

# *Nevada District Attorneys Association*



August 8<sup>th</sup>, 2022

Chair Scheible and Members of the Interim Judiciary Committee,

As the Interim Judiciary Committee considers recommendations for legislative action next session, we are writing to stress the importance of addressing problems arising from the passage of AB 424 and SB 369. As heard at the May 13<sup>th</sup>, 2022, meeting, local jurisdictions have worked diligently to enact the bail reform statutes passed last session. The Nevada District Attorneys Association, comprised of the 17 elected District Attorneys throughout Nevada, have been implementing the new bail statutes for at least the last month and many jurisdictions began implementation prior to the July 1<sup>st</sup>, 2022, effective date of AB 424. The concerns outlined in this letter are the product of conversations with district attorneys, city attorneys, judicial officers, court personnel and others throughout the State. Despite good-faith efforts of compliance, issues have arisen that necessitate legislative intervention. These issues primarily revolve around three main areas: 1)Timing, 2)Authority of a Court to hold someone without bail, and 3)Consistent and clear language.

## **I. Timing**

The goal of a prompt release determination must be balanced against the need for a thorough investigation, both by law enforcement before arrest and by prosecutors prior to the release hearing. Additionally, a prompt release determination must allow for a reasonable opportunity for victims of crime to be heard by the court when addressing bail and conditions of release. While these competing interests have always been at odds with each other, the conflicts have increased with the passage of the bail bills last summer. Prosecutors are tasked with a high burden of proof, but little time to adequately prepare and investigate prior to the hearing, much less seek meaningful victim input. This leads to uninformed release decisions and the potential to put the public at greater risk. The timing required for a detention hearing pursuant to the Federal Bail Reform Act and outlined in 18 U.S.C.A. § 3142(f) is very instructive.

The Act does not equate “prompt” or “immediate” with 48 hours. In fact, the Act requires that a detention hearing be held “immediately upon the person’s first appearance” and allows a 3-day delay of the detention hearing upon motion by the government. Additional continuances are allowed for good cause. In our jurisdiction, the Nevada Rules of Criminal Practice, adopted by the Nevada Supreme Court, specifically states in Rule 4, section 2(b) that the adversarial detention hearing shall be conducted in three days. While most jurisdictions require an initial detention hearing within a narrower window of time, few require a judicial finding of clear and convincing evidence after only 48 hours.

In addition to the burden on prosecuting agencies, the expedited time frames are causing staffing issues throughout Nevada. There are 17 DA’s offices covering 38 Justice Courts in Nevada – most of these offices and courts are rural, and some with only one prosecutor, one justice of the peace and few court personnel. While the Clark County DA’s office and the Las Vegas Justice Court have employees devoted to implementing AB 424, other jurisdictions do not have the money or personnel to properly staff these hearings going forward. Each day presents an additional burden on these agencies.

We are hoping you will consider the following recommendations around timing as you consider pretrial release:

1. Move the release hearing requirement from 48 hours to 72 hours.
2. Calculate the required time from the time of booking, instead of the time of arrest.
3. Exclude holidays from the computation of time.
4. The Court, the Prosecuting Attorney, Law Enforcement, Defense, or any involved party should be able to request a continuance of the release hearing. Specifying in statute what entity may seek a continuance and in what circumstances a continuance may be sought will help reduce the inconsistent application of the bail continuance statute. Reasons for a continuance should include, but not be limited to:
  - a. Continuances to give meaningful opportunity to contact the victim, or to allow a victim to express his or her wishes to the court or prosecutor.
  - b. Time for more investigation. Even after an arrest there are active, ongoing investigations. Law enforcement may need more time to investigate all aspects of the crime.
  - c. Situations in which there is a legitimate and significant question about Defendant’s criminal history.
5. Allow a Justice of the Peace or Municipal Court Judge to sit for each other. Currently, the Statute allows for Justices of the Peace to combine calendars. Allowing both will provide extra flexibility among certain local and county jurisdictions.

## **II. Authority to hold without bail**

First, if the Prosecuting Attorney proves by clear and convincing evidence that a person is a significant risk to reoffend, a danger to the victim, or has a high likelihood to not always appear in court, then a Judge should have the option to hold a defendant without bail. Currently, judges set unobtainable bails in those situations. We are asking for provisions like those in the Federal Bail Reform Act, which allow a judge to hold a defendant without bail. As long as a clear and convincing standard has been met, courts have consistently upheld the practice of holding defendants without bail.

Second, under current law, if a person commits a new felony while out on either bail or a suspended sentence, then a court may hold that person without bail pending a hearing in front of the earlier court. We propose to add cases of domestic violence, violation of protective order, and DUI to that list. If a person is pending a suspended sentence or release condition and picks up a new DUI, protective order violation, or DV, then the State should be able to hold them without bail.

## **III. Consistent and Clear Language**

In addition to the requests above, we have discovered a few other issues in statute that need to be addressed to help with clarity and consistency of application. They include:

1. The term 'Release Condition' and 'Bail' are used throughout the NRS but are not interchangeable. A consistent term needs to be used throughout the bail statutes.
2. The bail statutes are silent on what happens when a defendant refuses to come to court, would like to waive their right to a hearing, or otherwise refuses to participate in the pretrial release hearing. Courts will not address bail without the defendant's presence. The Statute should clarify that a court has the authority to hold a defendant without bail or the authority to alter bail if a person refuses to attend or participate in the release hearing. This power should continue until the persons presence in court can be secured. Additionally, the statute should allow a defendant to waive the hearing altogether.
3. A person against whom a bench warrant or arrest warrant has been issued is in an entirely different position than a person who has been arrested based on probable cause. We seek to clarify that those arrested on a bench warrant or arrest warrant are not entitled to a hearing within 48 hours.
4. Specify that a person may not re-litigate the question of bail once a Valdez hearing is held unless there have been changed circumstances and the subsequent request is in writing. Rule 8, Section 7, of the Nevada Rules of Criminal Practice, which govern the District Courts, prohibits a motion

once heard and disposed of from being renewed unless there is a showing of changed circumstances. Rule 5, section 3, states that all motions to change the defendant's pretrial detention status following the defendant's initial post-arrest individualized detention determination shall be in writing. We seek to impose these rules on Justice and Municipal Court matters as well.

We are always happy to continue dialogue with you on this important issue. If you would like to further discuss these important issues, we will make ourselves available to you at your convenience.

Sincerely,

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