IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

vs.

NO. S-1-SC-38743
Dist. Ct. No. D-202-LR-2021-00126

JESSE MASCARENO-HAIDLE,

Defendant-Respondent.

STATE OF NEW MEXICO'S BRIEF IN CHIEF

On Expedited Petition for Writ of Certiorari to the New Mexico Court of Appeals
Second Judicial District Court, Bernalillo County
Honorable Courtney Weaks, Presiding

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April 26, 2021

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TRANSCRIPT REFERENCES

The pretrial detention hearing on February 19, 2021, was stenographically recorded, and the State submitted a written transcribed as an attachment to its Expedited Petition for Writ of Certiorari.

TABLE OF AUTHORITIES

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I. INTRODUCTION

In *State v. Ferry*, 2018-NMSC-004, ¶ 6, 409 P.3d 918, this Court held that "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 in the community." The Court did not address whether this same evidence may be sufficient, by itself, to sustain the State's burden to prove that no release conditions will reasonably protect the safety of the community. The State asks this Court to answer that unanswered question in this expedited certiorari proceeding.

Residential burglaries are considered to be inherently dangerous because of the likelihood of a violent encounter between an intruder and a homeowner. Over the course of six months, Defendant is suspected of committing eighty nighttime residential burglaries while the occupants were home and asleep. He admitted to committing twenty-eight of those dangerous crimes. Defendant's conduct presents an enormous risk to public safety. He wantonly and repeatedly disregarded the law at the expense of endangering the occupants of eighty homes. His conduct establishes clear and convincing evidence that he will continue to commit crimes while released pending trial regardless of any conditions of release. The district court erred as a matter of law in determining that the State had not met its burden.

II. STATEMENT OF PROCEEDINGS

Albuquerque Police Department detectives identified Defendant Jesse Mascareno-Haidle as a suspect in approximately eighty nighttime residential burglaries. The massive string of burglaries occurred in Albuquerque and Los Lunas over a period of about six months, between July 2020 and January 2021. All of these burglaries occurred at night while the occupants were home and asleep. Detectives decided that, despite the need for ongoing investigation, it was imperative to make an arrest due to the frequency and inherent dangerousness of the crimes. They arrested Defendant on a limited number of charges, while continuing the investigation into the other burglaries, in order to attempt to put a stop to the dangerous crimes.

Detective Jason Allred secured an arrest warrant and filed charges against Defendant in relation to two of the burglaries. The complaint, filed in the metropolitan court under docket number T-4-FR-2021-000430, documented the extensive investigation up until that time but charged Defendant with a single burglary for which there had been a fingerprint match and with receiving and transferring stolen property related to another burglary based on a pawn shop's records. At the time of Defendant's initial arrest, detectives had not yet spoken to Defendant or executed search warrants, and the complaint thus did not contain any

inculpatory statements made by Defendant or any results of a search of Defendant's residence and the residence of his cohort.

Following the filing of the complaint, the State filed a motion for pretrial detention in No. D-202-LR-2021-00085. In its consideration of the motion, the district court acknowledged the scope of the allegations but commented that only a single residential burglary had been charged. In an order denying pretrial detention, the district court recognized "that the magnitude of the allegations is inherently dangerous" but concluded that the State had not shown an inability of conditions of release to protect the community.

Given the immense safety risk posed by such a large number of nighttime burglaries, coupled with the discovery of highly inculpatory evidence after the filing of the complaint in No. T-4-FR-2021-000430 and the district court's apparent reluctance to order detention when only one burglary had been charged, detectives obtained judicial authorization for a subsequent arrest warrant for the charges in the present matter, No. D-202-LR-2021-00126. **[*See* Tr. 2/19/21 at 42]**

A criminal complaint filed on February 5, 2021, under docket number T-4-FR-2021-000533 contained new charges related to a different nighttime residential burglary occurring on December 17, 2020. The complaint charged Defendant with seven felony offenses, including larceny in the second degree, conspiracy to commit

larceny, residential burglary, unlawful taking of a motor vehicle, two additional counts of conspiracy, and contributing to the delinquency of a minor. In the complaint, Detective Jason Allred explained the dangerousness of these crimes as follows:

> Knowing that it is very uncommon for residential burglaries to occur during the nighttime hours while the homeowners/residents are in the home, I recognized that there was an urgency to this investigation being initiated. The reason for this urgency was based upon the high probability of a violent encounter between the homeowner and the offender, were they to come in contact with one another during the commission of the burglary. Undoubtedly, the offenders committing this type of crime are also aware of this high probability of a violent encounter with the victim(s). Based on this information, I believed it likely that the offenders committing these crimes would be armed while committing the burglary.

[Attachment to Expedited M. for Pretrial Detention]

Upon Defendant's arrest, the State again filed an expedited motion for pretrial detention, this time under docket number D-202-LR-2021-00533.[1] In the motion, the ~~State alleged that Defen~~dant had created "an extremely dangerous and volatile

[1]Defendant argued below that the State's second motion for pretrial detention should be evaluated as a motion to reconsider under Rule 5-409(K) NMRA. This argument is specious. This case involves different felony charges than No. D-202-LR-202100085, and Article II, Section 13 of the New Mexico Constitution authorizes an independent motion for pretrial detention for the felonies charged in this case that had not been charged previously. The State's motion was to detain on the newly-filed charges, not to reconsider release on the previously-filed charges.

situation."

At a hearing on the motion, the State submitted as exhibits the criminal complaint in the present matter, filed in No. T-4-FR-2021-00533, as well as the criminal complaint from the November 19, 2020, burglary charged in No. T-4-FR-2021-000430. The State also presented the testimony of Detective Jason Allred.

Detective Allred testified that he had identified between seventy-five and eighty nighttime residential burglaries, in addition to six more in Los Lunas, that fit the same *modus operandi* and were tied to Defendant in some way. **[Tr. 2/19/21 at 27]** After receiving *Miranda* warnings upon his first arrest, Defendant admitted to having committed twenty-eight of the burglaries. **[Tr. 2/19/21 at 22]** Defendant said he targeted "rich houses." **[Tr. 2/19/21 at 21]** Defendant denied committing the burglaries in Los Lunas. However, he admitted to having at one time driven the stolen vehicle used to commit one of those burglaries. **[Tr. 2/19/21 at 27]** Officers found fired handgun casings in the vehicle, and an AR-15 was stolen during the burglary. **[Tr. 2/19/21 at 26]** A suppressor from the AR-15 was located during the execution of a search warrant at the residence of Defendant's accomplice; during the same search, officers found a handgun in the bedroom of a twelve year old. **[Tr. 2/19/21 at 44]**

Officers found a shotgun at Defendant's residence that Defendant admitted to

be his. **[Tr. 2/19/21 at 43-44]** Defendant's residence contained property stolen from some of the burglaries, including key fobs from vehicles stolen from the burglarized homes. Defendant is eighteen years of age. He admitted committing the burglaries with two juveniles. **[Tr. 2/19/21 at 22]**

Defendant presented the testimony of Jessica Etoll, a social worker employed by the Law Offices of the Public Defender. Ms. Etoll said Defendant had secured employment at his mother's workplace and that he would be living with his mother and two juvenile siblings. **[Tr. 2/19/21 at 55-56]** The case worker said she would assist Defendant in getting his GED. **[*Id.*]**

The district court found that "[t]here's nothing more dangerous and . . . more invasive than entering somebody's home through an unlocked door in the middle of the night." **[Tr. 2/19/21 at 72]** The court chastised Defendant for conduct that was "about the most dangerous activity that you can engage in." **[Tr. 2/19/21 at 71]** "The extent of this is alarming – beyond alarming . . . ." **[Tr. 2/19/21 at 72]** Nevertheless, the court described the second prong for detention, that is, showing conditions of release cannot protect the community, as "the hard part." **[Tr. 2/19/21 at 72]** The court observed that Defendant had been out of custody on conditions of release for six days without apparently committing additional crimes. As a result, the court concluded that the State could not show that there were no conditions of release that

could protect the community. **[Tr. 2/19/21 at 73]** The court ordered that Defendant have no firearms or dangerous weapons and required a GPS monitor. **[Tr. 2/19/21 at 75-76]**

III. ARGUMENT

A. Standard of Review

An order granting or denying pretrial detention will only be reversed upon a showing that the district court acted arbitrarily or capriciously, abused its discretion, issued a ruling not supported by substantial evidence, or acted contrary to the law. Rule 12-204(D)(2)(b) NMRA.

B. The district court erroneously concluded that the State failed to establish that no conditions of release can protect the safety of the community.

Article II, Section 13 authorizes the district court to detain a defendant pending trial if the State shows by clear and convincing proof that "no release conditions will reasonably protect the safety of any other person or the community." The language and standard of proof in Article II, Section 13 is modeled on federal statutes. *State ex rel. Torrez v. Whitaker*, 2018-NMSC-005, ¶ 94, 410 P.3d 201.

Bail reform jurisdictions, including New Mexico and the federal government, require proof of two things to detain a dangerous defendant pending trial: (1) dangerousness; and (2) an inability to protect community safety with conditions of release. *See State ex rel. Torrez*, 2018-NMSC-005, ¶¶ 100, 102. In *Ferry*, this Court

recognized that the State could establish the latter requirement with 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." 2018-NMSC-004, ¶ 6. The Court emphasized that no factor is dispositive and "[t]he 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." *Id.* ¶¶ 6-7. But the Court did not address whether the nature and circumstances of the alleged offenses can satisfy this element, and many judges have interpreted this silence to mean that the State must establish a previous violation of conditions of release or its equivalent. Indeed, it is now common for judges in the Second Judicial District to find that a defendant is dangerous but the State's evidence is lacking on ~~the question of whether co~~nditions of release can protect community safety.[2]

[2]*See, e.g., State v. Devin Munford*, No. D-202-LR-2020-01361, Order Denying Detention filed January 28, 2021, slip op. at 4 (concluding the defendant poses a "danger to the public" but "the State has failed to satisfy the third prong of the *Groves* analysis"); *State v. Angello Charley*, No. D-202-LR-2021-00259, Order Denying Detention filed April 2, 2021) (finding in alleging CSP resulting in injury that "the State presented clear and convincing evidence that [the defendant] may pose a danger to the community" but failed to show "no conditions can reasonably ensure the safety of the community"); *State v. Jamol Pete*, No. D-202-LR-2019-00675, Order Denying Detention filed July 24, 2019, slip op. at 4 ("The Court did find that Defendant poses a threat to the safety of any other person or

The question looms, then, how the State can meet its burden for "first-time" offenders charged with a series of violations of the law. This question is sometimes called the "Son of Sam" problem. A serial killer poses an obvious and extreme risk to community safety, but it is not clear how a court should determine whether an alleged serial killer with no criminal history will follow conditions of release. The text of this Court's rule provides the answer.

Dangerousness and the ability of conditions of release to protect the community do not depend on different evidence. Under Rule 5-409(F)(6), the court should consider any factor relevant to each question, and the rule lists the following factors that are relevant to both questions:

> (a) the nature and circumstances of the offense charged, including whether the offense is a crime of violence;
>
> (b) the weight of the evidence against the defendant;
>
> (c) the history and characteristics of the defendant;
>
> (d) the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release;

the community, but did find that there are release conditions that will reasonably protect the safety of any other person or the community."); *State v. Darian Bashir*, No. D-202-LR-2019-00175, Order Denying Detention filed Feb. 25, 2019, slip op. at 10 ("The State has shown by clear and convincing evidence that Defendant poses a risk to the safety of the community or any other person; however, the Court finds that the risk Defendant poses can be reasonably addressed with appropriate conditions of release.").

> (e) any facts tending to indicate that the defendant may or may not commit new crimes if released;
>
> (f) whether the defendant has been ordered detained under Article II, Section 13 of the New Mexico Constitution based on a finding of dangerousness in another pending case or was ordered detained based on a finding of dangerousness in any prior case; and
>
> (g) any available results of a pretrial risk assessment instrument approved by the Supreme Court for use in the jurisdiction, provided that the court shall not defer to the recommendation in the instrument but shall make an independent determination of dangerousness and community safety based on all information available at the hearing.

Rule 5-409(F)(6). Notably, none of these factors expressly mentions a defendant's previous violation of conditions of release.

This structure is similar to the federal system upon which New Mexico's pretrial detention rules are modeled. Like New Mexico's two-part structure, the Tenth Circuit has explained that the same "two-step process" is contained in 18 U.S.C. § 3142(f). *United States v. Ailon-Ailon*, 875 F.3d 1334, 1336 (10th Cir. 2017). For the second step of determining whether conditions of release can reasonably protect the community, the court must "consider various factors in making this determination, including 'the nature and circumstances of the offense charged,' 'the weight of the evidence against the person,' 'the history and characteristics of the person,' and 'the nature and seriousness of the danger to any person or the community that would be

posed by the person's release.'" *Id.* (quoting § 3142(g)).

The two steps are thus interrelated. *See United States v. Parker*, 65 F. Supp. 2d 358, 363 (W.D.N.Y. 2014) ("[A] finding that the defendant is a flight risk or danger will presumably support a finding that the person is unlikely to abide by conditions of release, and vice versa."). In other words, consistent with federal law, the New Mexico Constitution does not make it any more onerous for the State to prove, or the court to find, the conditions of release prong than the dangerousness prong. The conditions of release prong is not "the hard part" and does not require a showing of an earlier violation of conditions of release.

Indeed, violations of conditions of release are governed by Rule 5-403 NMRA, not Rule 5-409. While it may be "particularly helpful to consider whether a defendant has engaged in dangerous behavior while on supervised release," *Torrez*, 2018-NMSC-005, ¶ 102, this is by no means a requirement. It would conflate Rule 5-409 and Rule 5-403, and frustrate the community safety goals of the Constitution, to require proof of a previous violation of conditions of release in order to establish grounds for pretrial detention. Showing that conditions of release cannot protect the community is a part of the analysis, not the hard part of the analysis.

In this case, the State established that Defendant was suspected of committing seventy-five to eighty-six nighttime residential burglaries and admitted to twenty-

eight of them. Residential burglary is "an inherently dangerous crime because burglary 'creates the possibility of a violent confrontation between the offender and an occupant, caretaker, or some other person who comes to investigate.'" *United States v. Stitt*, 139 S. Ct. 399, 406 (2018) (quoting *Taylor v. United States*, 495 U.S. 575, 588 (1990) (describing the crime's "inherent potential for harm to persons")). "And the offender's own awareness of this possibility may mean that he is prepared to use violence if necessary to carry out his plans or to escape." *Taylor*, 495 U.S. at 588. Certain subclasses of residential burglary can be described as "especially dangerous," including those committed while armed, while a residence is occupied, or at night. *Id.* Further, "burglary is the type of offense that likely involves a weapon." *United States v. Snow*, 656 F.3d 498, 503 (2011). For these reasons, the District of Columbia, a bail reform jurisdiction, defines burglary as a crime of violence and a dangerous crime. *See* D.C. Code § 23-1331(3)(E), (4).

All of the twenty-eight burglaries Defendant admitted to committing occurred at night while the residence was occupied. In addition, detectives found a shotgun at Defendant's residence. During the burglaries, Defendant frequently stole the keys to vehicles from inside the home and then stole the vehicles parked at the residence. He also enlisted juveniles to participate in those cases. Combined, Defendant admitted to fifty or more felonies in a six-month period of time. His lawlessness was not

marginal; it was extreme. He did not act spontaneously, impetuously, or with isolated recklessness; he executed plans with deliberation. In short, Defendant showed habitual wanton disregard for the law and for homeowner safety over a period of more than six months.

The district court concluded based on this information that Defendant committed the most dangerous and most invasive crime. But the same information unquestionably establishes clear and convincing evidence that conditions of release would not curb Defendant's lawlessness. Those individuals who commit violent crimes do not view laws differently than conditions of release, such that they feel a license to violate one but somehow bound by the other. Laws direct people not to commit crimes in the same way that a court order directs defendants to obey the law. A repeated refusal to comply with the law helps predict a likelihood of disobeying court orders. As a result, many bail-reform jurisdictions employ rebuttable presumptions such that probable cause to believe an individual committed a particularly dangerous crime allows a court to presume 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).

Defendant has shown the utmost disrespect for the law and community safety, and there is no indication that he would somehow engage in mental gymnastics to

decide to honor orders of the court to obey the law instead of the law's inherent directive to the same effect. Indeed, his repeated and intentional unwillingness to follow the law shows otherwise. As a matter of reasonableness, those defendants who have shown the greatest unwillingness to follow the law are also the ones most likely to violate court orders.

The district court, however, believed that Defendant could follow court orders because he had done so for six days without apparent violation. Even during Defendant's six-month burglary spree, however, Defendant was not committing burglaries on a daily basis. He planned the burglaries and would execute several of them on the same night. Assuming he committed three to four burglaries on any given night, his disturbing tally of eighty burglaries could have been committed in as few as twenty nights out of one hundred and eighty. A six-day hiatus after charges were filed, just like a six-day hiatus before that time, in no way establishes that he is law-abiding or otherwise contradicts his habitual lawlessness.

This Court has cautioned that an assessment of the ability of conditions of release to protect the community "requires the exercise of reasoned judgment." *State v. Groves*, 2018-NMSC-006, ¶ 37, 410 P.3d 193. This assessment "does not require scientific accuracy any more than any other prediction of future human behavior." *Id.* And as far as this prediction is concerned, "[t]he fact that a defendant has shown

a propensity for engaging in dangerous conduct in the past may be helpful in predicting whether that behavior is likely to continue in the future." *Torrez*, 2018-NMSC-005, ¶ 101. "[A] defendant's past actions and statements can provide a sound basis for justifiable evidentiary inferences of likely future actions, which is the proper focus for the court and the parties under the new constitutional detention authority." *Id.* ¶ 100.

This Court has further recognized that the requirement of GPS monitoring does not prevent a defendant from endangering public safety. *Groves*, 2018-NMSC-006, ¶ 38. The goal of Article II, Section 13 is not to provide evidence against a defendant after a member of the community is harmed; it is to prevent the harm in the first instance.

The State established that Defendant habitually violates the law, habitually endangers homeowners, and habitually gratifies his thrill to burglarize occupied homes at the expense of community safety. The State thereby established under a clear and convincing standard that there are no conditions of release that would protect the community. *See United States v. Bordeaux*, No. 5:20-CR-00428, 2021 U.S. Dist. Lexis 8216, at *7 (E.D.N.C. Jan. 15, 2021) (unpublished) ("[A]ll four of the 18 U.S.C. § 3142(g) factors weigh in favor of detention, and in light of these factors, the court concludes that the government has proven by clear and convincing

evidence that no condition or combination of conditions for Defendant's release would reasonably assure the safety of the community."); *United States v. Hardy*, No. CR-18-01420-003, 2018 U.S. Dist. Lexis 193259, at *7 (D. Ariz. Nov 13, 2018) (unpublished) ("Defendant's criminal history demonstrates repeated, serious violations of the law, which reflects an increased risk that he would fail to follow court orders.").

The district court accepted the dangerousness of Defendant's conduct and did not find any reliability concern in Defendant's admission to at least twenty-eight such dangerous incidents in the last six to eight months. The nature and circumstances of the crime charged, Defendant's history and characteristics, the weight of the evidence, and the dangerousness Defendant poses to the community all show Defendant's likelihood to violate conditions of release and endanger the community. The district court's finding to the contrary reflects a misunderstanding of the law.

IV. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to reverse the district court's order denying pretrial release.

Respectfully submitted,

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