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 BRIEF IN RESPONSE TO *AMICI***

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INTRODUCTION

The Arizona Attorney General and the Arizona Attorneys for Criminal Justice with the Arizona Public Defender Association appeared as *amici* in the above-captioned matter. Petitioner Robert Louis Hiskett responds primarily to the Attorney General's brief.

Mr. Hiskett brought the present petition alleging: (1) his detention on $100,000 bail disregarded A.R.S. § 13-3967(B) and offended the Fourteenth and Eighth Amendments, and (2) Respondent Judge erroneously rejected his constitutional and statutory challenges to his mandatory pretrial GPS monitoring. Pet. for Special Action. This Court requested briefing on four issues: (1) the legality of requiring payment for pretrial electronic monitoring, (2) whether a court may require an individual to post a bond where payment for monitoring constitutes a financial hardship, (3) whether Respondent Judge's May 16 order was sufficiently based on a change in circumstances, and (4) whether the May 16 detention order comported with due process. Order Vacating Order, Requesting Briefing.

The State agrees that counties may not charge arrestees for pretrial electronic monitoring as a matter of Arizona law, and that such monitoring is therefore "unavailable" in counties that do not cover its cost. Br. at 6-7.[1] Mr. Hiskett should

[1] Unless otherwise noted, all citations to "Br." refer to the Arizona Attorney General's brief.

prevail on this claim. This, however, only resolves the statutory and constitutional challenges to charging for pretrial electronic monitoring. Pet. at 20. Remaining unresolved are (1) Respondent Judge's unjustified and unconstitutional order imposing a $100,000 bond, Pet. at 5-7, and (2) the constitutionality of the categorical imposition of pretrial GPS monitoring itself. Pet. at 12-19. This Court raised the former question and should also reach the latter: it is in the public interest to clarify the constitutional questions presented by blanket pretrial electronic monitoring, which Arizona courts will continue to face.

Ultimately, the State confuses the issues, misstates legal precedent, and addresses only one of the questions presented by this Court. Throughout, it suggests that because 24/7 location monitoring is less restrictive than jail, it is therefore "narrow and unobtrusive" and does not trigger well-established constitutional principles. Br. at 13. The State is woefully mistaken. Further, the State ignores the holding in *State v. Wein*, 244 Ariz. 22 (2018), as its brief advances the premise that persons charged with sex offenses "by their nature pose heightened risks to the community." Br. at 22, *see also* 11. This was flatly rejected in *Wein*, which held that sexual assault charges cannot categorically stand as evidence of a pretrial risk to public safety. 244 Ariz. at 31, ¶ 33. This Court should address the remaining constitutional questions to avoid confusion on these important issues.

ARGUMENT

I. This Court Should Turn to the Constitutionality of the Issues Presented

The State rightfully argues that as a matter of Arizona law, counties cannot charge individual arrestees for the cost of a pretrial GPS condition imposed on them. Br. at 6-7. However, this Court should not conclude its analysis there.

Even if this Court determines that the question of bearing GPS costs should be fully resolved on statutory grounds, this only resolves the final constitutional argument raised in Mr. Hiskett's petition. Pet. at 20. Additional constitutional violations remain to be remedied. Respondent Judge's $100,000 bail order violated Mr. Hiskett's due process and Eighth Amendment rights.[2] Further, the categorical imposition of onerous, blanket conditions of release—regardless of who pays the cost—infringes on the Eighth, Fourteenth, and Fourth Amendment rights of accused persons. These are purely legal questions of first impression and statewide importance. *Ingram v. Shumway*, 164 Ariz. 514, 516 (Ariz. 1990).

Hundreds of Arizonans are subject to determinations of their pretrial release conditions, including bail, each day. Prison Policy Initiative, Arizona Profile, *available at*: https://www.prisonpolicy.org/profiles/AZ.html. Arrestees throughout the state will continue to face onerous fees, conditions, and wealth-based

[2] The State presents no argument on the $100,000 bond order. Br. at 25.

incarceration—including in counties in which GPS monitoring is "available" or in which arrestees continue to pay for it—in the absence of clear direction from the state's higher courts. It is in the public interest and benefits judicial economy to clarify the rights presented by unaffordable bond orders and onerous, uniform pretrial release conditions; both issues are sure to appear again. *Ingram*, 164 Ariz. at 516 (continued special action jurisdiction serves the judicial economy where issue is likely to reappear); *see also Simpson v. Owens*, 207 Ariz. 261, 265, ¶ 13 (App. 2004). Thus, while "Arizona's courts do not reach constitutional issues if proper construction of a statute makes it unnecessary in determining the merits of the action," *Petolicchio v. Santa Cruz Cnty Fair and Rodeo Ass'n, Inc.*, 177 Ariz. 256, 259 (1994), this is not an instance in which resolution of the constitutional claims is unnecessary.

II. The Arizona Supreme Court has Already Established that a Charge of Sexual Assault Does Not Inherently Predict Dangerousness

This Court should also reach the constitutional merits of Mr. Hiskett's petition to correct the State's erroneous arguments that mere accusation of a specific crime—in this case sexual conduct with a minor—is a sufficient basis to deny arrestees individualized process in determining their conditions of release.

In *State v. Wein*, the Arizona Supreme Court evaluated whether a categorical denial of the right to pretrial release for persons accused of sexual assault passed constitutional muster. 244 Ariz. 22. The *Wein* Court reaffirmed that a categorical

approach to pretrial detention only satisfies due process if the factor triggering detention—in that case, a sexual assault charge—serves as a suitable proxy for the risk of flight or dangerousness in all instances. 244 Ariz. at 28, ¶¶ 21-22. The Court explicitly considered recidivism rates among persons convicted of sexual assault offenses and the inflammatory language in *Smith v. Doe*, 538 U.S. 84 (2003), which the State offers here.[3] 244 Ariz. at 28-9, ¶¶ 21-27. The *Wein* Court concluded that a sexual assault charge cannot stand alone as a proxy of either flight or dangerousness in all instances. *Id.* at 31, ¶ 33. Thus, in making a pretrial detention determination, courts must undertake an individualized, fact-specific inquiry as to whether that person "poses a substantial danger to another person or the community." *Id.* at 31, ¶ 37.

The State fundamentally disregards this key principle from *Wein*, suggesting that an accusation of any sex offense can stand as categorical evidence of dangerousness. *See* Br. at 11 (discussing purported recidivism rates of "convicted sex offenders" notwithstanding Mr. Hiskett's pretrial status), 22. The State argues,

[3] Notably, language in *Smith* suggested that recidivism rates for persons on the sex offender registry who do not receive treatment are "frightening and high." 538 U.S. at 103. The sole authority offered for this statement was an article in *Psychology Today* which lacked any data. Ira Ellman & Tara Ellman, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 CONST. COMMENT. 495, 497-98 (2015). The author of the *Psychology Today* article disavows the statement. Jacob Sullum, *"I'm Appalled," Says Source of Phony Number Used to Justify Harsh Sex Offender Laws*, REASON (Sep. 14, 2017), https://reason.com/2017/09/14/im-appalled-says-source-of-pseudo-statis/

"sex offenders are dangerous as a class," Br. at 11, and that sexual felony charges "by their nature pose heightened risks to the community." Br. at 22. This position cannot be reconciled with *Wein*,[4] and this Court should reject any such argument. "That an individual is charged with a crime cannot, as a constitutional matter, give rise to any inference that he is more likely than any other citizen to commit a crime if he is released from custody" given the presumption of innocence. *United States v. Scott*, 450 F.3d 863, 874 (9th Cir. 2006).

III. The blanket imposition of pretrial GPS monitoring offends Eighth, Fourteenth, and Fourth Amendment principles

a. The Eighth Amendment and state law require an individualized determination of pretrial release conditions

The State fundamentally misunderstands Mr. Hiskett's Eighth Amendment claim, and suggests that a challenge to pretrial location monitoring is "outside the scope of the Eighth Amendment[]."[5] Br. at 24. The State's Eighth Amendment principles depend on a misreading of the Eleventh Circuit decision in *Walker v. City of Calhoun*, 901 F.3d 1245, 1258 (11th. Cir. 2018) and a mistaken definition of the term "bail."

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[4] Further, as noted by *amici* AACJ and ADPA, a wide variety of circumstances could give rise to an accusation of felony sexual assault. AACJ Br. at 13.

[5] Mr. Hiskett's petition focused on the excessiveness of GPS monitoring and fees, but noted that his excessive bail argument also applied to the Respondent Judge's order summarily imposing $100,000 bail. Pet. at 18 n. 8. The excessiveness of the bail order is address in Section IV, *infra*.

i. There was no Eighth Amendment claim to "dismiss" in Walker

Walker involved an equal protection and due process challenge by Maurice Walker, a pretrial detainee incarcerated because he could not afford a bail requirement set by an automatic bail schedule. 901 F.3d 1245, 1251-52. Mr. Walker did not bring an Eighth Amendment claim. *Id.* at 1257-58. The State's suggestion that there was a live Eighth Amendment claim that the Eleventh Circuit "dismissed" is incorrect. Br. at 24.

ii. "Bail" is synonymous with "release on conditions"

Next, the State attempts to distinguish the legal concept of "bail" from that of pretrial "conditions of release," stating without authority that "a non-monetary release condition cannot be considered 'bail' under any sense of the word." Br. at 25. There is no principled basis for this position. The concept of "bail" stands for the right to pretrial release subject to a number of possible conditions including monetary bond. *See Stack v. Boyle*, 342 U.S. 1, 4 (1951) (describing the "right to bail" as the "traditional right to freedom before conviction . . .")[6]. The Eighth Amendment protection against excessive bail applies to other, non-monetary conditions of pretrial release. *Salerno*, 481 U.S. at 754 (noting Eighth Amendment principle that "the Government's proposed *conditions of release* or detention not be

[6] *See also* Timothy R. Schnacke, *Fundamentals of Bail*, Center for Legal and Evidence Based Practices, 39 (Aug. 2014) (describing the historic and modern purpose of bail as "to provide a mechanism for release").

'excessive' . . .") (emphasis added); *United States v. Motamedi*, 767 F.2d 1403, 1405 (9th Cir. 1985) (excessive bail clause requires courts to ensure a person facing trial is released "under the least restrictive *condition or combination of conditions* that will reasonably assure . . . appearance . . ." as noted by statute) (emphasis added). A federal district court considering an analogous federal provision specifically found that the pretrial electronic monitoring condition was properly analyzed under—and violated—the Eighth Amendment Excessive Bail Clause. *United States v. Kennedy*, 593 F. Supp. 2d 1221, 1227-28 (W.D. Wash. 2008).

Arizona law further demonstrates the absurdity of an argument that "bail" and pretrial release conditions are unrelated concepts. Arizona Rule of Criminal Procedure 7.3(c) acknowledges that conditions of release can be monetary (including bail bonds) and non-monetary (including pretrial services supports, court reminders, or location monitoring where justified). And A.R.S. § 13-3967 "prescribes *the conditions, including cash,* that a judicial officer may impose on a person released on bail." *Fragoso v. Fell*, 210 Ariz. 427, 431, ¶ 10 (App. 2005) (emphasis added) (internal quotation marks omitted).[7]

[7] Indeed, while "it is conceivable that bail by cash . . . might have been the only practical form of bail in Arizona when our constitution was adopted in 1910," it is more properly understood in the present day as just "one of the conditions by which [a defendant's court appearance] could be attained." *Id.* at 432–33, ¶¶ 16-18.

iii. The Eighth Amendment requires that pretrial release conditions be individualized and non-excessive

The State suggests that Mr. Hiskett was not entitled to an individualized process to determine the necessity of pretrial location monitoring. Br. at 19 (discussing due process). Yet, the Eighth Amendment's prohibition on excessive bail requires that "the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence *of that defendant*." *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (emphasis added). This inherently requires individualized findings. By design, the blanket GPS requirement imposed by A.R.S. § 13-3967(E)(1) lacks the requisite individualized inquiry into its necessity.[8] By extension, the location monitoring was not reasonably calculated to ensure either Mr. Hiskett's presence at trial or public safety.

b. Mandatory pretrial GPS monitoring implicates a fundamental right and infringes due process

As discussed *infra*, pretrial location monitoring is a "search" within the meaning of the Fourth Amendment. The State incorrectly suggests that, for this reason, conditions of pretrial release do not squarely implicate other constitutional rights. Br. at 16 (citing *Graham v. Connor*, 490 U.S. 386, 395 (1989)). Conditions of pretrial release raise issues beyond the Fourth Amendment. As a practical matter,

[8] As *amici* AACJ and APDA note, individualized consideration is required for any condition of pretrial release unless the condition is universal enough to be appropriate in every case, such as "attend all court dates." AACJ Br. at 16.

while some pretrial release conditions, such as drug testing and location monitoring, constitute "searches," others—like requirements to attend all court appearances or periodically check in with pretrial services—do not. And conditions on pretrial release can implicate other substantial rights such as the right to travel, *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 901-02 (1986), to parent, *Troxel v. Granville*, 530 U.S. 57, 65 (2000), or to bear arms, *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 778 (2010). Significantly, failure to comply with conditions of pretrial release—including for non-payment—can result in incarceration, which must be justified by more than Fourth Amendment reasonableness. *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975); *Salerno*, 481 U.S. at 750.

The State falsely argues that Mr. Hiskett has not identified a fundamental right. Br. at 17. Yet the right to pretrial liberty is fundamental, and the government may not infringe that right unless its actions are narrowly tailored to serve a compelling state interest. *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 780 (9th Cir. 2014) (citations omitted).[9] A condition of pretrial release that significantly burdens the fundamental right to pretrial liberty must also satisfy this standard. Pet. at 15-16;[10] *see also Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292, 2309 (2016)

[9] Arizona state law also establishes a statutory presumption of recognizance release in all release-eligible cases. Ariz. R. Cr. P. 7.2(a)(2).

[10] Mr. Hiskett has identified this fundamental right: to be free from unjustified pretrial incarceration and/or incarceration due to inability to pay a fee, *see* Pet. at 5-7, 16, Supp. Br. at 14) and is not "repackaging" a Fourth Amendment argument.

(state scheme, even supported by legitimate government interests, that presents an undue burden on fundamental rights must satisfy heightened scrutiny). The Arizona Supreme Court has already determined that judges making bail determinations must "tailor pretrial release conditions to be the least onerous, reasonable and necessary to effectuate the state's compelling interest[s]'" as a matter of substantive due process. *Samiuddin v. Nothwehr*, 243 Ariz. 204, 210, ¶ 18 (Ariz. 2017). As *amici* AACJ and APDA note, the blanket system of pretrial GPS in A.R.S. §13-3967(E) is not narrowly tailored. AACJ Br. at 16.

c. Mr. Hiskett did not receive adequate process on the question of GPS monitoring

The State suggests that Mr. Hiskett's procedural due process challenge must fail because he received other hearings as part of his criminal prosecution. Br. at 20-21. However, by design, Mr. Hiskett received no individualized process on the question of the necessity of location monitoring. The State suggests that (1) Mr. Hiskett should have used other hearings such as the grand jury indictment to request a tailored determination of appropriate release conditions, and/or (2) his probable cause determination provided sufficient justification for monitoring. *Id.* at 21. The first inference lays an unrealistic and impermissible burden on the accused: as the State notes, Mr. Hiskett's only chance of an opportunity to be heard on the issue of GPS monitoring would have been if he had been able to "convince the judge to completely disregard [the] statutory requirements . . ." Br. at 19. The second—that

probable cause of a serious crime constitutes sufficient justification for monitoring—impermissibly shortchanges due process in the same manner rejected in *Simpson* and *Wein*. 241 Ariz. at 348, ¶ 25; 244 Ariz. at 28-9, ¶¶ 23-25.

The State selectively quotes from *Wein* to suggest, "due process does not require individualized determinations in every case." *Id.* at 19. This is a gross mischaracterization. *Simpson II* established, and *Wein* reaffirmed, that a categorical, non-individualized approach to pretrial release determinations only satisfies due process if the category at issue—in *Wein*, a sexual assault charge—serves as a suitable proxy for the risk of flight or dangerousness in all instances. 244 Ariz. at 27, ¶ 20. The *Wein* Court found that accusation of sexual assault is not a proxy for dangerousness in all instances. *Id.* at 28, ¶ 22. *Simpson II* and *Wein* stand firmly for the proposition that persons accused of serious offenses *are* entitled to an individualized determination of their risk of flight or danger, and a pretrial release determination tailored to their specific circumstances. Notwithstanding the fact that Mr. Hiskett received an individualized determination of other pretrial conditions, such as traveling for work, *see* Br. at 20-21, he was never afforded a process or findings on the issue of location monitoring.

Arrestees facing the possibility of around-the-clock location monitoring maintain a high interest in liberty and privacy. *Scott*, 450 F.3d at 874. Mr. Hiskett was entitled to meaningful notice, an opportunity to be heard, and evidentiary

findings specifically with respect to the necessity of around-the-clock location monitoring. Pet. at 15-18.

d. Around-the-clock location monitoring is neither "narrow" nor "unobtrusive" and, absent meeting an exception to the warrant requirement, is unreasonable

The United States Supreme Court has made clear that "attaching 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). To justify such a search, the government must obtain a warrant based on probable cause. *Carpenter v. United States*, 138 S.Ct. 2205, 2221 (2018). "In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement." *Id.* The State does not identify an exception to the warrant requirement it believes A.R.S. § 13-3967(E) satisfies. The only conceivable exception implicated here is that found in 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).

The Ninth Circuit has already determined that a concern for pretrial public safety cannot be advanced as a "special need" under the Fourth Amendment, as "crime prevention is a quintessential general law enforcement purpose and therefore is the exact opposite of a special need." *United States v. Scott*, 450 F.3d 863, 869

(9th Cir. 2006). This Court should therefore disregard the State's arguments regarding purported public safety measures advanced by GPS monitoring, which are in any event tenuous. Br. at 11-12.

The sole remaining question, then, is whether the government can justify a uniform GPS monitoring condition based on a concern around failures to appear. On balance, the regime created by A.R.S. § 13-3967(E) presents too serious a privacy intrusion, without sufficient tailoring, to pass muster even under a "totality of the circumstances."

i. Mr. Hiskett retains a higher expectation of privacy than probationers or parolees

The State glosses over the distinction between pretrial arrestees and probationers or parolees. Br. at 8 n.1 (suggesting that *Samson* and *Knights* simply apply to "defendant[s]"). Yet Mr. Hiskett and other pretrial arrestees—shrouded in the presumption of innocence—have not had their expectation of privacy reduced to the extent of parolees, *Samson v. California*, 547 U.S. 843, 848–50 (2006) or probationers, *United States v. Knights*, 534 U.S. 112, 114 (2001). The State relies on *Scott* to argue that Mr. Hiskett had a "reduced expectation of privacy," Br. at 9 (citing 450 F.3d at 873), but *Scott* emphasized that pretrial arrestees' "privacy and liberty interests" are "far greater than a probationer's," and found a pretrial drug testing condition unreasonable even under a "totality of the circumstances" approach. 450 F.3d at 872-73. Further, the State cites *Mario W. v. Kaipio* to suggest

Mr. Hiskett's privacy interests are diminished, 230 Ariz. 122, 126, ¶ 14, but *Mario W.* pertained to juvenile arrestees whose liberty and privacy interests are less robust than those of adults. *Schall v. Martin*, 467 U.S. 253, 265 (1984). Finally, *Bell v. Wolfish*, cited by the State, pertained specifically to the government's interests in securely operating a jail. 441 U.S. 520, 534 (1979).

ii. The degree of intrusion presented by location monitoring is high

The State characterizes location monitoring is a "narrow and unobtrusive." Br. at 13. It decidedly is not. As AACJ and APDA note, "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflect a wealth of detail about her familial, political, professional, religious, and sexual associations." AACJ Br. at 19 n.6 (citing *United States v. Jones*, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring)). The SCRAM GPS system employed in Mohave County generates "nearly 1,500 GPS location points each and every day—creating a mountain of data for officers to sift through . . ." SCRAM Systems, https://www.scramsystems.com/products/scram-gps/ (last visited July 30, 2019). Monitoring occurs via an ankle bracelet that individuals must charge every other day. SCRAM GPS Product Brochure, *available at* https://www.scramsystems.com/products/scram-gps/ (last visited July 30, 2019) (showing 50-hour battery life). This cumbersome condition represents a significant intrusion on liberty and privacy.

iii. The GPS monitoring imposed by A.R.S. § 13-3967(E) is not narrowly tailored

The State suggests that a uniform monitoring requirement for all persons accused of crimes under Chapters 14 and 35.1 of the Arizona Criminal Code can be justified by its broad interests in "assuring a defendant's appearance at trial." Br. at 9. Yet it offers no evidence to suggest that persons accused under Chapters 14 and 35.1 present a unique risk of nonappearance. Pet. at 14. To the contrary, there is evidence to suggest that persons charged with sexual assault fail to appear for court dates at *lower* rates than persons accused of other crimes. *Id.* n. 3. By the State's logic, because it may incentivize court appearance, *every* pretrial arrestee could be subject to intrusive monitoring. Finally, there are less intrusive methods to advance the goals of court appearance, including optional phone or text reminders of upcoming court dates. Jennifer Elek, et al., *Use of Court Date Reminder Notices to Improve Court Appearance Rates, Pretrial Justice Center for Courts* (Sept. 2017) (noting, *inter alia*, that court reminder programs that have increased court appearance rates by up to 19.5 percent, with appearance rates of 92-94% reported); Pretrial Justice Center for Courts, *Use of Court Date Reminder Notices to Improve Court Appearance Rates*, Pretrial Justice Brief 10, 2010 (In Coconino County, AZ, live phone call reminders reduced FTA rate from 25.4% to 5.9% when caller received the live call).

A.R.S. § 13-3967(E) does not satisfy an exception to the warrant requirement

and presents an unreasonable, unconstitutional search. Pet. at 13–15.

e. Location monitoring may be justified on an individual, fact-specific basis

Mr. Hiskett does not suggest that location monitoring can never pass constitutional muster as a condition of pretrial release. There will inevitably be individual cases in which the government demonstrates an identifiable risk of flight or serious threat to another person's safety that a court finds is properly mitigated by a monitoring condition.[11] Mr. Hiskett, however, did not receive an individualized finding that GPS monitoring was necessary in his specific case, beyond the findings associated with probable cause. Tr. at 32:11-13; 16-19, 33:9-14; 34:1-6 (finding monitoring necessary solely as a function of crime charged). The mandatory monitoring program created in A.R.S. § 13-3967(E) contravenes the Eighth, Fourteenth, and Fourth Amendments.

IV. Respondent Judge's pretrial detention order violated the Fourteenth and Eighth Amendments

The State takes no position on the constitutionality of Respondent Judge's pretrial detention order. Br. at 25. As set forth in Mr. Hiskett's petition for special action, this order infringed his fundamental right to pretrial liberty as well as the due process and equal protection principles articulated in *Bearden.* Pet. at 5-7, 16.

[11] Other jurisdictions, such as New Jersey, already employ pretrial systems in which electronic monitoring may be required on an individual basis. N.J. Stat. 2A:162-17(b)(2)(k).

Under *Bearden* and its progeny, courts may not require monetary payment as a condition of release without meaningfully inquiring into what amount an individual is able to pay. *Bearden v. Georgia*, 461 U.S. 660, 671 (1983). Respondent Judge did not inquire into Mr. Hiskett's financial circumstances in setting $100,000 bond. Tr. at 34:7-8.

The right to bodily liberty is fundamental, and especially significant prior to a conviction. Hiskett Supp. Br. at 14 (citing *Salerno*, *Foucha*, *In re Winship*). Bail set in an amount an individual is unable to pay—a *de facto* order of pretrial detention—cannot pass constitutional muster unless it is supported by clear and convincing evidence that no less restrictive condition or combination of conditions will adequately mitigate an identifiable risk. *Santosky v. Kramer*, 455 U.S. 745, 756 (1982); *Turner v. Rogers*, 564 U.S. 431, 445 (2011); *Motamedi*, 767 F.2d at 1409. The $100,000 bail order was unconstitutional.

While Mr. Hiskett received an individualized hearing when Respondent Judge set a $100,000 bail requirement on May 16, 2018, Tr. at 32:2-34:8, the order was plainly excessive under the Eighth Amendment. In the face of Mr. Hiskett's successful period of pretrial release to date, attendance at all court appearance, and continued law-abiding behavior, $100,000 was excessive in relation to the interests

the government sought to protect.[12] *Stack*, 342 U.S. at 4; *Salerno*, 481 U.S. at 753-55.

CONCLUSION

This Court has accepted Mr. Hiskett's petition and ordered briefing on issues of statewide importance in need of resolution. While the Attorney General has taken the position that the costs of GPS monitoring may not be imposed on pretrial arrestees as a matter of state law, important unresolved questions remain. This Court should bring the constitutional parameters around pretrial release into clarity, as courts across the state will continue to grapple with these issues. It is a pillar of our democracy that persons accused but not convicted of a crime are presumed innocent and maintain their individual rights. Federal constitutional principles forbid both the blanket GPS program set forth in A.R.S. § 13-3967(E) and Respondent Judge's May 16 pretrial detention order.

[12] Indeed, at the May 16 hearing, the State took no position on pretrial GPS and did not move for an increased monetary bail or detention. Tr. 15:16-22.

Respectfully submitted this 2nd day of August, 2019

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