Supreme Court of Nevada
ADMINISTRATIVE OFFICE OF THE COURTS

ROBIN SWEET
Director and
State Court Administrator

JOHN MCCORMICK
Assistant Court Administrator
Judicial Programs and Services

RICHARD A. STEFANI
Deputy Director
Information Technology

MEETING NOTICE AND AGENDA

Commission on Statewide Rules of Criminal Procedure
Videoconference

Date and Time of Meeting: July 1, 2020 at Noon
Place of Meeting: Remote Access via Blue Jeans

All participants attending via teleconference or remote video should mute their lines when not speaking;
it is highly recommended that teleconference attendees use a landline and handset in order to reduce background noise.

AGENDA

I. Call to Order
   A. Call of Roll
   B. Determination of a Quorum
   C. Opening Remarks

II. Public Comment

III. Review and Approval of Previous Meeting Summary* **(Tab 1)**
   A. June 15, 2020

IV. Ongoing Reports/Status Reports
   A. Settlement Conferences

V. Statewide Rules Discussion
   A. Local Rules of Practice
      i. Second Judicial District
      ii. Eighth Judicial District
   B. Rule 8(h): Pretrial Motions **(Tab 2)**
   C. Rule 2: Case Assignment **(Tab 3)**
   D. Rule 4: Initial Appearance and Arraignment **(Tab 4)**

E. Rule 5: Pleas of Guilty or Nolo Contendere **(Tab 5)**
F. Rule 6: Release and Detention Pending Judicial Proceedings **(Tab 6)**

I. Additional Rules for Commission Consideration **(Tab 7)**
A. Grand Jury
B. Jury Commissioner

II. Other Items/Discussion
A. Rule Approval Process and Next Steps

III. Next Meeting Date and Location
A. TBD

IV. Adjournment

- Action items are noted by * and typically include review, approval, denial, and/or postponement of specific items. Certain items may be referred to a subcommittee for additional review and action.
- Agenda items may be taken out of order at the discretion of the Chair in order to accommodate persons appearing before the Commission and/or to aid in the time efficiency of the meeting.
- If members of the public participate in the meeting, they must identify themselves when requested. Public comment is welcomed by the Commission but may be limited at the discretion of the Chair.
- The Commission is pleased to provide reasonable accommodations for members of the public who are disabled and wish to attend the meeting. If assistance is required, please notify Commission staff by phone or by email no later than two working days prior to the meeting, as follows: Jamie Gradick, (775) 687-9808 - email: jgradick@nvcourts.nv.gov
- This meeting is exempt from the Nevada Open Meeting Law (NRS 241.030)
- At the discretion of the Chair, topics related to the administration of justice, judicial personnel, and judicial matters that are of a confidential nature may be closed to the public.
- **Notice of this meeting was posted in the following locations**: Nevada Supreme Court website: www.nevadajudiciary.us; Carson City: Supreme Court Building, Administrative Office of the Courts, 201 South Carson Street; Las Vegas: Nevada Supreme Court, 408 East Clark Avenue.

TAB 1

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Commission on Statewide Rules of Criminal Procedure

June 15, 2020
Noon
Summary prepared by: Kimberly Williams

Members Present
Justice James Hardesty, Chair
Justice Abbi Silver, Co-Vice Chair
Justice Lidia Stiglich, Co-Vice Chair
John Arrascada
Judge Douglas Herndon
Luke Prengaman – *Proxy for Christopher Hicks*
Darin Imlay
Mark Jackson
Lisa Rasmussen
Judge Shirley
John Springate
Darin Imlay - *Proxy for JoNell Thomas*
Chris Lalli – *Proxy for Steve Wolfson*

Guests Present
Alex Chen
Sharon Dickinson
John Petty
Alysa Grimes

AOC Staff Present
Jamie Gradick
Kimberly Williams

I. Call to Order
- Justice Hardesty called the meeting to order at 12:10 pm.
- Ms. Gradick called roll; a quorum was present.

II. Public Comment
- There was no public comment.

III. Review and Approval of May 27, 2020 Meeting Summary
- The May 27, 2020 meeting summary was approved.

IV. On Going Reports/Status Updates
- Settlement Conferences
  - Mr. Lalli reported how the amendment draft was written for the settlement conference Rule 252 *(Tab 2) (Please see meeting materials for additional information).*
    - Mr. Imlay supported the change.

- Justice Hardesty shared his concerns with the committee about potential issues and questioned if the settlement judge should consult with the trial judge on the negotiated sentence reached.
  - Mr. Lalli agreed the concerns are very likely to happen and are unavoidable.
  - Mr. Arrascada suggested a memorandum of terms be forwarded to the trial judge to accept or reject to avoid possible sentencing delays.
    - The committee continued to discuss the concerns and ultimately agree with Mr. Lalli.
- Justice Hardesty called for a vote to approve Rule 252's amendment as proposed by Mr. Lalli.
  - The motion passed; Judge Herndon abstained.

V. Statewide Rules Discussion

- Rule 8: Pretrial Motions *(Tab 3)*
  - Justice Hardesty informed the committee that the committee received additional materials for Rule 8(h) submitted last minute and would like to move further discussion to the July 1st meeting to give the committee additional time to review. *(Please see meeting materials for additional information)*. **Any additional commentary for consideration must be submitted to Ms. Gradick no later than Friday, June 19.**
    - Justice Hardesty expressed concern regarding the time that takes place between arrest and reaching the district court through grand jury indictment.
      - Justice Stiglich reported what she learned fr.om the clerk of the court in Washoe; When a person is arrested on a grand jury indictment, it can take up to two weeks to be seen by a district court judge.
        - Mr. Petty, Mr. Prengaman, and Mr. Arrascada agreed with the accuracy of the timeline.
        - Attendees discussed processes for bail setting under the *Valdez-Jiminez* case.
      - Judge Herndon shared his research on Clark County's timeframe. On average, it takes about a week from arrest to reach a district court judge with a grand jury indictment.
        - Attendees discussed parallel proceedings and setting of bail processes.
        - Judge Jones agreed with the accuracy of Judge Herndon's timeline.
        - Judge Herndon has asked the 8th Judicial District's IT department to develop reports to track timing of this.
        - Attendees discussed notification processes; the court is not aware of a defendant's grand jury indictment arrest until notified by the detention center.
    - Justice Hardesty commented that the timeframe in which the district court should be operating is deserving of a rule but these issues need to be examined within the context of that is currently taking place in the various judicial districts. The question is whether this Commission wants to weigh in on these issues and make recommendations to the Nevada Supreme Court.
    - Ms. Dickinson questioned if a new bail hearing would happen if new charges have been added in addition to the true bill.
      - Committee members collectively reported that the general rule in grand jury returns is not to change the bail from that which was set in justice court.
    - Ms. Dickinson raised concerns involving clients with bench warrants being entitled to a new hearing.

- Rule 14: Sentencing *(Tab 4)*
  - Justice Hardesty asked the committee for any additional comments or edits as currently drafted.

- Ms. Dickinson shared her concern with the 'three day rule' conflicting with NRS 176.015 Subsection 2, suggesting it gives the judge the opportunity to disregard taking everything presented into consideration.
- Justice Hardesty called for a vote to approve Rule 14 as modified by Mr. Arrascada.
  - The motion passed.

➢ Rule 15: Motions to continue trial settings *(Tab 5)*
- Justice Hardesty asked the committee for any additional comments or edits as currently drafted.
  - Ms. Dickinson stated her concern with (b)(1) removing the language: 'the length of time that the witness has been absent'.
    - Mr. Jackson responded that the concern is addressed in section (b)(4) and should remain as drafted.
  - Justice Hardesty called for a vote to approve Rule 15 as drafted by Mr. Prengaman.
    - The motion passed.

➢ Rule 2: Case Assignment *(Tab 6)*
- Justice Hardesty asked the committee to review Rule 2 so it can be addressed at the July 1st meeting.
- Justice Hardesty requested Judge Herndon and Judge Jones to review the minutes from the 2019 committee meetings and to review the concerns raised with the case assignment rule in Clark County.
  - Ms. Gradick will email copies of the minutes to Judge Herndon and Judge Jones.

➢ Rule 4: Initial Appearance and Arraignment *(Tab 7)*
- Justice Hardesty asked the committee to review Rule 4 so it can be addressed at the July 1 meeting. Send any edits, redrafts, or concerns to Ms. Gradick before the July 1 meeting.

VI. Additional Rules for Commission Consideration
➢ Grand Jury
➢ Jury Commissioner

VII. Other Items/Discussion
➢ Please be prepared to discuss Rule 2, Rule 4, and Rule 8(h) for the next committee meeting.

VIII. Next Meeting
➢ July 1, 2020 at Noon

IX. Adjournment
➢ The meeting adjourned at 1:18 p.m.

TAB 2

(h) Motions for pretrial release or to increase or decrease bail.

> All motions for pretrial release or to increase or decrease bail made after the defendant's initial post-arrest individualized detention determination has been made must be in writing, supported by an affidavit or declaration of the movant or the movant's attorney.

The original draft of Rule 8(h) addressed the difference between defendants who get to district court by way of indictment rather than criminal complaint (bail already set in justice court), but Valdez-Jimenez obviated any distinction by requiring the same automatic, prompt initial detention hearing for all arrested defendants.

This is a rule that governs the procedure for making motions in the district courts. I Valdez-Jimenez does not address motions per se. It requires a court to conduct an individualized detention determination in each case after arrest; no motion need be filed for this to occur. Most cases get to district court from justice court, where bail will have already be established in accord with Valdez-Jimenez. As the committee has previously discussed and as the majority has previously agreed, any motion to alter the detention status already established in justice court should be by written motion.

For those defendants arrested upon an indictment, the district court will likewise conduct an individualized detention determination pursuant to Valdez-Jimenez promptly after arrest. This will occur, consistent with Valdez-Jimenez, without any motion being filed by either party. Once a detention status has been thus determined, any later motion to alter that status should be in writing, for the same reasons that apply to cases coming to district court from justice court.

In other words, any bail/detention status motion will necessarily occur after a threshold detention status determination has been made via the prompt Valdez-Jimenez hearing, and this will be true regardless of whether the case was initiated by complaint in the justice courts or indictment in district court. After Valdez-Jimenez, motions will only come into play after detention status has been determined in the first instance, and in this posture such motions will be analogous to a request to reconsider the status already set at the prompt Valdez-Jimenez hearing.

A rule regarding motion procedure in district court does not, accordingly, implicate the timeline within which the initial Valdez-Jimenez hearing must occur, and therefore the rule should not attempt to delineate this timeline.

Additionally, there are both legal and practical reasons not to impose a 12-hour deadline for the Valdez-Jimenez hearing (as the Clark County Public Defender's Office proposes). First, a 12-hour deadline is not required by Valdez-Jimenez, and I don't believe there is any basis in the decision for imposing such a fast timeline.

Valdez-Jimenez stated that the initial hearing must occur within a "reasonable time," and analogized to the NRS 171.178 "reasonable time" standard for the first appearance.[1] As is well known, NRS 171.178 does not designate a specific time for the first appearance, but it does not require it within 12 hours. And the statute does contain a touchstone that sheds light on the Legislature's intent regarding the presumptively reasonable time for the first hearing, which is well beyond 12 hours: it provides for inquiry by the court "[i]f an arrested person is not brought before a magistrate within 72 hours after arrest, excluding nonjudicial days . . ."

Even more significantly, however, Valdez-Jimenez embraced the federal Bail Reform Act standards with approval and embraced/adopted the federal Bail Reform Act standard for a "prompt" detention hearing, since it is well known that the federal Act has been upheld as constitutional.[2] The Act allows at least 3 days for the

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[1] The Court, to illuminate the meaning of "prompt," observed that, "[g]enerally, such a hearing occurs at the initial appearance, or arraignment," then went on to state that while "'[t]here is no statutory designation of a specific time within which an arraignment shall be held after the arrest of an accused under an indictment,' this court presumes that an arraignment will be conducted within 'a reasonable time.'" Valdez-Jimenez, 136 Nev. Adv. Op. 20 at p.--, 2020 WL 1846887 at p.7 (2020) (quoting Tellis v. Sheriff, 85 Nev. 557, 559-60, 459 P.2d 364, 365 (1969)). The Court did not state or imply that the custody hearing had to be held at the same time as the arraignment; it merely analogized the "'reasonable time'" standard for conducting an arraignment to the "prompt" requirement for the custody hearing. The Court was stating, in other words, not that arraignment and custody hearing had to coincide, but simply that, as the section heading for this subject indicates, "*[a]n individualized bail hearing must be held within a reasonable time after arrest for defendants who remain in custody.*" Id. at p.6.

[2] Valdez-Jimenez, 136 Nev. Adv. Op. 20 at p.--, 2020 WL 1846887 at p.8 ("In Salerno, the United States Supreme Court upheld the constitutionality of pretrial detention provisions in the Bail Reform Act of 1984 . . .") (citing United States v. Salerno, 481 U.S. 739, 107 S. Ct. 2095 (1987)). Even without resort to cannons of construction, it is clear from the express language employed in Valdez-Jimenez that the court approved the constitutionally vetted and approved standard for "prompt" described in *Salerno*. The rules of interpretation only serve to highlight the obvious, which that the Nevada Supreme Court adopted the "several protections identified by Salerno in the federal Bail Reform Act" with their existing constructions. C.f. Ybarra, 97 Nev. at 249, 628 P.2d at 297–98 ("The general rule in Nevada is that a statute adopted from another jurisdiction will be presumed to have been adopted with the construction placed upon it by the courts of that jurisdiction before its adoption").

detention hearing to occur (after the first appearance, excluding weekends/holidays), without any showing of good cause; it is thus clear that due process allows at least 3 days for the detention hearing required by Valdez-Jimenez to occur.[3]

Additionally, a 12-hour deadline unfairly disadvantages the State in at least some of our jurisdictions. Valdez-Jimenez requires an adversarial, evidentiary hearing, and the decision imported the federal Act's clear-and-convincing burden of proof without importing the counterbalancing aspects of federal law, such as the various presumptions that exist under the Act. Regardless of what occurs in Clark County, prosecutors in some jurisdictions will not be able to gather necessary information or even run criminal histories for all defendants within 12 hours of arrest in order to be prepared for an adversarial evidentiary hearing where they bear a clear-and-convincing burden of proof. Counterbalancing a defendant's interests are the State's significant and compelling interests in public safety and ensuring the defendant's

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[3] See, e.g., United States v. Lee, 783 F.2d 92, 93–94 (7th Cir. 1986) ("Under 18 U.S.C. § 3142(f), the hearing must be held 'immediately upon the [defendant's] first appearance' unless the defendant or the government requests a continuance. These continuances are automatically available but are limited to five days at the defendant's request and three days at the government's request unless good cause is shown for a longer period") (emphasis added); United States v. Hurtado, 779 F.2d 1467, 1474 (11th Cir. 1985) ("The language of subsection (f) is unambiguous and admits of no exception. Congress provided that the determination to detain or release an accused must be made quickly – 'immediately upon the person's first appearance ' – except in three situations, all expressly provided for: 1) the government might ask for three days to prepare; 2) the defendant may have up to five days to secure counsel and marshal his defense; and 3) in exceptional cases 'for good cause' these time constraints may be relaxed. In this case the government asked for its three days; the petitioner did not request his statutory time allotment. Except for good cause, there is no provision for extending the continuance period beyond the statutorily-provided five days"); United States v. Melendez-Carrion, 790 F.2d 984, 991–92 (2d Cir. 1986) ("Nor is there merit to [defendant's] claim that it was error to grant his motion for a four-day continuance without written findings of good cause. The 'good cause' requirement of section 3142(f) applies only to a defendant's motion for a continuance in excess of five days"); United States v. Al-Azzawy, 768 F.2d 1141, 1144 (9th Cir. 1985) ("This length of time exceeded the number of days permitted for a defense continuance absent a finding of good cause"), abrogated on other grounds by United States v. Montalvo-Murillo, 495 U.S. 711 (1990); United States v. O'Shaughnessy, 764 F.2d 1035, 1038 (5th Cir.) ("If the Government moves, the defendant may avoid an immediate hearing at his first appearance before a judicial officer by invoking his right to a five day continuance, which can be extended for good cause. For its part, should the Government be uncertain about the need for detention, it may protect its position by moving for detention and invoking, at the first appearance, its right to a three day continuance which can be extended for good cause").

presence at all proceedings, and a 12-hour deadline unnecessarily and unfairly gives short shrift to those interests and the State's ability to pursue them.

A 12-hour deadline also undercuts the constitutional responsibility of providing notice of detention hearings to victims and affording them the opportunity to be heard.[4] The requirements of Nev. Const. art. I, § 8A are the supreme law of the State, but for many jurisdictions, a 12-hour deadline would make it infeasible to provide victims due notice of a detention hearings until the morning of the Valdez-Jimenez hearing.

Additionally, nothing in Valdez-Jimenez supports the provision for automatic release if the hearing is not held within 12 hours. Looking to federal practice in light of Valdez-Jimenez's heavy reliance upon the federal Act, the U.S. Supreme Court has held that there is no entitlement to release as a sanction for delay in holding the detention hearing. See United States v. Montalvo-Murillo, 495 U.S. 711, 717, 110 S. Ct. 2072, 2077 (1990).

The rule on motions governs, for instance, the procedure for filing Petrocelli motions, which, like Valdez-Jimenez, have a burden of proof component. Yet the rule does not attempt to incorporate the burden specified in the case law. There is no greater need or reason to single out detention hearings for more detailed treatment. It is therefore suggested that the rule be limited to its subject, the general procedure for filing motions, and provisions attempting to incorporate detention-hearing timelines or practice under Valdez-Jimenez, as well as provisions going well beyond what Valdez-Jimenez requires, be omitted.

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[4] See Nev. Const. art. I, § 8A sections (g) and (h). The responsibility of victim notice and providing the right to be heard cannot be shifted to the prosecutor. See Nev. Const. art. I, § 8A(2) ("This section [i.e., § 8A, the whole section] does not alter the powers, duties or responsibilities of a prosecuting attorney."). The cannons of construction for constitutional provisions are the same as for statutes. Landreth v. Malik, 127 Nev. 175, 180, 251 P.3d 163, 166 (2011). All provisions must be given effect, and interpretation shall not render any provisions nugatory. Banegas v. State Indus. Ins. System, 117 Nev. 222, 229, 19 P.3d 245, 250 (2001); Hobbs v. State, 127 Nev. 234, 237, 251 P.3d 177, 179 (2011); Paramount Ins. v. Rayson & Smitley, 86 Nev. 644, 649, 472 P.2d 530, 533 (1970). Imposing the Nev. Const. art. I, § 8A(1)(g) & (h) duties or responsibilities of victim notification upon prosecutors would be an addition to, and thus an alteration of the "duties or responsibilities" of a prosecuting attorney, contrary to the specific provisions of § 8A(2).

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 States 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 suspected 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

Rule 8(h) memo in response to Washoe County District Attorney's memo
Prepared by Chief Deputy Nancy Lemcke, Clark County Public Defender's Office

48 HOURS is the maximum amount of time under federal cases.

While the Nevada Revised Statutes and the Nevada Constitution indicate bail must be set immediately upon arrest, or within 12 hours or less, federal cases discussing constitutional protections under the Bail Reform Act of 1984 suggest that the outer limit for setting bail is 48 hours.

A. Custody determinations must be made no later than 48 hours after arrest

In *Gerstein v. Pugh*, 420 U.S. 103 (1975), the U.S. Supreme Court held that the constitution requires a 'prompt' probable cause review for individuals subject to warrantless arrests. Later, in *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), the Court defined 'prompt' as *no later* than 48 hours following arrest. Notably, the *McLaughlin* court specified that the 48-hour time frame was an *outer limit* – available only if more a more expeditious review is not practicable:

> This is not to say that the probable cause determination in a particular case passes constitutional muster simply because it is provided within 48 hours. Such a hearing may nonetheless violate *Gerstein* if the arrested individual can prove that his or her probable cause determination was delayed unreasonably.

McLaughlin, at 56-57.

In his dissent, Justice Antonin Scalia decried the 48-hour limitation as overly generous. Justice Scalia argued that, since then-existing technology – technology now thirty years old – allowed for more expeditious reviews, the constitution compelled a similarly expedited time frame (such as 24 hours) as an outer limit *McLaughlin*, at 68-69, Scalia, J. dissenting ("With one exception, no federal court considering the question has regarded 24 hours as an inadequate amount of time to complete arrest procedures, and with the same exception every court actually setting a limit for a probable-cause determination based on those procedures has selected 24 hours. *Bernard v. Palo Alto*, 699 F.2d at 1025; *McGill v. Parsons*, 532 F.2d 484, 485 (5th Cir. 1976); *Sanders v. Houston*, 543 F. Supp. At 701-03; *Lively v. Cullinane*, 451 F. Supp. At 1003-04. Cf. *Dommer v. Hatcher*, 427 F. Supp. 1040, 1046 (N.D. Ind. 1975 (24 hour maximum; 48 if Sunday included), rev'd in part, 653 F. 2d 289 (7th Cir. 1981)").

Both *Gerstein* and *McLaughlin* contemplated the possibility of probable cause determinations occurring in combination with other proceedings such as arraignments or bail hearings. *See Gerstein*, 420 U.S. at 124; *McLaughlin*, 500 U.S. at 54. But neither case required as much. Because of this, Clark County prosecutors assert that *McLaughlin*'s 48-hour rule does not constrain the time frame within which bail hearings must occur. Prosecutors contend that *McLaughlin's* 'within 48-hour' definition of 'prompt' applies only to probable cause determinations; and that custody determinations can occur beyond the 48 hour window. This is false.

Recent jurisprudence on the timing of bail hearings – most of which derives from federal review of county and municipal bail practices – discloses that the 48-hour limit imposed by *McLaughlin* applies with equal force to custody determinations. *See, e.g., O'Donnell v. Harris County, Texas*, 892 F.3d 147 (5th Cir. 2018); *Walker v. City of Calhoun, Georgia*, 901 F.3d 1245 (11th Cir. 2018) *cert. denied* __ U.S. __ 139 S. Ct. 1446 (2019); *Jones v. City of Clanton, Alabama* 2015 WL 5387219 (N.D. Ala. 2015). Thus, contrary to the position advanced by

prosecutors, *McLaughlin* constrains rather than enlarges the time within which bail hearings must occur. *See O'Donnell*, 892 F.3d at 160 *citing Gerstein*, supra, and *McLaughlin*, supra ("We conclude that the federal due process right entitles detainees to a hearing within 48 hours.") And that constraint requires bail hearings no later than 48 hours after arrest.

However, as the *McLaughlin* Court noted, the 48-hour obligation is an outer limit – a time frame allowed only if the government, in the exercise of due diligence, cannot conduct the inquiry sooner. Given that Las Vegas Justice Court conducts detention hearings daily within 12-24 hours of arrest, it is difficult to discern why other Clark County Justice Courts cannot do the same. Regardless, under the authority outlined above, those jurisdictions are required to conduct bail hearings *no later* than 48 hours following arrest. The failure to do so will subject the various townships to systemic legal challenges. *See McLaughlin* 500 U.S. at 56 ("[W]e believe that a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*. For this reason, such jurisdictions will be immune from systemic challenges.").

B. Use of a standardized money-bail schedule requires that detention hearings occur in less than 48 hours

Notably, however, the analysis changes when, as happens in Clark County, a jurisdiction offers immediate release pursuant to a standardized bail schedule. When an arrestee of means is provided the opportunity to pay a fixed bail to secure release shortly after booking, the poor cannot be forced to wait two days for a bail hearing. This amounts to discrimination on the basis of wealth. And incarceration resulting from wealth-based discrimination violates the Equal Protection Clause of the U.S. Constitution. *See Pierce v. City of Velda City, Missouri*, WL 10013006 (E.D. Mo. 2015).

In *Pierce*, the federal district court for the Eastern District of Missouri approved a declaratory judgment enjoining Velda City's practice of holding detention hearings 48 hours after arrest for those too poor to pay a scheduled money-bail amount. *Id*. The declaratory judgment stated:

> The use of a secured bail schedule to set the conditions for release of a person in custody after arrest for an offense that may be prosecuted by Velda City implicates the protections of the Equal Protection Clause when such a schedule is applied to the indigent. No person may, consistent with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, be held in custody after an arrest because the person is too poor to post a monetary bond. *If the government generally offers prompt release from custody after arrest upon posting a bond pursuant to a schedule, it cannot deny prompt release from custody to a person because the person is financially incapable of posting such a bond.*

Id. (emphasis added). Based on this, the *Pierce* court ordered Velda City to hold detention hearings for detainees too poor to pay fixed money-bail within 24 hours of arrest. *Id*. Thus, should Clark County continue utilizing a fixed money-bail schedule, the County must provide detention hearings for those too poor to pay the fixed amounts within a time frame commensurate to that which it would take a wealthy arrestee to secure release by paying the scheduled amount. This means bail hearings in Clark County will have to occur in advance of the 48-hour limit proscribed by *McLaughlin* and its progeny.

C. ***United States v. Montalvo-Murillo*, a case cited by prosecutors, does not support the proposition that the federal constitution permits detention hearings beyond 48-hours**

Prosecutors cite *United States v. Montalvo-Murillo*, 110 S.Ct. 2072, 2077 (1990) for the proposition that the federal constitution does not impose a time limit for bail hearings. In *Montalvo-Murillo* (which pre-dates *McLaughlin*) the U.S. Supreme Court was called upon to determine the remedy for detention hearings not held within the time limits proscribed in the Federal Bail Reform Act. *Id*. Importantly, the Court was *not* asked – nor did it endeavor -- to determine the constitutional limits for adjudicating the issue of pretrial custody. The defendant did not challenge the constitutionality of the Bail Reform Act's time specifications, nor did he challenge the constitutionality of his delayed detention hearing. The sole issue before the Court was the proper remedy for his untimely hearing. *Id*. As such, *Montalvo-Murillo* provides no instruction on the time frame within which a detention hearing must occur. This is especially true given that *Montalvo-Murillo* predates the 48-hour requirement later announced by the Supreme Court in *McLaughlin*.

D. Conclusion

Detention hearings must occur *no later* than 48-hours following arrest. If Clark County offers immediate release pursuant to payment of a fixed money-bail amount, custody hearings must occur sooner. While prosecutors urge a reading of the U.S. Supreme Court's decision in *County of Riverside v. McLaughlin* that expands rather than limits the time within which detention hearings must occur, this runs counter to recent authority on the issue. That authority compels the conclusion that the limits proscribed in *McLaughlin* constrain the time within which detention hearings must occur to *no more* than 48 hours following arrest.

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M E M O R A N D U M

TO	Christopher Lalli, Assistant District Attorney
FROM	Nell Christensen, Chief Deputy District Attorney
DATE	June 19, 2020
SUBJECT	Timing of Detention Hearings as Contemplated by Valdez-Jimenez

Chris,

You asked me to research the timing of "prompt" detention hearings as contemplated by Valdez-Jimenez v. Eighth Judicial Dist. Court in & for County of Clark, 136 Nev. Adv. Op. 20, 15 (2020). I understand that the defense bar has argued that detention hearings, where the State has a clear and convincing evidence burden, must be held within 48 hours of arrest and even 12 hours of arrest. A review of the Valdez-Jimenez opinion, the case law cited by the defense bar, and jurisprudence and laws of other jurisdictions that have such detention hearings, reveals that this claim is unfounded. The fact that the State has a burden of clear and convincing evidence at such hearings must not be lost in this determination.

My research and analysis follows.

I. Pursuant to Valdez-Jimenez, The Appropriate Definition of "Prompt" Mirrors NRS 171.178[1]'s Requirements for Arraignment.

An inquiry into what "prompt" means in the context of detention hearings as contemplated by the Nevada Supreme Court in Valdez-Jimenez starts with a review of the opinion itself. The Nevada Supreme Court kept the timing requirements open and flexible.

In Valdez-Jimenez, the Nevada Supreme Court noted that the individualized hearing must be "prompt." The Court stated:

> We recognize. . . that an accused is entitled to a ***prompt*** individualized hearing on his or her custody status after arrest. ***Generally, such a hearing occurs at the initial appearance, or arraignment***. Though "[t]here is no statutory designation of a specific time within which an arraignment shall be held after the arrest of an accused under an indictment," this court presumes that an arraignment will be conducted within "a reasonable time." Tellis v. Sheriff of Clark Cty., 85 Nev. 557, 559-60, 459 P.2d 364, 365 (1969). We have explained that one of the primary reasons for a speedy arraignment is to protect the defendant's "right to due process of law and to assure that he is not left to languish in jail." Id. at 559, 459 P.2d at 365. Accordingly, we stress that where a defendant remains in custody following indictment, he or she must be brought ***promptly*** before the district court for an individualized custody status determination.

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[1] NRS 171.178 Appearance before magistrate; release from custody by arresting officer.

1. Except as otherwise provided in subsections 5 and 6, a peace officer making an arrest under a warrant issued upon a complaint or without a warrant shall take the arrested person without unnecessary delay before the magistrate who issued the warrant or the nearest available magistrate empowered to commit persons charged with offenses against the laws of the State of Nevada.

2. A private person making an arrest without a warrant shall deliver the arrested person without unnecessary delay to a peace officer. Except as otherwise provided in subsections 5 and 6 and NRS 171.1772, the peace officer shall take the arrested person without unnecessary delay before the nearest available magistrate empowered to commit persons charged with offenses against the laws of the State of Nevada.

3. If an arrested person is not brought before a magistrate within 72 hours after arrest, excluding nonjudicial days, the magistrate:

(a) Shall give the prosecuting attorney an opportunity to explain the circumstances leading to the delay; and

(b) May release the arrested person if the magistrate determines that the person was not brought before a magistrate without unnecessary delay.

4. When a person arrested without a warrant is brought before a magistrate, a complaint must be filed forthwith.

5. Except as otherwise provided in NRS 178.484 and 178.487, where the defendant can be admitted to bail without appearing personally before a magistrate, the defendant must be so admitted with the least possible delay, and required to appear before a magistrate at the earliest convenient time thereafter.

6. A peace officer may immediately release from custody without any further proceedings any person the peace officer arrests without a warrant if the peace officer is satisfied that there are insufficient grounds for issuing a criminal complaint against the person arrested. Any record of the arrest of a person released pursuant to this subsection must also include a record of the release. A person so released shall be deemed not to have been arrested but only detained.

Valdez-Jimenez v. Eighth Judicial Dist. Court in & for County of Clark, 136 Nev. Adv. Op. 20, 15 (2020) (emphasis added).

The Court left open the question of a specific definition of the word, "prompt", and instead referred generally to initial appearance as well as arraignment, which is governed by statute and does not have a 48-hour requirement. The Court also pointed us to its opinion in Tellis v. Sheriff of Clark Cty., 85 Nev. 557, 559-60, 459 P.2d 364, 365 (1969), reminding us of its holding that arraignment must occur within "a reasonable time." Id. In Tellis, the Court stated:

> The appellant contends that his arraignment, more than fifty days after his arrest, violated his rights under NRS 171.178 and NRS 171.184. We disagree. Neither NRS 171.178 nor NRS 171.184 have any application to an arrest made after an indictment. Those statutory provisions are only applicable when the arrest is made after a warrant is issued upon a complaint or in the event of a warrantless arrest.
> . . .
> In the absence of a statutory requirement that an arrested person be arraigned within a fixed period of time, a reasonable time will be presumed before which an arraignment must be conducted.

Id.

Because the Nevada Supreme Court stated in Valdez-Jimenez that a prompt individualized hearing would "generally" occur at the arraignment, NRS 171.178 (footnoted in its entirety above) will guide us in an appropriate time for a detention hearing. NRS 171.178 begins by calling for arrested persons to be brought before a magistrate "without unnecessary delay. While "unnecessary delay" has generally meant that the action should be performed with all the promptness possible under the circumstances, NRS 171.178(3) specifies that "unnecessary delay" generally means more than 72 hours. Nevada Revised Statute 171.178(3)(a) then requires that if there is a delay in bringing the person before a magistrate, then the prosecuting attorney must (a) explain the circumstances of the delay, and (b) the judge may (discretionary language) release the person if the person was not brought before a magistrate without necessary delay. Further, NRS 171.178(4) states that "[w]hen a person arrested without a warrant is brought before a magistrate, a complaint must be filed forthwith."

The reference to this statute fits perfectly with timing requirements for detention hearings contemplated by the Bail Reform Act and frameworks in other states. The statute prioritizes promptness but builds in flexibility for delay for good cause. Under the statute, if the State fails to bring an arrested person before a magistrate within 72 hours, the prosecution shall be given a chance to explain the reasons behind the delay.[2] If, based upon the judge's opinion the delay is

[2] The legislative history behind NRS 171.178 is consistent with the State's interpretation. The 72-hour requirement was added in 1979 by Senate Bill 154 (hereinafter "SB 154"). SB 154 as introduced called for the appearance before a magistrate within 24 hours and the filing of a complaint within 48 hours after the initial appearance. If either of the

unnecessary, the judge may release the arrested person. Significantly, NRS 171.178 does not mandate that an arrested person be released from custody even if the delay was in fact unnecessary. It simply gives the judge discretion to release the person in, essentially, a totality of circumstances analysis. As discussed further below, this is exactly the flexibility used in most jurisdictions for detention hearings such as those contemplated by Valdez-Jimenez, and certainly those detention hearings with a burden of clear and convincing evidence.

II. The Nevada Supreme Court Was Aware of the Arguments the Defense Bar Now Makes When It Decided Valdez-Jimenez, But Still Allowed Flexibility in the Definition of a "Prompt" Hearing.

The Clark County Public Defender now cites ODonnell v. Harris County, 892 F.3d 147 (5th Cir. 2018) and Walker v. City of Calhoun, GA, 901 F.3d 1245, 1268 (11th Cir. 2018), cert. denied sub nom. Walker v. City of Calhoun, Ga., 139 S. Ct. 1446 (2019) for the proposition that the 48-hour rule in Riverside v. McLaughlin related to probable cause determinations also applies to the detention hearings contemplated in Valdez-Jimenez. A review of the briefs and argument in the Valdez-Jimenez appeal shows that the Public Defender and *amici* brought these cases to the attention of the Court. In fact, the Court considered the cases in its determination in Valdez-Jimenez. This is evident not only because they appear in the briefs, but also because the Court actually cited the cases in Valdez-Jimenez in its discussion of the timing requirements, noting that the cases stand for the proposition that court systems may use a standard bail schedule to set an initial bail amount, as long as the court system also provides an individualized hearing soon after arrest. The Court stated:

> [C]ourts generally have recognized that an initial bail amount may be set pursuant to a standardized bail schedule, as long as the accused is given the opportunity soon after arrest to have an individualized determination where the accused's financial ability to pay is considered. *See, e.g., Walker v. City of Calhoun*, 901 F.3d 1245 (11th Cir. 2018), cert. denied, —— U.S. ——, 139 S. Ct. 1446, 203 L.Ed.2d 681 (2019); *ODonnell v. Harris Cty*., 892 F.3d 147 (5th Cir. 2018); *see also In re Humphrey*, 19 Cal.App.5th 1006, 228

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time limits were not met, the bill required that the arrested person be released from custody. All of the language regarding the mandatory release of those arrested was eliminated by the time that SB 154 was passed by the legislature. The legislature ultimately decided that a judicial officer's discretion would be preferable to the proposed bill that ignored the complexities and realities of the criminal justice system best entertained case by case.

In its interpretation of NRS 171.178, the Nevada Attorney General reached the identical conclusion that failure to meet the statute's permissive language does not equate to an automatic release from custody. In a 1979 opinion issued by the Attorney General, the Attorney General points to a number of factors militating against the notion that the State must (1) bring the person before a magistrate and (2) file a complaint or risk having the person released without any further judicial review. 1979 Nev. Op. Atty. Gen. 134. Persuaded by the plain text that a magistrate "may" release the person, the Attorney General discredited the notion that NRS 171.178 requires arrested persons to be released. According to the Attorney General, "release is not mandatory under NRS 171.178 even if the delay was 'unnecessary.'" Id. As the opinion explains, "there may be other factors present in the case that might militate against release for delay, albeit unnecessary." Id.

> Cal. Rptr. 3d 513, 540-41 (2018), appeal pending, —— Cal.5th ——, 233 Cal.Rptr.3d 129, 417 P.3d 769 (2018).

Valdez-Jimenez, 136 Nev. Adv. Op. 20, 460 P.3d at 985.

As noted above, the Court opined that "prompt individualized (detention) hearings" would, at times, be held at arraignment, which our statutes dictate typically occurs at 72 hours. Instead of expressly requiring a 48-hour hearing for detention hearings after reviewing these cases, the Nevada Supreme Court pointed us to our law regarding arraignment to guide us in determining the appropriate timing of detention hearings. As discussed below, ODonnell and Walker are distinguishable from Valdez-Jimenez and the procedures in Nevada courts.

If the Court agreed with the proposition that detention hearings must be held within 48 hours of arrest, it surely would have noted that in its discussion of the definition of a "prompt" hearing. Instead, the timing requirements in Valdez-Jimenez seem purposefully flexible. In fact, the Court discusses with approval the Bail Reform Act, which grants the federal courts flexible timing requirements for detention hearings.

That flexibility is important. Whereas the Court in Valdez-Jimenez directs that, generally, detention hearings should occur at or before the arraignment, in Las Vegas, many will occur at the Las Vegas Justice Court's Initial Appearance Court within hours of arrest. However, the fact that Las Vegas provides hearings in the vast majority of cases very early in the proceedings does not create a legal standard for other Nevada courts or for all cases in Las Vegas. In fact, there is a solid legal basis to request that the detention hearing be heard at the arraignment or even later if needed to prepare to meet the clear and convincing burden. As discussed at length below, federal courts have found that the Bail Reform Act's provisions for continuances of detention hearings are acceptable and still ensure a "prompt" hearing. Similarly, other states have enacted laws mirroring the Bail Reform Act's timing requirements for detention hearings, and those statutes have withstood attack.

III. The Claim That "Prompt" Means Within 48 Hours of Arrest Conflates The Promptness Required for Probable Cause Determinations or Initial Bail Settings With The Promptness Required for Detention Hearings. They Are Not The Same Thing.

It is important to note that the consideration of the timing of a detention hearing is distinct and separate from rules regarding when a probable cause determination must take place. The 48-hour rule for a prompt probable cause determination should not be conflated with the rule for a "prompt" or "immediate" detention hearing. This especially true considering that the State's burden of clear and convincing evidence at a detention hearing is much higher than a probable cause standard.

The United States Supreme Court recognized the right to a prompt judicial determination of probable cause in Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854 (1975). Gerstein required

police officers to prove probable cause for arrests but did not require an adversarial hearing. Id. at 120, 95 S.Ct. at 866. Later, in County of Riverside v. McLaughlin, the United States Supreme Court provided more guidance regarding the timing requirements for probable cause determinations, holding that "a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of Gerstein." 500 U.S. 44, 56, 111 S. Ct. 1661, 1669–70 (1991). The promptness requirement developed in Gerstein and Riverside v. McLaughlin relates to the length of detention after a warrantless arrest before a probable cause determination. Gerstein, 420 U.S. at 124–25, 95 S.Ct. 854, 43 L.Ed.2d 54; Riverside v. McLaughlin, 500 U.S. at 52, 111 S.Ct. 1661; Powell v. Nevada, 511 U.S. 79, 80, 114 S. Ct. 1280, 1282 (1994).

The United States Supreme Court in both Gerstein and Riverside v. McLaughlin made clear that there was no single formula for jurisdictions to follow to comply with its directive to provide prompt probable cause hearings after arrest:

> We recognized that "state systems of criminal procedure vary widely" in the nature and number of pretrial procedures they provide, and we noted that there is no single "preferred" approach. (citing Gerstein, 420 U.S. at 123). We explained further that "flexibility and experimentation by the States" with respect to integrating probable cause determinations was desirable and that each State should settle upon an approach "to accord with [the] State's pretrial procedure viewed as a whole." Ibid. Our purpose in Gerstein was to make clear that the Fourth Amendment requires every State to provide prompt determinations of probable cause, but that the Constitution does not impose on the States a rigid procedural framework. Rather, individual States may choose to comply in different ways.

Riverside v. McLaughlin, 111 S. Ct. at 1668.

Gerstein and its progeny do not require arraignments, initial appearances, or detention hearings within 48 hours of arrest. Riverside v. McLaughlin, 111 S. Ct. at 1670. In fact, the United States Supreme Court in Riverside v. McLaughlin contemplated that arraignments, initial appearances, or bail hearings may permissibly take place at a later time than the probable cause determination. Riverside v. McLaughlin, 500 U.S. at 57, 111 S.Ct. 1661 ("The fact that in a particular case it may take longer than 48 hours to consolidate pretrial proceedings does not qualify as an extraordinary circumstance (to delay a probable cause determination). A jurisdiction that chooses to offer combined proceedings must do so as soon as is reasonably feasible, but in no event later than 48 hours after arrest."). In other words, jurisdictions may not extend the timing requirements for probable cause determinations by combining the probable cause determination with other hearings that have less stringent timing requirements. The Court in Riverside v. McLaughlin explained:

> Under Gerstein, jurisdictions may choose to combine probable cause determinations with other pretrial proceedings, so long as they do so promptly. This necessarily means that

> only certain proceedings are candidates for combination. Only those proceedings that arise very early in the pretrial process—such as bail hearings and arraignments—may be chosen. Even then, every effort must be made to expedite the combined proceedings. See 420 U.S., at 124, 95 S.Ct., at 868.

Riverside v. McLaughlin, 111 S. Ct. at 1670.

Although the United States Supreme Court held that other hearings may be held at the time of the 48-hour probable cause determination, it did not require those other proceedings to be held within 48 hours. In fact, it implicitly found that other hearings, including bail hearings, may be held later.

In 1992, the Nevada Attorney General noted this concept in a formal opinion answering the question of what procedures were necessary to comply with the 48-hour probable cause hearing following a warrantless arrest, as mandated by Riverside v. McLaughlin. The AG stated:

> The appearance for bail setting mandated by NRS 171.178 falls under the "other pretrial" procedure category discussed in Riverside as appropriate to combine with the probable cause determination as feasible, but the opinion does not require a combination of such proceedings, nor does it require that such other proceedings be conducted within 48 hours. Riverside, 111 S.Ct. at 1670-71. "The [Gerstein] Court explained that 'flexibility and experimentation' were 'desirab[le]'; that '[t]here is no single preferred pretrial procedure'; and that 'the nature of the probable cause determination usually will be shaped to accord with a State's pretrial procedure viewed as a whole.' Gerstein, 420 U.S. at 123." Id. at 1669.

1992 Nev. Op. Atty. Gen. 132 (1992).

The defense bar now argues, again, that ODonnell and Walker, which rely on Gerstein and Pugh, require detention hearings to also be held within 48 hours of arrest. The reliance by the defense bar on ODonnell and Walker is not new in the statewide discussion, as explained above. In fact, as noted, the Nevada Supreme Court discussed those cases in Valdez-Jimenez in its discussion of the timing requirements. The Nevada Supreme Court did not hold that detention hearings must be held within 48 hours of arrest despite having reviewed these opinions. That is because the cases are distinguishable from Valdez-Jimenez and the procedures in Nevada courts. Further, the Fifth and Eleventh Circuit analysis provides insight, but their holdings are not binding on our courts.

ODonnell and Walker relate to the specific provisions put into place by Harris County Texas and Calhoun, Georgia for how and when courts determine probable cause, arraign arrestees, and conduct an initial consideration of pretrial release. As explained in Riverside v. McLaughlin, where the court considered the system of a county that combined probable cause hearings, arraignments, and pretrial release hearings, each jurisdiction chooses its own systems to provide due process to arrestees:

> Under Gerstein, jurisdictions may choose to combine probable cause determinations with other pretrial proceedings, so long as they do so promptly. This necessarily means that only certain proceedings are candidates for combination. Only those proceedings that arise very early in the pretrial process—such as bail hearings and arraignments—may be chosen. Even then, every effort must be made to expedite the combined proceedings. See 420 U.S., at 124, 95 S.Ct., at 868.

County of Riverside v. McLaughlin, 111 S. Ct. 1661, 1671 (1991).

In ODonnell, the court considered a § 1983 action filed on behalf of arrestees and others similarly situated, against the county, county sheriff, county judges, and other county officials, alleging that county's system for setting bail for indigent misdemeanor arrestees, which resulted in detention of indigent arrestees solely due to their inability to pay bail, violated Equal Protection and Due Process Clauses. In Harris County, Texas, secured bail orders were imposed almost automatically on indigent misdemeanor arrestees. The Fifth Circuit found this problematic, noting:

> Far from demonstrating sensitivity to the indigent misdemeanor defendants' ability to pay, Hearing Officers and County Judges almost always set a bail amount that detains the indigent. In other words, the current procedure does not sufficiently protect detainees from magistrates imposing bail as an "instrument of oppression."

ODonnell v. Harris County, 892 F.3d 147, 159 (5th Cir. 2018). Essentially, the automatic bail setting ended up functioning as a detention order in these misdemeanor cases and there was no mechanism in place to hold a Valdez-Jimenez-like hearing to review that initial automatic setting. These bail settings certainly did not have the due process protections outlined in Valdez-Jimenez by the Nevada Supreme Court such as a clear and convincing burden and an individualized determination.

In ODonnell, the Fifth Circuit reviewed the district court's order granting an injunction and outlining several requirements. The district court had held that Texas State law required a hearing to take place within 24 hours of arrest. The Fifth Circuit found this to be too strict. The Texas timing requirements were based on Texas' reading of Gerstein's requirement for a prompt determination of probable cause prior to Riverside v. McLaughlin being published. Texas chose to combine the probable cause hearing with a bail determination. However, the Texas law's timing requirements was not changed after Riverside v. McLaughlin was published, requiring probable cause to be determined within 48 hours. The ODonnell court noted that Texas had combined the hearings and that Riverside v. McLaughlin required probable cause hearings to occur within 48 hours. As explained above, Riverside v. McLaughlin was specific that probable cause hearings could not be delayed beyond 48 hours by combining them with other proceedings, holding that:

> In order to satisfy Gerstein 's promptness requirement, a jurisdiction that chooses to combine probable cause determinations with other pretrial proceedings must do so as soon as is reasonably feasible, but in no event later than 48 hours after arrest.

111 S. Ct. at 1664. The holding of ODonnell was specific to the system in place in Harris County, Texas.

Also, it is worth pointing out that ODonnell misinterprets Riverside v. McLaughlin. ODonnell held that "McLaughlin explicitly included bail hearings within [the Gerstein 48-hour] deadline." ODonnell 892 F.3d at 160. As explained, Riverside v. McLaughlin does not explicitly include bail as a required procedure that must occur before 48 hours, rather detention hearings are given as an example of pretrial procedures that may be combined with the requisite probable cause hearing. Therefore, the further analysis and holdings of ODonnell, specifically that "federal due process right entitles detainees to a hearing within 48 hours," Id., is flawed.

Thus, the ODonnell opinion is not only nonbinding, it is based on flawed analysis and is distinguishable from a consideration of the specific type of hearing and framework contemplated in Valdez-Jimenez .

In Walker v. City of Calhoun, the Eleventh Circuit considered a city's Standing Bail Order, which guaranteed arrestees a hearing within 48 hours of arrest to prove their indigency (with court-appointed counsel) or they would be released. Walker challenged the city's framework, arguing that a 24-hour timeframe was required. Walker v. City of Calhoun, GA, 901 F.3d 1245, 1265–66 (11th Cir. 2018), cert. denied sub nom. Walker v. City of Calhoun, Ga., 139 S. Ct. 1446 (2019). In Walker, the City defended its 48-hour timeframe, and Walker argued for 24 hours for the hearing. The district court found for Walker. On appeal, the court found that the 48-hour window satisfied due process, rejecting the district court's logic:

> there is no constitutional basis for the district court's imposition of its preferred method of setting bail. In the context of probable cause determinations, the Supreme Court has "recognized that 'state systems of criminal procedure vary widely' in the nature and number of pretrial procedures they provide," and it has "noted that there is no single 'preferred' approach." McLaughlin, 500 U.S. at 53, 111 S.Ct. 1661 (quoting Gerstein, 420 U.S. at 123, 95 S.Ct. 854). The Court explained that " 'flexibility and experimentation by the States' " is "desirable and that each State should settle upon an approach 'to accord with [the] State's pretrial procedure viewed as a whole.' " Id. (alteration in original) (quoting Gerstein, 420 U.S. at 123, 95 S.Ct. 854). Respecting that flexibility gives "proper deference to the demands of federalism." Id. The same logic applies to bail determinations, and the district court provided no justification for substituting its preferred policy for the City's.

Walker, 901 F.3d at 1268. The court reversed the district court's decision.

The Walker court specifically differentiated the facts of the case in front of it from the considerations in United States v. Salerno, 481 U.S. 739, 107 S.Ct. 2095 (1987). Salerno was

also cited extensively in Valdez-Jimenez, as Salerno, like Valdez-Jimenez, relates to preventative detention. The court in Walker explained:

> Moreover, even if Salerno did embrace a form of heightened scrutiny, we do not believe it applies to this case because the City is not seeking to impose any form of preventative detention. Here, Walker himself was released, and the Standing Bail Order presently guarantees release within 48 hours of arrest to all indigent defendants in Walker's shoes. In a future case that raises the question whether a municipality may detain an indigent defendant because no feasible release conditions will assure his appearance in court, perhaps Salerno's framework might apply.

901 F.3d at 1263.

In briefs to the Nevada Supreme Court in Valdez-Jimenez, the PD brief as well as some *amicus* briefs cited ODonnell and Walker, arguing regarding the supposed intersection of two lines of federal constitutional authority referred to as the Bearden line (addressing wealth-based deprivations) and the Salerno line (concerning pretrial preventative detention). The defense continues to combine these two distinct lines of cases, even though the Walker court warned that Walker is distinguishable from Salerno. While it is true that the United States Supreme Court has recognized some indigent-related constitutional claims raised by persons unable to pay court-related fees and fines in sentencing and post-conviction contexts, the Court has never recognized such claims in the pretrial bail context. See e.g., Bearden v. Georgia, 461 U.S. 660, 103 S.Ct. 2064 (1983). Nor has the Supreme Court ever held that money-bail systems are constitutionally invalid because indigent defendants have greater difficulty paying bail than other criminal defendants.

Thus, the Walker opinion is not only nonbinding, it is distinguishable from a consideration of the specific type of hearing and framework contemplated in Valdez-Jimenez .

The courts in ODonnell and Walker both acknowledged the "heavy administrative burden" that would result from a requirement for the type of detention hearings contemplated in their cases to take place at the same time as the probable cause hearing and struck down any requirement that bail hearings occur within 24 hours. Although the cases are distinguishable from the issue at hand in Nevada, their analysis on this point is significant because it acknowledges that probable cause hearings are different from bail hearings, both in burden and time requirement. This same concept is noted in Gerstein and Riverside v. McLaughlin. Courts distinguish the level or amount of promptness required for each hearing. This further indicates that the promptness requirement for detention hearings should not be conflated as equal to the promptness requirement of probable cause determinations. As discussed further below, this concept also exists implicitly in the statutory framework of every state that shares similar timing requirements to the Bail Reform Act, which allows more time and allows for continuances, as discussed below.

Importantly, the Nevada Supreme Court clearly sees a difference between an initial bail setting and a detention hearing. Detention hearings as contemplated by Valdez-Jimenez are separate from an initial bail setting, accomplished in different ways by different jurisdictions, such as those contemplated in ODonnell and Walker. For example, the Court characterized a Valdez-Jimenez hearing as "[a]n individualized hearing (that) must be held within a reasonable time after arrest for defendants who ***remain*** in custody." Valdez-Jimenez, 460 P.3d at 985 (emphasis added). Further, the Court pointed out an initial bail amount may be set pursuant to a standardized bail schedule, with an individualized hearing occurring later. Id. The Court reasoned that:

> the United States Supreme Court decisions on which petitioners rely do not suggest that a hearing must be held before ***any*** detention can occur. *See, e.g., Salerno*, 481 U.S. at 747, 107 S.Ct. 2095 (stating that an arrestee is entitled to "a prompt" hearing under the federal Bail Reform Act).

Id. (emphasis added).

IV. If There Were a 48-hour Requirement for Detention Hearings, the United States Supreme Court Surely Would Have Directed That in Its Consideration of the Timing of Detention Hearings in Montalvo-Murillo or Its Consideration of the Constitutionality of the Bail Reform Act in Salerno.

The Court in Valdez-Jimenez noted that the Court "looks to federal precedent for guidance in determining what procedures satisfy due process." Citing Hernandez v. Bennett-Haron, 128 Nev. 580, 587, 287 P.3d 305, 310 (2012). Federal case law is instructive in this area. Importantly, the Bail Reform Act of 1984 (18 U.S.C.A. § 3142) does not require that detention hearings take place within 48 hours. Nevertheless, the Act has withstood constitutional attack.

In Valdez-Jimenez, the Court discussed United States v. Salerno at length. 481 U.S. 739, 107 S.Ct. 2095 (1987). In Salerno the United States Supreme Court upheld the Bail Reform Act of 1984 against constitutional challenge. The Bail Reform Act governs pretrial detention hearings and is codified at 18 U.S.C.A. § 3142. We can look to the Act and cases interpreting it for guidance.

The timing required for a detention hearing pursuant to the 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. Further delay is allowed for good cause. The Act specifies the following:

> The hearing shall be held immediately upon the person's ***first appearance*** before the judicial officer unless that person, or the attorney for the Government, seeks a

> continuance. Except for good cause, a continuance on motion of such person may not exceed five days (not including any intermediate Saturday, Sunday, or legal holiday), and a ***continuance on motion of the attorney for the Government may not exceed three days (not including any intermediate Saturday, Sunday, or legal holiday***). During a continuance, such person shall be detained . . .

(emphasis added).

The 3-day continuance is virtually automatic; a showing of good cause is necessary only upon a request for a further delay. For example, in United States v. O'Shaughnessy, 764 F.2d 1035, 1038 (5th Cir. 1985), the Court stated, "should the government be uncertain about the need for detention, it may protect its position by moving for detention and invoking, at the first appearance, its right to a three day continuance which can be extended for good cause." The Seventh Circuit has agreed with this interpretation of the Act's timing requirements, holding that "these continuances are automatically available but are limited to five days at the defendant's request and three days at the government's request unless good cause is shown for a longer period." United States v. Lee, 783 F.2d 92, 94 (7th Cir. 1986).

The plain language of the statute excludes weekends and holidays from the time computation. The Ninth Circuit has also held that weekend days are excluded when computing time permitted for continuances of detention hearings. United States v. Aitken, 898 F.2d 104 (9th Cir. 1990).

The Act has withstood constitutional attack. As stated, the United States Supreme Court found the Act constitutional in Salerno, which the Nevada Supreme Court discussed in Valdez-Jimenez.

Subsequent to its decision in Salerno, the United States Supreme Court discussed the timing requirements of the Act in United States v. Montalvo-Murillo, 110 S. Ct. 2072 (1990). There, the issue before the Court was the appropriate remedy for a violation of the timing requirements of the Act, as the hearing had been continued well past the 3-day continuance from initial appearance contemplated by the Act. When it was finally heard by the district court after 13 days, the district court found that the appropriate remedy for the delay was to release the defendant, even though it also found that the government had met the criteria for detention. At the time the United States Supreme Court issued its opinion, Montalvo-Murillo was at large. The Court opined that release had not been the appropriate remedy. In its discussion, the Court noted that it had upheld the Bail Reform Act against constitutional challenge in Salerno but had not specifically addressed the timing requirements of the statute. The Court stated:

> Though we did not refer in Salerno to the time limits for hearings as a feature which sustained the constitutionality of the Act, we recognize that a vital liberty interest is at stake. ***A prompt hearing is necessary, and the time limitations of the Act must be followed with care and precision.*** But the Act is silent on the issue of a remedy for violations of its time limits. Neither the timing requirements nor any other part of the Act

> can be read to require, or even suggest, that a timing error must result in release of a person who should otherwise be detained.

Montalvo-Murillo, 110 S. Ct. at 2077 (emphasis added).

Thus, the United States Supreme Court, when given the chance to analyze the timing requirements for detention hearings outlined in the Act, implicitly found that the Act's timing requirements met the definition of a "prompt" hearing.

The Eighth Circuit Court of Appeals considered an argument that a district court failed to comply with the requirements of the Bail Reform Act in United States v. Maull, 773 F.2d 1479 (8th Cir. 1985). The court noted "a fair reading of the statute is not that a detention hearing must be held 'immediately' when a defendant first appears in court, else to be forever barred, but rather that once a motion for pretrial detention is made, a hearing must occur promptly thereafter." Id. at 1483.

Furthermore, in United States v. Wimberly, 648 F.Supp. 1572 (D.Nev.1986), the United States District Court for the District of Nevada held the Bail Reform Act of 1984 was not violated by holding a detention hearing six days after defendant's initial appearance, where defendant requested five-day continuance and where two of the six days were weekend days; weekends and holidays were not included in computation of allowable five-day continuance of detention hearing under the Act. The Court stated: "Even if holding defendant's detention hearing on morning of the sixth day, rather than afternoon of the fifth day, after defendant's initial appearance was technical violation of five-day time limit for holding detention hearings, such violation was not material." Id. at 1574-75.

Likewise, the Eleventh Circuit came to a similar conclusion in United States v. Madruga, 810 F.2d 1010, 1014 (11th Cir. 1987), holding that a 24-hour extension beyond Act's three-day parameter was immaterial. There the Court held:

> Whether some minimal extension beyond the statute's three-day and five-day parameters may be excused as immaterial is a question of first impression in this circuit. I would leave open most materiality questions; but when the three-day or five-day extension for the detention hearing falls on a Saturday, a Sunday or a legal holiday and the judicial officer sets the hearing for the first day immediately thereafter which is not one of those days, I would hold that the delay is immaterial for the purposes of determining compliance with section 3142(f).

Of note is the fact that the Bail Reform Act has been in place since 1984 and has been attacked in litigation ever since. It has been considered by every United States Circuit as well as the United States Supreme Court. It has consistently withstood constitutional attack. Additionally, The District of Columbia's pretrial detention statute, upon which the pretrial detention feature of the Bail Reform Act was modeled, was upheld against a constitutional challenge in United States v. Edwards, 430 A.2d 1321, 1325–31 (D.C.Ct.App.1981) (en banc), cert. denied, 455 U.S. 1022,

102 S.Ct. 1721, 72 L.Ed.2d 141 (1982). Obviously, if the Bail Reform Act's timing requirements did not meet constitutional muster, then federal courts would be forced to be open on weekends and holidays to hold detention hearings "promptly." The federal courts are still closed on weekends and holidays.

V. Other Jurisdictions' Statutes and Rules Governing Detention Hearings Follow the Timing Requirements of the Bail Reform Act or Outline Other, Similar, Timing Requirements, not 48 Hours.

As mentioned above, the Nevada Supreme Court discussed and approved of the Bail Reform Act in Valdez-Jimenez. Importantly, many other jurisdictions also have statutes modeled after or very similar to the Bail Reform Act. We can look to those jurisdictions for guidance. Other states have something similar to a Valdez-Jimenez detention hearing. Exploring their timing requirements is valuable as well, even if the states do not require a burden of clear and convincing evidence or differ from Valdez-Jimenez detention hearings in other ways. Statutes from several other jurisdictions are outlined below.

In reviewing the frameworks in other states, it becomes clear that legislatures have built elasticity into their timing requirements, often allowing continuances for good cause. Further, when they require that the prosecution meet a high burden of proof at detention hearings, they also give the prosecution sufficient time to prepare to meet the burden. No one requires 12 hours, even in states that do not hold the prosecutor to a clear and convincing evidence standard. No one requires even 48 hours for true detention hearings like those contemplated in Valdez-Jimenez. Weekends and holidays are not included in most time computations. They often differentiate between initial custody assessments and true detention hearings.

Quite bluntly, these jurisdictions can't all be wrong. Their statutes and timing requirements for detention hearings have withstood constitutional attack, and the reasoning behind their timing requirements is sound. The burden of clear and convincing evidence is high, and the State should not be expected to be prepared to meet it within a few hours of arrest in every case, even if we are sometimes, or even often, able to do so. The timing requirements are purposefully flexible, in part, due to this burden. In one of the cases cited below, a Massachusetts court reasoned:

> In many situations where the threat of danger looms, particularly where the police make an arrest shortly after learning of the commission of a serious and violent crime, the brief period of time allowed before first appearance will not suffice for this further purpose (of a detention hearing). The police may know enough to establish probable cause that such a crime has been committed and that the arrested person committed it. They may also have grounds for concern that this person presents a continuing danger, but not nearly enough to meet the high burden ... The statute allows detention during a continuance to meet just such cases. To require that the arrested person be released pending that further inquiry may invite a sub rosa relaxation of the clear and convincing standard.

Mendonza v. Commonwealth, 423 Mass. 771, 792 (1996).

a. New Jersey

In January 2017, the state of New Jersey implemented sweeping Criminal Justice Reform, which included the addition of detention hearings. New Jersey law is similar to the Bail Reform Act and allows a judge to detain a defendant pretrial if the State proves by clear and convincing evidence that no release conditions would reasonably assure the defendant's appearance in court, the safety of the community, or the integrity of the criminal justice process. N.J.S.A. 2A:162–18(a).

The New Jersey statutory scheme has been touted across the country as a model to emulate in working toward bail reform. Whereas New Jersey law allows detention without bail in many more circumstances than allowed in Nevada, the statutes are still relevant in that they govern detention hearings generally. In New Jersey, while there is a statutory requirement for an initial custody assessment within 48 hours, the requirements for the timing of a pretrial detention hearing are similar to the federal Bail Reform Act. N.J. Stat. Ann. § 2A:162-19 reads in pertinent part as follows:

> the pretrial detention hearing shall be held no later than the eligible defendant's first appearance unless the eligible defendant, or the prosecutor, seeks a continuance. If a prosecutor files a motion for pretrial detention after the eligible defendant's first appearance has taken place or if no first appearance is required, the court shall schedule the pretrial detention hearing to take place within three working days of the date on which the prosecutor's motion was filed, unless the prosecutor or the eligible defendant seeks a continuance. ***Except for good cause, a continuance on motion of the eligible defendant may not exceed five days, not including any intermediate Saturday, Sunday, or legal holiday. Except for good cause, a continuance on motion of the prosecutor may not exceed three days, not including any intermediate Saturday, Sunday, or legal holiday.***

(Emphasis added). The above statute was put in place in New Jersey after extensive research into bail reform and federal detention hearings and was lauded by indigent defense advocates. Yet, New Jersey does not require 48-hour detention hearings.

b. California

Likewise, California has taken a similar approach in proposing Senate Bill 10 in a November 2020 referendum. The proposed bill has similar timing requirements to both the Bail Reform Act and New Jersey law. This bill seeks to allow for detention hearings to be conducted either at arraignment or within three days of the arraignment. Furthermore, it would allow for

prosecutorial motion seeking detention of a defendant pending trial that can be filed at arraignment or any time thereafter.

In pertinent parts, the proposed Cal.Penal Code § 1320.19 reads as follows:

> If the defendant is detained in custody, the preventive detention hearing shall be held no later than ***three court days after the motion for preventive detention is filed***. If the defendant is not detained in custody, the preventive detention hearing shall be held no later than three court days after the defendant is brought into custody as a result of a warrant issued in accordance with subdivision.
>
> . . .
>
> For good cause, the defense or the prosecution may seek a continuance of the preventive detention hearing. If a request for a continuance is granted, ***the continuance may not exceed three court*** days unless stipulated by the parties.

West's Ann.Cal.Penal Code § 1320.19 (emphasis added).

c. Massachusetts

Massachusetts's statute regarding detention hearings is also similar to the Bail Reform Act. Massachusetts's statute reads in pertinent part as follows:

> The hearing shall be held immediately upon the person's first appearance before the court unless that person, or the attorney for the commonwealth, seeks a continuance. Except for good cause, a continuance on motion of the person may not exceed seven days, and a ***continuance on motion of the attorney for the commonwealth may not exceed three business days***. During a continuance, the individual shall be detained upon a showing that there existed probable cause to arrest the person. At the hearing, such person shall have the right to be represented by counsel, and, if financially unable to . . .

Mass. Gen. Laws Ann. ch. 276, § 58A (West) (emphasis added).

In Mendonza v. Commonwealth, 423 Mass. 771, 792 (1996), § 58A was found constitutional. First, the court rejected Mendonza's claim that a person accused of crime may never be detained on grounds of dangerousness prior to his adjudication of guilt. Then, the court considered the objections Mendonza made to specific features of § 58A.4, such as the timing provisions. The court upheld the timing provisions, finding that the three-day continuance outlined in the statute should be based on good cause. The court reasoned:

> It would be odd indeed if bail could be revoked for misconduct which is not tried to conviction but that the very misconduct which led to the original charge might not allow preliminary detention. It is one of the virtues of § 58A that the need for preliminary relief

> on account of dangerousness is addressed explicitly and both the Commonwealth and the accused may direct their arguments and proofs openly to that question.

423 Mass. at 782. Further, the court explained:

> In many situations where the threat of danger looms, particularly where the police make an arrest shortly after learning of the commission of a serious and violent crime, the brief period of time allowed before first appearance will not suffice for this further purpose. The police may know enough to establish probable cause that such a crime has been committed and that the arrested person committed it. They may also have grounds for concern that this person presents a continuing danger, but not nearly enough to meet the high burden of § 58A. The statute allows detention during a continuance to meet just such cases. To require that the arrested person be released pending that further inquiry may invite a sub rosa relaxation of the clear and convincing standard.
>
> The sensible reading of the continuance provision is to allow such a three-day continuance at the request of the Commonwealth only if the Commonwealth can show good cause for it.

423 Mass. at 792.

d. New Mexico

Likewise, New Mexico rules regarding detention hearings are based on the Bail Reform Act. New Mexico amended its constitution in 2016 to provide judicial authority to deny pretrial release if a prosecutor shows by clear and convincing evidence that no release conditions a court could impose on a felony defendant would reasonably protect the safety of any other person or the community. State ex rel. Torrez v. Whitaker, 2018-NMSC-005 (2018).

New Mexico also allows for ***pretrial detention*** upon motion of a prosecutor. NMRA Rule 5-409. The detention hearing that would be held as a result of such a motion is similar to the type of hearing outlined in Valdez-Jimenez. Id. The rule requires that a "prosecutor must prove by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community." NMRA Rule 5-409(F)(4). The portion of the rule related to timing reads as follows:

> (1) Time.
> (a) Time limit. The hearing shall be held ***promptly***. Unless the court has issued a summons and notice of hearing under Subparagraph (E)(2) of this rule, ***the hearing shall commence no later than five (5) days after the later of the following events:***
> ***(i) the filing of the motion for pretrial detention; or***
> ***(ii) the date the defendant is arrested as a result of the motion for pretrial detention.***

> (b) Extensions. The time enlargement provisions in Rule 5-104 NMRA do not apply to a pretrial detention hearing. ***The court may extend the time limit for holding the hearing*** as follows:
>
> (i) ***for up to three (3) days*** if in the motion for pretrial detention the prosecutor requests a preliminary hearing to be held concurrently with the detention hearing;
>
> (ii) ***for up to three (3) days upon a showing that extraordinary circumstances exist*** and justice requires the extension;
>
> (iii) upon the defendant filing a waiver of the time limit; or
>
> (iv) upon stipulation of the parties.
>
> (c) Notice. The court shall promptly schedule the hearing and notify the parties of the hearing setting within one (1) business day after the filing of the motion.

Id. (emphasis added).

New Mexico Rule 5-401 of the New Mexico Rules of Criminal Procedure for the District Courts governs ***pretrial release***, which requires a different type of hearing. The timing provision is as follows:

> (1) Time. If a case is initiated in the district court, and the conditions of release have not been set by the magistrate or metropolitan court, the district court shall conduct a hearing under this rule and issue an order setting the conditions of release as soon as practicable, but in no event later than
>
> (a) if the defendant remains in custody, ***three (3) days after the date of arrest*** if the defendant is being held in the local detention center, or ***five (5) days after the date of arrest if the defendant is not being held in the local detention center;*** or
>
> (b) arraignment, if the defendant is not in custody.
>
> (2) Right to counsel. If the defendant does not have counsel at the initial release conditions hearing and is not ordered released at the hearing, the matter shall be continued for no longer than three (3) additional days for a further hearing to review conditions of release, at which the defendant shall have the right to assistance of retained or appointed counsel.

NM. Rule 5-401 (emphasis added).

e. Washington

Washington rules governing detention hearings are, likewise, based on the Bail Reform Act. As in New Mexico, Washington amended its constitution in 2010 to provide judicial authority to deny pretrial release upon a prosecutor's showing by clear and convincing evidence that a defendant's propensity for violence would create a substantial likelihood of danger to the community should the defendant be released. Wa. Const. art. 1, § 20. As in New Mexico, while there is a statutory requirement for an initial appearance and custody assessment within 48 hours of a warrantless arrest, see W.D. Wash. CrR 5; E.D. Wash. LR cr-5, the timing requirements of a

pretrial detention hearing are similar to the federal Bail Reform Act. Rev. Code Wash. § 10.21.060 governs pretrial detention hearings, subsection (2) pertains to the timing requirement of such hearing and reads as follows:

> (2) The hearing must be held ***immediately upon the defendant's first appearance*** before the judicial officer unless the defendant, or the attorney for the government, seeks a continuance. Except for good cause, ***a continuance on motion of such person may not exceed five days (not including any intermediate Saturday, Sunday, or legal holiday), and a continuance on motion of the attorney for the government may not exceed three days (not including any intermediate Saturday, Sunday, or legal holiday).*** During a continuance, such person must be detained.

(emphasis added).

Additionally, the Washington Supreme Court relied on, and agreed with, Montalvo-Murillo when it was presented with a similar case in State v. Martin, 969 P.2d 450, 454 (Wash. 1999). It held that where procedural delay interferes with timing requirements, "automatic dismissal is not warranted." Id. Absent prejudice suffered by the defendant because of the delay, a procedural delay should be considered harmless error. Id. at 545-54; see also State v Carlson, 828 P.2d 30 (Wash. 1992).

f. Illinois

725 ILCS 5/110-4 dictates that all persons shall be bailable before conviction save for persons charged with serious and enumerated offenses. A number of those serious offenses are bailable only after a bail hearing as determined by individual statute. For example, 725 ILCS 5/110-6.1 governs the denial of bail in non-probationable felony offenses. It states in pertinent part:

> **(a)** Upon verified petition by the State, the court shall hold a hearing to determine whether bail should be denied to a defendant who is charged with a felony offense for which a sentence of imprisonment, without probation, periodic imprisonment or conditional discharge, is required by law upon conviction, when it is alleged that the defendant's admission to bail poses a real and present threat to the physical safety of any person or persons.
>
> . . .
>
> **(2)** The hearing shall be held immediately upon the defendant's appearance before the court, ***unless for good cause shown the defendant or the State seeks a continuance. A continuance on motion of the defendant may not exceed 5 calendar days, and a continuance on the motion of the State may not exceed 3 calendar days.*** The defendant may be held in custody during such continuance.

(emphasis added). This language is mirrored in similar Illinois statutes that govern the denial of bail in other serious crimes, such as 725 ILCS 5/110-6.3.

g. Florida

Florida also has a statutory framework for pretrial detention. The relevant Florida statute provides State attorneys five days after filing a motion to conduct a pretrial detention hearing. Section 907.041 of the Florida Statute in relevant part states:

> (e) When a person charged with a crime for which pretrial detention could be ordered is arrested, the arresting agency may detain such defendant, prior to the filing by the state attorney of a motion seeking pretrial detention, for a period not to exceed 24 hours.
>
> (f) ***The pretrial detention hearing shall be held within 5 days of the filing by the state attorney of a complaint to seek pretrial detention***. The defendant may request a continuance. No continuance shall be for longer than 5 days unless there are extenuating circumstances. The defendant may be detained pending the hearing. The state attorney shall be entitled to one continuance for good cause

Fla. Stat. Ann. § 907.041(e)-(f) (emphasis added).

The Supreme Court of Florida considered generally the constitutionality of Fl. St. § 907.041 in State v. Paul, concluding:

> The Legislature by statute has constructed a comprehensive and specific framework setting forth the multiple circumstances under which trial courts may act to deny bail and order pretrial detention. This scheme as set forth in section 907.041, Florida Statutes (1997), fully comports with the Florida Constitution and has long been the standard by which trial courts have been guided in determining whether to deny bail. The statute and the rules enacted pursuant to the statute incorporate the considerations required to balance the court's need to enforce its orders, the need for society to be protected from those posing a danger to the community, and the defendant's constitutional rights to bail based on the time-honored presumption of innocence.

783.2d 1042 (Fla. 2001).

h. Eastern Band of Cherokee Indians Tribes

The Eastern Band of Cherokee Indians, located in western North Carolina, have adopted the language of the Bail Reform Act within their criminal code. The Cherokee Nation, as a sovereign nation within the U.S., has their own code, judiciary, and government. Their laws and ordinances have been codified within the North Carolina Municipal Code. The section relating to timing of pretrial detention hearings reads in pertinent part as follows:

> The hearing shall be held immediately upon the person's first appearance before the Cherokee Court Judge unless that person, or the attorney for the Tribe, seeks a continuance. ***Except for good cause, a continuance on motion of such person may not exceed five days (not including any intermediate Saturday, Sunday, or legal holiday),***

> ***and a continuance on motion of the attorney for the Tribe may not exceed three days (not including any intermediate Saturday, Sunday, or legal holiday*).** During a continuance, such person shall be detained, and the Judge, on motion of the attorney for the Tribe or sua sponte, may order that, while in custody, a person who appears to be an unlawful user of controlled substances or excessive user of alcohol receive a medical examination to determine whether such person could benefit from treatment.

(emphasis added). Eastern Band of Cherokee Indians Tribes and Tribal Nations, North Carolina Code of Ordinances Sec. 15-11.6(f) (emphasis added).

i. Oregon

Oregon law requires pretrial release except in specific circumstances. ORS § 135.240. The law specifies that "[i]f the defendant wants to have a hearing on the issue of release, the defendant must request the hearing at the time of arraignment in circuit court. If the defendant requests a release hearing, the court must hold the hearing ***within five days of the request***." Id. (emphasis added).

Generally, if a person in custody is not released before an arraignment, the magistrate at the arraignment must advise them of their right to a security release, subject to a release hearing. When a person in custody does not request a security release at the time of their arraignment, the magistrate shall make a release decision within 48 hours after the arraignment. ORS § 135.245(1), (2). Timing of arraignments is governed by ORS § 135.010, which reads in pertinent part:

> Except for good cause shown or at the request of the defendant, if the defendant is in custody, the arraignment shall be held during the first 36 hours of custody, excluding holidays, Saturdays and Sundays. In all other cases, except as provided for in ORS 133.060, the arraignment shall be held within 96 hours after the arrest.

Therefore, a person arrested in Oregon has the right to an initial release hearing and decision at an arraignment anywhere from 36 hours to 144 hours after being taken into custody, not including weekends and holidays. A person also has the right to have a hearing on the issue of release within 5 days of requesting it at the arraignment.

j. Louisiana

The Louisiana Code of Criminal Procedure Article 313 also allows for a detention hearing if the person has been arrested for certain offenses. The statute outlining such hearings was effective in January 2017. The Louisiana Code of Criminal Procedure reads as follows in regard to timing of such hearings:

> If the court orders a contradictory hearing, ***the hearing shall be held within five days from the date of determination of probable cause, exclusive of weekends and legal holidays***.

La. Code Crim. Proc. Ann. art. 313(A)(2) (emphasis added).

> Upon motion of the prosecuting attorney, the judge or magistrate may order the temporary detention of a person in custody who is charged with the commission of an offense, ***for a period of not more than five days, exclusive of weekends and legal holidays, pending the conducting of a contradictory bail hearing***. Following the contradictory hearing, upon proof by clear and convincing evidence either that there is a substantial risk that the defendant might flee or that the defendant poses an imminent danger to any other person or the community, the judge or magistrate may order the defendant held without bail pending trial.

La. Code Crim. Proc. Ann. art. 313(B) (emphasis added).

The Third Circuit Court of Appeals of Louisiana considered a violation of the statutory timing requirement that a hearing to set bond be held within five days in State v. Helaire, 230 So.3d 253 (2017). There, the defendant requested an immediate release from custody because a detention hearing was held in seven days instead of within five days. In its analysis, the court further discussed timing requirements, explaining:

> As stated in Article 313, the court is not required to hold a Gwen's Law hearing; the determination of whether to have the hearing is discretionary. If, however, the court orders a hearing, Article 313 require it be held within five days of the determination of probable cause.

Id. at 255.

k. Arizona

Arizona's statute regarding pretrial detention has a tighter timeframe than the Bail Reform Act and other state statutes but does not require a hearing within 48 hours of arrest. The statute reads, in pertinent part:

> On oral motion of the state, the court shall order the hearing required by subsection D (regarding detention hearings) of this section ***at or within twenty-four hours of the initial appearance*** unless the person who is subject to detention or the state moves for a continuance. A continuance that is granted on the motion of the person shall not exceed five calendar days unless there are extenuating circumstances. ***A continuance on the motion of the state shall be granted on good cause shown and shall not exceed twenty-four hours***. The prosecutor shall provide reasonable notice and an opportunity for victims and witnesses to be present and heard at any hearing. The person may be detained pending the hearing.

Ariz. Rev. Stat. Ann. § 13-3961.

l. Vermont

Vermont has a detention hearing framework a bit different from other states. In fact, Vermont allows for a second independent evidentiary hearing on the merits of the denial of bail. Vermont Statute § 7556 subsections (d) and (e) respectively state:

> (d) A person held without bail under section 7553a of this title prior to trial shall be entitled to an independent, second evidentiary hearing on the merits of the denial of bail, which shall be a hearing de novo by a single Justice of the Supreme Court forthwith.
>
> (e) A person held without bail prior to trial shall be entitled to review of that determination by a panel of three Supreme Court Justices within seven business days after bail is denied.

13 V.S.A. § 7556 (d) (e).

The Vermont Supreme Court heard a "bail appeal" in State v. Passino, 154 Vt. 377, 577 A.2d 281 (1990). Although not the main issue in the case, the court noted that the timing of the hearing in the case was acceptable:

> We emphasize that the bail hearing must be scheduled as soon as reasonably possible to protect defendant's right to bail. The scheduling in this case-twelve days elapsed between the arraignment and the commencement of the bail hearing-met this mandate.

Id. at 383.

m. Maine

In Maine, courts hold detention hearings in cases involving crimes that are currently, or were formerly, a capital offense. All other crimes do not require a formal pretrial detention hearing before bail can be decided. In cases where bail can be denied, that decision will be made at the initial appearance unless the State moves for a pretrial detention hearing, known as a Harnish Bail Hearing in Maine. If motioned by the State, the hearing must occur within 5 days of the motion but may be continued by the State or the defendant for good cause. During the interim time between initial appearance and pretrial detention hearing the defendant is held in custody. The statute reads in pertinent part:

> 1. In General. At the initial appearance before a judicial officer of a defendant in custody preconviction for a formerly capital offense, the judicial officer shall issue an

> order under section 1026, unless the attorney for the State moves for a Harnish bail proceeding. If the attorney for the State requests a Harnish bail proceeding before bail has been set, the judicial officer shall order the defendant held pending a hearing under subsection 2. The attorney for the State may move for a Harnish bail proceeding at any time preconviction. If the attorney for the State moves for a Harnish bail proceeding after bail has been set, the court may hold the defendant pending a hearing under subsection 2 or may continue the defendant's bail.
>
> 2. Harnish Bail Proceeding. A Harnish bail proceeding ***must be held within 5 court days of the State's request unless the court, for good cause shown and at the request of either the defendant or the attorney for the State, grants a continuance*.** Evidence presented at a Harnish bail proceeding may include testimony, affidavits and other reliable hearsay evidence as permitted by the court. If, after the hearing, the court finds probable cause to believe that the defendant has committed a formerly capital offense, it shall issue an order under subsection 3. If, after the hearing, the court does not find probable cause to believe that the defendant's alleged criminal conduct was formerly a capital offense, it shall issue an order under section 1026 and may amend its bail order as provided under section 1026, subsection 3, paragraph C.

15 .R.S. § 1027 (emphasis added).

n. Ohio

Ohio law allows a judge to hold an accused person without bail in a variety of circumstances. The timing provisions for a detention hearing are similar to those of the Bail Reform Act. Ohio Rev. Code Ann. § 2937.222 reads in pertinent part as follows:

> On the motion of the prosecuting attorney or on the judge's own motion, the judge shall hold a hearing to determine whether an accused person charged with aggravated murder when it is not a capital offense, murder, a felony of the first or second degree, a violation of section 2903.06 of the Revised Code, a violation of section 2903.211 of the Revised Code that is a felony, or a felony OVI offense shall be denied bail. The judge shall order that the accused be detained until the conclusion of the hearing. Except for good cause, a ***continuance on the motion of the state shall not exceed three court days***. Except for good cause, a continuance on the motion of the accused shall not exceed five court days unless the motion of the accused waives in writing the five-day limit and states in writing a specific period for which the accused requests a continuance. A continuance granted upon a motion of the accused that waives in writing the five-day limit shall not exceed five court days after the period of continuance requested in the motion.

Id. (emphasis added).

o. Washington D.C.

The timing requirements for detention hearings under D.C. law is similar to that of the Bail Reform Act:

> (d)(1) The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the government, seeks a continuance. Except for good cause, a continuance on motion of the person shall not exceed 5 days, and ***a continuance on motion of the attorney for the government shall not exceed 3 days***. During a continuance, the person shall be detained . . .

D.C. Code Ann. § 23-1322 (West) (emphasis added).

p. Oklahoma

The Court of Appeals of Oklahoma implemented procedural requirements for detention hearings in 1998 in Brill v. Gurich. The portion of the holding related to the timing of detention hearings states:

> 1. A hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the State, seeks a continuance. Except for good cause, a continuance on motion of the person may not exceed five days (not including any intermediate Saturday, Sunday, or legal holiday), and a ***continuance on motion of the attorney for the State may not exceed three days (not including any intermediate Saturday, Sunday, or legal holiday).***

965 P.2d 404, 407–08 (Okla. Crim. App. 1998), as corrected (Sept. 23, 1998) (emphasis added).

q. Colorado

Colorado's statute allows no-bail orders in certain enumerated categories of crimes and offenses. In such cases, the statute calls for a pretrial detention hearing to be held within 96 hours of arrest. The statute reads in part as follows:

> **(1)** All persons shall be bailable by sufficient sureties except:
>
> **(a)** For capital offenses when proof is evident or presumption is great; or
>
> **(b)** When, after a hearing held ***within ninety-six hours of arrest*** and upon reasonable notice, the court finds that the proof is evident or the presumption is great as to the crime alleged to have been committed and finds that the public would be placed in significant peril if the accused were released on bail and such

> person is accused in any of the following cases: (the statute goes on to enumerate the types of cases were bail may be denied).

C.R.S. 16-4-101, (parenthetical added).

The statute's only guidance regarding which party holds the burden of proof is found in a subsection allowing a defendant in a capital case to file a motion requesting that bail be set on the ground that the proof is not evident or the presumption not great. Colo. Rev. Stat. Ann. § 16-4-101 (West). At a hearing on such a motion, "the burden shall be upon the people to establish that the proof is evident or that the presumption is great." Id.

r. Alaska

In Alaska, "the burden of proof is on the prosecuting authority that a person charged with an offense should be detained or released with conditions" but the statute does not explicitly detail the level of the prosecutor's burden. Alaska Stat. Ann. § 12.30.011. There is also a "rebuttable presumption that there is a substantial risk that the person will not appear and the person poses a danger to the victim, other persons, or the community" if the person is charged with certain crimes. Id.

Alaska statutes dictate that a pretrial detention hearing occurs within 48 hours of the initial appearance. Alaska Stat. § 12.30.006(b) holds that:

> **(b)** At the first appearance before a judicial officer, a person may be detained up to 48 hours for the prosecuting authority to demonstrate that release of the person under AS 12.30.011 would not reasonably ensure the appearance of the person or will pose a danger to the victim, other persons, or the community, if the person has
>
> **(1)** been charged with an unclassified, class A, class B, or class C felony; or
>
> **(2)** a criminal conviction or charge outside the state.

s. Wisconsin

Wisconsin courts may deny any pretrial release, including release on bail, only for the enumerated crimes listed in Wis. Stat. § 969.035(1), (2). Where a person is charged with one of these offenses, Wisconsin statute dictates that they are entitled to a pretrial detention hearing within 10 days of either detention or the initial appearance. Defendants are detained during the interim time. Wis. Stat. § 969.035 (5) (emphasis added), regarding the timing of pretrial detention hearings, reads as follows:

> (5) A pretrial detention hearing is a hearing before a court for the purpose of determining if the continued detention of the defendant is justified. A pretrial detention hearing may be held in conjunction with a preliminary examination under s. 970.03 or a conditional

> release revocation hearing under s. 969.08 (5) (b), but separate findings shall be made by the court relating to the pretrial detention, preliminary examination and conditional release revocation. ***The pretrial detention hearing shall be commenced within 10 days from the date the defendant is detained or brought before the court under sub. (4).*** The defendant may not be denied release from custody in accordance with s. 969.03 for more than 10 days prior to the hearing required by this subsection.

(emphasis added). This 10-day period of detention prior to a pretrial detention hearing is also codified within the Wisconsin Constitution. It reads in pertinent part:

> The legislature ***may by law authorize, but may not require, circuit courts to deny release for a period not to exceed 10 days prior to the hearing required*** under this subsection to a person who is accused of committing a murder punishable by life imprisonment or a sexual assault punishable by a maximum imprisonment of 20 years, or who is accused of committing or attempting to commit a felony involving serious bodily harm to another or the threat of serious bodily harm to another and who has a previous conviction for committing or attempting to commit a felony involving serious bodily harm to another or the threat of serious bodily harm to another.

Wis. Const. art. 1, § 8 (3) (emphasis added).

t. Conclusion

Although not binding law by any means, the fact that federal statute and many other jurisdictions' laws allow for detention hearings to be held far outside a 48-hour window and build flexibility into the timing requirements is telling and instructive.

VI. The Remedy For Violation of the "Promptness" Requirement is Not Release.

Of course, we will make every effort to comply with the Valdez-Jimenez opinion and its promptness requirements. However, if for whatever reason the hearing is not held in a timely manner, there is guidance from the United States Supreme Court.

As discussed above, in Montalvo-Murillo, the United States Supreme Court considered a case in which the district court, noting a delay in the hearing past the Act's timing requirements, ruled that its hands were tied and it had to order the defendant released, even though the government had met its burden to detain. The United States Supreme Court held that Montalvo-Murillo was not entitled to release as a sanction for the delay. The Court stated:

> We find nothing in the statute to justify denying the Government an opportunity to prove that the person is dangerous or a risk of flight once the statutory time for hearing has passed. We do not agree that we should, or can, invent a remedy to satisfy some perceived need to coerce the courts and the Government into complying with the statutory time limits. Magistrates and district judges can be presumed to insist upon compliance with the law without the threat that we must embarrass the system by releasing a suspect certain to flee from justice, as this one did in such a deft and prompt

> manner. The district court, the court of appeals, and this Court remain open to order immediate release of anyone detained in violation of the statute. Whatever other remedies may exist for detention without a timely hearing or for conduct that is aggravated or intentional, a matter not before us here, we hold that once the Government discovers that the time limits have expired, it may ask for a prompt detention hearing and make its case to detain based upon the requirements set forth in the statute.
> . . .
> When a hearing is held, a defendant subject to detention already will have suffered whatever inconvenience and uncertainty a timely hearing would have spared him. Release would not restore these benefits to him. United States v. Morrison, 449 U.S. 361, 364, 101 S.Ct. 665, 667, 66 L.Ed.2d 564 (1981) (remedies should be tailored to the injury suffered). This case is similar to New York v. Harris, 495 U.S. 14, 110 S.Ct. 1640, 109 L.Ed.2d 13 (1990), in which we held that an unlawful arrest does not require a release and rearrest to validate custody, where probable cause exists. In this case, a person does not become immune from detention because of a timing violation.
>
> Our ruling is consistent also with Bank of Nova Scotia v. United States, 487 U.S., at 256, 108 S.Ct., at 2374, where we held that nonconstitutional error will be harmless unless the court concludes from the record as a whole that the error may have had a "substantial influence" on the outcome of the proceeding. In this case, it is clear that the noncompliance with the timing requirement had no substantial influence on the outcome of the proceeding. Because respondent was dangerous and likely to flee, he would have been detained if his hearing had been held upon his first appearance rather than a few days later.

United States v. Montalvo-Murillo, 110 S. Ct. 2072, 2079–80 (1990).

Note that the court found that ***delay*** of the procedural due process of a detention hearing is nonconstitutional error.

VII. Conclusion

Based on Nevada case law, federal court interpretations of the Bail Reform Act, and the laws of other states, it is clear detention hearings, as contemplated by the Nevada Supreme Court in Valdez-Jimenez are not subject to a 48-hour requirement and should not be. One could argue that our Nevada Supreme Court was purposeful in not providing a specific number of hours in the Valdez-Jimenez opinion. Instead, the Court demands "promptness," directs us to conduct hearings within a "reasonable" amount of time after arrest for defendants who remain in custody, and points us to law regarding arraignment, most likely with the understanding that flexibility of timing requirements is prudent.

TAB 3

Rule 2. Case assignment.

8th Rule 3.10. Consolidation and reassignment.

(a) When an indictment or information is filed against a defendant who has other criminal cases pending in the court, the new case may be assigned directly to the department wherein a case against that defendant is already pending.

(b) Unless objected to by one of the judges concerned, criminal cases, writs or motions may be consolidated or reassigned to any criminal department for trial, settlement or other resolution.

(c) In the event of negotiations being reached as to multiple cases having the same defendant, defense counsel and the prosecution may stipulate to having all of the involved cases assigned to the department having the oldest case with the lowest case number, and the court clerk shall then so reassign the involved cases. If the negotiations later break down, then the court clerk will again reassign the involved cases back to their respective department(s) of origin. The objection provision of subparagraph (b) hereinabove does not pertain to this present subparagraph (c).

2nd CR Rule 2. Case assignment.

Each criminal action shall be randomly assigned to a department of the court and shall remain in such department until final disposition of the action, unless:

(a) the action is brought against a defendant who is the subject of another pending or prior action in this court, in which case the action shall be assigned to the department of the most recent other action; or

(b) as otherwise ordered by the chief judge consistent with a plan of courtwide case management.

Comment: To the extent possible, cases involving a defendant who is the subject of another case in this district shall be assigned to the department of the other case. Otherwise, cases shall be randomly assigned.

2nd LR Rule 2. Organization of the court; chief judge; court administrator.

1. All civil and criminal cases shall be randomly assigned.
2. The district judges shall elect from among the general jurisdiction division and family court division judges a chief judge for a term of 2 years. The chief judge is the presiding judge as referred to in NRS 3.025 and the chief judge referred to in Supreme Court Rule 8.

***

TAB 4

Rule 4. Initial appearance and arraignment.

2nd CR Rule 3. Initial appearance and arraignment.

(a) At the initial appearance of the defendant before the district court, the court shall:

(1) supply the defendant a copy of the indictment or information unless the charging document has previously been made available to the defendant through e-filing;

(2) if necessary, determine whether the defendant qualifies for appointed counsel and, if so, appoint counsel to represent the defendant. In such event, newly appointed counsel shall be given an extension of time of at least 5 days before entry of plea;

(3) arraign the defendant upon all charges in the indictment or information;

(4) subject to the conditions set forth in NRS 178.4853,[2] determine appropriate conditions for the defendant's release from custody or that detention is warranted;

(5) if the defendant enters a plea of not guilty, set the dates for trial, pretrial motions, evidentiary hearings or status conferences;

(6) specify any discovery obligations of the parties beyond those contained in Chapter 174 of the Nevada Revised Statutes.

(b) If the defendant enters a plea of guilty or nolo contendere, the court may transfer the action to the Second Judicial District Court (Washoe County) Specialty Courts, if appropriate, or order a presentence report and set a sentencing date consistent with the jail population management policies of the court and L.C.R. 9.[3]

(c) Subject to the provisions of NRS 176.135,[4] a presentence report may be waived and sentence imposed at the entry of a plea of guilty or nolo contendere.

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[2] **NRS 178.4853 Factors considered before release without bail.** In deciding whether there is good cause to release a person without bail, the court at a minimum shall consider the following factors concerning the person:

1. The length of residence in the community;
2. The status and history of employment;
3. Relationships with the person's spouse and children, parents or other family members and with close friends;
4. Reputation, character and mental condition;
5. Prior criminal record, including, without limitation, any record of appearing or failing to appear after release on bail or without bail;
6. The identity of responsible members of the community who would vouch for the reliability of the person;
7. The nature of the offense with which the person is charged, the apparent probability of conviction and the likely sentence, insofar as these factors relate to the risk of not appearing;
8. The nature and seriousness of the danger to the alleged victim, any other person or the community that would be posed by the person's release;
9. The likelihood of more criminal activity by the person after release; and
10. Any other factors concerning the person's ties to the community or bearing on the risk that the person may willfully fail to appear.

[3] L.C.R. 9 addresses sentencing.

[4] **NRS 176.135 Presentence investigation and report: When required; time for completing.**

1. Except as otherwise provided in this section and NRS 176.151, the Division shall make a presentence investigation and report to the court on each defendant who pleads guilty, guilty but mentally ill or nolo contendere to, or is found guilty or guilty but mentally ill of, a felony.
2. If a defendant is convicted of a felony that is a sexual offense, the presentence investigation and report:

(a) Must be made before the imposition of sentence or the granting of probation; and

Comment: The initial appearance is the occasion for the court and counsel to establish a meaningful schedule for the trial and all pretrial activity appropriate to each case. Except in unforeseen, extraordinary circumstances, the schedule will not be subsequently modified. Status conferences are conducted to monitor the progress of a case. Persons who enter a plea of guilty or nolo contendere and qualify for treatment in the Second Judicial District Drug Court may, if the department deems the defendant to be an appropriate referral, be immediately referred to such court without further proceedings in the department in which the criminal action is commenced.

(b) If the sexual offense is an offense for which the suspension of sentence or the granting of probation is permitted, must include a psychosexual evaluation of the defendant.

3. If a defendant is convicted of a felony other than a sexual offense, the presentence investigation and report must be made before the imposition of sentence or the granting of probation unless:

(a) A sentence is fixed by a jury; or

(b) Such an investigation and report on the defendant has been made by the Division within the 5 years immediately preceding the date initially set for sentencing on the most recent offense.

4. Upon request of the court, the Division shall make presentence investigations and reports on defendants who plead guilty, guilty but mentally ill or nolo contendere to, or are found guilty or guilty but mentally ill of, gross misdemeanors.

TAB 5

Rule 5. Pleas of guilty or nolo contendere.

2nd CR Rule 4. Pleas of guilty or nolo contendere.

(a) All pleas of guilty or nolo contendere entered pursuant to a plea bargain agreement shall be supported by a written plea memorandum, filed in open court at the entry of the plea, stating:

(1) the terms of the plea bargain agreement;

(2) the factual basis for the plea and an acknowledgment by counsel that the defendant has been advised of the discovery produced and the evidence the State intends to present at trial;

(3) the constitutional rights waived by the defendant;

(4) the maximum possible punishment for any charge which is the subject of the plea bargain agreement;

(5) whether probation is available and whether multiple or enhanced sentences can be concurrent or consecutive;

(6) the defendant's acknowledgment that the court is not bound by the plea bargain agreement; and

(7) the defendant's knowledge of and voluntary consent to the terms of the plea bargain agreement and the contents of the memorandum.

(b) The guilty or nolo contendere plea memorandum shall be signed by the defendant and counsel for all parties to the agreement.

Comment: The plea bargain memorandum is integral to the entry of a guilty or nolo contendere plea and must be completed, signed and filed when the plea is entered.

TAB 6

Rule 6. Release and detention pending judicial proceedings.

8th Rule 3.80. Release from custody; bail reduction.

(a) When an individual is arrested on probable cause or on an arrest warrant, any district judge may, on an emergency basis only, unilaterally, without contact with a prosecutor, grant a release upon the individual's own recognizance pursuant to NRS 178.4851[5] and 178.4853[6] or reduce the amount of bail below the standard bail, provided that the arrest is for a misdemeanor, gross misdemeanor, non-violent felony, or some combination thereof. Before the court may grant an own recognizance release or bail reduction, the court must be satisfied that the individual arrested will likely appear in court at the next scheduled appearance date and does not present a threat in the interim if released. Once the individual arrested makes an initial court appearance, all issues regarding custodial status shall be addressed by the judge assigned the case or any other judge specifically designated or authorized by the assigned judge. A judge designated or authorized by the assigned judge, or by court rule, may release an individual from a bench warrant for a misdemeanor, gross misdemeanor or non-violent felony, or some combination thereof.

(b) When an individual is arrested on probable cause for a violent felony offense or on a bench warrant for a violent felony offense issued by the district court, Justice Court, or municipal court, a district judge shall not grant an own recognizance

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[5] **NRS 178.4853 Factors considered before release without bail.** In deciding whether there is good cause to release a person without bail, the court at a minimum shall consider the following factors concerning the person:

1. The length of residence in the community;
2. The status and history of employment;
3. Relationships with the person's spouse and children, parents or other family members and with close friends;
4. Reputation, character and mental condition;
5. Prior criminal record, including, without limitation, any record of appearing or failing to appear after release on bail or without bail;
6. The identity of responsible members of the community who would vouch for the reliability of the person;
7. The nature of the offense with which the person is charged, the apparent probability of conviction and the likely sentence, insofar as these factors relate to the risk of not appearing;
8. The nature and seriousness of the danger to the alleged victim, any other person or the community that would be posed by the person's release;
9. The likelihood of more criminal activity by the person after release; and
10. Any other factors concerning the person's ties to the community or bearing on the risk that the person may willfully fail to appear.

[6] **NRS 178.4853 Factors considered before release without bail.** In deciding whether there is good cause to release a person without bail, the court at a minimum shall consider the following factors concerning the person:

1. The length of residence in the community;
2. The status and history of employment;
3. Relationships with the person's spouse and children, parents or other family members and with close friends;
4. Reputation, character and mental condition;
5. Prior criminal record, including, without limitation, any record of appearing or failing to appear after release on bail or without bail;
6. The identity of responsible members of the community who would vouch for the reliability of the person;
7. The nature of the offense with which the person is charged, the apparent probability of conviction and the likely sentence, insofar as these factors relate to the risk of not appearing;
8. The nature and seriousness of the danger to the alleged victim, any other person or the community that would be posed by the person's release;
9. The likelihood of more criminal activity by the person after release; and
10. Any other factors concerning the person's ties to the community or bearing on the risk that the person may willfully fail to appear.

release or reduce the amount of bail established unless the judge provides an opportunity pursuant to NRS 178.486[7] for the prosecution to take a position thereon by telephone or in person, either in chambers or in open court. A district court judge may unilaterally increase bail for an individual arrested for a violent felony if the court is satisfied that the individual arrested will not likely appear in court at the next scheduled appearance date or presents a threat to the community in the interim if released.

(c) Between the time of an individual's arrest on probable cause, a bench warrant, or an arrest warrant and his or her subsequent court appearance, ex parte contact between the court and any person interested in the litigation regarding the individual's custodial status shall be allowed.

2nd CR Rule 5. Release and detention pending judicial proceedings.

(a) The court shall determine appropriate conditions for release or that detention is warranted using the factors set forth in NRS 178.4853[8] and NRS 178.486.[9]

(b) All persons released from custody, on bail or otherwise, shall comply with any terms or conditions of release imposed by the court.

(c) The court shall order the pretrial release of a defendant on personal recognizance (subject to supervision by the court services department, or upon such additional conditions as the court deems appropriate) unless the court determines that such release will not reasonably assure the appearance of the defendant as required or will endanger the safety of any other person or the community.

(d) If the court determines that the release of the defendant pursuant to subsection (c) of this rule will not reasonably assure the appearance of the defendant as required or will endanger the safety of any other person or the community, the court shall

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[7] **NRS 178.486 When bail is matter of discretion, notice of application must be given to district attorney.** When the admission to bail is a matter of discretion, the court, or officer by whom it may be ordered, shall require such notice of the application therefor as the court or officer may deem reasonable to be given to the district attorney of the county where the examination is had.

[8] **NRS 178.4853 Factors considered before release without bail.** In deciding whether there is good cause to release a person without bail, the court at a minimum shall consider the following factors concerning the person:

1. The length of residence in the community;
2. The status and history of employment;
3. Relationships with the person's spouse and children, parents or other family members and with close friends;
4. Reputation, character and mental condition;
5. Prior criminal record, including, without limitation, any record of appearing or failing to appear after release on bail or without bail;
6. The identity of responsible members of the community who would vouch for the reliability of the person;
7. The nature of the offense with which the person is charged, the apparent probability of conviction and the likely sentence, insofar as these factors relate to the risk of not appearing;
8. The nature and seriousness of the danger to the alleged victim, any other person or the community that would be posed by the person's release;
9. The likelihood of more criminal activity by the person after release; and
10. Any other factors concerning the person's ties to the community or bearing on the risk that the person may willfully fail to appear.

[9] **NRS 178.486 When bail is matter of discretion, notice of application must be given to district attorney.** When the admission to bail is a matter of discretion, the court, or officer by whom it may be ordered, shall require such notice of the application therefor as the court or officer may deem reasonable to be given to the district attorney of the county where the examination is had.

consider the release of the defendant upon the least restrictive condition, or combination of conditions, that will reasonably assure the presence of the defendant as required and the safety of any other person or the community, which may include the condition that the defendant:

(1) remain in the custody of a designated person, who agrees to assume supervision and agrees to report any violation of a release condition to the court services department, if the designated person submits to the jurisdiction of the court and is able reasonably to assure the court that the defendant will appear as required and will not pose a danger to the safety of any other person or the community;

(2) maintain employment or, if unemployed, actively seek employment;

(3) maintain or commence an educational program;

(4) abide by specified restrictions on personal associations, place of abode or travel;

(5) avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;

(6) report by telephone or in person on a regular basis to the court services department or a designated law enforcement agency or other agency;

(7) comply with a specified curfew;

(8) refrain from possessing a firearm, destructive device or other dangerous weapon;

(9) refrain from the use of alcohol or controlled substances;

(10) undergo a specified program of available medical, psychological, psychiatric or other counseling or treatment, and remain in a specified institution if required for that purpose;

(11) execute an agreement to forfeit upon failing to appear as required, such designated property, including money, as is reasonably necessary to assure the appearance of the defendant as required, and post with the court such indicia of ownership of the property or such percentage of the money as the court may specify;

(12) execute a bail bond with solvent sureties in such amount as is reasonably necessary to assure the appearance of the defendant as required;

(13) return to custody for specified hours following release for employment, schooling or other limited purposes; and

(14) satisfy any other condition that is reasonably necessary to assure the appearance of the defendant as required and to assure the safety of any other person and the community

(e) The court may at any time amend the order or conditions of release.

Comment: This rule adopts a release evaluation process primarily derived from 18 U.S.C. § 3142.[10]

[10] 18 U.S. Code § 3142 is lengthy and is therefore reproduced at the end of this document.

- Note that 2nd L.C.R. 7(i), "Pretrial Motions," provides that: "Motions made under L.C.R. 5 may be made orally in open court or in an on-the-record telephone conference with the court and opposing counsel."

TAB 7

Grand Jury

1. All procedures used by court for the selection process for grand jurors must be in writing and available to the public for review.

2. The district court shall keep all documents and statistics on the selection process for the grand jury and conduct periodic review to ensure the process allows for a grand jury drawn from the fair cross-section of our community.

2. A defendant is entitled to information relating to the composition of the grand jury in order to assess whether he has a viable constitutional challenge. A defendant may gain access to grand jury information by filing a motion in the district court where his Indictment is proceeding.

"Certainly, Nevada is not bound by this federal statute, and it does not have a state statute providing the right to inspect grand jury records. Nevertheless, this court is bound by Supreme Court precedent, and in *Adler,* we recognized that a defendant has a constitutional right to a grand jury drawn from a fair cross-section of the community. 95 Nev. at 347, 594 P.2d at 731. As the Supreme Court of Missouri noted when considering this same issue, "[t]his cross-section requirement would be without meaning if a defendant were denied all means of discovery in an effort to assert that right." *State ex rel. Garrett v. Saitz,* 594 S.W.2d 606, 608 (Mo.1980). Thus, we hold that Afzali is entitled to information relating to the racial composition of the grand jury so that he may assess whether he has a viable constitutional challenge." *Afzali v. State*, 130 Nev. 313, 317, 326 P.3d 1, 3 (2014).

Proposed by the Clark County Public Defender's Office

Jury Commissioner

Rule X.XX. **Availability of procedures**. The jury commissioner shall document, in writing, all procedures used by the jury commissioner's office in the selection of prospective jurors and make the procedures available to the public upon request.

Rule X.XX. **Jury sources**. The jury commissioner must utilize a list of persons who are registered to vote in the county, the Department of Motor Vehicles, the Employment Security Division of the Department of Employment, Training and Rehabilitation, and a public utility as required by NRS 6.045, and such other lists as may be authorized by the chief judge.

Rule X.XX. **Yearly reporting requirements**. The jury commissioner shall prepare and submit a yearly report that contains statistics from the records required to be maintained by the jury commissioner pursuant to NRS 6.045, including, without limitation, the name, occupation (where available), zip code and race of each trial juror who is summoned, each trial juror who appears for jury service, each trial juror who is selected, and each trial juror who is seated as a juror.

Rule X.XX. **Availability of documentation in master list**. All documentation collected by the jury commissioner and used to compile the master list must be made available to the parties to a jury trial upon request. A criminal defendant is entitled to information relating to the race, gender, occupation (where available), and zip code of the prospective jurors in the master list. The jury commissioner must also prepare a zip code report listing the number of prospective jurors in the master list by zip code to be given to the public upon request.

Rule X.XX. **Availability of documentation to the parties in a case**. All documentation collected by the jury commissioner from prospective jurors must be made available to the parties to a jury trial upon request. A criminal defendant is entitled to information relating to the race, gender, occupation (where available), and zip code of the prospective jurors assigned to his case, the prospective jurors reporting for jury service, and in the group of jurors summoned for jury on the date set for jury trial. This documentation must be made available, when requested, prior to beginning the jury selection process.

Proposed by:

Clark County Public Defender's Office

Chief Deputy Tegan Machnich
Chief Deputy Sharon Dickinson