UTAH JUDICIAL COUNCIL
STANDING COMMITTEE ON PRETRIAL RELEASE AND SUPERVISION
MEETING MINUTES

Webex video conferencing
February 4, 2021 – 12 p.m. (noon) to 2 p.m.

MEMBERS	**PRESENT**	**EXCUSED**	**GUESTS**
Judge George Harmond, Chair	X		Josh Esplin
Heidi Anderson		X	Chief Higley
Wayne Carlos		X	Lt. Larkin
Judge Keith Eddington	X		Tucker Samuelsen
Josh Graves	X		Sheriff Labrum
Andrea Jacobsen	X		Chief Butcher
Brent Johnson		X	Chief Dumont
Comm. Lorene Kamalu	X		Clay Carlos
Judge William Kendall		X	Paul Barron
Cpt. Corey Kiddle	X		Lt. Briel
Joanna Landau	X		Sheriff Sparks
Rich Mauro	X		Leslie Howitt
Judge Brendan McCullagh	x		5098***40
Judge Jeanne Robison	X		Jojo Liu
Reed Stringham	X		Yvette Rodier-Whitbe
Cara Tangaro	X		Deputy Greenwell
			Renae Cowley
STAFF:			Lt. Hall
Keisa Williams			Amberly Doubt
Minhvan Brimhall			Eric Hutchings
			Adam Trupp

1) **<u>Welcome and Approval of Minutes (Judge Harmond):</u>**

Judge Harmond welcomed members and guests to the meeting. The committee considered the minutes from the January 7, 2021 meeting. With no objections or further discussion on the minutes, Judge McCallugh moved to approve the minutes. Rich Mauro seconded the motion. The minutes were unanimously approved.

2) **<u>Update: New Salt Lake County Time-to-File and Initial Appearance procedures:</u>**

Mr. Graves: In the last few weeks, we've been primarily focused on getting jury trials up and running. We had our first successful trial a couple of weeks ago. We are meeting tomorrow with the agencies involved in this pilot to talk about issues that have cropped up. There were 340

bookings from January 4th through January 26th. Judge Kouris reviewed the filing deadlines and either reduced them to 2 days or left them at 4 calendar days.

Mr. Mauro: The idea is to separate out the potential crimes of violence that would allow the DA's office four days to file charges or request an extension. By and large, that has worked. From a defense perspective, we're really interested in the data on pretrial detention motions from Ms. Liu, Mr. Samuelsen, and Mr. Graves, the impact they've had, and what those hearings look like.

Mr. Graves: Cpt. Kiddle brought an issue to our attention. One of the challenges we didn't anticipate is that a lot of the bookings are Class B misdemeanors (or lower) out of justice courts. We notified the West Valley City and Salt Lake City and County justice courts about the pilot, but we didn't rope in Murray, Sandy, and all of the other smaller municipalities that have been affected. That has created notice concerns. Almost 100 of the 340 bookings were related to justice court holds or class B misdemeanors that would never qualify for a pretrial detention motion unless it's a domestic violence case, which I think is going to be rare. We need to make sure all of those parties are on board and that the 3rd district court has jurisdiction to make time-to-file determinations in justice court cases.

Judge McCullagh: I've discussed this with the Salt Lake County justice court bench. Our issue is those cases in which the magistrate judge has already determined that the defendant should be held without bail on the PC statement. Those should be four-day deadlines to give prosecutors time to file a case and a detention motion if they deem it appropriate. We are okay with reducing all other cases to the two-day filing deadline.

Mr. Graves: Thank you. That's helpful. We need to determine how to communicate that to Judge Kouris and the jail. Between the SLDA's office and West Valley City, 63 of the 340 bookings were new bookings on Class A misdemeanors or felonies (about 18.5%) that didn't clearly fall within the violent felony category. I haven't had a chance to pull the numbers to determine whether our office pursued pretrial detention or allowed pretrial release in those cases. My guess is that many of those were released because we couldn't find a basis to detain them. If this pilot becomes permanent, we would prefer that it be memorialized in a rule. Right now, a lot of resources are expended on communication back and forth between the agencies and miscommunicated timelines that require duplicated efforts. However, the first four weeks demonstrate that tiered timelines in rule 9 would result in a good portion of bookings reduced to the 2-day deadline.

3) **<u>Ability-to-Pay Matrix: public comments:</u>**

Judge Eddington: Many of the public comments seem like duplicates.

Judge Harmond: Some of them do seem to be cut and paste duplicates. That's okay, but based on the information we have right now, do you believe that this committee should make changes to the ability to pay matrix?

Judge Eddington: I am definitely interested in their comments. Everyone needs to express their feelings. I'm just not sure what changes could be made that would accommodate their concerns.

Judge Harmond: The comments are well taken, but they concern deep-seated problems that will take some time to iron out. Personally, I feel that the ability-to-pay matrix is valid under the law and it's a good place to start.

Mr. Mauro: I agree that the ability-to-pay matrix is a good place to start. Most of the comments are probably from an organization called Decarcerate Utah. They have an interest in eliminating cash bail. This is a widely debated issue and many systems throughout the country are moving toward eliminating all cash under any set of circumstances. My recommendation is that the committee wait to see how the legislature addresses bail reform. There are no less than 5 or 6 pending bills right now in the legislature. One repeals HB 206. One adds DUIs with injuries and another adds Class A misdemeanors to the list of no-bail eligible offenses in 77-20-1(2). I have some real concerns about the content of some of the bills and whether or not the bills are consistent with each other. If HB 206 is repealed, our group may be starting over and looking at different ways to address issues. One of my personal frustrations is that this group has spent a lot of time and effort on thoughtful processes and policies. The comments are great comments, but they're part of a larger picture that we will have to consider and reevaluate moving forward.

Ms. Williams: Mr. Mauro makes some great points. In the pretrial arena, some issues are policy-based and others are legal and procedural. Many of the policy-based issues are being hammered out in the session right now. The legal and procedural issues fall within the court's purview. HB 206 was a mix of both. On the policy issues, I agree that we need to wait and see what happens in the session. However, when it comes to the ability-to-pay matrix, I think the caselaw is pretty clear that judges must conduct an individualized assessment. That assessment includes consideration of the risk the person poses, the circumstances surrounding the arrest, and the individual's circumstances, including their ability to pay. The question is how do we do that? Is this matrix the best way, or should we make changes to the process?

In the 3rd paragraph of Lexi Wilson's comments, she says we don't have an infrastructure in place to assess someone's income. That is no longer true. As you know, we finished the programming that allows law enforcement to include a person's gross household income and number of dependents at the probable cause phase. However, that's not always going to be available. So maybe her point is that, when that information is unavailable, individuals don't have a way to provide it or time to talk to defense counsel prior to initial appearance. She may also be referring to the fact that individuals can't provide more information than just those two data points prior to initial appearances. I think that's a valid point, but given the current limitations, I don't know how we get there. Even if that's true, does it mean that what we're doing right now is not acceptable? I'm not sure what the alternative would be. It seems that the best fix is a version of the pilot Mr. Mauro and Mr. Graves are engaged in. If we could hold initial appearances remotely within 48 hours of arrest, with both defense counsel and

prosecutors present, judges would have a lot more information from which to make that initial release decision. She is correct in that we don't have that infrastructure in place. I'm hoping the Salt Lake County pilot will be a model for the rest of the state.

Another concern she had was incorporating the failure to appear risk score in the matrix, primarily for two reasons. First, the factors that make up the failure to appear risk score incorporate misdemeanor convictions. Second, willful failures to appear are rare. Our intention was to try to tie someone's ability to pay to their risk of failing to appear in court, rather than their risk to public safety. She is correct in that there is a big difference between willful failure to appear and failing to appear due to a variety of circumstances that support-based resources could resolve. There isn't a good way in our system to differentiate between the two and I think that's important to consider. That, to me, is something we should work on. I am absolutely open to making any kind of changes to this process or changes to the matrix that improve outcomes with a supportive, rather than punitive, approach. I just can't think of a better mechanism, give the infrastructure we're working with.

Judge McCullagh: The number of comments expressing the same concern is important. The matrix claims to be more equitable, but Utahns will not see justice until cash bail is abandoned. However, cash bail is not going to be abandoned until the legislature abandons it. The failure to appear measures could be more discrete and they will become more refined over time as we continue to look at them, but for the moment, the ability-to-pay matrix is the only information we have. We are required to make ability-to-pay decisions, so we need to use the matrix. I recommend that we send this on to Policy and Planning.

Mr. Hutchings: I agree. The legislature is all over the place, but they are listening. I think we should keep moving forward until told otherwise.

Commissioner Kamalu: I agree that the ability-to-pay matrix is the best tool for now.

Judge McCullagh moved to forward the ability-to-pay matrix to the Policy and Planning Committee without amendments, and with a recommendation that it be adopted as final. Judge Eddington seconded and the motion passed unanimously.

4) **<u>URCrP Subcommittee:</u>**
    - Rule 7A revisions
    - New rule 7.5
    - Rule 9
        - Proposed Amendments
        - Time-to-File project

Ms. Williams: The committee approved amendments to rule 7A at the last meeting, but Judge Robison noted a few issues that we missed, specifically related to proceedings in justice courts. In subsection (c)(5), justice courts don't have preliminary hearings so the recommendation is to eliminate that reference. Entering a plea in abeyance was added to subsection (f)(2).

Rule 7.5 is a new rule governing pretrial detention hearings. The impetus behind this rule was the feedback the committee received after HB 206 was implemented about confusion surrounding pretrial detention hearings. Rules 7 and 7A address initial appearances and what happens when a motion for pretrial detention is filed. Rule 7.5 addresses the procedures and evidentiary standards in the detention hearing itself. The subcommittee is seeking feedback because this is a brand new process. Pre-HB 206, these were called "bail" hearings, but it's really the same procedure. If HB 206 is repealed, maybe we go back to calling them "bail hearings," but personally, I like "pretrial detention hearings" because "bail" is used interchangeably to mean "release" and "money." Using "pretrial detention" makes the substance of the hearing much more clear. I suppose "bail" hearings might make sense when the motion is to reduce a monetary bail amount or to seek reduced conditions of release – when no one is asking for detention. The caselaw indicates that more due process protections might be applicable when detention is on the table.

Ms. Williams read portions of subsections (c) and (e). Much of the language in (e) was pulled directly from the statute. The rebuttable presumption language may need to come out depending on whether that remains in the code following the session.

Mr. Mauro: I think it's a good start and we're mostly in agreement. Paragraph (d) is concerning. There are some good parts of paragraph (d), but I think it is inconsistent with *State v. Kastanis*, a 1993 case. I think broader rights apply, including witness testimony and the accused's right to present evidence. *Kastanis* says the purpose of a detention hearing is very different than the purpose of a preliminary hearing, so the standard has to be something more than probable cause. I also recommend amendments to subsection (f). Some of the pending bills include a definition of substantial evidence that I think is also inconsistent with *Kastanis* and constitutional provisions.

Mr. Graves: I think there will be reasonable disagreement on what *Kastanis* requires. Existing rules of procedure and evidence are different than when that opinion was published. The subcommittee deliberately used the term "information" rather than "evidence" in subsection (d) to avoid the debate of whether the rules of evidence apply. The intention was to make it clear that these types of hearings can be heard by proffer. The rule allows the court to grant continuances upon motion from either party if there's a challenge to proffered evidence.
I think it's a good rule that would provide some clarity on those questions. If we sent this to the rules of criminal procedure committee, there will be a healthy debate about how *Kastanis* applies and whether or not it's applicable given the timing of that decision in relation to other subsequent rule changes.

I like the discovery process in (c) because it allows for discovery received at the last minute; if for example, I get a call from a victim the night before a detention hearing. Subsection (d) allows defense an opportunity to request a continuance to have time to digest the new information.

Ms. Landau: Subsection (b) says the defendant has the right to be represented by counsel at a pretrial detention hearing. That is obviously important language. My question is how that will play out in rural jurisdictions where, for example, criminal court is held once a week. If these hearings are scheduled outside that one day a week, I've heard that defense counsel are not always available because the hearings are happening so irregularly. What happens if defense counsel isn't available? What is the practical impact in rural jurisdictions?

Judge Harmond: We appoint counsel at the first appearance, so it should happen prior to a detention hearing. If counsel is unavailable, we can work around that. Moving to Webex has given us a lot more flexibility.

Judge Eddington: I agree. We generally try to appoint counsel before a detention hearing and it is a lot easier now. It would be good to continue to hold pretrial detention hearings virtually.

Ms. Landau: That might require training across the state because we're hearing about some inconsistency, but I really appreciate those two perspectives.

Mr. Mauro: I don't think rule 7.5 is ready to go to the rules of criminal procedure committee yet. First, it is highly problematic from a due process perspective, especially the inconsistency with *Kastanis*. Second, the looming definition of "substantial evidence" in 3 or 4 of the bail reform bills will undoubtedly impact what this rule says. We're asking House leadership and others to remove the "substantial evidence" component because I think it's better for this group and the rules committee, who have a higher degree of expertise, to decide what that means.

Ms. Williams: The subcommittee's recommendation is that this committee create a statewide working group to consider changing the time to file deadlines in rule 9. Some proposed members might be city prosecutors, rural prosecutors, sheriffs, and chiefs of police. If the filing deadlines are reduced, arresting agencies will have to get their police reports to prosecutors much more quickly.

Mr. Graves: The idea is to create a tiered time-to-file deadline. If the pilot in Salt Lake County is successful, how could we develop a rule applying that process statewide? Is it workable? Subsection (c)(5)(A) references violent felonies from the code. The seriousness of those offenses necessitates a little bit more time to collect evidence and information to support motions for detention.

Judge McCullagh: Again, if a magistrate has ordered a no-bail hold, it should qualify for a four-day filing deadline. That section should incorporate the no-bail eligible offenses in 77-20-1(2), in addition to the violent felonies. I think we should wait on this project until after the session.

<u>Rule 7A</u>:
Judge McCullagh moved to forward rule 7A to the Supreme Court's Rules of Criminal Procedure Committee as amended. Mr. Mauro seconded and the motion passed unanimously.

Rule 7.5:
Mr. Mauro moved to send rule 7.5 back to the subcommittee for further discussion. Judge McCullagh seconded and the motion passed unanimously.

Rule 9:
Judge McCullagh: I recommended waiting until after the session to create a working group on rule 9. I would reach out to the Utah Municipal Attorneys Association (UMAA), the Statewide Association of Prosecutors (SWAP), the Sheriff's Association, and the Jail Commanders Association for representatives. I would caution against too many members. It would also be important to collect data for those discussions.

Judge Robison: I'm on the subcommittee. We could either create a working group, or just reach out to stakeholders across the state and use that feedback to develop a rule. We definitely need input from rural areas, municipal prosecutors, and law enforcement.

Judge Harmond: I recommend letting the subcommittee reach out to stakeholders in rural areas, the sheriff's association, chiefs of police association, UAC, and anyone else the subcommittee deems appropriate. I also recommend waiting until after the legislative session to begin that work.

Mr. Hutchings: My experience over the last couple of years is that we don't have a good handle on what is happening in justice courts so I recommend including them.

The committee agreed to send the issue back to the subcommittee to begin seeking feedback after the session and to create a rule draft for the committee's consideration.

5) **Data Collection Subcommittee update:**

Ms. Liu: We have been working on building a data infrastructure to do real time tracking and visualizations of how our system is functioning. When we met with the committee last month, Mr. Samuelsen presented the bail dashboard. It shows what's happening at the Salt Lake County jail with respect to cash bail, and allows you to see who's being held and on what amounts. The feedback from this committee and the data collection subcommittee was that it would be helpful to see overall trend lines.

Mr. Samuelsen: CJAC's goal is to better understand and provide education about the pretrial process. Our interest is not limited to studying the effects of any particular shift in pretrial policies. I have compiled data from three different agencies, the Salt Lake County Jail, the Administrative Office of the Court, and the Salt Lake DA's office. The first few slides are data from the SLDA's office. Motions for pretrial detention were very rare prior to October 2020. The key takeaway is that most of the motions for detention are being filed in domestic violence and organized gang cases.

The data from the court includes motions for pretrial detention filed in all cases. It isn't limited to SLDA cases. Most are on serious felony charges. The misdemeanor cases are all domestic violence and not all cases had an associated booking. The jail data is consistent. It's mostly felony and misdemeanor domestic violence cases.

Only about 7% of felony and misdemeanor DV bookings were released within seven days. Historically, those were about three-fourths of the population. Three months prior to HB 206, a third of all first degree felony bookings were released within 7 days. In the 3 months after HB 206 went into effect, that number dropped to about 16% (about half). Only four (4) first degree felony bookings with a corresponding motion for pretrial detention were released within 7 days in the last 3 months (about 3%). What that shows is that if a motion for pretrial detention is filed, it almost always results in a jail stay for at least a week, and usually for a few weeks until a detention hearing can be held.

People bonding out on first degree felonies dropped by about 2/3 from 15%. Only 5% were released on pretrial services, down by about half. In the 3 months before HB 206, 12 people bonded out on first degree felony sex offenses within a week. That dropped to only 3 cases after HB 206. All 3 of those cases were early- to mid-October, immediately after HB 206 went into effect. First degree felony drug charges were the only category with the opposite effect. Pre-HB 206, the bond amounts were higher than they were post-HB 206.

The data from all three agencies tells the same story. There is an increase in people held without bail due to the filing of pretrial detention motions. This is data that we want to continue to track. Because HB 206 has only been in effect for a few months, we can't do any long term analysis yet to determine the impact on individual outcomes.

Ms. Williams: From what I'm hearing at the legislature, there are two very different narratives. One side says HB 206 caused a lot of dangerous people to be immediately released back on the street. The other side says that HB 206 and the pretrial detention process is resulting in many non-violent, low risk individuals being detained. In looking at your data, it seems to disprove both of those narratives. In fact, people who are considered dangerous, especially those charged with first degrees felonies and sexual abuse cases are being detained longer. And the makeup of the jail population includes more high-level offenses. Am I understanding that data correctly?

Mr. Samuelsen: One caveat is that the data covers a short period of time, so the number of cases is low. I would say that conclusion is fair, at least for the high severity cases. The primary reason is that in the past, those individuals may have bonded out. Now, with pretrial detention motions, that particular pathway is unavailable. The number of people held without bail on domestic violence charges has more than doubled. When you remove those with pretrial detention motions, it goes down, which is a clear indication that this is directly tied to those motions. With the people who are not considered a public safety risk, it's a bit more nuanced. The problem is that I think a lot of the people who might have been targeted by HB 206 to be

released early, may have been released due to COVID. It's a little tough to tease out the difference between HB 206 effects and COVID effects.

Mr. Hutchings: I think this is what's driving the conversation at the legislature right now. The massive amount of monetary bail historically set on high-risk cases doesn't exist now. That's a lot of money lost for the bail industry.

Commissioner Kamalu: Over and over I hear the mistaken idea that money bail is somehow helping with public safety, or that criminal activity is a consequence of the lack of money bail. The understanding that posting money bail doesn't protect public safety hasn't permeated amongst policy makers yet.

Ms. Williams: Do you have any thoughts about how to educate policy makers on that?

Commissioner Kamalu: That is the big question. I think it just takes time. There is so much for policy makers to learn that you are really reliant on subject matter experts. I think it's just going to be repetition. Legislators who understand these issues and who have influence within the legislature could educate other legislators in the interim. Something I've been doing is inviting Ms. Williams and Ms. Landau to continue to present to the Utah Association of Counties. Good policy is data-driven. All of this data is so important and helpful to policy makers.

Mr. Mauro: I think we need to look at the data in Salt Lake County more closely, but the feedback I'm getting from defense attorneys in rural Utah is that there are a vastly larger number of people being detained as a result of pretrial detention motions. In reviewing this data, it's really important to get rule 7.5 right and to identify due process procedures. Right now, my concern in Salt Lake County isn't necessarily the number of motions for detention filed, but rather whether there is a fair process in place. Are judges considering evidence, listening to arguments, and hearing from witnesses? Are judges conducting a true evaluation of substantial evidence and clear and convincing evidence to show danger to the community? If these hearings become rubber stamp hearings, it essentially means the prosecutor has unfettered discretion to decide who should remain in jail and who should be released. We have to look at that very carefully as we as we consider this data, and as we develop rules that I think are important to protect due process rights for people that are presumed innocent.

Judge Harmond thanked Ms. Liu and Mr. Samuelsen for their time and work. It is so much more valuable to have debates like we've had this afternoon based on real data, rather than on anecdotal information. The work that you and the subcommittee have done is invaluable.

Adjourn:

There being no further business, the meeting was adjourned at 1:45 p.m. with no motion. The next meeting is scheduled for March 4, 2021 at 12 pm (noon) via Webex video conferencing.