STATE OF MICHIGAN
IN THE COURT OF APPEALS

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT FORBES,

Defendant-Appellant.
_____/

Case No. _____

Circuit Court No. 20-01774-FH

District Court No. D-2000319-FY

Philip Mayor (P81691)
Daniel S. Korobkin (P72842)
American Civil Liberties Union
Fund of Michigan
2966 Woodward Ave.
Detroit, MI 48201
(313) 578-6803 (w); (617) 817-2229(c)
Attorneys for Defendant-Appellant

Brett A. Stevenson (P58170)
Kent County Office of the Defender
146 Monroe Center Suite 920
Grand Rapids, MI 49503
(616) 774-8181(w)
Co-counsel for Defendant-Appellant

Travis Earley (P68745)
Christopher Becker (P53752)
Kent County Prosecutor's Office
82 Ionia Ave NW
Grand Rapids, MI 49503
travis.earley@kentcountymi.gov
chris.becker@kentcountymi.gov
(616) 632-6710
Attorneys for Plaintiff-Appellee

_____ /

EMERGENCY MOTION FOR MODIFICATION OF RELEASE DECISION

Defendant Robert Forbes 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 $5,000 cash/surety to $75,000 cash only. The circuit court did so despite the fact that Mr. Forbes had been fully compliant with his release conditions for a year. And it did so *immediately* after Mr. Forbes declined a plea bargain and thus exercised his constitutional right to proceed to

trial. The circuit court later affirmed that decision, despite the fact that pre-trial services subsequently recommended that Mr. Forbes be released on a personal bond. 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.

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

1. Mr. Forbes is a 19-year-old who was booked into the Kent County Jail on February 3, 2020 and charged with two counts of fourth-degree criminal sexual conduct. In the words of the prosecutor, the gravamen of the charges is: "two separate victims which occurred at a — a high school where the defendant either on one occasion [sic] forced himself onto a female, trying to kiss her and touch her buttocks. And then, in the other matter, forced the individual's hand onto his penis." See Exhibit A, p 4 (transcript of February 23, 2021 circuit court status conference). At the time of the alleged offenses, Mr. Forbes was an 18-year-old high school student.

2. Mr. Forbes appeared before the district court for an arraignment on February 4, 2020. Bond in his case was set at $5,000 cash/surety. He posted bond via a surety and was released the same day. See Exhibit B (register of actions).

3. On February 17, 2020, Mr. Forbes waived his preliminary examination and was bound over. His bond was continued, and the district court clarified for the record that Mr. Forbes' release included a requirement that he report to Kent County Court Services during his release and that he have no contact with the alleged victims. See Exhibit C, pp 5–6.

4. For the next year, Mr. Forbes' appearances before the circuit court were

repeatedly postponed due to COVID-19. See Exhibit B. During this time, there was no allegation that Mr. Forbes was anything less than fully compliant with the terms of his release.

5. On February 23, 2021, more than a year after Mr. Forbes pretrial release, 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. Forbes. Exhibit A, p 5. Defense counsel indicated that Mr. Forbes was declining a plea bargain offered by the prosecution. *Id.*

6. Immediately upon being informed that the plea bargain had been rejected, the circuit court judge stated: "Well, I'm a little concerned about the bond in the matter, to be honest with you." The circuit court then increased bond to $75,000, cash only, despite the fact that the prosecution had not sought an increase and did not argue for one when given a chance to do so. The circuit court did not address, or even acknowledge, that Mr. Forbes had been released for over a year under court services supervision without incident.

7. Mr. Forbes was incarcerated the same afternoon, in the midst of the COVID-19 pandemic, due to his inability to post such a high bond.

8. Mr. Forbes' sentencing guidelines, if convicted of both charges, would be between 2 and 17 months. Exhibit A, p 3. Meanwhile, it will be approximately a year or more before his trial occurs due to COVID-19 related court backlogs—as the circuit court understood.

9. 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 Exhibits D–H (transcript of status conferences and register of actions for each case). This pattern is so well known by defense counsel such that undersigned defense

counsel, and other public defenders employed by the Kent County Office of the Defender, are forced to advise their clients as a matter of course 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.

10. On April 19, undersigned defense counsel filed a motion to reduce the increased bond pending trial, noting that Mr. Forbes had been compliant with his bond, and was stably employed, housed, and supported by his family prior to his incarceration as a result of the increase in his bond. See Exhibit I.

11. On May 7, the circuit court held a hearing on the motion. Prior to the hearing, Kent County Court Services created a bond motion report recommending that Mr. Forbes be given a personal bond with a requirement that he resume reporting to court services for supervised release. See Exhibit J.[1] The report noted that Mr. Forbes was a student at an online learning center prior to his incarceration, was a lifelong resident of Kent County, and was stably employed and housed.

12. The circuit court denied the motion based on Mr. Forbes' juvenile criminal history, without in any way addressing why non-financial release conditions would not protect public safety given that Mr. Forbes had been compliant with his release conditions for over a year prior to the February 23 hearing. See Exhibit K (May 7 transcript); Exhibit L (court order).

13. As a result, Mr. Forbes remains incarcerated while awaiting trial. Due to backlogs resulting from the COVID-19 crisis, it is unlikely that Mr. Forbes will be able to receive a trial in less than a year. See Exhibit M ¶ 4. In other words, he will likely remain

[1] The handwritten correction on page 1 of this document was made by counsel and is not part of the original document.

incarcerated *pretrial* for a year or more while awaiting trial for alleged offenses for which his sentencing guidelines, if convicted, would an intermediate sanction between 2 and 17 months.

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. Forbes' 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.

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. Forbes' compliance with release conditions for a year prior to his re-incarceration. 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.[2] Where, as here, release conditions are 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. Forbes' ability to

[2] 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).

pay, and thus abused its discretion by failing to select a bond amount that was sensibly tethered to his financial circumstances and to any potential risk to the public 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. Forbes 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).

* * * * *

Accordingly, Mr. Forbes requests that this Court order that he be released on his own recognizance subject to the same non-financial conditions of release that governed during his year of pre-trial release, including supervision by the Kent County Court Services. Alternatively, Mr. Forbes requests that his initial bond of $5,000 cash/surety be reinstated. Additionally, Mr. Forbes requests re-assignment to another judge in light of the circuit court's demonstration of prejudice by having already once punished Mr. Forbes through pre-trial detention for asserting his constitutional rights.

Respectfully submitted,

/s/Philip Mayor
Philip Mayor (P81691)
Daniel S. Korobkin (P72842)
American Civil Liberties Union
Fund of Michigan
2966 Woodward Ave.
Detroit, MI 48201
(313) 578-6803(w); 617-817-2229(c)
Attorneys for Defendant

/s/Brett A. Stevenson
Brett A. Stevenson (P58170)
Kent County Office of the Defender
146 Monroe Center Suite 920
Grand Rapids, MI 49503
(616) 774-8181(w)
Co-counsel for Defendant-Appellant

Date: June 15, 2021

STATE OF MICHIGAN
IN THE COURT OF APPEALS

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff-Appellee,

v

Case No. _____

ROBERT FORBES,

Circuit Court No. 20-01774-FH

Defendant-Appellant.

District Court No. D-2000319-FY

_____/

Philip Mayor (P81691)
Daniel S. Korobkin (P72842)
American Civil Liberties Union
Fund of Michigan
2966 Woodward Ave.
Detroit, MI 48201
(313) 578-6803 (w); (617) 817-2229(c)
Attorneys for Defendant-Appellant

Brett A. Stevenson (P58170)
Kent County Office of the Defender
146 Monroe Center Suite 920
Grand Rapids, MI 49503
(616) 774-8181(w)
Co-counsel for Defendant-Appellant

Travis Earley (P68745)
Christopher Becker (P53752)
Kent County Prosecutor's Office
82 Ionia Ave NW
Grand Rapids, MI 49503
travis.earley@kentcountymi.gov
chris.becker@kentcountymi.gov
(616) 632-6710
Attorneys for Plaintiff-Appellee

_____ /

DEFENDANT'S BRIEF IN SUPPORT OF
EMERGENCY MOTION FOR MODIFICATION OF RELEASE DECISION

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

Defendant Robert Forbes 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. Forbes' bond from $5,000 cash/surety to $75,000 cash after Mr. Forbes rejected a plea bargain and exercised his constitutional right to proceed to trial. As a result, as the circuit court knew full well, Mr. Forbes will remain detained for approximately a year or more as he awaits trial on charges for which his sentencing guidelines call for an intermediate sanction between 2 and 17 months. The circuit court's decision is unlawful for several independent, albeit overlapping, reasons.

First, the circuit court violated Mr. Forbes' 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.

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. This failure is particularly stark here given that Mr. Forbes had successfully complied with his non-financial release conditions without incident for over a year.

Third, the circuit court abused its discretion by failing to even inquire how much bond Mr. Forbes could afford, and by instead selecting an obviously unaffordable amount untethered to Mr. Forbes' 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* fifteen-fold increase of Mr. Forbes' bond should be reversed, and he should be ordered released subject to the same non-financial conditions that previously applied, including supervision by Kent County Court Services. Alternatively, Mr. Forbes requests that his initial bond of $5,000 cash/surety be reinstated. Additionally, Mr. Forbes requests re-assignment to another judge in light of the circuit court's demonstration of prejudice by having already once punished Mr. Forbes 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 February 23 order is a "release decision," namely, a decision to end Mr. Forbes' pre-trial release by increasing his bond fifteen-fold. Similarly, the circuit court's May 7 denial of Mr. Forbes' bond reduction motion is also a release decision that is also appealable here as of right under MCR 6.106(H)(1).

STATEMENT OF FACTS

Mr. Forbes was originally arraigned on February 4, 2020. Exhibit B. Bond was set at $5,000 cash/surety. *Id.* He posted bond via a surety and was released shortly thereafter.

On February 17, 2020, Mr. Forbes appeared in court as instructed, waived his preliminary exam, and was bound over. Bond was continued, and the district court noted on the record that Mr. Forbes' release conditions included a requirement that he report to Kent County Court Services and that he have no contact with the alleged victims. See Exhibit C, pp 5–6.

For over a year, Mr. Forbes' appearances before the circuit court were postponed due to COVID-19. See Exhibit B. During this time, there has been no allegation whatsoever that Mr. Forbes was anything less than fully compliant with the terms of his release. See Exhibit A, pp 5–6 (defense counsel informs the court that Mr. Forbes has been fully compliant with his terms of release and prosecution does not disagree); Exhibit K, pp 4–5 (same); see also Exhibit J (court services report, which does not allege any violations).

On February 23, 2021, the circuit court held a status conference via Zoom. The circuit court began the status conference by asking what type of plea bargain had been offered to Mr. Forbes. Exhibit A, p 3. Next the court inquired as to the sentencing guidelines if Mr. Forbes were to be convicted. The parties agreed that they were between 2 and 17 months if he were convicted of both charges he faced. *Id.* Then the court inquired how the prosecution intended to

prove its case if it went to trial. *Id.*, p 4. Defense counsel then informed the court that Mr. Forbes was declining the plea bargain he had been offered and wished to go to trial. *Id.*, p 5.

Immediately upon being informed that the plea bargain had been rejected, the circuit court stated: "Well, I'm a little concerned about the bond in the matter, to be honest with you." *Id.*, p 5. Defense counsel reminded the court that Mr. Forbes had been released for a year without incident, was compliant with his release terms, and was stably employed and housed. *Id.*, pp 5–6. The court invited the prosecutor to opine on bond, and the prosecution did not request an increase. *Id.*, p 6. The circuit court nonetheless increased bond to $75,000 cash on its own motion. The basis offered for this decision was that Mr. Forbes was on juvenile probation for a prior sexual offense. *Id.*, pp 6–7. The circuit court did not address, or even acknowledge, the fact that Mr. Forbes had been released for over a year under court services supervision without incident. The court then instructed Mr. Forbes to report to jail that same afternoon. *Id.*, p 6.

On April 19, undersigned defense counsel filed a motion to reduce the new $75,000 bond, again noting that Mr. Forbes had been compliant with his bond and was stably employed, housed, and supported by his family prior to his incarceration. Exhibit I. In preparation for the hearing on that motion, Kent County Court Services created a bond motion report recommending that Mr. Forbes be given a personal bond and be required to report to court services for supervised release. See Exhibit J, pp 1, 3.

On May 7, the circuit court held a hearing and denied the motion. The circuit court again mentioned Mr. Forbes' juvenile history, but again failed to address or analyze why non-financial release conditions would not sufficiently protect public safety given that Mr. Forbes had been compliant with his release conditions for over a year prior to the February 23 hearing. See

Exhibit K (May 7 hearing transcript); Exhibit L (order).

As a result, Mr. Forbes remains incarcerated while awaiting trial, and will almost certainly remain in jail for approximately a year or more due to COVID-19-related backlogs. Exhibit M ¶ 4. In other words, he is likely to be incarcerated pretrial for a year on charges for which his sentencing guidelines, if convicted, would be an intermediate sanction between 2 and 17 months.

As described in more detail in the Argument, Section I, below, the circuit court's actions reflect a consistent and repeated by this particular judge. In the past few months alone, he has rendered similar decisions in *at least* five other cases that are known to defense counsel. See Exhibits D–H (transcript of status conferences and register of actions for each case). Nor is this pattern new. See Exhibits N, O (similar decision from 2019 and 2018, respectively). Indeed, this pattern is so well known by defense counsel such that undersigned defense counsel (and other public defenders employed by 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, they will likely have their bond increased and be incarcerated while they await trial. Exhibit M ¶ 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. Forbes' 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. Forbes' 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. Forbes had been released for a year, 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). Furthermore, because he was no longer attending school in person, he could not pose a threat in the high school context in which both alleged offenses occurred. And he was stably employed and housed. There was no reasonable basis to increase bond, as reflected by the facts that even the prosecution did not seek to increase bond. Indeed, Kent County Court Services subsequently recommended that Mr. Forbes be released again on a personal bond, Exhibit J, pp 1, 3—a recommendation the circuit court disregarded without even acknowledging. The result of the circuit court's decision, if allowed to stand, is that Mr. Forbes will likely remain incarcerated for approximately a year or more—on an offense for which he faces a guidelines sentence of an intermediate sanction of only 2 to 17 months—as he awaits trial in light of the severely backlogged criminal docket in the 17th Circuit. 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 N.

And any question as to whether the facts of Mr. Forbes' cases raise a "realistic likelihood of vindictiveness" is eliminated by a clear pattern shown by five recent decisions by the same judge. See Exhibits D–H.[3] 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.

One example occurred the same day that the circuit court denied Mr. Forbes' bond reduction motion. On that day, the circuit court also denied a bond reduction motion for another defendant who had originally been released 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. See Exhibit D (September 15, 2020 transcript and ROA).[4]

Similarly, on May 25, a defendant charged with operating while intoxicated (third offense) appeared before the court and indicated that he would not plead guilty. The circuit court

[3] 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).

[4] 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.

proceeded to *sua sponte* increase the defendant's bond from $10,000 cash/surety to $75,000 cash/surety. Exhibit E. 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)

On the same day, the same court *sua sponte* increased bond from $10,000/10% to $100,000 cash in a case in which a 57-year-old defendant with no violent criminal history was alleged to have shot a friend in the leg during a drunken argument. The defendant had been compliant with his pre-trial release conditions, which included court services supervision and a prohibition on possessing firearms or consuming alcohol, for months prior to his encounter with this particular circuit court judge. See Exhibit F (register of actions details bond conditions; transcript discusses compliance).[5] Yet the court did not at all acknowledge or consider the fact that these non-financial conditions had succeeded in keeping the public safe and ensuring the defendants' appearance before increasing bond by an entire order of magnitude. *Id.*

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

[5] The full facts of Mr. Contreras-Reyes' case are set forth in a separate motion filed with this

methamphetamine." Exhibit G. 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.

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*[6] 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 H.

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 O. 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 P, 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

---

Court today, concurrently with this motion.

[6] 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

mere statistical anomaly. To the contrary, they represent a significant portion of the overall number of 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 total 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. Undersigned defense counsel, and other 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 M ¶ 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

---

prosecution did not even urge an increase in bond.

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).

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 *People v Chandler*, 505 Mich 1054 (2020), 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 Q.

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. Forbes had *already* been released and was successfully complying with non-financial conditions of release including supervision by Kent County Court Services, for a year prior to being re-incarcerated by the circuit court's *sua sponte* bail redetermination.

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. Forbes' 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. Forbes.

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. Forbes could afford to pay $75,000 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. Forbes is represented by appointed counsel and has thus been determined to be indigent. Despite his indigency, he was able to post the original $5,000 cash/surety bond that was imposed at arraignment, reflecting a considerable financial commitment given his limited means. As noted above, Mr. Forbes was fully compliant with his release conditions for a year after being released pursuant to such a bond, suggesting that if money bond was appropriate at all, the $5,000 bond was more than sufficient to protect the public.

The circuit court could point to no changed circumstances justifying the increased bond. There is no indication *at all* in the record that Mr. Forbes presents a flight risk. As to protecting the community, the circuit court received no new information at all—except the information about Mr. Forbes' successful year 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 $70,000 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.[7] 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

[7] 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).

havoc pre-trial detention wreaks on defendants and their families.[8] 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 somehow necessary for some very specific purpose.

Here, the circuit court made no findings that can justify the $75,000 cash bond and the resulting harm to Mr. Forbes. 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 is 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. Forbes' 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. Forbes is now detained because of his poverty. 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

---

[8] 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>.

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. Forbes Because of His Poverty.

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. Forbes' freedom resulting from his inability to pay $75,000 is exactly what happened here. As discussed above, the district court imposed unaffordable bail. As a result, Mr. Forbes 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. Forbes' 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. Forbes 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. Forbes will be detained prior to trial, quite possibly for longer than his likely sentence if convicted. Mr. Forbes 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. Forbes should be ordered released with a personal bond and the same non-financial release conditions that previously governed his yearlong release. Alternatively, his initial bond of $5,000 cash/surety 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,

/s/Philip Mayor
Philip Mayor (P81691)
Daniel S. Korobkin (P72842)
American Civil Liberties Union
Fund of Michigan
2966 Woodward Ave.
Detroit, MI 48201
(313) 578-6803(w); 617-817-2229(c)
Attorneys for Defendant

/s/Brett A. Stevenson
Brett A. Stevenson (P58170)
Kent County Office of the Defender
146 Monroe Center Suite 920
Grand Rapids, MI 49503
(616) 774-8181(w)
Co-counsel for Defendant-Appellant

Date: June 15, 2021