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. 1 CA-SA 19-0119 Mohave County Superior Court No. CR-2018-01854 **PETITIONER'S SUPPLEMENTAL BRIEF**

Jared G. Keenan, 027068
American Civil Liberties Union Foundation of Arizona
P.O. Box 17148
Phoenix, AZ 85011
(602) 650-1854
jkeenan@acluaz.org

Andrea Woods (*pro hac vice application pending*)
American Civil Liberties Union Foundation
Criminal Law Reform Project
125 Broad Street, 18th Floor
New York, New York 10004
(212) 549-2528
awoods@aclu.org

Whitney & Whitney, PLLC
Michael J. Wozniak, 026411
111 N. 4th Street
Kingman, AZ 86401
(928) 753-5295
mjw@abwhitneylaw.com

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION AND RELEVENT PROCEDURAL HISTORY

Without an individualized determination that it was necessary, Petitioner Robert Louis Hiskett was subjected to around-the-clock pretrial GPS monitoring that required him to pay $400 per month. This blanket condition subjected Mr. Hiskett to onerous and intrusive monitoring without any finding that he posed a threat requiring such an intrusion, and further exposed him and his family to possible financial distress. When Mr. Hiskett brought valid federal and state constitutional challenges to this location monitoring, Respondent Judge improperly revoked his OR release and imposed a $100,000 bail condition to detain him. Upon petitioning this Court through special action, the Court stayed the trial court's detention order and requested briefing on the following questions:

1. If the State/County utilizes electronic monitoring to augment an own-recognizance ("OR") release, may the court require an accused to pay in advance or on a weekly or monthly basis some fee for the cost of providing such service? If so, is there a limit on the fee? Must any such fee be deferred or waived in the case of an indigent defendant?

2. If an accused is otherwise eligible for an OR release with electronic monitoring, but the electronic monitoring fee charged by the State/County causes a provable financial hardship, may the court require a defendant to post a bond instead?

3. Under A.R.S. § 13-3967, did the court's order of May 16 sufficiently document a legally cognizable change in circumstances to justify the change in petitioner's release status from OR release with monitoring to requiring a bond for release from custody?

4. Under the facts of this case, is the trial court's May 16 pre-trial detention order consistent with due process principles?

Pursuant to this Court's Order, Petitioner Robert Louis Hiskett submits this Supplemental Brief in support of his Petition for Special Action.

ARGUMENT

1. **If the State/County utilizes electronic monitoring to augment an own-recognizance ("OR") release, may the court require an accused to pay in advance or on a weekly or monthly basis some fee for the cost of providing such service? If so, is there a limit on the fee? Must any such fee be deferred or waived in the case of an indigent defendant?**

As Mr. Hiskett argued in his Petition for Special Action, if electronic monitoring is imposed pursuant to A.R.S. § 13-3967(E)(1), an accused cannot be forced to pay a fee for the cost of such monitoring, as explicit legislative authority is required before courts can impose such costs on an individual. *Hiskett v. Hon. Lambert/State*, No. 1 CA-SA 19-0119, Petition for Special Action ("Petition") at 10-12 (May 17, 2019) (citing *State v. Reyes*, 232 Ariz. 468, 472, ¶ 11 (App. 2013); *Haag v. Steinle*, 227 Ariz. 212, 214-15, ¶¶ 10-11 (App. 2011)). Moreover, as Mr. Hiskett argues in his Petition and further argues below, imposing the cost of electronic monitoring on someone who has demonstrated a financial hardship, while threatening jail if payments are not made, violates due process and equal protection principles as explained by the Supreme Court in *Bearden*. *Id.* at 20 (citing *Bearden v. Georgia*, 461 U.S. 660, 664 (1993)).

Additionally, the imposition of electronic monitoring on pretrial defendants violates their right to privacy under the Fourth Amendment and Article II, Section 8

of the Arizona Constitution because attaching such a device to a person's body constitutes a search, which was ordered in this case without a warrant or other justification. *Id.* at 12-15 (citing *Grady v. North Carolina*, 135 S.Ct. 1368, 1370 (2015); *Carpenter v. United States*, 138 S.Ct. 2206, 2217-21 (2018); *United States v. Scott*, 450 F.3d 863, 866-67 (9th. Cir. 2006)).

Finally, the *categorical* imposition of electronic monitoring further violates the right to due process and the Eighth Amendment and Article II, section 15 of the Arizona Constitution because Respondent Judge imposed the electronic monitoring condition pursuant to A.R.S. § 13-3967(E)(1) without making individualized findings that electronic monitoring was the "least onerous, reasonable and necessary condition" of release in Mr. Hiskett's case. *Id.* at 15-18 (citing *Samiuddin v. Nothwehr*, 243 Ariz. 204, 210, ¶ 18 (2017)). Even if this Court were to set aside these constitutional and statutory concerns, imposing the cost of electronic monitoring on pretrial defendants raises additional problems.

I. Due Process and Equal Protection Forbid the Government from Jailing People Who Cannot Afford a Fee

Assuming *arguendo* a court may, in the appropriate circumstances, require an accused to pay the cost of electronic monitoring, such fees must be limited by a defendant's ability to pay and must be waived in the case of an indigent defendant. The United States Supreme Court held twenty-six years ago that incarcerating people due to their inability to afford a fine or fee violates the Fourteenth

Amendment guarantee of equal protection and due process. *Bearden*, 461 U.S. at 664. In Mohave County, failure to pay the fees associated with electronic monitoring will land a pre-trial defendant in jail. As Mohave County Probation Officer Alan Palomino bluntly explained, it's a "[s]imple equation, they don't pay, the GPS monitor is removed and they will be incarcerated." Exhibit 1, Email from Chief Probation Officer Alan Palomino to Defense Attorney Michael J. Wozniak. Such a threat 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*, 461 U.S. at 664, 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.

Bearden's hybrid analysis "requires a careful inquiry" into four factors: "[1] the nature of the individual interest affected, [2] the extent to which it is affected, [3] the rationality of the connection between" the policy or practice and the state's "purpose," and [4] "the existence of alternative means for effectuating the purpose." *Id.* at 666-67 (quotations omitted). When applying these factors, *Bearden* and its progeny establish the bedrock principle that the government may not jail an individual for failing to pay an amount of money without first determining whether the person is able to pay the amount. Furthermore, if an individual is unable to pay

the amount courts must consider possible alternatives that would also achieve the government's interests. See *Tate v. Short*, 401 U.S. 395, 397-98 (1971); *Williams v. Illinois*, 399 U.S. 235, 240 n. 1 (1970).

Here, the individual interest affected—Mr. Hiskett's liberty interest—is fundamental. Respondent Judge significantly affected this fundamental and "vital" interest when he vacated his order imposing electronic monitoring and instead imposed a much harsher release condition, sending Mr. Hiskett to jail on a $100,000 bond he could not afford. *United States v. Montalvo-Murillo*, 495 U.S. 711, 716 (1990). Further, Mr. Hiskett's fundamental right to pretrial liberty was infringed when he was subjected to location monitoring that tracked his every move under threat of incarceration should he fail to pay $400 per month. This location monitoring further implicated Mr. Hiskett's right to privacy. *See* Petition for Special Action at 12-15.

While there may be a rational connection between the use of electronic monitoring and the State's purposes of ensuring future court appearances and community safety in certain cases, this connection is weak in many cases. Indeed, when amending A.R.S. § 13-3967(E)(1), the Legislature acknowledged that not all pretrial defendants charged with crimes under Chapters 14 and 35.1 would be monitored, thereby undercutting the argument that such monitoring is always necessary to effectuate the State's purposes for imposing it. Moreover, alternative

means for accomplishing these goals exist. For example, courts could impose no contact provisions, restrictions of weapons ownership and possession, and periodic check-ins with pretrial services officers. *See* A.R.S. §§ 13-3967(D)(1)-(6). Further, as this Court suggested in *Martinez* and *Brown*, Mohave County could simply bear the cost of electronic monitoring and potentially seek "to recover the expended funds at sentencing should the underlying criminal proceedings result in a criminal conviction." Exhibit 4 attached to Petition for Special Action.

The Fourteenth Amendment's prohibition on wealth-based detention applies with special force for individuals facing possible detention prior to trial, who are presumed innocent. *See Pugh v. Rainwater*, 572 F.2d 1053, 1056 (1978) ("We view such depravation of liberty of one who is accused but not convicted of crime as presenting a question having broader effects and constitutional implications than would appear from a rule stated solely for the protection of indigents."); *ODonnell v. Harris Cnty., Tex.*, 892 F.3d 147, 162 n. 6 (5th Cir. 2018) (discussing the "punitive and heavily burdensome nature of pretrial confinement" and "the fact that it deprives someone who has only been 'accused but not yet convicted of crime' of their basic liberty.") (internal citations omitted); *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). Thus, assuming courts have the authority to impose such costs in some situations, those costs must be limited by a defendant's financial ability to pay. When courts fail to consider ability-to-pay, they run the risk that someone will be imprisoned merely because of his poverty in violation of *Bearden*.

Here, Respondent Judge acknowledged that Mr. Hiskett had shown that the cost of electronic monitoring was posing a financial hardship for him, noting, "I have to treat Mr. Hiskett differently than someone who is a millionaire or someone who is financially viable [sic] to pay the electronic monitoring." Exhibit B attached to Motion for Stay, Reporter's Transcript of Proceedings ("Tr.") at 16:4-7. Yet Respondent Judge rejected this Court's potential solution of seeking reimbursement from pretrial defendants like Mr. Hiskett for the cost of electronic monitoring upon conviction, while implicitly acknowledging Mr. Hiskett's financial circumstances and those similarly-situated: "If they're indigent now and they can't pay for the electronic monitoring, why would any court think that at sentencing the defendant is going to be able to reimburse the county?" Tr. 21:19-23.

Imposing a $100,000 bond on Mr. Hiskett after acknowledging that the much lower cost associated with electronic monitoring posed a financial hardship demonstrates Respondent Judge intended his May 16 Order to function as a detention order in violation of *Bearden* and its progeny. For these reasons, courts

cannot impose the cost of mandatory electronic monitoring ordered pursuant to A.R.S. § 13-3967(E)(1) and, assuming *arguendo* that courts have the authority to impose such costs in other situations, the fee imposed must be waived for an indigent defendant.

II. Arizona Law Allows Only "Judicial Officers" to Set Release Conditions

This Court asks "may *the court* require an accused to pay" the cost of pretrial electronic monitoring. Order Vacating Order/Requesting Additional Briefing/Setting Oral Argument at 1 (June 7, 2019) (emphasis added). As discussed above, if a judge imposes the cost of electronic monitoring on a defendant, the judge must consider the financial circumstances of that defendant before ordering any costs. In his December 10 Order, however, Respondent Judge simply stated that Mr. Hiskett "is responsible for all costs associated with" GPS monitoring. Exhibit 1 of Appendix to Petition for Special Action. Such an order fails to tailor the fees associated with electronic monitoring to Mr. Hiskett's financial circumstances. Nor does it provide a limit on what a monitoring company may charge. As such, SCRAM charges different fees to different pre-trial defendants. For example, in *Elias Martinez v. Hon. Sipe/State*, No. 1 CA-SA 19-0034, and *Michael Lavar Brown v. Hon. Sipe/State*, No. 1 CA-SA 19-0035, SCRAM was charging the pre-trial defendants approximately $300 per month. *See* Exhibit 3, Screenshot from Wells Fargo Mobile Banking for Elias Martinez (showing $150.00 bimonthly charge by

"SCRAM OF ARIZONA"). In contrast, SCRAM is charging Mr. Hiskett $400 per month.

Allowing a private, for-profit company to unilaterally decide what to charge pre-trial defendants for electronic monitoring violates the U.S. Constitution as well as Arizona's Constitution, statutes, and rules. As our Supreme Court has explained, the Arizona Constitution and the Legislature, through A.R.S. § 13-3967, vests "*judicial officers*" with the "authority to impose bail or release conditions." *Samiuddin*, 243 Ariz. at 207, ¶ 8 (emphasis added). No such authority exists for a non-judicial officer – such as the SCRAM company or its employees – to dictate the cost imposed on pre-trial defendants for electronic monitoring. Moreover, as argued in Mr. Hiskett's Petition, *any* fee added to a reasonable bail amount – including a bail set at "OR" – is *per se* excessive in violation of the state and federal constitutions. Petition at 18-19 (citing *Malone v. Super. Ct. In and For County of Maricopa*, 181 Ariz. 223, 224 (App. 1994)).

2. If an accused is otherwise eligible for an OR release with electronic monitoring, but the electronic monitoring fee charged by the State/County causes a provable financial hardship, may the court require a defendant to post a bond instead?

Yes, but only if the bond is not a more burdensome release condition than OR release with electronic monitoring *and* if the bond is imposed in a constitutional manner with consideration of the accused's ability to pay. When courts fail to consider ability to pay when imposing a bond, the result is usually a *de facto*

detention order in violation of the United States and Arizona constitutions. *See State v. Wein*, 244 Ariz. 22, 26, ¶ 11 ("The Due Process Clause prohibits the government from punishing an accused by jailing him before trial." (citing *United States v. Salerno*, 481 U.S. 739, 746 (1987).

When imposing release conditions and setting a reasonable bond, courts must impose the "least onerous" conditions necessary to ensure the accused appears at future court hearings and protection of the community. Ariz.R.Crim.P. 7.2(a); *see e.g. Samiuddin*, 243 Ariz. at 206, ¶ 2. As such, when courts set bond they must consider a defendant's ability to pay. *Hernandez v. Sessions*, 872 F.3d 976, 982 (2017) ("no person may be imprisoned merely on account of his poverty"); *see Brangan v. Commonwealth*, 477 Mass. 691, 693-94 (2017); *see In re Humphrey*, 19 Cal.App.5th at 1014.

In *Hernandez*, the United States Court of Appeals for the Ninth Circuit explained that "[a] bond determination process that does not include consideration of financial circumstances and alternative release conditions is unlikely to result in a bond amount that is reasonably related to the governments legitimate interests." 872 F.3d at 991. This is because without considering one's ability to pay, courts cannot know whether they are imposing the "least onerous" condition of release, which "risks detention that accomplishes 'little more than punishing a person for his poverty.'" *Id.* at 992 (citing *Bearden*, 461 U.S. at 671).

In *Brangan*, a criminal defendant was incarcerated pending trial on a secured bond that he could not afford "because of his indigence." 477 Mass. at 692. In challenging the order setting bail, Brangan argued the order violated his right to due process because the judge failed to consider his financial resources before setting a bail amount that was beyond his financial means, resulting in his long-term detention prior to trial. *Id.* at 693. In resolving these issues, the Supreme Judicial Court of Massachusetts (the state's highest court) held that in setting bail, "a judge must consider a defendant's financial resources." *Id.* Although the Court determined that judges, after considering a defendant's ability to pay, were not required to set bail in an amount the defendant can afford, doing so requires "written or orally recorded findings of fact and a statement of reasons" for imposing an unaffordable bail. *Id.* at 693-94. Moreover, judges can only impose an unaffordable bail when no other less onerous condition of release would assure a defendant's return to court. *Id.* at 693.

Similarly, the Court of Appeal for the First District of California recently relied on the constitutional principles underlying *Bearden* and *Salerno* to hold that judges must consider a defendant's ability to pay prior to imposing bail. *In re Humphrey*, 19 Cal.App.5th at 1014. The facts in *Humphrey* are very similar to those presented in Mr. Hiskett's case. As the Court explained,

> although the prosecutor presented no evidence that nonmonetary conditions of release could not sufficiently protect victim or public

> safety, and the trial court found petitioner suitable for release on bail, the court's order, by setting bail in an amount it was impossible for petitioner to pay, effectively constituted a *sub rosa* detention order lacking the due process protections constitutionally required to attend such an order.

Id.

Here, not only did Respondent Judge fail to consider Mr. Hiskett's ability to pay before imposing a $100,000 secured bond, he ignored the fact that Mr. Hiskett was already struggling to afford the fees charged by SCRAM for electronic monitoring. Even absent a suitable ability to pay inquiry, it stands to reason that someone struggling to pay $400 a month for electronic monitoring is unable to afford a $100,000 bond. As such, Respondent Judge's May 16 Order imposing a bond instead of OR release with electronic monitoring violated Mr. Hiskett's rights to due process and equal protection.

3. Under A.R.S. § 13-3967, did the court's order of May 16 sufficiently document a legally cognizable change in circumstances to justify the change in petitioner's release status from OR release with monitoring to requiring a bond for release from custody?

No, the court's order of May 16 fails to sufficiently document a legally cognizable change in circumstances to justify imposing much harsher conditions of release. In fact, after vacating its order imposing GPS monitoring, the court relied solely upon the charges against Mr. Hiskett to find he posed an unspecified risk to the community; information the court already knew when it imposed its original release conditions. Although the court claimed it placed "most of its decision" to

impose a $100,000 bond on whether Mr. Hiskett "poses a danger to the community," Tr. 32:16-19, the court failed to articulate a specific threat posed by Mr. Hiskett to justify this much harsher condition of release. Instead, the court simply noted the seriousness of the charges, Tr. 32:8-13, before articulating its belief that Mr. Hiskett would be a danger to the community "*if these allegations were proven true* [because then] the court has no reasonable assurance that the community is safe." Tr. 33:9-14 (emphasis added). Such a finding from the court undermines the presumption of innocence and ignores our Supreme Court's repeated holdings that outside of the capital context, charge alone—even a serious one—cannot stand as a proxy for flight risk or dangerousness. *Wein*, 244 Ariz. at 27-8, ¶¶ 21-2; *Simpson v. Miller* ("*Simpson II*"), 241 Ariz. 341, 349, ¶¶ 26, 30 (2017).

In addition, the court ignored all evidence that supported relaxing pretrial release conditions, including (1) Mr. Hiskett's lack of criminal history, Tr. 27:7-8; (2) his lack of failures to appear, Tr. 27:1-3; (3) the significant amount of time he has resided in Mohave County, Tr. 27:8-9; (3) the fact that he has appeared for every court hearing, Tr. 27:17; (4) his employment, Tr. 27:16-17; (5) the regular contact he maintains with his defense attorney, Tr. 28: 20-23; (6) the fact that he complies with all release conditions and conditions imposed in a related dependency matter, Tr. 29:9-10; and (7) his ties to the community, Tr. 29:18-19.

The court also misconstrued evidence that strongly supports Mr. Hiskett's

claim of innocence. As his attorney explained, DNA evidence contradicts statements made by the alleged victim to police because her DNA was excluded as contributing to a DNA mixture discovered in Mr. Hiskett's car. Tr. 30:2-17. Yet, the court used that evidence against Mr. Hiskett by falsely stating "the defense and state both agree that the alleged incidents happened in [Hiskett's] vehicle." Tr. 33:11-13. As such, the court failed to articulate a legally cognizable change in circumstances to justify its imposition of a harsher condition of release.

4. Under the facts of this case, is the trial court's May 16 pre-trial detention order consistent with due process principles?

No, the trial court's May 16 pre-trial detention order violated Mr. Hiskett's right due process and caused irreparable and unnecessary harm.

I. The May 16 Order Violates Due Process

The right to bodily liberty is a fundamental and substantive constitutional right. *United States v. Salerno*, 481 U.S. 739, 746 (1987); *Simpson II*, 241 Ariz. at 345, ¶ 9. Indeed, "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). In the pretrial context, one's interest in bodily freedom is especially significant because prior to conviction, an accused is afforded the presumption of innocence: "that bedrock, axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law." *In re Winship*, 397 U.S. 358, 363 (1970) (internal citation omitted).

Thus, it is undisputed that "[i]n our society liberty is the norm, and detention prior to trial…is the carefully limited exception." *Salerno,* 481 U.S. at 755.

Mr. Hiskett's fundamental interest in his pretrial liberty, therefore, cannot be infringed—including by setting an unattainable condition of release—absent a substantive finding under federal and state law that the deviation is necessary. *See Washington v. Harper*, 494 U.S. 210, 228 (1990); *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). As our Supreme Court noted, "[f]reedom from pretrial detention absent extraordinary circumstances traces to the common law, where the general rule was against pretrial incarceration…." *Simpson II*, 241 Ariz. at 345, ¶ 10. Thus, the issuance of an order of pretrial detention must satisfy heighten scrutiny that the order is necessary because no other conditions would be adequate to serve the government's interests in assuring future court appearances and protection of the community. *Id.* at 348, ¶¶ 22-23 (acknowledging that "heightened scrutiny" applies when the right "to be free from bodily restraint" is implicated in the pretrial context).

Here, the State "took no position on the findings as it relates to GPS monitoring." Tr. 15:9-10. Given that one of Mr. Hiskett's requested forms of relief was the removal of his GPS monitor, one can assume the State did not believe Mr. Hiskett posed a risk of flight or a danger to the community even if his GPS monitor was removed. Despite this Respondent Judge rejected the State's position as "ridiculous" stating,

> I don't understand why the State would not take a position. I don't understand why the State would not get down there to Phoenix and argue this case from the State's point of view [in *Martinez* and in *Brown*], because I think there is another side to this, and I certainly don't want to advocate for the State, and I don't. But again, *I think that that position by the State is really just ridiculous*.

Tr. 15:16-22 (emphasis added). As discussed above, not only did Respondent Judge fail to make a substantive finding that Mr. Hiskett posed such a serious risk of flight or danger to the community that pretrial detention was necessary, he refused to consider less restrictive alternatives to jail. *See* Tr. 21:15-23 (rejecting this Court's suggestion of using public funds to cover the cost of pretrial electronic monitoring then seeking possible reimbursement upon conviction).

Worse, Respondent Judge rejected less restrictive alternatives to incarceration for improper reasons, including (1) the potential financial strain should "numerous defendants" be placed on electronic monitoring, which would "bankrupt Mohave County," Tr. 17:15-19; and (2) the potential negative consequences to his position as judge should he "follow[ ] that statute [A.R.S. § 13-3967(E)(1)] and order[ ] Mohave County to pay for electronic monitoring." Tr. 17:22-23.[1] As he stated prior

[1] Arizona trial courts are required to impose "the least onerous conditions of release" when setting bail. Ariz.R.Crim.P. 7.2(a). Determining the "least onerous" release condition "reasonable and necessary" to protect the public requires the judge to make a case-specific determination. *Simpson II*, 241 Ariz. at 349, ¶ 31. The factors that inform a determination about appropriate release conditions in individual cases are laid out in A.R.S. §13-3967. However, the cost or administrative burden to the government are not among the listed factors a court must consider, and such administrative costs do not impact flight risk or danger to

to issuing his pretrial detention order:

> I will footnote an incident that happened back in the mid 2000s where Judge Carlisle was a commissioner of the superior court, *and he followed that statute and ordered Mohave County to pay for electric monitoring*. And the board of supervisors were ready to yank him out as the commissioner at that time because they were outraged at the cost of the electric monitoring.

Tr. 17:20-18:1 (emphasis added).

Thus, despite paying lip service to Mr. Hiskett's presumption of innocence, Tr. 16:21-23, Respondent Judge's statements demonstrate that he believes the government's financial interest and his own interest in not "outraging" the Mohave County Board of Supervisors trumps Mr. Hiskett's interest in pretrial liberty. In this very case, Respondent Judge knew Mr. Hiskett was struggling to afford the $400 monthly fees charged by SCRAM. *See* Tr. 16:4-7; 21:19-23. Ignoring this fact, Respondent Judge imposed a bond that he knew would result in the prolonged pretrial detention of someone who had not violated any previously imposed condition of release. *See* Tr. 27: 1-3, 17; 29:9-10. Indeed, had it not been for this Court's swift action, Mr. Hiskett would have remained in jail on a $100,000 bond. *See* Exhibit 2, Minute Order, Hearing on Emergency Ruling Issued by Court of Appeals (June 7, 2019) (noting Robert Hiskett's appearance "in custody" and ordering him released from jail "pursuant to Appellate Court's order"). Such

---

the community. Nor do the potential political ramifications a judge may face should he order the State/County to pay the cost of pretrial electronic monitoring.

arbitrary action by Respondent Judge knowingly violated Mr. Hiskett's right to due process.

II. The May 16 Order Caused Mr. Hiskett Irreparable and Unnecessary Harm

The Supreme Court has long recognized that "[p]retrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships." *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975). Respondent Judge's May 16 Order throwing Mr. Hiskett in jail resulted in irreparable and unnecessary harm to Mr. Hiskett and his family. Having arrived in court as ordered and out of custody, Mr. Hiskett left in handcuffs and tears, knowing he would not be able to afford the bond imposed on him. Worse, he feared he would miss his young daughter's birthday on May 27. Unfortunately, these fears were realized when his daughter turned three while Mr. Hiskett was in jail. Exhibit 2 (ordering Mr. Hiskett be released form jail eleven days after his daughter's birthday). Moreover, Mr. Hiskett and his family lived with incredible stress while Mr. Hiskett was incarcerated and unable to financially provide for them. This stress was compounded while they unsuccessfully struggled to collect $10,000 they could not afford to pay a bail bondsman to secure Mr. Hiskett's release. These harms are both irreparable and unnecessary as Mr. Hiskett poses no cognizable risk of flight nor a danger to the community requiring the imposition of a $100,000 bond. Respondent Judge's May 16 Order was arbitrary and capricious and violates Mr. Hiskett's right to due process

under the law.

Respectfully submitted this 1st day of July 2019.

By */s/Jared G. Keenan*
Jared G. Keenan
American Civil Liberties Union Foundation of Arizona