

STATE OF ALASKA

DEPARTMENT OF LAW CRIMINAL DIVISION

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March 10, 2010

Hon. Jay Ramras
Chair, House Judiciary Committee
Alaska State Capitol, Room 118
Juneau, Alaska 99801

Re: House Bill 324 – Bail Reform

Dear Chairman Ramras:

I am writing first to thank you for the thoughtful and thorough hearings that you held for HB 298 (sexual assault and abuse) and HB 316 (evidence retention and post-conviction DNA testing). I am also writing to ask again that you consider scheduling House Bill 324, the bail reform bill, for a hearing in the House Judiciary Committee. I hope you will not think we are too demanding, but there are good reasons to hear the bail bill: in addition to protection of the public and other victims, victims of sexual assault and sexual abuse will greatly benefit from the passage of the bill. Although bail reform is not directly targeted at sexual assault or sexual abuse in the state, the bill would provide additional protection to victims of these crimes.

The Problems with current law:

Our bail laws date back to 1966. It is clear that when the legislature adopted these statutes, times were not as difficult as present. For example, unless a person has been convicted of an unclassified felony or a class A felony, our bail laws allow a person found guilty of any other crime, either by plea or by verdict, to be released pending imposition of sentence or during an appeal. The following scenarios are only a few of many examples of the danger that can result from the application of the current law.

Larry Berryhill, IJU-07-992CR, was convicted of two counts of Sexual Abuse of a Minor in the Second Degree for having sexual contact with a young boy who worked for him at his lodge in Gustavus. After being found guilty, and over the state's objection, the court released him on an unsecured signature bond, in lieu of posting bail, in the amount of \$25,000. Mr. Berryhill did not appear for his sentencing. Alaska State Troopers and law enforcement agents from other states

(Mr. Berryhill had committed similar crimes in other states) found that Mr. Berryhill had fled to Argentina, and was vacationing in New Zealand and Europe when he should have appeared in court for his sentencing. Mr. Berryhill died before the Troopers were able to arrest him. He did not spend a single day in jail for his sexual abuse of that young boy.

Michael Williams, 3AN-10-166CR, has been convicted of a felony five times, two of the felonies were federal armed bank robbery convictions from the late 1980s. In January, 2008, he was charged with the Robbery in the First Degree for a home invasion robbery with multiple victims. The state proceeded with the prosecution under the three strikes law – with a 99 year sentence possible if convicted. This potential sentence is higher than most people convicted of homicide would receive. Over the state's objection, bail was set at \$5,000 cash appearance bond and a third party custodian was appointed. The state requested several times that his bail be increased, but were unsuccessful. Mr. Williams skipped out soon after release, and a bench warrant was issued for his arrest. He has not been found.

James Spencer, 3AN-09-2113CR, was charged with Robbery in the First Degree after confronting a Carr's employee with a handgun. Over the state's objection, his bail was set at \$1,000 cash performance bond, and \$5,000 cash or corporate appearance bond. Last week, Mr. Spencer was arrested and charged with a new Robbery in the First Degree for an armed robbery at the Burger King (3AN010-2471CR).

Jack Lee Espinoza, Jr., 3AN-10-2113CR, was charged with two counts of Robbery in the First Degree. He had been convicted of more than 10 crimes in the past, several of them were felonies. Over the state's objection, Mr. Espinoza had been released on bail of \$2,500 cash or corporate appearance bond and ankle monitoring. Within 48 hours of his release, Mr. Espinoza had cut off his ankle monitor, and with another person committed another armed robbery at a trailer in Anchorage. The victim was shot, allegedly by the other person, during the robbery.

How HB 324 will help avoid these problems

Section 10 of HB 324 (page 13, beginning at line 26) provides that a person found guilty of a sexual felony may not be released pending imposition of sentence or appeal. The legislature has raised the maximum term of imprisonment for a person convicted of a sexual felony to 99 years; with that maximum term the danger of flight is high. Additionally, the

danger of sex offenders victimizing others is significant. Mr. Berryhill would not have been released after being found guilty of sexual abuse under HB 324.

HB 324 is similar to federal law in part because it would adopt a presumption, that is rebuttable, that no combination of conditions or monetary bail would ensure the safety of the public and the appearance of the defendant in cases where the person is either charged with an unclassified or a class A felony (similar to current law), or the defendant is a higher risk of flight or danger to the public (new in HB 324). The bill provides that other persons with higher risk include the following:

- persons charged with a felony who have a prior felony conviction and less than five years have elapsed since unconditional release for the prior felony;
- persons charged with a crime committed while the person was on release for another charge or conviction;
- persons charged with a domestic violence crime if the person has a conviction for a domestic violence crime within the previous five years;
- persons arrested in connection with a felony charge or conviction out of state and the person is fugitive from the other jurisdiction.

The individuals described in the scenarios above (except for Mr. Berryhill), would have burden of going forward under HB 324 with suggestion for release conditions. For example, Mr. Williams would have to present information and suggestions for conditions of release that would satisfy a judicial officer that he would not be a danger to the public and he would not be a flight risk. Mr. Williams still has the constitutional right to have bail set for him.

Additionally, HB 324 would adopt standards for third party custodians so that, for example, a person charged with crimes, on probation, or with recent convictions could not act as a third party custodian. HB 324 would require a judicial officer to do basic screening of a person before appointing the person as a custodian. Defendants have taken advantage of third party custodians in the past. There have been advertisements on Craig's list for third party custodians (see attached).

Misconceptions about HB 324

We have heard several comments about HB 324 that are simply not accurate. For example, the bill changes the deadline for the first appearance before a court of a person arrested from 24 to 48 hours. This change has been described as contrary to the practice of a

Honorable Jay Ramras
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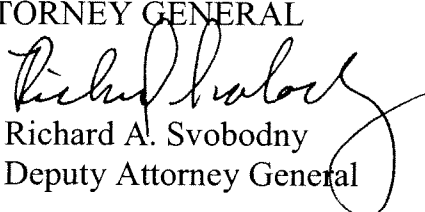
majority of other states. As can be seen by the attached memorandum and chart, Alaska is one of only three states who require a first appearance within 24 hours. The remaining states have later deadlines. There are many good reasons to change this deadline. It would give all parties a chance to gather information for better informed bail hearings. Even more important is that victims in Alaska have a constitutional right to appear at arraignments and bail hearings. Often we are unable to notify them of a hearing that must be held within 24 hours of arrest; other times the victim is still in the hospital at this time. The change to a 48 hour deadline will help the system make the victim's right to be present much more meaningful.

We also have heard people say that HB 324 would prohibit certain people from being released on bail. This is not correct. Defendants have a constitutional right to have bail set for their release. HB 324 simply changes certain procedures for the courts to follow in setting bail. In doing so, it would protect the public and discourage bail jumping much better than does current law.

Sincerely,

DANIEL S. SULLIVAN
ATTORNEY GENERAL

By:


Richard A. Svobodny
Deputy Attorney General

Enclosures

MEMORANDUM

STATE OF ALASKA

Department of Law - Criminal Division

To: Senate Judiciary Committee

Date: March 1, 2010

Thru: Richard Svobodny, Deputy Attorney General
Anne Carpeneti, Assistant Attorney General

From: Susan S. McLean *SMc*
Director, Criminal Division

Subject: **Other State Rules - First
Appearance After Arrest**

General Considerations

The Fourth Amendment requires that a person must be released from custody after 48 hours if a court has not determined that there is probable cause for the arrest. *County of Riverside v. McLaughlin*, 500 U.S. 44, 57-59, 111 S.Ct. 1661, 1670-1671 (1991). Violation of the rule is but one factor to consider in determining whether to suppress a defendant's in-custody statements.

- Since probable cause (and the amount of bail) must be determined before an arrest warrant issues, a probable cause determination only applies to warrantless arrests.
- Since probable cause may be determined on the basis of affidavits and sworn testimony after a warrantless arrest, the defendant's presence is not required at a probable cause hearing.
- Many states require appearance before a magistrate without unnecessary delay, but most courts have not defined "without unnecessary delay" as a specific amount of time, and determine meaning on a case by case basis.

Only 3 of the 24 states which set specific time limits mandate appearance within 24 actual hours of arrest.

Summary - First Appearance Following Warrantless Arrest, By Total Number of States

- 3 states - 24 hours, calculated including weekends and holidays (AK, FL, MD)
- 1 state - 24 hours, weekends and holidays *may* be included or excluded (WA)
- 6 states - 24 hours, calculated *excluding* weekends and holidays (AZ, CT, DE, ID, MA, NH)
- 1 state - 36 hours, calculated *excluding* day of arrest, Sundays and holidays (MN)
- 7 states - 48 hours, including weekends and holidays (AL, AR, GA, HI, MS, NE, TX)
- 1 state - 48 hours, *excluding* Sunday, holiday, and days when court not in session (CA)
- 1 state - 48 hours, *excluding* Saturday, Sunday and holidays (ME)
- 1 state - 48 hours if 1st appearance is combined w/prob. cause hearing (court decision) (WI)
- 2 states - 72 hours, including weekends and holidays (NJ, WY)
- 1 state - 72 hours, *excluding* Saturday, Sunday and holidays (LA)
- 1 state - 72 hours is "without delay", if probable cause w/in 48 hours (court decision) (TN)
- 21 states - "without unnecessary delay" (CO, IL, IA, KS, KY, MI, MT, NV, NM, NY, NC, ND, OH, OK, OR, PA, RI, SD, UT, VT, WV)
- 2 states - "forthwith" (SC, VA)
- 1 state - "promptly" (repealed a 24- hour rule in 1995) (IN)
- 1 state - person must be released if not "charged" within 20 hours, but no provision for first appearance (MO)

State Time Limits for Initial Appearance Before Magistrate

State	Time Limit	Authority	Statutory language/construction
Alabama	48 hours - Warrantless arrest 72 hours - Arrest w/ warrant	Ala. R. Crim. P. 4.3(a)(1)(iii) Ala. R. Crim. P. 4.3(b)(2)(i)	
Alaska	24 hours, including weekends and holidays	Alaska R. Crim. P. 5(a)(1)	
Arizona	24 hours, excluding Sat., Sun and holidays	Ariz. R. Crim. P. 4.1(b) and Ariz. R. Crim. P. 1.3	<i>See, State v. Watkins</i> , 2008 WL 3171651 * 3 (Ariz. App. Aug.5, 2008) (Sat. Sun. and legal holiday excluded from calculation of 24 hrs; citing Rules 4.1(b) and 1.3))
Arkansas	48 hours Case law suggests that exception may exist for weekends and holidays	Ark. R. Crim. P. 4.1(e)	<i>See, Larson v. Dorney</i> , ___ F.Supp. ___, Slip. Op. 2009WL 903392 *4 (W.D. Ark, April 1, 2009)(delay between arrest on Good Friday and appearance on Monday was "as promptly as calendar would allow")
California	48 hours, excluding Sundays and holidays. If 48 hours expires when court is not in session, then next judicial day.	CA Penal Code § 825(a)(1) CA Penal Code § 825(a)(2)	
Colorado	without unnecessary delay	CRSA. § 16-2-112 Colo. R. Crim. P. 5	
Connecticut	24 hours, excluding Sat., Sun. and holidays	CRS 54-1(g) Conn. Practice Book R. 37-1	Statutory language "promptly before the court sitting next regularly" means the next court day, excluding weekends and holidays. <i>State v. Pirowski</i> , 11 Conn. App. 238,240, 526 A.2d 562 (1996)
Delaware	24 hours, excluding Sundays and holidays	11 Del. C. § 1909	
Florida	24 hours, including weekends and holidays	Fla. R. Crim. P 3.130	
Georgia	48 hours –warrantless arrest 72 hours – arrest with warrant	Ga. Uniform St. Ct. R. 26.1 Ga. St § 17-4-62; Ga. St § 117-4-26	
Hawaii	48 hours	H.R.S. 803-9(5)	
Idaho	24 hours, excluding Sat., Sun. and holidays	I.C.R, Rule 5(b)	
Illinois	without unnecessary delay	I.L.C.S. § 109-1	<i>See, People v. Willis</i> , 831 N.E.2d, 531, 538 (Ill., 2005) Ill Court cites <i>McLaughlin</i> as requiring 48 hours, but delay is only one factor to be examined in deciding whether confession is voluntary. Court has not otherwise defined "unnecessary delay".

Indiana	<p>" promptly"</p> <p>24 hr. rule repealed, 1995</p> <p>Ct. decision implies that more than 48 hours can pass before initial appearance before magistrate</p>	Ind. Code § 35-33-7-1	<p>See, <i>State v. Larson</i>, 776 N.W.2d, 254, 258 (Ind. 2009) – probable cause must be determined with 48 hours, but can be based on hearsay and written testimony. "Arrested person has no right to be physically present at probable cause hearing." Ind. law does not provide for a specific period of time in defining how "promptly" a person is brought before magistrate</p>
Iowa	without unnecessary delay	I.C.A. 804.22	
Kansas	without unnecessary delay	KSA 2003 Supp. 22- 2901	<p>See, <i>State v. Carrow</i>, 2006 WL 399251 *4 (Kan. App., Feb. 17, 2006) - cites <i>McLaughlin</i> as defining "without unreasonable delay" to mean that period of delay "cannot be longer than 48 hours, excluding weekends and holidays"</p>
Kentucky	without unnecessary delay	Ky. R. Crim. P. 3.02(2)	
Louisiana	<p>72 hours excluding Sat., Sun, holidays</p> <p>48 hours probable cause hearing, which is not adversarial and conducted without presence of defendant</p>	<p>LSA – C.Cr. P. Art. 230-1(A)</p> <p>LSA –C. Cr. P. Art. 230.2(A)</p>	
Maine	48 hours, excluding Sat., Sun and holidays	Me. R. Crim. P. 5(a)	
Maryland	24 hours, including weekends and holidays	Md. Rule 4-212(e) and (f)	<p>Although statute does not specifically state "including weekends", it is clear from case law. See, e.g., <i>Odum v. State</i>, 846 A. 2d 145 (Md. App. 2004)</p>
Massachusetts	<p>24 hours, excluding weekends and holidays</p> <p>(see judicial interpretation re probable cause determination)</p>	Mass. R. Crim. P. 7	<p>"accused shall be brought before court then in session, and, if not at its next session".</p> <p>Language at the court's "next session" suggests that if an accused is arrested on Friday, the next session would be a regular court day.</p> <p>See, <i>Jenkins v. Chief Justice of Dist. Court Dept.</i>, 619 N.E.2d 324, 337,339 (Mass, 1993) holding that probable cause must be determined within 24 hours but that the determination may be made ex parte upon written documents.</p>
Michigan	without unnecessary delay	M.C.L.A. § 764.13	
Minnesota	36 hours, excluding day of arrest, Sun. and holidays	49 M.S.A. R. Crim. P. 4.02(5)	

Mississippi	without unnecessary delay, within 48 hours	M.C.A. 99-3-17 Uniform Cnty and Cir R 6.03	
Missouri	None – must be charged within 20 hours, but no requirement of personal appearance	V. Ann. Mo. C. Art. 544.170	All persons who are arrested without warrant shall be released if not charged and held by warrant within 20 hours of arrest <i>See, St. v. Brown</i> , 933 P.2d 672, 675-676 (Mont. 1999) acknowledging <i>McLaughlin</i> 48 hour time limit for probable cause determination, and holding that to be one factor in deciding voluntariness of confession.
Montana	without unnecessary delay	MCA 46-7-101	
Nebraska	48 hours	Neb. Crim. Rule 5.1(b)(1)	
Nevada	without unnecessary delay -warrantless arrest	N.R.S. 171-1771	<i>See, Powell v. State</i> , 930 P.2d 1123 (Nev. 1997), acknowledging that <i>McLaughlin</i> requires probable cause hearing within 48 hours
	72 hours- arrest with warrant	N.R.S. 171-178	
New Hampshire	24 hours, excluding Sat., Sun. and holidays	N.R.S. § 594:20(a)	
New Jersey	72 hours, provided that complaint showing probable cause is filed within 12 hours of arrest	N.J. Crim. Rules 3:4-1 and 3:4-2	
New Mexico	without unnecessary delay	NMSA § 31-1-5	
New York	without unnecessary delay	McKinney's CPL § 140.20 sub1	
North Carolina	without unnecessary delay	N.C.G.S.A. § 15A-511	
North Dakota	without unnecessary delay	N.D.C.C. 2906-25 N.D. Crim. Rule 5(a)	
Ohio	without unnecessary delay	O.R.C. § 29.35.05 Ohio Crim. Rule 4(e)	
Oklahoma	without unnecessary delay	22 Okl. Stat. Ann. § 181	<i>See, Black v. State</i> , 871 P.2d 35, 39 (Okl. Cr. 1994). Citing <i>McLaughlin</i> , court recognized that delay longer than 48 hours in taking defendant to probable cause hearing is unreasonable.
Oregon	without unnecessary delay		
Pennsylvania	without unnecessary delay	Pa.R.Crim.P. 519	
Rhode Island	without unnecessary delay (unless charged w/ offense under RI Gen Law. 12.13.1.1*)	Super. R. Crim. P., Rule 5 Dist. R. Crim. P., Rule 9	*Unless charged w/ offense under RI Gen Laws, 12.13.1.1 (charges carrying life sentence or firearm offenses committed by persons previously convicted of offense carrying life sentence), in which case 48 hrs., excluding Sat., Sun. and holidays
South Carolina	Shall be forthwith carried before a magistrate and a warrant of arrest procured	S.C. Code 1976§ 22-5-200	

South Dakota	without unnecessary delay	SDCL § 23A-4-1	<i>State v. Larson</i> , 776 N.W. 2d 254, 258 (S.D., 2009) persons arrested without warrant are constitutionally entitled to probable cause determination within 24 hours.
Tennessee	"without unnecessary delay" – Judicially defined – 72 hours for appearance before magistrate 48 hrs for probable cause, but hearing unnecessary	Tenn. R. Crim. P. 5(a)	Due process is violated if probable cause is not determined within 48 hours, but a full adversarial hearing is not necessary. If an individual is not brought before a magistrate within 72 hours there has been an unnecessary delay within the definition of Tenn. R. Crim. P. 5.1. <i>State v. Carter</i> , 16 SW 762, 766 (Tenn. 2000)
Texas	48 hours	V. Ann. Tex. C.C.P. Art 14.06	
Utah	without unnecessary delay- 48 hours probable cause, but arrestee need not be present	U.C.A. 1953 § 77-723 Utah Criminal Rule 7	
Vermont	without unnecessary delay	Vt. R. Crim. P. 3(g)	
Virginia	"forthwith" (Warrantless arrest only)	Va. Code Ann. § 19.2-82	Accused and officer appear together "forwith" for probable cause hearing. Does not apply to arrests with warrant
Washington	24 hours, including weekends and holidays 48 hours prob. cause, but hearing not required	Wash. Cr.RLJ 3.2.1 (c) Wash. Cr.RLJ 3.2.1(a)	"must be brought before a court of limited jurisdiction as soon as practicable after the detention is commenced, but in any event before the close of business on the next court day." Sat, Sun and holidays may be considered court days
West Virginia	Without unnecessary delay	W.Va. Code Sex. 62-1-5 W.Va. R. Crim. P. 5	
Wisconsin	Within a reasonable time Judicial definition - 48 hours implicitly the reasonable time	W.S.A. § 970.01	If the initial appearance also serves as the <i>Riverside</i> probable-cause hearing it must be held within 48 hours barring extraordinary circumstances. In cases where a defendant's <i>Riverside</i> (v. <i>McLaughlin</i>) determination was properly made in a proceeding prior to the initial appearance, court looks at the individual circumstances of the case to determine a "reasonable time" from the defendant's arrest <i>State v. Evans</i> , 522 N.W. 2d, 554, 563 (Wis. App., 1994) (Held: 4 days over a weekend not unreasonable)
Wyoming	without unnecessary delay and in no event more than 72 hours	W. R Crim P. 5(a)	

From: Henderson, Robert E (LAW)
Sent: Tuesday, January 19, 2010 5:09 PM
To: Carpeneti, R Anne D (LAW); Svobodny, Richard (LAW)
Cc: Novak, John J (LAW)
Subject: FW: Third Party Custodian Craigslist ad

Annie and Rick:

Laurie Eller is an LOA in our office who saw the craigslist posting asking someone to come forward as a TPC.

Robert E. Henderson
Assistant District Attorney
907.269.6300 (office)
907.269.6321 (fax)

From: Eller, Laurie A (LAW)
Sent: Tuesday, January 19, 2010 5:00 PM
To: Henderson, Robert E (LAW)
Subject: Third Party Custodian Craigslist ad

Rob, I finally remembered to look for that Craigslist ad from last summer about someone wanting to pay for a TPC. I found it and it is shown below. Let me know if I can be of further help. ☺

Date: 2009-08-24, 11:19AM AKDT
Reply to: job-k7j6y-1339990957@craigslist.org [Errors when replying to ads?]

Looking for third party in court case , court case is non violent, non-sexual,non- abusive. Its is a Misdemeanor , but requires THIRD PARTY for 30 days until next court date. Will pay handsomely\$\$\$\$\$\$

- Location: ANCHORAGE
- Compensation: Will Pay Handsomely\$\$\$\$\$\$\$\$
- Principals only. Recruiters, please don't contact this job poster.
- Please, no phone calls about this job!
- Please do not contact job poster about other services, products or commercial interests.

PostingID: 1339990957