



February 14, 2019

Minnesota House of Representatives

Public Safety and Criminal Justice Reform Finance
Minnesota State Capital
75 Rev Dr Martin Luther King Jr Boulevard, Room 120
St. Paul, Minnesota 55155

RE: House File 741, relating to public safety; limiting use of money bail for certain offenses; amending Minnesota Statutes 2018, section 629.53.

Dear Representative Mariani and Members of the Committee:

This letter contains my written remarks concerning H.F. 741, which concerns reform of various laws concerning bail in misdemeanor cases. Our association, the American Bail Coalition, consists of various surety insurers, most of whom underwrite the various licensed bail bonding agents conducting business in Minnesota. We are proud partners in Minnesota's criminal justice system, facilitating the orderly and speedy release of defendants from jail while financially guaranteeing the appearance of the defendants as required.

While we agree that bail reform in many places is necessary, in reviewing Minnesota's rules and statutes governing the setting of bail and conditions of release, I can confidently say that the system does not suffer many of the same defects that are seen in other states. Largely, we believe, much of this legislation is unnecessary and conflicts with current court rules or practice. Due process improvements, we believe should be made, but whether those are concerns of the legislature or procedural concerns for courts, we will leave to the experts to decide.

First, the filter on the front end of the system in Minnesota to keep unnecessary persons out of jail starts pre-arrest. Law enforcement officers in Minnesota must make specific findings to overcome a presumption of the issuance of a citation in misdemeanor cases:

Rule 601, Subd. 1. Mandatory Citation Issuance in Misdemeanor Cases.

(a) By Arresting Officer. In misdemeanor cases, peace officers who decide to proceed with prosecution and who act without a warrant must issue a citation and release the defendant unless it reasonably appears:

(1) the person must be detained to prevent bodily injury to that person or another;



(2) further criminal conduct will occur; or

(3) a substantial likelihood exists that the person will not respond to a citation.

In addition, an officer is required to then release a defendant prior to jailing the defendant when none of these three conditions are present. This serves as an immediate check to keeping persons out of jail who do not belong there in the first place, and is quite unusual as compared to other states, most of whom simply allow discretionary use of a citation but not require any particular finding by the police.

Second, the legislation appears to create a new standard for the imposition of financial conditions of bail in certain misdemeanor cases, potentially eliminating judicial officers' ability to consider public safety in the setting of bail. Excepted from consideration are certain repeat drunk driving offenses, domestic violence cases, stalking, and violation of protection order cases. The current rule says that "a person must be released on personal recognizance or an unsecured appearance bond unless a court determines that release will endanger the public safety or will not reasonably assure the defendant's appearance." The new standard in all cases not excepted, meaning all other misdemeanors, is that a judge must overcome a presumption of a release on own recognizance only "If the court determines that there is a substantial likelihood that a defendant will not appear at future court appearances." Only then may a court then impose an unsecured or secured bond.

To compound the problem, Section (3) of the bill then adopts the existing presumption in favor of recognizance in the court Rule 6.02, Subdivision 1. It is hard to understand what is actually meant here, other than to conclude that a court cannot consider public safety in the misdemeanor cases, not including the specifically enumerated cases in: "section 169A.20 if the defendant has three or more prior impaired driving convictions within the previous ten years. As used in this subdivision, "prior impaired driving conviction" has the meaning given in section 169A.03; (2) section 518B.01; (3) section 609.2242; (4) section 609.749; and (5) section 629.75."

At the end of the day, there is no reason to start tinkering with these presumptions in the non-enumerated misdemeanor cases in the first place. The Rules in our view already handle this issue and provide for the appropriate judicial discretion. There is no reason to depart from the current rule – a rule that forty-six other states also follow that allow or require consideration of public safety in bail setting in all cases.

Ben Johnson, Minnesota legislative analyst, issued a document entitled *Bail in Minnesota*, which is a good summary of Minnesota's bail laws.¹ He makes an important point as we begin taking a look at the language contained in the bill on lines 2.1 through 2.7:

While a court must consider a person's ability to pay, *there is nothing that requires*

¹ <https://www.house.leg.state.mn.us/hrd/pubs/ss/ssbailmn.pdf>



judges to set bail at an amount detainees can actually pay. That practice contrasts with the federal rule under which a judge “may not impose a financial condition that results in the pretrial detention of the person.” However, the federal system has a procedure for detention in which a person can be held without bail under certain circumstances. Because the Minnesota Constitution requires judges to set bail, detention would be unconstitutional in Minnesota.

Under the new proposed legislation, Subsection (c) (which borrows directly from the federal statute) and (d) would therefore create an absolute right to release on all misdemeanors not specifically excepted immediately but no later than 48 hours since there would be no other legal basis for their detention. If a defendant could not meet a bail that today is determined not to be “excessive” under the Minnesota or federal constitution, then it could serve to detain. No longer under this language. Subsection (D) then provides for a mandatory review within 48 hours, but if the rule in (c) is adopted there is no reason to assume that this wouldn’t open the floodgates to *habeas* petitions and other motions demanding immediate release, to which they would be entitled.

That said, we do believe the rule contained in Subsection (d) is an important change, but should be amended to simply require that all bails set by a bail schedule should be reviewed as soon as possible but no more than 48 hours. This is consistent with recent case-law in several cases coming out of the U.S. Courts of Appeals in the Fifth (*O’Donnell v. Harris County, Texas*) and Eleventh Circuits (*Walker v. Calhoun, Georgia*). The presumption that someone is being detained should be deleted presuming the substantive right to an affordable bail is deleted. We believe this right to due process and bail reviews within 48 hours should be extended to tribunals at all jurisdictional levels in Minnesota.

In addition, I would point out there are other numerous and significant safeguards in Minnesota’s law that serve to check against persons languishing when they are held in jail pending trial, due to inability to post bail or other holds that keep them in jail.

First, misdemeanor bail in Minnesota is capped. Section 629.471 provides that “the maximum cash bail that may be required for a person charged with a misdemeanor or gross misdemeanor offense is double the highest cash fine that may be imposed for that offense,” with certain exceptions.

Second, the right to speedy trial, coupled with mandatory release after the trial deadline is about as robust as I have seen in my time working on this issue. According to Mr. Johnson:

If a person charged with a misdemeanor demands a speedy trial, the trial must take place within ten days or else the defendant must be released on nonmonetary conditions. Unless there are exigent circumstances, a person charged with a gross misdemeanor or felony must be released on nonmonetary conditions if trial does not begin within 120 days after the person enters a plea other than guilty.²

² *Id.*



Third, judges are already required to consider financial resources of the defendant in the setting of bail. According to Mr. Johnson, "Judges consider 13 specific factors when choosing conditions of release. Those conditions include the nature of the crime charged, the person's ties to the community, **the person's financial resources**, and the safety of others."³

In addition, this legislation would impose a requirement that a court, in the misdemeanor cases not exempted, impose the least restrictive conditions of release. Yet, this is already covered in current law as well. The comment to Rule 6.2 states as follows:

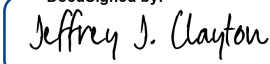
The conditions of release must proceed from the least restrictive to the ultimate imposition of cash bail depending on the circumstances in each case. Release on monetary conditions should only be required when no other conditions will reasonably ensure the defendant's appearance. When monetary conditions are imposed, bail should be set at the lowest level necessary to ensure the defendant's reappearance.

This is consistent with the law of the land since 1951, announced by the U.S. Supreme Court in *Stack v. Boyle*⁴: "Bail set before trial at a figure higher than an amount reasonably calculated to fulfill the purpose of assuring the presence of the defendant is "excessive" under the Eighth Amendment."

There are always opportunities to improve any system, and we believe that focusing this legislation on the due process issues should be the preferred approach. Creating a right to an immediate affordable bail and mandatory release within 48 hours, we think, is not the right approach.

We look forward to working with lawmakers and stakeholders to find additional opportunities to improve Minnesota's bail system.

Respectfully submitted,

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³ *Id.*

⁴ 342 U.S. 1.