

STATE OF MICHIGAN
IN THE COURT OF APPEALS

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff-Appellee,

v

Case No. _____

DAVID CONTRERAS-REYES,

Circuit Court No. 21-01253-FH

Defendant-Appellant.

District Court No. 2021-FY-00110

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EMERGENCY MOTION FOR MODIFICATION OF RELEASE DECISION

Defendant David Contreras-Reyes appeals by right, pursuant to MCR 6.106(H), requesting review of the circuit court's decision to incarcerate him pre-trial by increasing his bond, *sua sponte*, from \$10,000/10% to \$100,000 cash. The circuit court did so despite the fact that Mr. Contreras-Reyes had been fully compliant with his extensive non-financial release conditions for over three

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months and has extensive ties to the community. And it did so *immediately* after Mr. Contreras-Reyes declined a plea bargain, thus exercising his constitutional right to proceed to trial. Unfortunately, the circuit court's actions here reflect an ongoing pattern by which the chief judge of the 17th Circuit Court routinely increases bond by enormous amounts immediately after defendants assert their innocence and opt to proceed to trial. Indeed, earlier this week another panel found that the same judge abused his discretion in another case exhibiting the same pattern of judicial conduct. See *People v Forbes*, unpublished order of the Court of Appeals, issued June 23, 2021 (Docket No. 357529), attached as Exhibit A.

As set forth in the attached brief, the circuit court's bail order was an abuse of discretion and violated Mr. Contreras-Reyes' constitutional rights in light of the following:

1. Mr. Contreras-Reyes is a 57-year-old man with no violent criminal history prior to the incident at issue here. See Exhibit B, p 4 (court services report with criminal history).

2. He was booked into the Kent County Jail on January 16, 2021 and charged with assault with intent to do great bodily harm, discharge of a firearm in a building, and felony firearm. In the words of the prosecutor, the gravamen of the charges is that “[t]he victim had several friends over for dinner and drinks. [Mr. Contreras-Reyes] was one of those people. And after apparently being intoxicated or under the influence, pulled out his handgun that the folks knew him to carry. It's my understanding he fired three rounds into the ground or the floor of the home and then shot the victim in the leg.” See Exhibit C, p 5 (transcript of May 25 hearing).

3. Mr. Contreras-Reyes was not charged with unlawful possession of a firearm because he has a conceal-carry permit. The firearm in question was, of course, seized by the police and held as evidence, meaning that Mr. Contreras-Reyes no longer had access to it.

4. Mr. Contreras-Reyes appeared before the district court for an arraignment on

January 16, the same date that he was arrested. Bond was set at \$10,000/10%. In addition, the district court imposed several non-financial release conditions: a no-contact order with the victim, a requirement not to possess or purchase any firearms, a requirement to report to Kent County Court Services for supervision, a requirement not to consume alcohol or drugs and to submit to testing as required by court services, and a prohibition on engaging in any form of assaultive or threatening behavior. Exhibit D (order of special conditions of bond); see also Exhibit E (register of actions) (entry on February 10 listing some special conditions).

5. Mr. Contreras-Reyes posted bond on February 8. See Exhibit E.

6. On February 10, 2021, Mr. Contreras-Reyes waived his preliminary examination and was bound over. His bond was continued. See Exhibit E.

7. Between February 8 and a status conference before the circuit court on May 25, there was no allegation that Mr. Contreras-Reyes was anything less than fully compliant with the terms of his release, and the prosecution has not contended otherwise. See Exhibit C, p 7–8. Court services has confirmed that Mr. Contreras-Reyes was compliant with his release terms and reported as directed. Exhibit F. In other words, there is no allegation that Mr. Contreras-Reyes has possessed a firearm, consumed a drop of alcohol, contacted the alleged victim, or engaged in any kind of threatening behavior since being released in February.

8. On May 25, the circuit court held a status conference via Zoom. At that status conference, the circuit court asked whether a plea bargain had been offered to Mr. Contreras-Reyes, asked for the details of the plea bargain, and re-explained the details of the proffered bargain to Mr. Contreras-Reyes. Exhibit C, pp 4–6. Defense counsel then indicated that Mr. Contreras-Reyes was declining the proffered plea bargain. *Id.*, p 6.

9. Immediately upon being informed that the plea bargain had been rejected, the

circuit court judge stated: “All right. I am -- this is the first time I've had a chance to look at this file or know anything about this case. I've had a chance to review the bond which is presently set at \$10,000. I am concerned that that is low.” The circuit court then increased bond to \$100,000 cash, despite the fact that the prosecution had not sought an increase and did not argue for one when given a chance to do so. *Id.*, p 8. The reasons given by the circuit court for its decision were that the court was concerned for the safety of community because the charges involved a shooting in a building and that Mr. Contreras-Reyes was a flight risk because “defendant is looking at some significant time if convicted.” *Id.*

10. The circuit court did not address, or even acknowledge, the facts that Mr. Contreras-Reyes had been released for over three months without incident, had appeared at all required court and court services appointments, lacked any prior violent history, and was compliant with his terms of release which included not owning a firearm or consuming alcohol. Nor did the circuit court address or acknowledge the facts that Mr. Contreras-Reyes was fully employed, has community ties (including children) in Kent County, owns a house in Kent County, and had resided in the area for approximately 25 years. *Id.*, pp 7–8.

11. Mr. Contreras-Reyes, who is medically vulnerable because of his somewhat advanced age, was incarcerated the same afternoon, in the midst of the COVID-19 pandemic, due to his inability to post such a high bond.

12. It will be approximately a year or more before Mr. Contreras-Reyes’ trial occurs due to COVID-19 related court backlogs—as the circuit court understood. See Exhibit G ¶ 4.

13. The action taken by the circuit court chief judge here—dramatically increasing cash bond *sua sponte*, to an obviously unaffordable amount, immediately after a criminal defendant declined a plea bargain—reflects a consistent and repeated pattern by this judge. In the past few

months, he has done the same thing in *at least* five other cases that are known to defense counsel. See *Forbes*, Exhibit A; Exhibits H–L (transcripts register of actions for each case). This pattern is well known in the criminal defense community, such that the entire staff of the Kent County Office of the Defender are forced to advise their clients as a matter of course that if the client declines a plea bargain before this judge, they will likely have their bond increased and be incarcerated while they await trial. Exhibit G ¶ 5.

14. The circuit court’s bail determination was unlawful for several independent, albeit overlapping, reasons.

15. First, the circuit court’s decision to increase bond violated Mr. Contreras-Reyes’ right to due process because it punished him for exercising his constitutional right to proceed to trial. The punitive nature of the circuit court’s actions is clearly demonstrated by the fact that this is not an isolated case, but instead reflects a longstanding pattern of judicial conduct. See *Forbes*, Exhibit A.

16. Second, the circuit court did not comply with MCR 6.106(C)–(D) because it did not make any record finding whatsoever that cash bail was necessary to address any flight risk or danger to the public that could not be addressed through non-financial conditions. In particular, the court did not even acknowledge Mr. Contreras-Reyes’ compliance with release conditions for over three months prior to his re-incarceration. See *Forbes*, Exhibit A (holding that a defendant’s compliant “conduct while on bond . . . demonstrates that the modification by the trial court was not required to ensure defendant’s appearance at court proceedings or to protect the public”). Nor did it acknowledge Mr. Contreras-Reyes’ ties to Kent County and his lack of any violent criminal history or history of non-appearance. Article 1, § 15 of the Michigan Constitution guarantees that “[a]ll persons shall, before conviction, be bailable by sufficient sureties,” except in circumstance

not applicable here. Article 1, § 16 provides that “[e]xcessive bail shall not be imposed.” MCR 6.106(C)–(F) implement these rights and provides that personal recognizance release or unsecured appearance bonds are the default release options.¹ Where, as here, release conditions are already working, raising bond *sua sponte* without any new information violates the court rules’ presumption of release, and thus constitutes an abuse of discretion as a matter of law.

17. Third, the circuit court made no inquiry whatsoever into Mr. Contreras-Reyes’ ability to pay, and thus abused its discretion by failing to select a bond amount that was tethered to his financial circumstances and to any potential risk to the public or flight risk that might exist.

18. Fourth, the circuit court’s bail decision is also unconstitutional because the circuit court’s actions did not satisfy the constitutional prerequisites for pretrial detention that are required by the equal protection and due process clauses. Mr. Contreras-Reyes is now being incarcerated “simply because, through no fault of his own, he cannot pay.” *Bearden v Georgia*, 461 US 660, 672–673; 103 S Ct 2064; 76 L Ed 2d 221 (1983).

19. Although Mr. Contreras-Reyes was incarcerated on May 25, the afternoon after the circuit court rendered its oral decision, the circuit court did not initially enter a written order increasing bond. Mr. Contreras-Reyes appealed to this Court, but on June 21 this Court held that it lacked jurisdiction due to the lack of a written order from the circuit court. See *People v Contreras-Reyes*, unpublished order of the Court of Appeals, issued June 22, 2021 (Docket No. 357527), attached as Exhibit M.

20. On June 22, the circuit court issued a written order increasing Mr. Contreras-Reyes’

¹ Furthermore, in response to the COVID-19 pandemic, the Michigan Supreme Court has specifically urged trial courts to “take into careful consideration public health factors arising out of the present state of emergency . . . in making pretrial release decisions, including in determining any conditions of release.” Administrative Order No. 2020-1 (2020).

bond to \$100,000 cash for the reasons set forth orally on May 25. Exhibit N.

* * * * *

Accordingly, Mr. Contreras-Reyes requests that this Court order that he be released on his own recognizance subject to the same extensive non-financial conditions of release that governed during his pre-trial release. Alternatively, Mr. Contreras-Reyes requests that his initial bond of \$10,000/10% be reinstated. Additionally, Mr. Contreras-Reyes requests re-assignment to another judge in light of the circuit court's demonstration of prejudice by having already once punished Mr. Contreras-Reyes through pre-trial detention for asserting his constitutional rights.

Respectfully submitted,

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Date: June 24, 2021

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**DEFENDANT'S BRIEF IN SUPPORT OF
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Defendant Robert Contreras-Reyes appeals by right, pursuant to MCR 6.106(H), requesting review of a decision by 17th Circuit Chief Judge Mark A. Trusock to *sua sponte* increase Mr. Contreras-Reyes' bond from \$10,000/10% to \$100,000 cash after Mr. Contreras-Reyes rejected a plea bargain and exercised his constitutional right to proceed to trial. Given that the original bond was a 10% bond, meaning that Mr. Contreras-Reyes had to post \$1,000, this reflects a *100-fold* increase in his bond. As a result, as the circuit court knew full well, Mr. Contreras-Reyes will remain detained for approximately a year or more as he awaits trial. The circuit court's decision is unlawful for several independent, albeit overlapping, reasons.

First, the circuit court violated Mr. Contreras-Reyes' right to due process by punishing him for asserting his innocence and exercising his constitutional right to request a trial. Worryingly, this reflects an established pattern by this judge in which he consistently, and *sua sponte*, increases bond and sends defendants to jail immediately after they decline plea bargains. Indeed, earlier this week this Court held that the same judge abused his discretion in another very similar case in which the circuit court *sua sponte* increased bond for a defendant who had just rejected a plea bargain and who had previously been compliant with the conditions of his release for a considerable period of time. See *Forbes*, Exhibit A.

Second, the circuit court erred as a matter of law by ignoring Michigan's presumption against cash bail. Specifically, the court failed to make findings, which are mandatory for imposing cash bail under MCR 6.106, that non-financial release conditions would not adequately protect the public or prevent any risk of non-appearance. This failure is particularly stark here given that Mr. Contreras-Reyes had successfully complied with his non-financial release conditions without incident for months and had longstanding ties to Kent County.

Third, the circuit court abused its discretion by failing to even inquire how much bond Mr.

Contreras-Reyes could afford, and by instead selecting an obviously unaffordable amount untethered to Mr. Contreras-Reyes' individual financial situation and ability to pay.

Fourth, the circuit court's bail determination violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment which, taken together, prohibit the incarceration of poor defendants in circumstances when otherwise-similarly situated defendants who are wealthier would be permitted to pay to remain free. Similarly, the Due Process Clause prohibits depriving anyone of their liberty prior to a criminal conviction unless individualized findings have been made that the defendant will pose an unmanageable flight risk or an identifiable and articulable danger to the public prior to trial.

This means that the Fourteenth Amendment—just like the Michigan Court Rules—requires a court, before imposing cash bail, to: (1) make a meaningful inquiry into the defendant's ability to afford cash bail, (2) properly consider non-financial release conditions before imposing an amount of bail known to be unaffordable, and (3) make findings supported by clear and convincing evidence that the defendant would be an articulable and identified risk to others or an unmanageable flight risk if released without paying the proposed amount of cash bail. The circuit court failed to make any of these findings here.

For each of these reasons, the circuit court's *sua sponte* hundred-fold increase of Mr. Contreras-Reyes' bond should be reversed, and he should be ordered released with a personal bond subject to the same extensive non-financial conditions that previously applied. Alternatively, Mr. Contreras-Reyes requests that his initial bond of \$10,000/10% be reinstated. Additionally, Mr. Contreras-Reyes requests re-assignment to another judge in light of the circuit court's demonstration of prejudice by having already once punished Mr. Contreras-Reyes through pre-trial detention for asserting his constitutional rights. See *People v Hegwood*, 465 Mich 432, 440

n17; 636 NW 2d 127 (2001) (noting that reassignment is appropriate when a judge has shown “prejudices or improper attitudes regarding [a] particular defendant”).

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to MCR 6.106(H). That provision, in relevant part, provides that “[a] party seeking review of a release decision may file a motion in the court having appellate jurisdiction over the court that made the release decision.” Here, the circuit court’s June 22 signed order increasing bond is a “release decision,” namely, a decision to end Mr. Contreras-Reyes’ pre-trial release by increasing his bond by two orders of magnitude.

STATEMENT OF FACTS

Mr. Contreras-Reyes is a 57-year-old man with no violent criminal history prior to the incident at issue here. See Exhibit B, p 4. He was booked into the Kent County Jail on January 16, 2021 and charged with assault with intent to do great bodily harm, discharge of a firearm in a building, and felony firearm. In the words of the prosecutor, the gravamen of the charges is that “[t]he victim had several friends over for dinner and drinks. [Mr. Contreras-Reyes] was one of those people. And after apparently being intoxicated or under the influence, pulled out his handgun that the folks knew him to carry. It’s my understanding he fired three rounds into the ground or the floor of the home and then shot the victim in the leg.” See Exhibit C, p 5.

Mr. Contreras-Reyes was not charged with unlawful possession of a firearm; he has a conceal-carry permit. The firearm in question was, of course, seized by the police and held as evidence, meaning that Mr. Contreras-Reyes no longer had access to it.

Mr. Contreras-Reyes appeared before the district court for an arraignment on January 16, the same date that he was arrested. Bond was set at \$10,000/10%. The district court imposed several non-financial release conditions: a no-contact order with the victim, a requirement not to

possess or purchase any firearms, a requirement to report to Kent County Court Services for supervision, a requirement not to consume alcohol or drugs and to submit to testing as required by court services, and a prohibition on engaging in any form of assaultive or threatening behavior. Exhibits D (special bond conditions order), E (register of actions).

Mr. Contreras-Reyes posted bond on February 8. See Exhibit E. On February 10, 2021, he waived his preliminary examination and was bound over; his bond was continued. *Id.*

Between February 8 and a status conference before the circuit court on May 25, there was no allegation that Mr. Contreras-Reyes was anything less than fully compliant with the terms of his release, and the prosecution has not contended otherwise. See Exhibit C, p 7–8. Court services has confirmed that Mr. Contreras-Reyes was compliant with his release terms and reported as directed. Exhibit F. In other words, there is no allegation that Mr. Contreras-Reyes has possessed a gun, consumed a drop of alcohol, contacted the alleged victim, or engaged in any kind of threatening behavior since being released in February.

On May 25, the circuit court held a status conference via Zoom. At that status conference, the circuit court asked whether a plea bargain had been offered to Mr. Contreras-Reyes. Exhibit C, p 4. It then asked for the details of the plea bargain and re-explained the details of the proffered bargain to Mr. Contreras-Reyes, emphasizing the sentence he could face if he did not accept the plea. *Id.*, pp 5–6. The circuit court then directed Mr. Contreras-Reyes to speak with his defense counsel about the plea bargain in a breakout room, though there was no indication that Mr. Contreras-Reyes did not already understand the plea bargain. *Id.*, pp 6–7. After he conferred with defense counsel, counsel informed the court that Mr. Contreras-Reyes was declining the proffered plea bargain. *Id.*, p 6.

Immediately afterwards, the circuit court judge stated: “All right. I am -- this is the first

time I've had a chance to look at this file or know anything about this case. I've had a chance to review the bond which is presently set at \$10,000. I am concerned that that is low.” The circuit court then increased bond to \$100,000 cash, despite the fact that the prosecution had not sought an increase and did not argue for one when given a chance to do so. *Id.*, p 8. The reasons given by the circuit court for its decision were that the court was concerned for the safety of community because the charges involved a shooting in a building and that Mr. Contreras-Reyes was a flight risk because “defendant is looking at some significant time if convicted.” *Id.*

The circuit court did not address, or even acknowledge, the facts that Mr. Contreras-Reyes had been released for over three months without incident, lacked any prior violent history or history of non-appearance, and was compliant with his terms of release which included not owning a firearm or consuming alcohol and reporting to court services. Nor did the circuit court address or acknowledge defense counsel’s representations that Mr. Contreras-Reyes was fully employed, has community ties (including children) in Kent County, owns a house in Kent County, and had resided in the area for approximately 25 years. *Id.*, pp 7–8.

Mr. Contreras-Reyes, who is medically vulnerable because of his somewhat advanced age, was incarcerated the same afternoon, in the midst of the COVID-19 pandemic, due to his inability to post such a high bond.

Although Mr. Contreras-Reyes was incarcerated on May 25, the circuit court did not initially enter a written order increasing his bond. Mr. Contreras-Reyes appealed to this Court, but on June 21 this Court held that it lacked jurisdiction due to the lack of a written order from the circuit court. Exhibit M.

On June 22, the circuit court issued a written order increasing Mr. Contreras-Reyes’ bond to \$100,000 cash “for the reasons stated on the record at [the] hearing on May 25, 2021.” Exhibit

N.

It will be approximately a year or more before Mr. Contreras-Reyes' trial occurs due to COVID-19 related court backlogs—as the circuit court understood. See Exhibit G ¶ 4.

As described in more detail in the Argument, Section I, below, the circuit court's actions reflect a consistent and repeated pattern by this particular judge. In the past few months alone, he has rendered similar decision in *at least* five other cases that are known to defense counsel. See *Forbes*, Exhibit A; Exhibits H–L (transcript of status conferences and register of actions for each case). Nor is this pattern new. See Exhibits M, N (similar decision from 2019 and 2018, respectively). This pattern is well known in the criminal defense community, such that the entire staff of the Kent County Office of the Defender are forced to advise their clients as a matter of course that if the client declines a plea bargain before this judge, they will likely have their bond increased and be incarcerated while they await trial. Exhibit G ¶ 5.

STANDARD OF REVIEW

On appeal, this Court applies an abuse of discretion standard when determining whether to stay, vacate, modify, or reverse the circuit court's ruling regarding bond or release. MCR 6.106(H). “A court ‘by definition abuses its discretion when it makes an error of law.’” *Kidder v Ptacin*, 284 Mich App 166, 170; 771 NW2d 806 (2009), quoting *Koon v United States*, 518 US 81, 100; 116 S Ct 2035; 135 L Ed 2d 392 (1996). Thus, under the abuse of discretion standard, questions of law such as the constitutional issues and issues regarding the violation of the Michigan Court Rules are, in effect, reviewed de novo. See *People v Luckity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

ARGUMENT

I. The Circuit Court Violated Mr. Contreras-Reyes' Right to Procedural Due Process By *Sua Sponte* Increasing His Bond in Response to His Exercise of His Constitutional Right to Proceed to Trial.

It is well established that “penalizing those who choose to exercise’ constitutional rights ‘would be patently unconstitutional” by violating core due process principles. *North Carolina v Pearce*, 395 US 711, 724; 89 S Ct 2072; 23 L Ed 2d 658 (1969), overruled on other grounds by *Alabama v Smith*, 490 US 794; 109 S Ct 2201; 104 L Ed 2d 865, quoting *United States v Jackson*, 390 US 570, 581; 88 S Ct 1209; 20 L Ed 2d 138 (1968); see also *People v Mazzie*, 429 Mich 29; 413 NW2d 1 (1987) (applying *Pearce*). Such “vindictive conduct by persons with the awesome power of prosecutors (and judges) is unacceptable and requires control.” *United States v Andrews*, 633 F2d 449, 453 (CA 6, 1980) (en banc). The test for determining when a defendant’s due process rights have been violated in response to their exercise of a right is whether “there exists a ‘realistic likelihood of vindictiveness”” by the trial court based on the information before the appellate court. *Id.*

The use of bond to punish defendants who choose to proceed to trial is, unfortunately, not unknown to courts. For example, in *People v Weatherford*, 132 Mich App 165, 170; 346 NW2d 920 (1984), this Court found that a circuit court judge who had *sua sponte* increased bond had done so in order to incarcerate a defendant and thereby induce him to plead guilty. This court held such “inherently coercive” behavior unlawful and allowed the defendant to withdraw his guilty plea. *Id.*; accord *People v Grant*, 61 App Div 3d 177; 873 NYS2d 355 (2009). Similarly, the United States Supreme Court has held that it is unconstitutional for the legislature to authorize harsher punishment for a criminal defendant who exercises their right to proceed to trial than would be available for conviction of the same offense by plea bargain. *United States v Jackson*, 390 US

570, 582; 88 S Ct 1209; 20 L Ed 2d 138 (1968). Such a scheme “needlessly chill[s] the exercise of basic constitutional rights.” *Id.*

Here, Chief Judge Trusock’s pattern of increasing bond and thus incarcerating defendants who exercise their right to proceed to trial is precisely the type of decision that presents a “realistic likelihood of vindictiveness” of the sort that courts have consistently found to be unconstitutional. *Andrews*, 633 F2d at 453. Indeed, the troubling facts of Mr. Contreras-Reyes’ own case suffice to raise precisely such a realistic likelihood on their own. At the time that he informed the circuit court of his desire to go to trial, Mr. Contreras-Reyes had been released for over three months, under the supervision of Kent County Court Services, and is not alleged to have violated any conditions of his pre-trial release during that time (including, of course, re-offending). Exhibit C, pp 6–7; Exhibit F. The extensive conditions to which he was subject included a prohibition on owning firearms or consuming alcohol—the two key factors that allegedly contributed to the offense. And he was subject to alcohol testing on demand by Court Services. See Exhibits D, E.

Furthermore, Mr. Contreras-Reyes had longstanding community ties. He owns a home in Kent County, has resided there for 25 years, has children there, and was employed full-time. Exhibit C, pp 7–8. He has no history of violent criminal activity and no history of non-appearance in court. Exhibit B, p 4. There was no reasonable basis to increase bond, as reflected by the facts that even the prosecution did not seek to increase bond. Exhibit C, p 6. The result of the circuit court’s decision, if allowed to stand, is that Mr. Contreras-Reyes will likely remain incarcerated for approximately a year or more as he awaits trial in light of the severely backlogged criminal docket in the 17th Circuit. Exhibit G ¶ 4. The backlog was also known to the circuit court, of course. In fact, the same judge recently informed another defendant, whose bond had just been increased five-fold (in response to the defendant’s request for a bond *reduction*), that the defendant

would eventually go to trial but “we’ll get to it after we get done with the 44 [backlogged] murder cases.” Exhibit O.

And any question as to whether the facts of Mr. Contreras-Reyes’ cases raise a “realistic likelihood of vindictiveness” is eliminated by a clear pattern shown by five recent decisions by the same judge. See Exhibits H–L.² In each of these cases, the circuit court’s actions are virtually identical. Immediately upon being informed of the decision by a defendant who is not already incarcerated to reject a plea bargain, the circuit court re-examines bond *sua sponte*—and then increases it, usually more than tenfold, to an obviously unaffordable amount, regardless of the individual facts or whether the prosecution has made a request to increase bond.

Earlier this week, this Court was confronted with one such case, and found that the circuit court abused its discretion by *sua sponte* increasing bond. See *Forbes*, Exhibit A. In *Forbes*, the circuit court denied a bond reduction motion for 19-year-old Robert Forbes, a defendant whom the court had previously incarcerated by increasing his bond 15-fold from \$5,000 cash/surety to \$75,000 cash even though Mr. Forbes had been released pre-trial for over a year under Court Services supervision without incident and faced a guidelines sentence of an interim sanction of only 2 to 17 months. See Exhibit H.

Another example occurred the same day that the circuit court incarcerated Mr. Contreras-Reyes. On that day, a defendant charged with operating while intoxicated (third offense) appeared

² Because this case arises via a motion rather than an appeal, this court can consider these documents afresh without taking judicial notice. However, even if it were necessary to do so, this Court can and should take judicial notice of the transcripts as they are official court records. “Documents that are part of lower court records *in this or other cases* are within this Court’s purview under principles of judicial notice, based on the one court of justice concept found in Michigan’s constitution.” *In re Martin*, unpublished per curiam opinion of the Court of Appeals, issued March 24, 2009 (Docket No. 286425); 2009 WL 763797 at *4 (emphasis in original), citing Const 1963, art 6, § 1; *People v Snow*, 386 Mich 586, 591; 194 NW2d 314 (1972).

before the court and indicated that he would not plead guilty. The circuit court proceeded to *sua sponte* increase the defendant's bond from \$10,000 cash/surety to \$75,000 cash/surety. Exhibit I. In doing so, the court not only ignored the fact that the defendant had been released for months on bond without issue, but also failed to acknowledge that the defendant's release conditions already included an alcohol tether and a condition of not driving while intoxicated. See *id.* (register of actions showing the bond conditions imposed at the defendant's original arraignment in September 2020). No evidence was presented at the hearing to suggest that these conditions had not served their intended purpose of protecting the public without the need for pretrial incarceration. See *id.* (transcript of hearing).

And on the same day that the circuit court denied bond reduction to the defendant in the *Forbes* case, the circuit court also denied a bond reduction motion for another defendant who had previously been released without incident for five months on bond. That defendant was released after paying a \$10,000 cash/surety bond in April 2020, but the circuit court increased bond *sua sponte* from \$10,000 to \$150,000 in September 2020 immediately after the defendant insisted on going to trial. Exhibit J (September 15, 2020 hearing transcript and ROA).³

And again: on May 18, the same court *sua sponte* increased bond from \$1,000/10% to \$75,000 cash (increasing the amount the defendant would have to post by a factor of 7500) after a defendant rejected a plea bargain in a case in which the allegations against the defendant, in the prosecution's own words, were that he was in a car that was stopped for "an unlawful plate or an unregistered plate," leading to a search of the car in which officers "found small amounts of

³ The bond in the case in question was originally increased at a September 2020 status conference. At that status conference, the circuit court erroneously stated that the prior bond was \$20,000 (as opposed to \$10,000). The correct number is reflected in the register of actions and at the May 7 hearing on the defendant's bond reduction motion.

methamphetamine.” Exhibit K. The court did so despite being informed, without contradiction from the prosecution, that the defendant was reporting to court services and complying with his release conditions for a significant period of time. *Id.*

And yet again: on March 30, in a case in which the criminal defendant had somehow managed to post a significant bond of \$50,000 cash/surety, the same court *sua sponte*⁴ raised the issue of bond after the defendant declined a plea bargain, and quadrupled it to \$200,000 cash/surety despite the fact that the defendant had been released since October 2020 pursuant to a no-contact order and had not violated his release conditions during his nearly half-year of release. See Exhibit L.

Nor is the court’s pattern of bond increases a new development. In September 2019 the court *sua sponte* increased bond from \$5,000/10% to \$75,000 cash/surety for a defendant accused of retail fraud who refused to plead guilty. Exhibit P. And in July 2018, the court *sua sponte* increased bond from a \$20,000 personal recognizance bond to \$200,000 cash in a larceny case in which the defendant had been compliant with release conditions for over a year prior to the court increasing his bond in response to the defendant’s refusal to plead guilty. See *People v Stoltz*, unpublished order of the Court of Appeals, issued August 21, 2018 (Docket No. 344983) (Shapiro, J., dissenting) (attached as Exhibit Q, along with the transcript of the bond hearing in question).

This case and the others cited above likely reflect a mere fraction of the cases in which the court has used bond increases to incarcerate defendants who exercise their right to trial over the years. Nonetheless, even this case plus the other five recent cases cannot be dismissed as a mere statistical anomaly. To the contrary, they represent a significant portion of the overall number of

⁴ In the March 30 case, unlike the other cases cited, the prosecution actually urged the bond to be increased after the circuit court raised the issue on its own accord. In the other cases, the prosecution did not even urge an increase in bond.

felony cases that proceed to criminal trial in Kent County. According to the 17th Circuit’s annual report, between 2016 through 2019, the entire court conducted only 50–67 criminal trials *per year* (felony and misdemeanor combined). See 17th Circuit Court Annual Report (2019), p 12, available at < <https://www.accesskent.com/Courts/17thcc/pdfs/2019-Annual-Report.pdf>> (accessed June 11, 2021). Thus, the six recent cases identified above represent around 10% of the *total* criminal trial caseload for the entire 17th Circuit in a given year. When a single judge is responsible for incarcerating six (known) felony defendants who wish to proceed to trial in the matter a few months, it is no anomaly; it is a clear and unmistakable pattern.

This pattern is well understood in the Grand Rapids criminal law community. Defense attorneys at the Kent County Office of the Defender are forced to advise any client who appears before the chief judge, and who is not already incarcerated, that declining a plea bargain will likely lead to their being incarcerated until trial due to the chief judge’s practice of drastically increasing bond in such situations. Exhibit G ¶ 5. And, as noted above, due to backlogs and delays relating to the COVID-19 pandemic, it is understood by everyone in the legal system that a defendant is not likely to receive a trial for approximately a year or more, meaning that declining a felony plea bargain in a case that is being tried before the chief judge essentially amounts to a pre-trial sentence of approximately a year in jail—during a time when the defendant is (supposed to be) presumed innocent. *Id.* ¶ 4.

This pattern of conduct plainly runs afoul of the constitutional prohibition on courts retaliating against criminal defendants who assert their constitutional rights. The realistic probability that this circuit court’s conduct is vindictive is dramatically underscored by the fact that the transcripts show that the court *consistently* and *immediately* raises bond the moment after a defendant declines a plea bargain. It is further evidenced by the fact that the court typically does

so *sua sponte*, often ignoring the fact that the defendant has been compliant with release conditions, and equally often despite the fact that the prosecution has not even sought a bond modification. Perhaps, taken alone, one or two of these other cases might not be indicative of a realistic likelihood of vindictiveness based on their particular facts. However, the disturbing pattern here of clearly “penalizing those who choose to exercise constitutional rights” is “patently unconstitutional as a violation of due process principles.” *Pearce*, 395 US at 724 (quotation marks omitted); see also *Weatherford*, 132 Mich App at 170.

II. The Cash Bail Imposed Here Violates the Law Governing Bail Under the Michigan Court Rules and the United States and Michigan Constitutions.

A. The Circuit Court Failed to Apply the Michigan Court Rules’ Double Presumption of Release Without Cash Bail.

Michigan’s Constitution guarantees that “[a]ll persons shall, before conviction, be bailable by sufficient sureties,” except in four specific circumstances not applicable here. Const 1963, art 1, § 15. It further guarantees that “[e]xcessive bail shall not be imposed.” Const 1963, art 1, § 16. Similarly, state law guarantees that “[e]xcept as otherwise provided by law, a person accused of a criminal offense is entitled to bail. The amount of bail shall not be excessive.” MCL 765.6(1). In turn, the general rule is that “[b]ail set at a figure higher than an amount reasonably calculated to [assure the presence of the accused at trial] is ‘excessive’.” *Stack v Boyle*, 342 US 1, 5; 72 S Ct 1; 96 L Ed 3 (1951). See also *People v Edmond*, 81 Mich App 743, 747; 266 NW2d 640 (1978) (“Money bail is excessive if it is in an amount greater than reasonably necessary to adequately assure that the accused will appear when his presence is required.”).

The Michigan Supreme Court has promulgated court rules establishing a *double* presumption that a pre-trial arrestee must be released without any cash bail requirement. First, “the court *must* order the pretrial release of the defendant on personal recognizance, or on an

unsecured appearance bond . . . unless the court determines that such release will not reasonably ensure the appearance of the defendant as required, or that such release will present a danger to the public.” MCR 6.106(C) (emphasis added).

Second, even if the court *does* determine that there is evidence of a possible flight risk or danger to the public, the presumption of release without cash bail remains. Before even considering cash bail, a court must next consider releasing the defendant under *non-financial* release conditions, including, but not limited to, 14 conditions that are specifically enumerated by court rule. MCR 6.106(D). It is only “[i]f the court determines for reasons *it states on the record* that the defendant’s appearance or the protection of the public cannot otherwise be assured [that] money bail, with or without conditions . . . may be required.” MCR 6.106(E) (emphasis added). The Michigan Supreme Court has been “emphatic” that this “rule is to be complied with in spirit, as well as to the letter.” *People v Spicer*, 402 Mich 406, 409; 263 NW2d 256 (1978). Furthermore, it is improper for a trial court to “conclude[] that defendant [i]s a flight risk, despite the fact that defendant had no history of absconding on bond or failing to appear for court, and based only on defendant’s presumed incentive to avoid punishment—an incentive present in virtually every case.” *People v Chandler*, 505 Mich 1054 (2020) (CAVANAGH, J., concurring).

Michigan courts have recently made clear that these admonitions are not to be taken lightly. For example, in *People v Shelton*, 506 Mich 1030 (2020), the Supreme Court found that a circuit court had abused its discretion in denying bond to a defendant charged with first degree criminal sexual conduct. And in *Chandler*, 505 Mich 1054, the Court found that a circuit court abused its discretion by imposing unaffordable bond on a defendant charged with felony firearm as a fourth habitual offender. This Court, similarly, has held that a circuit court abused its discretion by imposing unaffordable bond on a defendant charged with felony firearm and intent to deliver a

controlled substance. *People v Ferguson*, unpublished order of the Court of Appeals, issued March 23, 2020 (Docket No. 353226), attached as Exhibit R.

Most recently, in *Forbes*, this Court emphasized that “[m]oney bail may only be imposed where the ‘defendant’s appearance or the protection of the public cannot be otherwise assured.’” *Forbes*, Exhibit A, quoting MCL 6.106(E). In *Forbes*, just as in this case, the defendant had been released for a lengthy period of time with several conditions of release with which the defendant had fully complied. This Court held that it was an abuse of discretion to increase bond under those circumstances because “[d]efendant’s conduct while on bond . . . demonstrates that the modification made by the trial court was not required to ensure defendant’s appearance at court proceedings or to protect to public.” *Id.*

Here, the circuit court’s decision violated the Michigan Court Rules in two interrelated ways. First, it failed to apply, or even acknowledge, the double presumption of pre-trial release—the “favored policy” in this State. *Edmond*, 81 Mich App at 747. Second, the circuit court failed to make a specific, evidence-based finding that non-financial release conditions, such as those listed in MCR 6.106(D), would not suffice to address any concerns. That error is particularly stark on this record in which Mr. Contreras-Reyes had *already* been released, had reported both to court and court services as directed, and was successfully complying with extensive non-financial conditions including court supervision, and not possessing a firearm or consuming alcohol, for over three months prior to being re-incarcerated by the circuit court’s *sua sponte* bail redetermination. See *Forbes*, Exhibit A.

The circuit court’s failure to comply with the Michigan Court Rules constitutes legal error and, thus, abuse of discretion. Accordingly, this Court should order Mr. Contreras-Reyes’ release with a personal bond under the same non-financial terms that governed his initial release.

B. Alternatively, the Amount of Cash Bail Approved by the Circuit Court Was an Abuse of Discretion Because It Was Unaffordable to Mr. Contreras-Reyes.

As noted above, the purpose of cash bail is to allow a defendant to remain free while also providing the defendant with an adequate incentive—the return of the security posted—to ensure the defendant’s attendance at trial and the safety of the public during the pre-trial period. Bail must be set at a “reasonable amount” calculated to accomplish these goals. *Boyle*, 342 US at 1; *Edmond*, 81 Mich App at 747.

Determining the proper amount of bail in any given case necessarily requires an inquiry into the defendant’s financial situation. The Michigan Court Rules require that one factor the court must consider when determining release conditions is the “defendant’s employment status and history and financial history *insofar as these factors relate to the ability to post money bail.*” MCR 6.106(F)(1)(f) (emphasis added). A large bail amount may be necessary to deter a wealthy defendant from fleeing the jurisdiction, whereas a nominal amount may be more than sufficient to prevent against the potential flight risk posed by a defendant who makes minimum wage and needs every available dollar simply to pay rent or feed her family. As one court has succinctly explained it: “[T]he deterrent effect of a bond is necessarily a function of the totality of a defendant’s assets.” *United States v Babhnani*, 493 F3d 63, 77 (CA 2, 2007).

When cash bail is instead set at an amount that is unaffordable to the defendant, the bail requirement is, for all intents and purposes, a pre-trial detention order. See *Weatherspoon v Oldham*, 17-cv-2535, 2018 WL 1053548, at *6 (WD Tenn, 2018) (“[R]equiring money bail as a condition of release at an amount impossible for the defendant to pay is equivalent to a detention order”). Yet MCR 6.106(F)(3) specifically prohibits “pretrial detention . . . on the basis of . . . economic status.” That is precisely what a court does when it imposes bail that is unaffordable

to a poor defendant without factoring in what the defendant can afford. Here, if Mr. Contreras-Reyes could afford to pay \$100,000 cash, he would be free while pending trial; but since he cannot he is instead detained “on the basis of . . . his economic status.” *Id.*

Mr. Contreras was able to post the original \$10,000/10% bond. And, as noted above, Mr. Contreras-Reyes appeared at court and court services as directed and was fully compliant with his release conditions for over three months after being released pursuant to such a bond, suggesting that if money bond was appropriate at all, the \$10,000 bond was more than sufficient.

The circuit court could not (and did not) point to any changed circumstances justifying the increased bond. There is no indication *at all* in the record that Mr. Contreras-Reyes presents a flight risk. Rather, the circuit court relied exclusively on the fact that Mr. Contreras-Reyes faced a potential multi-year sentence. But this consideration, at least on its own, is in improper basis for imposing a large bond because a “defendant's presumed incentive to avoid punishment” is “an incentive present in virtually every case.” *Chandler*, 505 Mich at 1054 (CAVANAGH, J., concurring). That is especially true here because all other facts before the circuit court indicated a *lack* of flight risk: Mr. Contreras-Reyes had appeared at all required hearings and before court services while released, is a long term-resident of Kent County where he also owns a home where his family resides, and he was stably employed. Exhibit C, pp 7–8; Exhibit F.

As to protecting the community, the circuit court received no new information at all—except the information about Mr. Contreras-Reyes’ successful months of release—that would bear on whether he posed a danger to the community. There is simply no explanation whatsoever as to why a payment of an additional \$99,000 would somehow provide additional protection to the public.

It bears noting that research now demonstrates that unaffordable bond, resulting in a

defendant’s ongoing pre-trial detention, inflicts enormous harm on the pursuit of justice. Both academic studies and caselaw demonstrate that being in jail pre-trial tends to induce guilty pleas by causing defendants to plead in order to speed their release from jail.⁵ The same studies also show that pre-trial detention leads to higher conviction rates and more severe sentences. See *id.* As the United States Supreme Court has explained, “if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious.” *Barker v Wingo*, 407 US 514, 532–533; 92 S Ct 2182; 33 L Ed 2d 101 (1972).

Detention as the result of unaffordable bail also has other “detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness.” *Id.* Pre-trial detention also has detrimental effects on society: Studies show that defendants who are detained before trial are 1.3 times more likely to recidivate, likely because of the economic havoc pre-trial detention wreaks on defendants and their families.⁶ It is the height of irrationality to inflict such a toll on a defendant—someone who is presumed innocent until proven guilty—without concrete reasons, supported by concrete evidence, that the unaffordable amount of bail is

⁵ See, e.g., *Weatherford*, 132 Mich App 165. See also Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J L Econ & Org 511, 512, 532 (2018), available at <<https://academic.oup.com/jleo/article/34/4/511/5100740>> (finding that a person who is detained pretrial has a 13 percent increase in the likelihood of being convicted and an 18 percent increase in the likelihood of pleading guilty); Leslie & Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignment*, 60 J L & Econ 529 (2017).

⁶ See Lowenkamp, VanNostrand & Holsinger, *The Hidden Costs of Pretrial Detention* (Laura & John Arnold Foundation, 2013) <https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_hidden-costs_FNL.pdf>, pp 19–20 (“Defendants detained pretrial were 1.3 times more likely to recidivate compared to defendants who were released at some point pending trial.”); Dobbie, Goldin & Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 Am Econ Rev 201, 235 (2018), <<https://pubs.aeaweb.org/doi/pdfplus/10.1257/aer.20161503>>.

somehow necessary for some very specific purpose.

Here, the circuit court made no findings that can justify the \$100,000 cash bond and the resulting harm to Mr. Contreras-Reyes. By imposing unaffordable bail without identifying a valid reason why the amount selected was necessary even though it was unaffordable, the circuit court veered “outside the range of principled outcomes,” and thus abused its discretion. *Barksdale v Bert’s Marketplace*, 289 Mich App 652, 657; 797 NW2d 700 (2010). This all the more true given that “pretrial release of an accused is a matter of constitutional right and the State’s favored policy.” *Edmond*, 81 Mich App at 747.

C. The District Court’s Bail Decision Is an Unconstitutional Pre-Trial Detention Order.

The cash bail ordered in this case also violates Mr. Contreras-Reyes’ rights relating to pre-trial detention under the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution. First, the cash bail imposed here violates the Equal Protection and Due Process Clauses as a result of the fact that Mr. Contreras-Reyes is now detained because of his inability to pay. Second, because the unaffordable bail order is essentially a pre-trial detention order, due process principles requires that it must be supported by individualized factual findings, based on clear and convincing evidence, about flight risk or danger to the public that this record cannot support.

i. The Imposition of Unaffordable Bail Unconstitutionally Discriminates Against Mr. Contreras-Reyes Because of His Lack of Wealth.

It is well established that it is “contrary to the fundamental fairness required by the Fourteenth Amendment” to “deprive [an individual] of his conditional freedom simply because, through no fault of his own, he cannot pay.” *Bearden v Georgia*, 461 US 660, 672–673; 103 S Ct 2064; 76 L Ed 2d 221 (1983); *People v Jackson*, 483 Mich 271, 280; 769 NW2d 630 (2009),

quoting *Bearden*. See also *Tate v Short*, 401 US 395, 396; 91 S Ct 668; 28 L Ed 2d 130 (1971); *People v Collins*, 239 Mich App 125, 135–136; 607 NW2d 760 (1999), citing *Tate*. “[T]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.” *Griffin v Illinois*, 351 US 12, 19; 76 S Ct 585; 100 L Ed 891 (1956). The Supreme Court has explained that “[d]ue process and equal protection principles converge in the Court’s analysis” in cases involving the jailing of poor defendants as the result of their inability to pay court-ordered sums. *Bearden*, 461 US at 665. Furthermore, “the passage of time has heightened rather than weakened [courts’] attempts to mitigate the disparate treatment of indigents in the criminal process.” *Williams v Illinois*, 399 US 235, 241; 90 S Ct 2018; 26 L Ed 2d 586 (1970).

The deprivation of Mr. Contreras-Reyes’ freedom resulting from his inability to pay \$100,000 is exactly what happened here. As discussed above, the district court imposed unaffordable bail. As a result, Mr. Contreras-Reyes is detained because “through no fault of his own, he cannot pay.” *Bearden*, 461 US at 673. If he were wealthier, he would be able to purchase his pre-trial freedom even though he would pose the same potential risks. Because Mr. Contreras-Reyes’ detention is due to his financial inability to afford bail, the district court violated his right to equal protection.

ii. The Imposition of Unaffordable Bail Deprives Mr. Contreras-Reyes of His Liberty Without Constitutionally Adequate Findings, in Violation of His Right to Substantive Due Process.

The imposition of cash bail in this case means that Mr. Contreras-Reyes will be detained prior to trial, likely for at least a year. Exhibit G ¶ 4. Mr. Contreras-Reyes cannot afford the bail amount and is presently incarcerated, so the district court’s bail determination is, in effect, a pre-trial detention order. See *Weatherspoon*, 2018 WL 1053548, at *6.

The “‘general rule’ of substantive due process [is] that the government may not detain a

person prior to a judgment of guilt in a criminal trial.” *United States v Salerno*, 481 US 739, 749; 107 S Ct 2095; 95 L Ed 2d 697 (1987). Because criminal defendants have a “fundamental interest in liberty pending trial,” a pre-trial detention that lacks sufficient justification “violate[s] [a defendant’s] right to due process of law.” *Atkins v Michigan*, 644 F2d 543, 550 (CA 6, 1981).

In order to justify pre-trial detention, the governmental interest must be “compelling.” *Salerno*, 481 US at 748. Accordingly, there must be “special circumstances to restrain individuals’ liberty.” *Id.* at 749. “Ordinarily, where a fundamental liberty interest protected by the substantive due process component of the Fourteenth Amendment is involved, the government cannot infringe on that right ‘unless the infringement is narrowly tailored to serve a compelling state interest.’” *Johnson v Cincinnati*, 310 F3d 484, 502 (CA 6, 2002), quoting *Washington v Glucksberg*, 521 US 702, 721; 117 S Ct 2258; 138 L Ed 2d 772 (1997). Therefore, in the context of federal pre-trial detention, the Supreme Court upheld the constitutionality of the Federal Bail Reform Act only because it limits pre-trial detention to “specific categor[ies] of extremely serious offenses,” and, in such cases, requires evidentiary proof, by clear and convincing evidence, “that an arrestee presents an *identified and articulable* threat to an individual or the community,” and that “no conditions of release can reasonably assure the safety of the community or any person.” *Salerno*, 481 US at 750 (emphasis added).

These rigorous standards have not been met here as discussed above. As such, the district court’s decision to impose what amounts to a pre-trial detention order lacked the requisite narrow tailoring and was unconstitutional.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated, the circuit court’s bail order should be reversed and Mr. Contreras-Reyes should be ordered released with a personal bond and the same extensive non-financial release conditions that previously governed his yearlong release. Alternatively, his initial bond of \$10,000/10% should be reinstated. Additionally, his case should be re-assigned to another judge in light of the circuit court’s demonstration of prejudice towards his exercise of his constitutional rights.

Respectfully submitted,

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