

# Association of Deputy District Attorneys



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**UNITED STATES HOUSE OF REPRESENTATIVES  
HOUSE COMMITTEE ON THE JUDICIARY  
SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY  
FROM *MIRANDA* TO *GIDEON*: A CALL FOR PRETRIAL REFORM  
MARCH 26, 2021  
STATEMENT OF  
MICHELE HANISEE  
PRESIDENT, ASSOCIATION OF DEPUTY DISTRICT ATTORNEYS**

Good morning chairpersons and members. I have spent nearly 23 years as a prosecutor in the largest local prosecutorial agency in the country. For the majority of that time my caseload has consisted largely of murders and sexual assaults. I am proud to work in an extremely diverse office that has a history of hiring and promoting women and persons of color.

There is certainly room for reform in any system. While I believe that the United States justice system with its presumption of innocence, is one of the best, any improvement that decreases the possibility of a wrongful conviction while balancing the rights of victims and witnesses is laudable.

As a prosecutor, I have seen the impact of the justice system not just on the accused but also on victims and witnesses. Intimidation of victims and witnesses is sadly not rare. More than one of my witnesses in gang murders was murdered either before or after their testimony. I have had witnesses whose cars were firebombed, houses shot at, or who were threatened in court as they testified with the classic index finger stroke across the neck gesture.

These victims and witnesses did not volunteer to become participants in the justice system. They were drafted against their will by the acts of the accused. We need a justice system that is fair to both the accused and to the victims and witnesses.

## CASH BAIL

Cash bail can disproportionately impact the poor, or more to the point, advantage the wealthy. But cash bail is not necessary so long as a pre-trial detention determination is made on a reasonable risk assessment that accounts for flight risk, victim safety, and public safety and which allows judges to make appropriate deviations to address the particulars of individual cases.

Detention considerations cannot be based simply on algorithms but need to include the nature and particulars of the crime. Certain crimes, due to the pathology involved, are more likely to be repeated at great harm to victims. Domestic violence, child molestation, and child abuse are some examples. The abuse can not only be repeated but can escalate once the perpetrator has been publicly accused. On many unfortunate occasions, a victim of domestic violence was murdered when the accused was not detained pending trial.

In California, changes to pre-trial detention status are based upon changes in circumstance or a triggering event such as willful violation of the terms of release or willful failure to appear for court. Being found guilty at trial is the type of change in circumstance that justifies a change in detention status. Prior to trial the accused is presumed innocent until proven guilty. That presumption disappears upon a finding of guilt. When a person is found guilty of a serious or violent crime that will result in incarceration, the presumption is that they be placed in custody absent a significant justification for a judge to deviate from that presumption.

#### INTERROGATION

Videotaped interviews of arrestees are optimal. However, admissibility of a statement in court should never be conditioned on the use of audio or video recording. Too many things could go wrong through no fault of the interviewing peace officer. Exclusion of evidence should only ever be based on the Constitutional considerations enumerated by the United States Supreme Court and lower courts of appeal.

#### PRETRIAL DISCOVERY

I cannot claim to be intimately familiar with the federal justice system. I do know that California's discovery laws require more and earlier disclosure than the federal system. In California, an accused is provided with counsel at their first appearance unless they decline appointed counsel. In the absence of a significant reason to withhold pre-trial discovery, it is provided to the defense promptly. Promptness, however, is contextual and has to consider the volume and nature of the evidence and the necessity of processing and documenting the evidence. In the average murder case, 15 days is not enough time. In a complex case it is not unusual for the discovery process to take months. In California, all witness statements are provided to the defense at least 30 days prior to trial, but as a matter of practice usually long before that. We have no equivalent to the Jencks Act. There are valid reasons to delay disclosure of evidence such as risk of harm to victims and witnesses; risk of jeopardizing an ongoing investigation, or risk of destruction of evidence. When delayed disclosure occurs it is typically under the supervision of a judge who conducts an ex-parte review of the evidence and who can issue appropriate protective orders to limit who has access to the evidence when it is disclosed.

While prosecutors already face penalties for non-compliance with discovery rules, such as exclusion of evidence at trial, adverse jury instructions or being reported to the state bar for discipline, a necessity for an expansive discovery policy is meaningful penalties for defense attorneys who violate discovery laws and court protective orders. It is not unprecedented for a defense attorney to turn over evidence to a defendant or defendant's family in violation of the law or in violation of court protective orders, then claim ignorance or forgetfulness when the malfeasance is discovered. Police reports containing victim and witness statements, home addresses, workplaces and other identifying information are then used to target victims and witnesses. Because of these risks, the privacy and safety concerns of victims and witnesses should be weighed against the rights of the accused. The victims and witnesses are not voluntary participants in the criminal justice system and their rights should not be trampled by having their home address and personal telephone number disclosed unnecessarily or to persons who are not part of the legal defense team.

#### SUMMATION

While pondering the harm caused by incarceration do not forget to consider the harm caused by those who commit crime and the rights of the victims and witnesses to be free from threats, harassment, intimidation, and repeated interviews and hearings that take them away from their jobs and families. The safety and rights of victims and witnesses must be balanced against the rights of the accused.