

No. _____

In The
Supreme Court of the United States

STATE OF MISSOURI EX REL.
MICHALENE HAGAN,

Petitioner,
v.

THE HONORABLE DAVID ASH AND
THE HONORABLE GREGORY ALLSBERRY,
Respondents.

On Petition for a Writ of Certiorari
to the Missouri Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

- I. When a judge sets bond on the initial warrant for arrest, whether the Excessive Bail Clauses are preempted or stayed because of Missouri Supreme Court Rule 33.
- II. Whether a one million-dollar, cash-only bond on the initial warrant for arrest, regarding a class C felony delivery of a controlled substance and a class D felony unlawful possession of an explosive weapon, violates the Excessive Bail Clauses of the United States and the Missouri Constitutions.

PARTIES TO THE PROCEEDING

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¹ The Honorable David Ash is listed as a party because he presently presides over Petitioner's case. In brief, Petitioner's case was initially assigned to the Honorable Gregory Allsberry. Judge Allsberry set the bond that Petitioner is challenging herein. Prior to filing this petition, but subsequent to the Missouri Court of Appeals, Eastern District's denial of Petitioner's petition for writ of prohibition (case no. ED109511), Petitioner timely filed a motion for change of judge regarding Judge Allsberry. Said motion was granted. On March 25, 2021, Petitioner's case was assigned to Judge Ash.

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² 1 Annals of Cong. 754 (1789) (J. Gales ed. 1834) (statement of Rep. Livermore).

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³ Each appendix is a true and accurate copy. Petitioner's date of birth and social security number have been redacted in appendices A and C. Appendices were exhibits in the Missouri appellate courts. A copy of appendices A to I which were filed in the Missouri Court of Appeals, Eastern District and the Missouri Supreme Court are not filed in this petition because that would result in two additional copies of the same appendix.

In addition, the page numbering of the appendices in the booklet and the electronic filing is different and thus cross-references are provided. The page numbering of the appendices in the booklet includes the letter 'a' and the electronic filing includes the letter 'e'. The appendices in the electronic filing have an appendix sticker and the page numbers are handwritten.

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Orders Below

On February 12, 2021, the Honorable Gregory Allsberry (“Respondent”) set bond on the initial warrant for arrest at one million dollars, cash only. App. 8a; App. 3e.

On March 12, 2021, the Missouri Court of Appeals, Eastern District denied, without reaching the merits, Petitioner’s petition for a writ of prohibition claiming her constitutional rights protected by the Excessive Bail Clauses were violated by the bond set by Respondent on February 12, 2021. App. 82a; App. 51e.

On May 4, 2021, the Missouri Supreme Court denied, without reaching the merits, Petitioner’s petition for a writ of prohibition claiming her constitutional rights protected by the Excessive Bail Clauses were violated by the bond set by Respondent on February 12, 2021. App. 115a; App. 76e.

Jurisdiction¹

Petitioner seeks review of the Missouri Supreme Court’s May 4, 2021 order denying, without explanation, Petitioner’s petition for a writ of prohibition regarding Respondent’s February 12, 2021 decision to set a one million-

¹ Given the pretrial posture of Petitioner’s Excessive Bail Clause claim, Mootness is an additional issue that will be will be discussed herein, as it was in the Missouri appellate courts. Appendix K at 59a-61a and 32e-34e; Appendix P at 91a-93a and 57e-59e.

dollar, cash-only bond on the initial warrant for arrest regarding a class C felony delivery of a controlled substance and a class D felony unlawful possession of an explosive weapon. App. 115a; App. 76e.

“Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed . . . where . . . any title, right, privilege, or immunity is . . . claimed under the Constitution . . .” 28 U.S.C. § 1257(a).

Petitioner has a constitutional right under the United States Constitution’s Eighth Amendment’s Excessive Bail Clause to not have excessive bail (i.e., an excessive bond). Thus, jurisdiction is based on 28 U.S.C. § 1257(a).

Mootness

“This Constitution[] . . . shall be the supreme Law of the Land[.]” U.S. Const. art. VI.

“The mootness of a controversy is a threshold question in any appellate review of that controversy.” State ex rel. Chastain v. City of Kansas City, 968 S.W.2d 232, 237 (Mo. App. W.D. 1998).

“As a general rule, moot cases must be dismissed.” Warlick v. Warlick, 294 S.W.3d 128, 130 (Mo. App. E.D. 2009) (internal citation omitted).

“The public interest exception to mootness applies whenever a case presents an issue that (1) is of general public interest and importance, (2) will recur and (3) will evade appellate review in future live controversies.” Gurley v. Mo. Bd.

of Private Investigator Exam’rs, 361 S.W.3d 406, 414 (Mo. banc 2012) (internal citation omitted).

As applied to the time when a judge sets bond on the initial warrant for arrest, counsel is not aware of any law stating that the Excessive Bail Clauses are preempted or stayed.

Argument

One, counsel was unable to find a caselaw definition or dictionary definition for “of general public interest.” Id. The consequence is that its meaning must be determined on a case-by-case basis. That said, if Petitioner’s one million-dollar, cash-only bond on the initial warrant for arrest for said charges does not rise to the level “of general public interest and importance,” counsel was also unable to find any caselaw that provides guidance as to what is or would be the threshold amount necessary for Petitioner’s bond to be “of general public interest and importance.” Id.; Id.

Two, this issue is likely to recur because, as a matter of custom and practice, it seems quite common for judges to set bonds on the initial warrants for arrest.

Three, and more importantly, is the fact that this issue “will evade appellate review in future live controversies.” Id.

Regarding a possible jury trial, bond or bail is not an element in either of the verdict directing instructions for the charges. App. 29a and 33a; App. 13e and 16e. Thus, there would be no evidentiary rulings on Petitioner’s bond.

Regarding a possible guilty plea, “[t]he State is correct, however, to the extent it argues a guilty plea serves as a waiver of most nonjurisdictional errors that occurred prior to its entry, including constitutional challenges.” State v. Russell, 598 S.W.3d 133, 138 (Mo. banc 2020) (internal citation omitted); see also Soutee v. State, 51 S.W.3d 474, 480 (Mo. App. S.D. 2001) (stating, “[a] person who pleads guilty to a criminal offense has a right to challenge the sufficiency of the information or indictment by direct appeal.”).

Therefore, counsel submits that Petitioner’s Excessive Bail Clause claim satisfies the public interest exception to mootness.

Constitutional Provisions and Statutes²

“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. Const. amend. VIII.

“[E]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.” Mo. Const. art. I, § 21.

² Missouri statutory and constitutional citations are to the electronic database published by the Missouri Revisor of Statutes, Cum. Supp. 2020, as of July 18, 2021. Citations for jury instructions are to the Missouri Approved Instructions-Criminal, Fourth Edition published by the Missouri Supreme Court Publications and available electronically through the Missouri Bar’s website. Unless indicated otherwise, all other citations are to LexisNexis 2021.

“[T]he Eighth Amendment's proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment.” Schilb v. Kuebel, 404 U.S. 357, 365 (1971).

“The supreme court may establish rules relating to practice, procedure and pleading for all courts and administrative tribunals, which shall have the force and effect of law.” Mo. Const. art. V, § 5.

*Missouri Supreme Court Rule 33*³

33.01. Misdemeanors or Felonies--
Right to Release--Conditions

(a) A defendant charged with a bailable offense shall be entitled to be released from custody pending trial or other stage of the criminal proceedings.

(b) The defendant's release shall be upon the conditions that:

(1) The defendant will appear in the court in which the case is prosecuted or appealed, from time to time as required to answer the criminal charge;

(2) The defendant will submit to the orders, judgment and sentence, and

³ Included sections of Rule 33 are: Rule 33.01, Rule 33.02, Rule 33.05, and Rule 33.06. Said four sections also appear in appendix I at 41a-52a and 22e-27e.

process of the court having jurisdiction over the defendant;

(3) The defendant shall not commit any new offenses and shall not tamper with any victim or witness in the case, nor have any person do so on the defendant's behalf; and

(4) The defendant will comply fully with any and all conditions imposed by the court in granting release.

(c) The court shall release the defendant on the defendant's own recognizance subject only to the conditions under subsection (b) with no additional conditions of release unless the court determines such release will not secure the appearance of the defendant at trial, or at any other stage of the criminal proceedings, or the safety of the community or other person, including but not limited to the crime victims and witnesses. If the court so determines, it shall set and impose additional conditions of release pursuant to this subsection.

The court shall set and impose the least restrictive condition or combination of conditions of release, and the court shall not set or impose any condition or combination of conditions of release greater than necessary to secure

the appearance of the defendant at trial, or at any other stage of the criminal proceedings, or the safety of the community or other person, including but not limited to the crime victims and witnesses.

When considering the least restrictive condition or combination of conditions of release to set and impose, the court shall first consider non-monetary conditions. Should the court determine non-monetary conditions alone will not secure the appearance of the defendant at trial, or at any other stage of the criminal proceedings, or the safety of the community or other person, including but not limited to the crime victims and witnesses, then the court may consider monetary conditions or a combination of non-monetary and monetary conditions to satisfy the foregoing. After considering the defendant's ability to pay, a monetary condition fixed at more than is necessary to secure the appearance of the defendant at trial, or at any other stage of the criminal proceedings, or the safety of the community or other person, including but not limited to the

crime victims and witnesses, is impermissible.

If the court determines additional conditions of release are required pursuant to this subsection, it shall set and impose one or more of the following conditions of release:

- (1) Place the defendant in the custody of a designated person or organization agreeing to supervise the defendant;
- (2) Place restrictions on the travel, association, or place of abode of the defendant during the period of release, including the holding by the court of the defendant's passport;
- (3) Require the defendant to report regularly to some officer of the court or peace officer, in such manner as the court directs;
- (4) Require the use of electronic monitoring of defendant's location, the testing of defendant for drug or alcohol use, or the installation and use of ignition interlock devices. The court may order the eligible defendant to pay all or a portion of the costs of such conditions, but the court shall consider how best to minimize the costs to the defendant and waive the costs for an eligible defendant who is indigent and who

has demonstrated to the court an inability to pay all or a portion of the costs;

(5) Require the defendant to seek employment, to maintain employment, or to maintain or commence an educational program;

(6) Require the defendant to comply with a specified curfew;

(7) Require the defendant to refrain from possessing a firearm or other deadly weapon;

(8) Require the defendant to abstain from possession or use of alcohol or any controlled substance without a physician's prescription;

(9) Require the defendant to undergo available medical, psychological or psychiatric treatment, including treatment for drug or alcohol dependency and remain in a specified institution if required for that purpose;

(10) Require the defendant to return to custody for specified hours following release for employment, school, treatment, or other limited purpose;

(11) Require the defendant to be placed on home supervision with or without the use of an electronic monitoring device. The court may order the eligible defendant to pay all or a portion of the costs of the

electronic monitoring, but the court shall consider how best to minimize the costs of such condition to the defendant and waive the costs for an eligible defendant who is indigent and who has demonstrated to the court an inability to pay all or a portion of the costs;

(12) Require the defendant to execute a monetary bond in a stated amount wherein the defendant promises to pay to the court the stated amount should the defendant fail to appear or abide by the conditions of release;

(13) Require the execution of a monetary bond in a stated amount with sufficient sureties, or the deposit in the registry of the court of a sum in cash or negotiable bonds of the United States or the State of Missouri or any political subdivision;

(14) Require the execution of a monetary bond in a stated amount and the deposit in the registry of the court of 10 percent, or such lesser sum as the court directs, of such sum in cash or negotiable bonds of the United States or the State of Missouri or any political subdivision;

(15) Require the deposit of a property bond of sufficient value as approved and directed by the court;

(16) Impose other conditions necessary to secure the appearance of the defendant at trial, or at any other stage of the criminal proceedings, or the safety of the community or other person, including but not limited to the crime victims and witnesses.

(d) Should the court determine upon clear and convincing evidence that no combination of non-monetary conditions and monetary conditions will secure the safety of the community or other person, including but not limited to the crime victims and witnesses, then the court shall order the defendant detained pending trial or any other stage of the criminal proceedings. A defendant so detained shall, upon written request filed after arraignment, be entitled to a trial which begins within 120 days of the defendant's request or within 120 days of an order granting a change of venue, whichever occurs later. Any request by the defendant to continue the trial beyond the 120 days shall be considered a waiver by the defendant of the right to

have the trial conducted within 120 days.

(e) In determining whether to detain the defendant pursuant to subsection (d) or release the defendant with a condition or combination of conditions of release, if any, pursuant to subsection (c), the court shall base its determination on the individual circumstances of the defendant and the case. Based on available information, the court shall take into account: the nature and circumstances of the offense charged; the weight of the evidence against the defendant; the defendant's family ties, employment, financial resources, including ability to pay, character, and mental condition; the length of the defendant's residence in the community; the defendant's record of convictions; the defendant's record of appearance at court proceedings or flight to avoid prosecution or failure to appear at court proceedings; whether the defendant was on probation, parole or release pending trial or appeal at the time the offense for which the court is considering detention or release was committed; and any validated evidentiary-based risk

assessment tool approved by the Supreme Court of Missouri.

(f) A court detaining or releasing the defendant under this Rule shall enter an order stating the condition or combination of conditions of release, if any, set and imposed by the court. If the defendant is detained and unable to comply with any condition of release, the defendant shall have the right to a release hearing pursuant to Rule 33.05. At any hearing conducted under Rule 33, the court shall permit but not require either party to make a record on the defendant's financial status and ability to pay any monetary condition or other relevant issue. At such hearing, the court shall also make written or oral findings on the record supporting the reasons for detention or conditions set and imposed. The court shall inform the defendant of the conditions set and imposed, if any, and that the conditions of release may be revoked and the defendant detained until trial or other stage of the criminal proceedings for violation of any of the conditions of release and that a warrant for the defendant's arrest may be issued

immediately upon notification to the court of any such violation.

Missouri Supreme Court Rule 33.01.

33.02. Misdemeanors or Felonies--Warrant for Arrest--Conditions to be Stated on Warrant

The court, or clerk at the court's direction for a specific warrant, issuing a warrant for the arrest of any defendant shall state the condition or combination of conditions of release, if any, on the warrant for arrest.

Missouri Supreme Court Rule 33.02

33.05. Misdemeanors or Felonies--Release Hearing

A defendant who continues to be detained after the initial appearance under Rule 21.10 or Rule 22.08 shall have the defendant's detention or conditions of release reviewed at a hearing by the court subject to the right of a victim to be informed of and heard at the hearing. The hearing shall occur as soon as practicable but no later than seven days, excluding weekends and holidays, after the initial appearance, absent good cause shown by the parties or the

court. At the hearing, the court shall determine if the defendant shall be detained or released as provided in Rule 33.01. Nothing herein shall prohibit a defendant from making subsequent applicat[-] ion for review of the defendant's detention or conditions of release under Rule 33.01.

Missouri Supreme Court Rule 33.05.

33.06. Misdemeanors or Felonies--
Modification of Conditions of
Release

(a) Upon motion by the state or by the defendant, or upon the court's own motion, the court, subject to the right of a victim to be informed of and be heard, and after notice to the parties and hearing, may modify the conditions of release when the court finds that:

- (1) New, different, or additional requirements for release are necessary; or
- (2) The conditions of release which have been set are excessive; or
- (3) The defendant has failed to comply with or has violated the conditions of release; or
- (4) The defendant has been convicted of the offense charged.

(b) When the conditions of release are increased by the court, or new conditions of release are set and imposed, the court may remand the defendant to the custody of the sheriff or other officer until compliance with the modified conditions. If the defendant is not in custody, the court may order that a warrant for the defendant's arrest be issued.

Missouri Supreme Court Rule 33.06.

Statement of the Case

On February 12, 2021, Respondent set bond on the initial warrant for arrest at one million dollars, cash only. App. 8a; App. 3e.

On February 17, 2021, the State filed a Complaint against Petitioner. App. 10a; App. 5e. The Complaint charges two counts. Id. One count is a class C felony of delivery of a controlled substance and the other count is a class D felony of unlawful possession of an explosive weapon. Id.

On February 17, 2021, the State filed a Probable Cause Statement. App. 14a; App. 7e. Information pertaining to Petitioner's criminal history is contained in paragraph ten. App. 18a; App. 8e. Neither of Petitioner's pending charges nor her criminal history includes a dangerous felony. App. 118a; App. 78e (Section 556.061(19), Revised Statutes of Missouri – the statutory definition for a dangerous felony).

On February 18, 2021, Petitioner, not having the wherewithal to post bond, was in custody at the time when she appeared for the initial appearance. App. 19a; App. 10e. A bond hearing was set for February 23, 2021. *Id.*

On February 23, 2021, Respondent held a hearing and there was no change to the bond that was set on February 12, 2021. App. 27a; App. 12e.

Petitioner's address is located in the county where the charges are pending. App. 5a and 14a; App. 1e and 7e.

On March 9, 2021, undersigned counsel filed his entry of appearance. App. 39a; App. 21e.

On March 11, 2021, Petitioner filed a petition for writ of prohibition in the Missouri Court of Appeals, Eastern District claiming her constitutional rights protected by the Excessive Bail Clauses were violated by the bond set by Respondent on February 12, 2021.⁴ App. 56a; App. 30e. On March 12, 2021, the Eastern District summarily denied Petitioner's petition. App. 82a; App. 51e.

On March 26, 2021, Petitioner filed a petition for writ of prohibition in the Missouri Supreme Court claiming her constitutional rights protected by the Excessive Bail Clauses were violated by the bond set by Respondent on February 12, 2021.⁵ App. 87a; App. 54e. On May

⁴ Petitioner's writ summary, writ suggestions, and writ index are appendices J, L, and M, respectively.

⁵ Petitioner's writ summary, writ suggestions, and writ index are appendices O, Q, and R, respectively.

4, 2021, the Missouri Supreme Court summarily denied Petitioner's petition. App. 115a; App. 76e.

Argument

Introduction

Petitioner's questions presented for review were, in fact, presented to the Missouri appellate courts. App. 57a-58a and 89a; App. 31e and 55e.

Petitioner's petitions argued the context is strictly limited to when a judge sets bond on the initial warrant for arrest. App. at 66a, 98a, 38e, and 63e (stating, "whether bond is amended at a subsequent bond hearing when defendant is present is irrelevant to and not part of [Petitioner's] constitutional claim.").

Compelling Reasons:

I. There appears to be no law that preempts or stays the Eighth Amendment's Excessive Bail Clause at the time when a judge sets bond on the initial warrant for arrest.

The Excessive Bail Clauses are not mentioned in the four relevant sections of Missouri Supreme Court Rule 33. App. 41a-52a; App. 22e-27e. The word "excessive" appears in Rule 33.06 but the context is conditions of release and not preemption. App. 51a; App. 27e.

In this context, a judge's discretion is bound by the Excessive Bail Clause, and absent a preemption or stay of said clause at the time when a judge sets a bond on the initial warrant for arrest, Rule 33.05 is consequently rendered irrelevant.

A defendant who continues to be detained after the initial appearance under Rule 21.10 or Rule 22.08 shall have the defendant's detention or conditions of release reviewed at a hearing by the court subject to the right of a victim to be informed of and heard at the hearing. The hearing shall occur as soon as practicable but no later than seven days, excluding weekends and holidays, after the initial appearance, absent good cause shown by the parties or the court.

Missouri Supreme Court Rule 33.05.

Again, whether any defendant's bond in a criminal case is amended – either reduced or increased – at a subsequent bond hearing is irrelevant to and not part of Petitioner's constitutional claim.

By way of introduction to Petitioner's second question presented for review and second compelling reason, assuming arguendo that the Excessive Bail Clause is not preempted or stayed at the time when a judge sets bond on the initial warrant for arrest, considerations of due process and fundamental fairness would seem to suggest

that the prospect of one or several subsequent bond hearings is a wholly inadequate constitutional remedy, *if*, assuming arguendo, the bond set by a judge on the initial warrant for arrest was, in fact, in violation of the Excessive Bail Clause.

II. Rep. Livermore's 1789 question – “What is meant by the terms excessive bail?”⁶ – may not have been taken seriously in previous centuries, but considering we have one of the highest incarceration rates in the world, an answer to his question now seems essential to our national interest.

“Representative Livermore's 1789 question, ‘What is meant by the terms excessive bail?’” is “a question that is important to all defendants, but is of particular importance to those who can lay claim to only the most meager resources, and are consequently more vulnerable.” *Johnson v. Missouri, petition for cert. filed* (U.S. June 22, 2011) (No. 10-1550) (questions presented for review) (quoting 1 Annals of Cong. 754 (1789) (J. Gales ed. 1834) (statement of Rep. Livermore)), *cert. denied* (Oct. 3, 2011); *Id.*

“What is meant by the terms excessive bail?,” either in a broad sense or as applied to [P]etitioner's case” has not been answered by the

⁶ 1 Annals of Cong. 754 (1789) (J. Gales ed. 1834) (statement of Rep. Livermore).

United States Supreme Court in over 230 years. Id.

“Can an indigent be denied freedom, where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom?” Bandy v. United States, 81 S. Ct. 197, 198 (Douglas, Circuit Justice, 1960).

United States Supreme Court Caselaw

“The Supreme Court has directly addressed the [Excessive Bail] Clause only three times since its adoption.” Galen v. County of Los Angeles, 477 F.3d 652, 659 (9th Cir. 2007). The three cases are Stack v. Boyle, 342 U.S. 1 (1951); Carlson v. Landon, 342 U.S. 524 (1952); and United States v. Salerno, 481 U.S. 739 (1987). Id.

“[N]one of the [above] cases dealt directly with whether or not the amount of a defendant’s bail was constitutionally excessive.” Johnson v. Missouri, *petition for cert. filed* (U.S. June 22, 2011) (No. 10-1550, p. 2), *cert. denied* (Oct. 3, 2011).

In 1951, in a federal case, the Court “did not reach the question of excessiveness because it concluded ‘that bail ha[d] not been fixed by proper methods.’” Johnson v. Missouri, *petition for cert. filed* (U.S. June 22, 2011) (No. 10-1550, pp. 2-3), *cert. denied* (Oct. 3, 2011); Stack v. Boyle, 342 U.S. 1, 7 (1951). At that time, an incomplete definition was “[b]ail set at a figure higher than an amount reasonably calculated to fulfill this purpose is ‘excessive’ under the Eighth

Amendment.” Boyle, 342 U.S. at 5. This incomplete definition was later determined to be dictum in Salerno.

Carlson v. Landon “was a civil case dealing with deportation which held that ‘the Eighth Amendment [did] not require that bail be allowed under the circumstances of these cases.’” Carlson v. Landon, 342 U.S. 524 (1952).

In 1987, the Court determined that “the Bail Reform Act's provisions permitting pretrial detention on the basis of future dangerousness[]” were constitutional. United States v. Salerno, 481 U.S. 739, 746 (1987). Salerno critically distinguished Boyle by stating that Boyle's incomplete definition is dictum. Id. at 752 and 753 (stating, “bail set at a figure higher than an amount reasonably calculated [to ensure the defendant's presence at trial] is “excessive” under the Eighth Amendment[]” is dictum.”).

Additional Caselaw

The following cases broadly demonstrate there is support for either side, but the unifying piece that is missing is an answer to Rep. Livermore's 1789 question.

The bail bond must be fixed with a view to giving the prisoner his liberty, not for the purpose of keeping him in jail. If, in order to keep him in custody, the bond is ordered at a sum so large that the prisoner cannot furnish it the order violates Section 24, Article II, of the

Constitution. For that is saying the offense is not bailable when the Constitution says it is.

State ex rel. Corella v. Miles, 262 S.W. 364, 365 (Mo. 1924).

“The only legitimate purpose in setting bail is to ensure the accused's appearance at trial, and any amount in addition to that figure is excessive.” State v. Dodson, 556 S.W.2d 938, 944 (Mo.App. 1977).

“Excessive bail is the equivalent of a refusal to grant bail, and in such cases habeas corpus is an available and appropriate remedy for relief.” Jones v. Grimes, 134 S.E.2d 790, 792 (Ga. 1964).

“The court abuses its discretion when it sets an excessive bail that is designed to be the functional equivalent of no bail.” Best v. State, 28 So. 3d 134, 135 (Fla. Dist. Ct. App. 2010) (internal citation omitted).

Excessive bail is for practical purposes no bail at all. In this regard too there is a general misconception as to the purpose of bail. Bail may not be used to "punish" a defendant. Being presumed innocent, he is entitled to release on bail in a sum which he can furnish.

People v. Rezek, 204 N.Y.S.2d 640, 643 (N.Y. 1960).

“The presumption of innocence, a basic presumption in our system of criminal law, is a paramount consideration when fixing bail,

perhaps somewhat diminished by the requirement that probable cause be present before an arrest is permitted.” State v. Fann, 571 A.2d 1023, 1026 (N.J. Super. Ct. Law Div. 1990).

“A decision upon the question of excessiveness must be based upon two basic and related considerations: (1) The object of bail itself, and (2) the financial ability of the accused to provide the required amount of bail.” Hobbs v. Lindsey, 162 N.E.2d 85, 87-88 (Ind. 1959).

The test for excessiveness is not whether defendant is financially capable of posting bond but whether the amount of bail is reasonably calculated to assure the defendant's appearance at trial. United States v. Beaman, 631 F.2d 85, 86 (6th Cir. 1980) (internal citation omitted).

“[A] bail setting is not constitutionally excessive merely because a defendant is financially unable to satisfy the requirement.” United States v. McConnell, 842 F.2d 105, 107 (5th Cir. 1988) (internal citations omitted).

“While the ability or inability to make bail is a factor, it, alone, does not control the amount.” Ex parte Cevallos, 537 S.W.2d 744, 745 (Tex. Crim. App. 1976) (internal citations omitted).

“[B]ail is not to be deemed excessive merely because the accused cannot give the bail required[.]” Gusick v. Boies, 233 P.2d 446, 448 (Ariz. 1951) (internal citation omitted).

In Summary

Neither of Petitioner’s pending charges – a class C felony delivery of a controlled substance

and a class D felony unlawful possession of an explosive weapon – nor her criminal history includes a dangerous felony. App. 118a, App. 78e; App. 18a, App. 8e.

Petitioner submits Respondent's February 12, 2021 decision to set a one million-dollar, cash-only bond on the initial warrant for arrest was, is, and always will be excessive under the Eighth Amendment's Excessive Bail Clause.

However, for the reasons provided to the first question presented for review, assuming arguendo that the Excessive Bail Clause is not preempted or stayed at the time when a judge sets bond on the initial warrant for arrest, the constitutional remedy is not a subsequent bond hearing but a reasoned opinion on the merits from an appellate court as to why said bond violates or does not violate Petitioner's rights under the Excessive Bail Clause.

And without an answer to Rep. Livermore's 1789 question – "What is meant by the terms excessive bail?"⁷ – Petitioner's cash-only bond could have been set at two million dollars or ten million dollars for that matter.

Conclusion

The petition for a writ of certiorari should be granted.

⁷ 1 Annals of Cong. 754 (1789) (J. Gales ed. 1834) (statement of Rep. Livermore).

Respectfully submitted,

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