

MINUTES
SENATE JUDICIARY & RULES COMMITTEE

DATE: Friday, February 08, 2019

TIME: 1:30 P.M.

PLACE: Room WW54

MEMBERS PRESENT: Chairman Lakey, Vice Chairman Lee, Senators Lodge, Anthon, Thayn, Grow, Cheatham, and Burgoyne

ABSENT/ EXCUSED: Senator Nye

NOTE: The sign-in sheet, testimonies and other related materials will be retained with the minutes in the committee's office until the end of the session and will then be located on file with the minutes in the Legislative Services Library.

CONVENED: **Chairman Lakey** called the Senate Judiciary and Rules Committee (Committee) to order at 1:30 p.m.

RS 26819 **Relating to Law Enforcement Agents** - To prohibit engagement in motorcycle profiling. **Senator Lee Heider**, District 24, presented **RS 26819**, relating to Law Enforcement agents - To prohibit engagement in motorcycle profiling. He stated there is no reason for the motorcycling element of our society to worry about being stopped by state or local law enforcement agents just because they ride a motorcycle or wear motorcycle-related paraphernalia. He indicated law enforcement should make stops based on violation of laws, and not based on a person's appearance.

DISCUSSION: **Senator Grow** noted that there are no penalties stated in the proposed legislation and asked how violations would be handled. **Senator Heider** advised that an individual who feels they have been profiled can address the matter with the officer, or his commanding staff. Violations would be handled within the law enforcement department.

Senator Burgoyne commented that when this legislation comes back for a hearing on the merits, he would like information on the legal ramifications of violating the statute. In particular, if the stop results in criminal charges, and the person receiving the citation indicates a possible profiling violation, could this result in dismissal of the criminal charges.

Vice Chairman Lee indicated she would like to know why the language is limiting profiling to "motorcycle," and does not include other types of profiling.

Senator Anthon commented that perhaps the definition language could be changed slightly to cover the situation where an officer notices someone because of what they are wearing, and then pulls them over for doing something that is inappropriate.

MOTION: **Senator Anthon** moved to send **RS 26819** to print. **Vice Chairman Lee** seconded the motion. The motion carried by **voice vote**.

RS 26546C1 **Relating to Bail Enforcement Agents** - To set, for Bail Enforcement Agents, guidelines which do not currently exist. **Michael Kane**, representing the Idaho Sheriff's Association (ISA), presented **RS 26546C1** relating to bounty hunters—to set guidelines which do not currently exist. **Mr. Kane** stated that this bill has been before the Committee in past sessions, and this is an attempt at compromise between the bail agent communities and other stakeholders. He indicated changes from previous versions of this legislation include: 1.) the required age for a bail enforcement agent is 18 rather than 21; 2.) identification of the bail enforcement agent is limited to a badge; and 3.) penalties for violation have been reduced. **Mr. Kane** stated that ISA believes this is a really good bill for public safety.

DISCUSSION: **Senator Burgoyne** commented that he appreciated the compromising nature of this legislation. He indicated that when the bill comes back for hearing, he would appreciate knowing whether prosecution can be assigned to another county if a prosecuting attorney has a conflict. He also would like information on the statute of limitations set forth in Idaho Code § 19-403, as well as info on the effect of permitting people to be bail agents who may have criminal records.

MOTION: **Senator Thayne** moved to send **RS 26546C1** to print. **Senator Anthon** seconded the motion. The motion carried by **voice vote**.

H 31 **Relating to Divorce** - To revise a position regarding when a final decree shall be entered. **Jason Spillman**, Legal Counsel, Administrative Office of the Courts, stated that this is a clean up bill, and deals with the court's efforts to establish time frames in seven-day increments. He indicated that this legislation amends Idaho Code § 32-716, which establishes the cooling-off period for divorce actions in Idaho, during which the court can neither enter a final decree nor conduct a hearing on the merits. He advised the current statute requires 20 days and this legislation would amend that to 21 days.

DISCUSSION: In response to a question from Senator Thayne, **Mr. Spillman** advised that generally a time period begins the day after the filing, and includes all holidays and weekends. Provided, however, if the final day falls on a weekend or holiday, the period is extended to the next day that is not a Saturday, Sunday, or legal holiday.

MOTION: **Senator Burgoyne** moved to send **H 31** to the floor with a **do pass** recommendation. **Vice Chairman Lee** seconded the motion. The motion carried by **voice vote**. Senator Thayne will sponsor the bill on the floor.

H 32 **Relating to Motor Vehicles** - To provide for substance use disorders, service providers and substance use disorder assessments and to make technical corrections. **Mr. Spillman** stated that this legislation is basically a language update in order to align the statute with the established language that is used in the field, and used in the Department of Health and Welfare's (DHW) regulations. He indicated that Idaho Code § 18-8005, subsection 11, states that persons who are convicted of driving under the influence are required, before sentencing, to obtain an alcohol evaluation conducted by an alcohol evaluation facility that is approved by the DHW. This bill changes the term "alcohol evaluation facility" to "substance use disorders service providers." **Mr. Spillman** indicated there is an additional reference in statute to "substance abuse assessment," and this bill changes that to "substance use disorder" to align with the DHW regulations.

MOTION: **Senator Anthon** moved to send **H 32** to the floor with a **do pass** recommendation. **Senator Lodge** seconded the motion. The motion carried by **voice vote**. Senator Lodge will sponsor the bill on the floor.

Relating to Search Warrants - To provide that an oral statement shall be transcribed if requested and to make technical corrections. **Mr. Spillman** stated that **H 33** deals with the process related to oral affidavits that are submitted to the court in support of an application for a search warrant. He indicated that normally such affidavits are submitted in writing; however, there are some emergency circumstances, such as when an officer makes a request for a warrant for a blood draw from a driver who has been involved in an accident. **Mr. Spillman** advised that Idaho Code § 19-4404 sets forth the process whereby an officer can provide an oral statement to the court that lays out what basis there is for the search warrant. The current statute requires that those statements be not only recorded, but they also must be transcribed. He indicated there is an obvious need for the recording that preserves the record of what the court based its decision on, and the statute requires that recording be filed with the court. However, oftentimes the transcripts are not used by anyone. This bill will maintain the party's right to have that transcript, but requires them to request it, thereby saving the court money by only transcribing those transcripts that are requested.

Mr. Spillman indicated that he has had some feedback that defense attorneys have a hard time getting this transcript and he submits that may be a process to be addressed by the court. He explained that often when an oral affidavit is accepted, the court does not have a case opened and this is a pre-filing activity. He believes these recordings are stored in an administrative area of the court, and the court does not have sufficient information to uniformly log them; however, the statute maintains the defense attorney's right to obtain a transcript.

DISCUSSION:

Vice Chairman Lee noted that the Committee had previously heard testimony from Judge Wildman about the importance of having written transcripts in court proceedings, and it is surprising to see this "as needed" request aimed at cost savings. **Mr. Spillman** advised that Judge Wildman's comments were directed at reporting generally at the district court level, and this legislation deals with a pre-filing at the magistrate court level on an emergency basis, where they cannot get a court reporter in the room. **Vice Chairman Lee** indicated she could see that it might be burdensome for the court to transcribe every recording requesting a search warrant, but noted the value to the defense attorney in being able to peruse that information quickly. **Mr. Spillman** indicated that any information obtained from the transcript would likely be used in a motion to suppress, which would happen later in a case. He explained that the current process is for the court to prepare these transcripts in the order that they receive the recordings. He stated this could even speed up the process, as a recording could be pulled when requested and immediately transcribed.

Senator Burgoyne asked if the \$12,000 transcribing cost **Mr. Spillman** quoted for Ada County is an annual cost. **Mr. Spillman** advised it is. **Senator Burgoyne** inquired whether the magistrate judge on duty goes into the courthouse for purposes of placing an officer under oath and recording an oral statement, or if the magistrate does this with a phone recording. **Mr. Spillman** responded it is handled both ways.

TESTIMONY: **Mike French**, a private defense attorney in Boise, appeared on behalf of the Idaho Association of Criminal Defense Attorneys (IACDA), and spoke in opposition to **H 33**. She stated that the fact that the Idaho Prosecuting Attorneys Association (IPAA) and the 1994 Legislature recognized that the entire application for a search warrant proceeding should be both recorded and transcribed, is an indicator of the importance of the process in protecting fundamental constitutional rights: the right to be free from unreasonable search and seizure which is the bedrock of democracy. She indicated IACDA feels the transcription of a recording requesting a search warrant provides an added layer that ensures both the affidavit and the magistrate's authorization of the search are preserved without question. **Ms. French** indicated that pursuant to Rule 16 of the Idaho Rules of Criminal Procedure, defense attorneys are requesting the transcript of a recording in initial discovery requests directed to the prosecuting attorney. However, they are being met with responses to those discovery request advising a copy of the transcript can be obtained from the court. She stated this then becomes a hunt to find the right combination of terms that might identify the recording. This time delay is a factor for her as she tries to be as efficient as possible in defending her clients. If she has those documents right away, she can make a determination on whether to cut losses or go to trial (for full comments, see attachment 1).

DISCUSSION: Committee members held a discussion with Ms. French and Mr. Spillman regarding the lack of a uniform process for storing these recordings, and the importance to a busy public defender of quickly getting a copy of the affidavit. They discussed the time, process, and cost that is required to obtain a written transcript of an affidavit for a search warrant from the court. It was noted that this affidavit is actually a statement of a prosecution witness, and the discovery rules state that this should be provided to the defense by the prosecuting attorney upon request. It was also noted that these recordings are obtained ex parte when a defendant is not present, so those records should be preserved for their constitutional importance. Technology advances were discussed and the resulting problem of dealing with different types of records. It was pointed out that Idaho Code § 19-4406 requires that the magistrate's verbal authorization be "recorded and transcribed," and this change to Idaho Code § 19-4404 would be inconsistent.

Ms. French stated she disagreed with the Statement of Purpose for **H 33** indicating that these transcripts are infrequently used. She surmised that part of the reason many transcripts go unclaimed may be that busy public defenders simply do not have the time to do the extra work to pursue them. She advised that rather than spend the time to locate these recordings and obtain transcripts from the court, she chooses to file a motion to compel. This puts it into the record, and shows her diligence in attempting to get these documents that are key to a constitutional defense.

Mr. Spillman apologized that he was not aware of the inconsistency between this legislation and the language of Idaho Code § 19-4406. He stated there does seem to be an issue between the defense bar and the prosecution regarding the process of obtaining these transcripts. He indicated that having the statute clarified by indicating either the prosecution or defense may request the transcript from the court may resolve some of the problem.

MOTION: **Senator Anthon** moved to hold **H 33** in Committee. **Senator Burgoyne** seconded the motion.

SUBSTITUTE MOTION: **Vice Chairman Lee** moved to send **H 33** to the floor with a **do pass** recommendation. The substitute motion failed for lack of a second.

DISCUSSION: **Senator Anthon** spoke in support of his motion stating that he appreciates the Idaho Supreme Court engaging in this kind of cleanup, but has some concerns regarding creating an inconsistency in the statute. He also stated, with technology advances, he is concerned about how the different types of media will be stored. He feels there are collateral issues to be addressed, and does not feel good at this point in moving ahead with this bill.

Vice Chairman Lee mentioned that with technology advances and the court being essentially all electronic now, the issue of how we are keeping audio recordings should be addressed. She stated this is a good start.

Senator Burgoyne stated that when this legislation was drafted it probably looked to the court and Mr. Spillman like a technical correction; after the legislative history has been presented, he feels the 1994 Legislature made a policy decision, and with this bill, that is designed to make a technical correction, we would be overturning a policy choice. He has concerns about these discovery disputes wasting time and money, and would encourage the defense and prosecutorial bars to take a look at these issues and see if there is not a way to work it out.

Chairman Lakey indicated that he sees this as a process that needs to be worked out between the courts, the prosecution, and the defense bar. It may take additional verbage in standard discovery requests, or a special discovery request, but it should not take a motion to compel to get the transcribed affidavit. He stated he would like to see more discussion on this proposed legislation.

**ORIGINAL
MOTION VOICE
VOTE:**

The motion to hold **H 33** carried by **voice vote**.

H 34

Relating to Sexual Offender Registration - To revise and correct a term used in Idaho Code § 18-6608. **Mr. Spillman** stated this is another language cleanup bill. In 2018, the term "sexual" was removed from the title of the crime of forcible penetration by use of a foreign object as set forth in Idaho Code § 18-6608. Despite this change, the sex offender registration statutes continue to refer to this crime by its former name. This bill will simply update those references to refer to the new title.

MOTION:

Vice Chairman Lee moved to send **H 34** to the floor with a **do pass** recommendation. **Senator Thayn** seconded the motion. The motion carried by **voice vote**. Senator Cheatham will sponsor the bill on the floor.

S 1043

Relating to the addition of one new district judge position with resident chambers in Ada County. **Mr. Spillman** advised that **S 1043** seeks to amend Idaho Code § 1-805 which establishes the number of District judges for the Fourth District. The Fourth District comprises Ada, Elmore, Valley, and Boise counties and currently has 11 district judges. This proposed bill would amend that to 12 district judges. An amendment in 2013 was the last time a district judge was added for this district. Since that time Ada County has seen rapid growth in population, and this has placed a resulting stress on the court system in the form of increased case loads. **Mr. Spillman** indicated that this request is part of the court's budget being considered by the Joint Finance and Appropriations Committee (JFAC). In response to a question at the print hearing from Vice Chairman Lee, he advised that former JFAC Chairs have indicated that any request should be added into the budget to be considered. He also stated that even with this additional Judge the court estimates they will still be a half judge short of where they were in 2013.

S 1043 **Senator Grow** moved to send **S 1043** to the floor with a **do pass** recommendation. **Senator Burgoyne** seconded the motion. The motion carried by **voice vote**. Senator Grow will sponsor the bill on the floor.

ADJOURNED: There being no further business, **Chairman Lakey** adjourned the meeting at 2:51 p.m.

Senator Lakey
Chair

Sharon Pennington
Secretary

Lois Bencken
Assistant