to § 13-3967(E)(1), such monitoring should not be considered "available," and courts are not required to impose it as a condition of release.

B. The categorical imposition of pretrial location monitoring constitutes an unreasonable search in violation of the Fourth Amendment.

Requiring Mr. Hiskett to submit to mandatory location monitoring amounts to an unreasonable search in violation of the Fourth Amendment. Mr. Hiskett, like everyone accused under Chapters 14 and 35.1 of the Arizona Criminal Code, has been subjected to location monitoring that tracks his every geographic move. Minute-by-minute, every monitored person's location is available to law enforcement officials to scrutinize. *See* SCRAM GPS Product Brochure, *available at* https://www.scramsystems.com/products/scram-gps/ (last visited April 16, 2019). By tracking a person's physical location, this monitoring reveals the types of businesses, places of worship, doctor's offices, or other locations they frequent, and with whom they associate. SCRAM, the company providing GPS monitoring in Mohave County, boasts of its capacity to "[s]ee specific locations visited by a client, easily distinguish travel patterns, and identify unknown locations with integrated

Google Maps," as well as "[v]iew participants who visit the same location at the same or different times." *Id.*

The United States Supreme Court has made clear that "attach[ing] a device to a person's body, without consent, for the purpose of tracking that individual's movements" constitutes a "search" under the Fourth Amendment. *Grady v. North Carolina*, 135 S. Ct. 1368, 1370 (2015). The magnitude of the privacy intrusion effected by that search is great. *See Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018). Because this tracking is "remarkably easy, cheap, and efficient compared to traditional investigative tools," it threatens to upend the traditional protections guaranteed by the Fourth Amendment, granting the government a power of "near perfect surveillance." *Id.* at 2218; *accord Jones*, 565 U.S. at 429-30 (Alito, J., concurring in the judgment).

Typically, to justify such a search, the government must obtain a warrant based on probable cause. *Carpenter*, 138 S. Ct. at 2221. "In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement," *id.*, such as when an individual provides valid consent or under circumstances in which "special needs, beyond the normal need for law enforcement" render requiring probable cause "impracticable." *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987). No such exception applies here.

In *United States v. Scott*, the Ninth Circuit determined that an individual does not "consent" to pretrial searches when the alternative is to face continued incarceration in violation of other fundamental and essential rights. 450 F.3d 863, 866-67 (9th Cir. 2006). Moreover, the Court flatly rejected the notion that protecting community safety upon pretrial release constitutes a "special need," though it considered more deeply the possibility that assuring future court appearance may be. *Id.* at 869.

Here, no evidence has been put forth to suggest that the problem of missed court appearances is common enough to justify the widespread intrusion. The Legislature produced no such evidence in amending A.R.S. § 13-3967(E)(1).[3] Nor did the government set forth evidence that Mr. Hiskett was particularly likely to fail to appear. Absent empirical evidence, Mr. Hiskett and similarly-charged persons pose only a theoretical risk of failing to appear in court. The Supreme Court and Ninth Circuit have made clear that such "hypothetical" hazards are insufficient to

[3] To the contrary, evidence suggests that failure to appear rates may be lower among people charged with serious crimes such as those under chapters 14 and 35.1. Bureau of Justice Statistics, *Pretrial Release of Felony Defendants, 1992* (finding failures to appear issued more often for people charged with felony property and drug crimes than violent offenses including sexual assault); Amaryllis Austin, *The Presumption of Detention Statute's Relationship to Release rates*, 52 Fed. Probation 60 (Sept. 2017) (finding no significant difference in failure to appear in the federal system among charges with or without presumed detention, including sex offense).

justify a special needs search. *Chandler v. Miller*, 520 U.S. 305, 319 (1999); *Scott*, 450 F.3d at 870.

The mandatory location monitoring amounts to an unjustified and unreasonable search infringing upon Mr. Hiskett's Fourth Amendment privacy rights

C. The categorical imposition of pretrial location monitoring violates the right to due process.

In the setting pretrial release conditions,[4] procedural due process requires the accused be afforded an "opportunity to be heard," which "is protected through an individualized hearing and a particularized finding by a 'neutral and detached judge.'" *United States v. Kennedy*, 593 F. Supp. 2d 1221, 1229 (W.D. Wash. 2008) (interpreting analogous monitoring requirement under federal law) (citing *Ward v. Monroeville*, 409 U.S. 57, 61–62 (1972)); *see also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985); *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970).

In *Simpson I*, the Arizona Court of Appeals addressed the procedural protections necessary if the government wants to detain someone pretrial under the state's "no bail provisions."[5] Given the fundamental interests implicated by uniform

[4] The same due process principles outlined in this section apply to the setting of $100,000 bail over Mr. Hiskett's release. The entry of $100,000 bail, absent sufficient justification, also violated Mr. Hiskett's right to due process.

[5] Two of those no-bail provisions have since been deemed unconstitutional. *See Simpson v. Miller*, 241 Ariz. 341, 387 P.3d 1270, *cert. denied sub nom. Arizona v. Hiskett*, 138 S. Ct. 146, 199 L. Ed. 2d 37 (2017) ("*Simpson II*") (invalidating

electronic monitoring—particularly where the condition can result in pretrial detention—*Simpson I* is instructive. 207 Ariz. 261. The Court determined that due process guarantees "the right to counsel," the "opportunity to testify and present information," "the opportunity to cross-examine opposing witnesses," and "a requirement of findings of fact and a statement of reasons" for the judge's bail decision. *Id.* at 270.

Finally, the Arizona Supreme Court has determined that judges setting bail must "tailor pretrial release conditions to be the least onerous, reasonable and necessary to effectuate the state's compelling interest[s].'" *Samiuddin*, 243 Ariz. at 210 ¶ 18 (evaluating substantive due process). The plain language of § 13-3967(E)(1) categorically denies an individualized determination of whether electronic monitoring is a necessary, reasonable condition to impose in service of the government's interests. Rather, it mandates monitoring notwithstanding the evidence presented during a hearing or pretrial conference, and regardless of what likelihood of flight, witness tampering, or safety threat the judicial officer deems an individual to pose. Moreover, less restrictive conditions short of monitoring are not meaningfully considered, nor are findings with respect to the necessity of monitoring

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provision denying right to release to those accused of sexual conduct with a minor); *State v. Wein*, *244 Ariz. 22, 28, 417 P.3d 787, 793 (2018), cert. denied sub nom. Arizona v. Goodman* (U.S. Jan. 14, 2019) (invalidating same provision with respect to those accused of sexual assault).

entered. The categorical imposition of pretrial electronic monitoring pursuant to § 13-3967(E)(1) does not satisfy constitutional due process standards.[6] As applied to Mr. Hiskett, pretrial location monitoring violates due process.

Additionally, and in the alternative, this Court's imposition of electronic monitoring[7] violated the right to procedural due process as applied to Mr. Hiskett. This court entered no individualized findings after a meaningful hearing that Mr. Hiskett presented a specific risk listed in art. II, § 22 of the Arizona Constitution. Nor did this court evaluate whether there were less onerous conditions that might mitigate any such risk. On the question of the necessity of GPS monitoring, Mr. Hiskett did not have an opportunity to present evidence to establish the sufficiency of a less-restrictive set of pretrial release conditions, nor to interrogate evidence from the state that he posed an individual risk to the community, to witnesses, or to flee such that electronic monitoring was appropriate. To the contrary, this court found

[6] Even the serious charge of sexual assault cannot inherently stand in as a proxy for an individualized determination of flight risk or dangerousness and comport with due process principles. *State v. Wein*, 244 Ariz. 22, 28, (2018), *cert. denied sub nom. Arizona v. Goodman* (U.S. Jan. 14, 2019) ("[N]othing shows that most persons charged with sexual assault, or even a significant number, would likely commit another sexual assault or otherwise dangerous crime pending trial if released on bail.").

[7] Once again, the constitutional rights implicated by Mr. Hiskett's order of mandatory electronic monitoring also apply to the Respondent Judge's entry of a $100,000 bail requirement. Respondent Judge was required to impose the least onerous condition in light of Mr. Hiskett's circumstances and overstepped those bounds in his May 16 orders.

Mr. Hiskett suitable for release on his own recognizance and even allowed him to travel out-of-state for work but added the monitoring condition pursuant to A.R.S. § 13-3967(E). Mr. Hiskett must be given an opportunity to be heard with respect to the monitoring condition prior to the imposition of such a condition. Moreover, should the monitoring condition be imposed, it must be the least onerous, reasonable, and necessary condition to mitigate a particular individualized threat.

D. The federal and state prohibitions on excessive bail forbid the state from imposing fees in addition to a reasonable bail amount or imposing release conditions that are not the least restrictive.

The imposition of location monitoring violates the state and federal prohibition of "excessive bail" in two ways. U.S. Const. amend. VIII; Ariz. Const. art. 2, sec. 15. First, because individuals are forced to shoulder the cost of monitoring, the condition functionally adds fees to any bail amount set. Second, the monitoring condition itself is not reasonably necessary to assure the court appearances of everyone charged under chapters 14 and 35.1 of the Arizona Criminal Code and is therefore excessive.[8]

Under state and federal law, once a court reaches a reasonable bail amount, fees added to that amount are excessive. *Malone v. Super. Ct. In and For County of Maricopa*, 181 Ariz. 223, 224 (App. 1994) (relying on *Stack*, 341 U.S. at 5; *Gusick*

[8] So too was Respondent Judge's May 16 Order summarily imposing a $100,000 bail requirement excessive under these principles.

v. Boies, 72 Ariz. 233, 236 (1951)). Here, this Court determined that cash bail was not appropriate and released Mr. Hiskett on his own recognizance. This Court then ordered electronic monitoring, imposing "all costs" on Mr. Hiskett. These costs are an assessment that cannot be "conjoined" with the determination that release on Mr. Hiskett's own recognizance was the "reasonable bail" in this case. To do so violates the constitutional prohibition on excessive bail.

Further, under Arizona law, a person released pretrial must be subject only to "the least restrictive conditions necessary." Ariz. R. Crim. P. 7.2(a). "Once a state decides to release a criminal defendant pending trial, the state may impose only such conditions as are constitutional, including compliance with the prohibition against excessive bail." *United States v. Scott*, 450 F.3d 863, 867 n. 5 (9th Cir. 2006); *see also Galen v. County of Los Angeles*, 477 F.3d 652, 659-60 (9th Cir. 2007) (citing *Salerno*, 481 U.S. at 753-55) (bail may not be set to achieve invalid interests or in an amount that is excessive in relation to the interests sought to be protected). Here, location monitoring went beyond the conditions reasonably necessary to assure Mr. Hiskett's successful pretrial release. The electronic monitoring condition amounts to an excessive bail condition as applied to Mr. Hiskett and is impermissible under the Eighth Amendment and Article II of the Arizona Constitution.

E. Due process and equal protection forbid the state from jailing people who cannot afford a fee.

The threat of arrest and detention caused by Mr. Hiskett's potential inability to pay for his monitoring—as well as the actual detention of Mr. Hiskett on an unaffordable $100,00 bond—ignores the principle of "equal justice" to which the United States Supreme Court adheres when considering "the treatment of indigents in our criminal justice system." *Bearden v. Georgia*, 461 U.S. 660, 664 (1993) (citing *Griffin v. Illinois*, 351 U.S. 12, 19 (1956)) (plurality opinion). In *Bearden*, the Supreme Court established that a hybrid of due process and equal protection principles prohibit jailing a criminal defendant solely for his or her inability to pay a court cost. This prohibition on wealth-based detention applies with special force for individuals facing possible detention prior to trial, who are presumed innocent, like Mr. Hiskett. *See Pugh v. Rainwater*, 572 F.2d 1053, 1056 (1978); *ODonnell v. Harris Cnty., Tex.*, 892 F.3d 147, 162 n. 6 (5th Cir. 2018); *In re Humphrey*, 19 Cal. App. 5th 1006, 1025-31, *review granted*, 417 P.3d 769 (2018); *Caliste v. Cantrell*, 329 F. Supp. 3d 296, 312-15 (E.D. La. 2018); *Schultz v. State*, 330 F. Supp. 3d 1344, 1373 (N.D. Ala. 2018), *appeal pending*, No. 18-13898 (11th Cir.); *Walker v. City of Calhoun, Ga.*, 901 F.3d 1245, 1260-61 (11th Cir. 2018).

CONCLUSION

Mr. Hiskett respectfully asks the Court to accept jurisdiction of this petition for special action, release him from the Mohave County Jail, address the arguments from his underlying Motion, and grant relief on those challenges.

Respectfully submitted this 17th day of May 2019.

By */s/Kathleen E. Brody*
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