

IN THE  
MISSOURI COURT OF APPEALS  
EASTERN DISTRICT



44e

STATE OF MISSOURI ex rel. ) Cause No.  
MICHALENE HAGAN, ) (Re: Lincoln County  
Relator, ) Case 21L6-CR00158)  
 )  
v. )  
 )  
THE HONORABLE GREGORY )  
ALLSBERRY, Associate Circuit )  
Judge, 45th Judicial Circuit, )  
Lincoln County, Missouri, )  
Respondent. )

## SUGGESTIONS IN SUPPORT

Relator's suggestions consist of caselaw from nonbinding jurisdictions.

The following holdings or principles offer broad support for either side, but do not definitively answer “Representative Livermore’s 1789 question, ‘What is meant by the terms excessive bail?[]’” 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).

To the extent any cases are deemed relevant, Relator's constitutional claim is a distinguishing fact because it is strictly tied to the moment in time – a time when there appears to be no law (e.g., Rule 33) that preempts or stays the Excessive Bail Clauses – when a judge sets bond on the initial warrant for arrest.

*Caselaw*

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"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).

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).

"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).

"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).

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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).

Respectfully submitted,

*/s/ Lou Horwitz*

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**Certificate of Service**

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I certify that on this 11th day of March, 2021, a true copy of the above and foregoing was electronically filed with the Clerk of the Court via the Missouri eFiling System and served via electronic mail to the parties and attorneys listed below.

The Honorable Gregory Allsberry, Associate Circuit Judge  
45th Judicial Circuit  
Lincoln County Justice Center  
45 Business Park Drive  
Troy, MO 63379  
Tel: 636-528-6300  
Fax: 636-528-9168  
Email: gregory.allsberry@courts.mo.gov

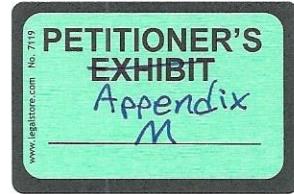
Ms. Tamma Keim, Assistant Prosecuting Attorney  
Lincoln County Prosecuting Attorney's Office  
Lincoln County Justice Center  
45 Business Park Drive  
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Email: tkeim@lcmopa.com

*/s/ Lou Horwitz*

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Louis Horwitz

IN THE  
MISSOURI COURT OF APPEALS  
EASTERN DISTRICT



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STATE OF MISSOURI ex rel.	)	Cause No.
MICHALENE HAGAN,	)	(Re: Lincoln County
Relator,	)	Case 21L6-CR00158)
	)	
v.	)	
	)	
THE HONORABLE GREGORY	)	
ALLSBERRY, Associate Circuit	)	
Judge, 45th Judicial Circuit,	)	
Lincoln County, Missouri,	)	
Respondent.	)	

**INDEX TO EXHIBITS<sup>1</sup>**

<u>Exhibit</u>	<u>Description</u>	<u>Page Number</u>
A	Warrant	1
B	Complaint	5
C	Probable Cause Statement	7
D	Initial Appearance	10
E	Bond Memo and Order	11
F	Verdict Directing Instruction	13

for Count I

<sup>1</sup> Each exhibit is a true and accurate copy. Relator's social security number and date of birth have been redacted in exhibits A and C. This Index, including the certificate of service, consists of three pages.

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<u>Exhibit</u>	<u>Description</u>	<u>Page Number</u>
G	Verdict Directing Instruction for Count II	16
H	Entry of Appearance	21
I	Rule 33 <sup>2</sup>	22

Respectfully submitted,

*/s/ Lou Horwitz*

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#### **Certificate of Service**

I certify that on this 11th day of March, 2021, a true copy of the above and foregoing was electronically filed with the Clerk of the Court via the Missouri eFiling System and served via electronic mail to the parties and attorneys listed below.

The Honorable Gregory Allsberry, Associate Circuit Judge  
45th Judicial Circuit  
Lincoln County Justice Center  
45 Business Park Drive  
Troy, MO 63379  
Tel: 636-528-6300  
Fax: 636-528-9168

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<sup>2</sup> The Rules included are 33.01, 33.02, 33.05, and 33.06.

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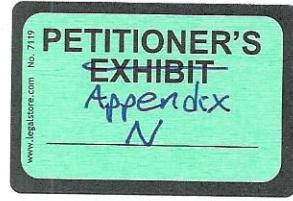
Email: gregory.allsberry@courts.mo.gov

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45 Business Park Drive  
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*/s/ Lou Horwitz*

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Louis Horwitz



# In the Missouri Court of Appeals

## Eastern District

STATE OF MISSOURI, ex rel. ) No. ED109511  
MICHALENE HAGAN, )  
 )  
Relator, ) Writ of Prohibition  
 )  
vs. ) Cause No. 21L6-CR00158  
 )  
HONORABLE GREGORY ALLSBERRY, )  
Associate Circuit Judge, 45<sup>th</sup> Judicial Circuit, )  
Lincoln County, Missouri, )  
 )  
Respondent. )

### ORDER

Relator has filed a Petition for Writ of Prohibition along with Suggestions in Support and Exhibits.

Being duly advised in the premises, the Court hereby DENIES Relator's Petition for Writ of Prohibition.

SO ORDERED:

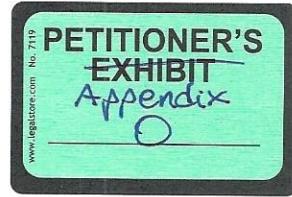
DATE: March 12, 2021

Robert M. Clayton III, Presiding Judge  
Writ Division Six  
Missouri Court of Appeals, Eastern District

cc: Hon. Gregory Allsberry  
Louis R. Horwitz  
Tamma E. Keim



IN THE  
MISSOURI SUPREME COURT



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STATE OF MISSOURI ex rel.	)	Cause No.
MICHALENE HAGAN,	)	(Re: Lincoln County
Relator,	)	Case 21L6-CR00158)
	)	
v.	)	
	)	
THE HONORABLE DAVID ASH,	)	
Associate Circuit Judge, 45th	)	
Judicial Circuit, Lincoln County,	)	
Missouri, and	)	
THE HONORABLE GREGORY	)	
ALLSBERRY, Associate Circuit	)	
Judge, 45th Judicial Circuit,	)	
Lincoln County, Missouri,	)	
Respondents.	)	

**WRIT SUMMARY**

**Parties and their attorneys:**

**Relator:** Michalene Hagan.

**Relator's attorney:** Louis Horwitz, Lou Horwitz LLC, 1 Mid Rivers Mall Drive, Suite 280, St. Peters, MO 63376, tel: 636-279-1532, fax: 636-279-1632, email: LouHorwitzLLC@att.net.

**Respondents:**

The Honorable David Ash, Associate Circuit Judge, 45th Judicial Circuit, Lincoln County Courthouse, 45 Business Park Drive, Troy, MO 63379, tel: 636-528-6300, fax: 636-528-9168, email: david.ash@courts.mo.gov.

The Honorable Gregory Allsberry, Associate Circuit Judge, 45th Judicial Circuit, Lincoln County Courthouse, 45 Business Park Drive, Troy, MO 63379, tel: 636-528-6300, fax: 636-528-9168, email: gregory.allsberry@courts.mo.gov.

**Respondents' attorney:** Tammy Keim, Assistant Prosecuting Attorney, Lincoln County Prosecuting Attorney's Office, 45 Business Park Drive, Troy, MO 63379, tel: 636-528-8571, fax: 636-528-2152, email: tkeim@lcmopa.com.

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**Nature of underlying action:** Criminal Complaint charging Relator with a class C felony of delivery of a controlled substance and a class D felony of unlawful possession of an explosive weapon.

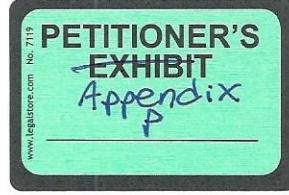
**Action of Respondent being challenged, including date thereof:** On February 12, 2021, the Honorable Gregory Allsberry set bond at one million dollars, cash only on the initial warrant for arrest.

**Relief sought by Relator:** Relator seeks a writ of prohibition holding, as a matter of law and as applied, that 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.

**Date case set:** There is no trial date because the case is in associate circuit court on a Complaint.

**Any previous or pending writ proceeding:** Case No. ED109511. On March 11, 2021, Relator filed a petition for writ of prohibition in the Missouri Court of Appeals, Eastern District. On March 12, 2021, the petition was summarily denied.

IN THE  
MISSOURI SUPREME COURT



STATE OF MISSOURI ex rel.	)	Cause No.
MICHALENE HAGAN,	)	(Re: Lincoln County
Relator,	)	Case 21L6-CR00158)
	)	
v.	)	
	)	
THE HONORABLE DAVID ASH,	)	
Associate Circuit Judge, 45th	)	
Judicial Circuit, Lincoln County,	)	
Missouri, and	)	
THE HONORABLE GREGORY	)	
ALLSBERRY, Associate Circuit	)	
Judge, 45th Judicial Circuit,	)	
Lincoln County, Missouri,	)	
Respondents.	)	

**PETITION FOR WRIT OF PROHIBITION<sup>1</sup>**

COMES NOW Michalene Hagan, Relator, by and through undersigned counsel, pursuant to Supreme Court Rule 97, and petitions the Court for a writ

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<sup>1</sup> Judge Ash is listed as a party because he presently presides over Relator's case. In brief, Relator's case was initially assigned to Judge Allsberry. Judge Allsberry set the bond that Relator is challenging herein. Prior to filing this petition, but subsequent to the Eastern District's denial of Relator's petition for writ of prohibition (case no. ED109511), Relator timely filed a Rule 32.06 motion for change of judge regarding Judge Allsberry. Said motion was granted. On March 25, 2021, Relator's case was assigned to Judge Ash.

of prohibition based on the claim that, as a matter of law and as applied, Judge Allsberry's setting of 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, reasonably suggests that the Excessive Bail Clauses of the United States and the Missouri Constitutions were, in fact, violated.<sup>2</sup>

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### *Issues*

- I. When a judge sets bond on the initial warrant for arrest, whether the Excessive Bail Clauses are preempted or stayed because of Rule 33.<sup>3</sup>
- 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.

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<sup>2</sup> Unless indicated otherwise, Missouri statutory and constitutional citations are to the electronic database published by the Missouri Revisor of Statutes, Cum. Supp. 2020, as of March 25, 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. Links or hyperlinks are not listed pursuant to Rule 103.04(b). All other citations are to LexisNexis 2021.

<sup>3</sup> Exhibit I contains Rules 33.01, 33.02, 33.05, and 33.06.

## STATEMENT OF JURISDICTION<sup>4</sup>

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“The supreme court and districts of the court of appeals may issue and determine original remedial writs.” Mo. Const. art. V, § 4.1.

“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.

“Pursuant to these rules, applicable statutes and constitutional provisions, if a court fails to set conditions for release, or sets inadequate or excessive conditions, an accused or the state may seek remedial writ relief in a higher court pursuant to Rule 84.24.” Rule 33.09.

“No original remedial writ shall be issued by an appellate court in any case wherein adequate relief can be afforded by an appeal or by application for such writ to a lower court.” Rule 84.22(a).

“In all cases of final judgment rendered upon any indictment or information, an appeal to the proper appellate court shall be allowed to the defendant, provided, . . . .” Section 547.070, RSMo.

An appeal is not an option for Relator because Respondent’s setting of a one million-dollar, cash-only bond on the initial warrant for arrest is not a judgment under Rule 74.01. See Rule 74.01(a) (stating, “[a] judgment is entered

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<sup>4</sup> Given the procedural posture of this claim, two additional preliminary matters will be mentioned herein: 1) Mootness and 2) Prohibition versus Mandamus.

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when a writing signed by the judge and denominated ‘judgment’ or ‘decree’ is filed.”) and exhibit A.

#### *Mootness*

“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).

#### *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 Relator’s bond 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 Relator’s bond to be “of general public interest and importance.” Id.; Id.

Further, “[t]his Constitution[] . . . shall be the supreme law of the land[.]” U.S. Const. art. VI. And as applied to the time when bond is set on the initial warrant for arrest, counsel is not aware of any law stating that the Excessive Bail Clauses are preempted or stayed because of Rule 33.<sup>5</sup>

Two, this issue is likely to recur because, as a matter of custom and practice, it seems quite common for bonds to be set 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. Whether bond is amended at a subsequent bond hearing when defendant is present is irrelevant to and not part of Relator’s constitutional claim. Again, when bond is set on the initial warrant for arrest, counsel is not aware of any law stating that the Excessive Bail Clauses are preempted or stayed because of Rule 33.

Regarding a possible jury trial, bond, or the issue of bond, is not an element in either of the verdict directing instructions for Relator’s charges. See exhibits F and G. 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.

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<sup>5</sup> “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.” Rule 33.05.

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 Relator’s Excessive Bail Clause claim satisfies the public interest exception to mootness.

*Prohibition versus Mandamus*

“Pursuant to these rules, applicable statutes and constitutional provisions, if a court fails to set conditions for release, or sets inadequate or excessive conditions, an accused or the state may seek remedial writ relief in a higher court pursuant to Rule 84.24.” Rule 33.09.

It is fundamental in the law of mandamus . . . that a prior express and specific demand be made of respondent of that which relator seeks, *and that a refusal of such demand occur*, before relator has any standing in court, or his application for the writ contains any ground for relief.

State ex rel. Healea v. Tucker, 545 S.W.3d 348, 353-354 (Mo. banc 2018) (internal citation omitted).

A writ of prohibition is appropriate: (1) to prevent the usurpation of judicial power when a lower court lacks authority or jurisdiction; (2) to remedy an excess of authority, jurisdiction or abuse of discretion

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where the lower court lacks the power to act as intended; or (3) where a party may suffer irreparable harm if relief is not granted.

State ex rel. Strauser v. Martinez, 416 S.W.3d 798, 801 (Mo. banc 2014) (internal citation omitted).

“An abuse of discretion occurs if the circuit court’s decision ‘is clearly against the logic of the circumstance, is arbitrary and unreasonable, and indicates a lack of careful consideration.’” Id. (internal citations omitted).

#### *Argument*

At the time when any judge decides to set the bond on an initial warrant for arrest, it is impossible for any defendant to make a specific demand to the judge about the bond because the defendant is not a part of that process.<sup>6</sup> Tucker, 545 S.W.3d at 353.

Since a petition for a writ of mandamus is not an option, the only possible writ is a writ of prohibition to remedy an abuse of discretion. Martinez, 416 S.W.3d at 801. Relator submits that a finding that the Excessive Bail Clauses have been violated would, in turn, establish that there was an abuse of discretion.

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<sup>6</sup> In addition, the constitutional propriety of not setting a bond on an initial warrant for arrest (excluding probation cases “[b]ecause probation revocation is a civil proceeding[”]) is not embedded, in any way, in Relator’s claim. State ex rel. Manion v. Elliott, 305 S.W.3d 462, 462 (Mo. banc 2010).

## STATEMENT OF THE FACTS<sup>7</sup>

On February 12, 2021, Judge Allsberry signed the initial warrant for arrest and decided to set bond at one million dollars, cash only. See exhibit A, pp. 2-3.

On February 17, 2021, the State filed a Complaint against Relator. See exhibit B. 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. See exhibit C. Information pertaining to Relator's criminal history is contained in paragraph ten. Id. at p. 8. None of the offenses in paragraph ten and neither of the charges in the Complaint would be considered a dangerous felony as defined by law. Section 556.061(19), RSMo.

On February 18, 2021, since Relator does not have one million dollars cash, Relator appeared in custody for the initial appearance. See exhibit D. Judge Allsberry set a bond hearing for February 23, 2021. Id.

On February 23, 2021, Judge Allsberry held a hearing and there was no change to the bond. See exhibit E.

Relator's address is located in the county where the charges are pending. See exhibit A, p.1 and exhibit C, p.7.

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<sup>7</sup> Relator's social security number and date of birth have been redacted in exhibits A and C.

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On March 9, 2021, undersigned counsel filed his entry of appearance. See exhibit H.

On March 11, 2021, Relator filed a petition for writ of prohibition in the Missouri Court of Appeals, Eastern District. See exhibit K.<sup>8</sup> On March 12, 2021, the Eastern District summarily denied Relator's petition. See exhibit N.

### **RELIEF SOUGHT**

Relator seeks a writ of prohibition holding, as a matter of law and as applied, that 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.

### **STATEMENT OF THE REASONS WHY THE WRIT SHOULD ISSUE**

#### *Issue I*

Regarding when a judge sets bond on the initial warrant for arrest, whether the Excessive Bail Clauses are preempted or stayed because of Rule 33, counsel is not aware of any law stating that the Excessive Bail Clauses are preempted or stayed because of Rule 33.

On February 12, 2021, Respondent signed the initial warrant for arrest and decided to set bond at one million dollars, cash only. See exhibit A, pp. 2-3.

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<sup>8</sup> Relator's writ summary, writ suggestions, and writ index are exhibits J, L, and M, respectively.

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“Pursuant to these rules, applicable statutes and constitutional provisions, if a court fails to set conditions for release, or sets inadequate or excessive conditions, an accused or the state may seek remedial writ relief in a higher court pursuant to Rule 84.24.” Rule 33.09.

In response to the Respondent’s February 12, 2021 decision to set bond on the initial warrant for arrest at one million dollars, cash only, combined with the fact that there appears to be no law stating that the Excessive Bail Clauses are preempted or stayed because of Rule 33, Relator, believing the bond set on February 12, 2021 was, is, and always will be excessive, “may seek remedial writ relief in a higher court pursuant to Rule 84.24.” Rule 33.09.

Absent a preemption or stay of the Excessive Bail Clauses, Rule 33.05 is rendered irrelevant at the time when a judge sets a bond on the initial warrant for arrest. See Rule 33.05. Again, whether bond is amended at a subsequent bond hearing when defendant is present is irrelevant to and not part of Relator’s constitutional claim.

#### *Issue II*

Regarding “[w]hether 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[,]” the writ should issue because “Representative Livermore’s 1789 question, ‘What is meant by the terms excessive bail?,’ either in a broad sense or as applied to

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[Relator's] case" has not been answered by the United States Supreme Court in over 230 years. 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).

#### *Excessive Bail Clauses*

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. "That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." Mo. Const. art. I, § 21.

"[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).

#### *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).

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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).

And 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). Further, Salerno critically distinguished Boyle by stating that Boyle's incomplete definition is dictum. Salerno, 481 U.S. at 753. Specifically, “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. Id. at 752; Id. at 753.

#### *Missouri Caselaw*

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

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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).

### CONCLUSION

“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).

“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.

In short, the writ should issue because the setting of a bond on the initial warrant for arrest would seem to satisfy the “public interest

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exception to mootness[;]" it appears that no law preempts or stays the Excessive Bail Clauses at this stage; and thus, a one million-dollar, cash-only bond, regarding a class C felony delivery of a controlled substance and a class D felony unlawful possession of an explosive weapon, reasonably suggests that the Excessive Bail Clauses of the United States and the Missouri Constitutions were, in fact, violated. Gurley, 361 S.W.3d at 414.

Respectfully submitted,

*/s/ Lou Horwitz*

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#### **Certificate of Service**

I certify that on this 26th day of March, 2021, a true copy of the above and foregoing was electronically filed with the Clerk of the Court via the Missouri eFiling System and served via electronic mail to the parties and attorneys listed below.

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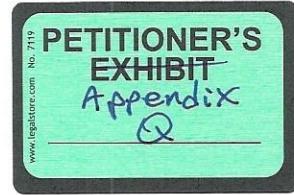
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*/s/ Lou Horwitz*

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Louis Horwitz

IN THE  
MISSOURI SUPREME COURT



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STATE OF MISSOURI ex rel.	)	Cause No.
MICHALENE HAGAN,	)	(Re: Lincoln County
Relator,	)	Case 21L6-CR00158)
	)	
v.	)	
	)	
THE HONORABLE DAVID ASH,	)	
Associate Circuit Judge, 45th	)	
Judicial Circuit, Lincoln County,	)	
Missouri, and	)	
THE HONORABLE GREGORY	)	
ALLSBERRY, Associate Circuit	)	
Judge, 45th Judicial Circuit,	)	
Lincoln County, Missouri,	)	
Respondents.	)	

**SUGGESTIONS IN SUPPORT**

Relator's suggestions consist of caselaw from nonbinding jurisdictions.

The following holdings or principles offer broad support for either side, but do not definitively answer "Representative Livermore's 1789 question, 'What is meant by the terms excessive bail?[]'" *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).

To the extent any cases are deemed relevant, Relator's constitutional claim is a distinguishing fact because it is strictly tied to the moment in time – a time

when there appears to be no law (e.g., Rule 33) that preempts or stays the  
Excessive Bail Clauses – when a judge sets bond on the initial warrant for arrest.

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*Caselaw*

“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).

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).

“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).

“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).

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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).

Respectfully submitted,

*/s/ Lou Horwitz*

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**Certificate of Service**

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*/s/ Lou Horwitz*

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Louis Horwitz

IN THE  
MISSOURI SUPREME COURT



STATE OF MISSOURI ex rel. ) Cause No.  
 MICHALENE HAGAN, ) (Re: Lincoln County  
 Relator, ) Case 21L6-CR00158)  
 )  
 v. )  
 )  
 THE HONORABLE DAVID ASH, )  
 Associate Circuit Judge, 45th )  
 Judicial Circuit, Lincoln County, )  
 Missouri, and )  
 THE HONORABLE GREGORY )  
 ALLSBERRY, Associate Circuit )  
 Judge, 45th Judicial Circuit, )  
 Lincoln County, Missouri, )  
 Respondents. )

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INDEX TO EXHIBITS<sup>1</sup>

<u>Exhibit</u>	<u>Description</u>	<u>Page Number</u>
A	Warrant	1
B	Complaint	5
C	Probable Cause Statement	7

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<sup>1</sup> Each exhibit is a true and accurate copy. Relator's social security number and date of birth have been redacted in exhibits A and C. A copy of the exhibits filed in the Eastern District are not filed in this petition because that would result in another copy of this petition's exhibits A to I. This Index, including the certificate of service, consists of three pages.

<u>Exhibit</u>	<u>Description</u>	<u>Page Number</u>
D	Initial Appearance	10
E	Bond Memo and Order	11
F	Verdict Directing Instruction for Count I	13
G	Verdict Directing Instruction for Count II	16
H	Entry of Appearance	21
I	Rule 33 <sup>2</sup>	22
J	Writ summary – Eastern District (“ED”)	28
K	Writ petition – ED	30
L	Writ suggestions – ED	44
M	Writ index to exhibits – ED	48
N	ED’s 3/12/21 order	51

Respectfully submitted,

*/s/ Lou Horwitz*

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<sup>2</sup> The Rules included are 33.01, 33.02, 33.05, and 33.06.

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*/s/ Lou Horwitz*

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Louis Horwitz

# In the Supreme Court of Missouri

May Session, 2021

State ex rel. Michalene Hagan,

Relator,

No. SC99023      PROHIBITION  
Lincoln County Circuit Court No. 21L6-CR00158  
Eastern District Court of Appeals No. ED109511



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The Honorable David Ash and the Honorable Gregory Allsberry,  
Respondents.

*Now at this day, on consideration of the petition for a writ of prohibition herein to the said respondents, it is ordered by the Court here that the said petition be, and the same is hereby denied.*

STATE OF MISSOURI-Sct.

*I, BETSY AUBUCHON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Session thereof, 2021, and on the 4<sup>th</sup> day of May, 2021, in the above-entitled cause.*

*WITNESS my hand and the Seal of the Supreme Court of Missouri, at my office in the City of Jefferson, this 4<sup>th</sup> day of May, 2021.*



Betsy Aubuchon, Clerk

Lori S. Knaebel, Deputy Clerk

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Supreme Court of Missouri

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vs.

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**MANDATE**

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**JUDGMENT**

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(14) "Consent": consent or lack of consent may be expressed or implied. Assent does not constitute consent if:

(a) It is given by a person who lacks the mental capacity to authorize the conduct charged to constitute the offense and such mental incapacity is manifest or known to the actor; or

(b) It is given by a person who by reason of youth, mental disease or defect, drug-induced state, or any other reason is manifestly unable or known by the actor to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense; or

(c) It is induced by force, duress or deception;

(15) "Controlled substance", a drug, substance, or immediate precursor in schedules I through V as defined in chapter 195;

(16) "Criminal negligence", failure to be aware of a substantial and unjustifiable risk that circumstances exist or a result will follow, and such failure constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation;

(17) "Custody", a person is in custody when he or she has been arrested but has not been delivered to a place of confinement;

(18) "Damage", when used in relation to a computer system or network, means any alteration, deletion, or destruction of any part of the computer system or network;

(19) "Dangerous felony", the felonies of arson in the first degree, assault in the first degree, attempted rape in the first degree if physical injury results, attempted forcible rape if physical injury results, attempted sodomy in the first degree if physical injury results, attempted forcible sodomy if physical injury results, rape in the first degree, forcible rape, sodomy in the first degree, forcible sodomy, assault in the second degree if the victim of such assault is a special victim as defined in subdivision (14) of section 565.002, kidnapping in the first degree, kidnapping, murder in the second degree, assault of a law enforcement officer in the first degree, domestic assault in the first degree, elder abuse in the first degree, robbery in the first degree, armed criminal action, conspiracy to commit an offense when the offense is a dangerous felony, vehicle hijacking when punished as a class A felony, statutory rape in the first degree when the victim is a child less than twelve years of age at the time of the commission of the act giving rise to the offense, statutory sodomy in the first degree when the victim is a child less than twelve years of age at the time of the commission of the act giving rise to the offense, child molestation in the first or second degree, abuse of a child if the child dies as a result of injuries sustained from conduct chargeable under section 568.060, child kidnapping, parental kidnapping committed by detaining or concealing the whereabouts of the child for not less than one hundred twenty days under section 565.153, and an "intoxication-related traffic offense" or "intoxication-related boating offense" if the person is found to be a "habitual offender" or "habitual boating offender" as such terms are defined in section 577.001;

(20) "Dangerous instrument", any instrument, article or substance, which, under the circumstances in which it is used, is readily capable of causing death or other serious physical



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