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10-27-2022

### Johnston v. Eighth Jud. Dist. Ct., 138 Nev. Adv. Op. 67 (Oct. 6, 2022)

Joe Morgan

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#### Recommended Citation

Morgan, Joe, "Johnston v. Eighth Jud. Dist. Ct., 138 Nev. Adv. Op. 67 (Oct. 6, 2022)" (2022). *Nevada Supreme Court Summaries*. 1536.

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## PRETRIAL RELEASE PROCEDURES CLARIFIED

### **Summary**

A defendant is constitutionally entitled to a prompt hearing after being taken into custody from pretrial release, and at that hearing, the State bears the burden of demonstrating probable cause. A violation of a condition of a pretrial release may lead to statutory sanctions, and the court does not recognize a distinction between so-called “technical” and “substantive” violations. NRS 178.4851 and *Valdez-Jimenez* require the district court to make findings of fact on the record that each condition of pretrial release is the least restrictive means of ensuring public safety and the defendant’s return to court.

### **Background**

The State charged petitioner Derek Johnston with criminal activity. He was granted bail and placed on house arrest with pretrial release conditions.

The Las Vegas Metropolitan Police Department (LVMPD) then arrested Johnston and took him into custody for violating his pretrial release conditions. The State moved to revoke bail. Over one month later, the district court held a hearing on the motion. The district court temporarily granted the motion pending an evidentiary hearing. A few weeks later, the district court held an evidentiary hearing. At that hearing, Johnston argued that his violation was a technical violation, not a substantive one. The district court rejected this proposed distinction. The district court nonetheless reinstated Johnston to house arrest. Johnston requested to be removed from house arrest. He also argued that house arrest and the pretrial release conditions that were imposed were not the least restrictive means of ensuring public safety and his return to court. The district court denied Johnston’s request and did not providing a ruling on whether the protocol represented the least restrictive means.

LVMPD arrested Johnston and took him into custody for a second time for violating other pretrial release conditions. No hearing on Johnston’s detention was scheduled. However, at a calendar call hearing, Johnston sought his release from custody. He objected that the State was required to move to detain him. Despite Johnston’s objection, the district court directed Johnston to move for his release. The district court did not address his custody status. After an evidentiary hearing, the district court ordered Johnston’s release. The district court also ordered his reinstatement to house arrest.

Johnston filed a petition for writ of mandamus challenging the pretrial release procedures.

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<sup>1</sup> By Joe Morgan.

## **Discussion**

### ***Johnston’s challenges relating to the procedures for addressing violations of the pretrial release terms are moot***

Johnston challenges the procedures for addressing the alleged violations of his pretrial release conditions. The court’s role is to resolve live disputes, not moot or abstract issues.<sup>2</sup> There are however recognized exceptions.<sup>3</sup> Johnston is no longer in custody. His claims challenging his detention are therefore moot. The court must determine whether an exception exists.

### ***The moot claims should be considered as presenting issues capable of repetition, yet evading review***

Johnston argues that the capable-of-repetition-yet-evading-review exception applies. He argues that most detentions of this nature are short and that the issues concerning such a detention become moot once the case is eventually resolved. He contends that these issues regularly recur, citing three other criminal cases. He claims that these detention issues involve violations of due process. The court may consider a moot case “if it involves a matter of widespread importance that is capable of repetition, yet evading review.”<sup>4</sup> For this exception to apply, the party must show “that (1) the duration of the challenged action is relatively short, (2) there is a likelihood that a similar issue will arise in the future, and (3) the matter is important.”<sup>5</sup> Here, the exception applies. First, the duration of the challenged detention is short. Therefore, it is unlikely that the detainee could have a constitutional claim decided before release or conviction.<sup>6</sup> Second, it is likely that these issues will arise in the future. The cases cited by Johnston suggest this is so, and Johnston himself has twice been detained in this manner. Third, pretrial detention affects many arrestees, and the constitutionality of pretrial release procedures is at issue.

### ***Mandamus relief is warranted in part, and this petition presents several important legal issues that merit clarification***

The questions here are of statewide importance. The court grants mandamus relief in part to direct the district court to make findings of fact on the record consistent with NRS 178.4851.<sup>7</sup> The court grants advisory mandamus in part to clarify the law on pretrial release procedures.<sup>8</sup>

### ***Due process requires a prompt hearing for a defendant taken into custody while on house arrest for a pretrial release violation, at which the State must show probable cause***

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<sup>2</sup> Univ. & Cmty. Coll. Sys. of Nev. v. Nevadans for Sound Gov’t, 120 Nev. 712, 720, 100 P.3d 179, 186 (2004).

<sup>3</sup> See 1A C.J.S. *Actions* § 80 (2022 update).

<sup>4</sup> See *Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010).

<sup>5</sup> *Bisch v. Las Vegas Metro. Police Dep’t*, 129 Nev. 328, 334–35, 302 P.3d 1108, 1113 (2013).

<sup>6</sup> *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975).

<sup>7</sup> NEV. REV. STAT. § 34.160; *Ina Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008).

<sup>8</sup> *Walker v. Second Judicial Dist. Court*, 136 Nev. 678, 683, 476 P.3d 1194, 1198–99 (2020).

Johnston argues that he was deprived of his right to due process by being held in custody for over a month without a hearing. He argues that he was entitled to a prompt hearing. The State argues that no hearing is required because such a detention is not a new arrest. The federal and state constitutions provide that no person shall be deprived of liberty without due process of law.<sup>9</sup> For due process, the timing of a hearing is critical.<sup>10</sup> NRS 178.4851(7) provides that any penalty for violating a pretrial release condition must be preceded by notice and a hearing.<sup>11</sup> The statute does not provide specific time limits for conducting the hearing. The court adopts Johnston’s argument. Here, anyone detained for allegedly violating a pretrial release condition has a due process right to a prompt hearing. At the hearing, the State must show probable cause that a violation has occurred,<sup>12</sup> and the defendant may contest the evidence.<sup>13</sup> If probable cause is found, sanctions set out in NRS 178.4851(7)(a)–(c) may be imposed.<sup>14</sup> The court rejects the State’s argument that taking a person into custody does not qualify as an arrest.<sup>15</sup> By not holding a prompt hearing on an alleged pretrial release violation, a district court abuses its discretion.

***A violation of house arrest restrictions may justify taking a defendant into custody, and there is no distinction between “technical” and “substantive” violations***

Johnston argues that the language in NRS 178.487 would be rendered surplusage if the court does not create intermediate levels of sanctions. He proposes adoption of the standard from the federal Bail Reform Act of 1984 and NRS 176A.630, which allegedly differentiate between “technical” and “non-technical” violations. Courts look first to plain language in interpreting a statute.<sup>16</sup> Where legislative intent is clear, courts will construe it to give effect to that intent.<sup>17</sup> The plain language of the statutes at issue means that Johnston’s arguments fail. NRS 178.487 does not apply here. NRS 178.4851(7)(c) is the applicable statute, and it does not distinguish between “technical” and “substantive” violations. NRS 176A.630 *does* define a “technical violation.” By contrast, there are no classifications of violations in NRS 178.4851(7). It appears the Legislature did not intend for Nevada’s bails laws to mirror of the analogous federal laws.

***The district court manifestly abused its discretion by failing to enter findings on the record supporting the conditions of pretrial release that it imposed***

Johnston contends that the district court erred because the restrictions that it imposed on him were not individualized to his circumstances and because he was required to submit to house arrest. The district court did not make factual findings below. Its order is reviewed for an abuse of discretion.<sup>18</sup> NRS 178.4851(1) provides that “the court shall only impose . . . a condition of release . . . on a person as it deems to be the least restrictive means necessary to protect the safety of the community or to ensure that the person will appear at all times and places ordered by the

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<sup>9</sup> U.S. CONST. amend. XIV, § 1; NEV. CONST. art. 1, § 8(2).

<sup>10</sup> *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970).

<sup>11</sup> NEV. REV. STAT. § 178.4851(7).

<sup>12</sup> *Valdez-Jimenez v. Eighth Judicial Dist. Court*, 136 Nev. 155, 166, 460 P.3d 976, 987 (2020).

<sup>13</sup> *State v. Knight*, 380 A.2d 61, 61 (Vt. 1977).

<sup>14</sup> *See Sheriff Washoe Cnty. v. Steward*, 109 Nev. 831, 835, 858 P.2d 48, 51 (1993).

<sup>15</sup> NEV. REV. STAT. § 178.4851(9).

<sup>16</sup> *Bergna v. State*, 120 Nev. 869, 873, 102 P.3d 549, 551 (2004).

<sup>17</sup> *Id.*

<sup>18</sup> *Valdez-Jimenez v. Eighth Judicial Dist. Court*, 136 Nev. 155, 161, 460 P.3d 976, 984 (2020).

court.”<sup>19</sup> The court must support any condition imposed with reasoned findings of fact on the record.<sup>20</sup> The determination must be individualized.<sup>21</sup> The district court abused its discretion by failing to make the required findings when it assigned Johnston to house arrest. The court directs the district court to make the necessary findings of fact on the record.

### **Conclusion**

The court clarifies three issues of law. First, a defendant has a constitutional right to a prompt hearing after being taken into custody from pretrial release, and at that hearing, the State bears the burden of demonstrating probable cause. Second, a violation of a condition of pretrial release may lead to statutory sanctions, and the Court does not recognize a distinction between so-called “technical” and “substantive” violations. And third, NRS 178.4851 and *Valdez-Jimenez* require the district court to make findings of fact on the record that each condition of pretrial release is the least restrictive means of ensuring public safety and the defendant’s return to court. The court grants mandamus relief in part and denies mandamus relief in part.

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<sup>19</sup> NEV. REV. STAT. § 178.4851(1).

<sup>20</sup> § 178.4851(3); *see also Valdez-Jimenez*, 136 Nev. at 166, 460 P.3d at 987.

<sup>21</sup> *See Valdez-Jimenez*, 136 Nev. at 164, 460 P.3d at 985.