No. 20220636-SC

IN THE

UTAH SUPREME COURT

STATE OF UTAH,
Plaintiff / Appellant

v.

KOLBY RYAN BARNETT,
Defendant / Appellee

Appellee's Principal Brief

On appeal from the Second Judicial District Court, Davis County,
Honorable Rita Cornish, District Court No. 221700665

Mr. Barnett is not incarcerated.

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Introduction

This is a case about the interpretation of the Bail Provision (Article I, Section 8) of the Utah Constitution.

Appellant Davis County argues the Bail Provision mandates that a court hold Appellee Kolby Barnett without bail because he was charged with a felony while awaiting trial on other felonies. Davis County asserts that where an individual has no constitutional right to bail, a court has no discretion to set bail. Thus, the prosecutor's discretion in charging an individual and seeking a no-bail hold is determinative of whether an individual may receive bail.

But Davis County is wrong. The Bail Provision creates an individual's *right* to bail; it sets forth the general right to bail followed by the exceptions when a district court can deny bail without infringing on an individual's right. But although a court *can* deny bail to individuals who do not have a constitutional right to bail, the Bail Provision does not *mandate* that a court do so. The Provision creates a right subject to exceptions, not a prohibition against bail.

Accordingly, the district court correctly determined that Kolby was eligible for bail, but only as a matter of judicial discretion as opposed to a constitutional mandate.

Issue Presented

Issue 1: Did the district court correctly conclude that the Bail Provision did not mandate the detention of Kolby without bail?

Standard of review: Appellate courts "review de novo a district court's interpretation of constitutional provisions, granting it no deference." *Dexter v. Bosko*, 2008 UT 29, ¶ 5, 184 P.3d 592 (quotation omitted).

Preservation: This issue is preserved. (R.49, 110, 209.)

Statement of the Case

1. Davis County charges Kolby and seeks to incarcerate him before trial without bail

In 2022, Kolby was on felony probation. (Stip. Mot. at 3.)[1] In April 2022, Davis County charged Kolby with several felonies and misdemeanors for stealing credit cards and using those cards to purchase about $6,000 worth of items. (R.13–16.) This Davis County case is the one at issue in this appeal.

Around that same time, Salt Lake County charged Kolby in several cases. (Stip. Mot. at 3.) One judge in Salt Lake County had released Kolby on bail, but another judge in Salt Lake County had ordered that Kolby be held without bail for alleged probation violations. (*Id.*) Thus, at the time that Davis County charged Kolby, he was already held without bail in the Salt Lake County Adult Detention Center. (*Id.*; R.33.)

When Davis County filed its Information in April 2022, it requested that the Davis County court detain Kolby without bail because Kolby was charged with felony offenses while on felony probation. (R.26.)

Kolby was arraigned in May 2022, and the Davis County court set a detention hearing. (R.40, 162.)

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[1] After the record in this case was filed, the parties filed a stipulated motion to supplement the record because the most significant hearing in the case—the July 2022 detention hearing—was not recorded in full. This Court granted that motion. (Order, dated Aug. 26, 2022.) However, this Court never paginated the supplemental record. Consequently, Kolby will refer to that supplemental record as "Stip. Mot. at ___," which he has attached as Addendum A to this brief.

2. The Davis County court grants Kolby bail

The Davis County court held a detention hearing in July 2022. (R.171.) The parties agreed that the initial question the court had to answer was whether the Bail Provision in the Utah Constitution prohibited the court from granting Kolby bail. (Stip. Mot. at 2.)

In relevant part, the Bail Provision reads: "All persons charged with a crime shall be bailable except . . . persons charged with a felony while on probation or parole, or while free on bail awaiting trial on a previous felony charge, when there is substantial evidence to support the new felony charge." Utah Const. art. I, § 8. This exception is commonly called the "felony-on-felony exception." Kolby agreed that he fell under this exception—that he was charged with felonies while on felony probation. (Stip. Mot. at 2.)

Davis County argued that the Bail Provision required the Davis County court to hold Kolby without bail. (R.49–101.) In response, Kolby argued that the Bail Provision contained no constitutional mandate he be held without bail and that the court could grant bail at its discretion. (R.110.)

The Davis County court rejected Davis County's interpretation. (Stip. Mot. at 2.) It reasoned that the plain language of the Bail Provision did not prohibit bail for felony-on-felony defendants and that, for those defendants, courts could grant or deny bail in their discretion. (*Id.*)

The parties next addressed whether the court should grant Kolby bail. Kolby explained that he was participating in the Sheriff's Prisoner Labor Detail at

the Adult Detention Center (ADC) and that he was eligible to advance to a higher level in that program, where he could be on a work detail with an ankle monitor performing tasks on the outside grounds of the ADC. (Stip. Mot. at 3.) However, he could not advance to that level because, under the ADC policies, inmates with no-bail holds out of other jurisdictions were not allowed to advance. (*Id.* at 3.) Thus, a no-bail hold in this case would prevent Kolby from advancing to the next level of the ADC's labor detail program. (*Id.*) Kolby asked that the court grant him bail, even if the amount of the bond was high. (*Id.*)

In response, Davis County argued that the district court had no discretion to grant bail and was instead constitutionally required to keep Kolby on a no-bail hold because of Kolby's criminal history and because he fell under the felony-on-felony exception to the Bail Provision. (*Id.* at 4.)

The Davis County court found that Kolby was held without bail in Salt Lake County and that Kolby would remain in custody until the Salt Lake County court released its no-bail hold. (*Id.*) It found that Kolby was participating in the Sheriff's Prisoner Labor Detail program but that the no-bail hold in this case prevented Kolby from being granted additional privileges in that program, such as being on supervised release for work detail during the day. (*Id.*; R.209.)

The court found that the "interests that need to be served—appearance when required, safety of witnesses, safety of the public, and the failure to obstruct or attempt to obstruct the criminal process-can be served" and that "conditions of release . . . will reasonably ensure those interests." (R.209.) The court granted

Kolby bail, set a monetary bond at $50,000, and required Kolby to submit to supervision by Pretrial Services. (*Id.*)

Davis County then petitioned for interlocutory review of the bail order. (R.178.) Kolby asked the Utah Court of Appeals to grant the petition and certify the case to this Court. The petition was granted, and this case was certified to this Court. (R.202.)

Kolby has since entered drug court in Salt Lake County.[2]

[2] *See*, *e.g.*, *State v. Barnett*, Dist. No. 211905649 (docket entry on 9/20/22); *State v. Barnett*, Dist. No. 221904193 (docket entry on 9/20/22); *State v. Barnett*, Dist. No. 211903878 (docket entry on 9/20/22).

Summary of the Argument

The plain language of the Bail Provision of the Utah Constitution creates a right to bail subject to exceptions, not a prohibition against bail.

As recognized by this Court nearly 50 years ago, the Bail Provision creates a mandatory, fundamental right to bail. *Scott v. Ryan*, 548 P.2d 235, 236 (Utah 1976). That mandatory right is followed by exceptions to that right. But an exception to a mandatory right is not a prohibition; it is simply something less than mandatory. Furthermore, the Bail Provision contains no explicitly prohibitory language. The framers of the Utah Constitution knew how to draft prohibitory language, as they did so in the provisions surrounding the Bail Provision. But none of that language appears in the Bail Provision.

The plain language, the surrounding constitutional provisions, and history all show that the Bail Provision does not prohibit the grant of bail. Thus, this Court should affirm the district court.

Argument

Davis County argues that the Bail Provision of the Utah Constitution *prohibits* a court from granting bail. It does not. Instead, the Bail Provision creates an individual's *constitutional right to bail* and then carves out narrow exceptions to that constitutional mandate for circumstances where bail is discretionary. The Bail Provision contains no language that prohibits bail outright. Thus, there is no merit to Davis County's argument that the Bail Provision requires courts to detain certain individuals based solely on the nature of their charges.

As set forth below, (1) the district court complied with the Bail Provision and Bail Statute that govern bail in Utah; (2) the district court's interpretation of the Bail Provision is in harmony with this Court's precedent; (3) the district court correctly interpreted the plain language of the Bail Provision; (4) history supports the district court's interpretation; (5) this Court should not rely on legislative history in interpreting the provision, but even if this Court does, it supports the district court's interpretation; and (6) public policy considerations likewise support the district court's interpretation of the Bail Provision.

1. The district court complied with the Bail Provision and the Bail Statute

In Utah, bail is governed by the Bail Provision of the Utah Constitution and the Bail Statute enacted by the Utah Legislature. In this case, the district court complied with both in setting bail for Kolby.

Bail Provision: In 1896, the framers of the Utah Constitution wrote Article I, Section 8, which stated: "All prisoners shall be bailable by sufficient sureties, except for capital offenses when the proof is evidence or the presumption strong." Utah Const., art. I, § 8 (1896). The Bail Provision was amended in 1971 and 1988.

The 1988 version is the governing provision, and it reads, in relevant part: "All persons charged with a crime shall be bailable except . . . persons charged with a felony while on probation or parole, or while free on bail awaiting trial on a previous felony charge, when there is substantial evidence to support the new felony charge." Utah Const., art. I, § 8 (1988).

Bail Statute: The Utah Legislature created a Bail Statute to legislate the bail process. *See generally* Utah Code § 77-20-*et seq.*[3] The current Bail Statute directs that an "individual charged with, or arrested for, a criminal offense shall be admitted to bail as a matter of right, except if the individual is charged with" qualifying offenses. Utah Code § 77-20-201(1). Thus, the Bail Statute largely mirrors the Bail Provision.

The Bail Statute also creates a process for the court to grant or deny bail. The Bail Statute directs that when a magistrate issues an arrest warrant, the magistrate must issue a temporary pretrial status order that either releases the

[3] The Bail Statute has been amended many times. The Bail Statute was amended in 2021, and the 2021 version is the most current version of the Bail Statute at the time this brief was filed.

individual on his own recognizance, provides conditions for the individual's release, or orders that the individual be detained pending trial. Utah Code § 77-20-205(1).

A judge must issue a pretrial status order at the first appearance hearing. Utah Code § 77-20-205(2)(a). But in issuing the pretrial status order, the judge must not "give any deference to a magistrate's decision in a temporary pretrial status order." Utah Code § 77-20-205(2)(b). However, a judge must delay the issuance of that pretrial status order if the government moves for pretrial detention. Utah Code § 77-20-205(2).

Once the government has moved for pretrial detention, the court must hold a pretrial detention hearing, where the parties can present evidence and arguments. Utah Code § 77-20-206(1)–(4). After that hearing, a judge "may" order detention if the individual is accused of committing an offense that qualifies for detention under the Bail Provision or the Bail Statute and the government "demonstrates substantial evidence to support the charge, and meets all additional evidentiary burdens." Utah Code § 77-20-206(5).

In deciding whether to grant an individual pretrial release, a judge must only impose conditions that ensure an individual's appearance in court, the safety of witnesses and victims, the safety and welfare of the public, and integrity of the criminal justice process. Utah Code § 77-20-205(3).

The district court complied with the Bail Provision and Bail Statute: In this case, the Davis County court issued an arrest warrant the day

after Davis County filed its Information. (R.29–30.) That arrest warrant—based only on Davis County's probable cause statement in its Information—allowed Kolby to be held without bail. (R.30.) The court issued a temporary pretrial status order that Kolby be held without bail. Utah Code § 77-20-205(1).

As is required by the Bail Statute, the Davis County court did not address the pretrial status order at the first appearance because Davis County filed a motion for pretrial detention. (R.20–26.) *See* Utah Code § 77-20-205(2). It only continued the temporary pretrial status order until it could hold a detention hearing. *See* Utah Code § 77-20-205(2)(d) ("If a magistrate or judge delays the issuance of a pretrial status order . . . , the magistrate or judge shall extend the temporary pretrial status order until the issuance of a pretrial status order.").

Thus, the Davis County court issued its pretrial status order at the July 2022 detention hearing. That was the first hearing where the court heard argument and evidence from both parties (rather than the one-sided probable cause statement in the Information) and where Kolby was represented by his appointed counsel. Accordingly, as the Bail Statute provides, the Davis County court did not give any deference to the temporary pretrial status order that was essentially obtained by Davis County on an ex parte basis. Utah Code § 77-20-205(2)(b).

At the detention hearing, the Davis County court declined to detain Kolby. That was in line with the Bail Statute's guidance that after a detention hearing, a court "may order detention" if the individual commits a qualifying offense and

the State shows substantial evidence to support the charge. Utah Code § 77-20-206(5). Davis County has not challenged the constitutionality of the Bail Statute, which, by its plain language, gives courts discretion to grant bail, even if an individual is accused of an offense that qualifies for detention under the Bail Provision. Utah Code § 77-20-206(5) ("After hearing evidence on a motion for pretrial detention, and based on the totality of the circumstances, a judge *may* order detention . . .").

However, Davis County has argued that the Bail Provision mandates that individuals charged with certain offenses be detained prior to trial without bail. As argued below, those arguments are without merit. To Kolby's knowledge, every district court that has received briefing and argument on this issue has rejected it.[4] The plain language of the Bail Provision does not mandate that a court deny bail to an individual who does not have a constitutional right to bail, although it does permit the court to deny bail under such circumstances. Utah

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[4] Kolby is aware of only four instances where district courts ruled on the "felony-on-felony" issue after it was briefed and argued, and in each case, every court rejected Davis County's proposed prohibition against bail and held that bail was discretionary. *See State v. Panter,* Dist. No. 201702029 (Judge Ronald Russell); *State v. Martinez,* Dist. No. 201701961 (Judge David Hamilton); *State v. Lewis,* Dist. Nos. 01701517, 20170162, 1817002284 (Judge David Hamilton); *State v. Gonzales,* Dist. No. 201701138 (Judge Rita Cornish).

Exercising judicial discretion, the courts released defendants Panter, Martinez, and Gonzales to Pretrial Service with conditions whereas the court detained Lewis as posing an unreasonable risk of danger to the community and of non-appearance. In another case, a court declined to reach the constitutional question because Davis County failed to present "substantial evidence" to support the new felony charge. *State v. Monard,* Dist. No. 211700676 (Judge D.J. Williams).

Const., art. I, § 8. Thus, the district court complied with the Bail Statute and Bail Provision when it granted Kolby bail.

2. The district court's interpretation of the Bail Provision is in harmony with this Court's precedent

The district court's interpretation of the Bail Provision is in harmony with this Court's precedent. Although this Court has not directly addressed the question of whether the Bail Provision prohibits a court from granting bail, (1) this Court's precedent has recognized that the Bail Provision establishes the *right* to bail and sets forth *exceptions* to that right, which is consistent with the district court's interpretation; and (2) this Court has never—in over 100 years since it was ratified—interpreted the Bail Provision in the manner urged by Davis County.

2.1 This Court's precedent recognizes that the Bail Provision establishes a right to bail subject to exceptions

This Court has recognized that the Bail Provision establishes an individual's constitutional right to bail in Utah and sets forth exceptions to this general right. *Scott v. Ryan*, 548 P.2d 235, 236 (Utah 1976). The Bail Provision mandates that individuals have a constitutional right to bail, except when the individuals have been charged with qualifying offenses to which that constitutional right does not extend:

> (1) All persons charged with a crime *shall be bailable* except:
>
> . . .
>
> (b) persons charged with a felony while on probation or parole, or while free on bail awaiting trial on a previous felony

> charge, when there is substantial evidence to support the new felony charge[.]

Utah Const., art. I, § 8 (1988) (emphasis added).

The mandatory language ("shall be bailable") establishes the general constitutional right to bail. *Id.* The Bail Provision defines the contours of this right by enumerating circumstances to which the constitutional right to bail does *not* extend. One of those circumstances is when a person is charged with a felony while on probation or parole. Utah Const. art. I, § 8.

This Court has long recognized that the Bail Provision "affirms the fundamental right to bail of one accused of a crime; and it does so in mandatory terms." *Scott*, 548 P.2d at 236 (emphases added). In other words, except as provided by the Bail Provision, an individual must be granted bail to avoid infringing on that individual's constitutional right. *Id.* This Court has explained that the Bail Provision "grants a fundamental right, [and] the exceptions create distinct classifications, which mark a departure from the norm." *Scott*, 548 P.2d at 236 (emphasis added). That "norm" is the "fundamental right" to bail—and the "exceptions" that depart from the norm are the circumstances under which bail is not constitutionally "mandate[ed]." *Id.*

In other words, the Bail Provision guarantees the general right to bail, then sets forth exceptions where an individual is not constitutionally entitled to bail. In such circumstances, a court can deny bail without infringing on an individual's constitutional right. But it does not follow that merely because one does not have a constitutional right to something, that thing must be denied. To the contrary, as

discussed in the following sections, there is no plain language in the Bail Provision prohibiting a court from setting bail.

Here, the district court correctly recognized that the plain language of the Bail Provision established a right to bail, created exceptions to that right, and did not mandate denial of bail. (Stip. Mot. at 2.) Thus, the district court's interpretation is in harmony with the plain language of the Bail Provision and this Court's precedent interpreting it in *Scott*.

2.2 This Court has not interpreted the Bail Provision to prohibit a court from granting bail

While acknowledging that no court has yet interpreted the Bail Provision, Davis County claims that five cases support that the Bail Provision prohibits bail. (Aplt. Br. at 37–39.) But Davis County is wrong. Three support the district court's interpretation, rather than Davis County's, and two are irrelevant.

First, in one case, this Court used permissive language indicating that the decision to deny bail was *discretionary*. In *Roll v. Larson*, 516 P.2d 1392, 1392 (Utah 1973), the Court held that "This [Bail] provision refers to a specific, distinct category identified as 'capital offenses' for which bail *may* be denied under certain circumstances." (emphasis added). The Court used the discretionary word *may*—"offenses' for which bail *may* be denied"—rather than interpreting the Bail Provision to *mandate* that courts deny bail for these offenses. The district court's interpretation is in harmony with *Roll*.

Second, in two other cases, this Court and the Utah Court of Appeals acknowledged that the Bail Provision removed the constitutional *right to bail* for

those accused of qualifying offenses. The courts held that the Bail Provision denied the *right to bail*, not that it *denied bail* to those so accused. Thus, these cases support that those who are not “bailable” under the Bail Provision do not have the *right* to bail, not that they are not eligible for bail.

In *State v. Kastanis*, 848 P.2d 673, 675 (Utah 1993), this Court reasoned: “Section 8, however, *denied the right to bail* in capital cases and certain other categories of offenses and by inference guaranteed bail to all others as a matter of right. Even in capital cases, bail was not to be denied unless the proof was evident or the presumption strong.” (Emphasis added.) And in *State v. Alvillar*, 748 P.2d 207, 210 (Utah App. 1988), the Utah Court of Appeals discussed whether a defendant should be given credit for time served prior to his conviction. In the context of that discussion, the Court of Appeals noted that under the Bail Provision, the defendant “was *simply not entitled to bail, as a matter of right*, totally aside from the state of his personal finances.” *Alvillar*, 748 P.2d at 210 (emphasis added).

The courts in *Kastanis* and *Alvillar* recognized that the constitutional right to bail could be eliminated in certain circumstances. But the fact that an individual is not constitutionally entitled to bail does not mean that a court is constitutionally prohibited from granting bail.

Third, in *Ex parte Springer,* 1 Utah 214 (Utah Terr. 1875)—a case that was published 20 years before the Utah Constitution was ratified—does not support Davis County’s argument. *Springer* refers to a statute, does not mention the word

“bailable,” and does not cast any useful light on how that word should be interpreted. Most importantly, the Court in *Springer* does not say that bail is prohibited, but rather that “[t]he petitioner will not be admitted to bail” in this case. 1 Utah 214. Finally, in this very short opinion, the Court concludes by stating that "the prosecution has admitted that it is a capital case *and there are no facts to warrant any other conclusion, or that this would be an exception.*” *Id.* (emphasis supplied). By this language, the Court acknowledges that there could be facts or exceptions that would warrant admitting the defendant to bail; *i.e.,* that the court has discretion to reach that conclusion if the facts and circumstances so warranted.

The final case Davis County relies on—*State v. M.L.C.*, 933 P.2d 380 (Utah 1997)—should also carry little weight. In *M.L.C.*, this Court addressed whether juveniles were entitled to bail rights. 933 P.2d at 384. In its analysis, the Court briefly mentioned the text of the Bail Provision and then the Court dropped a footnote that read: “Bail is not available under this section for” and it listed the three enumerated circumstances in the Bail Provision. *Id.* at 383, n.5.

The Court’s note—“Bail is not available under this section”—should carry no weight because the Court was not analyzing the meaning of the Bail Provision or interpreting the language at issue in this case. Thus, the footnote is dicta. Additionally, the perfunctory footnote did not engage in plain meaning analysis of the language of the Bail Provision through a historical lens, nor did the footnote confront the tension between this footnote and its precedent in *Scott,*

Roll, Kastanis, and *Alvillar*. Thus, the footnote in *M.L.C.* is irrelevant to the issues before the Court in this case.

In sum, this Court has never squarely addressed the issue of whether the Bail Provision prohibits a court from granting bail. But this Court's precedent in *Scott,* as well as *Roll, Kastanis*, and *Alvillar* supports that the Bail Provision recognized a constitutional right and exceptions to that right to bail, rather than prohibiting a court from granting bail. Thus, the district court's interpretation of the Bail Provision is in line with this Court's precedent, and Davis County has put forth no relevant, applicable precedent from this Court supporting its contrary interpretation.

3. The district court correctly interpreted the plain language of the Bail Provision

In interpreting provisions of the Utah Constitution, this Court "first look[s] to the text's plain meaning," as well as examining the surrounding provisions for context. *Am. Bush v. City of S. Salt Lake*, 2006 UT 40, ¶ 11, 140 P.3d 1235.

As set forth below, (1) the plain language of the Bail Provision and its placement in Article I demonstrate that the Bail Provision creates a right subject to exceptions, rather than a prohibition; (2) under Davis County's preferred definition of "bailable" as eligible for bail rather than entitled to bail, the language of the Bail Provision still creates a right subject to exceptions, rather than a prohibition; and (3) Article I, Section 26 does not make the Bail Provision prohibitory where it contains no prohibitory language.

3.1 The plain language of the Bail Provision, confirmed by its placement in Article I, demonstrates that it creates a right subject to exceptions rather than a prohibition

The Bail Provision provides, "All persons charged with a crime shall be bailable except" under the enumerated circumstances. Utah Const., art. I, § 8. Under this language, a person "shall be bailable" except where explicitly provided in the Bail Provision. The Bail Provision contains no prohibitory language forbidding a court from granting bail when a person does not have the constitutional right to bail. This is consistent with *Scott*, where this Court interpreted the Bail Provision as "grant[ing] a *fundamental* right" and creating "exceptions [that] create distinct classifications, which mark a departure from the norm." *Scott*, 548 P.2d at 236 (emphasis added). Thus, the plain language of the Bail Provision establishes a constitutional right subject to exceptions, rather than any constitutional prohibition.

Beyond the language of the Bail Provision and *Scott*, the placement of the Bail Provision—inside the declaration of rights of the Utah Constitution—further supports that the Bail Provision is meant to define and secure an individual's right to bail, rather than to prohibit a court from granting bail.

The Utah Constitution is comprised of several articles. Article I of the Utah Constitution—the article where the Bail Provision is housed—is Utah's declaration of rights. It creates a variety of fundamental individual rights, including the "right to enjoy and defend . . . lives and liberties"; "[t]he rights of conscience" and "free exercise" of religion; the right to "due process of law"; the

right to a unanimous jury verdict in criminal cases; the right to "compensation" when "property is taken or damaged for public use"; and so forth. Utah Const., art. I, §§ 1, 4, 7, 10, 22, 25.

By including the Bail Provision in Utah's declaration of rights, the framers confirmed that the purpose of the Bail Provision was to define an individual's right to bail by guaranteeing bail, except in the enumerated circumstances, where a district court can deny bail without violating an individual's constitutional right. But it does not follow that because a district can deny bail without infringing on an individual's constitutional right under some circumstances, that the court *must* deny bail. Both the plain language of the Bail Provision and its placement in Utah's declaration of rights, which is focused on defining the *rights* of the individual, prevent such an interpretation.

Nonetheless, Davis County asserts that the placement of the Bail Provision in Article I supports its argument that the Bail Provision prohibits bail because Article I "prioritizes the rights of the innocent." (Aplt. Br. at 8.) By "innocent," Davis County seems to mean those who have not been accused of crimes. But Davis County overlooks that a significant number of provisions in Article I are devoted to those who are accused of crimes—and thus, apparently in Davis County's eyes, are not "innocent." For example, Section 9 prohibits excessive bail; Section 10 enshrines trial by jury; Section 12 creates rights for accused persons; Section 13 requires prosecution by indictment; Section 14 forbids unreasonable searches; and Section 16 prohibits imprisonment for debtors. Utah Const., art. I,

§§ 9, 10, 12, 13, 14, 16. Article I creates rights for all accused persons, not merely those who are deemed "innocent." *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 783 (2010) (reasoning that many constitutional rights have "controversial public safety implications").

In sum, Article I is a charter of individual rights, intended to endow Utahns with protections. Its purpose is set forth the contours of individual rights. Both the plain language of the Bail Provision and its placement in Article I, along with this Court's decision in *Scott*, demonstrate that the Bail Provision establishes a constitutional right to bail, subject to exceptions, rather than prohibiting a court from granting bail.

3.2 Even under Davis County's preferred definition of "bailable," the Bail Provision creates a right subject to exceptions, rather than a prohibition

Davis County argues that the Bail Provision requires a court to deny bail based on a single historical dictionary definition defining the word "bailable" as meaning capable or worthy of bail, rather than entitled to bail.[5] (Aplt. Br. at 34–35.) It reasons that the subsequent "except" means that those with qualifying offenses are not capable of receiving bail. (*Id.*) But Davis County's position is wrong for two reasons.

[5] For support, it cites Webster's dictionary's definition of bailable: "[t]hat may be set free upon bond with sureties; that may be admitted to bail." Noah Webster, Amer. Dict. of the English Lang. Online, "bailable" (1828).

First, Davis County's definition does not support make the Bail Provision prohibitory: Inserting Davis County's preferred definition, the Bail Provision would read, "All persons charged with a crime shall be [capable of receiving bail] except" under the enumerated circumstances. But the "shall" language of the Bail Provision creates a mandatory right whereby all persons are constitutionally guaranteed to be capable of receiving bail, subject to exceptions where a person is not constitutionally guaranteed to be capable of receiving bail. Thus, even under Davis County's definition, the Bail Provision creates a right subject to exceptions rather than a prohibition.

The core problem for Davis County is that the Bail Provision does not say that a person is "not bailable" or "not capable of receiving bail" in enumerated circumstances. Instead, the enumerated circumstances are an exception to the constitutional right guaranteed by the word "shall." Regardless of whether the constitutional right defined by the phrase "shall be bailable" is the *right to be entitled to bail* or the *right to be capable of receiving bail*, the Bail Provision provides a right subject to exceptions, rather than a prohibition.

Second, bailable means entitled to bail rather than capable of receiving bail: Davis County has not demonstrated with its single historical dictionary definition that "bailable" means "capable of receiving bail" rather than "entitled to bail." Its definition of "bailable" as "capable of receiving bail" rather than "entitled to bail" is contrary to *Scott*, which held that the Bail Provision "affirms the fundamental right to bail of one accused of a crime; and it does so in

mandatory terms." *Scott*, 548 P.2d at 236. A mandatory and fundamental right to bail is consistent with the phrase "shall be bailable" meaning "shall be entitled to bail," rather than meaning "shall be capable of receiving bail." Davis County's proposed definition is at odds with *Scott*.

And contrary to Davis County's single historical dictionary definition, several historical dictionaries define "bailable" as released on bail as a matter of right.[6] And other dictionaries define "bailable" as permissive—as in an individual "may be bailed"—but it is not clear whether that permissiveness means the court may grant bail or a person is capable of being granted bailed.[7] And some dictionaries appear to define bail both as a matter of right and as capable of being bailed.[8] Thus, the dictionaries do not clearly support Davis County's position that this Court should adopt a definition of "bailable" that is at odds with *Scott*.

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[6] *See* STEWART RAPALJE & ROBERT L. LAWRENCE, A DICTIONARY OF AMERICAN AND ENGLISH LAW, WITH DEFINITIONS OF THE TECHNICAL TERMS OF THE CANON AND CIVIL LAWS 106 (1888) ("A writ or process is said to be bailable when a person arrested under it may be liberated on bail, either as a matter of right, or in the discretion of the court."); JOHN BOUVIER, A LAW DICTIONARY ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA 311 (15TH ED. REV. & ENLARGED, 1890) ("An action in which the defendant is entitled to be discharged from arrest only upon giving bond to answer."); J. KENDRICK KINNEY. LAW DICTIONARY AND GLOSSARY: PRIMARILY FOR THE USE OF STUDENTS BUT ADAPTED ALSO TO THE USE OF THE PROFESSION AT LARGE 91 (1893) ("[r]equiring, authorizing or admitting of bail; entitled to be discharged on bail.").

[7] *See* WILLIAM C. COCHRAN, THE STUDENTS' LAW LEXICON - A DICTIONARY OF LEGAL WORDS AND PHRASES 83 (1888) ("[A]n arresting process is said to be bailable when the person arrested may obtain his liberty on giving bail.")

[8] HENRY CAMPBELL BLACK, DICTIONARY OF LAW CONTAINING DEFINITIONS OF THE TERMS AND PHRASES OF AMERICAN AND ENGLISH JURISPRUDENCE, ANCIENT

In contrast, as thoroughly discussed in section 4.2, decisions of the supreme courts of others states provide a clear majority view prior to 1896 that the word "bailable" indicated a mandatory right, which is consistent with this Court's decision in *Scott*.[9] *Infra* section 4.2. Beyond this, several state courts indicated that even if an individual was charged with a capital felony, a court could still exercise discretion to admit that individual to bail. *Id.*

Ultimately, "capable of receiving bail" implies something less than the fundamental mandatory right to bail already recognized in *Scott*. This Court should reject Davis County's definition of "bailable" as at odds with *Scott*. But even if this Court were to accept Davis County's definition, it does not support Davis County's contention that the Bail Provision prohibits courts from granting bail.

3.3 Article I, Section 26 does not make the Bail Provision prohibitory in the absence of prohibitory language

Davis County points to Article I, Section 26 of the Utah Constitution to argue that the Bail Provision is both mandatory and prohibitory—that it necessarily mandates bail in certain circumstances but prohibits bail in others. (Aplt. Br. at 39–42.) But Article I, Section 26 does not mandate that every

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AND MODERN 114 (1891) ("[c]apable of being bailed; admitting of bail; authorizing or requiring bail.").

[9] This Court may inform "textual interpretation with historical evidence of the framers' intent," including looking to "court decisions made contemporaneously to the framing of Utah's constitution in sister states with similar . . . constitutional provisions." *Am. Bush v. City of S. Salt Lake*, 2006 UT 40, ¶ 11, 140 P.3d 1235.

provision of the constitution be construed to be *both* mandatory *and* prohibitory. Some provisions are mandatory, others are prohibitory, and others may be both. But whether a section is mandatory or prohibitory turns on the plain language of the provision in question.

Article I, Section 26 of the Utah Constitution reads, “The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.” Utah Const., art. I, § 26. Section 26, thus, provides for three categories of constitutional provisions: (1) those which are mandatory, (2) those which are prohibitory, and (3) those which are “declared to be otherwise.” *Id.*

Section 26 deals with the effect of words contained in Utah’s constitutional provisions, but it does not insert words that do not exist into other provisions. It prescribes the effect of the plain language; it does not alter the plain language. And while the Bail Provision contains mandatory language, subject to an express exception, it does not contain any prohibitory language that would make the “provision[] . . . prohibitory” under Article I, Section 26.

In the Bail Provision, the first eight words give the provision a mandatory effect under Article 1, Section 26: “All persons charged with a crime shall be bailable. . . ” Utah Const., art. 1, § 8. This Court has already classified that language as “mandatory.” *Scott*, 548 P.2d at 236.

The Bail Provision also contains language that is an express exception to the mandatory language: “All persons charged with a crime shall be bailable

except. . . " Utah Const., art. 1, § 8 (emphasis added). The subsections after "except" are not mandatory or prohibitory because they are expressly declared to be "otherwise." Utah Const., art. I, § 26. Indeed, other states have recognized exceptions to a mandatory rule as neither mandatory nor prohibitory. *State ex rel. Niewoehner v. Bottomly*, 116 Mont. 96, 148 P.2d 545, 555–56 (1944) (Morris, J. dissenting) (explaining that "by the use of the word 'unless otherwise provided by law,' there are 'express words' by which the other language in [its provision was] is not mandatory, neither is it prohibitory").[10] The use of the word "except" is an express word that is neither mandatory nor prohibitory, which creates an exception to the otherwise mandatory language of the Bail Provision. *See also* Utah Const., art. I, §§ 8, 26.

The "except" language of the Bail Provision exempts accused individuals from the otherwise mandatory bail requirement establishing the "fundamental right to bail." *See Scott*, 548 P.2d at 236; Utah Const. art I, § 8(1). Accordingly, when an accused's circumstances fall under one of these exceptions, he does not have a constitutional right to bail. *Id.*

This same structure—a mandatory/prohibitory phrase followed by the word "except"—is found in another provision of Article I: the debt imprisonment provision in Article I, Section 16: "There shall be no imprisonment for debt

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[10] The Supreme Court of Montana was discussing a state constitutional provision substantively identical to Utah's Article I § 26: "The provisions of this constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." Montana Const. art. III, § 29.

except in cases of absconding debtors." Utah Const., art. I, § 16. If Davis County is correct that the exception to a mandatory rule is a prohibitive, the Utah Constitution would *require* courts to imprison absconding debtors rather than merely exempting absconding debtors from the otherwise general prohibition against imprisonment. But Article I, Section 16 contains no mandatory language requiring absconding debtors to be imprisoned.

Thus, the best reading of Article I, Section 16 is that the phrase following "except" is an exception to the mandatory language rather than a prohibition: not *all* absconding debtors *must* be imprisoned. Rather, imprisonment is prohibited for all debts, but in the case of absconding debtors, imprisonment *may* be ordered. *Id.*

This same logic applies to the Bail Provision. The word "except" in the Bail Provision signals an exception to the mandatory rule, and an exception to a mandatory rule is simply something less than mandatory. If an individual falls into one of the excepted categories, the district court has discretion to deny bail.

Nonetheless, Davis County argues that the "except" and "shall" language in the Bail Provision coupled with Section 26 create a prohibition against bail. But the Bail Provision contains no prohibitory language that would make that would make the "provision. . . prohibitory" under Article I, Section 26. In contrast, several provisions contained in Article I of the Utah Constitution, have prohibitory language, such as "shall not," "shall never," or "no . . . shall," as detailed below:

- "The rights of conscience *shall never* be infringed. The State *shall* make *no* law respecting an establishment of religion or prohibiting the free exercise thereof . . ." Utah Const., art. I, § 4 (emphasis added).
- "The privilege of the writ of habeas corpus *shall not* be suspended." Utah Const., art. I, § 5 (emphasis added).
- "The individual right of the people to keep and bear arms . . . *shall not* be infringed." Utah Const., art. I, § 6 (emphasis added).
- "*No* person *shall* be deprived of life, liberty or property without due process of law." Utah Const., art. I, § 7 (emphasis added); *see Spackman ex rel. Spackman v. Bd. of Educ. of Box Elder Cty. Sch. Dist.*, 2000 UT 87, ¶ 11, 16 P.3d 533 (holding that this constitutional provision is expressly prohibitive).
- "Excessive bail *shall not* be required[.]" Utah Const., art. I, § 9 (emphasis added).
- "*No* law *shall* be passed to abridge or restrain the freedom of speech or of the press." Utah Const., art. I, § 15 (emphasis added).

But the Bail Provision does not contain the phrases "shall not," "shall never," "shall . . . no," or "no . . . shall," or similar language that would make the Bail "[P]rovision . . . prohibitory." Utah Const., art. I, § 26.

Thus, Article I, Section 26 establishes that the Bail Provision creates a mandatory right to bail, subject to express enumerated exceptions, but the Bail

Provision contains no language prohibiting bail. The Bail Provision cannot be read to be a prohibitory provision without inserting language that does not exist.

4. History supports the district court's interpretation of the Bail Provision

Before discussing the plain language and structure of the Bail Provision, Davis County launches into a history lesson about the Bail Provision. In constitutional analysis, "the text's plain language may begin and end the analysis." *S. Salt Lake City v. Maese*, 2019 UT 58, ¶ 23, 450 P.3d 1092. "Where doubt exists about the constitution's meaning, we can and should consider all relevant materials. Often that will require a deep immersion in the shared linguistic, political, and legal presuppositions and understandings of the ratification era." *Id.* (quotation marks omitted).

As argued in section 3, the plain language of the Bail Provision, its placement within the Utah Constitution, the surrounding provisions, and the caselaw should satisfy this Court that the Bail Provision creates a constitutional right to bail for all accused. The Bail Provision only removes the constitutional right to bail in certain circumstances, and the removal of the constitutional right does not prohibit a district court from granting bail. Thus, this Court can begin and end its analysis with the Bail Provision's text. It need not delve into history.

Nonetheless, this Court may inform "textual interpretation with historical evidence of the framers' intent." *Am. Bush v. City of S. Salt Lake*, 2006 UT 40, ¶ 11, 140 P.3d 1235. This includes "look[ing] for guidance to the common law, our state's particular . . . traditions, and the intent of our constitution's drafters,"

"court decisions made contemporaneously to the framing of Utah's constitution in sister states with similar . . . constitutional provisions," and an understanding of similar federal provisions "contemporary to its adoption is also instructive." *Id* And in this case, a historical analysis confirms that the district court correctly interpreted the Bail Provision.

4.1 Early history supports that the Bail Provision created a right to bail

"In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987). Bail "permits the unhampered preparation of a defense," "serves to prevent the infliction of punishment prior to conviction," preserves "the presumption of innocence," and secures "the presence of an accused." *Stack v. Boyle*, 342 U.S. 1, 4–5 (1951).

It is against this backdrop that this Court must decide what the State of Utah intended when it adopted the Bail Provision in 1896. In its historical argument, Davis County has argued that the Bail Provision should be read more strictly than its contemporaneous federal Judiciary Act, because the 1896 Utah Constitution must be interpreted to remove all discretion from the courts in the case of capital offenses. But Davis County's rationale for the argument that Utah's founders intended its constitution to be *more restrictive* of a pretrial detainee's rights than federal law is thin.

Davis County has done an exemplary job of demonstrating that the terms of the Bail Provision remained essentially the same from the earliest days of the

Utah Territory through the adoption of the Utah Constitution in 1896.[11] But nothing in Davis County's historical recitation, however, supports its contention that the inclusion of the word "bailable" means what Davis County claims it means. In fact, this Court has cautioned against "converting the historical record into a type of Rorschach test where we only see what we are already inclined to see." *Maese*, 2019 UT 58, ¶ 20 (quotation marks omitted).

As discussed below, early bail rights in the United States and history from Territory of Utah demonstrate that the Bail Provision was drafted to give Utahns more bail protections, not fewer.

Early bail rights in the United States: The need for strong bail rights arose in England, where although all defendants could seek bail (including defendants charged with capital crimes), courts had discretion whether to grant bail. *Jennings v. Rodriguez*, 138 S. Ct. 830, 863 (2018) (Breyer, J., dissenting).[12]

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[11] For example, the Ordinance of the Northwest Territory provided, in Article the Second, that "all persons shall be bailable unless for capital offences, where the proof shall be evident, or the presumption great." Ordinance for the Governance of the Territory of the U.S. N.W. of the River Ohio (1855).

This same verbiage is repeated in the statutes of the Utah Territory and then the State of Utah, until the Utah Constitution was amended in 1971 and 1988. Although the 1971 and 1988 amendments to the Utah Constitution added qualifying offenses, the basic structure of the constitutional provision, "shall be bailable . . . except" did not change.

[12] In English common law "all offenses, including treason, are bailable, though the high crimes are so not of right but only in the discretion of the court" but "this judicial discretion was abused to the great damage of prisoners." *Hampton v. State*, 42 Ohio St. 401, 403 (Ohio 1884); *see also Gamble v. United States*, 139 S. Ct. 1960, 1970 (2019) (noting that the English courts had discretion

Although the United States Constitution did not guarantee a right to bail,[13] the first legislative treatment of the right was the federal Judiciary Act, September 24, 1789, 1 Stat. 73. This Act, to "Establish the Judicial Courts of the United States," states: "And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, *who shall exercise their discretion therein*, regarding the nature and circumstances of the offence, and of the evidence, and the usages of law." 1 Stat. 73, sec. 33 (emphasis added).

The Judiciary Act created a right with exceptions and not a prohibition. *Id.* Unlike the English courts, the United States courts did not have discretion to grant or deny bail for all offenses; rather, it had to grant bail for all offenses except for capital ones, and for capital offenses, the courts could decide whether to grant an individual bail in the "exercise [of] their discretion therein." *Id.*[14]

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to grant bail to an individual who was charged with murder—generally a capital offense—but "found no convincing reason to grant bail").

[13] The United States Supreme Court has interpreted the Eighth Amendment of the United States Constitution as not guaranteeing a right to bail, but mandating that if bail is allowed that it not be excessive. *See Carlson v. Landon*, 342 U.S. 524, 546 (1952).

[14] The structure of the Judiciary Act is duplicated in the current federal bail statute, which gives a court the discretion to consider a number of factors for pretrial detention of an accused, all deriving from the fundamental purposes of assuring the presence of the defendant at trial and protecting the public from danger. 18 U.S.C. § 3142.

As has been frequently noted in other contexts by this Court and by commentators, the Utah Constitution tends to be *more* protective of fundamental rights, not less. As one author has observed: "For criminal defendants in particular, Mormons, who comprised most of the state constitutional delegates, were targeted over several decades with wide-scale and abusive polygamy prosecutions. More than perhaps any other delegation in constitutional history, Utah's constitutional framers were acutely aware of governmental abuses of power in criminal prosecutions. They wrote a strong constitution to protect against those problems from happening again."[15]

While Davis County uses the example of Joseph Smith's death while in custody without bail for the alleged offense of treason against Illinois to support the contention that the citizens of the Utah Territory understood that certain offenses were not subject to bail, that is not the key lesson to draw from Smith's death as it bears on the intent of the Utah framers.

Although the early Mormons lived in Illinois and were subject to Illinois law, they took the extraordinary step of enacting a charter for the City of Nauvoo that granted *habeas corpus* powers to the municipal government.[16] In fact, prior

[15] Samuel Newton, "Giving Teeth to State Constitutions: Using History to Argue Utah's Constitution Affords Greater Protections to Criminal Defendants," 3 Utah J. Crim. L. 40, 42 (2018).

[16] *See* A. Keith Thompson, "The Habeas Corpus Protection Protected Joseph Smith from Missouri Arrest Requisitions," 29 Interpreter: A Journal of Latter-day Saint Faith and Scholarship, 273, 303–05 (2018).

to Smith's death, Nauvoo's municipal court had released Smith from custody after he was charged with inciting a riot.[17]

And once in the Utah Territory, the early Mormons operated under a system where bail was discretionary, even for capital offenses. In 1872, Brigham Young—who was the president of The Church of Jesus Christ of Latter-day Saints—was charged with murder and arrested by the United States marshal (at this point in time, the United States government had passed the Poland Act, which gave federal courts jurisdiction over almost all of the Utah Territory).[18]

At his bail hearing, Young's attorney noted that another individual who was charged with murder—Daniel H. Wells—had been released on bail.[19] The U.S. district attorney who charged Young informed the court that "there was no doubt at all that in the United States courts under the old statutes all parties may be admitted to bail. We have seen this course followed in other cases equally important with this one. Aaron Burr and Jefferson Davis were both admitted to bail."[20] The district attorney asked the court to exercise its discretion and grant Young bail.[21] The court, however, exercised its discretion to decline to admit

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[17] The Church of Jesus Christ of Latter-day Saints, Saints: The Standard of Truth (Vol. 1), at 541.

[18] Edward W. Tullidge, The History of Salt Lake City and Its Founders (1886), at 551. This book is available in a digital format on Google Books.

[19] *Id.*

[20] *Id.* at 551–52.

[21] *Id.* at 552.

Young to bail, although it allowed him to be detained at his home rather than in a jail.[22]

At the time the Utah Constitution was adopted in 1896, federal prisoners could obtain bail for any offense, including a capital offense, at the discretion of the court if "the offence, and of the evidence, and the usages of law" supported the pre-trial release of the accused. Judiciary Act, 1 Stat. 73, sec. 33. Given the early Mormon experience of persecution and sense of fundamental distrust of government, and the willingness of the early Mormon leaders to grant extraordinary *habeas corpus* power to their municipal government, it would have been unreasonable for the framers of the Utah Constitution to give their citizens *fewer* protections from the danger of being held without bail than was afforded federal defendants at the time.

Thus, early history of the United States and the Utah Territory support the district court's reading of Bail Provision as granting a right with exceptions, with no prohibitions.

4.2 The fundamental right to bail was recognized in sister states

The Bail Provision as it appears in the 1896 Utah Constitution was widely adopted in the constitutions of other states. *See State v. Burgins*, 464 S.W.3d 298, 304 & n.3 (Tenn. 2015). Decisions of the supreme courts of those states provide a clear majority view prior to 1896 that the word "bailable" indicated a

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[22] *Id.*

mandatory right. And several state courts indicated in the 1800s that even if an individual was charged with a capital felony, a court could still exercise discretion to admit that individual to bail.

Courts interpreted the word "bailable" as creating a mandatory right to bail: Throughout its brief, the Davis County cites statutes and cases that use the word "bailable" without explaining what the word "bailable" means. But a review of cases that were released in the 1800s shows that state courts interpreted "bailable" to mean a "right to bail."

For example, in 1895—the same year as the Utah Constitutional Convention—Wyoming's Supreme Court noted that "state constitutions in this country generally, as well as by our own, so as to give bail *as a matter of right* in those cases where it is allowable." *State v. Crocker*, 40 P. 681, 686 (Wy. 1895); *see also In re Boulter*, 39 P. 875, 876 (Wy. 1895).

In fact, state courts whose constitutions used the word "bailable" frequently spoke of individuals being "entitled" to bail or having a "right" to bail before they were convicted. *See Ex parte Dykes*, 3 So. 306, 306 (Ala. 1887) (because evidence is not strong that the defendant committed murder, he is "entitled to bail"); *State v. Hufford*, 23 Iowa 579, 582 (Iowa 1868) (noting that the "bailable" language in the state constitution created a "right to bail"); *Street v. State*, 43 Miss. 1, 4 (Miss. 1870) ("Bail is a matter of right in all cases" except in capital cases); *State v. Start*, 54 P. 22, 22 (Kan. Ct. App. 1898) (defendant was "entitled to bail); *Ex parte Newman*, 41 S.W. 628, 629 (Tex. Crim. Ct. App. 1897)

(a defendant who is "bailable" is "entitled to bail"); *Rigdon v. State*, 26 So. 711, 712 (Fla. 1899) ("[A]ll persons are bailable by sufficient sureties, as matter of absolute right."); *State v. Granvelle*, 1886 WL 2607, at *1 (Ohio Com. Pl. 1886) ("No one doubts, that in cases of felony, before conviction, a defendant is entitled to bail, as a matter of right, upon tendering sufficient sureties.")

There was a nearly universal consensus that bail was required prior to indictment or conviction. *In re Longworth*, 7 La. Ann. 247, 251 (La. 1852) (finding that the judge has "*no discretion except in fixing the amount of the security*." (emphasis added)); *Ex parte Ezell*, 40 Tex. 451, 460 (Tex. 1874) (referring to its "*absolute* constitutional right of bail" (emphasis added)); *State v. Levy*, 24 Minn. 362, 368 (Minn. 1877) (making bail *required* before conviction and discretionary after conviction but before sentencing); *In re Finlen*, 18 P. 827, 828 (Nev. 1888); *In re Losasso*, 24 P. 1080, 1081 (Colo. 1890) (observing that its nearly universal constitutional provision "changes the common law so as to confer an absolute right to bail after indictment in all other felonies [but capital offenses]," thus providing "[b]ail as a matter of right" to everyone but those indicted with a capital offense).

Thus, in the 1800s, state supreme courts interpreting constitutional language similar or identical to the Bail Provision nearly universally interpreted their constitutional bail provisions to mean that bail was a constitutional right.

State courts held that they had discretion to grant bail even in capital cases: Courts in states that had constitutional language similar to the

Bail Provision also noted that courts still maintained discretion to grant a defendant bail who was charged with a qualifying offense.

In the 1800s, capital crimes with strong evidence were the only offenses that excepted defendants from the constitutional right to bail. *See* Utah Const., art. I, § 8 (1896). Those qualifying offenses have since been expanded to include the felony-on-felony exception and other crimes. *See* Utah Const., art. I, § 8 (1988). But although the number of qualifying offenses has expanded, the key constitutional language has not changed since 1896: "shall be bailable . . . except." Thus, it is important that state courts in the 1800s interpreted this language to give courts discretion to grant bail to those who were charged with a qualifying offense—capital crimes with strong evidence.

In 1862, the California Supreme Court concluded that California's constitution "secures to the citizen accused the right to bail in all cases, except when charged with a capital offense, and even then, unless the proof of guilt is evident or the presumption of it is great." *People v. Tinder*, 19 Cal. 539, 542 (Cal. 1862). The court made clear that its "right to bail" in capital cases "may be made a matter of discretion, and may be forbidden by legislation, but in no other cases." *Id*. Thus, even in capital cases, the right to bail was not prohibited outright.

In 1889, the Missouri Supreme Court noted that its constitution directed that all persons be "bailable" except those charged with capital offenses. *In re Goans*, 12 S.W. 635, 635 (Mo. 1889). It reasoned that the "indictment for a capital offense furnishes a strong presumption of guilt, and this presumption

must be applied, in all such cases, on application for bail. There must be other facts and circumstances which overcome this presumption before the prisoner can be bailed." *Id.* It then noted that the defendant's first trial ended in a mistrial, and the defendant had never acted to evade trial. *Id.* The court then reviewed the facts of the case and concluded that the defendant "should be let to bail." *Id.*

In 1890, the Colorado Supreme Court noted that in cases where individuals were charged with capital offenses where the proof was strong, "bail should be denied in the absence of some special ground such as those above mentioned, wherein all courts exercise a judicial discretion." *In re Losasso*, 24 P. 1080, 1082 (Colo. 1890). In recognizing that courts had discretion to bail individuals charged with capital offenses, it encouraged "extreme caution in exercising the power of admitting to bail in this class of offenses." *Id.*

Other courts have indicated that even when a defendant is charged with a capital felony and there is evidence against that defendant, courts maintain discretion to release that defendant on bail. *See State v. Klingman*, 14 Iowa 404, 408 (1862) (noting that a judge retained some discretion in capital cases, even where the proof was evident); *State v. Herndon*, 12 S.E. 268, 269 (N.C. 1890) (noting that a capital felony charge is "prima facie not bailable" but "a judge will admit to bail" only "in a clear case"); *Ex parte Eastham*, 27 S.E. 896, 897 (W.Va. 1897) (reasoning that capital cases are not "bailable" and that "[i]n the exercise of the judicial discretion, it is the common rule to refuse bail in a capital case")

Thus, sister states have interpreted language similar to the Bail Provision

to mean that individuals had the right to bail, and if they were charged with a qualifying offense where the evidence was strong, the court still had discretion to either grant or deny bail. This historical analysis demonstrates that the district court correctly interpreted the Bail Provision.

5. This Court should not rely on legislative history

Davis County also argues that the legislative history from when the Bail Provision was amended in 1988 shows that the Bail Provision is prohibitory.

But modern legislative history is irrelevant. Everyone agrees that the key language at issue—"shall be bailable . . . except"—was adopted in 1896 and remains unchanged. Although the Bail Provision was amended in 1971 and 1988, those amendments only added to the categories of persons for whom bail was not mandatory.

Beyond the irrelevance of modern legislative history, this Court cautioned against looking to the intent of individual legislators when interpreting constitutional provisions: "While we have at times used language of 'intent' in discussing our constitutional interpretation analysis, our focus is on the objective original public meaning of the text, not the intent of those who wrote it." *Maese*, 2019 UT 58. ¶ 19, fn. 6. Similarly, floor speeches are not worthwhile aids in statutory construction. Antonin Scalia & Bryan Garner, Reading Law at 369 ("[I]n the interpretation of a text, no recourse may be had to legislative history.").

And the 1988 floor debates do not overwhelming support Davis County's interpretation. When Senators Winn L. Richards and LeRay L. McAllister

introduced an amendment to the Bail Provision to the Senate in 1988, it was loosely described as "providing that 'a judge in his discretion can deny bail to individuals who either might flee the jurisdiction of the court who would be a danger to others . . . .'" Jeffrey G. Thomson, *The Utah Constitution's Prohibitory Bail Provisions in Utah Criminal Proceedings*, 4 Utah J. Crim. L. 69, 86–87 (2019).

Moreover, the 1988 amendments to the Bail Provision were suggested by the Constitutional Revision Commission, which suggested the amendments to more closely align with federal bail standards.[23] At the time, bail in the federal system was determined by an analysis of a defendant's specific propensity for flight and safety risks rather than a rote examination of what crimes the defendant was charged with. 18 U.S.C. § 3142 (1985).[24] Although many wanted bail reform to follow federal standards, the Constitutional Revision Commission was concerned that the Bail Provision would not allow for individuals to be denied bail based on flight and safety risk because the Bail Provision mandated

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[23] Report of the Constitutional Revision Commission (January 1988) at 55.

[24] The most recent version of the Bail Reform Act mandates bail in all cases except when a court finds that there is "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. § 3142(a), (e)(1) (2022). The Bail Reform Act does not require that an individual be automatically held without bail if they committed a felony while awaiting trial on another felony charge. 18 U.S.C. § 3142(e). Instead, the Act states that if a person commits a felony while awaiting trial for another felony, "a rebuttable presumption arises that no condition or combination of conditions will reasonably assure the safety of any other person and the community." 18 U.S.C. § 3142(e)(2) (2022).

bail.[25] So the Commission "propose[d] an amendment to [the Bail Provision], instead of repeal, to preserve the presumption of bail while *allowing* for the denial of bail when the person charged may pose a danger to the community or is likely to flee the jurisdiction of the court." *Id.* (emphasis added). Thus, the 1988 amendments sought to align Utah's bail standards with the federal bail standards, which allowed for bail in the vast majority of circumstances but also allowed (but did not mandate) district courts to deny bail under certain circumstances. *See* 18 U.S.C. § 3142 (1985).

To support its position, the State relies on the comments of Senator Lyle W. Hillyard, who agreed that a court was mandated to deny bail to an individual who fell into one of the enumerated categories of the Bail Provision. (Aplt. Br. at 32–33.) But Senator Hillyard sponsored a bill in 2016 that made it clear that courts had discretion to grant bail to those who fell within the felony-on-felony exception.[26]

It is telling that the most recent amendments to the Bail Statute indicate the Legislature's understanding that the Bail Provision does *not* prohibit bail. The Bail Statute restates the Bail Provision, noting that all charged with crimes "shall be admitted to bail as a matter of right" unless an individual is charged with a

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[25] Report of the Constitutional Revision Commission (January 1988) at 55.

[26] *See* Pre-trial Release Amendments, S.B. 202, § 14 (2016 Gen. Sess.), *available at* https://le.utah.gov/~2016/bills/static/SB0202.html ("[A] magistrate or judge *may* deny pre-trial release if a person is arrested for, or charged with a . . . felony supported by substantial evidence and the offense is alleged to have occurred while the person was on probation, parole, or pre-trial release on a previous felony charge . . ." (emphasis added)).

qualifying offense. Utah Code § 77-20-201(1). But *even if* an individual is charged with a qualifying offense and the State demonstrates that substantial evidence supports the charge, the judge "may" order pretrial detention. Utah Code § 77-20-206(5). The Bail Statute does not *require* pretrial detention. *Id.*

To the extent the Legislature's understanding of the Bail Provision over the last 100 years is relevant to this Court's decision, it should also consider that the Legislature's recent understanding of the Bail Provision—as set out in the Bail Statute—comports with the district court's interpretation of the Bail Provision.

6. The district court's interpretation creates better policy

Davis County argues that public policy favors its interpretation, but Davis County is wrong. To the extent this Court considers public policy, it supports a district court having discretion to grant bail when individuals are not entitled to bail as a matter of right.

Below, the district court recognized that the policy interests outlined in the Bail Statute weighed in favor of granting Kolby bail. It noted that Kolby was already incarcerated at the ADC on a no-bail hold, and the no-bail temporary pretrial status order from Davis County was preventing Kolby from progressing in his Prisoner Labor Detail program. (Stip. Mot. at 5.) The court found that the "interests that need to be served—appearance when required, safety of witnesses, safety of the public, and the failure to obstruct or attempt to obstruct the criminal process-can be served" and that "conditions of release . . . will reasonably ensure those interests." (R.209.) Thus, the district court reasoned that public policy—as

it was articulated in the Bail Statute—was served by granting Kolby bail. The district court was correct.

Nonetheless, Davis County, asserts that public policy favors its interpretation of the Bail Provision: that whenever an individual is charged with any felony while on probation for any felony (or awaiting trial on a pending felony), that individual should automatically be denied bail, regardless of their circumstances. It argues that allowing district courts to have discretion to grant bail when an individual is charged with a qualifying offense creates unpredictability in the law, "breeds a lack of uniformity," allows a court discretion without any direction, allows a court to discriminate, pushes the court into a policy-making role, and raises constitutional concerns about the separation-of-powers doctrine. (Aplt. Br. at 42–45.) Not so.

6.1 The legislature has already articulated bounds for a district court's discretion in admitting bail

Davis County claims that permitting district courts to exercise discretion allows district courts to discriminate against defendants, would create unpredictability in the law, and would give district courts discretion without direction. Davis County is wrong.

Far from courts being without direction and engaging in rampant unfettered discrimination, district courts' discretion is already constrained by the Bail Statute. In deciding whether to grant bail with conditions, the legislature directs courts to consider whether the conditions will "reasonably ensure: (a) the individual's appearance in court when required; (b) the safety of any witnesses or

victims of the offense allegedly committed by the individual; (c) the safety and welfare of the public; and (d) that the individual will not obstruct, or attempt to obstruct, the criminal justice process." Utah Code § 77-20-205(3). The legislative framework already guides courts on when to grant bail, and that guidance creates uniformity and predictability in the law.

Davis County's interpretation would shift discretion away from district courts to prosecutors, who make the charging decisions that Davis County claims prohibit a court from granting bail. Prosecutors draft the informations, applications for arrest warrants, and detention requests that inform the district courts of the facts that would qualify a defendant for a no-bail hold. If courts have no discretion to consider the individual's circumstances, courts would be obligated to hold individuals without bail whenever a prosecutor asked.

Thus, Davis County's policy concerns about unfettered discretion, discrimination, and action without guidance, are valid concerns under Davis County's interpretation, which makes *prosecutors*' discretion (rather than the courts' discretion) the determining factor in whether an individual can receive bail. But Davis County's concerns are not valid concerns when neutral courts exercise their discretion under the legislative dictates of the Bail Statute.

6.2 Davis County's interpretation is overbroad, because it sweeps in dozens of nonviolent felonies

Davis County also appears to argue that all felonies should be treated the same. But Davis County ignores that the felonies include a panoply of nonviolent

unlawful a activities: recording a movie in a movie theater,[27] identity fraud,[28] theft of utility services,[29] conveyance of real estate by a married man without a wife's consent,[30] communications fraud,[31] insurance fraud,[32] issuing a bad check,[33] bribing someone to influence a publicly exhibited contest,[34] charging interest at a higher rate than authorized by law,[35] not paying child support,[36] gambling, and many others.[37]

Under Davis County's proposed interpretation, the district court could not consider bail for a single mother who is on probation for felony theft of utility services who is then charged with a felony for passing a bad check to buy groceries for her children, even if the mother was the sole provider and carer of her children, and there was no evidence that she presented any danger or risk of flight. Instead, based solely on the prosecutors' discretion in charging the mother and requesting a no-bail hold, she would be incarcerated without bail, depriving

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[27] Utah Code § 13-10b-201(2)(b) (a second violation is a third-degree felony).

[28] Utah Code § 76-6-1102.

[29] Utah Code § 76-6-409.3(4)(a)(iii).

[30] Utah Code § 76-6-516.

[31] Utah Code § 76-10-1801.

[32] Utah Code § 76-6-521.

[33] Utah Code § 76-6-505.

[34] Utah Code § 76-6-514.

[35] Utah Code § 76-6-520.

[36] Utah Code § 76-7-201(3).

[37] Utah Code § 76-10-1102(3).

her children of their sole support and care, without any consideration of her circumstances by the court.

Similarly, a person who struggled against substance abuse but relapses as they near successful termination of felony probation and is charged with a felony due to prior qualifying convictions should not automatically be subject to detention without bail. Indeed, the judge, prosecutor, defense counsel, the probation agent and the accused may all recognize that it would be far better for the individual and for society for the individual to enter a drug treatment program than to be incarcerated. Yet, under Davis County's interpretation of the Utah Constitution, pretrial incarceration without bail would be mandated.

Given the wide variety of felonies in Utah, some individuals charged with multiple felonies do not necessarily pose a risk of non-appearance or danger to the community. And given the wide variety of human circumstances, there are instances (such as Kolby's case) when particular considerations relevant to the individuals' circumstances weigh in favor of a court granting bail to a person who has been charged with a subsequent felony while on probation.

Thus, Davis County's proposed interpretation is overbroad; it would require pretrial detention without bail for a wide variety of nonviolent defendants even if they pose no risk of danger to the community or of nonappearance.

6.3 Davis County's interpretation eviscerates problem-solving courts

Davis County's interpretation of the Bail Provision would decimate the growing network of problem-solving courts in the State, which have been proven to reduce recidivism.

For over 20 years, Utah has had problem-solving courts, such as drug court, mental health court, and veteran's court.[38] These courts were born since the "traditional criminal justice system . . . was ineffective at reducing recidivism" because "the strategies being utilized did not focus on nor address the underlying criminogenic needs of justice-involved individuals."[39]

The Utah Legislature created drug courts to foster a "collaborative strategy between the court, prosecutors, defense counsel, corrections, and substance abuse treatment services to reduce substance abuse by offenders." Utah Code § 78A-5-201(1)(b). Admission to drug court is "based on a risk and needs assessment, without regard to the nature of the offense." Utah Code § 78A-5-201(6)(b). Participation in drug court significantly reduces recidivism rates.[40]

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[38] *See* Utah Courts, Problem Solving Courts, *available at* https://legacy.utcourts.gov/courts/psc/ (last accessed February 26, 2023); Utah Code § 78A-5-201 (drug court); Utah Code § 78A-5-303 (veteran's court); Utah R. J. Admin. R 4-409 (all problem-solving courts).

[39] National Drug Court Resource Center, Kristen DeVall et al., Painting the Current Picture: A National Report on Treatment Courts in the United States (2002) at 2, *available at* https://ndcrc.org/wp-content/uploads/2022/08/PCP_2022_HighlightsInsights_DigitalRelease.pdf.

[40] Cache County, Drug Court, https://www.cachecounty.org/attorney/criminal-division/drug-court.html ("The First District Drug Court's overall recidivism rate since its inception in 2000 is

Here, Kolby was charged in several cases with committing multiple felonies in a few-month timespan. (R.23–24.) However, in September 2022, Kolby entered drug court in Salt Lake County. [41] Under Davis County's interpretation of the Bail Provision, Kolby would not be in drug court—he would be incarcerated. But drug courts were created because incarceration was not solving the roots of criminal behavior. [42] And felony drug courts in Utah are "most effective when participants have a high need of treatment and pose a high risk to society."[43]

Thus, Davis County's interpretation of the Bail Provision would significantly curtail, if not decimate, problem-solving courts in Utah, as oftentimes individuals are in Kolby's position when they enter these courts: facing multiple felonies in multiple cases. But under Davis County's interpretation, all those individuals should instead be incarcerated rather than participating in problem-solving courts that could actually reduce their rate of

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15%, as measured by the number who graduate and don't return with new criminal charges. The recidivism rate at the Utah State Prison is approximately 50%, where they return within three years with new charges."); National Institute of Justice, Do Drug Courts Work? Findings from Drug Court Research, https://nij.ojp.gov/topics/articles/do-drug-courts-work-findings-drug-court-research.

[41] *See, e.g.*, *State v. Barnett*, Dist. No. 211905649 (docket entry on 9/20/22); *State v. Barnett*, Dist. No. 221904193 (docket entry on 9/20/22); *State v. Barnett*, Dist. No. 211903878 (docket entry on 9/20/22).

[42] DeVall et al., Painting the Current Picture: A National Report on Treatment Courts in the United States (2002) at 2.

[43] Office of the Utah State Auditor, A Performance Audit of Utah's Felony Drug Court Program, *available at* https://site.utah.gov/auditor/wp-content/uploads/sites/6/2013/05/Audit-Brief-Performance-Audit-of-Utah%E2%80%99s-Adult-Felony-Drug-Courts.pdf.

recidivism. The end result of Davis County's interpretation is not a safer community.

In sum, public policy supports the district court's interpretation of the Bail Provision. Although Davis County talks about the necessity of public safety, the Bail Provision is "not the only constitutional right that has controversial public safety implications." *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 783 (2010). Several rights—such as the right to bear arms, the right to a speedy trial, and rights restricting when the government can search or seize someone—all impact public safety. *Id.* But bail implicates far more than public safety: "[u]nless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

Davis County's interpretation of the Bail Provision would mandate incarceration of anyone who commits a felony while on felony probation or while awaiting trial for a felony, regardless of whether that person is a flight risk or dangerous to the community or has an underlying condition that (if addressed) could significantly resolve the individual's criminal behavior. This argument is the equivalent of simply disregarding the rehabilitative aspect of criminal enforcement and simply relegating an entire community to imprisonment without discretion. This is not what the people of Utah stand for: redemption is fundamental and is available to Kolby here. The Bail Provision should not be interpreted to stand in the way of that.

Conclusion

This Court should interpret the Bail Provision as creating a constitutional right to bail. When an accused individual falls into the Provision's felony-on-felony exception, that individual loses his constitutional right to bail, but district courts—in their discretion—may still admit that individual to bail.

Consequently, this Court should affirm the district court's decision to admit Kolby to bail.

DATED this 28th day of February, 2023.

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Certificate of Compliance With Rule 24(f)(1)

I hereby certify that:

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(a)(11) and 24 (g) because this brief contains 12,774 words, excluding the parts of the brief exempted by Utah R. App. P. 24(g)(2).

2. This brief complies with Utah R. App. P. 21.

DATED this 28th day of February, 2023.

/s/ Emily Adams

Certificate of Service

This is to certify that on February 28, 2023, I emailed and caused two true and correct copies of the foregoing to be served on the following via first class mail, postage prepaid:

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Addendum A
Stipulated Motion to Supplement the Record

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IN THE UTAH SUPREME COURT

STATE OF UTAH, Plaintiff / Petitioner, vs. KOLBY RYAN BARNETT, Defendant / Respondent.	**STIPULATED MOTION TO RECONSTRUCT THE RECORD** App. No. 20220636-SC

Under Rule 11(h) of the Utah Rules of Appellate Procedure, the parties request that this Court supplement the record in this case with the statement below. The record in this case only includes a partial transcript of the bail hearing in this case that occurred on July 11, 2022. The parties have agreed about what occurred at that bail hearing that was not recorded:

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On July 11, 2022, Judge Rita Cornish held a bail hearing. The beginning of the hearing was not recorded.

At that hearing, the Court called the case and indicated it was set for a pretrial conference and bail hearing. The State was represented by Deputy Davis County Attorney Gage Arnold (the "State"). Barnett was represented by legal defender Logan Bushell (the "Defense").

The defense indicated that the first issue the Court needed to resolve was whether the Court was prohibited from granting bail to Barnett under Art. I, § 8, as the State argued because Barnett was a "felony-on-felony" offender. The defense conceded that Barnett was on felony probation when the new felony charges allegedly occurred. The defense did not address the question of whether there was substantial evidence to support to support the new felony charges. Instead, the defense stated that it was their understanding the Court had ruled in another case (State v. Gonzalez, 201701138) that the plain language of Art. I, § 8 does not prohibit courts from granting bail to felony-on-felony defendants as a matter of judicial discretion. The State acknowledged that it was aware that this judge had reached that interpretive conclusion in that case.

The Court indicated it had reviewed the briefs submitted by the parties and that it was also familiar with the legal arguments because the Court had considered them in other cases. The Court confirmed its determination that the plain language of Art. I, § 8 does not prohibit bail for felony-on-felony defendants. The Court further explained that, although felony-on-felony defendants were not entitled to bail as a matter of right under Art. I, § 8, courts could grant or deny bail as a matter of judicial discretion.

The defense then explained that Barnett was on felony probation for cases in the Third Judicial District Court for Salt Lake County and that he also had numerous unresolved felony charges in the same court. Although the judge in Third District had authorized Barnett's release on the unresolved cases with monetary bonds and/or reporting to pretrial services, the judge in Third District had also ordered that Barnett be held no bail at the time for alleged probation violations. Accordingly, Barnett was being held at that time without bail in the custody of the Salt Lake County Adult Detention Center and, the defense argued, was not likely to be released until all of his cases were resolved. The defense explained that Barnett was participating in the Sheriff's Prisoner Labor Detail at the ADC and that he was eligible to advance to a higher level in that program. Specifically, Barnett was eligible to participate in a work detail with an ankle monitor performing tasks on the outside grounds of the ADC. Barnett was unable to advance to the next level of the program because under the ADC policies inmates with no bail holds out of other jurisdictions were not allowed to advance to the ankle monitor work detail. The no bail hold in this case was therefore preventing Barnett from advancing to the next level of the jail's labor detail program.

With that explanation, the defense asked the Court to set a monetary bond instead of holding Barnett without bail, even if the amount of the bond was as high as $100,000.00 to ensure Barnett would be unable to post bail.

The State opposed Barnett's request. The State argued that Barnett was not only a felony-on-felony offender because he was on felony probation at the time the new felonies were committed, but was also felony-on-felony because he committed the many new felony charges while released to pretrial services on the unresolved felony charges in Salt Lake County. The State emphasized that Barnett's criminal history was lengthy and ongoing and discussed the many new felony charges brought against Barnett in different jurisdictions since being placed on felony probation. The State reiterated that Barnett should be held without bail because he was felony-on-felony under Art. I, § 8 and thus nonbailable. On this issue, the State asked to the Court to expressly find that there was substantial evidence to support the new felony charges in order to perfect the record for purposes of an appeal. The State disagreed that a court retains constitutional discretion under this provision. But even if a court did, because of Barnett's ongoing criminal activity and failures to comply with probation and pretrial release requirements in Salt Lake, the State argued that Barnett should not be granted bail even as a matter of discretion.

The defense did not contest the substantial evidence issue and submitted the case to the Court.

The Court expressly found that there was substantial evidence to support the new felony charges in this case and that Barnett was therefore not entitled to bail as a matter of right under Art. I, § 8 because he was on felony probation when the new felonies were allegedly committed. However, the Court again

indicated that it could still grant bail as a matter of discretion. The Court found that that Barnett had a numerous, serious felony charges pending in both Salt Lake and Davis Counties. The Court found that Barnett was being held without bail in the Salt Lake County ADC for alleged probation violations and would remain in custody unless and until the court in Salt Lake lifted to those no bail holds. The Court found that Barnett was participating in the Sheriff's Prisoner Labor Detail program at the ADC but that the no bail hold in this case had prevented Barnett from being granted additional privileges in that program. It is at this point that the recording of the July 11, 2022 hearing starts.

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The parties—Kolby Barnett through attorney Emily Adams and the State through Jeffrey Thomson—now request that this Court include this stipulated statement of facts in the record on appeal.

DATED this 5th day of August, 2022.

THE APPELLATE GROUP

/s/ Emily Adams
EMILY ADAMS
Appellate Attorney for Kolby Barnett

CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2022, I emailed or mailed a true and correct copy of the foregoing postage prepaid to the following:

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