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MEMORANDUM OF AUTHORITY RE: TIME LIMITS
FOR ADJUDICATING POST-ARREST DETENTION

I. Issue presented

In *Valdez-Jimenez v. District Court*, the Nevada Supreme Court held that Nevada arrestees are entitled to a ‘prompt’ detention hearing following arrest. This gives rise to the question at issue here: what amounts to ‘prompt’ under controlling federal constitutional principles? Prevailing authority fixes the time limit for detention hearings following arrest at *no later* than 48 hours. Notably, however, emerging jurisprudence suggests that, in jurisdictions utilizing fixed bail schedules, custody determinations for individuals too poor to pay fixed money-bail must occur within a time frame similar to that which it would take a wealthy individual to secure release by paying the fixed amount. In other words, a detention protocol cannot discriminate on the basis of wealth by forcing the poor to wait for custody adjudications while the wealthy pay for immediate release.

II. Authority

A. Custody determinations must be made *no later* than 48 hours after arrest

In *Gerstein v. Pugh*, 420 U.S. 103 (1975), the U.S. Supreme Court held that the constitution requires a ‘prompt’ probable cause review for individuals subject to warrantless arrests. Later, in

County of Riverside v. McLaughlin, 500 U.S. 44 (1991), the Court defined ‘prompt’ as *no later* than 48 hours following arrest. Notably, the *McLaughlin* court specified that the 48-hour time frame was an *outer limit* – available only if more a more expeditious review is not practicable:

This is not to say that the probable cause determination in a particular case passes constitutional muster simply because it is provided within 48 hours. Such a hearing may nonetheless violate *Gerstein* if the arrested individual can prove that his or her probable cause determination was delayed unreasonably.

McLaughlin, at 56-57.

In his dissent, Justice Antonin Scalia decried the 48-hour limitation as overly generous. Justice Scalia argued that, since then-existing technology – technology now thirty years old – allowed for more expeditious reviews, the constitution compelled a similarly expedited time frame (such as 24 hours) as an outer limit *McLaughlin*, at 68-69, Scalia, J. dissenting (“With one exception, no federal court considering the question has regarded 24 hours as an inadequate amount of time to complete arrest procedures, and with the same exception every court actually setting a limit for a probable-cause determination based on those procedures has selected 24 hours. *Bernard v. Palo Alto*, 699 F.2d at 1025; *McGill v. Parsons*, 532 F.2d 484, 485 (5th Cir. 1976); *Sanders v. Houston*, 543 F. Supp. At 701-03; *Lively v. Cullinane*, 451 F. Supp. At 1003-04. Cf. *Dommer v. Hatcher*, 427 F. Supp. 1040, 1046 (N.D. Ind. 1975 (24 hour maximum; 48 if Sunday included), rev’d in part, 653 F. 2d 289 (7th Cir. 1981)’”).

Both *Gerstein* and *McLaughlin* contemplated the possibility of probable cause determinations occurring in combination with other proceedings such as arraignments or bail hearings. See *Gerstein*, 420 U.S. at 124; *McLaughlin*, 500 U.S. at 54. But neither case required as much. Because of this, Clark County prosecutors assert that *McLaughlin*’s 48-hour rule does not constrain the time frame within which bail hearings must occur. Prosecutors contend that *McLaughlin*’s ‘within 48-hour’ definition of ‘prompt’ applies only to probable cause

determinations; and that custody determinations can occur beyond the 48 hour window. This is false.

Recent jurisprudence on the timing of bail hearings – most of which derives from federal review of county and municipal bail practices – discloses that the 48-hour limit imposed by *McLaughlin* applies with equal force to custody determinations. *See, e.g., O'Donnell v. Harris County, Texas*, 892 F.3d 147 (5th Cir. 2018); *Walker v. City of Calhoun, Georgia*, 901 F.3d 1245 (11th Cir. 2018) *cert. denied* __ U.S. __ 139 S. Ct. 1446 (2019); *Jones v. City of Clanton, Alabama* 2015 WL 5387219 (N.D. Ala. 2015). Thus, contrary to the position advanced by prosecutors, *McLaughlin* constrains rather than enlarges the time within which bail hearings must occur. *See O'Donnell*, 892 F.3d at 160 *citing Gerstein*, *supra*, and *McLaughlin*, *supra* (“We conclude that the federal due process right entitles detainees to a hearing within 48 hours.”) And that constraint requires bail hearings no later than 48 hours after arrest.

However, as the *McLaughlin* Court noted, the 48-hour obligation is an outer limit – a time frame allowed only if the government, in the exercise of due diligence, cannot conduct the inquiry sooner. Given that Las Vegas Justice Court conducts detention hearings daily within 12-24 hours of arrest, it is difficult to discern why other Clark County Justice Courts cannot do the same. Regardless, under the authority outlined above, those jurisdictions are required to conduct bail hearings *no later* than 48 hours following arrest. The failure to do so will subject the various townships to systemic legal challenges. *See McLaughlin* 500 U.S. at 56 (“[W]e believe that a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*. For this reason, such jurisdictions will be immune from systemic challenges.”).

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B. Use of a standardized money-bail schedule requires that detention hearings occur in *less than 48* hours

Notably, however, the analysis changes when, as happens in Clark County, a jurisdiction offers immediate release pursuant to a standardized bail schedule. When an arrestee of means is provided the opportunity to pay a fixed bail to secure release shortly after booking, the poor cannot be forced to wait two days for a bail hearing. This amounts to discrimination on the basis of wealth. And incarceration resulting from wealth-based discrimination violates the Equal Protection Clause of the U.S. Constitution. *See Pierce v. City of Velda City, Missouri*, WL 10013006 (E.D. Mo. 2015).

In *Pierce*, the federal district court for the Eastern District of Missouri approved a declaratory judgment enjoining Velda City's practice of holding detention hearings 48 hours after arrest for those too poor to pay a scheduled money-bail amount. *Id.* The declaratory judgment stated:

The use of a secured bail schedule to set the conditions for release of a person in custody after arrest for an offense that may be prosecuted by Velda City implicates the protections of the Equal Protection Clause when such a schedule is applied to the indigent. No person may, consistent with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, be held in custody after an arrest because the person is too poor to post a monetary bond. *If the government generally offers prompt release from custody after arrest upon posting a bond pursuant to a schedule, it cannot deny prompt release from custody to a person because the person is financially incapable of posting such a bond.*

Id. (emphasis added). Based on this, the *Pierce* court ordered Velda City to hold detention hearings for detainees too poor to pay fixed money-bail within 24 hours of arrest. *Id.* Thus, should Clark County continue utilizing a fixed money-bail schedule, the County must provide detention hearings for those too poor to pay the fixed amounts within a time frame commensurate to that which it would take a wealthy arrestee to secure release by paying the scheduled amount. This

means bail hearings in Clark County will have to occur in advance of the 48-hour limit proscribed by *McLaughlin* and its progeny.

C. *United States v. Montalvo-Murillo* does not support the proposition that the federal constitution permits detention hearings beyond 48-hours

Prosecutors cite *United States v. Montalvo-Murillo*, 110 S.Ct. 2072, 2077 (1990) for the proposition that the federal constitution does not impose a time limit for bail hearings. In *Montalvo-Murillo* (which pre-dates *McLaughlin*) the U.S. Supreme Court was called upon to determine the remedy for detention hearings not held within the time limits proscribed in the Federal Bail Reform Act. *Id.* Importantly, the Court was *not* asked – nor did it endeavor -- to determine the constitutional limits for adjudicating the issue of pretrial custody. The defendant did not challenge the constitutionality of the Bail Reform Act's time specifications, nor did he challenge the constitutionality of his delayed detention hearing. The sole issue before the Court was the proper remedy for his untimely hearing. *Id.* As such, *Montalvo-Murillo* provides no instruction on the time frame within which a detention hearing must occur. This is especially true given that *Montalvo-Murillo* predates the 48-hour requirement later announced by the Supreme Court in *McLaughlin*.

III. Conclusion

Detention hearings must occur *no later* than 48-hours following arrest. If Clark County offers immediate release pursuant to payment of a fixed money-bail amount, custody hearings must occur sooner. While prosecutors urge a reading of the U.S. Supreme Court's decision in *County of Riverside v. McLaughlin* that expands rather than limits the time within which detention hearings must occur, this runs counter to recent authority on the issue. That authority compels the conclusion that the limits proscribed in *McLaughlin* constrain the time within which detention hearings must occur to *no more* than 48 hours following arrest.