

January 17, 2021

The Honorable Lawrence R. Klemin
Chair, ND House Judiciary Committee
600 East Boulevard Avenue
Bismarck, ND 58505

Submitted electronically only:

Re: Testimony in Support of HB 1123

Dear Chairman Klemin, members of the House Judiciary Committee, and HB 1123 Sponsors,

I write individually in support of HB1123. I am an attorney in private practice in Fargo. I am a resident of Legislative District 45. I primarily practice in State and Federal courts in North Dakota, I am also admitted to practice in Minnesota state courts and the United States Court of Appeals for the Armed Forces. For the past 20 years, my primary practice has been criminal defense. I retired from the North Dakota Army National Guard after serving twenty four years, the last eight of which were with the Judge Advocate General Corps. Prior to law school, I served as a Bismarck Police officer for more than five years. I have had the previous privilege of working with the Chairman and members of the Assembly as a citizen member of the Interim Commission on Alternatives to Incarceration.

Even a single day in jail can be life-changing. Arrested citizens lose jobs, housing, and opportunity. Taxpayers bear the resulting costs. Add additional days and the damage compounds. HB 1123 seeks to protect citizens and taxpayers from the costs of custodial arrests and cash bail for low-level offenses for which arrested citizens could instead be summoned.

This bill addresses real problems of disparate treatment, creating a presumption that residents charged with low-level offenses will be released on a promise to appear. It further creates the presumption that judicial officers will summon residents to court for low-level offenses rather than issuing arrest warrants. The bill rightfully preserves a magistrate's authority to require posting of bail in instances where there are reasonable and probable grounds to believe the individual will not otherwise appear.

SUMMMONS IN LIEU OF ARREST

There is currently a stark lack of consistency across the state and among various courts. Some courts regularly and successfully use a summons to alert citizens of a pending charge. Other courts seldom, if ever, use a summons, but instead direct the custodial arrest by warrant. This regularly happens even in cases where citizens have already been arrested, booked, jailed, and have paid bail.

I routinely represent clients arrested and charged with municipal offenses. After the case is reviewed, a municipal prosecutor may dismiss the charge and refer it to a county attorney's office for prosecution on a higher level offense. Likewise, I have regularly represented individuals who have been arrested,

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charged, and have posted bail. When a charge precedes a complete investigation, a prosecutor may dismiss, reinstating prosecution months or years later—resulting in another arrest.

Opponents who claim inconvenience related to this proposal fail to recognize that unlike arrest warrants which must be served only on the arrestee and in person by a peace officer, a summons can be personally served on the person, by leaving a copy with a responsible person at the person's residence, or even by mail or other commercial delivery requiring a signed receipt. And, service of a summons need not be made by a peace officer. More simply, this proposal would actually ease the burden on law enforcement by providing a mechanism to bring low-level offenders before a court without the expense and impact of custodial arrest.

North Dakota Rule of Criminal Procedure 4(a)(2) already provides authority to issue a summons in lieu of a warrant if the magistrate has reason to believe the defendant will appear. Subsection (a)(3) of the rule provides if the defendant fails to appear when summoned, the magistrate must issue an arrest warrant. If adopted, this proposal simply creates the presumption that authorities would start with a summons in lieu of an arrest warrant.

RELEASE ON RECOGNIZANCE

Many courts use cash bail to collect fines and fees in advance of conviction. For those arrested without a warrant, most courts authorize posting of cash bail under a "bail schedule" established by the court. Disparities in cash bail for the exact same offense committed in the exact same location because of the agency making the arrest. A statutory presumption of release on a promise to appear extinguishes the disparities.

Impaired driving cases serve as a good example. For a first offense with an alcohol concentration not exceeding .16, North Dakota law requires a minimum fine of \$500. If the offense is charged under state law rather than municipal ordinance, \$225 in additional fees are required upon conviction. For good policy reason, courts develop standard sentencing practices for recurrent offenses. In Cass County, this type of offender can expect fines of \$750-\$800, and for the same offense in Fargo City Court an offender can expect \$650 in fines and costs. A West Fargo City Court offender can expect \$500 in fines and costs. The respective current bail schedules: Cass County, \$800; Fargo, \$650; and West Fargo, \$500. An accused unable to post scheduled bail (or perhaps more aptly, pay their fines and costs in advance of conviction) is held in jail until appearing before a judge.

Convenience to the court and court staff, and proactive efforts to ensure ability to enforce legislative directives on the collection of mandatory fines and fees are laudable aims. But these practices have the unintended consequence of jailing those unable to pay their fines in advance of their conviction.

There is a practical counterargument: convicted offenders who have not paid their fines and fees are regularly arrested for failing to comply with the court judgment (i.e., failing to pay fines imposed by the court). I agree current practices may actually protect offenders in the end. I also agree that if this proposal passes, perhaps more offenders will fail to appear, resulting in additional work for courts and their staffs. On balance, because even a day in jail may adversely and profoundly alter the course of a person's life, I support this proposal.

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North Dakota Rule of Criminal Procedure 46 governs bail, and directs that courts must start with a presumption that a defendant should be released on recognizance. In many districts, that presumption is never applied—likely because of the practical reasons outlined above. The bail reform act—federal law governing bail in federal courts—starts with the same general presumption. In twenty years of practice in federal court, I recall only one client who was ordered to post cash bail—the rest if eligible were released on a promise to appear and conditions. Perhaps this is an unfair comparison because federal courts benefit from the use of pretrial services officers who serve, on a pretrial basis, in a capacity similar to our probation and parole officers following conviction.

During the pandemic, release on recognizance has been more common. Some might suggest increased levels of non-appearance have occurred, and may use that “evidence” to suggest cash bail is the solution. First, non-appearance is likely much more attributable to the pandemic (and gubernatorial quarantine orders) than the absence of cash bail. But more importantly, the claim that cash bail more adequately ensures appearance is proven inaccurate by federal courts—where the penalties upon conviction are almost always far more significant—which release on recognizance. While I support adoption of this bill as the best option currently available, I offer additional comment on alternatives.

ALTERNATIVES

Automated messaging and reminders are likely more effective than cash bail. Cellular telephones are ubiquitous. We regularly receive text reminders for doctor or dental appointments, blood donations, or even car repair. In lieu of forcing posting of cash bail, offenders who provide contact information and agree to text notification should be permitted to do so.

Many who are jailed and unable to post bail suffer from serious chemical use disorders. The motive of jailing offenders for their own good is pure, but providing alternative placement and treatment options is a far better solution. Of course, alternatives come with cost.

CONCLUSION

I write in support of HB1123. A presumption of summons in lieu of arrest, and a presumption of release on a promise to appear rather than posting of cash bail applied to residents accused of low-level offenses makes sense. I extend my personal appreciation to the sponsors for their efforts, and I encourage this Committee to recommend passage.

Respectfully submitted,

/s/ Mark A. Friese

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Cc: Sen. Ronald Sorvaag, rsorvaag@nd.gov
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