



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

**STATE OF NEW MEXICO,**

**Plaintiff-Appellant,**

vs.

**NO. S-1-SC-39316**

**Dist. Ct. No. D-202-PD-202200234**

**Dist. Ct. No. D-202-PD-202100917**

**ADRIAN AVILA,**

**Defendant-Appellee.**

**STATE OF NEW MEXICO'S MOTION**  
**FOR APPEAL PURSUANT TO RULE 12-204**

Pursuant to Rules 5-405(A)(3)(b), 5-409(L), and 12-204(C)(1) NMRA, the Plaintiff-Appellant, State of New Mexico, respectfully moves for an appeal of the district court's orders of March 30, 2022, denying the State's motions for pretrial detention. The district court found Defendant to be dangerous but concluded that the State had failed to prove under a clear and convincing standard that the safety of the community could not be protected by conditions of release.

First degree murder is the most serious charge in New Mexico and carries with it a potential sentence of life imprisonment. Defendant is charged with *two* first degree murders that occurred on separate occasions and were linked only by Defendant's *modus operandi* of ambushing individuals in their car in order to rob

them of guns and valuables. Defendant is also charged with a third similar crime that did not result in a homicide. The State established grounds to believe that Defendant planned and executed this series of highly dangerous crimes with deliberation and at the risk of far greater consequences than any judicial remedy for a violation of conditions of release. The charged crimes, found by the court to rest on reliable evidence, establish that Defendant presents a massive danger to the community that cannot be curbed through conditions of release. It is pure folly to believe that an individual would murder with abandon despite facing the potential of multiple life sentences but would somehow become a law-abiding citizen at the risk of being jailed for a year while awaiting trial.

Defendant is exactly the type of criminal defendant for whom the voters authorized pretrial detention by adopting the amendment to Article II, Section 13 of the New Mexico Constitution. He is also exactly the type of defendant that had been detained in New Mexico for over a century before the voters *expanded* pretrial detention in 2016. The district court's decision to release Defendant is arbitrary, capricious, and an abuse of discretion that shocks the conscience. The State respectfully asks this Court to reverse.

## **I. FACTUAL BACKGROUND**

By grand jury indictment in No. D-202-CR-202200583, Defendant is charged with first degree murder, armed robbery, shooting at or from a motor vehicle resulting in great bodily harm, and conspiracy to commit each of those crimes in relation to the death of Donnie Brandon on August 8, 2020. By grand jury indictment in No. D-202-CR-202200042, Defendant is charged with first degree murder in relation to the death of Elias Otero on February 11, 2021, first degree kidnapping, armed robbery, and conspiracy to commit armed robbery of Nicholas Otero on February 11, 2021, armed robbery and conspiracy to commit armed robbery of Richard Archuleta on February 10, 2021, and tampering with evidence.

For the incident occurring first in time, the criminal complaint alleges the following facts. In the early morning hours of August 8, 2020, Defendant, Armando Rodriguez, Luis Ayala, and JaJuan Bennett arrived at Sandia Vista Park on Chico Road in Albuquerque and met up with Brandon and his girlfriend, Terecita Trujillo. Earlier that night, Rodriguez and Brandon had discussed the sale of gun, and during the later encounter, Brandon asked to buy a gun from Rodriguez. At the time, Brandon was in the driver's seat of his car and had his own handgun in his lap. Defendant, Rodriguez, Ayala, and Bennett were standing next to the driver's side door, and all four of them had handguns in their hands. Trujillo described them as

surrounding Brandon. When Brandon took out money to buy a gun, Rodriguez told Brandon to give them his gun and money before the four of them opened fire at Brandon. Rodriguez, who is Defendant's cousin and who did not identify Defendant as being involved, admitted that the group planned the robbery before they arrived at the park. Ayala later posted a video on Snapchat showing Rodriguez holding Brandon's gun, and police officers located the gun in the apartment where Rodriguez said they would find it. Bennett identified Defendant as one of the shooters, and Trujillo also identified Defendant as being one of the four individuals that robbed and murdered Brandon. Defendant's cell tower records place him in the area of the park at the time of the homicide.

Like Defendant, his co-conspirators, Bennett, Ayala, and Rodriguez, have been charged with Brandon's murder in Nos. D-202-CR-20210019, D-202-CR-2021001833, and D-202-CR-202101870, respectively. Unlike Defendant, however, Bennett, Ayala, and Rodriguez are not charged with other homicides. Nonetheless, Bennett, Ayala, and Rodriguez have all been detained under Rule 5-409. At the time of the alleged crime, Defendant was sixteen years old and had no criminal history. Ayala was seventeen years old and a pending juvenile case for shooting at a dwelling or occupied building for an incident occurring one month before Brandon's murder. Rodriguez was nineteen years old and had no criminal history. Bennett was twenty-

one years old and had no prior convictions, but he was on conditions of release, including a GPS monitor, facing charges of shooting at a dwelling or occupied building and child abuse following the denial of a pretrial detention motion.

In Defendant's second case, the criminal complaint alleges the following facts. On February 10, 2021, Anna Bella Dukes communicated by Snapchat with Archuleta and asked him to pick her up at her house. The messages end at 10:41 p.m. During this same period of time Dukes communicated by Snapchat with Defendant, referring to him as Adrian and telling him that he better have her back if anyone came after her because they know where she lives. Dukes then told Defendant that it's "grey on the outside" and, in response to Defendant's question about the kind of car, said it is a Chevy Impala. These messages end at 11:05 p.m. A short time later, Archuleta reported to the police that he had been carjacked by two Hispanic males armed with guns who took his grey Chevy Impala. He reported that he had been with a female at Alvarado Park at the time of the carjacking.

During the early morning hours of February 11, 2021, only a short time after Archuleta's carjacking, Dukes sent messages to Nicholas Otero asking him to take her to a park. She had him drive to Alvarado Park where she placed her cell phone under her leg. She asked him where he kept his money and whether he had any guns. Nicholas told her he had a rifle in the trunk and kept his money in the center console.

Nicholas noticed that Dukes' phone was connected on a call and told her he was going to leave. At that time, Archuleta's carjacked vehicle came up behind Nicholas's car, and three males armed with guns and wearing face coverings pulled Nicholas from his car, pointed guns at his head, and demanded the cash in his center console and the rifle in his trunk. They forced Nicholas to take off his clothes and searched through his car. One male, whom Nicholas described as crazy, fired a round near Nicholas and begged the others to let him shoot Nicholas. When the males did not locate the rifle in the car, they forced Nicholas to find someone to pay a ransom of \$1000 or be killed. He was forced into the passenger seat of his car, and he saw Dukes get into the grey Chevy Impala that had just been carjacked from Archuleta. Nicholas gave them directions to his brother's house and, upon their instruction, called his brother and told him to bring \$1000 and a gun outside. When Elias Otero came outside, one of the males pointed a gun at Nicholas's head. Elias pointed a gun at the male, and the male shot Elias several times and killed him. The group fled the scene in Nicholas's and Archuleta's cars with Nicholas still in his passenger seat. Nicholas jumped from the moving vehicle to escape. During the flight, the males crashed Nicholas's car and fled on foot.

Dukes sent Snapchat messages to a friend before the carjackings in which she said that she was scared and it's either her "life or their jewelry." Dukes' friend refers

to “Adrian” in these messages. During the time when Dukes and Nicholas were discussing the location of his cash and rifle at Alvarado Park, Dukes’ phone was connected to Defendant’s phone. In addition, Defendant’s cell tower records show his phone to be located in the vicinity of the crimes at Alvarado Park and Elias Otero’s home at the time the crimes were committed.

In Docket Number D-202-CR-202200043, Dukes is charged with the same crimes as Defendant for the incidents occurring on the night of February 10 and the early morning hours of February 11. Dukes, who was seventeen years old at the time of the crime and had no criminal history, stipulated to her pretrial detention under Rule 5-409.

Defendant’s detention hearing took place on three dates, February 17, March 15, and March 22, 2022. The first hearing was sealed because Defendant was a juvenile at the time of the alleged crimes; the court ultimately concluded that sealing was unnecessary because Defendant is charged as a serious youthful offender and is therefore subject to the rules of criminal procedure applicable to adults.

At the hearing, the State proffered and the court admitted as exhibits the criminal complaints containing the above-described facts, and the State summarized the complaints for the court. The State emphasized the planning and level of violence involved in the crimes and described the allegations as shockingly violent. In

addition, the court admitted as exhibits the public safety assessment recommending release on Defendant's own recognizance, photographs from Defendant's Snapchat account showing him wearing a folded up ski mask on his head and holding a handgun with a green laser and, in different photographs, an individual of similar stature wearing the same shirt with the ski mask pulled over his face and holding the same gun, photographs from Defendant's Snapchat of various firearms that Defendant offered to sell or trade, and a similarly-themed video of Defendant from Snapchat. The State presented the testimony of a forensic analyst, Kate Rosoff, in reference to the photographs and video. The State observed that Defendant could not legally possess handguns at the time the photographs and video were posted. Defendant cross-examined Ms. Rosoff on the ability of people to create Snapchat accounts using someone else's identity but otherwise presented no evidence and made no proffers.

The State argued that Defendant is dangerous to the community and no conditions of release could reasonably protect the community. More specifically, the State argued that the pattern of violent conduct outlined in the criminal complaints demonstrated that Defendant would not comply with court orders. The State further argued that a GPS monitor cannot prevent Defendant from having access to firearms or from committing further violence and Defendant could remove a GPS monitor or

leave his home in spite of house arrest, noting in fact that JaJuan Bennett had been on a GPS monitor at the time of his participation in robbing and killing Brandon. The State highlighted the planned decision to violate the law in a greatly dangerous manner and the conspiracy involving a number of armed individuals, in contrast to an isolated or spontaneous event, as proof that Defendant would not respect any conditions of release.

Defendant relied on the PSA score, his age, his lack of criminal activity other than the multiple criminal episodes charged in these cases, and the lack of any previous violation of conditions of release. Defendant also disputed the strength of the evidence against him and informed the court that Defendant could live with and be supervised by his mother. Defendant's mother spoke at the hearing and agreed to have Defendant live with her. She noted that Defendant did not live with her at the time of the crimes because she had purchased a home for her sixteen-year-old son to live in with his brother.

The court found by clear and convincing proof that Defendant is a danger to the community. However, the court found that the State had not met its burden to show that conditions of release could not reasonably protect the safety of the community. Two substantially identical written orders filed on March 30, 2022, six days after the hearing instead of the three days required by Rule 5-409(G), contain

little more than bare conclusions. The court relied on Defendant's age, his lack of criminal history, and the absence of any previous violation of conditions of release to support its finding that the State had not met its burden of showing that conditions of release cannot reasonably protect the safety of the community.

## II. ARGUMENT

Judges across New Mexico have routinely held individuals charged with first degree murder pending trial for more than a century absent some indication pretrial detention is unwarranted. First degree murder is the only crime serious enough to receive the legislative label of a capital offense and the only crime subject to life without possibility of release or parole. Defendant is charged with not just one but two first degree murders, both of which were planned and ruthlessly committed with armed co-conspirators, and Defendant is further charged with a third similar crime involving firearms and extremely dangerous acts of violence. Defendant's release while charged with these crimes, after a finding that reliable evidence establishes Defendant's dangerousness by clear and convincing evidence, undermines public confidence in the criminal justice system and threatens the mission of bail reform.

**A. A charge of first degree murder based on reliable evidence does not require pretrial detention but establishes sufficient proof that the individual is dangerous and conditions of release cannot reasonably protect the community to allow for pretrial detention.**

The United States Supreme Court has determined that pretrial detention,

accompanied by certain procedural protections, is constitutionally permissible: “When the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, we believe that, consistent with the Due Process Clause, a court may disable the arrestee from executing that threat.” *United States v. Salerno*, 481 U.S. 739, 751 (1987). Proof of “an identified and articulable threat” includes in part a showing “that no conditions of release can reasonably assure the safety of the community or any person.” *Id.* at 750.

Article II, Section 13, as amended in 2016, incorporates the *Salerno* standard by requiring “clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community.” The voters adopted this language to protect community safety by “grant[ing] courts new authority to deny release on bail pending trial for dangerous defendants in felony cases.” N.M. Const. art. II, § 13 compiler’s annot. (quoting the language appearing on the ballot). Pretrial detention under this provision, however, was not completely novel.

Since statehood, Article II, Section 13 has excluded from the right to bail persons charged with “capital offenses when the proof is evident or the presumption great.” New Mexico shares this language with forty-seven other states. *See State v.*

*Brown*, 2014-NMSC-038, ¶ 26, 338 P.3d 1276. This Court held shortly after the adoption of the Constitution that “[a]n indictment charging a capital offense raises a rebuttable presumption that the proof is evident and the presumption great of the guilt of the accused, and accused is not entitled to bail until that presumption is overcome.” *Ex parte Towndrow*, 1915-NMSC-073, ¶ 7, 20 N.M. 631. This rule applied even if the individual was charged with only one first degree murder, if the individual had no criminal history, and if the State had not sought the death penalty or alleged aggravating circumstances supporting the death penalty. *See State v. Coffin*, 1999-NMSC-038, ¶ 69, 128 N.M. 192 (observing that “all capital defendants face a period of pretrial incarceration” in a case in which the notice of intent to seek the death penalty was not filed until ten months after the defendant’s arrest). Further, this rule was valid until 2009, meaning that this rule survived the 1987 constitutional analysis of *Salerno* such that the presumption of detention incorporated both an assessment of dangerousness and an evaluation of whether conditions of release could reasonably protect the community.

In *State v. Ameer*, 2018-NMSC-030, ¶¶ 69-70, 458 P.3d 390, this Court held that the “proof is evident or the presumption great” language in Article II, Section 13 did not survive the repeal of the death penalty in 2009 because the drafters of the Constitution intended to limit “capital offenses” to those crimes eligible for capital

punishment. Consistent with established rules of constitutional and statutory construction, *see, e.g.*, NMSA 1978, § 12-2A-14 (1997), the Court looked to the intent of the provision at the time of its original enactment and not to the intent of the voters in 2016, who presumably would not have intended to enact surplusage. But the Court emphasized that the 2016 bail reform amendment means that “our district courts now have a much broader evidence-based detention authority applicable in both capital and noncapital felonies.” *Id.* ¶ 71.

Indeed, when the Legislature repealed the death penalty in 2009, it did not modify the crime of first degree murder. Nor did the Legislature find that first degree murder is a less dangerous crime than it was before 2009 or that those charged with first degree murder pose less of a danger to the community if released while pending trial. First degree murder remains the most serious crime in New Mexico, and individuals charged with first degree murder pose a special risk to the safety of the community. Following *Ameer*, courts cannot rely on a presumption of detention based on a charge of first degree murder and must undertake an “evidence-based” analysis of the Rule 5-409 factors. In other words, district judges are no longer *required* to detain individuals charged with first degree murder when the proof is evident. But because the new pretrial detention language in Article II, Section 13 actually provides *much broader* detention authority, the State is not required to show

more to justify detention than it did before, that is, a charge of first degree murder continues to supply sufficient grounds for detention as long as it is warranted by a balancing of the factors articulated in Rule 5-409.

This Court has, in fact, repeatedly recognized that first degree murder is unique in its seriousness. *See State v. Franklin*, 2018-NMSC-015, ¶¶ 14-17, 413 P.3d 861. After *Ameer*, a court may deny pretrial detention for a defendant charged with first degree murder when, for example, there are concerns about the strength of the evidence or there are individualized circumstances that indicate that conditions of release can protect the community or that the defendant is unlikely to commit new crimes. But first degree murder is too serious a crime and poses too great a danger to the community to permit a finding of insufficient proof under the Article II, Section 13 standard. Liberty is precious, but life is far more so. This state’s emphasis on the preciousness of life in repealing the death penalty cannot be used to diminish the importance of the lives of victims and the threat to the lives of members of the community when defendants charged with first degree murder are released.

**B. The court’s order does not contain individualized findings supporting the denial of pretrial detention.**

Rule 5-409(H) requires “findings of the individualized facts justifying the denial of the detention motion.” The court in this case found that the State had presented reliable evidence to establish dangerousness by clear and convincing

evidence but had failed to prove by clear and convincing evidence that conditions of release cannot reasonably protect the community. The court's ruling, however, is not supported by individual findings as required by Rule 5-409.

The court relied on only three facts: "this defendant was sixteen years old at the time of the offense, had no criminal history, or any history indicating that he cannot comply with conditions of release." The first fact is an improper consideration for pretrial detention. The second "fact" lacks substantial evidence and is contrary to the record. The third fact would apply to anyone charged with any number of murders who had not previously been charged with a criminal offense regardless of how the crimes were committed or how likely the defendant is to reoffend. These facts cannot justify the denial of detention of a defendant charged with reliable evidence with planning and executing three armed robberies, a kidnapping for ransom, and two murders. To so hold would ignore the voters' intent to broaden pretrial detention authority and transform Article II, Section 13 into no more than a means of addressing violations of conditions of release.

The district court improperly considered Defendant's age at the time of the offense. Although Rule 5-409(F)(6)(c) contemplates the consideration of a defendant's "characteristics," pretrial detention and release do not address culpability or punishment. The relevant consideration is the defendant's characteristics at the

time of the hearing. Defendant is no longer sixteen years old and is now an adult. Further, a defendant's age does not correlate with an ability of conditions of release to protect the community. As indicated by the legislative authority to detain juveniles even for the commission of delinquent acts, as opposed to a serious youthful offense, *see* NMSA 1978, § 32A-2-11 (2003), juveniles can pose a risk to themselves or the community against which conditions of release do not offer adequate protection. Indeed, youth is associated with a greater risk of reoffending as indicated by the public safety assessment's consideration of whether a defendant is under the age of twenty.

The court also found that Defendant has no criminal history, but the evidence at the hearing does not support this finding. Defendant does not have any previous convictions or charges, but future dangerousness requires the consideration of not only formal charging but also a defendant's "prior conduct, charged or uncharged." *State ex rel. Torrez v. Whitaker*, 2018-NMSC-005, ¶ 101, 410 P.3d 201. "The 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." *Id.* The State presented evidence found to be reliable by the court that Defendant had committed a previous murder and armed robbery and had illegally possessed and sought to sell multiple firearms through social media before he planned

the carjacking of Archuleta and the armed robbery and kidnapping of Nicholas Otero and committed the murder of Elias Otero. The State therefore showed Defendant's propensity for engaging in extremely dangerous conduct, and the fact that Defendant had not been formally charged with the first murder at the time he allegedly committed the second murder does not militate in favor of release. The charged acts were the opposite of an "isolated act" for which conditions of release might be sufficient to protect the community. *State v. Groves*, 2018-NMSC-006, ¶ 34, 410 P.3d 193.

The court lastly found no history of violating conditions of release. This fact, however, is not unique to Defendant. Many defendants commit extremely dangerous crimes that warrant them being held in custody pending trial without having been charged with a crime previously, including Rodriguez, who was held after being charged with only one of the three criminal episodes for which Defendant was charged. If a violation of conditions of release were required for pretrial detention, the Constitution would say so. In fact, this Court has observed that "[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." *State v. Ferry*, 2018-NMSC-004, ¶ 6, 409 P.3d 918. Some examples include "a defendant's defiance of restraining orders;

dangerous conduct in violation of a court order; intimidation tactics; threatening behavior; stalking of witnesses, victims, or victims' family members; or inability or refusal to abide by conditions of release in other cases." *Id.*

In this case, reliable evidence indicated that Defendant engaged in the threatening behavior of telling Nicholas he would kill him if he did not get someone to pay a ransom, aiming a gun at Archuleta's head while robbing him, and pointing a gun at Brandon while his co-conspirator demanded Brandon's gun and money before shooting him. In addition, Dukes told her friend that she believed her life depended on her participating in the robberies and that she had a choice between losing her life or the victim losing his valuables. As the State highlighted at the hearing, the nature and circumstances of Defendant's crimes include planning, a joint criminal enterprise of multiple people, and the repeated use and discharge of firearms. The acts Defendant is alleged to have committed are so brazen and heinous that Defendant cannot reasonably be expected to follow the directives of an authority figure. It is certainly beyond the pale to believe that a relatively short detention pending trial is a sufficiently great consequence to induce law-abiding behavior when the evidence at the hearing showed that Defendant was willing to plan and carry out crimes that could put him in prison for the rest of his life.

As the State argued below, and as this Court has recognized, a GPS monitor

does not prevent a defendant from committing additional crimes. *See Groves*, 2018-NMSC-006, ¶ 38. Nor can the community rely on house arrest with Defendant's mother to protect its safety, especially given that Defendant's mother was responsible for supervising him when he was sixteen years old but allowed him to live on his own with an unimpeded opportunity to commit the charged crimes.

Under Rule 5-409, dangerousness and the ability of conditions of release to protect the community do not require different evidence. 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;
- (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 those factors expressly mentions a defendant's previous violation of conditions of release.

The charged offenses, including multiple murders, the nature and circumstances of the crimes, including premeditation and conspiracy, and Defendant's characteristics, including a propensity for extremely violent behavior, established clear and convincing evidence that conditions of release cannot reasonably protect the safety of the community. It was an abuse of discretion for the district court to find otherwise.

### **III. CONCLUSION**

The district court's decision to release Defendant placed the public at unnecessary risk and is contrary to the language and purpose of Article II, Section 13. The State respectfully moves to appeal the district court's order denying pretrial release and asks this Court to reverse the district court's abuse of discretion in denying the State's motion for pretrial detention.

Respectfully submitted,

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Certificate of Service

I certify that notice has been provided as required by Rule 12-204 either by mailing a true copy of this document by first class mail or by providing electronic service on April 6, 2022, or the date of acceptance of the filing, to the following:

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