



Joey D. Moya

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

No. S-1-SC-38743  
Ct. App. No. A-1-CA-39561  
Dist. Ct. No. D-202-LR-2021-00126

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

vs.

JESSE MASCARENO-HAIDLE,

Defendant-Respondent.

**DEFENDANT'S RESPONSE TO EXPEDITED PETITION FOR WRIT OF  
CERTIORARI**

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## **I. INTRODUCTION**

New Mexico law has long placed the authority to determine questions of bail and pretrial release in the hands of the district courts. Following the adoption of New Mexico's bail reform constitutional amendment in 2016, and New Mexico's overall rejection of a money-bond pretrial release system, the authority of the district courts regarding pretrial release decisions has become an even more crucial aspect of the criminal justice system. Under Article II, Section 13 of the New Mexico Constitution, and Rule 5-409 of the New Mexico Rules of Criminal Procedure of the District Courts, the State may seek pretrial detention, and the courts may grant the request, when there exists sufficient evidence to show that a defendant poses a threat to the community, and that there are no conditions of release that can reasonably protect the safety of the community. The State's request to detain an individual should never be taken lightly. A person charged with a crime is innocent until proven guilty, and accompanying the presumption of innocence is the general presumption that a person is entitled to their freedom pending trial and an adjudication of guilt. *U.S. v. Salerno*, 481 U.S. 739, 754, 107, S.Ct. 2095, 2105 (1987) ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."). Thus, judicial decisions regarding pretrial release and detention require a nuanced, fact-based analysis that considers the current charges, the history and characteristics of each particular

defendant, and countless other individualized factors. Every case is different because each defendant is different. Accordingly, New Mexico rejects a broad, categorical approach to judicial detention decisions in favor of a case-by-case individualized approach. The discretion to make these case-specific and individualized decisions rests with the district courts.

The State's request for appellate review in this case seeks to limit the discretion of the district courts to consider all relevant factors for and against detention, and to fashion tailored conditions of release based on the unique characteristics of each case and defendant. The district court in the present case heard evidence of the allegations against the defendant, Jesse Mascareno; reviewed Mr. Mascareno's total lack of criminal history, a Pretrial Services Public Safety Assessment ("PSR") with recommendation for release on personal recognizance; and noted evidence of Mr. Mascareno's compliance with pretrial release conditions. After the hearing, the district court denied the State's petition for pretrial detention. The order denying the State's detention petition was based on substantial evidence and was well within the district court's discretion. For these reasons, the State's request for certiorari in this case should be denied.

## **II. BACKGROUND AND PROCEDURAL HISTORY**

This matter is before the Court on the State's Rule 12-204 request for review of a New Mexico Court of Appeals order affirming the Second Judicial District

Court's denial of the State's petition for pretrial detention.

On January 29, 2021, the State filed a Criminal Complaint – Arrest Warrant Affidavit in Bernalillo County Metropolitan Court Case Number T-4-FR-2021-000430 (“First Complaint”) charging Mr. Mascareno with one count of residential burglary, one count of unlawful taking of a motor vehicle, and one count of receiving or transferring a stolen motor vehicle. The First Complaint was prepared by Albuquerque Police Department (“APD”) Detective Jason Allred and approved by Deputy District Attorney Natalie Lyon. The First Complaint documented Detective Allred’s investigation into a series of burglaries that allegedly occurred between July 2020 and January 2021. The State alleges that Mr. Mascareno was involved in around 80 burglaries. The charges arise from one of these incidents that allegedly occurred on November 19, 2020.

On January 29, 2021, Mr. Mascareno was arrested at his home by APD officers. He was cooperative and gave a lengthy statement to Detective Allred following the arrest. The State alleges that Mr. Mascareno admitted to involvement in 26 of the alleged incidents.<sup>1</sup>

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<sup>1</sup> The State makes a point to note in its Rule 12-204 pleading that Mr. Mascareno’s alleged confession occurred subsequent to an advisement of rights in accordance with *Miranda v. Arizona*, however, the Defense is currently investigating whether Mr. Mascareno’s statement was elicited in violation of Mr. Mascareno’s constitutional rights pursuant to *State v. King*, 2013-NMSC-014, 300 P.3d 732 (“The moment that the unambiguous [invocation of the right to remain silent] is made, the interrogator must ‘scrupulously honor’ the suspect's or person's right by ceasing the interrogation. The interrogator is not at liberty to refuse to discontinue the interrogation or to persist in repeated efforts to wear down the suspect so as to cause the suspect to change his or her mind.”).

On January 30, 2021, the State filed a motion for pretrial detention and the case was transferred to the Second Judicial District Court under Case Number D-202-LR-2021-00085. At the hearing on February 3, 2021, the State relied substantially on the allegations contained in the First Complaint regarding the pattern of burglaries. The State's arguments at the hearing largely mirrored the arguments offered by the State in its request for certiorari in this matter, and focused on the large number of alleged incidents. At the Defense's request, the Court also considered Mr. Mascareno's lack of criminal history and the PSA recommendation of release on personal recognizance. The Court denied the State's motion for pretrial detention, finding that while the State had demonstrated that Mr. Mascarneo may pose a danger, that the State had failed to show by clear and convincing evidence that no conditions of release could ensure the safety of the community. An order setting conditions of release was filed on February 3, 2021. Among Mr. Mascareno's conditions of release were the highest level of supervision by pretrial services and a strict curfew.

Mr. Mascareno complied with all conditions of release. He reported to pretrial services as ordered, was in regular contact with his pretrial services officer, and maintained excellent communication with his attorneys.

On February 5, 2021, the State filed a Criminal Complaint – Arrest Warrant Affidavit in Bernalillo Metropolitan Court Case Number T-4-FR-2021-00533

(“Second Complaint”) alleging seven felony charges arising from a burglary incident on December 17, 2020. The Second Complaint was prepared by Detective Allred on February 4, 2021 and approved by Deputy District Attorney Lyon the same day. The Second Complaint’s narrative summary of the December 17 incident was copied word-for-word from the narrative portion of the First Complaint. The only information in the Second Complaint that was not included in the First Complaint is Detective Allred’s account of his January 29 interview with Mr. Mascareno and APD’s subsequent recovery of property from the December 17 burglary. In every other respect, the Second Complaint either exactly mirrors or abbreviates the narrative of the First Complaint, and adds new charges.

On February 12, 2021, APD arrested Mr. Mascareno on the Second Complaint. Mr. Mascareno was again cooperative with police. He was arrested at the address that he had previously provided the court during the court-imposed curfew period. He did not attempt to prevent his arrest or interfere with the APD investigation in any way.

On February 12, 2021 the State filed a new petition for pretrial detention based on the charges in the Second Complaint. The case was transferred to the district court under Case Number D-202-LR-2021-00126. At the motion hearing on February 19, 2021, the State again relied on the (mostly duplicative) allegations in the First and Second Criminal Complaints and the proffer by State’s counsel that

Mr. Mascareno had been implicated in around 80 total burglaries. The State also presented testimony from Detective Allred regarding his investigation into the series of burglaries discussed in both complaints. Detective Allred also testified regarding his January 29 interview with Mr. Mascareno and the recovery of property allegedly stolen during some of the burglaries. During cross-examination, Detective Allred testified that, following the denial of the first petition for pretrial detention, Detective Allred and Deputy District Attorney Lyon decided to file additional charges specifically to gain another opportunity to incarcerate Mr. Mascareno. The Court also took testimony from Jessica Etoll, a licensed master social worker employed by the Law Office of the Public Defender (“LOPD”), regarding services and treatment available to Mr. Mascareno.

At the conclusion of the February 19 hearing, the Court again found that the State had failed to present clear and convincing evidence that there are no conditions of release that can reasonably protect the community. Taking judicial notice of the order denying the motion for pretrial detention in Case Number D-202-LR-2021-00085, the Court reasoned that a prior judge presented with essentially the same evidence, including the exact same allegation that Mr. Mascareno was involved in around 80 burglaries, had already found and ordered that the State had failed to meet its burden of proof under, Rule 5-409 NMRA. The court considered Mr. Mascareno’s total lack of criminal history and the PSA

recommendation for release on personal recognizance. Finally, the Court noted that Mr. Mascareno had complied with all conditions of release. The Court denied the State's second motion for pretrial detention and set strict conditions for Mr. Mascareno, filing a second order setting conditions of release on February 22, 2021.

Mr. Mascareno's current conditions of release include: supervision by pretrial services at the highest level, drug and alcohol testing, mental health and substance abuse treatment and counseling, and GPS monitoring. Mr. Mascareno is still in total compliance with all conditions of release, is currently employed, and is enrolled in classes at the Central New Mexico Community College where he is working toward a GED. Mr. Mascareno is also working with his LOPD social worker, Jessica Etoll, on services and treatment options.

On February 22, 2021, the State filed a criminal information in District Court Case Number D-202-CR-2021-00328, consolidating all previous case numbers. Preliminary examination is scheduled on April 7, 2021.

On March 8, 2021, the State filed a petition in the New Mexico Court of Appeals requesting review of the district court's denial of the detention petition. On March 16, 2021, the Court of Appeals affirmed the district court's denial of the petition. On March 26, 2021, the State filed its Expedited Petition for Writ of Certiorari in this matter. This response follows.



### **III. STANDARD OF REVIEW**

Rule 12-204(D)(2)(b) NMRA, governing procedures in appeals from bail orders, provides that a district court decision shall be set aside only if it is shown that the decision (1) “is arbitrary, capricious, or reflects an abuse of discretion,” (2) “is not supported by substantial evidence,” or (3) “is otherwise not in accordance with law.” *State v. Groves*, 2018-NMSC-006, ¶ 24. “An abuse of discretion occurs when the court exceeds the bounds of reason, all the circumstances before it being considered.” *Brown*, 2014-NMSC-038, ¶ 43, 338 P.3d 1276 (internal quotation marks and citation omitted). Similarly, a decision “is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record.” *N.M. Att’y Gen. v. N.M. Pub. Reg. Comm’n*, 2013-NMSC-042, ¶ 10, 309 P.3d 89 (internal quotation marks and citation omitted). “Substantial evidence is such relevant evidence that a reasonable mind would find adequate to support a conclusion.” *State ex rel. King v. B&B Inv. Grp., Inc.*, 2014-NMSC-024, ¶ 12, 329 P.3d 658 (internal quotation marks and citation omitted).

### **IV. ARGUMENT**

Article II, Section 13 provides that “[b]ail may be denied by a court of record pending trial for a defendant charged with a felony if the prosecuting authority ... proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community.” The New

Mexico Supreme Court previously held that the State and the Defense “may offer evidence in many different forms during a detention hearing. The litigants may introduce live testimony and proffer documentary evidence in a form that carries sufficient indicia of reliability, and the Rules of Evidence do not apply.” *State v. Ferry*, 2018-NMSC-004, ¶ 3, 409 P.3d. 918. This Court has further stated that the State “has the burden of proving by clear and convincing evidence that (1) the defendant poses a future threat to others or the community, and (2) no conditions of release will reasonably protect the safety of another person or the community.” *Ferry*, 2018-NMSC-004, ¶ 3.

In assessing the State’s petition for detention in a criminal case, the Court must make three determinations:

(1) which information in any form carries sufficient indicia of reliability to be worthy of consideration, (2) the extent to which that information would indicate that a defendant may be likely to pose a threat to the safety of others if released pending trial, and (3) whether any potential pretrial release conditions ‘will reasonably protect the safety’ of others, as required by the new constitutional standard in Article II, Section 13.

*State v. Groves*, 2018-NMSC-006, ¶ 29, 410 P.3d 193 citing *Torrez v. Whitaker*, 2018-NMSC-005, ¶¶ 99-102, 410P.3d 201 (internal quotations omitted).

In *State v. Ferry*, this Court provided additional guidance regarding the State's burden of proof under Rule 5-409, stating "the nature and circumstances of a defendant's conduct in the underlying charged offense(s) may be sufficient, despite other evidence, to sustain the State's burden of proving by clear and convincing evidence that the defendant poses a threat to others or the community." 2018-NMSC-004, ¶ 6. However, the *Ferry* Court made clear that "[i]f the State meets this initial burden of proof the State must still prove by clear and convincing evidence, under Article II, Section 13, that "no release conditions will reasonably protect the safety of any other person or the community." *Id.* In assessing this final prong of the analysis, the *Ferry* Court noted that a trial judge may consider a wide array of evidence. *Id.* ¶ 6 ("The potential evidence of a person's dangerous inability or refusal to abide by the directives of an authority figure are so variable that it is difficult to catalog all of the circumstances that might satisfy the State's burden of proof."). For instance, "the State may introduce evidence of a defendant's defiance of restraining orders; dangerous conduct in violation of a court order; intimidation tactics; threatening behavior; stalking of witnesses, victims, or victims' family members; or inability or refusal to abide by conditions of release in other cases." *Id.* The *Ferry* Court made clear that district courts "must not automatically consider any one factor to be dispositive in pretrial detention hearings." *Id.* ¶ 7.

In the present case, the district court considered a wide array of factors prior to denying the State's petition, including: the State's proffer of Mr. Mascareno's alleged lawlessness, Mr. Mascareno's lack of criminal history, the district court's prior order denying the State's first motion for pretrial detention, Mr. Mascareno's compliance with conditions of release in Case Number D-202-LR-2021-00085, Mr. Mascareno's compliance with law enforcement throughout the case, and the resources available to Mr. Mascareno through representation by LOPD. After weighing all of these factors, the Court denied the State's petition. Doing so was within the district court's discretion and in accordance with this Court's guidance from *State v. Ferry* and Rule 5-409.

This Court should scrutinize the State's argument asserting that the district court erred as matter of law in finding that the State failed to present clear and convincing evidence that no conditions of release can reasonably ensure the safety of the community. In its request for a writ of certiorari, the State contends that there is an unanswered question of law as to whether a court may consider the nature and circumstances of the instant case sufficient to support a finding that there are no conditions of release that can be fashioned to protect the community. Not only does this argument misstate the record from the detention hearing in this case, it incorrectly articulates the guidance from *State v. Ferry*. Nothing in the *Ferry* decision prohibits a district court from considering the nature of the instant

allegations in assessing a defendant’s ability or inability to comply with conditions of release. In fact, the New Mexico district courts routinely consider the nature and circumstances of the charged offense as one of many factors when analyzing the “conditions of release prong” of the Rule 5-409 analysis. By asserting that the district court erred as a matter of law, the State essentially advocates for the exact analytical error that this Court has cautioned against: focusing on the “category or punishability” of the charged crime rather than the case and defendant specific inquiry that should guide a district court’s decision under Rule 5-409. *See State v. Groves*, 2018-NMSC-006, ¶ 33 (“We emphasize that the relevant consideration for a court is not the category or punishability of the charged crime”); *State ex rel. Torrez v. Whitaker*, 2018-NMSC-005, ¶ 101 (“Detention decisions, like release conditions, should not be based categorically on the statutory classification and punishability of the charged offense. But the particular facts and circumstances in currently charged cases...”).

At the hearing in this case, the judge considered the nature and circumstances of the current alleged offenses in the First and Second Complaints, but found that other factors weighed in favor of release. In doing so, the district court engaged in precisely the kind of individualized analysis required under the law. The district court considered the unique characteristics of the case and the

defendant, and crafted an order denying the State's petition based on the evidence presented by the parties.

Finally, the State's public policy argument that a lack of appellate guidance is resulting in an inappropriate number of denied detention petitions is unsupported. The statistical number of granted versus denied Rule 5-409 detention petitions undermines the State's premise. In 2020 for instance, district judges in Bernalillo County granted around 51.5 percent of detention petitions, a relatively high "success rate" given that many detention petitions are filed in cases involving non-violent charges or significant mitigating factors. The State's detention petitions are not denied due to a lack of clarity in the law, but because, as is the case here, the State failed to meet its burden of proof by clear and convincing evidence.

## V. CONCLUSION

For the foregoing reasons, this Court should deny the State's petition.

Respectfully submitted,

*/s/ Noah W. Gelb*

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**STATEMENT OF COMPLIANCE**

Pursuant to Rule 12-502(D)(3), this brief was prepared using Times New Roman, a proportionally-spaced typeface, and the body of the brief contains 3016 words. This brief was prepared using Microsoft Word. The word-count information was obtained from Microsoft Word.

**CERTIFICATION OF SERVICE**

I hereby certify that on the Fifth day of April, 2021 I caused the foregoing response to be filed electronically through the Odyssey/E-File & Serve System, which caused opposing counsel to be served by electronic means

/s/ Noah W. Gelb  
NOAH WALKER GELB