

## **Second proposal**

### **Rule 8 Pretrial Motions**

#### **(h) Motions regarding pre-trial confinement or release.**

- i. Standard: Every arrestee who is not released on his own recognizance must be immediately brought before a neutral magistrate for a counseled, adversarial, detention hearing within 12 hours following arrest.
- ii. Oral Motions: Any arrestee not afforded a detention hearing as proscribed by subsection (i) shall be allowed to make an oral request for release or for a detention hearing.
- iii. Written Motions: All other pre-trial confinement or release motions must be in writing.
- iv. In all motions and at all detention hearings the State shall bear the burden of demonstrating, by clear and convincing evidence, that pre-trial detention is the least restrictive means of ensuring an arrestee's return to court and/or community safety before any order resulting in pre-trial confinement may issue.

*Proposal submitted by the Clark County Public Defender's Office*

*Chief Deputy Nancy Lemcke and Chief Deputy Sharon Dickinson*

## **SUMMARY:**

NRS 178.484 – If a person is not released on their own recognizance after an arrest, the Legislature requires bail to be set upon arrest or no more than 12 hours after arrest.

## **AUTHORITIES:**

In *Valdez-Jimenez v. Eighth Judicial District Court*, 460 P.3d 976, 980 (Nev. 2020), the Court held that: “[a] defendant who remains in custody following arrest is constitutionally entitled to a prompt individualized determination on his or her pretrial custody status.” *Id.* at 980 (emphasis added). The Court came to this reasoning, noting that: “[b]ecause of the important liberty interest at stake when bail has the effect of detaining an individual pending trial, we hold that a defendant who remains in custody after arrest is entitled to an individualized hearing at which the State must prove by clear and convincing evidence that bail, rather than less restrictive conditions, is necessary to ensure the defendant’s future court proceedings or to protect the safety of the community...” *Id.* at 988.

The unanswered question in *Valdez-Jimenez* is: what is the time frame for a “prompt” bail hearing?

The answer to that question can be found in an analysis of the Nevada Constitution, NRS 178.484, NRS 171.178 and NRS 173.195.

The Nevada Constitution provides that: “**All persons shall be bailable** by sufficient sureties; unless for Capital Offenses or murders punishable by life imprisonment without possibility of parole when the proof is evident or the presumption is great.” Nev. Const. art 1, sec. 7 (emphasis added). Excessive amounts of bail are prohibited. Nev. Const. art. 1, sec. 6.

Because the Nevada Constitution favors releasing a person upon arrest, rather than keeping them detained, the Legislature enacted NRS 178.4851 which provides that: “[A] court may release without bail any person entitled to bail if it appears to the court that it can impose conditions on the person that will adequately protect the health, safety and welfare of the community and ensure that the person will appear at all times and places ordered by the court.” NRS 178.4851.

In that bail may be considered as a requirement for an arrestee’s release, the Legislature followed the Nevada Constitution’s mandates by saying: “Except as otherwise provided in this section, **a person arrested** for an offense other than murder of the first degree **must be admitted to bail.**” NRS 178.484(1)(emphasis added). The Legislature also allowed those arrested for murder in the first degree to be released under bail in certain circumstances. NRS 178.484(4).

Hence, the Nevada Constitution and the Nevada Revised Statutes require a prompt release of an arrestee from custody through an own recognizance release or by bail.

NRS 178.484, NRS 171.178 and NRS 173.195 explain the time frame for a prompt bail hearing. The answer is one of statutory construction.

As noted previously, NRS 178.484(1) states: “Except as otherwise provided in this section, a person arrested for an offense other than murder of the first degree must be admitted to bail.”

The plain meaning of the words within NRS 178.484(1) indicate a bail decision must occur promptly or immediately. When a statute’s language is plain and unambiguous, Court may not look beyond the statute for a different meaning. *DeStefano v. Berkus*, 121 Nev. 627, 630 (2005); *Nay v. State*, 123 Nev. 326, 331 (2007).

Not only does the plain meaning of the words in NRS 178.484(1) indicated that bail must be promptly and immediately decided, a review of the exceptions to NRS 178.484(1) further support this conclusion. Notable, the Legislature included **some time frames for when bail must be given** within the exceptions. The exceptions include:

- Arrest for a new felony crime while on probation or parole or under certain types of suspended sentences.
- Arrest for a new felony whose prior sentence was suspended by NRS 4.373 or 5.055 or 4.3763 or 5.076.
- Arrested for a certain DUI crimes – release on bail depends on concentration of alcohol
- Arrest for certain DUI crimes involving a controlled substance – no bail or release sooner than 12 hours after arrest
- Arrest for BADV – no bail sooner than 12 hours after arrest
- Arrest for violation of a TPO – no bail prior to 12 hours after arrest

It is significant that the Legislature decided that those arrested for BADV or some DUI cases may not be released prior to 12 hours, thereby allowing for a cooling down period, but did not do so for other crimes. Thus, the Legislature intended for those convicted of other crimes to be eligible for immediate release.

By omitting a time period in NRS 178.484(1) but including some timeframes in the exceptions, the Legislature indicated that bail under NRS 178.484(1) must be set immediately or in less than 12 hours. This interpretation comports with statutory construction analysis because “a statute should be read to give plain meaning to all of its parts.” *Gaines v. State*, 116 Nev. 359, 365 (2000).

Also, the fact that the Legislature expressed specific time frames for the issuance of bail in some instances and not in NRS 178.484(1) indicates that the Legislature

intended the time frame for the issuance of bail NRS 178.484(1) to be less than the other time periods or to be immediate upon arrest. “[E]xpressio unius est exclusio alterius,” expression of one thing is the exclusion of another.” *State v. Javier C.*, 289 P.3d 1194, 1197 (Nev. 2012) *citing Cramer v. State, DMV*, 240 P.3d 8, 12 (Nev. 2010).

Accordingly, because the Legislature did not include a time frame within the first sentence of NRS 178.484(1) as it did in the exceptions, the Legislature meant for bail to be given “promptly” and “immediately” upon arrest. And this is what the courts were doing prior to the issuance of *Valdez-Jimenez* by placing an automatic standard bail amount on a person when arrested.

NRS 171.178 also helps explain the time frame for the setting of bail. NRS 171.178 requires a person arrested be brought to a magistrate within 72 hours for a probable cause determination. As we know the 72 hour time frame was changed to 48 hours in *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) (arrestee must be promptly brought before a magistrate within 48 hours for a judicial determination of probable cause when a person is arrested without a warrant). But NRS 171.178 is important for determining the time frame for a prompt judicial determination of bail. Because the Legislature place a time frame for a probable cause hearing in NRS 171.178 (72 hours) but did not do so in NRS 178.484(1), the Legislature meant that bail, or a release on own recognizance, must be determined immediately upon arrest.

The Nevada Supreme Court presumes that when enacting legislation, Legislature does so “with full knowledge of existing statutes relating to the same subject.” *DeStefano v. Berkus*, 121 Nev. 627, 631 (2005) *quoting State Farm*, 116 Nev. 290, 295 (2000) *quoting City of Boulder v. General Sales Drivers*, 101 Nev. 117, 118-19 (1985). Thus, by not placing a time frame in NRS 178.484(1), the Legislative indicated that bail must be set immediately or promptly upon arrest – not 72 or 48 hours later at the time of a probable cause hearing as in NRS 171.178.

NRS 173.195 further indicates bail must be set immediately. NRS 173.195 states that upon executing a warrant, an officer “shall bring the arrested person promptly before the court or, for the purpose of admission of bail, before the magistrate.” Thus, again, the Legislature wants bail to be decided promptly or immediately even if a person is arrested based on warrant after a return of a grand jury Indictment.

Based on the above, an arrestee is entitled to a prompt bail hearing which should be conducted immediately upon arrest or within 12 hours of the arrest. However, twelve hours or less may be insufficient to satisfy the “promptness” requirement. In Massachusetts, a prompt bail hearing must occur in six hours. *Com. v. King*, 429 Mass. 169, 175 (1999).

*Submitted by Clark County Public Defender’s Office – Chief Deputy Sharon Dickinson*

