

Court of Appeals, State of Colorado 2 East 14th Avenue Denver, CO 80203	
Petition for Review from the District Court, Weld County Honorable Annette Kundelius, District Judge Case No. 25CR960	
The People of the State of Colorado, Plaintiff-Respondent v. Moises Rodriguez-Nunez, Defendant-Petitioner	
Daniel King, Reg. #26129 KingLaw PLLC 12650 W 64th Avenue, Unit E, #128 Arvada, CO 80004 (303) 906-8011 danielbking.law@gmail.com SIDLEY-MACKIE LLC Andrew Sidley-MacKie, Reg. #52471 PO Box 272269, Fort Collins, CO 80527 (970) 305-5870 andrew@sidley-mackie.com <i>Under Contract with OADC</i>	Δ COURT USE ONLY Δ Case No. 25CA2183 Petition Granted and Case Remanded with Directions Opinion by Judge Kuhn Grove and Yun, JJ., concur
PETITION FOR REHEARING	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 32 and C.A.R. 40 including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 40(b):

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Andrew Sidley-MacKie, Reg. #52471

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ARGUMENTS

This Court properly reversed and remanded this case for a new bond hearing, but the opinion also unnecessarily decided important and contested questions about the constitutional constraints on unattainable monetary bail. Because resolving these questions was unnecessary to the Court's judgment, and they are not likely to recur on remand, this Court should decline to reach them.

In addition, this Court should clarify certain statements that could be read to conflict with Colorado's bond statutes. This Court's opinion could be read to suggest both that (1) a trial court need not consider whether a monetary condition is attainable and (2) that a trial court need not consider nonmonetary conditions as less restrictive alternatives. These suggestions conflict with Colorado's bond statutes and this Court should clarify these issues to avoid confusion.

Mr. Rodriguez-Nunez respectfully requests that this Court modify its opinion to remove Part II.E, *see People v. Rodriguez-Nunez*, 2026 COA 48, ¶¶ 27–29, and to revise Part III to clarify that trial courts are required to consider both attainability and possible nonmonetary alternative conditions when setting bond, *see id.*, ¶ 30.

1. This Court should decline to reach the constitutional limits on unattainable bonds.

This Court correctly held that the district court misinterpreted the 2024 amendment to Article II, Section 19(1)(d) of the Colorado Constitution and failed to consider Mr. Rodriguez-Nunez’s individual circumstances when setting bond. *See Rodriguez-Nunez*, ¶¶ 12, 26. No further analysis was necessary to support this Court’s judgment. In Part II.E, however, the Court appears to hold that there are no constitutional constraints on unattainable bail. *See id.*, ¶ 29. In so doing, the Court did not analyze the implications of the Colorado Constitution’s “absolute right to bail.” *Id.*, ¶ 5; *In re People v. Smith*, 2023 CO 40, ¶ 44; *see* Colo. Const. art. II, § 19(1). Instead, the Court focused primarily on the bail statutes. *See Rodriguez-Nunez*, ¶¶ 27, 29 (“We aren’t persuaded because the statutes don’t impose such requirements. . . . Rodriguez-Nunez’s contention amounts to a request for us to read into the statutory scheme unattainability conditions that don’t exist in the statute’s plain language.”).

“[U]nnecessary or premature decisions of constitutional questions should be avoided.” *City of Greenwood Village v. Petitioners for the Proposed City of Centennial*, 3 P.3d 427, 437 (Colo. 2000). “[A] court should not decide a constitutional issue unless and until . . . the necessity for such decision is clear and inescapable.” *People v. Lybarger*, 700 P.2d 910, 915 (Colo. 1985). Even beyond constitutional avoidance, when this Court reverses and

remands it “typically reach[es] additional issues only to the extent that they are likely to arise again on remand.” *People v. Cooper*, 2026 COA 44, ¶ 15 n.5 (internal quotation marks omitted). In this case, the constitutional issues are unlikely to recur after proper consideration of Mr. Rodriguez-Nunez’s individual circumstances.

Declining to unnecessarily reach the constitutional questions is especially appropriate because of the substantial persuasive authority contrary to the Court’s holding. The federal constitution does not guarantee a right to bail, but other states do have analogous right-to-bail provisions in their own constitutions, including California and New Mexico. *See* Cal. Const. art. I, § 12; N.M. Const. art. II, § 13. The California Supreme Court reached the opposite conclusion reached by this Court: “[B]ail must generally be set in an amount that is reasonably attainable, in order to effectuate the defendant’s constitutional right to pretrial release on bail.” *In re Kowalczyk*, 587 P.3d 1205, 1210 (Cal. 2026). The New Mexico Supreme Court did the same: “Setting a money bond that a defendant cannot afford to post is a denial of the constitutional right to be released on bail for those who are not detainable . . . under the New Mexico Constitution.” *State ex rel. Torrez v. Whitaker*, 410 P.3d 201, 219 (N.M. 2018). There is substantial historical support for this position. *See* Kellen R. Funk and Sandra G. Mayson, *Bail at the Founding*, 137 Harv. L. Rev. 1816, 1823

(2024) (“When bail was mandatory . . . the law on the books required that the pledge amount be one that the defendant and his sureties could pay if need be.”).

The Court’s opinion does not explain why a trial court may evade Colorado’s “absolute right to bail,” *Rodriguez-Nunez*, ¶ 5, by imposing bail that it knows will result in detention so long as it does not do so “explicitly,” *id.*, ¶ 20. This holding would effectively create a new exception to the Colorado Constitution’s right to bail for any situation in which the *statutory* bail factors support an unattainable bail. *See id.*, ¶ 29; *cf. Smith*, ¶ 20 (holding that the Colorado Constitution must be interpreted to “prevent the evasion of [its] legitimate operation”); *Palmer v. District Court*, 398 P.2d 435, 437 (Colo. 1965) (“The mention of one exception [to the right to bail] excludes other exceptions.”). This new, unwritten exception would come without the evidentiary and speedy trial protections that the constitution dictates for a formal denial of bail. *See Colo. Const. art. II, § 19(1)(a), (b), (d), (2).*

This Court’s result was not dictated by precedent. *See Rodriguez-Nunez*, ¶ 19 (citing *People v. Jones*, 489 P.2d 596, 599 (Colo. 1971)). *Jones* reversed a trial court that purported to grant presentence confinement credit but then imposed a sentence that was “mathematically impossible” to reconcile with granting such credit. *Jones*, 489 P.2d at 599. The

constitutional prerequisites for secured money bail were not relevant to this holding. *Id.* (“The posture of this appeal, however, does not require that constitutional criteria be the heart of this decision. The infirmities of our bail system are not the true basis of the defendants’ complaints.”).

Jones’s self-professed dictum that “[t]he right to bail does not amount to a guarantee that every defendant who is charged with a crime will be released without bail if he is indigent”¹ was based on an unwillingness to “hold that pre-sentence confinement is punishment and that an order fixing monetary bail is unconstitutional *Per se*.” *Id.* at 598–99. Even if *Jones*’s remark is binding, it is consistent with holding that unattainable monetary conditions may not circumvent the right to bail. That holding would not turn on whether pretrial incarceration is punishment and would not render monetary bail automatically unconstitutional. Indigency alone does not mandate a personal recognizance bond, even in cases that are not eligible for detention orders, because some monetary condition may be reasonably attainable even to an indigent defendant: reasonably attainable bail need not be “easily affordable or convenient.” *Kowalczyk*, 587 P.3d at 1210.

¹ The case relied on by *Jones* for this point was not governed by any constitutional right to bail, declined to decide the constitutionality of unattainable monetary bail, and expressed concern about the practice: “To continue to demand a substantial bond which the defendant is unable to secure raises considerable problems for the equal administration of the law.” *Bandy v. United States*, 81 S. Ct. 197, 197 (1960) (Douglas, J., in chambers).

Even setting aside the “absolute right to bail,” *Rodriguez-Nunez*, ¶ 5, the United States and Colorado Constitutions require clear and convincing evidence that no less restrictive alternative will satisfy the purposes of bail before a trial court may impose unattainable bail that functions as a de facto detention order. Our Supreme Court has not addressed this issue, in *Jones* or elsewhere, but other courts have. For example, the Nevada Supreme Court found “that when bail is set in an amount that results in continued detention, it functions as a detention order, and accordingly is subject to the same due process requirements applicable to a deprivation of liberty,” including that “the State has the burden of proving by clear and convincing evidence that no less restrictive alternative will satisfy its interests in ensuring the defendant’s presence and the community’s safety.” *Valdez-Jimenez v. Eighth Judicial District Court*, 460 P.3d 976, 987 (Nev. 2020). The California Supreme Court imposed the same standard under the California Constitution even before *Kowalczyk*. See *In re Humphrey*, 482 P.3d 1008, 1019–20 (Cal. 2021). The United States Supreme Court has held that clear and convincing evidence is constitutionally required for civil commitment, see *Addington v. Texas*, 441 U.S. 418, 423–27, 431–33 (1979), and relied on the federal bail statute’s clear and convincing evidence standard to uphold its detention provisions against constitutional challenge, see *United States v. Salerno*, 481 U.S. 739, 750–51 (1987).

The weight of authority disagreeing with this Court's conclusions on these important constitutional questions counsels against deciding them unnecessarily.

2. Colorado's bail statutes require that trial courts consider individual financial circumstances and less-restrictive, nonmonetary alternatives when setting bond.

This Court's opinion says, "Rodriguez-Nunez also contends that the district court's determination for a monetary bond must include considerations of *attainability*. . . . We aren't persuaded because the statutes don't impose such requirements." *Rodriguez-Nunez*, ¶ 27. This could be read not only to reject Mr. Rodriguez-Nunez's constitutional arguments, but also to suggest that a trial court need not even consider whether the monetary condition it sets is attainable based on the defendant's individual circumstances. The opinion also says that the district court "*may* consider the use of nonmonetary conditions as less restrictive options for vindicating community safety concerns." *Id.*, ¶ 30 (emphasis added). This could be read to suggest that trial courts are merely permitted, but not required, to consider nonmonetary alternatives and that nonmonetary conditions are relevant only to community safety, not to return to court. These suggestions – distinct from the constitutional issues discussed above – conflict with Colorado's bond statutes.

When setting bond, Colorado’s statutes require a trial court to “tak[e] into consideration . . . the person’s financial condition,” “[p]resume that all persons in custody are eligible for release on bond with the appropriate and least-restrictive conditions,” and “[c]onsider all methods of bond and conditions of release to avoid unnecessary pretrial incarceration.”

§ 16-4-103(3)(a), (4)(a), (4)(c), C.R.S. 2025. A trial court cannot comply with these statutory mandates without considering whether a monetary condition of bond is attainable and without considering nonmonetary alternative conditions that address either appearance concerns, public safety concerns, or both. *Cf. Rodriguez-Nunez*, ¶ 21 (holding that the trial court erred by not considering “individual characteristics or financial condition”); *People v. Fallis*, 2015 COA 75, ¶ 8 (holding that a nonmonetary condition reasonably addressed risk of flight).

If a trial court does not even consider whether bail is attainable, then it cannot determine whether monetary conditions or nonmonetary conditions are less restrictive for a particular individual. If a monetary bond condition is unattainable based on an individual’s financial condition, then nonmonetary bond conditions will, by definition, be less restrictive. Meanwhile, monetary conditions that are easily attainable may be less restrictive for a wealthy defendant. Refusing to consider attainability will also risk unnecessary pretrial incarceration that could be avoided through

alternative conditions, contravening the bond statute's direct command. This Court should therefore clarify that trial courts are, at minimum, statutorily required to *consider* both attainability and nonmonetary alternatives, regardless of whether the Court reaches the constitutional questions.

CONCLUSION

Mr. Rodriguez-Nunez respectfully requests that this Court grant rehearing and modify its opinion by declining to address the constitutional issues that are unnecessary to the disposition and clarifying that trial courts are at least required to consider attainability and nonmonetary alternative conditions when setting bond.

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Date: June 18, 2026

CERTIFICATE OF SERVICE

I certify that on June 18, 2026, I served a copy of this document on Ashley Scott McCuaig, Blake Austin Madone, and Michael James Rourke of the Weld County District Attorney's Office via Colorado Courts E-Filing.



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