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 Maricopa County Superior Court No. CR-2018-01854

AMICUS BRIEF OF THE ARIZONA ATTORNEY GENERAL

MARK BRNOVICH
ATTORNEY GENERAL

Rusty D. Crandell (026224)
Deputy Solicitor General
Anthony R. Napolitano (034586)
Assistant Attorney General
2005 North Central Avenue
Phoenix, Arizona 85004
Telephone: (602) 542-3333
Facsimile: (602) 542-8308
ACL@azag.gov
Attorneys for Amicus Curiae
The Arizona Attorney General

TABLE OF CONTENTS

STATEMENT OF ISSUES 1

INTRODUCTION 2

BACKGROUND 4

ARGUMENT 5

I. Counties Are Not Authorized To Shift The Costs Of Mandatory Pretrial Electronic Monitoring Under A.R.S. § 13-3967(E)(1).....5

II. If This Court Were To Reach The Constitutional Issues, Petitioner's Claims Fail. 7

A. Pretrial Location Monitoring Of Charged Sexual Offenders Is Reasonable Under The Fourth Amendment. 8

1. Petitioner's Indictment For Sexual Conduct With A Minor Reduces His Expectations Of Privacy. 9

2. The State's Substantial and Compelling Interests Outweigh Petitioner's Reduced Privacy Expectations. 10

B. Petitioner's Substantive Due Process Claim Fails Because He Does Not Assert The Violation Of A Fundamental Right. 16

C. Petitioner Has Received Sufficient Procedural Due Process To Satisfy The Fourteenth Amendment And No Individualized Determination Is Required.....18

1. Petitioner Fails To Identify A Significant Deprivation Of Right For Which Procedure Was Not Given. 19

2. The "Risk Of Erroneous Deprivation" Of Petitioner's Interests Are Low As He Has Received Sufficient Procedural Process, Including A Grand Jury Proceeding And Court Hearings. 20

3. The State's Legitimate And Compelling Interests Greatly Outweigh The Other Elements Of The *Mathews* Test. 22

D. The Pretrial Release Conditions Imposed Under § 13-3967(E)(1) Are Not Excessive Bail Under Either The Federal Or State Constitution. 24

CONCLUSION 25

TABLE OF AUTHORITES

CASES

Bell v. Wolfish
441 U.S. 520 (1979).....9

Carpenter v. United States
138 S. Ct. 2206 (2018).....9

Coker v. Georgia
433 U.S. 584 (1977).....11-12

Doe v. Miller
405 F.3d 700 (8th Cir. 2005).....11

Doe v. Munoz
507 F.3d 961 (6th Cir. 2007).....18

Graham v. Connor
490 U.S. 386 (1989).....16

Haag v. Steinle
227 Ariz. 212 (App. 2011).....6-7

Kriz v. Buckeye Petroleum Co., Inc.
145 Ariz. 374 (1985).....5

Mario W. v. Kaipio
230 Ariz. 122 (2012)..... passim

Mathews v. Eldridge
424 U.S. 319 (1976)..... 18, 19, 20, 22

McKune v. Lile
536 U.S. 24 (2002).....11

Nat'l Treasury Employees Union v. Von Raab
489 U.S. 656 (1989).....12

New Jersey v. T.L.O.
469 U.S. 325 (1985).....12

Norris v. Premier Integrity Sols., Inc.
641 F.3d 695 (6th Cir. 2011) 3, 9

R.L. Augustine Const. Co. v. Peoria Unified Sch. Dist. No. 11
188 Ariz. 368 (1997).....2

Rendel v. Mummert
106 Ariz. 233 (1970).....23

Samson v. California
547 U.S. 843 (2006)..... 3, 8, 9, 22

Simpson v. Miller (*Simpson II*)
241 Ariz. 341 (2017)..... 19, 20, 23

Skinner v. Railway Labor Executives' Ass'n
489 U.S. 602 (1989)..... 12, 16

Smith v. Doe
538 U.S. 84 (2003).....11

State v. McCall
139 Ariz. 147 (1983).....18

State v. Reyes
232 Ariz. 468 (App. 2013)..... 2, 5, 6, 7

State v. Wein
244 Ariz. 22 (2018)..... 10, 19, 20, 23

United States v. Kebodeaux
133 S. Ct. 2496 (2013).....11

United States v. Knights
534 U.S. 112 (2001).....8

United States v. Salerno
481 U.S. 739 (1987).....3

United States v. Scott
450 F.3d 863 (9th Cir. 2006) 9, 13

Walker v. City of Calhoun, GA
901 F.3d 1245 (11th Cir. 2018) 3, 24

Washington v. Glucksberg
521 U.S. 702 (1997)..... 17, 18

STATUTES

A.R.S. § 13-3961(B) 3, 10

A.R.S. § 13-3967(E)(1)..... 1, 2, 6

A.R.S. § 13-902(G).....7

A.R.S. § 21-413..... 21, 22

OTHER AUTHORITIES

Albert J. Lemke, *Evaluation of the Pretrial Release Pilot Program in the Mesa Municipal Court*, Institute for Court Management Court Executive Development Program 2008-2009 Phase III Project (2009).....14

Edna Erez, et. al., *GPS Monitoring Technologies and Domestic Violence: An Evaluation Study*
National Institute of Justice (2012).....14

John K. Roman, et.al., *The Costs and Benefits of Electronic Monitoring for Washington, D.C.*, District of Colombia Crime Policy Institute (Sept. 2012) 16

Kevin T. Wolff, et. al., *The Impact of Location Monitoring Among U.S. Pretrial Defendants in the District of New Jersey*
Federal Probation (Dec. 2017).....15

Minutes of the House Appropriations Committee, 45th Leg., 2nd Reg. Sess. (April 9, 2002) 6

National Institute of Justice, *Electronic Monitoring Reduces Recidivism* (2011)...15

Stephen V. Gies, et al., *Monitoring High-Risk Sex Offenders With GPS Technology: An Evaluation of the California Supervision Program Final Report* (2012) 15

Susan Turner and Jesse Jannetta, et al., *Implementation And Early Outcomes For The San Diego High Risk Sex Offender (HRSO) GPS Pilot Program*, UC Irvine Center for Evidence-Based Corrections (2007)..... 14, 15

RULES

Arizona Rule of Criminal Procedure 12.5 21

CONSTITUTIONAL PROVISIONS

Ariz. Const. art. 2, § 22(B)..... 3, 10, 22, 25

STATEMENT OF ISSUES

The Arizona Attorney General, upon this Court's invitation, offers its views as *amicus curiae* on the following issues presented in the Petition:

1. Does A.R.S. § 13-3967(E)(1) authorize the imposition of electronic location monitoring fees on a criminal defendant awaiting trial?
2. Does mandatory GPS monitoring under A.R.S. § 13-3967(E)(1) violate the Fourth Amendment?
3. Does the categorical imposition of electronic monitoring under A.R.S. § 13-3967(E)(1) satisfy the Fourteenth Amendment's Due Process requirements?
4. Is the imposition of GPS monitoring on Petitioner excessive bail under the Eighth Amendment or Arizona Constitution?

The Attorney General takes no position on the questions concerning whether the superior court erred when it imposed bail on Petitioner.

INTRODUCTION

The superior court's order imposing monitoring fees on Petitioner should be vacated because A.R.S. § 13-3967(E)(1) does not authorize courts to order criminal defendants to bear the costs of mandatory pretrial electronic monitoring. *State v. Reyes*, 232 Ariz. 468 (App. 2013). Because this statute does not allow the costs of monitoring to be shifted to defendants and because Mohave County has not elected to pay for such monitoring, electronic monitoring is not presently "available" for pre-trial releasees in Mohave County. A.R.S. § 13-3967(E)(1). As such, GPS monitoring cannot be imposed on Petitioner under A.R.S. § 13-3967(E)(1). This conclusion—made on statutory grounds—obviates the need to address Petitioner's objections to GPS monitoring on constitutional grounds. *R.L. Augustine Const. Co. v. Peoria Unified Sch. Dist. No. 11*, 188 Ariz. 368, 370 (1997) ("We will not reach a constitutional question if a case can be fairly decided on nonconstitutional grounds.").

If, however, the Court were to reach Petitioner's constitutional challenges to mandatory GPS monitoring, Petitioner's challenges would fail. The State has legitimate and compelling interests in (1) "[a]ssuring the appearance of the accused," (2) "[p]rotecting against the intimidation of witnesses," and (3) "[p]rotecting the safety of the victim, any other person or the community," all of which are served by GPS monitoring of defendants charged with sexual

felonies. Ariz. Const. art. 2, § 22(B); A.R.S. § 13-3961(B). Conversely, Petitioner's indictment for sexual conduct with a minor and his status as a pre-trial releasee have "reduced … [his] expectation of privacy." *Norris v. Premier Integrity Sols., Inc.*, 641 F.3d 695, 699 (6th Cir. 2011).

When the State's substantial interests are balanced against Petitioner's reduced privacy expectations, electronic monitoring is a reasonable pretrial release condition that satisfies Fourth Amendment "totality of the circumstances" analysis, the appropriate test under Arizona law. *Mario W. v. Kaipio*, 230 Ariz. 122, 126 (2012), *Samson v. California*, 547 U.S. 843 (2006). The categorical implementation of this condition does not violate substantive due process. Petitioner is not permitted to repackage an alleged Fourth Amendment violation as a substantive due process violation and, in any event, Petitioner has failed to establish that GPS monitoring violates any fundamental right triggering heightened scrutiny. Petitioner has also failed to show that the procedural protections afforded him were inadequate, especially in light of the State's compelling interests. Finally, Petitioner's claims fall outside the scope of the Eighth Amendment and Arizona Constitution's excessive bail clauses because his challenge is primarily procedural, and electronic monitoring to further a legitimate state interest does not qualify as excessive bail. *Walker v. City of Calhoun, GA*, 901 F.3d 1245, 1258 (11th Cir. 2018); *United States v. Salerno*, 481 U.S. 739, 754 (1987).

BACKGROUND

On November 27, 2018, a grand jury indicted Petitioner on three counts of Sexual Conduct with a Minor Under Fifteen Years of Age, Class 2 Felony, a Dangerous Crime Against Children. Indictment 1–2. The grand jury heard evidence that the defendant intentionally engaged in sexual intercourse or oral sexual contact with a child who was twelve years old or younger when the crimes occurred. *Id.* at 3. After deliberation, the grand jury found probable cause that the defendant had engaged in sexual contact with the child. *Id.* at 4. The fifteen members of the grand jury unanimously voted to indict the defendant on all three counts of Sexual Conduct with a Minor. *Id.* Petitioner appeared in court on a summons after the indictment and was subsequently released on the condition that he pay for electronic monitoring services until he returns to stand trial. Pet. Br. 1. Petitioner now challenges the constitutionality of his release conditions, as well as the bond imposed by the superior court while awaiting trial under A.R.S. § 13-3967. *Id.* at 2.

On June 7, 2019, the Arizona Court of Appeals issued an order inviting the Office of the Arizona Attorney General to state its position on the issues in the Petition.

ARGUMENT

I. Counties Are Not Authorized To Shift The Costs Of Mandatory Pretrial Electronic Monitoring Under A.R.S. § 13-3967(E)(1).

Whether A.R.S. § 13-3967(E)(1) permits a court to impose pretrial electronic monitoring costs on a defendant is a matter of statutory interpretation. To determine a statute's meaning, courts "first look[] to the words of the statute." *Kriz v. Buckeye Petroleum Co., Inc.*, 145 Ariz. 374, 377 (1985) (citing *State ex rel. Flournoy v. Mangum*, 113 Ariz. 151, 548 P.2d 1148 (1976)). A.R.S. § 13-3967(E)(1) states that a "judicial officer shall impose . . . [e]lectronic monitoring where available," but is silent as to who shall bear the costs. This silence creates ambiguity concerning whether a defendant may be ordered to pay for monitoring costs. The decision in *State v. Reyes* resolves this ambiguity in favor of Petitioner because, when a statute requires a mandatory condition of release, courts typically may not impose the costs of such a condition on a defendant without express statutory authorization. *See Reyes*, 232 Ariz. at 468.

In *Reyes*, the court of appeals addressed a convicted felon's challenge to an order requiring him to pay for statutorily-mandated DNA testing despite the relevant statute's silence as to who would bear the costs. The court held that the legislature's failure to "specifically state that a convicted felon has to pay" these costs left "no basis" for the lower court to order that he do so. *Id.* at 472. As the

Reyes court noted, if the legislature wanted convicts to pay the costs of mandatory DNA testing, "we presume it would say so expressly, as it has done so in other statutes." *Id.* at 472 (citing A.R.S. §§ 13-902(G), 31-467.06(A), and 11-459(K)).

Here, as in *Reyes*, the statute imposes a mandatory pretrial release condition but does not identify who is responsible for the costs of this condition. *Id.* at 471. If the court could not order the *convicted* felon in *Reyes* to bear the cost of a statute's mandatory action where the statute was silent about cost shifting, the same reasoning applies with greater force here where an *accused* defendant would have to bear statutorily-mandated costs under A.R.S. § 13-3967(E)(1), which is also silent as to cost shifting. Thus, applying *Reyes*, the trial court below lacked the statutory authority to order that Petitioner bear the costs of statutorily-mandated location monitoring during his pretrial release.

The legislative history of A.R.S. 13-3967(E)(1) also supports applying the reasoning in *Reyes* here. Committee minutes taken during the passage of subsection (E) indicate that legislators added the "where available" language "so counties in which [electronic monitoring] is not available would not have an additional incurred cost." Minutes of the House Appropriations Committee, 45th Leg., 2nd Reg. Sess. at 4 (April 9, 2002). In *Haag v. Steinle*, this court relied on these minutes to reject the State's argument that "where available" required an out-of-state defendant to be released in Maricopa County rather than in his home city

in which electronic monitoring was unavailable. 227 Ariz. 212, 214 (App. 2011). Instead, the court determined that the "where available" language was meant to avoid imposing an unfunded mandate on counties who could not afford to pay for mandatory electronic monitoring. *Id*. at 215. This analysis of the legislative history in *Haag*, coupled with the absence of statutory language, further demonstrates that the costs of mandatory GPS under A.R.S. § 13-3967(E)(1) cannot be shifted to accused defendants. Should the Legislature desire that defendants bear the costs of electronic monitoring, however, it need only break its silence and add language to § 13-3967(E) similar to that present in the examples cited in *Reyes*. 232 Ariz. at 472; *see, e.g.*, A.R.S. § 13-902(G) ("The court may impose a fee on the probationer to offset the cost of the monitoring device required by this subsection.").

II. If This Court Were To Reach The Constitutional Issues, Petitioner's Claims Fail.

Because the expenses of GPS monitoring under A.R.S. § 13-3967(E)(1) cannot be shifted to defendants and Mohave County has not yet elected to pay for such monitoring, GPS monitoring is not "available" for pretrial releasees in that county and cannot be imposed on Petitioner. Because Petitioner's GPS monitoring claims can be resolved on statutory grounds, the Court need not and should not reach Petitioner's constitutional arguments. *E.g., R.L. Augustine Const. Co.,* 188

Ariz. at 370 ("We will not reach a constitutional question if a case can be fairly decided on nonconstitutional grounds."). Nevertheless, out of an abundance of caution, the Attorney General addresses Petitioner's constitutional challenges to GPS monitoring under A.R.S. § 13-3967(E)(1), each of which lack merit.

A. Pretrial Location Monitoring Of Charged Sexual Offenders Is Reasonable Under The Fourth Amendment.

Mandatory location monitoring of defendants charged with the felony sexual offenses set forth in A.R.S. § 13-3967(E)(1) does not violate the Fourth Amendment. Even assuming that GPS monitoring of a pretrial releasee could constitute a search subject to the Fourth Amendment, such monitoring is reasonable, and therefore permissible, under the totality of the circumstances. In *Mario W.*, 230 Ariz. 122, the Arizona Supreme Court upheld A.R.S. § 8-238(A), which requires buccal samples from certain juveniles as a condition of pretrial release, against a Fourth Amendment challenge. Because of the releasees' "diminished expectations of privacy," the court evaluated whether the pretrial condition was reasonable under the "totality of the circumstances." *Mario W.*, 230 Ariz. at 126, ¶¶ 14, 16.[1] The reasonableness of a release condition "'is determined

[1] *See also Samson*, 547 U.S. at 843, 855 (totality of circumstances test applies where defendant had "substantially diminished expectation of privacy."); *United States v. Knights*, 534 U.S. 112, 121 (2001) (totality of circumstances appropriate where defendant had "significantly diminished privacy interests."); *Bell v. Wolfish*,

by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy, and on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" *Id.* at 126, ¶ 14 (quoting *Samson*, 547 U.S. at 848).

The Court should apply the same test here and conclude that A.R.S. § 13-3967(E)(1) does not violate the Fourth Amendment. For persons charged with the sexual felonies set forth in this statute, the State's legitimate interests in assuring a defendant's appearance at trial and protecting victims and the community outweigh a pretrial releasee's diminished expectation of privacy.

1. Petitioner's Indictment For Sexual Conduct With A Minor Reduces His Expectations Of Privacy.

Charged criminal defendants in a "Pretrial Release Program" have a "reduced . . . expectation of privacy." *Norris v. Premier Integrity Sols., Inc.*, 641 F.3d 695, 699 (6th Cir. 2011); *United States v. Scott*, 450 F.3d 863, 873 (9th Cir. 2006). Petitioner—and other charged sexual offenders—have "reduced expectation[s] of privacy" following a finding of probable cause. *Scott*, 450 F.3d at 873. Petitioner's citation to *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018), is inapplicable here as it concerns "legitimate expectation[s] of privacy"

---

441 U.S. 520, 557 (1979) (balancing government interests and privacy intrusion appropriate where "a pretrial detainee retains . . . a diminished expectation of privacy.").

for uncharged citizens, not someone already arrested, charged, and released awaiting trial. Pet. Br. at 13.[2] Unlike *Carpenter*, Petitioner is a charged criminal defendant awaiting trial for three counts of Sexual Conduct with a Minor Under Fifteen Years of Age—a Dangerous Crime Against Children—after a grand jury found probable cause to believe he committed these crimes. Pet. Br. at 1 and Exhibit 1. As such, Petitioner has a diminished expectation of privacy.

2. The State's Substantial and Compelling Interests Outweigh Petitioner's Reduced Privacy Expectations.

While Petitioner has a diminished privacy interest, the State's interests could not be greater. These interests include (1) "[a]ssuring the appearance of the accused," (2) "[p]rotecting against the intimidation of witnesses," and (3) "[p]rotecting the safety of the victim, [and] any other person or the community," all of which are served by GPS monitoring of criminal defendants on pretrial release. Ariz. Const. art. II, § 22(B); A.R.S. § 13-3961(B). Each of these interests is "legitimate and compelling." *State v. Wein*, 244 Ariz. 22, 27 (2018) ("Ensuring that the accused is present for trial serves a legitimate and compelling purpose. . . . And the government has an equally compelling interest in protecting

---

[2] Carpenter challenged the validity of the government seizing his cell-phone records as part of a criminal investigation while he was a robbery suspect. The Supreme Court held that the government must generally obtain a search warrant supported by probable cause before seizing cell phone records for an uncharged individual being investigated.

victims and the public from those who would commit sexual assault while on pretrial release.").

The State's legitimate and compelling interests outweigh Petitioner's interests under the totality of the circumstances, especially given the serious sexual felonies with which he is charged. "Sex offenders are a serious threat in this Nation" and present a substantial danger to the community. *McKune v. Lile*, 536 U.S. 24, 32 (2002) (plurality opinion) (upholding a state program attempting to reduce the danger of recidivism among sex offenders). Sex offenders are "dangerous[] as a class" and pose a "frightening and high" risk of recidivism. *Smith v. Doe*, 538 U.S. 84, 103 (2003). "When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *McKune*, 536 U.S. at 33; *see also United States v. Kebodeaux*, 133 S. Ct. 2496, 2503 (2013) ("There is evidence that recidivism rates among sex offenders are higher than the average for other types of criminals."). Even on an individual basis, experts in the field admit that they cannot "predict with confidence whether a particular sex offender will reoffend." *Doe v. Miller*, 405 F.3d 700, 716 (8th Cir. 2005).

Further, perpetrators of this particularly heinous crime inflict severe, life-altering trauma on their victims—further increasing the harm their recidivism will impose on society. As Justice Powell observed in *Coker v. Georgia*, "[t]he

deliberate viciousness of the rapist may be greater than that of the murderer," as "[s]ome victims are so grievously injured physically or psychologically that life is beyond repair." 433 U.S. 584, 603 (1977) (concurring in the judgment in part and dissenting in part).

The electronic monitoring requirement in A.R.S. § 13-3967(E)(1) is designed to prevent or reduce these extraordinary and serious harms to the community at large and specifically to victims who may be contacted and intimidated—or worse—by their attackers pending trial. The Supreme Court has determined that a State's interest in protecting the public from potential harm can, on its own, justify intrusions on an individual's privacy expectations. *See Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 621 (1989) (the "governmental interest in ensuring the safety of the traveling public and of the employees themselves" justified the suspicionless drug-testing of railway employees after accidents); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 672 (1989) (the government's "compelling interests in safety and in the integrity of [the U.S.] borders justified the suspicionless drug-testing of Customs employees); *New Jersey v. T.L.O.*, 469 U.S. 325, 353 (1985) (Blackmun, J., concurring in judgment) (the state's interest in protecting "the very safety of students and school personnel" justified suspicionless searches of students' property).

The Arizona Supreme Court has also held that the State's legitimate and compelling interest in ensuring that charged offenders return for trial can outweigh pretrial releasees' diminished privacy expectations under the totality of the circumstances. *Mario*, 230 Ariz. at 128. In upholding a requirement that juveniles released pretrial first submit a DNA sample, the Arizona Supreme Court ruled that the State's "important" interest in recapturing and properly identifying absconding defendants outweighed the defendants' privacy expectations. *Id.* As in *Mario*, Arizona's legitimate interest in discouraging charged sex offenders from absconding—and tracking them down if they do—through the use of mandatory electronic location monitoring under § 13-3967(E)(1) outweighs alleged offenders' reduced privacy interests.

That such an interest can be served by as narrow and unobtrusive a means as location monitoring decisively shifts the totality of the circumstances in the State's favor. While the *Scott* court found only a "tenuous" connection between the imposed conditions—house searches and drug tests—and the government's interest in ensuring charged offenders return for trial, location monitoring in this case is substantially related to Arizona's interests in locating charged offenders who fail to appear, protecting victims, and promoting community safety. 450 F.3d at 870.

Statistical evidence supports the effectiveness of GPS monitoring in furthering the State's compelling interests. A study of the location monitoring program in Mesa, Arizona for pretrial releasees found that, while traditionally-released defendants failed to appear in court roughly 29% of the time, electronically monitored defendants failed to appear in court only 5% of the time.[3] A separate San Diego study confirms that high risk sex offenders released with GPS monitors are significantly less likely than their traditionally-monitored counterparts to abscond.[4] Electronic monitoring also allows for the enforcement of geographic boundary zones, which reduces the likelihood of victim intimidation and improves victim safety. The National Institute of Justice reports that GPS-monitored defendants are more likely to stay away from no-contact zones and to refrain from contacting their victims.[5]

---

[3] Albert J. Lemke, *Evaluation of the Pretrial Release Pilot Program in the Mesa Municipal Court* at 31, Institute for Court Management Court Executive Development Program 2008-2009 Phase III Project (2009) (https://www.ncsc.org/~/media/Files/PDF/Education%20and%20Careers/CEDP%20Papers/2009/Lemke_EvalPretrialReleaseProg.ashx).

[4] Susan Turner and Jesse Jannetta, et al., *Implementation And Early Outcomes For The San Diego High Risk Sex Offender (HRSO) GPS Pilot Program*, UC Irvine Center for Evidence-Based Corrections (2007) (ucicorrections.seweb.uci.edu/files/2013/06/HRSO_GPS_Pilot_Program.pdf.

[5] Edna Erez, et. al., *GPS Monitoring Technologies and Domestic Violence: An Evaluation Study* at 147, National Institute of Justice (2012).

The safety benefits of location monitoring extend to the general community in which a defendant is released as well. In a New Jersey study, electronically monitored defendants were "significantly" less likely to be arrested for committing a crime while under pretrial supervision (6.8% compared to 10.6%).[6] Other studies showed that electronically-monitored high risk sex offenders are 21% less likely to be charged with a new crime and that electronic monitoring reduces the risk that an offender will fail to meet parole requirements by 31%.[7] A comparison of high-risk sex offenders with and without GPS monitoring concludes that "subjects in the GPS group demonstrate significantly better outcomes."[8] Traditional parolees were three-times more likely to commit a sex-related violation post-release than those with GPS monitors and twice as likely to be arrested for

---

[6] Kevin T. Wolff, et. al., *The Impact of Location Monitoring Among U.S. Pretrial Defendants in the District of New Jersey* at 5, Federal Probation (Dec. 2017) (https://www.uscourts.gov/sites/default/files/81_3_2_0.pdf).

[7] Turner and Jannetta, et al., *supra*, at 19 (24.2% of high risk sex offenders were charged with a new crime compared to 19.1% of those with GPS monitors); National Institute of Justice, *Electronic Monitoring Reduces Recidivism* (2011) (https://www.ncjrs.gov/pdffiles1/nij/ 234460.pdf).

[8] Stephen V. Gies, et al., *Monitoring High-Risk Sex Offenders With GPS Technology: An Evaluation of the California Supervision Program Final Report* at xiii (2012). (https://www.ncjrs.gov/pdffiles1/nij/grants/238481.pdf).

any crime.[9] Another study predicts that electronic monitoring will reduce probationers' rearrest rate by 23.5% within one year.[10]

The United States Supreme Court has upheld restrictions, like those under A.R.S. § 13-3967(E)(1), which present "only limited threats" to an individual's privacy in light of a "compelling" government interest. *E.g.*, *Skinner*, 489 U.S. at 628 (allowing government-mandated drug and alcohol testing of railroad employees despite such testing being a "search" under the Fourth Amendment). Viewing the totality of the circumstances, location-only monitoring is a reasonable restriction because the State's legitimate and important governmental interests outweigh a charged sex offender's diminished privacy expectations.

B. Petitioner's Substantive Due Process Claim Fails Because He Does Not Assert The Violation Of A Fundamental Right.

The Court should reject Petitioner's attempt (Pet. Br. at 15–18) to repackage his Fourth Amendment claim as a substantive due process claim. When a specific constitutional provision is applicable, like the Fourth Amendment, it "must be the guide for analyzing these claims," "not the more generalized notion of 'substantive due process.'" *E.g.*, *Graham v. Connor*, 490 U.S. 386, 395 (1989) (when the

---

[9] *Id*.

[10] John K. Roman, et.al., *The Costs and Benefits of Electronic Monitoring for Washington, D.C.*, District of Colombia Crime Policy Institute at 7 (Sept. 2012) (http://urbaninstitute.org/sites/default/files/alfresco/publication-pdfs/412678-The-Costs-and-Benefits-of-Electronic-Monitoring-for-Washington-D-C-.PDF).

Fourth Amendment provides an explicit textual source of constitutional protection, that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims).

Even if he could simultaneously bring both claims, Petitioner has failed to establish a substantive due process violation. In substantive due process cases, the aggrieved party must provide "a 'careful description' of the asserted fundamental liberty interest" that has been allegedly violated. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)). Further, for a right to be considered "fundamental," it must be "'deeply rooted in this Nation's history and tradition," and be "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Id.* at 721.

Petitioner has not met his burden to demonstrate a fundamental right protected by the Due Process Clause. Petitioner has not set forth a coherent (let alone careful) description of the right at issue. A vague reference to "the fundamental interests implicated by uniform electronic monitoring" hardly meets the standard. Pet. Br. 15–16. Petitioner has also made no attempt to show that any such interest is deeply rooted in this Nation's history and tradition and is implicit in the concept of ordered liberty.

Because Petitioner has failed to establish a fundamental right, his substantive due process claim must be evaluated under the rational basis standard, which requires only that a law be "rationally related to legitimate government interests." *Glucksberg*, 521 U.S. at 728; *see also Doe v. Munoz*, 507 F.3d 961 (6th Cir. 2007) (state's publishing of sex offender records was not a violation of plaintiffs' fundamental right to substantive due process because there was a rational basis for that state action). The State easily passes this low standard. As set forth above, *supra* Part II.A.2, the State has not only a rational basis for its categorical imposition of location monitoring on charged sex offenders as a condition of pretrial release, but it also has compelling interests for doing so. Thus, Petitioner's substantive due process claim fails.

C. Petitioner Has Received Sufficient Procedural Due Process To Satisfy The Fourteenth Amendment And No Individualized Determination Is Required.

Petitioner also argues that A.R.S. § 13-3967(E)(1) violates procedural due process, even though Petitioner fails to identify a private interest affected, or conduct an analysis under the relevant test in *Mathews v. Eldridge.* 424 U.S. 319, 335 (1976). This constitutes waiver of Petitioner's opportunity to do so. *State v. McCall*, 139 Ariz. 147, 163 (1983) ("Failure to argue a claim constitutes abandonment and waiver thereof."). However, assuming *arguendo* that

Petitioner's claim should still be analyzed under the *Mathews* test, the factors topple the balance in the State's favor.

1. Petitioner Fails To Identify A Significant Deprivation Of Right For Which Procedure Was Not Given.

Mathews first requires an examination of "the private interest that will be affected by the official action." 424 U.S. at 335. In claiming he was entitled to an individualized finding that GPS monitoring was the least restrictive condition of pretrial release, Petitioner ignores, as the Arizona Supreme Court "reaffirm[ed]" in *Wein*, that "due process does not require individualized determinations in every case." 244 Ariz. at 30 (2018) (citing *Simpson v. Miller* (*Simpson II*), 241 Ariz. 341, 348 (2017)). Petitioner's procedural rights were not violated when he could not convince the judge to completely disregard the statutory requirements of A.R.S. § 13-3967(E)(1). But even so, as Petitioner admits, the superior court did make an individualized accommodation "allow[ing] him to travel out-of-state for work" during his release and granting him "supervised visits with his own child," despite the requirement that he contact no children under sixteen. Pet. Br. 1, 18. Further, to the extent that Petitioner asserts an interest in being released without being electronically monitored, such tracking is a minor imposition on Petitioner's "diminished expectation of privacy" and still allows him to exercise liberty relatively

unhindered. *Wein*, 244 Ariz. at 30 (quoting *Simpson II*, 241 Ariz. at 349) (noting the low impact of GPS monitoring on a releasee's rights). Thus, even if Petitioner could identify an affected private interest, the imposition on his liberty is minor.

2. The "Risk Of Erroneous Deprivation" Of Petitioner's Interests Are Low As He Has Received Sufficient Procedural Process, Including A Grand Jury Proceeding And Court Hearings.

Second, the "risk of an erroneous deprivation of" any of these potential interests is low given the copious amounts of process and procedure to which Petitioner has had access. *Mathews*, 424 U.S. at 335. Petitioner asserts that procedural due process requires he be given an "opportunity to be heard," "the right to counsel," the "opportunity to testify and present information," and "findings of fact and a statement of reasons for the judge's bail decision." Pet. Br. 15–16 (internal quotation marks omitted).

Petitioner has received all these due process requirements. He has retained counsel. Pet. Br. Ex. 1. He was given a hearing before the Mohave County Superior Court. *Id.* He had the opportunity to present information to the trial judge. Petitioner was allowed, through his counsel, to "discuss[] Petitioner's specific needs with the trial judge, before the judge made an

individualized determination allowing Petitioner to travel to and from California for work. Pet. Br. 1.

Additionally, Petitioner had the opportunity to testify and present information before the grand jury. If Petitioner had desired to present evidence to the grand jury, he could have submitted a "written request" and been "permitted to appear" under Arizona Rule of Criminal Procedure 12.5. If Petitioner did not take advantage of these opportunities, it is not a due process violation.

Additionally, the judge's bail decision followed a grand jury's indictment. After hearing evidence regarding Petitioner's possible crime, a fifteen-member grand jury unanimously found probable cause that he intentionally engaged in sexual intercourse or oral sexual contact with a child who was twelve years old or younger at the time. Pet. Br. at 3.[11] This process resulted in an individualized determination that there is probable cause to believe that Petitioner committed the crimes for which he was indicted, and is therefore subject to monitoring under A.R.S. 13-3967(E)(1). The grand jury's unanimous finding of probable cause after viewing "all the evidence taken together" drastically lowers the risk that Petitioner

[11] A grand jury may only issue an indictment "if, from all the evidence taken together, it is convinced that there is probable cause to believe the person under investigation is guilty of such public offense." A.R.S. § 21-413

has been "erroneous[ly]" charged, and any alleged deprivations stem directly from that charge. A.R.S. § 21-413; *Mathews*, 424 U.S. at 335.

3. The State's Legitimate And Compelling Interests Greatly Outweigh The Other Elements Of The *Mathews* Test.

In contrast, the State maintains legitimate and compelling interests that significantly outweigh any of Petitioner's private interests under the third prong of *Mathews*. 424 U.S. at 335 (private interest(s) affected and risk of erroneous deprivation are weighed against "the Government's interest"); *Mario W.*, 230 Ariz. at126; *Samson*, 547 U.S. at 843. These interests, as discussed above, include "[a]ssuring the appearance of the accused," "[p]rotecting against the intimidation of witnesses," and "[p]rotecting the safety of the victim, any other person in the community." Ariz. Const. art. 2, § 22(B). These interests are particularly acute under A.R.S. § 13-3967(E)(1) because the statute is specifically limited to sexual felonies, which by their nature pose heightened risks to the community. See *supra* Part II.A.2. The importance of GPS monitoring to protect against these risks is underscored by statistics that demonstrate the effectiveness of electronic monitoring. *Id.* (multiple studies demonstrate that electronically monitored defendants failed to appear at a significantly lower rate than traditionally-released defendants, tended to refrain from physically contacting victims, and were

significantly less likely to be arrested for committing a crime during pretrial release).

"Pretrial release with restrictions placed upon a defendant's actions has long represented a compromise between the liberties that a person normally enjoys and the right of the state to insure compliance with its processes." *Rendel v. Mummert*, 106 Ariz. 233, 238–39 (1970). The Arizona Supreme Court has recognized that electronic monitoring of defendants charged with sexual crimes helps strike an appropriate balance between a person's liberty interests and the interests of the State. The court in *Wein* specifically referenced GPS monitoring as a justifiable alternative to pretrial confinement. 244 Ariz. at 30 (quoting *Simpson II*, 241 Ariz. at 349) (GPS monitoring "'would serve the state's objective equally well at less cost to individual liberty.'"). In *Wein*, the Court suggested that the "serious threat" of sex offenders committing crimes can be reduced "*if conditions like GPS monitoring are imposed*." 244 Ariz. at 30 (emphasis added). Similarly, the *Simpson II* Court listed "GPS monitoring" as a "permissible condition[] of release to ensure community safety." 241 Ariz. at 349. The Arizona Supreme Court thus endorses the use of GPS monitoring of pretrial releasees as a viable and constitutional measure to advance the legitimate and compelling State interest of promoting community safety.

Considering these factors together, Petitioner's minor private interests and the insignificant risk of erroneous deprivation after a grand jury proceeding and a separate court hearing are outweighed by the State's legitimate and compelling interests that allow it to regulate the release conditions for alleged sex offenders. For the reasons stated above, Petitioner's procedural due process claims should be denied.

D. The Pretrial Release Conditions Imposed Under § 13-3967(E)(1) Are Not Excessive Bail Under Either The Federal Or State Constitution.

Petitioners' Eighth Amendment and Arizona Constitution excessive bail arguments fail because he is challenging the process by which bail conditions were set rather than a true claim that location monitoring is itself excessive. Such claims are outside the scope of the Eighth Amendment's protections. *Walker,* 901 F.3d at 1258 ("The district court was correct … to evaluate this case under due process and equal protection rubrics rather than the Eighth Amendment."). The Eighth Amendment is not the appropriate vehicle for what are really procedural due process claims. *Id*. at 1258.

Additionally, because electronic location monitoring does not constitute "bail," it is not subject to the Eighth Amendment. As the *Walker* Court acknowledged in dismissing the excessive bail claims it addressed, conditions of pretrial release are within the releasing authority's discretion. *Id*. at 1258.

Petitioner does not meet his burden of establishing that location monitoring is actually bail under the Eighth Amendment or the Arizona Constitution, citing no case law to establish this basic element. Indeed, the Arizona Constitution makes explicit that "bail" is not the same thing as "conditions of release." Ariz. Const. art. 2, § 22(B) (distinguishing "bail" from "conditions of release"). Thus, Petitioner's argument also fails because a non-monetary release condition cannot be considered "bail" under any sense of the word.[12]

CONCLUSION

A.R.S. § 13-3967(E)(1) does not apply to Petitioner because GPS monitoring is not "available" in Mohave County. For this reason, the Court need not address Petitioner's unfounded arguments that A.R.S. § 13-3967(E)(1) is unconstitutional. The Attorney General takes no position on whether the superior court erred when it imposed bail on Petitioner.

---

[12] Petitioner misquotes Ariz. R. Crim. P. 7.2(a) as requiring "the least restrictive condition necessary." Pet. Br. 19. No such language is found in the rule. In any event, this rule does not and cannot expand the scope of the Eighth Amendment or Arizona Constitution article 2, section 15. Plaintiff also provides no basis for any insinuation that Ariz. R. Crim. P. 7.2(a) somehow excuses or supersedes the mandatory condition of electronic monitoring under A.R.S. § 13-3967(E)(1).

RESPECTFULLY SUBMITTED this 22nd day of July, 2019.

MARK BRNOVICH
ATTORNEY GENERAL

By /s/ Anthony R. Napolitano

Rusty D. Crandell
Deputy Solicitor General
Anthony R. Napolitano
Assistant Attorney General

Attorneys for Amicus Curiae
The Arizona Attorney General