UTAH JUDICIAL COUNCIL
STANDING COMMITTEE ON PRETRIAL RELEASE AND SUPERVISION
MEETING MINUTES
Webex video conferencing
March 4, 2021 – 12 p.m. (noon) to 2 p.m.

MEMBERS	PRESENT	EXCUSED	GUESTS
Judge George Harmond, Chair	X		Tucker Samuelsen
Heidi Anderson		X	Jojo Liu
Wayne Carlos		X	Clay Carlos
Judge Keith Eddington	X		Paul Barron
Josh Graves	X		Yvette Rodier-Whitbe
Andrea Jacobsen		X	Renae Cowley
Brent Johnson	X		Deputy Greenwell
Comm. Lorene Kamalu	X		Marc Ebel
Judge William Kendall	X		Tom Ross
Cpt. Corey Kiddle	X		Eric Hutchings
Rich Mauro	X		Michael Drechsel
Judge Brendan McCullagh	X		Joanna Landau
Judge Jeanne Robison	X		Jon Puente
Tom Ross	X		Josh Esplin
Reed Stringham	X		Sheriff Sparks
Cara Tangaro		X	Mark Ebel
			Chief Higley
STAFF:			Lt. Larkin
Keisa Williams			Shanda Gonzalez
Minhvan Brimhall			Sheriff Tucker
			Lt. Hackwell
			Riley Riser
			Lt. Baggs
			Sheriff Smith
			Iron County Jail

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 February 4, 2021 meeting. Commissioner Kamalu noted a typo on the bottom of page 9 where two words were repeated. With no objections or further discussion on the minutes, Commissioner Kamalu moved to approve the minutes subject to those amendments. Mr. Mauro seconded the motion. The minutes were unanimously approved.

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

Mr. Graves: A few weeks ago we met with Judge Kouris and Judge McCullagh about how to implement a more uniform process because of the potential impacts on justice court municipal prosecutors. We discussed keeping the two-day filing deadline on misdemeanors and four days on felonies for now while we work through the rule amendment process. We are working with various partners and courts to get a local order in place to test that process and make sure everyone is on the same page.

3) **<u>2021 Bills related to Pretrial:</u>**
    - **HB 47 (adds DUIs to no-bail eligible offenses)**
    - **HB 58 (adds rioting to no-bail eligible offenses, requires appearance before release)**
    - **SB 138 (adds rioting to no-bail eligible offenses)**
    - **HB 207 (adds MA to no-bail eligible offenses)**
    - **HB 220 (repeal of HB 206 with few exceptions)**
    - **HB 240 (amendments to HB 206)**
    - **SB 171 (amendments to HB 206)**

Mr. Drechsel: There are a number of bills focused on Pretrial issues.

H.B. 240: This was Representative Pitcher's effort to fix concerns with HB 206 from the last session. It never made it to a House committee.

H.B. 207: This bill was sponsored by Representative Shipp and was in response to feedback that he received from his county attorney. It would permit courts to hold individuals without bail on any class A misdemeanor. It also did not make it to a House committee.

H.B. 47: This bill was referred to as “Sarah's Bill” in honor of the young lady and her friends who were hit head on by an impaired or intoxicated driver in Logan Canyon in July of 2020. That case is still pending, but she ended up losing her legs in the accident. The bill does create a new provision, but part of it could already be accomplished under current law. The bill states that a person can be held without bail if they are charged with driving under the influence resulting in serious bodily injury or death. However, those offenses are felonies and a person could already be held without bail on a felony when there is substantial evidence to support the charge and clear and convincing evidence that they would pose a danger to the community, etc. In that regard, the bill doesn't really change things in a meaningful way, but what is different is the creation of a provision that says victim testimony is not required at a hearing for a motion to detain if it would be an undue burden on the victim. More importantly, it creates a rebuttable presumption that a person is a substantial danger to the community as long as they have an alcohol content of over 0.05, or they have a measurable controlled substance in their system, and they are charged with an offense that involves serious bodily injury or death.

Judge McCullagh: To qualify as a felony, the offense of DUI or Driving with a Measurable Controlled Substance in the body must be the result of negligent or criminally negligent operation of a motor vehicle. It's a difference between a 3rd degree felony and a 2nd degree felony automobile homicide. Unless there is an allegation of negligence or criminal negligence, you don't have auto homicide. The "negligence" nexus is now gone, so this bill broadens no-bail holds to class B misdemeanors when there is an injury regardless of the causal nexus. Once H.B. 220 passes, the magistrate who would be handling those class B misdemeanors no longer has the authority to deny bail, so this is something that district court judges will now be required to address.

Mr. Mauro: I don't think that was the sponsor's intent. There was a lot of negotiated language on this bill. I believe Rep. Eliason's intent was to make this applicable to felonies, so this result is clearly something that hadn't been considered.

H.B. 58: This bill creates the ability to hold individuals charged with felony Riot without bail. It was in response to criminal behavior during the mass protests in the summer of 2020. The court must find substantial evidence to support the charge and clearing convincing evidence that the individual is not likely to appear for a subsequent court appearance. Interestingly, it doesn't speak to whether the person poses a substantial danger to the community. It also states that an individual arrested for violation of felony riot cannot be released before the individual appears before the magistrate or judge. However, it fails to recognize that in practice that appearance before a magistrate is really just reviewing the probable cause statement, so it's unclear whether this will result in a meaningful change.

S.B. 138: This bill also deals with riots. It has gone through a number of iterations, including a substitute late last night. I don't know that it will pass because I believe all of the fiscal note bills had to pass before noon today and this will likely involve a fiscal note. It makes a similar pronouncement that when you're convicted of or charged with felony riot in which substantial property damage or bodily injury is sustained, you could be held without bail. The court must find substantial evidence to support the charge and clear and convincing evidence that the person won't appear in court. However, the language is ambiguous. It appears that if the riot event itself involves substantial property damage or bodily injury, then any offense committed during that time/event could subject the person to a potential no bail hold, even if the person charged didn't cause the damage or injury.

S.B. 171 started out as an almost mirror image of H.B. 240 (Rep. Pitcher's bill) to try and fix some of the friction points with HB206, but it quickly changed to a version that was the result of significant effort by a number of individuals to find compromised language. In large measure, those meetings were really productive. I think they are the sort of meetings that we ought to be having and are reflective of what these standing committee meetings have been. On Tuesday night, Senator Weiler amended S.B. 171 to just establish a 21-member task force to continue studying Pretrial release with meetings to begin in July of 2021, and a final report to the legislature by November of 2022. That's where S.B. 171 stands right now.

H.B. 220: This bill has garnered the most attention and discussion, and a number of you have been very involved. It passed yesterday and will now go to the Governor for signature. Unless the Governor chooses to veto H.B. 220, it will become the law. H.B. 220 rolls back most of the meaningful or substantive changes in in Section 77-20-1 of H.B. 206. It removes from state code the presumption of own recognizance (OR) release. It removes "least restrictive conditions" language and the statutory reference to conducting ability to pay determinations when imposing a monetary condition of release. It removes the statutory reference to the appointment of counsel for pretrial detention hearings. It also removes procedural components related to motions for pretrial detention and the hearings that would result from those motions. Unfortunately, it also removes the ability of justice court judges to deny bail in any case, meaning those decisions will now have to be referred to a district court judge. However, it retains a number of provisions in H.B. 206 related to processing citations. It also retains a special fund for forfeited monetary bail that will be administered by CCJJ as a grant program to help support pretrial release initiatives at the local level. May 5th is the effective date.

Mr. Graves: Will the "undue burden" language in H.B. 47 merge with the process in H.B. 220?

Mr. Drechsel: Yes. The drafting attorney crafted coordinating clause language that you can find at the bottom of H.B. 220 in lines 813-814.

Mr. Mauro: I'm not sure what the "undue burden" language does in terms of how and when a detention hearing can be set. In reading H.B. 220, I'm not entirely clear whether prosecutors can file motions for detention in the same manner that they could under H.B. 206. Under H.B. 47, arguably a detention hearing would look very different in a DUI with injury case than it would with other types of general offenses. Lines 334 to 352 set forth procedures for pretrial detention hearings, but all of the language about Pretrial Status Orders and motions for detention was eliminated in the early sections of H.B. 220. It seems as though the new language is really addressing bail sets, as opposed to detention hearings, so there are unanswered questions about what H.B. 220 actually does in regard to pretrial detention hearing procedures.

Ms. Williams: I think that's a good point and it's something the Rules of Criminal Procedure Committee and Supreme Court will need to take a hard look at after the dust settles. Mr. Drechsel did a great job during the session making it clear that certain procedures are constitutionally required. For example, if the intent is that the court no longer consider ability to pay, or that we go back to using a charge-based bail schedule, because of constitutional requirements surrounding due process and equal protection, that isn't likely to be the case. I want to make sure that's clear to everyone attending this meeting as well. As I've mentioned before, these issues are challenging because they involve a mix of policy and procedure. The Court certainly intends to stay in its lane on the procedural side, but a lot of the changes in H.B. 220 are procedural and I'm concerned that many stakeholders supporting H.B. 220 don't understand that distinction.

Mr. Dreschel: I don't think the dust will settle on these issues for a while. This committee has been working on draft rules related to pretrial detention hearings and other changes to rule 7.

That makes things challenging because, to Ms. Williams' point about the mix of policy and procedure, some of the policy decisions will still be up in the air. Certainly, we will know what the law says come May 5th, but we won't know what the efforts of the legislative work group will be. The court rules will need to accomplish the Herculean task of trying to address procedural requirements, while also being flexible and responsive to developing policy discussions over the summer of 2021. This will be a moving target for longer than any of us would like. We were told in every committee hearing and every floor debate that the intention is that further attention will be paid to this, and that future changes should be expected. What those changes will look like we don't know, but we need to expect change in this area in the very short term.

Mr. Ross: Many of us were very involved in these discussions during the session and I think, unfortunately, there is more confusion than ever. It's going to be difficult to work through. I've never seen so many groups that are usually aligned on opposite sides of an issue. Prosecutors, defense counsel, and law enforcement were split. I hope everyone keeps talking and this continues to be a collaborative effort. It's extremely important that we don't just have a few voices at the table.

Mr. Drechsel: I agree. This committee has invested countless hours in addressing pretrial issues over the years. As the conversations begin to unfold about what the model should look like moving forward, I recommend that this committee and the advisory committee on the rules of criminal procedure committee be involved in those conversations. In addition, there will be increased legislative involvement moving forward. I know that you are looking for legislators to fill important roles on the committee. This is a good opportunity to try to get those legislators involved in the task force involved here as well. That would allow us to bridge the communication gap that sometimes exists between various groups.

Mr. Hutchings: We have been working on these issues an awfully long time. Maybe this is an opportunity to combine the two groups moving forward.

Judge Harmond: Mr. Drechsel, thank you for your time. We know you are extremely busy and appreciate you being with us today.

4) **<u>URCrP Subcommittee update:</u>**
   - **Legal research**
   - **Developing plan for time-to-file (rule 9) project**

Ms. Williams: The rules subcommittee is in the middle of its work. The next meeting is in a week. Members have been assigned legal research projects on different issues related to proposed amendments to the rules of criminal procedure. The subcommittee is also developing a plan for the Rule 9 time-to-file project. The subcommittee will need to determine how best to reach out to all of the various stakeholders across the state and identify impacts, including financial impacts, to ensure that any proposed plan is workable. After the last Committee meeting, the best approach appears to be the subcommittee reaching out to and seeking

feedback from stakeholders, and then developing recommendations based on that feedback. The subcommittee will reach out to other Committee members for assistance as needed.

5) **<u>Data Collection Subcommittee update:</u>**
    - **LE and pretrial data to judges via PC system – programming project proposal/estimates**
    - **SB 159**

Mr. Hutchings: I think we've gotten to a really good place. The subcommittee has been looking closely at determining what information we need in order to inform conversations about pretrial reform. Who makes up the pretrial population? Why are they in jail? What conditions put them there? Why are they out? What happened after the fact? Part of it is policy-related and a more contextual data-gathering effort. I think that's going to be absolutely critical for informing this committee and the legislative task force once created. With the data we've gathered and the input received from a variety of agencies and areas of interest in the last year, we have been able to drill down into specific issues.

With the project proposal, I think we have a good sense of what information needs to be in front of a judge, and how we could get it there. The remaining issue is how to fund it. I've been collaborating with Senator Anderegg. I feel pretty confident that we will get some funding this session that will allow us to make forward progress, particularly with Phase I. Phase II would take a little longer and be a little more expensive. I don't know that we will get enough funding to cover everything we were hoping for out of general funds. However, I think we have a very clear target.

I want to reassure this committee that if you have questions, or if questions are brought to you about this initiative, or you're worried about a certain population, I think we're in a position to pull actual data and not just talk anecdotally. I believe by the time we hit the next session, we will be able to drive good policy with the work this group has done on data. We will provide an update on budget at the end of the session. I'd like to thank Ms. Williams for her extensive work to ensure the subcommittee is effective.

Ms. Williams: The entire subcommittee has been incredibly engaged. Ms. Liu, Mr. Saumelson, Mr. Quigley, and Mr. Graves have carried the water on gathering and analyzing an immense amount of data. One of the things on the subcommittee's agenda now is to start digging into data issues more broadly. First, to define terms. Second, to determine what questions the committee wants to answer and what data elements we need in order to do that. Where are the gaps? Where and how do the systems connect (or not)? What do we need in order to fix those kinds of systemic issues?

Mr. Hutchings: I agree, especially about defining terms. If we limit data collection to only a couple of courts or geographic regions, we're probably not going to have too big of an issue. However, as we start looking across all counties and jurisdictions, definitions are going to become more critical. CCJJ has been trying to define "recidivism" for a long time. We really need

to nail that down. Even if it's not perfect, at some point we need a glossary of terms. I believe what Salt Lake County built through the efforts of Mr. Samuelson, Ms. Liu, and the AOC, has put us in a position where we should be able to scale things down and roll it out to other jurisdictions. But first we need clear and consistent definitions. Part of our effort over the next few months will be focused on that.

Mr. Ross: Everything you're saying is absolutely right. It's not going to be fast in the sense that in a year from now we're up and running, but we need to identify a way to interface disparate systems. There are four records management vendors for law enforcement, jail systems, and prosecutor information. We believe we may be able to interface systems by bringing those vendors in, but there will be costs involved. As of today, S.B. 159 has passed and the governor's office is behind it. S.B. 159 creates a working group to determine how we move this project forward, and what the costs are going to be. Kudos to Salt Lake County because the data they were able to provide was critical for someone like me who's been on the law enforcement side for 34 years. This was not a comfortable conversation, because law enforcement wasn't always on the same side of the issue, but it helped me see that some of the issues raised on public safety risks may not have been entirely accurate, or were more a result of COVID confusion, among other things. Data is key if we're going to do this right.

Judge McCullagh: As we found out this year, the plural of anecdote is not data, but without data, anecdotes are going to rule. Even with good data, it's hard to push back against a bad anecdote, but if we don't have it, we're never going to be able to move forward.

Judge Harmond: Thank you for all of the work that you and the data subcommittee have done. I think the data subcommittee's efforts may be the most important thing that comes out of this committee in the long run. The basic infrastructure is out there and people are gathering data, we just need to coordinate it. Mr. Ross, thank you for your participation. We really appreciate it.

The committee will need to begin thinking about what may need to be modified moving forward in light of new legislation, but there is still a lot of groundwork to be done on data. To Judge McCullagh's point, we probably didn't have it early enough in the session. It's hard to say whether it would have made a difference, but it's so important.

Adjourn:

There being no further business, the meeting was adjourned at 12:54 p.m. with no motion. The next meeting is scheduled for April 1, 2021 at 12 pm (noon) via Webex video conferencing.