No. 24A198

In The
Supreme Court of the United States

IN RE GAVIN B. DAVIS,

Petitioner.

On Petition for a Writ of Mandamus to the
United States Court of Appeals,
Fifth Circuit

RULE 22 APPLICATION FOR BAIL

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INTRODUCTION

1. The Supreme Court has previously treated Rule 22 Applications as a petition for a writ of certiorari.[1] The lead case, *In re Gavin B. Davis,* case no. 24-5088, a Rule 20 Petition for a Writ of Mandamus regarding the existing circuit court split of interlocutory appellate review of 18 U.S.C. § 3164 pretrial release orders was filed nunc pro tunc to Apr. 19, 2024. On Aug. 1, 2024, the Court docketed, *Gavin B. Davis v. United States*, case no. 24-5204, a Petition for a Writ of Certiorari with a filing date of Jul. 18, 2024 and posing the same two (2) questions as 24-5088.[2]

2. On Jul. 29, 2024, Respondent, the Solicitor General, on behalf of the United States, expressly waived its right to respond[3] to the 24-5088 Rule 20 Petition—and, in doing so, consensually relinquished a known right; and, that with which this Court's Rules plainly prescribe at Rule 20.3(b) and Rule 15.2. In effect, the Respondent is de facto estopped[4] as to the matters put forth by the Petitioner in the 24-5088 Petition.

3. NOW, Applicant, Mr. Gavin B. Davis, brings this **Rule 22 Application for Bail** to the Circuit Justice[5] for the Fifth Circuit Court of Appeals, the HON. SAMUEL A. ALITO JR., respectfully requesting his pretrial release on the least restrictive and most flexible terms and conditions as Constitutionally guaranteed. There is no differential standard of review and such review is de novo. (also,

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[1] see e.g. *Harrington v. Purdue Pharma L.P.*, 144 S. Ct. 44 (2023)

[2] 24-5204 intentionally trails 24-5088

[3] United States was properly served the 24-5402 Petition on or about Jul. 22, 2024 and also expressly waived its right to respond therein / thereto on Aug. 9, 2024.

[4] Applicant, in great faith and with aforethought, has Noticed the Solicitor General of its Rule 15.2 and other obligations. See e.g. Applicant's Letters of May 10, 2024 and Aug. 12, 2024 to Solicitor General (attached as Exhibit A). Also, see Applicant's significant, substantial and numerous positive estoppels in the 24-5088 Petition at pg. iii, fn. 1; pg. iii, fn. 2; pg. iv and fn. 3; pg. 1; pg. 2, fn.7; Jurisdiction, pg. 5-9 and fn. 13-24 (not disputed); pg. 6-7, fn. 20; pg. 7-8, fn. 23; pg. 8; pg. 11; pg. 11, fn. 29; and pg. 12, fn. 31.

[5] see e.g. *Harris v. U.S.*, 404 U.S. 1232 (1971); Circuit Justice has a non-delegable responsibility to make an independent determination of the merits of an application for bail; *Levy v. Parker*, 396 U.S. 1204 (1969); compared to standard of review put forth in *McGee v. Alaska*, 463 U.S. 1339 (1983); and, note, in part, that most of the situations involving requests for bail / release before the Supreme Court derive from post-conviction proceedings; compared to this Application, concerning *pretrial* liberty — which remains, novel, before the Court, in such regard. Also, this Court did, in fact, grant bail to applicants in the 1970s.

Applicant respectfully requests the timely appointment of counsel.[6,7]) (Unless the right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is excessive under the Eighth Amendment. (*Pugh v. Rainwater*, 572 F. 2d 1053 (5th Cir. 1978))

4. Applicant, Mr. Gavin B. Davis, is an individual that is presently a citizen of the United States of America. He holds a Bachelor of Science degree from Cornell University. Applicant has been unlawfully detained since May 10, 2022 for allegedly causing three of his fraternity brethren "substantial emotional distress".[8,9] The Supreme Court has said, 'In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." "Congressional intent [of the Bail Reform Act is] to give courts the power to deny release to "a small identifiable group of particularly dangerous defendants" (S. Rep. No. 225, 98th Cong. 1st Sess. (1983))

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[6] Sixth Amendment guarantees a criminal defendant the right to the assistance of counsel. Due Process clause of the Fourteenth Amendment guarantees a criminal defendant certain minimum safeguards necessary to adequately and effectively access the court; among the safeguards is the right to counsel. The services of a lawyer will for virtually every layman be necessary to present an appeal in a form suitable for appellate consideration on the merits (*Evitts v. Lucey*, 469 U.S. 387 (1985)) (also, obvious deficiencies in representation may be addressed by an appellate court sua sponte (*Massaro v. U.S.*, 538 U.S. 500 (2003))) (Fed. R. Crim. P. 44 makes clear that a defendant's Sixth Amendment right to (the effective assistance) of counsel includes "every stage of the proceedings" including appeals (*Doherty v. U.S.*, 404 U.S. 28 (1971)) (the right to counsel may be fully retroactive (see e.g. *Michigan v. Payne*, 412 U.S. 47, 52, fn. 6 (1973); *Ashe v. Swenson*, 397 U.S. 436, 437, fn. 1 (1970); *Teague v. Lane*, 489 U.S. 288, 313-314 (1989)).

[7] Court is in receipt of Applicant's Rule 21 Motion to Appoint Counsel as provided with the 24-5088 Petition.

[8] USDC WD TX, 22-219-FB-HJB, Indictment, Dkt. 3, May 2022. The Bail Reform Act carefully limits the circumstances under which detention may be sought to the most serious crimes (*U.S. v. Salerno*, 481 U.S. 739, 747, 107 S. Ct. 2095 95 L. Ed. 2d 697 (1987)). "The Bail Reform Act's dictate that the presumption of innocence shall not be modified or limited." (*U.S. v. Sanchez*, 2007 U.S. Dist. LEXIS 117088 (USDC ND TX 2007) quoting *U.S. v. Salerno*, 481 U.S. 739, 755, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987))

[9] Applicant fully retracted statements that the government has taken issue with. See Applicant's November 2022 Affidavit as attached (Exhibit B). Applicant had (has) no criminal intent; and no mens rea knowledge. The government, as well as the alleged victim witnesses, could have taken so many more reasonable and timely intervening steps prior to the steps that have led to the current state of affairs. (also Note, focus should be on whether an alleged threat made is if Applicant should have reasonably foreseen that the statement would be taken as threat by those to whom it was made. *U.S. v. Fulmer*, 108 F. 3d 1486, 46 Fed. R. Evid. Serv. (CBC) 411, 1997 U.S. App LEXIS 5869 (1st Cir. 1997))

5. Subsequent to moving in propia persona (out of vital necessity) [10] on Sep. 5, 2023 in USDC WD TX, 22-219, Applicant took the exact steps related to seeking his pretrial liberty that he timely requested that each of the prior four (4) defense attorneys take and on Dec. 6, 2023, was GRANTED conditional release[11]; though, on terms and conditions that remain as punitive, oppressive, inflexible, highly restrictive and unlawful, prima facie.

6. Such terms and conditions of the Dec. 6, 2023 Release Order [12] collectively constitute, in no uncertain terms, a "virtual prison"[13] and represent the

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[10] Applicant has had to move for the appointment of new counsel given inertness, negligence, incompetence, etc. (see e.g. *Mempa v. Rhay*, 389 U.S. 128, 134, 88 S. Ct. 254, 257, 19 L. Ed. 2d 336 (1967), "although counsel is present, the performance of counsel may be so inadequate that, in effect, no assistance of counsel is provided.")

[11] The Due Process clause of the Fourteenth Amendment includes "the right to be free from continued detention after it was or should have been known that the detainee was entitled to release." (*Campbell v. Johnson*, 586 F. 3d 835, 840 (11th Cir. 2009)) (Due Process limit on the duration of preventive detention requires assessment on a case-by-case basis – in determining whether Due Process has been violated, court considers not only factors relevant in the initial detention decision ... but also additional factors such as the length of detention that has in fact occurred or may occur in the future, the non-speculative nature of future detention .. (*U.S. v. Hare*, 873 F. 2d. 796 (5th Cir. 1989)). Applicant had a right to be released proximate to the original detention in May 2022.

[12] USDC WD TX, 22-219-FB-HJB, Dkt. 173, 175, attached as Exhibit C. The terms and conditions of the Dec. 6, 2023 Release Order, in no uncertain terms, violate Applicant's Constitutional and other substantive rights. In addition, no condition-by-condition analysis was undertaken (see e.g. prior counsel T. Moore's Jul. 3, 2024, 22-219 Motion for 18 U.S.C. § 3142 (i) Release, Dkt. 250 at pg. 3, Section IV, ¶ 1; attached as Exhibit E). This is vitally important, as there is no "one size fits all" set of terms and conditions; each case requires a condition-by-condition analysis and the careful tailoring of the least restrictive and most flexible terms and conditions of pretrial release.

[13] None of the proposed terms and conditions on form AO199B of the Dec. 6, 2023 Release Order: are (i) related to a (a) legitimate government interest; or, separately (b) justified as such; (ii) if potentially having legitimate purpose, are the least restrictive and most flexible respective term or condition as there are, in each instance, a multitude of less restrictive more flexible alternatives; and, (iii) such ready alternatives have deminimus costs, respectively. The U.S. Supreme Court has carefully delineated fundamental rights and applies strict scrutiny to those rights. The fundamental liberties protected by the Due Process clause include most of the rights enumerated in the Bill of Rights and certain personal choices central to individual dignity and autonomy. "Freedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that the Due Process clause protects" (*Zadvydas v. Davis*, 533 U.S. 678, 690, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001); there exists a Constitutionally protected interest in avoiding physical (and other) restraints of liberty) Compared to the terms and conditions off the Dec. 6, 2023 Release Order, which amount to punishment of the Applicant, prima facie. Under the Due Process Clause of the Fourteenth Amendment, a detainee, such as the Applicant, may not be punished prior to an adjudication of guilt in accordance with due process of law (see also, e.g., 18 U.S.C. § 3142 (j)). Such terms and conditions of the Dec. 6, 2023 release order would be more appropriate for: (A) different criminal charges altogether (see e.g. Nature and Seriousness of the danger to any person or the community that would be posed by a person's release (18 U.S.C. § 3142 (g)(4)) and (B) someone

very definition of an unlawful "preventive detention", prima facie. (detention or conditions of release cannot be excessive in relation to purpose (*Bell v. Wolfish*, 441 U.S. 520, 538, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979)) (the demands of equal protection of laws and of due process prohibit depriving pretrial detainees of the right of other citizens to a greater extent than necessary to assure appearance at trial and security. (*Id.*)) (also, as the Applicant is in the pretrial stage of the proceeding, onerous, restrictive, inflexible terms and conditions of bail violate the Due Process clause of the Fifth Amendment and the excessive bail clause of the Eighth Amendment (see e.g. *U.S. v. Karper*, 847 F. Supp. 2d 350 (USDC ND NY 2011); also, *Taylor v. Kentucky*, 436 U.S. 478, 483, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978); *U.S. v. Polovizzi*, 697 F. Supp. 2d 381, 389 at fn. 10 (USDC E.D.N.Y. 2010).

7. Applicant has now been in custody since May 10, 2022, or over twenty-seven (27) months. ("the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act[14]." *U.S. v. Salerno*, 481 U.S. 739, 755, 107 S. Ct. 2095, 95 L. Ed. 697 (1987)[15] — and this speaks to the heart of the controversy and the questions posed in the 24-5088 Petition)

8. Further, over eight (8) months have passed since the Dec. 6, 2023 proposed Release Order. Over nine (9) months have passed since the Hon. Fred Biery indicated on Oct. 31, 2023, that, "in reviewing the file .. the maximum punishment on these counts is five years. [Applicant] does not have any significant prior [criminal] record.[16] Even if a jury were to convict [the Applicant], my educated guess is that you have already served the time that you would be assessed under

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who has been convicted subject to probation (see e.g. *United States v. Quicksey*, 371 F. Supp. 561 (S.D. W. Va. 1974), modified, 525 F.2d 337 (4th Cir. 1975)) standards for post-trial release are much stricter than standards relating to pre-trial release). The record does not contain any reasonable basis, whatsoever, for concluding in totality, and separately, individually that the terms and conditions of release are necessary or lawful. (see e.g. *U.S. v. McConnell*, 842 F. 2d 105 (5th Cir. 1988) citing to *States v. Maull*, 773 F. 2d 1479 (8th Cir. 1985) and *U.S. v. Jessup*, 757 F. 2d 378 (1st Cir. 1985))

[14] 18 U.S.C. §§ 3161–3174

[15] 23-50812, FRAP 9 Motion at pg. 7, fn. 5

[16] Applicant has one (1) misdemeanor on his prior record; is in the lowest federal category (1); and is also rated by U.S. Pretrial Services National Risk Assessment as a "Low" Risk. Further, none of the 22-219 allegations are 18 U.S.C. § 3142 (e)(3) charges or carry a minimum sentence.

the [sentencing] guidelines. And the Court has no reason to believe that the guidelines would not be followed".[17]

10. On May 16, 2024, the prosecution, via written plea, offered the Applicant TIME SERVED and three (3) years Supervised Release.[18]

CIRCUMSTANCES OF OFFENSE AND SELECT PERTINENT FACTS AND PROCEDURAL BACKGROUND

12. Applicant was detained on May 10, 2022 and charged with: (a) three (3) counts of 18 U.S.C. §§ 2261 (A)(2)(B) (Cyberstalking) which indicate that the Applicant caused three (3) of his fraternity brothers "substantial emotional distress"; and, (b) one (1) count of 18 U.S.C. § 875 (c) (Interstate communication threat to injure; stemming from one brief phone call on Dec. 24, 2020, or twenty-nine months prior to being charged). The three (3) alleged victim witnesses and the Applicant are graduates of Cornell University; have been employed in Hotel Real Estate (asset brokerage, structured financing, development, private equity) and have maintained professional and personal relationships with each other for over twenty (20) years. Further, the three (3) alleged victim witnesses live thousands of miles away from the Applicant (California, Colorado and Utah). There is no mandatory minimum sentence for the criminal allegations (Counts 1-4); which is indicative that such crimes are not so serious as to deny pretrial liberty.[19] These are not crimes were an accused is normally denied their Constitutional right to pretrial liberty. (("Courts should rarely detain Applicants charged with non-capital offenses; doubts regarding propriety of release should be resolved in favor of the Applicant. (*U.S. v. Townsend*, 897 F. 2d. 989 (9th Cir. 1990))[20]" None of the actions or conduct that the government has taken issue with for which brought the four (4) charges were immediate or proximate to May 10, 2022.

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[17] USDC WD TX, 22-219-FB-HJB, Oct. 31, 2023 Transcript, Dkt. 169, at pg. 5, ln 2-9
[18] Attached as Exhibit D
[19] In *U.S. v. Hinde*, 789 F. 2d 1490 (11th Cir. 1986); adding together maximum sentences is improper for the purposes of bail review.
[20] As cited in 5th Cir., 23-50812, FRAP 9 Motion for Release, pg. 11, ¶ 11

13. On May 11, 2022, U.S. Pretrial Services[21] completed a Pretrial Risk Assessment and the Applicant was rated as a "3" on a "0-5" point scale; or "Moderate Risk" (as divulged belatedly on Nov. 7, 2023 upon Applicant's own initiatives). (subsequent to moving in propia persona in September 2023, Applicant, on his own accord[22], engaged with U.S. Pretrial Services who updated each of (i) its Pretrial Services Report, including correcting previously incorrect information regarding the Applicant's criminal history; and (ii) have its national office update its Pretrial Risk Assessment; whereby, after updating, Applicant's Assessment was lowered to 'Low Risk' on Dec. 6, 2023—such errors are unconscionable).

14. On May 20, 2022, the Applicant appeared for arraignment and a detention hearing with Ms. Molly Roth (FPD)[23]. On this day, Applicant was unlawfully detained without bail.[24]

15. On Sep. 5, 2023, Applicant moved in propia persona in the trial proceeding.

16. On Nov. 13, 2023, the Court (HJB) found that Applicant had produced enough evidence to reopen the May 20, 2022 detention hearing[25] and set a hearing for Dec. 6, 2023.

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[21] U.S. Pretrial Services is an arm of the U.S. Government – the adversarial party in the proceeding. Such adversary cooperates with the U.S. Attorney (see e.g. 18 U.S.C. § 3154 (8), (10)) and works under the auspices of the Administrative Office of the U.S. Courts (see 18 U.S.C. § 3152 (a))

[22] With urgency, Applicant had requested that each of the prior four (4) defense attorneys engage with U.S. Pretrial Services in order to update, iterate and correct detrimentally inaccurate information regarding the Applicant's criminal history: the Applicant has one (1) misdemeanor on his record, in totality (i.e. one "point").

[23] Terminated for cause: e.g. inertness, deficient performance, negligence in December 2022. See e.g. USDC WD TX, 22-219-FB-HJB, Dkt. 30, 31; also, see e.g. IAC Summary Table at Dkt. 109. Further, see 22-219, Dkt. 51, 52 for the deplorable work product of prior counsel John Kuntz IV.

[24] USDC WD TX, 22-219-FB-HJB, Dkt. 23. (denial of bail is the most restrictive; in *U.S. v. Presley*, 52 F. 3d 64 (4th Cir. 1995); such persons are usually facing life sentences; and/or are categorized as the most serious of offenses; here, Applicant is the opposite of such) (hearsay evidence is *not* sufficient to satisfy clear and convincing evidence required for denial of bail (see e.g. *U.S. v. Fisher*, 618 F. Supp. 536 (E.D. Pa 1985)) (also, none of the allegations fall under 18 U.S.C. § 3142 (e)(3); and, separately, none of the six (6) conditions of 18 U.S.C. § 3142 (f)(1) and (2) are present. *U.S. v. LaLonde*, 246 F. Supp. 2d 873 (S.D. Ohio 2003); "the magistrate's detention order was vacated, as the statute did not permit the detention of the defendant who did not satisfy any of the conditions of a subsection of the statute regardless of his dangerousness to the community or to specific others" (LEXIS case overview))

17. On Dec. 6, 2023, Applicant obtained a release order (22-219, Dkt. 173, 175, Exhibit C hereto on his Motion for Release, Dkt. 171), though on terms and conditions that are punitive, oppressive, inflexible, highly restrictive and unlawful, prima facie.

18. On Dec. 8, 2023, Applicant filed a FRAP 9 Motion for Release in 5th Cir., 23-50812, from which movement to the Supreme Court in 24-5088 (and 24-5204) is brought. (also, Applicant requested the appointment of counsel in 23-50812)

19. On Jan. 8, 2024, Applicant's Motion for Reconsideration (22-219, Dkt. 184) of the Release Order (Dkt. 173, 175) was heard and summarily denied. On this day, Judge Fred Biery does not engage with the Applicant's thoughtful Motion for Reconsideration; but rather, provides a binary ultimatum with respect to the proposed terms and conditions of the Dec. 6, 2023 release order:

> Applicant: [I] would like to go through the motion[26] and talk about the terms and conditions [of the proposed release order] and what my view is ..
> Biery: No. You either agree to the conditions or you go back to jail. So your choice.

Biery's binary ultimatum is not a de novo review; but rather, is evidentiary as to the mere adoption of the Dec. 6, 2023 magistrate order without a bona fide opportunity for a hearing [27,28]

20. On May 15, 2024, the prosecution filed a superseding indictment[29] adding one (1) 18 U.S.C. § 115 (a)(1)(B), influencing federal official by threat,

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[25] A detention hearing may be reopened where new evidence justifies such action (as Ordered on Nov. 13, 2023 (see USDC WD TX, 22-219-FB-HJB, Dkt. 151-153)). The burden of production resting with the defense is "light" (see e.g. *U.S. v. Dominguez*, 783 F. 2d 702, 707 (7th Cir. 1986)).

[26] i.e. USDC WD TX, 22-219-FB-HJB, Dkt. 184, Defendant's Motion for Reconsideration

[27] USDC WD TX, 22-219-FB-HJB, Dkt. 203, Jan. 8, 2024 Transcript at pg. 18, ln 6-24

[28] See e.g., USDC WD TX, 22-219-FB-HJB, Dkt. 184, pg. 9, ¶ 9, citing to persuasive authority, "District Court in setting bail pending trial should have stated its reasons, *rather than merely adopting*, without even opportunity for hearing, report of magistrate." (*United States v. Edson*, 487 F.2d 370 (1st Cir. 1973)); also, see *Id.* at pg. 6, ¶ 3, citing to District Court's review of the Release Order is to be de novo; and, it may impose different conditions of release (see e.g. 18 U.S.C. § 3142 (c)(3); *U.S. v. Rueben*, 974 F. 3d 580, 585-6 (5th Cir. 1992) citing to *U.S. v. Fortna*, 769 F. 2d 243, 249 (5th Cir. 1985))

[29] USDC WD TX, 22-219-FB-HJB, Dkt. 210

allegation.[30] Applicant alleges, in part, that the prosecution has increased the charges following the exercise of one or more legal rights of the Applicant; where such action is Malicious, Vindictive and otherwise. Further, such action meets the prima facie case and threshold showing of the mere "appearance" of Vindictiveness, a low bar.[31] The prosecution is unable to prove that the increase in charge was justified by any objective change in circumstances or in the state of evidence that influenced the original charging process.[32] Therefore, such is evidentiary – and begs the question as to why.

21. On May 16, 2024, the prosecution, via written plea, offered the Applicant TIME SERVED and three (3) years Supervised Release.[33]

22. On May 28, 2024, U.S. Asst. Attorney Bettina Richardson sent prior standby counsel and former U.S. Asst. Attorney, Thomas P. Moore, an email, which states, in part, that under the United States Sentencing Guidelines (U.S.S.G.) Calculations: "15-21 months ([e]ach count involves a separate incident and a separate victim; potential for consecutive sentences)"; while also stating, "2A6.1 (a)(1) 12 [,] (b)(2) +2 (>2 threats) [,] 14 / I"; or, approximately *one-half* the time that the Applicant has now been in pretrial custody.

23. On Jun. 13, 2024, Applicant withdrew his *Faretta* waiver and Standby Counsel Moore was appointed as counsel. On this day, subsequent to appointment, counsel Moore indicates that the first order of business is moving for Applicant's pretrial release; and, also, that any potential concerns of the prosecutor with respect

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[30] The description of Count 5 in the superseding indictment indicates that on or about Jan. 14, 2021, Applicant, "did threatened to murder any Deputy United States Marshall who approached him, with intent to impede, intimidate, and interfere with the Deputy United States Marshall's performance of official duties." Applicant refutes that previously or currently he has any intention, whatsoever, of (a) murdering; or (b) physically harming; or (c) interfering with performance of official duties of: anyone including but not limited to (i) any authority; (ii) any federal employee; (iii) any state or municipal officer (to be reasonably construed in the broadest sense); or (iv) any other person. Also, see Applicant's sworn Affidavit executed on Nov. 3, 2022, attached as Exhibit B hereto.

[31] Regarding malicious prosecution, statutory overcharging, no bar to cross-action, see e.g. *Chiaverni v. City of Napoleon*, 144 S. Ct. 1745 (2024); also, see e.g. *Thompson v. Clark*, 596 U.S. 36 (2022); *Vierick v. U.S.*, 318 U.S. 236, 247, 63 S. Ct. 561, 87 L. Ed. 734 (1943); FRCrP 12(b)(3)(A);

[32] See e.g., *U.S. v. Leach*, 613 F. 3d 1295, 1980 U.S. App. LEXIS 19588 (5th Cir. 1980) (bad faith on part of government in bringing superseding indictment)

[33] Attached as Exhibit D

to the allegations could be appropriately addressed with a protective order (see e.g. 18 U.S.C. §§ 3142 (c)(1)(B)(v)).

24. On Jul. 3, 2024, prior counsel Moore filed an 18 U.S.C. § 3142 (i) Motion for Release[34] which included a (reasonable) proposed release plan for the Applicant developed by Moore and former FBI Agent Oliveras based on their combined fifty years of experience working for the U.S. Government.

JURISDICTION AND STANDARD OF REVIEW[35]

25. Rule 20 movement is authorized by 28 U.S.C. § 1651(a), The All Writs Act; which, is purposefully broad in scope to allow the Supreme Court to issue a wide variety of types of writ (see e.g. *Adams v. U.S.*, 317 U.S. 269, 63 S. Ct. 236, 87 L. Ed. 268, 1942 U.S. LEXIS 1 (1942), reh'g denied, 317 U.S. 713, 87 L. Ed. 568 (1943); this Court may avail itself of *all* auxiliary writs as aids in performance of its duties when use of such aids is calculated in its sound judgment to achieve the ends of justice entrusted to it.) Also, the word "necessary" in 28 U.S.C. § 1651(a) is not given narrow interpretation (*Whittel v. Roche*, 88 F. 2d 366, 1937 U.S. App. LEXIS 3128 (9th Cir. 1937)) Also, under 28 U.S.C. § 1651(a), Supreme Court has authority to grant interim relief in order to preserve jurisdiction of full court to consider Petitioner's claim(s) on the merits. (*Kimble v. Swackhamer*, 439 U.S. 1385, 99 S. Ct. 51, 58 L. Ed. 2d 225, 1978 U.S. LEXIS 4309 (1978)).[36]

26. Before considering questions raised for certiorari, Supreme Court may raise the question of jurisdiction of court below on which Supreme Court's own jurisdiction depends. (*Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 60 S. Ct. 44, 84 L. ed. 85, 1939 U.S. LEXIS (1939))[37]

27. Under FRAP 9, a criminal defendant, such as the Applicant, may immediately appeal an order continuing pretrial detention or refusing to set bail.

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[34] Attached as Exhibit E

[35] This Section should be read in conjunction with the Jurisdiction section in the 24-5088 Petition; and, itself, is expressed as if incorporated herein.

[36] 24-5088 Rule 20 Petition at pg. 1-2, fn. 7

[37] 24-5088 Rule 20 Petition at pg. 3, fn. 9

The language of the rule is broad, authorizing immediate appeal of orders regarding the release or detention of the defendant (FRAP 9 (a)(1)). An order (i) denying release under 3164 (c); or (ii) denying vacation of a detention order , are each plainly orders regarding a defendant's detention or release. Federal courts of Appeals have jurisdiction to review such orders before final judgment. An appellate court is obligated to independently assess strength of party's FRAP 9 motion for release pending appeal. (*United States v. Clark*, 917 F.2d 177, 18 Fed. R. Serv. 3d (Callaghan) 1051 (5th Cir. 1990))

28. Under FRAP 2, the Circuit Court can exercise its discretion to suspend FRAP 9 (b) requirement that a defendant's motion for release first be made in the District Court (see e.g. *U.S. v. Hochevar*, 214 F. 3d 342, LEXIS 13926 (2nd Cir. 2000))

29. Also, in pre-conviction or post-conviction detention appeal, unlike in ordinary appeal, court of appeals is free in determining appropriateness of order below, to consider materials not presented to district court. (*United States v. Tortora*, 922 F.2d 880 (1st Cir. 1990)) (Court of Appeals had jurisdiction to review District Court's order denying motion for modification of conditions of pretrial release, even though defendant was not detained, since order was final, was collateral to issue of guilt or innocence, involved risk of irreparable injury[38] to constitutional rights, and involved unsettled question of law which, if not reviewed, could evade ordinary appellate review. (*United States v. Spilotro*, 786 F.2d 808 (8th Cir. 1986)

30. The Bail Reform Act provides Guidelines and Conditions of Release of "possibly" dangerous defendants. Under Fed. R. Cr. P. 46, before trial, 18 U.S.C. §§

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[38] With regard to harm, injury, per se prejudice (and compounding thereof); there is a historic body of case law including but not limited to: *U.S. v. Salerno*; *Stack v. Boyle*; *Zadyvdas v. Davis* (2001); *U.S. v. Hare* (5th Cir. 1989); *Barker v. Wingo* (1972); *Smith v. Hooey* (1969); *U.S. v. Ewell* (1972); *U.S. v. Goodson*, 204 F. 3d 508 (4th Cir. 1989); *U.S. v. Spilofro*, 786 F. 2d 808 (8th Cir. 1986); *U.S. v. Byrd*, 31 F. 3d, 1329, 1339 (5th Cir. 1994). It is important to highlight the ill and harm when one's Constitutional right to pretrial liberty (as well as other fundamental rights) are violated via illegal detention—such as has occurred to the Applicant. Also, the Applicant has, in fact, shown actual prejudice (see e.g. *U.S. v. Byrd*, 31 F. 3d 1329, 1339 (5th Cir. 1994) (also, *U.S. v. Lucien*, 61 F. 3d 366 (5th Cir. 1995))

3142 and 3144 govern pre-trial release. Pursuant to (i) a United States citizen's Constitutional rights to pre-trial liberty; (ii) 18 U.S.C. § 3146; (iii) Fed. R. Cr. P. 46; and (iv) other authority; a defendant's right to pre-trial liberty is guaranteed; and, separately, on the most flexible and least restrictive terms and conditions.[39] The issue is determination of the amount of bail; secured or unsecured.[40] Under the Bail Reform Act, an authorized judicial officer may order release or detention of a defendant pending trial (18 U.S.C. § 3142). Release may be authorized: (i) on personal recognizance or an unsecured appearance bond (18 U.S.C. § 3142 (b)); or (ii) release subject to certain conditions (18 U.S.C. § 3142 (c)). In the alternative, a defendant may be detained pending trial (18 U.S.C. § 3142 (e)[41]).

18 U.S.C. § 3142 (c) Factors

31. Applicant, despite believing he need not have any conditions for release, for posterity, discusses relevant 3142 (c)[42] factors below.

32. Release pursuant to 18 U.S.C. §§ 3142 (c):

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[39] The Fourth Amendment guarantees a right to pre-liberty. The Eighth Amendment guarantees a right to non-excessive or punitive terms and conditions of bail. The misuse of bail and pretrial custody is a matter of national and state importance. Since *Schlib v. Kuebel*, 404 U.S. 357 (1971), the Eighth Amendment protection against excessive (and punitive) bail has been assumed to apply through the Fourteenth Amendment (due process).

[40] see e.g. *U.S. v. Dohm*, 597 F. 2d 535 (5th Cir. 1979)

[41] Pursuant to 18 U.S.C. § 3142 (e), for a set of criminal allegations, there exists an automatic statutory presumption requiring rebuttal. Applicant's criminal allegations are not crimes falling under such statute; which, is highly evidentiary. Otherwise, pursuant to 18 U.S.C. §§ 3142 (f)(1), after a finding of probable cause for detention, a rebuttal presumption exists for the defense as the burden shifts to the defendant in demonstrating that there are no conditions of release sufficient to assure that the defendant will not engage in deeper criminal activity pending trial and that the defendant will appear for court. The rebuttal presumption merely shifts the burden of producing evidence, the ultimate burden of proof always rests with the government." (*U.S. v. Blauvelt*, LEXIS 87060 (USDC MD 2008) citing to D. Pringle, *Bail and Detention Federal Criminal Proceedings*, 22 Colo. Law 913, 920 (1993)). The defendant need only present some credible evidence indicating that there are conditions that could be imposed that would reasonably assure the safety of the community or another person. Thereafter, the court shall consider the 3142 (g) factors, as it would in a non-presumption case.

[42] Applicant has requested the appointment of counsel and is entitled to the assistance of counsel. Also, for more detail regarding 18 U.S.C. § 3142 (c) Factors, see USDC WD TX, 22-219-FB-HJB, Dkt. 171, Applicant's Motion for Release for the Dec. 6, 2023 Bond Hearing, at pg. 16-19 of 27, ¶¶ 19-20 (a)-(b)(xv).

(a). Pursuant to 18 U.S.C. §§ 3142 (c)(1)(A), the mandatory condition to not commit federal, state, or local crimes during release is sufficient deterrent, prima facie, to support a defendant's pretrial release. The onus is on the court, provided a sufficient factual predicate, to find a reasonable set of conditions upon which to provide a defendant his or her Constitutional right to pretrial liberty. On Nov. 13, 2023, in 22-219, the Magistrate reminded the government of the extraordinary weight revocation of bail carries. Applicant has suffered tremendously while detained without bond for the past twenty-seven (27) months. (in *U.S. v. Accetturo*, 783 F. 2d 382 (3d Cir. 1986), in determining the appropriateness of pretrial detention, there is a small but identifiable group of particularly dangerous defendants as to whom imposition of stringent release conditions nor prospect of revocation of release can reasonably assure public safety. (revocation is the most punitive; 18 U.S.C. § 3148 authorizes sanctions for violation of release conditions))

(b). Pursuant to 18 U.S.C. §§ 3142 (c)(1)(B), release is subject to the least restrictive condition, or combination of conditions that such judicial officer determines will reasonably assure (but not guarantee)[43] the appearance of the person as required and the safety of any other person or the community. Certain conditions could include:

(b)(i). Pursuant to 18 U.S.C. §§ 3142 (c)(1)(B)(v), Applicant stipulates not to contact the alleged victim witnesses during the pendency of the case. Anything broader than such no contact stipulation would be deemed restrictive and in violation of the Applicant's rights. No contact orders are sufficient to deter the conduct in question specifically with respect to the allegations and the persons named in the Indictment. Also, Applicant is unlikely to commit the same alleged offenses again during the course of the proceeding (see e.g. *U.S. v. Demker*, 523 F. Supp. 2d 677 (S.D. Ohio 2007))

[43] The standard of "reasonable assurance" does not require that the release conditions "guarantee" the appearance of the accused or the safety of the community. (see e.g. *U.S. v. Orta*, 760 F. 2d 887, 891-892 (8th Cir. 1985))

(b)(ii). Pursuant to **18 U.S.C. §§ 3142 (c)(1)(B)(vi)**, a defendant may be required to report on a regular basis to a designated law enforcement agency, pretrial services agent, or other agency. Applicant posits that there is a difference between "reporting" and consent for supervision by the government (e.g. U.S. Pretrial Services [44]) or pretrial GPS Monitoring (intensive supervision; and, separately, a 4th Amendment violation); and that there are many more reasonable alternatives. Since Dec. 3, 2019, outside of overnight travel to Houston, Texas to compete in the Southwest Regional Masters Track & Field Championships, Applicant has not left San Antonio, Texas overnight; and, separately, has resided with his family – it is very simple to contact the Applicant, himself, or his family if his whereabouts are in question.

(b)(iii). Pursuant to **18 U.S.C. §§ 3142 (c)(1)(B)(xi)**, this subsection discusses potential for bond surety. Applicant is requesting Personal Recognizance release. Most recently in April 2018 (Superior Court of California, San Diego County, SCD266332 / 273403) Applicant was released on his Own Recognizance with no other terms and conditions of bail and allowed to freely leave each of the State of California and San Diego County prior to court in June 2018. Thereafter, Applicant successful completed eighteen (18) months of formal probation without incident; and eighteen (18) months of informal summary probation to the Superior Court, also

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[44] U.S. Pretrial Services is an arm of the U.S. Government – the adversarial party in the proceeding. Such adversary cooperates with the U.S. Attorney (see e.g. 18 U.S.C. § 3154 (8), (10)) and works under the auspices of the Administrative Office of the U.S. Courts (see 18 U.S.C. § 3152 (a)). It is vitally important that, in addition to Pretrial Services being an adversary, the Pretrial Services supervision proposed in the Dec. 6, 2023 Release Order constitutes criminal punishment, infringes on the Applicant's substantive rights and may be more appropriate for someone on probation, post-conviction. Applicant should be released with (a) no third party supervision by (i) an adversary, such as Pretrial Services, or (ii) anyone. Also, for any (b)(i) subsequent changes to terms and conditions of release (if any), such should only be done formally through the Court; or (ii) administered (emphasis) through Pretrial Services without substantive ability to opine, infringe, affect or otherwise, Applicant's substantive pretrial rights. Also, post-conviction "supervised release conditions cannot involve a greater deprivation of liberty than is reasonably necessary to achieve the latter three statutory goals of supervised release (18 U.S.C. § 3583(d); 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D) – and importantly, note the differences and distinctions between supervised release (as contested in the instant case) vis-à-vis pretrial release (see e.g. 22-219, Dkt. 171, at pg. 9, ¶¶ 1-2; pg. 11, ¶¶ 2-3; pg. 12, ¶ 4; pg. 13, ¶ 6; pg. 14, ¶ 8; pg. 19-20, ¶¶ 21-25 (flight risk); pg. 21, ¶¶ 26-28 (risk of danger)))

without issue.[45] Applicant made all of his court appearances, did not violate court orders and successfully completed probation. No other actions have been taken by third parties against the Applicant prior to being detained in 22-219 in May 2022. Applicant believes that he is entitled to Personal Recognizance release.

(b)(iv). Pursuant to **18 U.S.C. §§ 3142 (c)(2)**, any amount of bond surety greater than Personal Recognizance / Own Recognizance bonding and release would be an abuse of discretion by the Court (prima facie), when considering e.g. (i) Applicant's Declaration of Assets and Income to U.S. Pretrial Services; (ii) Applicant's appointment of Counsel due to indigence.

Flight Risk

33. Applicant does not pose any *serious* (operative legal qualification) risk of flight. Issue of court appearance is more likely than not, but not a guarantee. (*U.S. v. Westbrook*, 780 F. 2d 1185, 1189 (5th Cir. 1986))[46]

34. Applicant has a significant and substantial history of appearing[47], at liberty, in court to face any and all allegations of state and/or federal crime. Such a fact, weighs heavily in favor of the Applicant continuing to face any and all criminal allegations. As the Applicant requested that the Court take Judicial Notice (Dkt. 31, Request for Relief) of his federal habeas petition[48], *Davis v. Bonta*, USDC SD Cal, 21-2042, Doc. 1; which, the Court GRANTED (see Dkt. 34, Dec. 6, 2022) (also lodged, Dkt. 120), do Note for additional information regarding Applicant's record of court

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[45] Also, due to changes in the California penal code; today, probation would be ordered for approximately one-half the time that the Applicant successfully completed without issue; and, all such charges are also now automatically expunged in California today.

[46] USDC WD TX, 22-219-FB-HJB, Dec. 6, 2023, Motion for Release, Dkt. 171 at pg. 19, ¶ 21; also, Jan. 8, 2024, Motion for Reconsideration, Dkt. 184 at pg. 10, ¶ 12

[47] See *Davis v. Bonta*, USDC SD Cal, 21-2042, Doc. 1, pg. 48-49, ¶ 124 listing Defendant's twenty-seven (27) non-duplicative court appearances. Note: 21-2042, Doc. 1, is attached to 22-219, Dkt. 120

[48] USDC SD Cal denied Defendant's federal habeas petition, finding that it did not have jurisdiction as the Defendant was not in custody. Defendant, generally, disputes such, finding, in part, that: (i) had the charges been more serious (i.e. subject to lengthier sentencing), he would have been in custody at the time of filing the federal petition (21-2042); (ii) had his State of California habeas petition to stay probation pending direct appeal (including that before the Supreme Court of the United States, see e.g. *Davis v. California*, SCOTUS, 20-752, cert. denied) been granted, he would have been in custody at the time of filing the federal petition; and (iii) if he had filed the federal habeas petition any earlier, it would have been denied under *Younger* Abstention doctrine.

appearances see Dkt. 120, 21-2042 at ¶ 124; also, ¶¶ 14-17, 22, 26-27. A defendant can miss court for good cause – with respect to false prior failure to appear allegations, see e.g. Dkt. 120, 21-2042 at ¶ 130; also, at ¶¶ 44-45 (waiving attorney conflict); ¶ 46 (appointment of counsel request); ¶ 47 (notice of availability); ¶ 49 (voice message to Superior Court); ¶ 52 (select detail regarding VT); ¶¶ 53-54 (bail).

35. Proof by preponderance of evidence is the standard of proof necessary to demonstrate flight risk under 18 U.S.C. § 3142 (see e.g. *U.S. v. Logan*, 613 F. Supp. 1227 (D. Mont. 1985)). The government has provided no evidence or proof of flight risk previously or currently. (also, no affirmative evidence that the Applicant was fleeing jurisdiction or taking affirmative steps to do so (see e.g. *U.S. v. Riveria-Cruz*, 363 F. Supp. 2d 40 (D.P.R. 2008)). Applicant has none of the characteristics that might be associated with flight risk: e.g. large sums of available funds; numerous places to conceal himself; use of aliases; etc. (once again, see 18 U.S.C. § 3142 (j))

36. Applicant is the antithesis of a flight risk as clearly demonstrated by his court actions. Applicant is not someone who evades the law; but rather, is better typified as someone *highly* engaged with the process of the law.

Risk of Danger

37. The burden of proving by clear and convincing evidence dangerousness to community requires more than a preponderance of the evidence and something less than beyond a reasonable doubt; evidence must support conclusion in regard to danger of a ***high*** degree of certainty (*U.S. v. Chimurenga*, 760 F. 2d 400 (2d Cir. 1985))

38. "Detaining a defendant based on dangerousness due to alleged past conduct, without the required finding of [ ] would amount to punitive incarceration for a charged offense for which the Applicant has not been convicted." *U.S. v. Robertson*, 547 F. Supp. 3d, 560 (USDC ND TX 2021) citing to (*Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979)) (see also, 18 U.S.C. § 3142 (j)) (also, *U.S. v. Stanford*, 394 F. App'x 73, 74 (5th Cir. 2010)). Yet, this is precisely what has

happened, thus far; and, subject to the punitive terms and conditions of the Dec. 6, 2023 Release Order, has no end in sight (therefore, perpetuating, Due Process concerns and continued violation of the Defendant-Appellant's rights), absent timely review, modification to the least restrictive and most flexible terms and conditions and redress.

42. Government must present more reliable and convincing evidence that Applicant poses threat to community. The hearsay and other information proffered is part of "criminal framing" for illicit purpose(s) including but not limited to denying the Applicant his Constitutional right to pretrial liberty; or other infringements on his substantive rights. None of the information proferred by the government proves any propensity for criminal activity in the future (or past) or dangerousness (prima facie) (see e.g. *Fassler v. U.S.*, 885 F. 2d 1016 (5th Cir. 1988))

41. Applicant is not a gang member or recidivist offender. Applicant has no history of violence. There is absolutely no proof, whatsoever, that the Applicant is a danger to the alleged victim witnesses or the community.

18 U.S.C. § 3142 (g) Factors

43. Generalizing, it appears that a common reason that persons seeking pretrial release denied by the trial court seeking appeal, are often denied thereafter by the appellate court for failing to engage with the 3142 (g) factors.[49]

44. Pursuant to 18 U.S.C. § 3142 (g)(1), **Nature and Circumstances of the Offense** charged. See prior section herein, Circumstances of Offense.

45. Pursuant to 18 U.S.C. § 3142 (g)(2), **Weight of Evidence.** The government has, in fact, not provided any bona fide evidence. However, Applicant showing great diligence has provided substantial explanation and certain evidence rebutting the government's false, partial and misleading assertions. The weight of the evidence weighs, clearly, in favor of the Applicant.

46. Pursuant to 18 U.S.C. § 3142 (g)(3), **History and Characteristics of the person.**

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[49] For more detail regarding 18 U.S.C. § 3142 (g) Factors, see USDC WD TX, 22-219-FB-HJB, Dkt. 171, Applicant's Motion for Release for the Dec. 6, 2023 Bond Hearing at pg. 21-25 of 27, ¶¶ 29-32 (a)-(c)

(a). Pursuant to 18 U.S.C. § 3142 (g)(3)(A), person's character:

(a)(i). *Physical Health.* As reported to U.S. Pretrial Services[50], Applicant is a recent three-time Masters All-American Track & Field athlete at 400m (2020 – 2022)[51]. In order to achieve such level of physical health, Applicant: (i) exercises approximately eight to ten hours per week; (ii) maintains a highly regimented diet; and (iii) leads an extremely holistic lifestyle. In summary, Applicant's lifestyle is exemplary of someone whose character is built of a strong work ethic and extraordinary level of commitment and dedication to goals.

(a)(ii). *Mental Health.* As reported under penalty of perjury, Applicant is unmedicated and has no mental health issues. Certainly, as would be reasonably expected, Applicant has suffered emotionally from a traumatic marriage dissolution in California (a no fault divorce state) but has shown great effort, resolve and progress in restarting his life.

(a)(iii). *Family Ties.* the vast majority of family, economic and social ties are in the instant jurisdiction[52]. Applicant has resided with his family in the greater San Antonio area since Dec. 3, 2019. His family has lived in the greater San Antonio since 2012. The living situation would be aptly described as stable.

(a)(iv). *Employment.* Understanding the Applicant's employment history is of importance.

Beginning in late 2021, the Applicant begin training with the Chicago, IL based Futures and Commodities firm, TopStep. Immediately prior to Applicant's May 10, 2022, Applicant had completed his TopStep training and entered into an independent contractor agreement with TopStep to begin trading their capital. Once an independent contractor agreement is executed, TopStep, trading through the CBOE, establishes a trading subaccount with one of its brokerages. A trader's SSN (and EIN as Applicant utilizes a single-member LLC) is run, which would

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[50] On November 1, 2023, Defendant provided a copy of his Masters Track & Field Rankings to Ms. Brenda Q. of U.S. Pretrial Services.

[51] Defendant was detained on May 10, 2022 and has been unable to compete since this time.

[52] The government failed to show by a preponderance of the evidence that the Defendant posed serious risk of flight.

include various Patriot Act compliance type background checks via the S.E.C. TopStep employs, in an independent contractor capacity, as is the case of most professional traders throughout the United States, a few thousand persons. Nearly all of such individuals trade from their residences; and are colloquially known in the securities industry as "pajama traders". There are no personnel reporting duties when entering into an independent contractor agreement with TopStep. Their decision making processes are entirely rules based and objective. Upon release, Applicant does not anticipate having to retrain with TopStep; however, given the passage of time, he will have to resubmit his independent contractor agreement with TopStep and begin the background check processes again, prior to establishing his trading subaccount. As indicated, Applicant was about to begin trading with TopStep in May 2022, and traders can make substantial sums of money.

Applicant has established a Texas S-Corporation, H-Fin Capital Partners, for the purposes of long-short U.S. equity investment. Such entity is a shell entity with less than $2,000 of capital. Such entity has not begun, and is not anticipated to begin, raising third party capital anytime in the near future. Such entity was current with its State and Federal filings at the time of Applicant's detainment in May 2022. As indicated above, Applicant also has a single-member LLC, also H-Fin Capital Partners, established for the purposes of contracting with TopStep. At the time of Applicant's detainment in May 2022, such entity was current with its State and Federal filings. Each entity is vetted through its bank for regulatory purposes. The LLC is also vetted through TopStep and its own obligations such as those with broker-dealers, securities laws and the S.E.C. The Applicant and each of the two Texas business entities have had no state or federal regulatory issues. Upon release, Applicant will have to file late returns and pay late filing fees. However, as indicated there is no income currently associated with either entity.

Previously, Applicant entered into an Options training program with Salt Lake City, UT based Maverick Capital. However, Applicant did not earn any income with Maverick Capital and traded a $25,000 account (Maverick's accounts go up to $1 million for their top traders).

From 2003 to 2016, Applicant was an intermediary engaged in hotel real estate finance, transacting over $2.6 billion in his career. During this period he was a Managing Director with New York City based Ackman-Ziff; a Senior Vice President with CBRE and part of its original Structured Financing team and also a principal with three boutique hotel capital advisory firms. From 2000 to 2002, Applicant was a Financial Analyst with the Canadian Imperial Bank of Commerce in their Investment Banking division.

(a)(v). *Financial Resources.* As previously indicated, Applicant has little to no income or assets currently; however, that is anticipated to positively change over the next twelve (12) months. At the same time, he is not without financial support in regard to food, shelter and basic necessities.

(a)(vi). *Length of Residence in the Community.* Applicant has resided with his family in the greater San Antonio area since Dec. 3, 2019. His family has lived in the greater San Antonio since 2012. The living situation would be aptly described as stable.

(a)(vii). *History of Drug or Alcohol Abuse.* It is unconsciousable that U.S. Pretrial Services reports any history of drug or alcohol abuse. In fact, in light of the evidence provided and Applicant's All-American Masters Track & Field achievements, this is the antithesis of any form of substance abuse issues, prima facie.

(a)(viii). *Record of Court Appearances.* The Applicant can most aptly be typified as "running at the law" not from it – that is to say, he is highly engaged with the process of the law. As the Court has, in fact, taken Judicial Notice of *Davis v. Bonta*, USDC SD Cal, 21-2042 (see e.g. Dkt. 120, 21-2042, ¶ 124; also, ¶¶ 14-17, 22, 26-27. A Applicant can miss court for good cause – with respect to false prior failure to appear allegations, see e.g. Dkt. 120, 21-2042 at ¶ 130; also, at ¶¶ 44-45 (waiving attorney conflict); ¶ 46 (appointment of counsel request); ¶ 47 (notice of availability); ¶ 49 (voice message to Superior Court); ¶ 52 (select detail regarding VT); ¶¶ 53-54 (bail))

(b). Pursuant to 18 U.S.C. § 3142 (g)(3)(B), **Supervision.** Applicant is not currently on supervision (e.g. probation, parole) and has no other pending charges. Further, Applicant did, in fact, successfully complete three (3) years of probation in the contested Superior of California, San Diego County, SCD266332 / 273403 case and controversy.

(c). Pursuant to 18 U.S.C. § 3142 (g)(4), **Nature and Seriousness of the danger to any person or the community that would be posed by a person's release.** Applicant's charges carry no minimum sentence, a five-year maximum sentence and are almost never run consecutively. While recognizing that any criminal allegations are, of course, serious—in the context of criminal allegations, these are not considered serious. Release of the Applicant poses no threat to any person or the community, prima facie.

REQUEST FOR RELIEF

51. Si plures conditions ascriptae et si division quilbet vel alteri erovum satis est obtemperare; et disjunctivis, sufficit alteram esse veram; et ad veritalem copulative requiritur quad utraque pars sit vera.[53]

Pretrial Release – Scenario One – the United States Expressly Waived its Rights

52. In its Jul. 29, 2024 express waiver of its right to file a response to the 24-5088 Petition, Respondent, United States, has consensually relinquished a known right; and, that with which this Court's Rules plainly prescribe at Rule

[53] Intention is that one combination amongst several alternatives will be taken; a priori, to best effect the purpose of the Applicant, in multiple regards, as it relates to equitable redress and the timely return of his liberty wholly intact, or as near thereto as possible – in the spirit of such Constitutional right – and so as not to violate or place undue restrictions upon any other substantive and/or fundamental rights of the Applicant, such as the ability to work in the manner in which he is accustomed (i.e. with the ever day tools of our modern society such as a computer, telephone, electronics and access to the internet – tools so vitally important to one's livelihood as to have secured a more important position on Maslow's hierarchy as that of food and shelter. (also note that any form of computer monitoring (if any) is to be narrowly tailored (see e.g. *U.S. v. Lifshitz*, 369 F. 3d 173, 190 (2d Cir. 2004))

20.3(b) and Rule 15.2[54]. Therefore, A PRIORI, the Applicant respectfully requests that the Court: render its opinion on the aforementioned via declaration, decree or as otherwise may be appropriate to provide legal force and effect (i.e. in its express waiver, is the Respondent estopped, as alleged? and, if so, does that render Applicant's timely movement for release ever stronger e.g. in light of Rule 15.2?)

53. As a result of the opposition's express waiver of its right to file a response to the 24-5088 Petition, the Applicant requests that the Court:

(a) timely Order his release from federal pretrial custody on personal recognizance[55] or an unsecured appearance bond (18 U.S.C. §§ 3142 (b))[56]; or if denied for any reason; thereafter,

(b) timely Order his release from federal pretrial custody subject to certain conditions (18 U.S.C. § 3142 (c)); where such conditions are fashioned to fit the case and controversy; or, in the alternative,

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[54] As Rule 15.2 prescribes that the Respondent shall address *any* (emphasis added) perceived misstatement of fact or law in the 24-5088 Petition that bears on what issues properly would be before the Court if certiorari were granted; and, also that the Respondent has an obligation to the Court to point out in the Brief in Opposition and not later *any* perceived misstatement made in the Petition. The Respondent is, in fact, estopped.

[55] In April 2018, Applicant (in Superior Court of California, San Diego County, case no.: SCD266332 / SCD273403) was released on his Own Recognizance with no other terms and conditions and allowed to freely leave each of the jurisdiction of the County and State of California. Applicant thereafter returned for his court appearances. Applicant also complied with all terms and conditions of probation (despite moving on each of direct appeal, collateral appeal and seeking to stay probation pending appeal) for three (3) years without each issue. These cases included protective orders which were fully abided by without issue. The protective orders did, in fact, expire and were not renewed. Applicant has peacefully contacted such persons subsequent to the expiration of the protective orders. In this case and controversy, all that is necessary, as the Applicant, himself, has stipulated to, is to not contact the alleged victim witnesses during its pendency.

[56] Applicant was released on his Own Recognizance in April 2018 (Superior Court of California, San Diego County, SCD266332 / SCD273403; a case, still contested (see e.g. *Davis v. Bonta*, USDC SD Cal, 21-2042, Doc. 1; lodged at Dkt. 120 (Oct. 30, 2023)) and resulting in totality in one (1) misdemeanor (as discussed at length in court on Nov. 13, 2023). Since April 2018, Defendant has: (i) made court appearances; (ii) despite filing each of a motion to stay probation pending appeal and a California state petition (each denied), successfully completed thirty-six (36) months of probation without issue; and (iii) abided by the protective order in place; as well, as separately a civil protective order (Los Angeles County, Mr. Jason M. Adler) (all protective orders did, in fact, expire; without violation and with the Applicant having peacefully contact such persons since their respective expirations).

(c) timely appoint counsel for the purposes of bail review before this Court including but not limited to briefing and/or evidentiary hearing and/or as otherwise may be relevant.

Pretrial Release – Scenario Two – 18 U.S.C. § 3164 Release

x. If the Applicant's release is GRANTED under the prior paragraph above, Applicant requests that the Court render its Opinion on his right to release and on lawful terms and conditions of release under 18 U.S.C. § 3164. In the alternative, if the Applicant's release is not granted under the prior paragraph above, Applicant requests that the Court:

(a) timely Order his release from federal pretrial custody on personal recognizance[57] or an unsecured appearance bond (18 U.S.C. §§ 3142 (b))[58]; or if denied for any reason; thereafter,

(b) timely Order his release from federal pretrial custody subject to certain conditions (18 U.S.C. § 3142 (c)); where such conditions are fashioned to fit the case and controversy; or, in the alternative,

(c) timely appoint counsel for the purposes of bail review before this Court including but not limited to briefing and/or evidentiary hearing and/or as otherwise may be relevant.

x. Applicant has now been detained in violation of his Constitutional and other fundamental rights for over twenty-seven (27) months. Even if such delay were not of constitutional magnitude, Fed. R. Crim. P. 48 (b), and other authority, allow the Court to dismiss the indictment.[59] Applicant has demonstrated strong grounds for the dismissal of the Indictment (Dkt. 3) and case (22-219) with

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[57] See fn. 55

[58] See fn. 56

[59] "The prohibition in the criminal justice systems against unnecessary delay is designed (1) to protect against undue and oppressive incarceration prior to trial, (2) to minimize anxiety and concern public accusation and (3) to protect the ability of an accused to defend himself" (*U.S. v. Goodson*, 204 F. 3d 508 (4th Cir. 1999) citing to *Smith v. Hooey*, 393 U.S. 374, 378, 21 L. Ed. 607, 89 S. Ct. 575 (1969) (quoting *U.S. v. Ewell*, 383 U.S. 116, 120, 15 L. Ed. 2d 627, 86 S. Ct. 773 (1966)).

prejudice as respectfully requested for by the Court. (see e.g. *United States v. Blackwell*, 12 F.3d 44, 48 (5th Cir. 1994); dismissal with prejudice where maximum sentence was three years, and defendant had already served two years)

x. The Applicant requests any other relief that the Court deems appropriate.

CERTIFICATION AND CLOSING

By signing below, I certify to the best of my knowledge, information and belief that this Filing and accompaniments: (a) is not being presented for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (b) is supported by existing law; (c) the factual contentions have evidentiary support, or if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and (d) the filing otherwise complies with the requirements of Fed. R. Cr. P.

DATE: 8/14/24

Mr. Gavin B. Davis, Pro Per
APPLICANT

DECLARATIONS MADE UNDER PENALTY OF PERJURY

All matters herein by the Applicant are so declared under penalty of perjury as true and correct to the best of my knowledge and so declared as true and correct under penalty of perjury pursuant to 28 U.S.C. § 1746.

DATE: 8/14/24

Mr. Gavin B. Davis, Individually
APPLICANT

MIRANDA CANO
Notary Public, State of Texas
Comm. Expires 04-14-2027
Notary ID 134308346

MC 8/14/24

No._____

In The
Supreme Court of the United States

IN RE GAVIN B. DAVIS,
Petitioner.

CERTIFICATE OF SERVICE

As required by Supreme Court Rules 39.2, 29.5 (c), Proof of Service, I certify that one (1) copy Rule 22 Application for Bail was completed via U.S. Mail to Respondent, United States of America, Solicitor General of the United States at Room 5614, Department of Justice, 950 Pennsylvania Ave., N.W., Washington D.C. 20530-0001 and Assistant U.S. Attorney, Bettina J. Richardson, 601 NW Loop 410, Suite 600, San Antonio, TX 78206. The aforementioned is declared under penalty of perjury as true and correct pursuant to 28 U.S.C. § 1746. Executed on 8/14/24.

GAVIN B. DAVIS (#00197510), Pro Per
Applicant, Petitioner & Federalist

MIRANDA CANO
Notary Public, State of Texas
Comm. Expires 04-14-2027
Notary ID 134308346

8/14/24