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Version 1.0[1]

Memorandum on Detention Hearings for Defense Attorneys

I. Offenses for Which Bail May be Denied

When a defendant is charged with a "capital offense" or a "felony committed while on probation or parole, or while free on bail awaiting trial on a previous felony charge," a court may only detain a defendant after finding there is "substantial evidence" to find that the defendant committed a new felony. Utah Const. art. I, § 8(1)(a), (b); Utah Code § 77-20-1(2)(a), (b). Notably, the Utah Supreme Court has held that a "felony committed while on probation" specifically refers to "felony probation," *Scott v. Ryan*, 548 P.2d 235, 236 (UT 1976); a defendant on misdemeanor probation is not at risk for a denial of bail under Utah Const. art. I, § 8(1)(b). *Id*. Additionally, the State does not need to actually seek the death penalty in order for a crime to qualify as a "capital offense" for purposes of a detention hearing. *Roll v. Larson*, 516 P.2d 1392 (1973).

For all other qualifying situations in which bail may be denied, the detention hearing is divided into a two-step process. Ensuring that courts strictly follow the two-step process may be the important way to avoid erroneous rulings. First, the court must find "substantial evidence" that the crime occurred. Utah Const. art. I, § 8(1)(a)-(c); Utah Code § 77-20-1(2)(a)-(e). Then the court must apply a second evidentiary standard that serves as an individualized assessment of the

[1] This is version 1.0 of the memorandum. I will likely update as new information and arguments surface. It's meant for attorneys, not courts, but parts of it can easily be adapted into a court memorandum. Please do not share with non-defense attorneys, but feel free to plagiarize it in memoranda to courts. Check citations and case language before using it arguments just in case there are typos or inaccuracies. And please reach out to me with insights that might be useful to strengthen future versions of the memorandum.

defendant's eligibility for release. The criteria for that assessment differs slightly depending on the crime charged.

If there is substantial evidence to believe that the defendant committed a felony (i.e., any felony), the court must also find "by clear and convincing evidence that the individual would constitute a substantial danger to any other individual or to the community, or is likely to flee the jurisdiction of the court, if released on bail." Utah Code § 77-20-1(2)(c).

As an alternative avenue to detention, if there is substantial evidence to believe that the defendant committed a felony the court must find "by clear and convincing evidence that the individual violated a material condition of release while previously on bail." Utah Code § 77-20-1(2)(d).

As an aside, section (2)(d) might be open to a constitutional challenge, possibly on an as-applied basis. Utah Const. art. I, § 8(1)(c) authorizes the legislature to designate any crime as one for which bail may be denied so long as there is "substantial evidence to support the charge and the court finds by clear and convincing evidence that the person would constitute a substantial danger to any other person or to the community or is likely to flee the jurisdiction of the court if released on bail." That language is clearly reflected in Utah Code § 77-20-1(2)(c) above. It does not authorize the legislature to change the standard from "clear and convincing evidence" that the person poses a "substantial danger" to others or is "likely to flee" to "clear and convincing evidence" that the defendant "violated a material condition of release while previously on bail." Although a material condition of release may create a "change of circumstance" for which a court may revisit pretrial detention, Utah R. Crim. P. 7(c)(3), it's conceivable that a defendant violates a "material condition of release" that does not furnish evidence that the defendant poses

a "substantial danger" or is "likely to flee." An example may be that the court orders a defendant to submit to random drug tests which the defendant fails to do.

Finally, if there is substantial evidence to believe that the defendant committed a crime of domestic violence, the court must also find "by clear and convincing evidence, that the individual would constitute a substantial danger to an alleged victim of domestic violence if released on bail." Utah Code § 77-20-1(2)(e). Here too the legislature has somewhat stepped outside of its authorization under Utah Const. art. I, § 8(1)(c). Note that the clear and convincing standard for domestic violence is only tied to "a substantial danger to an alleged victim of domestic violence," and not to the possibility of the defendant fleeing the jurisdiction or causing a danger to other members of the community. In other words, the legislature has more narrowly tailored a court's "clear and convincing" findings than the Constitution permits. Because the legislative deviation is helpful to defendants, the question of its constitutionality is not addressed here.

II. What Rights Does a Defendant Have at a Detention Hearing?

A defendant's rights in detention hearings flows from Utah Code § 77-20-1(11), Utah Const. art. I, § 8, and Due Process as elucidated through caselaw.

A. Adequate Notice

"A fundamental guarantee of due process is the right to notice. Before a right of property or other important interest is foreclosed as a result of state action, reasonable notice must be afforded." *In re Adoption of BY*, 2015 UT 67, ¶ 18 (*citing Mathews v. Eldridge*, 424 U.S. 319, 348, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)). Adequate notice must do more than merely notify a person of the nature of hearing in which their right may be affected: "Part of the function of notice is to give the charged party a chance to marshal the facts in his defense and to clarify what the charges

are, in fact." *Wolff v. McDonald*, 418 U.S. 539, 563-64 (1974) (discussing the requirements for constitutionally adequate notice in parole revocation proceedings); *see also State v. Kastanis*, 848 P.2d 673, 675 (Utah 1993) (requiring that a defendant be "given adequate notice to prepare for" detention hearings.). Sufficient notice for important hearings must also be given in writing and at least 24 hours before a hearing. *Wolff v. McDonald*, at 563-64. An order or judgment rendered without adequate notice is grounds to make the decision void. *Id*.; *see also Hegbloom*, 2014 UT App 213, ¶ 21 ("Had [the defendant] lacked notice of the protective-order proceeding, we might well agree that the resulting order was void.").

Although not solely a matter of notice, the court may not detain the defendant pending a detention hearing unless the prosecutor's motion (1) "states a reasonable case for detention," and (2) explains why "detaining the defendant until after the motion is heard is in the interest of justice and public safety." Utah Code § 77-20-1(3)(c)(ii).

B. The Right to Counsel

The right to counsel at a detention hearing is noted directly in statute. Utah Code § 77-20-1(6)(c); *see also Rothgery v. Gillespie Cty., Tex.*, 554 U.S. 191, 199 (2008).

C. A Prompt Hearing

Utah Code § 77-20-1(6)(b) requires that after a detention motion is filed, the court must schedule the hearing "as soon as practicable." Other jurisdictions have given more concrete directions. Helpfully, in February 2020, The National Center for State Courts published a white paper surveying five specific jurisdictions who have created detailed pretrial detention reforms. *Pretrial Preventative Detention*, NCSC, https://nvcourts.gov/AOC/Committees_and_Commissions/Evidence/Documents/Reports_and_Studies/Pretrial_Preventive_Detention_White_Paper_4_24_2020/ (February 2020). These five jurisdictions—California, New Jersey, New Mexico,

Arizona, and the District of Columbia—were surveyed for their robust statutory and rule requirements as models for Nevada to follow as it develops its pretrial detention reforms. *Id*. at 4.

In California, a pretrial detention hearing must be held within three days of the detention motion's filing. Cal. Penal Code § 1320.19(a) With good cause the prosecutor may receive up to three days for a continuance. *Id*. Same goes for New Jersey, also allowing the prosecutor up to three days. N.J. R. CR. R. 3:4A(b)(1). New Mexico requires that it be held within five days of the prosecutor's motion. NM R DIST CT RCRP 5-409(F)(1)(a). The prosecutor may receive a three-day extension either for extraordinary circumstances or if the preliminary hearing can also be done within three days of the extension. *Id*. at (b). Arizona also requires that the hearing be held within five days of the prosecutor's motion, allowing for only a 24-hour continuance for the prosecution if good cause is shown; if the motion is made orally at the Initial Appearance, the detention hearing must be held within 24 hours of the oral motion. AZ ST § 13-3961(E). In the District of Columbia, the detention hearing must be heard at the Initial Appearance, but the prosecution can receive up to a three-day continuance with good cause shown. D.C. Code Ann. § 23-1322 (d)(1). All of the above jurisdictions also allow for defense to request a continuance with varying limitations.

D. An Opportunity to Present Evidence and Make Oral Arguments

Utah Code § 77-20-1(6)(d) requires that "both parties" be given "the opportunity to make argument and to present relevant evidence at the detention hearing." A meaningful hearing typically requires the opportunity for an oral presentation, *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) (finding that written submissions "do not permit the recipient to mold his argument to the issues of the decision maker . . .").

E. The Right of Discovery

Utah Code § 77-20-1 states nothing about a prosecutor's discovery obligations prior to detention hearings. And neither U. R. Crim. P. 7 nor rule 16 have been updated to specifically address discovery before detention hearings. Rule 16 does, however, state "The prosecutor shall make all disclosures as soon as practicable following the filing of charges. . .".

Other jurisdictions have created more detailed requirements. They are instructive because the right to an evidentiary means, under due process, a right to a meaningful hearing. More broadly, the right to a meaningful hearing includes the right to disclosures of evidence intended to be used at that hearing. *Greene v. McElroy*, 360 U.S. 474, 496 (1959), *quoted with approval in Goldberg v. Kelly*, 397 U.S. 254, 270 (1970). The Supreme Court specifically noted:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.

The rules in other jurisdictions are instructive to the degree that they set the standard for what a meaningful hearing must be under a standard of "fundamental fairness." *See State v. Tiedemann*, 2007 UT 49, ¶ 44 (noting that "fundamental fairness" is at the heart of due process under Utah Const. art. I, § 7).

Looking again to the same jurisdictions in section C. *supra*: California is silent on a prosecutor's discovery obligations. Cal. Penal Code § 1320.19. However, New Jersey requires disclosures 24 hours in advance of the hearing all evidence it intends to introduce and all exculpatory evidence. N.J. R. CR. R. 3:4A(b)(1); 3:4-2. New Mexico has the same requirements as New Jersey but allows for additional evidence to be presented after the deadline if the evidence is discovered after the deadline. NM R DIST CT RCRP 5-409(F)(2).

Arizona has nothing on disclosures in its statute for detention hearings, but it does state, "Testimony of the person charged that is given during the hearing shall not be admissible on the

issue of guilt in any subsequent judicial proceeding," which lessens the potential harm of not being given the prosecutor's discovery. AZ ST § 13-3961(E).

For the District of Columbia, the Jencks Act applies, requiring the government to disclose all "Jencks Act statements" prior to the hearing unless there is good cause not to. D.C. Super. Ct. R. Crim. P. 46; 26.2

F. Cross-Examination of the State's Witnesses

It doesn't appear that the State must present witnesses for live testimony at detention hearings. As discussed below, there is probably no right to confrontation at detention hearings, and the State is constitutionally authorized to use reliable hearsay. The Utah Rules of Evidence once governed detention hearings, *see Chynoweth v. Larson*, 527 P.2d 1081 (Utah 1977), but no longer do. Utah R. Evid. 1101. In *Chynoweth*, the Utah Supreme Court noted a right to cross-examine witnesses at detention hearings. 527 P.2d at 1082. However, it's unclear whether *Chynoweth* binds that right to detention hearings as a matter of constitutional right or as an extension of the rules of evidence that once applied to the hearings. Cases on related circumstances help to clarify the issue.

The right to cross-examine witnesses is part and parcel to due process. *See Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."). That right applies in both parole revocation proceedings, *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972), and probation revocation proceedings. *Layton City v. Peronek*, 803 P.2d 1294, 1299 (UT App 1990) (citing *Morrissey v. Brewer,* 408 U.S. 471, 489 (1972).

So it appears that the right to cross-examine witnesses applies to detention hearings even though there is not a right to confrontation (see below). The most probable implication is that if

the State presents witnesses, then the defense has a right to cross-examine them. If no witnesses are presented, then the right of cross-examination does not create a requirement to have witnesses be present.

G. Sufficient Findings

As a matter of due process a decisionmaker must make findings and the conclusion of an evidentiary hearing. *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970). For findings to be adequate, they must "state the reasons for [the] determination and indicate the evidence [relied] on." *Id*. at 271. Inadequate findings on the record may void an order. *Wichita R. & Light Co. v. Pub. Utilities Comm'n of the State of Kan.*, 260 U.S. 48, 58 (1922); *State v. Vigil*, 815 P. 2d 1296, 1300-01 (Utah Ct. App. 1991). They allow the defendant an opportunity to assess whether the decision was just. *Gagnon v. Scarpelli*, 411 U.S. 778, 785 (1973). They make review of the court's decision for deficiencies significantly easier.

Citing to a federal statute on detention but otherwise analyzing the right to bail on constitutional grounds, the United States Supreme Court noted that if a judicial officer denies release, "he must state his findings of fact in writing" and "support his conclusion with clear and convincing evidence." *United States v. Salerno*, 481 U.S. 739, 742 (1987).

In *Brill v. Gulch*, the Oklahoma Court of Criminal Appeals found that federal due process required specific findings as indicated in *Salerno*, reversing a detention order for insufficient findings. 965 P.2d 404, 405–06 (OK CR 1998), *as corrected* (Sept. 23, 1998). They noted:

> The order of the District Court does not meet the above requirements as it merely denies Petitioner bail finding only that Petitioner "is a flight risk" and "poses a threat to the community" without any substantiating facts. In addition, the order does not make any findings to establish that there are not any conditions of release that would assure the safety of the community.

Id. at 409. The Court of Criminal Appeals remanded the case so that the district court would make adequate findings. *Id*. Similarly, the Massachusetts Supreme Court held that a judge's findings to deny bail must include a "particularized statement as to why no less restrictive condition will suffice" in order to constitute adequate findings. *Brangan v. Commonwealth*, 80 N.E.3d 949, 966 (Mass. 2017).

H. But Probably Not the Right to Confrontation

Defendants probably do not have the right to confront witnesses at a detention hearing. Although the issue is not settled, there are suggestions in federal caselaw that the Sixth Amendment right to confrontation only applies to trial. *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) (plurality). Utah's Constitution appears to explicitly deny the right to confrontation at detention hearings. Art. I, § 12 gives the right to confront witnesses in "criminal prosecutions" (which suggests more than just the trial stage), but also includes: "Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part . . . at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule." The words "nothing in this constitution shall preclude" suggests that other parts of the constitution may shape the use of reliable hearsay but cannot overcome the permissibility of presenting evidence through reliable hearsay. Section II, below, gives some arguments on the scope of reliably hearsay for these hearings.

III. What evidence is admissible?

Utah Code § 77-20-1 is silent on what evidence is admissible at detention hearings. Utah R. Evid. 1101 indicates that the rules of evidence don't apply. And Utah Const. art. I, § 12 allows "the use of reliable hearsay evidence as defined by statute or rule in whole or in part" in the proceedings. But currently no statute or rule explains what "reliable hearsay evidence" means in

these proceedings. In fact, Utah R. Evid. 1102(b), which includes "1102 statements" as a kind of reliable hearsay emphasizes, "For purposes of criminal preliminary examinations only, reliable hearsay includes. . ." (emphasis added). In other words, Rule 1102 is only instructive on the meaning of "reliable hearsay" for detention hearings, but it's not controlling on the issue.

In the absence of any rule or statute currently describing the meaning of "reliable hearsay evidence" one argument could be that the State may not present its evidence through reliable hearsay. However, Utah Const. art. I, § 12 merely states that "nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule" and says nothing about whether reliable hearsay must be defined by rule or statute *before* its admission. That said, the scope of reliable hearsay in other contexts is instructive. Rule 1102 is one useful source. Another is in probation revocation proceedings.

Unlike detention hearings, the right of confrontation applies to probation revocation proceedings. *Layton City v. Peronek*, 803 P.2d 1294, 1299 (UT App 1990) (citing *Morrissey v. Brewer,* 408 U.S. 471, 489 (1972). But before *Crawford v. Washington*, 541 U.S. 36 (2004), the Confrontation Clause was more closely tied to the meaning of reliable hearsay than the right of face-to-face confrontation. *See e.g. Peronek*, 803 P.2d at 1299. So although probation revocation proceedings discuss the meaning of reliable hearsay with respect to the otherwise irrelevant Confrontation Clause, their analysis on the meaning of reliable hearsay is nevertheless instructive, particularly in the absence of rule or statute governing the issue.

In *Peronek*, the prosecutor admitted a jailer's incident report in a probation revocation proceeding to show that the defendant had consumed alcohol through a lieutenant police officer who had no direct knowledge that the defendant consumed alcohol:

> A critical component of the incident report was a record of an electronic breath analysis which allegedly demonstrated the presence of alcohol in defendant's bloodstream. Since

> the investigating jailer did not testify, and Lieutenant Cunningham had no personal knowledge of the incident, this was the only evidence which tended to show defendant had consumed alcohol. Nothing in the incident report itself or in Lieutenant Cunningham's testimony supported any inference that the device used to administer the breath test was functioning properly, or that the person administering the test had the appropriate skills to operate the device and interpret the results, or that the record card appended to the incident report was an accurate reflection of the device's readings.

Id. Because the officer had no direct knowledge of the information that the jailer knew the hearsay was deemed unreliable and required reversal. *Id*. at 1299-1300.

And in *State v. Tate*, the trial court unlawfully heard hearsay testimony regarding a forgery charge offered by the investigating officers of that offense whose only knowledge about the offense stemmed from statements of other individuals who had actual personal knowledge of the forgery. 989 P.2d 73, ¶¶ 2-4, 17 (UT App 1999).

Peronek and *Tate* stand for the proposition that hearsay evidence is unreliable if (1) the offeror has no personal knowledge of evidence, or (2) the offeror has knowledge of the evidence but only through the statements of others.

Finally, persuasive authority offers another avenue to describe the meaning of reliable hearsay. A particularly insightful case is *State v. Engel*, 99 N.J. 453 (1985).

In *Engel*, the trial court was found to have erroneously permitted hearsay testimony of a co-conspirator's confession in a capital felony detention hearing. *Id*. The New Jersey Supreme Court determined that the hearsay evidence could come in only if:

> (1) the confession is more probative on the point for which it is offered than any other evidence that the State can procure through diligent efforts under all of the circumstances; and (2) the confession itself is sufficiently trustworthy or circumstantial corroboration of the confession renders it sufficiently trustworthy.

Id. at 468. *Engel* is a persuasive case for three reasons: (1) like Utah, New Jersey uses the "substantial evidence" standard, *see* fn. 2*, infra*; (2) the Utah Supreme Court has previously looked to New Jersey caselaw for persuasive authority on the structure of detention hearings, *see*

Chynoweth v. Larson, 527 P.2d 1081 (Utah 1977); and (3) the test has some intuitive appeal to it for being both flexible and protective. As an additional point, the New Jersey test is grounded in "fundamental fairness." *Engel* at 472. And while the Utah Constitution specifically instructs that "nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule," Utah Const. art. I, § 12, it's difficult to imagine that Utah Courts would interpret "nothing in this constitution" so broadly as to violative of "fundamental fairness," provided that the *Engel* test is a persuasive one.

IV. What Does Substantial Evidence Mean?

To detain someone without bail, the State must show that there is substantial evidence to support the charge. The test for substantial evidence is:

> whether the facts adduced by the State, notwithstanding contradiction of them by defense proof, warrant the conclusion that if believed by a jury they furnish a reasonable basis for a verdict of [the offense]."

State v. Kastanis, 848 P.2d 673, 676 (Utah 1993), *quoting Chynoweth v. Larson*, 527 P.2d 1081, 1081 (Utah 1977) (emphasis omitted). The test is derived from a New Jersey case, *State v. Obstein*, 52 N.J. 516, 247 A.2d 5 (1968). A later New Jersey case, *State v. Engel*, 99 N.J. 453 (1985), offers some clarification on what this test means.[2] Tailoring its holding specifically to capital murder (the offense that was at issue in *Engel*), the court stated that substantial evidence signifies:

> that the evidence that is produced at the bail hearing pointing to the commission of the crime of capital murder must be cogent and persuasive. . . . [S]uch evidence demonstrate[s] both a likelihood of conviction and reasonable grounds to believe that the

[2] Under New Jersey, the test references two standards: that the "proof is evident" and "presumption great," *State v. Engel*, 99 N.J. 453, 453 (1985). At the time the Utah Supreme Court adopted the description of those terms from *Obstein*, Utah's constitution used the same language. *See Chynoweth v. Larson*, 527 P.2d 1081 (Utah 1977). The language was later updated by amendment to "substantial evidence," but as recognized in *Kastanis*, the updated language did not alter the standard. *State v. Kastanis*, 848 P.2d 673, 676 (Utah 1993). Therefore, while *Engel* uses the older, archaic language for "substantial evidence," its insight on the language given in *Obstein* is probative of the meaning that Utah adopted from *Obstein*.

> death penalty may be imposed. . . . The quantum of evidence necessary to satisfy this standard has been described as a fair likelihood of conviction.

Id. at 459 (citation omitted) (quotation marks omitted).

It may also help to frame substantial evidence by reference to two other evidentiary standards frequently used in criminal proceedings: probable cause at a preliminary hearing and directed verdict at trial. Courts should interpret substantial evidence to be slightly higher than the standard for a directed verdict.

For preliminary hearings, "the prosecution must present sufficient evidence to support a reasonable belief that an offense has been committed and that the defendant committed it." *State v. Clark*, 2001 UT 9, ¶ 16 (citation omitted). This is lower than the standard for a directed verdict. *Id*. at ¶ 15. Credibility findings must be limited to whether the evidence is wholly lacking and incapable of reasonable inference to prove some issue which supports the prosecution's claim" *State v. Virgin*, 2006 UT 29, ¶ 24 (cleaned up). This requires the court to "view the evidence in the light most favorable to the prosecution" and resolving "all inferences in favor of prosecution." *Id*. (cleaned up).

To deny a directed verdict, the court must find "some evidence exists from which a reasonable jury could find that the elements of the crime had been proven beyond a reasonable doubt." *State v. Montoya*, 2004 UT 5, ¶ 29. The motion should be denied if the state has "established a prima facie case against the defendant by producing believable evidence of all the elements of the crime charged," when that evidence is "viewed in the light most favorable to the state." *Id*. (cleaned up).

Much like the standard for a directed verdict, the court must tie "substantial evidence" to whether the evidence, "if believed by a jury," would "furnish a reasonable basis for a verdict" of guilty. *State v. Kastanis*, 848 P.2d 673, 676 (Utah 1993). But unlike the standard for directed

verdict, the court may not weigh the evidence at a detention hearing in favor of the State; rather, the court must weigh the State's evidence in light of contradictory evidence produced by the defense. *Id*. Also notably, while the standard for directed verdict uses the language "some evidence" to describe the evidence that the prosecutor must present, the appropriate term in detention hearings is "substantial evidence," clearly indicating a higher burden.

This heightened standard of proof makes sense given the right at stake when compared with the low admissibility threshold. Pretrial liberty is a fundamental right. *Scott v. Ryan*, 548 P.2d 235, 236 (UT 1976). At risk is whether the State will incarcerate an innocent person until trial. Moreover, unlike the possibility of incarceration the flows from a conviction, a detention hearing lacks a number of procedural and substantive safeguards to shield a person from an unfair deprivation of liberty. There are no rules of evidence. Nor is there a right to confrontation. Without those safeguards, the burden on the State should be recognized as a high one.

V. What Does Clear and Convincing Evidence Mean?

"Generally speaking, a burden of proof is an expression of society's tolerance for error in a particular realm of the law." Essential Botanical Farms, LC v. Kay, 2011 UT 71, ¶ 21. The clear and convincing standard is most notably associated in cases involving civil commitment, deportation, denaturalization, or where parental liberty interests are at stake." *Id*. The Utah Supreme Court has held that the best way to understand the standard is to resort to the "commonly understood meanings of the words 'clear' and 'convincing.'" *Id*. at ¶ 24. That said, Model Utah Jury Instruction CV118 may also be instructive:

> CV118 Clear and convincing evidence.
> Some facts in this case must be proved by a higher level of proof called "clear and convincing evidence." When I tell you that a party must prove something by clear and convincing evidence, I mean that the party must persuade you, by the evidence, to the point that there remains no serious or substantial doubt as to the truth of the fact.

MUJI 1st Instruction 2.19 (amended 9/2011). Here, the standard would mean something like, "the State must show clear and convincing evidence why the defendant, if released, would pose a *substantial* danger to another, or would be likely to *flee* the court's jurisdiction."

To elaborate, clear and convincing evidence may not be tied to the potential danger of others, but to a "substantial danger" to another. And it is not tied to the risk of non-appearance but to the risk that someone will "flee" the court's jurisdiction.

To the point of flight risk—failing to appear to court should not be confused with being a flight risk.

> Scholars, judges, and legislative drafters often use flight and nonappearance interchangeably. But these terms are not coextensive. Flight risk is properly assigned to defendants who are expected to flee a jurisdiction. This is a small, and arguably shrinking, subcategory of a much larger group of defendants who pose risks of nonappearance.

Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. Chi. L. Rev. 677, 682–83 (2018). While it is often assumed that defendants are more flee on serious felonies than other charges, one study showed that 83% of felony defendants released pretrial made all their court dates while only 3% were fugitive after a year. *Id*. at 689. In fact, "Nonappearance rates for those charged with lower-level felonies and misdemeanors are typically higher than for defendants charged with higher-level felonies." *Id*. at 690. The reasons for a defendant's non-appearance vary considerably, but when "individuals who fail to appear inadvertently or for other nonwillful reasons are lumped in with other 'fugitives' and 'flight risks,' there is clear potential for mismanagement of the risks that are actually present." *Id*. at 730. And tools such as the PSA cannot distinguish "between types of nonappearance," making them weak indicators of actual flight risk. *Id*. at 720.

Many defendants lack the practical ability to pose a flight risk. In one case, a federal district judge declined to hold that a defendant was a flight risk, finding:

> Defendant has lived in the community his entire life, was employed for over a year and living with his girlfriend and their infant daughter until his arrest .... Contrary to the government's view, defendant is not a risk of flight. Offenders like defendant almost never flee; they have nowhere to go.

Id. at 710.

Even where a defendant has the means to constitute a genuine flight risk, there is an important distinction between being able to flee and having the intention to flee. *Id*. at 708. In *Truong Dinh Hung v. United States*, Justice Brennan was presented with a bail petition for a Vietnamese resident who had been charged with giving classified information to the Vietnamese ambassador in Paris. 439 U.S. 1326, 1327 (1978). The petitioner's bail had been revoked pending the outcome of an appeal on his conviction. *Id*. at 1326. While the facts that he was a non-permanent resident who maintained contacts with the Vietnamese ambassador to Paris indicated his capacity to flee, Justice Brennan held that there were a number of facts that made that possibility unlikely, particularly his extensive ties to his family and community in the United States. *Id*. at 1329. The Government's facts could not "establish any inclination on the part" of the defendant to actually flee. *Id*.

On the issue of substantial danger, a highly probative case is *State v. Wein*, 244 Ariz. 22, 31, 417 P.3d 787, 796 (2018), *cert. denied sub nom. Arizona v. Goodman*, 139 S. Ct. 917, 202 L. Ed. 2d 658 (2019). In *Wein*, Arizona's Constitution was amended to permit the categorical denial of bail for individuals charged with sexual assault so long as there is sufficient evidence to support the charge. *Id*. While acknowledging that a supported allegation of sexual assault may be a crime worthy of pretrial detention, the Court held that federal due process prohibits the categorical denial of bail without a showing that the categorical denial is narrowly tailored to the compelling government interests of preventing flight or protecting individuals in the community. *Id*. at 793. A supported allegation of sexual assault may suggest that the defendant poses a

dangers to another, but there is no firm evidence to suggest that people who commit sexual assault once are so likely to pose a future danger to others such that that they may be denied an individualized assessment of the actual risk they pose. *Id*. The Arizona Supreme Court distinguished sexual assault from capital offenses and felonies committed while on probation (both of which, like they are in Utah, do not require individualized assessments of risk) as being sufficiently narrowly tailored to categorical denials of bail. *Id*. at 796.

Although *Wein* does not speak directly to the "clear and convincing" standard for "substantial danger," it is illustrative of an important issue in these proceedings: the nature of the crime charged, standing alone, should not be *per se* evidence of a defendant's risk to others (except in capital offenses). That said, the facts of the crime charged, standing alone, still might be.

VI. How Does the Presumption of Detention Factor into Detention Hearings?

Utah Code § 77-20-1(8) creates a presumption of detention for homicides and offenses for which life imprisonment may be the sentence (more simply, 1st Degree Felonies). The presumption may be rebutted by evidence from the defense with specific conditions of release that will reasonably ensure safety to others, appearance in court, and integrity of judicial operations. *Id*. at (8)(c). That language indicates that the presumption of detention relates to the "clear and convincing evidence" prong of a detention hearing, not the "substantial evidence" prong.

The presumption of detention for certain qualifying offenses exists in federal courts as well. For example, in *United States v. Rodriguez*, the Second Circuit clarified that when the defendant bears a rebuttable presumption in detention hearings, the defendant bears the burden of production that, once met, triggers the State's burden of persuasion to overcome the defendant's

evidence by a clear and convincing standard. 950 F.2d 85, 88 (2d Cir. 1991). That burden shifting approach makes sense in the federal system where the bail system is almost entirely controlled by statute, but the burden shifting approach is hard to reconcile with the right to bail under Utah Const. art. I, § 8.

Utah Const. art. I, § 8 creates a presumption of bail or release on all offenses except for certain qualifying offenses *after* the requisite evidentiary conditions are met. That frequently includes the prosecutor's burden to show that detention is necessary by "clear and convincing evidence." *Id*. at (c).

Placing a preliminary burden of production on the defendant clashes with the plain language of Utah Const. art. I, § 8; *see Scott v. Ryan*, 548 P.2d 235, 236 (UT 1976) ("Since the right to bail is a fundamental right, the State must sustain the burden of proving the accused is within one of the exceptions.").

To illustrate the problem, if, following the federal system, a defendant cannot meet their burden of production, Utah Code § 77-20-1(8) relieves the State of its constitutional burden to show that detention is necessary. That's problematic because Utah Const. art. I, § 8 makes clear that detention may occur only *after* the State meets its burden. Consequently, if the presumption of detention follows the federal system, a defendant charged with either a homicide or 1st Degree Felony may be deprived the process of law specifically required in the Constitution. Because the defendant could be deprived of forcing the prosecutor to meet their burden, the federal approach to the presumption of detention should be recognized as an unconstitutional implementation of the presumption.

A somewhat related law in Nevada was recently found unconstitutional by the Nevada Supreme Court. In *Valdez-Jimenez v. Eighth Judicial Dist. Court in & for Cty. of Clark*, 460 P.3d

976 (Nev. 2020), the court examined a Nevada law that created a presumption of monetary bail unless the defendant can show "good cause" as to why the defendant should be released without first paying bail. *Id*. at 987. The court determined that the law was unconstitutional because, among other reasons, the law "effectively relieves the State of its burden of proving that bail is necessary to ensure the defendant's appearance or protect the community." *Id*. Although Utah Code § 77-20-1(8)'s presumption of detention may operate a differently than the Nevada law—it is much more narrowly tailored to the most serious crimes—the issue is not necessarily what is the best public policy, but of what the plain meaning of the Constitution requires.

Because courts are required to resolve statutory interpretation in favor of constitutionality, *Vega v. Jordan Valley Medical Center, LP*, 2019 UT 35, ¶ 12, one solution may be to apply the presumption of detention after the State has met its evidentiary burdens to qualify for a no-bail detention. Notably, Utah Code § 77-20-1(7) states that once the State has met its evidentiary burdens, the court *may* detain the defendant without bail. In other words, the decision to detain becomes discretionary after the requisite findings. A presumption of detention would instruct courts that they must use their discretion to detain the defendant unless the defendant can rebut the necessity of the detention. That interpretation resolves the ambiguity.

However, another example reintroduces the ambiguity. There's a presumption of detention for homicides, include negligent homicide, a Class A misdemeanor. But a person cannot be held without bail on non-domestic violence misdemeanors. *See* Utah Code § 77-20-1(2)(e), The presumption of detention under this circumstance suggests a presumption of detention on bail; meaning, it is presumed that the defendant must bail out to secure his or her release. That presumption resolves the ambiguity as well, but only if bail is set at an affordable amount. If the court were to set unaffordably high bail on a Class A misdemeanor, Utah Code §

76-5-206, the defendant would suffer an unconstitutional deprivation of liberty. Other jurisdictions have recognized that unaffordable bail constitutes a *de facto* detention order. *See e.g. Brangen v. Commonwealth*, 80 N.E.3d 949, 963 (Mass. 2017). A *de facto* detention order creates significant harm to the defendant because the deprives the defendant of the constitutional and procedural safeguards that come with a detention hearing, particularly an evidentiary hearing with a clearly defined standard of proof, and the right to appeal. Utah Code § 77-20-1(13) (creating a right to appeal a detention order).

The Massachusetts Supreme Court has held that a *de facto* detention order is permissible under its constitution so long as the defendant is afforded the same rights and procedural safeguards that would come from an actual detention order. *Brangen*, at 963. Comparatively, the New Mexico Supreme Court has held that *de facto* detention orders are outright impermissible. *State v. Brown*, 338 P.3d 1276, 1292 (N.M. 2014). Those two courts take different avenues to reach essentially the same conclusion: detention on bail cannot sidestep the constitutional safeguards that come with pretrial detention.

Put simply, a presumption to detain for negligent homicide only avoids constitutional pitfalls if the presumption merely means that the defendant should secure his or release with monetary conditions unless the defense can show that monetary conditions are not appropriate for release.

A third way in which the presumption of detention may apply—and notably, none of the three proposals are mutually exclusive—is to the scheduling of a detention hearing.

Upon filing a motion for pretrial detention, the court may delay ordering a pretrial status order and detain the defendant until after a detention hearing so long as:

(A) the prosecutor's motion states a reasonable case for detention; and

(B) detaining the defendant until after the motion is heard is in the interests of justice and public safety.

Utah Code § 77-20-1(3)(c)(ii). If the motion does not meet those requirements, the court could decide to release the defendant pending the detention hearing. However, the presumption to detain for homicides and 1st Degree Felonies may mean that the judge should presumably detain the defendant even if the prosecutor's motion fails to sufficiently plead (A) and (B) and absent the defendant's ability to overcome the presumption.

VII. First Impression Strategy to Defeating Substantial Evidence

This section will receive further updates as more detention hearings are heard. For now, because the State may present evidence in the form of written documents, the defendant's ability to attack the credibility of the State's evidence is low. One solution is to use contradictory testimony from the defendant (who is often the only witness that the defense could use). But putting the defendant on the witness stand may creates potentially incalculable risks.

It's possible that the State may not be permitted to admit a defendant's statements at a detention hearing as substantive evidence in trial for that offense. *See Simmons v. United States*, 390 U.S. 377, 394 (1968) (holding that a defendant's statements made in probable cause evaluation for a motion to suppress may not be substantively admitted against him at trial over the defendant's objection). Even if that limitation applies to detention hearings, the statements could be used as impeachment at trial and to energize the prosecution to conduct further investigations.

Another solution would be to create a written statement on behalf of the defendant about the incident. The defendant's statement could be submitted into evidence without opening them to questioning, and it can be tailored to mitigate the harms of revealing defense's trial strategy.

Additionally, some care should be taken when the State presents live witnesses for cross examination. It's entirely foreseeable that a witness may testify for the State a detention hearing but be declared unavailable by the time of trial. Under Utah R. Evid. 804, the transcript of the witness's testimony may be admissible at trial because the defense had a prior opportunity to cross examine the person at the detention hearing. However, under both Utah R. Evid. 804 and the Confrontation Clause, that transcript may be inadmissible if the defense can show that that the opportunity and motive to cross examine at the detention hearing was different than that at trial. Defense should consider making a protective statement on the record of a detention hearing such as, "No more questions your honor, but I will note for the record that because this hearing was quickly set and discovery is not yet complete, I have not conducted the sort of cross examination I would do if this was a trial."

VIII. First Impression Strategy to Defeating the Clear and Convincing Standard

This section will receive further updates later. In the meantime, a useful resource for attacking this portion of the detention hearing comes from the New Jersey Pretrial Justice Manual. https://www.nacdl.org/getattachment/50e0c53b-6641-4a79-8b49-c733def39e37/the-new-jersey-pretrial-justice-manual.pdf. These suggestions include being prepared to explain a bad PSA and having in mind specific conditions of release to propose to the court. So long as defense can offer plausible release conditions and put the prosecutor through the burden of arguing, at a clear and convincing burden, why those conditions would be futile, then defense may be highly effective at the hearings.

IX. Appeal – to be added later

A. Right to appeal

B. Overcoming Mootness

C. Remedies on Appeal