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IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

ROMEO A. SAIMON, **Petitioner,** **v.** **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS ("CNMI"), NMI DEPARTMENT OF CORRECTIONS ("DOC"), CORRECTIONS COMMISSIONER VINCENT S. ATTAO, CNMI DEPARTMENT OF PUBLIC SAFETY ("DPS") AND PUBLIC SAFTEY COMMISSIONER ROBERT A. GUERRERO,** **Defendants.**	**CIVIL ACTION NO. 18-0409** **ORDER DENYING PETITIONER'S APPLICATION FOR A WRIT OF HABEAS CORPUS WITHOUT PREJUDICE**

I. INTRODUCTION

On December 13, 2018, at 1:30 p.m. the parties appeared before Judge Kenneth Govendo in courtroom 201 of the Marianas Business Plaza in Susupe, Saipan. The Petitioner was present, in custody, and represented by Attorney Robert Myers. The Commonwealth was present and represented by Assistant Attorney General Robert Pickett and Assistant Attorney General Hessel Yntema. The Court finally heard arguments on Petitioner's Application for a Writ of Habeas Corpus. Based on a review of the filings, oral arguments, and applicable law, the Court makes the following decision.

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II. BACKGROUND

Romeo Aquino Saimon ("Petitioner")[1] is charged with two (2) counts of sexual assault in the second degree under 6 CMC § 1302(a)(3) and § 1461. *Commonwealth v. Joseph Saimon, et al.*, NMI Superior Court Criminal Case No. 18-0066. Specifically, Petitioner and three other family members (Christopher Saimon, Joseph Saimon, and Richmond Keyboard) stand accused of gang-raping Joseph Saimon's girlfriend while she was intoxicated and/or incapacitated on June 24 and 25, 2018. *Id*. Petitioner was arrested on June 26, 2018. On June 28, 2018, Associate Judge Wesley Bogdan set the initial bail for Petitioner at $50,000.00. The following day, a bail hearing was held before Associate Judge Joseph Camacho. Associate Judge Camacho found the Petitioner indigent, set a preliminary hearing date, and issued a supplemental bail order keeping the bail at $50,000.00. During another hearing before Associate Judge Camacho on July 10, 2018, Petitioner waived his preliminary hearing.

On August 15, 2018, Petitioner filed a Motion for Detention Revocation requesting that Petitioner be released to a third-party custodian. Additionally, Petitioner filed an Application to Modify Bail, arguing that bail amount was too high given Petitioner's indigent status. Associate Judge Teresa Kim-Tenorio heard brief arguments on the issue on August 28, 2018, and denied Petitioner's motion and application from the bench.

Petitioner filed an Application for a Writ of Habeas Corpus ostensibly challenging all of his bail orders on September 17, 2018. In the Application, Petitioner argues that the Superior Court's bail procedures deprived Petitioner of his Fifth and Fourteenth Amendment Due Process and Equal Protection rights. Additionally, Petitioner alleges that the entire CNMI Superior Court bail system is unconstitutional and Superior Court does not use the safeguards necessary to protect indigent defendants for the last seventeen (17) years. *Petitioner's Brief* at 15. The Commonwealth filed its

[1] For clarity, the Court will refer to Mr. Romeo A. Saimon as the "Petitioner" throughout this order, even when referring to him in the context of the underlying criminal case, where he is a defendant.

Reply on October 23, 2018. Petitioner responded to the Commonwealth's arguments on November 9, 2018. Finally, the Commonwealth filed a Sur Reply on December 4, 2018.

Before the Court addresses the parties' arguments, a brief discussion of the judicial assignment history of this case is necessary given the appellate nature of habeas corpus. The matter was initially assigned to Associate Judge Kim-Tenorio, but she immediately self-recused as she is presiding over the underlying criminal case. *Commonwealth v. Saimon*, Civil No. 18-0409 (NMI Super Ct. Sept 25, 2018) (Associate Judge Kim-Tenorio's Order of Self-Recusal). On October 1, 2018, Presiding Judge Roberto Naraja issued an Order to Show Cause, but then assigned the case to Associate Judge Camacho on October 23, 2018. On November 27, 2018, Associate Judge Camacho held a hearing on the matter where the parties raised scheduling, procedural, and conflict issues regarding Associate Judge Camacho's previous involvement with the bail process in question.[2, 3] Following the hearing, the Commonwealth filed a Motion to Recuse or Disqualify Associate Judge Camacho from the case, raising the same conflict issues that were raised at the November 27, 2018, hearing.[4] On December 4, 2018, Associate Judge Camacho recused himself from the matter.[5] Presiding Judge Naraja then assigned the case to Associate Judge Govendo on December 6, 2018.

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[2] At the November 27, 2018 hearing, the Commonwealth expressed concern over Associate Judge Camacho's ability to hear the case due to the fact that Associate Judge Camacho held a bail hearing with Petitioner on July 9, 2018. The Commonwealth argued that Petitioner was in fact challenging all the bail orders (Associate Judge Bogdan's, Associate Judge Camacho's, and Associate Judge Kim-Tenorio's bail orders), in the underlying criminal case, while Associate Judge Camacho was under the impression that Petitioner was only challenging Associate Judge Kim-Tenorio's August 28, 2018 bail order. Petitioner was apparently unaware of this issue but chose to adopt the Commonwealth's concerns. Petitioner then refused to waive any objection on the issue going forward. It should be noted that Petitioner's Application and Brief are rather unclear regarding which specific bail order is actually being challenged, thus it is assumed that all are being challenged.

[3] Petitioner also made the Court aware that Petitioner has been incarcerated for one hundred seventy-four (174) days as of the date of the issuance of this order.

[4] The Commonwealth notes that "[h]abeas review is different from a pretrial criminal hearing because it is much more in the nature of a direct appeal." *Commonwealth's Motion* at 8-9 (citing *Fowler v. Butts*, 829 F.3d 788, 790 (7th Cir. 2016) (holding that "[a] federal judge always is disqualified from hearing a collateral attack on judgment he or she entered or affirmed as a state judge.").

[5] "I am persuaded by the Office of the Attorney General's well written and researched Motion to Recuse or Disqualify. A judge entertaining a habeas petition that challenges his or her decisions made in a criminal case can appear to be sitting in 'appellate review' over his or her own ruling, therefore to avoid any conflict, the undersigned recuses from the above matter." *Saimon v. CNMI, et al.*, Civ. No. 18-0409 (NMI Super. Ct. Dec. 4, 2018) (Associate Judge Camacho's Order of Self-Recusal at 1).

III. DISCUSSION

There are multiple procedural hurdles that a petitioner must overcome before a court can actually reach the merits of an application for a writ of habeas corpus. The habeas corpus statute in the Commonwealth Code, while bare and lacking detail, provides some procedural guidance. The Court will look to the Antiterrorism and Effective Death Penalty Act of 1992 ("AEDPA")[6], established federal case law, and relevant Commonwealth case law to fill in the gaps and provide procedural clarity.

To file an application for a writ of habeas corpus, Petitioner must be in custody. 6 CMC § 7101. Here, there is no question that Petitioner is in custody. Under AEDPA, a habeas petitioner has a one (1) year statute of limitations to file an application. 28 U.S.C. § 2244(d)(1). The Commonwealth Code contains nothing that suggests a statute of limitations exists for habeas claims. Regardless, the issue is moot because Petitioner filed his application well within the one (1) year time limit under AEDPA. *Id.*[7] A habeas petitioner must bring a Constitutional claim in his or her application.[8] Here, Petitioner claims that the original courts failed to respect Petitioner's Fifth and Fourteenth Amendment Due Process and Equal Protection Rights, respectively. *Application* at 8. A habeas petitioner must also raise all issues at the original court that s/he wishes to raise before a habeas court. Otherwise, a petitioner will procedurally default on those issues and will be barred from raising them before the habeas court. *Wainwright v Sykes*, 433 U.S. 72, 86-87 (1977); *see also Amadeo v. Zant*, 486 U.S. 214, 221-23 (1988). After reviewing the record and transcript, Petitioner appropriately raised the issues at the original court that Petitioner raises at this level.

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[6] AEDPA's purpose is to severely limit the ability of state prisoners to obtain habeas corpus relief following the 1995 Oklahoma City Federal Building bombing. John H. Blume, *AEDPA: The Hype and the Bite*, 91 CORNELL L. REV. 259, 270 (2006).

[7] The last of the alleged offending bail hearings and orders occurred on August 28, 2018. Petitioner filed his application on September 17, 2018.

[8] A petitioner cannot bring a Fourth Amendment illegal search and seizure claim. *Stone v. Powell*, 428 U.S. 465, 494-95 (1976). However, a petitioner can bring a claim that involves *Miranda* rights. *Withrow v. Williams*, 507 U.S. 680, 694-95 (1993).

A. The Application of the Exhaustion Doctrine to the CNMI

One of the last major procedural hurdles that Petitioner must clear is the doctrine of exhaustion. Put simply, the exhaustion doctrine and its application in the CNMI is a gatekeeping issue. The Court cannot discuss the legality and nature of Petitioner's pre-trial detention process until the Court determines exactly how to apply exhaustion to the CNMI. Petitioner contends that the exhaustion doctrine does not apply here due to the lack of CNMI specific law. Petitioner states: "neither the Habeas Corpus statute nor the case law requires Romeo to file for reconsideration or appeal, or both." *Petitioner's Reply* at 6. Petitioner acknowledges that federally, a habeas applicant must exhaust all remedies before seeking habeas relief. *Id.* at 7. Further, Petitioner also acknowledges the *Appleby* decision, but contends that the decision only applies to cases that originate from the parole board, thus dealing only with administrative appeals. *Id.* at 6. Additionally, Petitioner states that "[t]he Habeas Corpus statute does not require an applicant to file an appeal unless the application is denied. *See* 6 CMC § 7109." *Id.* at 3. Petitioner contends that "[w]hat the government misses is that Romeo is not seeking to file in federal Court – he is filing here with the CNMI Court." *Id*. The Commonwealth responds that that exhaustion doctrine fully applies to the CNMI: "Commonwealth courts have repeatedly required exhaustion of remedies at law prior to entertaining petitions for writs of habeas corpus collaterally attacking confinement in criminal cases. Commonwealth's Sur Reply at 1." Additionally, the Commonwealth points to numerous federal cases that support their argument.

The exhaustion doctrine is a purely federal creation initially brought about by the United States Supreme Court. *Ex parte Royall*, 117 U.S. 241, 251 (1886); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842-43 (1999); *Stack v. Boyle*, 342 U.S. 1, 6-7 (1951) (holding relief on a habeas corpus petition collaterally attacking excessive bail was inappropriate when there was an adequate

unexhausted remedy in the criminal proceeding).[9] Although, the Supreme Court case law has since been superseded by 28 U.S.C. § 2254(b)(1)-(c), which codified the exhaustion doctrine.

In the CNMI, there is no statute that specifically applies the exhaustion doctrine. However, the Commonwealth Supreme Court previously held that when challenging a parole board decision, all other remedies must be exhausted before a habeas petition may be heard. *Commonwealth v. Appleby*, 2007 MP 19 ¶ 9 (citing *United States ex rel. Sanders v Arnold*, 535 F.2d 848, 850 (3rd Cir. 1976)). The *Appleby*[10] decision does not appear to apply the exhaustion doctrine wholesale, thus the need for the Court to determine how it applies here. The exhaustion doctrine has been strictly applied to other writs in the CNMI by the Supreme Court: "[i]t is virtually a universal rule that a petition for a writ cannot be a substitute for an appeal at law." *Tudela v. CNMI Superior Court*, 2006 MP 7, p. 7 (holding that a writ of mandamus is not appropriate when there are other remedies available). Despite these cases, there is no specific case that fully applies exhaustion to CNMI habeas cases outside of the parole board situation. Although, the mere existence of *Appleby* and *Tudela* strongly suggest that exhaustion should applied by natural extension.

The federal application applies when a petitioner is making the jump from the state level to the federal level, which is not analogous to the situation presented here. 28 U.S.C. § 2254(c). However, there are clear reasons why the Federal Courts and the United States Congress would want the proceedings at the state level to be concluded; these reasons also have application in the CNMI. The United States Supreme Court felt that exhaustion was necessary to "prevent disruption of state judicial proceedings and interlocutory appeals." *Rose v. Lundy*, 455 U.S. 509, 518 (1982) (citing *United States ex rel. Kennedy v. Tyler*, 269 U.S. 13, 17-19 (1925)).

[9] "Codified since 1948 in 28 U.S.C. § 2254, the exhaustion rule, while not a jurisdictional requirement, *Granberry v. Greer*, 481 U.S. 129 (1987), creates a 'strong presumption in favor of requiring the prisoner to pursue his available state remedies.' *Id*., at 131; see also *Rose v. Lundy*, supra, at 515 ('[S]tate remedies must be exhausted except in unusual circumstances')." *Castile v. Peoples*, 489 U.S. 346, 349 (1989).

[10] "Prior to challenging a parole decision by seeking habeas corpus relief, a defendant must exhaust all available administrative remedies." *Appleby*, at ¶ 9 (citing *United States ex rel. Sanders v Arnold*, 535 F.2d 848, 850 (3rd Cir. 1976)).

Specifically, the Supreme Court stated that the exhaustion doctrine protects the state court's role in the enforcement of federal law, prevents the disruption of state judicial proceedings, and minimizes friction between federal and state systems of justice by allowing the State the first opportunity to address alleged violations of prisoners' federal rights. *Rose*, at 518 (citing *Duckworth v. Serrano*, 454 U.S. 1, 2 (1981)(*per curiam*). Finally, the Supreme Court also noted that exhaustion helps to create a complete factual record for federal review. *Rose*, at 519. It should additionally be noted that the federal application of the exhaustion doctrine is exceptionally strict: "Title 28 U.S.C. § 2254 (c) provides that a claim shall not be deemed exhausted so long as a petitioner 'has the right under the law of the State to raise, by *any available procedure*, the question presented.'" *Castille v. Peoples*, 489 U.S. 346, 350 (1989) (emphasis added).

Thus, following a review of the relevant case law and information above, the Court will apply the strict federal application of the exhaustion doctrine to this case. Petitioner's arguments are simply not in line with the applicable law. It is clear that habeas corpus relief is an "extraordinary remedy" that should be reserved until every other path has been exhausted. *Appleby*, at ¶ 9; *Camacho v. Tenorio*, Civ. No. 08-183 (N.M.I. Super Ct. Aug. 12, 2009) (Amended Order: Denying Writ of Habeas Corpus at 3). Further, it is appropriate to align the CNMI with applicable federal case law and statute. 28 U.S.C. § 2254(c); *Ex parte Royall*, 117 U.S. 241, 251 (1886); *Stack v. Boyle*, 342 U.S. 1, 6-7 (1951); *Castille v. Peoples*, 489 U.S. 346, 350 (1989); *Rose v. Lundy*, 455 U.S. 509, 515 (1982); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842-43 (1999).

The Court particularly finds the points made by the Supreme Court in *Rose v. Lundy* applicable and relevant to the CNMI. The Court believes it necessary to prevent the disruption of the original court's judicial proceedings and to minimize any potential procedural friction. *Rose*, at

515.[11] To this point, the Court realizes that it is possible that a petitioner in a similar situation could file both an application for a writ of habeas corpus and file for a motion to reconsider or an appeal to the Commonwealth Supreme Court challenging the detention. Such a move would in effect be forum shopping and would clog up the Commonwealth courts with different actions all trying to accomplish the same outcome. In general, interlocutory appeals are prohibited, except in particular circumstances. *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1707 (2017); *CNMI v. Blas*, 2007 MP 17 ¶ 9 n.3.[12] An interlocutory appeal in a habeas case would particularly muddy the waters of a matter that is supposed to be as clear and procedurally straightforward as possible. *See Rose*, at 515. The Court is also keen to make sure that by exhausting all previous remedies, a petitioner comes to the habeas proceedings with a full and developed factual and procedural record. *See Id*.

Finally, the relevant CNMI cases provide a strong indication that exhaustion should be fully and strictly applied in the CNMI. *Appleby*, at ¶ 9; *Tudela* at p. 7. Again, while these cases are not precisely on point, they present an incredibly strong presumption in favor of fully extending the exhaustion doctrine. This presumption cannot be ignored. Thus, to prevent unnecessary procedural confusion and friction, the Court will apply and enforce the strict federal application of the exhaustion doctrine and naturally extend previous CNMI case law to all habeas cases.[13]

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[11] *See also Ex Parte Hawk*, 321 U.S. 114, 117 (1944); *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 490-91 (1973); *Darr v. Burford*, 339 U.S. 200, 204 (1950).

[12] "The collateral order doctrine is an exception to the final judgment rule, which is confined to limited circumstances." *Pacific Amusement, Inc. v. Villanueva*, 2005 MP 11 ¶ 18. "To fall within the doctrine, the appealed order must: "(1) have conclusively determined the disputed questions; (2) have resolved an important issue completely separate from the merits of the action; and (3) be effectively unreviewable on appeal from a final judgment." *Blas*, ¶ 9 n.3 (citing *Commonwealth v. Hasinto*, 1 NMI 377, 384 n.6 (1990)).

[13] A second petition for a writ of habeas corpus is allowed after a petitioner failed to exhaust his remedies on his first petition. *Slack v. McDaniel*, 529 U.S. 473, 487 (2000) (holding that the second petition was not successive, stressing that the exhaustion rule is not a trap to the unwary pro se petitioner); *see also Felker v. Turpin*, 518 U.S. 651, 656-57 (1996) (holding that 28 U.S.C. § 2244(b) prevents a successive habeas petition unless a few specific circumstances are met). The specific circumstances are presented in 28 U.S.C. § 2244(b).

B. The Exhaustion Doctrine as Applied to Petitioner

Since the Court decided that the exhaustion doctrine applies strictly, it must now determine whether or not Petitioner exhausted any and all procedures available to a habeas applicant. *Castille*, at 350. The Commonwealth specifically argues that Petitioner failed to exhaust all remedies available before filing an application for a writ of habeas corpus; thus, Petitioner's application should be dismissed. *Commonwealth's Return* at 4. First, the Commonwealth points out that Petitioner should have filed a motion to reconsider the bail order. *Id*. Second, the Commonwealth states that Petitioner should have filed an appeal to the Commonwealth Supreme Court. *Id*. Thus, completion of both these appeals would fully satisfy the exhaustion doctrine. *Id*. The Commonwealth noted that the Commonwealth "Supreme Court has jurisdiction over the appeal of a trial court order denying a motion to modify bail conditions of release pursuant to the collateral order doctrine." *Id.* (citing *Commonwealth v. Camacho*, 2002 MP 14 ¶ 1 n.1). Petitioner counters that even if the doctrine of exhaustion is applied, Petitioner met the burden of exhaustion. *Id*. Petitioner believes that his motion to revoke detention and Petitioner's verbal objection on the record at the August 28, 2018, hearing, and his further verbal objection at the October 9, 2018, status conference satisfied the exhaustion requirement. *Id*.

After review of the parties' arguments, the record, and the procedural posture of the case, it is clear that Petitioner failed to exhaust *all procedures and potential remedies* before filing an application for a writ of habeas corpus. Therefore, Petitioner application must be denied without prejudice.[14] Below, the Court will present the different paths that Petitioner failed to attempt. The Court would like to note that all of the options listed and explained below should have been explored by Petitioner first before Petitioner applied for a writ of habeas corpus. *Castille*, at 350.

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[14] A second petition for a writ of habeas corpus is allowed after a petitioner failed to exhaust his remedies on his first petition, thus the Court cannot and will not dismiss the application with prejudice. *Slack*, 529 U.S. at 487.

Petitioner failed to file an appeal of his bail orders directly to the Commonwealth Supreme Court. The Commonwealth Supreme Court clearly considers a bail order a final decision that is ripe for appeal:

> We have jurisdiction over final judgments and orders of the Superior Court. *Commonwealth v. Hasinto*, 1 N.M.I. 377, 384-85 (1990); 1 CMC § 3102(a). Bail orders are not final judgments, however, an exception to the requirement of finality is the collateral order doctrine. [15]

Commonwealth v. Camacho, 2002 MP 14 ¶ 1 n.1. The Commonwealth Supreme Court then analyzed a bail order in the context of the collateral order doctrine:

> We find that the denial of bail in this case is subject to the collateral order doctrine. First, the trial court's ruling on the issue of bail constitutes a complete, formal and final rejection of a criminal defendant's claimed right; thereby satisfying the first prong of the test. Second, the very nature of a bail decision is such that it is collateral to, and separate from the guilt or innocence of an accused. Finally, the question of a bail order for the time period between verdict and sentence is such that it would become moot if review awaited an appeal of the entire case.

Id. It is clear that Petitioner was presented with an opportunity to appeal a final judgment in the form of a bail order. Unfortunately for Petitioner, he was unable to recognize the opportunity: "[h]ere, Romeo has not been convicted, there is no final judgment to appeal from, there is nothing to appeal from . . ." *Petitioner's Brief* at 3.[16] Petitioner is simply incorrect and clearly does not

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[15] The collateral order doctrine holds that:

> An interlocutory order warrants immediate appeal when: [1] the order constitutes a complete, formal, and in trial court, final rejection of the claim the order addresses. [2] . . . the claim is . . . collateral to, and separable from the principle issue . . . whether or not the accused is guilty of the offense charged. [and] [3] The order involved rights . . . that would be significantly undermined if appellate review . . . were postponed until after conviction and sentence.

Camacho, at ¶ 1 (citing United *States v. Harper*, 729 F.2d 1216, 1220 (9th Cir. 1984); *Hasinto*, at 384 n.6.

[16] The Court would like to remind the Petitioner that a direct appeal of a bail order to the Supreme Court would have likely given Petitioner a quick decision on the merits of his claim due to the pretrial nature of Petitioner's detention. Further, Petitioner would have avoided the difficult habeas procedural hurdles that are preventing the Court from reaching the substantive issues.

realize that a bail order creates a sufficient appealable record.[17] Therefore, Petitioner neglected to pursue a readily available remedy.

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Petitioner failed to file a motion to reconsider the original court's decision to deny Petitioner's Motion for Detention Revocation. While there is no explicit motion to reconsider in the CNMI Rules of Criminal Procedure, the Commonwealth Supreme Court previously held that the standard for a motion to reconsider in a criminal case is equivalent to Rule 59(e) of the Commonwealth Rules of Civil Procedure: "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Commonwealth v. Eguia*, 2008 MP 17 ¶ 7. It should be noted that reconsideration of a court's order or judgment under Rule 59(e) is an extraordinary remedy and the moving party must meet an "exceedingly difficult" burden to obtain relief. *See Soto-Padro v. Public Bldgs. Auth*., 675 F.3d 1, 9 (1st Cir. 2012). Additionally, Commonwealth law favors the finality of court decisions to "maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." *Cushnie v. Arriola*, 2000 MP 7 ¶ 6; (citing 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE: JURISDICTION § 4478 (1981)). Accordingly, it is the general practice of the court "to refuse to reopen what has been decided." *Id*. Despite this mountainous bar, the strict application of the exhaustion doctrine requires that any and all available procedures must be exhausted. *Castille*, 489 U.S. at 350. Thus, by choosing to not file a motion to reconsider, Petitioner again left a readily available procedure unexhausted.

Additionally, the Court would like to note a third option that Petitioner did not attempt in a timely manner. The Commonwealth Rules of Criminal Procedure Rule 46 allow a defendant to

[17] At the December 13, 2018 hearing, Petitioner repeatedly argued that directly appealing a bail order to the Supreme Court would not help Petitioner because a bail order does not create an adequate appealable record. Instead, Petitioner felt that pursuing a writ of habeas corpus first would create the adequate appealable record that Petitioner desires. The Petitioner 's understanding of the process is backwards of what it should be.

request a review of the bail conditions imposed twenty-four (24) hours after his/her initial release hearing. Specifically, Rule 46(A)(4) states:

> A person for who conditions of release are imposed and who after 24 hours from the time of the release hearing continues to be detained as a result of his/her inability to meet the conditions of release, shall, upon application, be entitled to have the conditions reviewed by the judge who imposed them.

Com. R. Crim. P. 46(a)(4). For unknown reasons, Petitioner again failed to take advantage of this provision and challenge any of the bail orders (June 28, 2018 or July 10, 2018) until August 15, 2018. The Court is not suggesting that this Petitioner or any other petitioner continually file an overly excessive amount of Rule 46(A)(4) applications. However, Petitioner should have at minimum made one or two timely attempts under Rule 46(A)(4) to rectify the alleged injustices suffered by Petitioner.

The Court would like to address one more argument that Petitioner made verbally at the December 13, 2018 hearing. Petitioner argues that in the habeas context, a petitioner who has been incarcerated for over six (6) months without a constitutionally adequate bail hearing will have suffered irreparable harm and should be released.[18] See *Arevalo v. Hennessy*, 882 F.3d 763, 766-67 (9th Cir. 2018). On the face of the issue, Petitioner is absolutely correct. However, Petitioner again does not recognize the underlying procedural requirements. The petitioner in *Arevalo* was required to and did "properly exhaust his state remedies as to his bail hearing." *Id*. at 767.[19] Contrary to Petitioner's assertion, even a petitioner who suffered irreparable harm due to unconstitutional pretrial detention must exhaust his/her remedies before applying for a habeas writ. Thus, Petitioner's irreparable harm argument fails.

It is clear that Petitioner did not exhaust all available procedures before filing for a writ of habeas corpus. Petitioner's verbal objections at the August 28, 2018, and October 9, 2018, hearings

[18] At the time of the issuance of this order, petitioner has been one hundred seventy-one (174) days, just under six (6) months.

[19] The petitioner "filed two motions with the superior court, a habeas petition with the California Court of Appeal, and a petition for a writ of habeas corpus with the California Supreme Court, each of which was denied." *Id*.

are woefully insufficient given high bar that the exhaustion doctrine sets. The Court would like to remind Petitioner that a writ of habeas corpus is an extraordinary and rare remedy.[20] *Appleby*, at ¶ 9; *Camacho v. Tenorio*, Civ. No. 08-183 (NMI Super. Ct. Aug. 12, 2009) (Amended Order: Denying Writ of Habeas Corpus at 3). It then makes sense that a petitioner must try everything else before attempting what is essentially an avenue of last resort. Therefore, due to the fact that Petitioner failed to exhaust all remedies available before choosing to pursue a writ of habeas corpus, the Court is unable to reach the merits of Petitioner's application or any of the other arguments.

V. CONCLUSION

For the foregoing reasons, Petitioner's Application for a Writ of Habeas Corpus is **DENIED** without prejudice.

IT IS SO ORDERED this 17th day of December, 2018.

/s/
Kenneth L. Govendo, Associate Judge

[20] See Lee, JoAnn (2006) "An Empirical Analysis of Habeas Corpus: The Impact of Teague v. Lane and the Anti-Terrorism and Death Penalty Act on Habeas Petition Success Rates and Judicial Efficiency," CORNELL J.L. & PUB. POL'Y. Vol. 15: Iss., 3, Article 5.