Agenda
Pretrial Release & Supervision Committee Meeting
September 5, 2019
12:00 – 2:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Judicial Council Room, 3rd Floor, N31

12:00	Welcome and Approval of Minutes • May 2, 2019	Action	Tab 1	Judge George Harmond
12:05	Proposed Amendments to URCrP 9 and 9A • Issue Memo	Action	Tab 2	Keisa Williams Judge George Harmond
1:00	Pretrial 'Ability to Pay' Analysis • National Caselaw Overview	Discussion	Tab 3	Keisa Williams
1:50	Developing Model Pretrial Service Programs	Discussion		Judge George Harmond
2:00	Adjourn	Action		Judge George Harmond

Committee Web Page: https://www.utcourts.gov/utc/pretrial-release/

Meeting Schedule: Meetings are held in the Matheson Courthouse, Judicial Council Room (N31), from 12:00 to 2:00 unless otherwise stated.

2019 Meeting Schedule:
November 7, 2019

2020 Meeting Schedule:
January 2, 2020
March 5, 2020
May 7, 2020
July 2, 2020
September 3, 2020
November 5, 2020

Tab 1

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

Judicial Council Room (N31), Matheson Courthouse
450 South State Street, Salt Lake City, Utah 84114
May 2, 2019 – 12:00 p.m. to 2:00 p.m.

DRAFT

MEMBERS:	PRESENT	EXCUSED
Judge George Harmond, *Chair*	•	
Wayne Carlos	•	
Kimberly Crandall	•	
Judge Keith Eddington	•	
Sen. Lyle Hillyard	•	
Rep. Eric Hutchings		•
Brent Johnson		•
Comm. Lorene Kamalu	•	
Judge William Kendall	•	
Lt. Corey Kiddle		•
Pat Kimball	•	
Richard Mauro	•	
Judge Brendan McCullagh	•	
Judge Rick Romney		•
Reed Stringham	•	
Cara Tangaro	•	
Marshall Thompson		•
Adam Trupp		•

GUESTS:

Deputy Jeff Greenwell – Sanpete County
Deputy Jesse Fausett – Carbon County
Sargent Victor Turner – Carbon County
Judge Samuel Chiara – Duchsene County
Patty Fox – Davis County
Emily Golombek – Davis County
Pat Kimball – Salt Lake County
Frank Piganelli
Clay Quigley - AOC
Ray Wahl - AOC

STAFF:

Keisa Williams
Minhvan Brimhall (recording secretary)

Welcome (Judge Harmond):
Judge Harmond welcomed everyone to the meeting and introduced two new members. Rich Mauro is the Executive Director of the Salt Lake Legal Defenders Office and a member of the Indigent Defense Commission (IDC). He will be representing the IDC on this Committee. Commissioner Lorene Kamalu is a Davis County Commissioner and she will be representing the Utah Association of Counties.

Approval of September 6, 2018 Meeting Minutes (Judge Harmond):

The committee considered the minutes from the September 6, 2018 meeting. With no changes or further discussion, Judge Kendall moved to approve the minutes. Reed Stringham seconded the motion. The motion carried unanimously.

Introduction of Speakers and Purpose of Presentations (Keisa Williams):

Ms. Williams introduced each speaker. The focus of today's meeting is to learn about all of the various pretrial supervision services and programs across Utah. The PSA has been implemented and judges find them very helpful, however, they've expressed a need for corresponding pretrial supervision programs. Without those services judges often impose monetary conditions of release, even though that may not be necessary, just due to a lack of minimal supervision options. Each of the counties represented here today operate a unique pretrial supervision program based on local resources, funding, and practices. There is no one way to run a successful pretrial program. The goal is to become better informed as a Committee before we reach out to counties and stakeholders to encourage the creation of these programs across the rest of the State.

Sanpete County Pretrial Services (Deputy Jeff Greenwell):

The Sanpete County Pretrial Program is run by the Sanpete County Sheriff's Office. Deputy Greenwell is the only pretrial officer. He is also the probation officer and drug court tracker. The program began in 2017. Since then, they've supervised approximately 120 clients, with a success rate of 76% - no new crimes committed and no failures to appear from arrest to adjudication. The program supports the 6th District Court under Judge Bagley and Judge Lee. They supervise, on average, 14 people on pretrial at any given time. The majority of the clients report directly to Deputy Greenwell on a weekly basis in his office, but he also makes home visits.

Deputy Greenwell has arrest authority as a deputy sheriff. To qualify for pretrial release, clients must sign a pretrial supervision agreement granting officers the authority to search the client and their home or property. He has not had to issue a warrant for a failure to appear (FTA) on anyone under his supervision, as opposed to numerous FTA warrants issued for individuals not under supervision.

Deputy Greenwell uses Automon as a pretrial case management system. Clients receive text message reminders of court hearings, office visits, and drug tests. Other supervision services include call-ins, in-person check-ins, UAs, and they are working on getting ankle monitors for higher risk clients. The pretrial program is funded solely by the Sheriff's Department. Clients are only required to pay for a $60 set-up fee, which includes the costs of supervision, drug testing and equipment. There are no monthly fees. To include ankle monitoring services, there would be a $250 security fee up front, plus a monthly service fee. Right now, if a judge is very adamant about ankle monitoring, Deputy Greenwell calls a local private provider who provides the equipment, and they allow him to access their program to track the client. Those costs are much higher than what he would be able to offer.

When a PSA is available, the judges are good about using those recommendations to order pretrial services. The County Attorney will sometimes request pretrial supervision. When they don't have a PSA, the County Attorney will advise the judge of the criminal history, previous FTAs, etc. Deputy Greenwell sits in the courtroom at Initial Appearance. When an individual is released to pretrial, the judge points out Deputy Greenwell to the defendant. During a recess, Deputy Greenwell meets the client in the holding cell, gets their contact information, has them sign the pretrial release agreement, and then hands it to the judge who signs it. The agreement is immediately filed into the case by the court clerk. The client is provided with Deputy Greenwell's contact information and told when and where to meet with him.

If law enforcement officers look in Xchange when they pull someone over and see a pretrial agreement in the case file, they will call Deputy Greenwell to let him know they've picked up one of his clients. If the client violates a condition of release (other than a minor traffic violation), Deputy Greenwell will typically go the jail and file a 72-hour hold, an order to show cause, a warrant, or new charges.

Senator Hillyard asked about whether Sanpete County has private probation providers and whether they have arrest authority. Deputy Greenwell said the closest provider is in Nephi and private probation providers are unable to arrest on scene and would need to contact a local law enforcement agent. Senator Hillyard asked about the accuracy of criminal records in BCI. Deputy Greenwell reported that as long as there are four positive identifiers, they are confident that the person being arrested or charged is the same person identified through BCI. If there are discrepancies, the person is responsible for contacting BCI to correct their information. Ms. Williams noted that when the AOC first began working with BCI to create the automated PC System, they were told by prosecutors and defense counsel that the criminal records weren't always up-to-date. The latest charges or case dispositions may not have been captured yet. That is one of the reasons the Court's system, when generating a PSA, will review BCI, NCIC, and CORIS to ensure the information is as accurate as possible. Judge Chiara and Cara Tangaro noted that it is rare for a person's criminal record to be inaccurate or missing updated information; approximately 1% of cases. Kim Crandall noted that when things are inaccurate, it's typically because they were arrested on a more serious charge but then pled to a lesser offense. Judge McCullagh noted that the criminal histories are really hard to understand so it may more often be an issue of training on how to read them.

For Sanpete County, it costs roughly $52.84 per day to house an inmate in jail; approx. $19,286 per year for one inmate. The pretrial program (1 FTE) costs roughly $85,000 per year for salary, benefits, equipment, and supplies. It only takes 4 clients per year on pretrial supervision to cover the entire cost of the program and break even. Since Feb 2017, Deputy Greenwell has supervised 121 clients, saving the county almost $1.5 million dollars.

Rich Mauro asked whether a public defender is available at initial appearance and what their involvement is in the process. A public defender is available in the courtroom to advise clients at initial appearance. There is no indigency waiver for the $60.00 pretrial supervision set-up fee, but Deputy Greenwell will work with them to make payments. Individuals are not revoked

or arrested for lack of payment. They have not set up a collection process. They've never had a client unable to come up with the money. Wayne Carlos asked whether individuals not offered pretrial supervision have the opportunity to bond out of jail. Deputy Greenwell stated that individuals can bond out if the judge orders it. If they're on pretrial supervision, they typically see a reduction in their bail amount or an own recognizance release.

Carbon County Pretrial Services (Deputy Jesse Fausett and Sargent Victor Turner):

Carbon County began offering pretrial services around 2014. The program was revamped in September 2018. The program is made up of two bailiffs who work double-duty as pretrial trackers, and bailiffs in Carbon County Justice Court or 7th District Court. The client pays for UA's and electronic monitoring services. Those services were offered for free under a JRI grant originally, but when the grant went away the sheriff's office couldn't afford to cover the costs. Starting in September, pretrial officers are a lot less "hands on" and are focused primarily on call-ins, in-person check ins, and tracking electronic monitors. Success is defined as showing up to court and not committing another crime. Judges typically order pretrial supervision based on the PSA and clients sign the agreement for services before they are released from the jail.

There are certain offenses that they try to avoid supervising pretrial, mainly sex offenses. Cara Tangaro asked if they ever consider supervising individuals charged with sex offenses because those individuals rarely reoffend and typically show up in court. Judge McCullagh noted the issue is more likely about the severity of a potential violation. Judge Harmond said those decisions are made on a case-by-case basis. Sgt Turner said the Carbon County Attorney made the decision that they should not supervise on sex cases unless ordered by the court. Deputy Greenwell said the individuals he supervises with sex offenses are usually the best clients as far as showing up and not committing new offenses, but he checks in with them often.

The officers attend 90% of court appearances and work directly with the County Attorney regarding each client's compliance or status. The officers will review the docket with the County Attorney before they go into court. They identify arrestees on the docket who might be appropriate for pretrial supervision, and those who may have been on pretrial before and whether they were successful/unsuccessful. The officers have arrest powers, but they do not arrest for violating pretrial conditions. Violations are tracked and officers notify the County Attorney, but they don't arrest or search their homes or property unless it's something in plain sight or egregious. They will arrest on an FTA warrant or new charges. They will do home visits, but only for individuals who are higher risk (PRL 3 and above).

Carbon County's success rate is roughly 60%. Since September 2018, 32 people out of 186 would be considered failures due to obtaining new charges or failing to appear in court. They supervise roughly 100 people at any one time – counting both justice and district court. The Sheriff's Office funds the entire program. It costs approximately $52 per day to house an inmate in jail. They didn't have the numbers with them, but Sgt Turner was certain the program saves the county money. There are no set-up fees. Clients are referred to a private provider for UAs and ankle monitoring. UAs cost about $20 depending on what the client is being tested for. That amount covers the cost of the UA tester as well. Clients are given a list of providers to

contact and are required to check in on a daily basis. Judge Harmond noted that UAs and monitoring are rarely ordered as a condition of release.

Senator Hillyard asked whether the commission of new crimes counts as a failure. Sgt Turner said yes, approximately 10% of the 60% who failed to comply committed a new offense. Pat Kimball asked whether they felt individuals failed to appear because they forgot or were willfully avoiding prosecution. Sgt Turner said typically clients who are new to the system will check in and go to court. For those who are in and out of jail a lot, it's probably a function of lifestyle, history, habits, etc. Judge Harmond noted that a large percentage are confused because they have several cases in different courts and they aren't sure where they're supposed to be. Judge Chiara noted that a lot of it is a function of serious addiction. Wayne Carlos noted that an additional component to failures to appear is being surrounded by an enabling system that doesn't hold them accountable.

Rich Mauro asked if public defenders are contacting pretrial officers and asking whether pretrial services are available to their clients at a later stage in the process. The judge considers it at initial appearance, but are public defenders asking about pretrial release later in the life of the case in lieu of doing a bond hearing? Judge Harmond said public defenders appear via video conference. Pretrial decisions are usually made at an initial video appearance and are not often revisited. Rich Mauro noted that Salt Lake Legal Defenders interact frequently with pretrial services about their clients and asked whether that was happening in other counties. Deputy Greenwell said no, the public defenders speak directly with the County Attorney.

Duchesne County Pretrial Services (Judge Samuel Chiara):

Pretrial services in Duchesne County started early with a JRI grant. Judge Chiara worked with the prosecutor's office, a public defender, the county commission, and the sheriff's office to look at the program and determine how best to distribute the funds. Before they started using PSAs, if a person made it to their initial appearance and hadn't bailed out, they would be appointed a public defender who would go back to holding to visit with them. Many times public defenders would stipulate with the county attorney to pre-trial release.

The way the original program was developed, pretrial release was still considered "in custody" because arrestees were in the custody of the sheriff's office and the program was operated by the sheriff's office. The judge authorized an individual's participation in the pretrial release program, much like a work release program except outside the jail. To qualify, individuals were screened for violent offenses. The client signed a pretrial release agreement consenting to searches and were put on an ankle monitor. They were put in contact with a local mental health facility case worker who would help line up services in the community, including substance abuse and mental health assessments, employment opportunities, evaluations, etc. The sheriff's office conducted UAs.

In the first two years, 122 people participated and 6,520 inmate days of incarceration were avoided. It costs $63.09 (without capital expenses) or $72.40 (with capital) per day to house an inmate. The cost of having an inmate out with an ankle monitor, including administration,

deputy trackers, and UAs is $40.72 per day. The county saves $32.00 per day, even if the client is wearing an ankle monitor and being drug tested. In two years, the county saved over $200,000. Aside from that, clients were charged an initial fee. With a 50% collection rate, the county saved an additional $100,000 because half of the costs were borne by the supervised individuals themselves.

Because they were supervised by the sheriff's office, if a client violated they were brought back into the jail and the jail followed a violation procedure (lower-level of due process), where the individual was allowed a hearing similar to when an inmate violated a jail rule. Judge Chiara trained the jail on drug addiction, proximal and distal goals, and other public safety behaviors so that the jail could exercise some discretion. The sheriff's office would occasionally pull someone in for a violation, hold them for a couple of days, and then let them back out, but it was all within the discretion of the sheriff.

50% of people placed on pretrial supervision made it successfully to disposition without a new offense. Of those, 50% have not had a new offense since 2017. If all of those individuals released to pretrial had remained in custody, the cost to the county would have been $472,000 to keep them incarcerated, as opposed to $172,000 to have them out on pretrial.

When the PSA was implemented, the program changed a little. Pretrial release levels, PRL 1-3 look similar to Carbon County. PRL 4-5 are essentially the original program outlined above with an ankle monitor and more serious supervision. There were a number of people who cut off their ankle monitors, so Judge Chiara started advising them that if they cut it off they would be charged with a new 3rd degree felony because it's an escape from official custody. Under the PRL 4-5 program, clients are still in the custody of the Duchesne County Sheriff's Office. One of the conditions is that they reside in the county because the sheriff's office is unable to arrest outside of Duchesne County.

There are various fees for pretrial services ranging from $20-$70 per month based on the level of supervision, and a potential $100 warrant amount for failing to call in. The fee amounts are included in the contract, but they have never been enforced. People who don't pay have not been brought back in for failing to pay and they haven't been pursued by the county for collection. It doesn't go to state debt collection. The collection rate is about 50%, but the county hasn't been too concerned because of the amount of savings from the pretrial program in general.

Judge Chiara has asked that pretrial officers begin tracking the success rate based on the new PSA conditions. Anecdotally, so far the success rate has been pretty good and new crimes are most often possession of controlled substances. Judge Chiara isn't sure how pretrial came up with this number, but 30% of clients who get into treatment while out on pretrial release stay in treatment once they are released.

Judge Chiara expressed that there are not nearly enough PSAs generated. He hopes that those numbers can be increased. It's very helpful to judges to be able to see those when reviewing

probable cause statements. Judge Chiara said he loves it when he has a PSA because he does not have to guess and he can either release or hold someone. Otherwise, when he doesn't have a PSA he's not sure what to do so he just sets the monetary bail amount on the bail schedule because there isn't enough information to make another decision. If the individual is still in front of him the following week, then he can make a better decision. The judge feels there are a number of people he could be releasing if he had the PSA to help guide him. Ms. Williams stated that she is working with jails to get SID rates up when PC affidavits are submitted, which would increase PSA generation rates. In addition, Ms. Williams outlined a permanent statewide solution the AOC will begin programming that will fix an issue related to unrecognizable national criminal history information. The new programming fix would dramatically increase PSA generation rates, particularly in bordering counties.

Davis County Pretrial Services (Patty Fox):
The Davis County commission approved and supported funding to create a new pretrial supervision program in 2018. They are currently in the implementation phase and are hoping to begin supervising individuals before the end of the year. There are 3 FTEs; a coordinator and two case managers. They've obtained office space in the Layton courthouse. The biggest challenge so far has been passing the UCJIS audit and FBI requirements to access criminal history records. That process has taken about 7 months because the Davis County IT network and the pretrial case management provider, Automon, had to meet and pass the BCI audits as well. Currently, pretrial is working with the judges, county attorney, and public defender to finalize the PSA release condition levels for Davis County, and are trying to determine initial capacity for the program.

Automon will allow pretrial to track data and performance measures based on national best practices for pretrial efficiencies (NIC Measuring What Matters). One of the most important measures is to decrease the amount of time a person spends incarcerated pretrial. Success will be defined as no FTAs or new criminal activity during the pretrial phase. Pretrial services will also be conducting self-evaluations focusing on results-based accountability; asking not only how much did pretrial do, but how well did they do it and are clients better off. Services anticipated are FTA reminder calls and texts, post FTA calls and texts, UAs, ankle monitoring, and check-ins.

Pretrial plans on attending central arraignment court 3 days per week. In Davis County, it costs $70 per day to house an inmate in jail. Davis Behavioral Health has been contracted to provide substance abuse assessments for each participant at no cost. The plan for now is that each participant will be required to participate in treatment for 6 months, or as long as there is funding available. There will be no fees for pretrial supervision, but drug testing will include a fee. UA tests will continue to be done by the sheriff's office and the results relayed to pretrial services.

Salt Lake County Pretrial Services (Pat Kimball):
Salt Lake County's pretrial program began in 1974. It is a county agency housed in Criminal Justice Services, and it is fully funded by the county. All of the employees are nationally

certified through the National Association of Pretrial Service Agencies (NAPSA). There are 29 FTEs and 2 PTEs. Pretrial runs a 24/7 operation at the jail, staffed with 14 jail screeners and 2 supervisors. The jail screening unit interviews approximately 36,000 people every year. In addition, there are 10 case managers and 2 supervisors in the county office. They supervise approximately 4,000 people per year and are currently supervising just over 1,000 defendants (100-120 per case manager). There are two district court representatives that attend initial appearance court and arraignment. They are available in the courtroom to answer any questions about a client's compliance or provide recommendations when requested.

The average supervision time was about 99 days in 2018. There are three ways individuals are released from the Salt Lake County jail:

1. Released by pretrial services (own recognizance or supervised release) based on the PSA score. Pretrial has release authority up to, and including, non-violent 3rd degree felonies pursuant to a memorandum of understanding with the 3rd District Court.
2. Supervised release as ordered by a judge (monetary and/or non-monetary).
3. Overcrowding release by the jail. This is not facilitated by pretrial services.

Overcrowding release (OCR) is a big problem for pretrial services because if someone has failed to appear and a warrant is issued, they get picked up and kicked right back out without supervision. The OCR decision is based on the charge, not the risk level. People are getting released regardless of: the number of OCRs, no bail warrants, multiple probation violations, absconding for a year, failing to appear in court, etc.

Pretrial will make a decision based on the PSA score and the following release criteria:

- Individuals with risk scores above 4/5 are only released with approval from a supervisor
- Charge does not constitute a threat to public safety
- Require a judge's authorization for violent F3s, and all F2 and F1 offenses
- Individual cannot be under any supervision. Do not release if currently under AP&P supervision, pretrial supervision, or another private provider. If they are rearrested, it constitutes a violation of pretrial conditions so they don't release them again.
- Jail interviews determine whether the client has a support system. Participants are not denied if they do not have a residence, but those with DV charges must have a verified alternate residence.
- Pretrial will provide release recommendation reports to the court upon request by a judge.

Supervision options are listed on the Salt Lake County DMF on the court's website. Additional conditions can be ordered by a judge, including weekly UAs, but clients are required to pay for those. UA fees are $15 for a 5 panel test.

Pretrial services offer in-house anger management classes, substance abuse classes, and journaling. Electronic monitoring is available if ordered, but clients are required to pay. In January pretrial began a gender-informed needs assessment (GINA) for women who are PRL 2

and above. The assessment takes 1-2 hours and determines individual needs; housing, education, trauma, drug abuse, etc. Case managers develop a case plan based on that assessment. Females between the ages of 24-44 have higher rates of failure than any other demographic. This program was created to try and focus on those high-risk individuals.

Individuals placed on pretrial release will be supervised for 90 days. If charges are never filed, pretrial sends a letter to the DA's office stating the person has been under supervision with no filing, and noting whether the individual has been compliant. Those not charged and released from pretrial services will be charged the $35 screening fee. If someone is out of compliance, pretrial sends a revocation request to the court, defense counsel, and prosecutors. Pretrial does not have arrest authority.

Pretrial offers a surrender program for individuals with an outstanding district court warrant. A screener assesses the person for eligibility, arranges a court date, and drafts a release order with conditions for the person to take with them to court. If the judge agrees, the person can be released to pretrial without having to go through the entire arrest process (which can take up to 8 hours). The screener will help coordinate with the jail for booking if required. This benefits the defendant, law enforcement, and the jail.

Pretrial tracks a lot of data; success rate, safety rate, FTAs, # of releases, total # of clients, avg # of clients per case manager, # of clients by risk score, time from release to intake, etc. Pretrial has its own county-based case management system and will be upgrading to a new one this summer.

There is no supervision fee, but clients pay for UA testing and ankle monitoring. Pretrial supervision costs $5.71 per day vs. approx. $90 per day to house an inmate in jail per day.

Adjourn:

There being no further business, Judge Harmond thanked the presenters for their time. The meeting was adjourned at 1:57 pm. The next meeting is scheduled for July 11, 2019, at 12 pm in the Judicial Council room.

Tab 2

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

September 4, 2019

Hon. Mary T. Noonan
State Court Administrator
Catherine J. Dupont
Deputy Court Administrator

M E M O R A N D U M

TO: **Standing Committee on Pretrial Release and Supervision**

FROM: **Keisa Williams**

RE: **Proposed Amendments to URCrP 9 and 9A**

The Supreme Court's Advisory Committee on the Rules of Criminal Procedure published proposed amendments to Rules 9 and 9A for public comment on July 18th (attached). The comment period closed on September 1st. The proposed amendments affect, and in certain circumstances significantly increase, the amount of time arrestees may spend in custody while awaiting the filing of formal charges.

The amendments were drafted by the current Board of District Court Judges. I believe these changes to be contrary to the intent of the Judicial Council to improve pretrial practices, and they appear to be a departure from the 2015 Board of District Court Judges' recommendations to the Chief Justice.

My concerns with the May 2019 proposed amendments are summarized below *(based significantly on issues raised by a district court judge),* along with a recommendation for the Committee's consideration.

Problems with Rule 9

The proposed rule requires that a person who remains in custody 24 hrs after a warrantless arrest must be charged by Information "without delay, and no later than the fourth calendar day after [he] was arrested." URCrP 9(c)(3). The old rule imposed a consequence for not filing timely--the arrested person was automatically released on his own recognizance. The new rule eliminates this language. What happens at the end of that deadline?

The new rule then adopts a five-calendar day failure to file deadline in subsection (d). The rule provides if a person is incarcerated on a warrantless arrest and cannot post bail, "he shall appear before the court that issued the warrant within five calendar days after the person was arrested. If an Information has been filed, initial appearance is conducted. If no Information has been filed, the person is released.

So there is an inherent conflict in the rule. Subsection (c)(3) imposes a four-day failure to file deadline, with no consequence for not filing timely. Subsection (d) then imposes a five-calendar day failure to file deadline, this one with the "teeth" of own recognizance release for violating it. As a practical matter, the proposed rule extends the failure to file deadline from four calendar days to five. The effect of this extension is to permit low-risk offenders to be held in jail for one additional day without any charges being filed. In addition, the language refers to "the court that *issued the warrant*." Rule 9 pertains to arrests *without* a warrant.

In addition, when combined with Rule 9(c)(4)--which allows the deadline to be extended to "5:00 p.m. on the next business day" when the failure to file deadline expires on a weekend or legal holiday, the new rule permits a person who cannot make bail to remain in jail uncharged for more than nine days. A person arrested on the Monday before President's Day at 6:00 a.m. will remain in jail, uncharged until the next Tuesday before appearing before the Court and being released. During this period of time, low-risk offenders who pose no threat to public safety lose their jobs, lose their housing, and go off prescribed medications intended to treat mental health conditions. All of these life disruptions starkly increase the risk of recidivism.

I see no reason why the failure to file deadline cannot be two calendar days after the date of arrest. Yes, there will be complex cases in which more time will be needed to screen the case and file. But these cases are relatively rare and the rule allows for an extension of time for good cause.

Problems with Rule 9A

The proposed rule requires that when a person is arrested on a warrant and cannot post bail, "the court must conduct an initial appearance or arraignment within three calendar days after the person was "booked." URCrP 9A(b)(1). The rule defines "booked" to mean not only that the arrested person "has been processed into a jail" but also that "notice of the incarceration has been provided to the court that issued the warrant." URCrP 9A(a)3).

The problem is that the definition of "booked" is written in the passive voice which means that no one is specifically tasked with the duty to provide the Court with "notice of the incarceration." Who does this--the arresting officer, booking staff at the jail, the prosecutor? With no one identified as the person responsible for notice, notice will not be given and a person--who is physically incarcerated--will languish in jail because he has not been "booked" for purposes of Rule 9A.

Rule 9A also permits a low-risk offender to be incarcerated for seven days before initial appearance. This is so because, if the three calendar day deadline for initial appearance "expires on a weekend or legal holiday" the time is extended to "5:00 p.m. on the next business day." URCrP 9A(b)(2). This means that a person arrested on the Wednesday before President's Day at 6:00 a.m. will not have her initial appearance until the next Tuesday. Again, during this week of incarceration, low risk offenders who pose no risk to public safety lose their jobs, lose their housing, and go off prescribed medications. These losses significantly increase the likelihood of recidivism.

Absent the need for transportation to the warrant-issuing jurisdiction, there is no reason why persons arrested on a warrant cannot appear for initial appearance on the next court day. And in most jurisdictions, even those arrestees requiring transportation could be seen by a judge via video.

The District Court Board's Reversal

In May 2015, after conducting a state-wide survey of practice in each district, the 2015 District Court Board unanimously recommended that the judiciary adopt a uniform process for reviewing probable cause statements, setting bail, and scheduling initial appearances. One of the Board's recommendations was that Informations be filed within 72 hours of booking. (See the Attached Board Memo).

The 2019 Board's endorsement of proposed Rules 9 and 9A appears to be a departure from this original recommendation. I was not involved in the Board's discussions so it is unclear to me at this time why they are recommending a failure to file deadline almost twice as long. Regardless, the Board's decision to endorse proposed Rules 9 and 9A is unsupported by new research and is, in my opinion, ill-advised. It is also important to remember that these rules apply not only to felony charges, but also to individuals arrested on non-violent misdemeanor charges.

Recommendation

I've discussed my concerns with Brent Johnson, staff attorney for the Advisory Committee on the Rules of Criminal Procedure, along with two district court judges. Mr. Johnson intends to recommend to the Rules of Criminal Procedure Committee that it create a subcommittee to discuss the proposed rules and present its own amendments for consideration by the full committee. If approved, the subcommittee would consist of:

- 3 members from the Rules of Criminal Procedure
- 1 member from the Board of District Court Judges
- 1 member from the Board of Justice Court Judges
- 1 member from the Standing Committee on Pretrial Release and Supervision
- Judge Derek Pullan (if available and interested)

My recommendation is that this committee send an official memo to the Rules of Criminal Procedure Committee endorsing the creation of the subcommittee as outlined above, and identifying an individual to serve as our committee's representative. Our representative would report back to the full committee regularly and would ensure the full committee has an opportunity to approve, or provide an official position on, any future proposed amendments.

Rule 9. Proceedings for persons arrested without a warrant on suspicion of a crime.

(a)(1) **Probable cause determination**. A person arrested and delivered to a correctional facility without a warrant for an offense must be presented without unnecessary delay before a magistrate for the determination of probable cause and whether the suspect qualifies for pretrial release under Utah Code § 77-20-1, and if so, what if any conditions of release are warranted.

(a)(2)(A) The arresting officer, custodial authority, or prosecutor with authority over the most serious offense for which defendant was arrested must, as soon as reasonably feasible but in no event longer than 24 hours after the arrest, present to a magistrate a sworn statement that contains the facts known to support probable cause to believe the defendant has committed a crime. The statement must contain any facts known to the affiant that are relevant to determining the appropriateness of precharge release and the conditions thereof.

(a)(2)(B) If available, the magistrate should also be presented the results of a validated pretrial risk assessment tool.

(a)(2)(C) The magistrate must review the information provided and determine if probable cause exists to believe the defendant committed the offense or offenses described. If the magistrate finds there is probable cause, the magistrate must determine if the person is eligible for pretrial release pursuant to Utah Code § 77-20-1, and what if any conditions on that release are reasonably necessary to:

(a)(2)(C)(i) ensure the appearance of the accused at future court proceedings;

(a)(2)(C)(ii) ensure the integrity of the judicial process;

(a)(2)(C)(iii) prevent direct or indirect contact with witnesses or victims by the accused, if appropriate; and

(a)(2)(C)(iv) ensure the safety of the public and the community.

(a)(2)(D) If the magistrate finds the statement does not support probable cause to support the charges filed, the magistrate may determine what if any charges are supported, and proceed under subsection (a)(2)(C).

(a)(2)(E) If probable cause is not articulated for any charge, the magistrate must return the statement to the submitting authority indicating such.

(a)(3) A statement that is verbally communicated by telephone must be reduced to a sworn written statement prior to presentment to the magistrate. The statement must be retained by the submitting authority and as soon as practicable, a copy shall be delivered to the magistrate who made the determination.

(a)(4) The arrestee need not be present at the probable cause determination.

(b) **Magistrate availability.**

(b)(1) The information required in subsection (a)(2) may be presented to any magistrate, although if the judicial district has adopted a magistrate rotation, the presentment should be in accord with that schedule or rotation. If the arrestee is charged with a capital offense, the magistrate may not be a justice court judge.

(b)(2) If a person is arrested in a county other than where the offense was alleged to have been committed, the arresting authority may present the person to a magistrate in the location arrested, or in the county where the crime was committed.

(c) **Time for review.**

(c)(1) Unless the time is extended at 24 hours after booking, if no probable cause determination and order setting bail have been received by the custodial authority, the defendant must be released on the arrested charges on recognizance.

(c)(2) During the 24 hours after arrest, for good cause shown an arresting officer, custodial authority, or prosecutor with authority over the most serious offense for which defendant was arrested may request an additional 24 hours to hold a defendant and prepare the probable cause statement or request for release conditions.

(c)(3) If after 24 hours, the suspect remains in custody, an information <u>charging the suspect with offenses from the incident leading to the arrest</u> must be filed without delay, <u>and no later than the fourth calendar day after the defendant was arrested</u> ~~charging the suspect with offenses from the incident leading to the arrest~~.

~~(c)(4)(A) If no information has been filed by 5:00pm on the fourth calendar day after the defendant was booked, the release conditions set under subsection (a)(2)(B) shall revert to recognizance release.~~

(c)(4)(~~B~~A) The four day period in this subsection may be extended upon application of the prosecutor for a period of three more days, for good cause shown.

(c)(4)(~~C~~B) If the time periods in this subsection (c)(4) or subsection (d) expire on a weekend or legal holiday, the period expires at 5:00pm on the next business day.

(d) **Time for Initial Appearance or Arraignment**

(d) When a person has been arrested and has not been released pursuant to subsections (a) or (c) or when the person cannot provide any condition or security required by the magistrate, the person shall appear before the court that issued the warrant within five calendar days after the person was arrested. If an information has been filed, the court shall conduct an initial appearance. If an information has not been filed, the court shall order the person released from custody unless the prosecutor has requested an extension pursuant to subsection (c)(4)(b). If an extension is granted pursuant to subsection (c)(4)(b), the court shall conduct an initial appearance on the next calendar day after the extension period.

(e) **Other processes**. Nothing in this rule is intended to preclude the accomplishment of other procedural processes at the time of the determination referred to in subsection (a)(2).

Rule 9A Procedures for persons arrested pursuant to an arrest warrant.

(a)(1) For purposes of this rule an “arrest warrant” means a warrant issued by a judge pursuant to Rule 6(c), or after a defendant’s failure to appear at an initial appearance or arraignment after having been summoned.

(a)(2) An “arrest warrant” does not include a warrant issued for failing to appear for a subsequent court proceeding or for reasons other than those described in subsection (a)(1).

(a)(3) For purposes of this rule "booked" means that an arrested person has been processed into a jail and notice of the incarceration has been provided to the court that issued the warrant.

(b)(1) When a peace officer or other person arrests a defendant pursuant to an arrest warrant and the arrested person cannot provide any condition or security required by the judge or magistrate issuing the arrest warrant, ~~the person arrested must be presented to a magistrate within 24 hours after arrest. The information provided to the magistrate must include the case number, and the results of any validated pretrial risk assessment.~~ the court must conduct an initial appearance or arraignment within three calendar days after the arrested person was booked. This time may be extended by the court to accommodate the person’s transportation to the jurisdiction from which the warrant issued.

(b)(2) If the time periods in this subsection (b) expire on a weekend or legal holiday, the period expires at 5:00 pm on the next business day.

~~(c) With the results of the pretrial risk assessment, and having considered the factors that caused the court to issue an arrest warrant in the first place, the magistrate may modify the release conditions~~.

~~(d) Any defendant who remains in custody after the review process must be seen by the court issuing the arrest warrant no later than the third day after the arrest.~~

~~(e)~~(c) If the arrested person meets the conditions, or provides the security required by the arrest warrant, the person must be released and instructed to appear as required in the issuing court.

~~(f)~~(d) Any posted security must be forwarded to the court issuing the arrest warrant.

MEMORANDUM

TO: Chief Justice Matthew B. Durrant

FROM: Board of District Court Judges

DATE: May 29, 2015

RE: Recommendations For A Uniform Process For Setting Bail

Dear Chief Justice Durrant,

As you know, the Judicial Council decided to study bail and pre-trial release in 2015 and has appointed a subcommittee to undertake this work. Coincidentally, the Department of Public Safety has expressed its intention to begin the development of a state-wide system for electronic review of probable cause statements and the setting of bail. The Department hopes to begin development in January 2016.

This focus on the issue of bail spurred the Board to consider bail procedures throughout the State and to make recommendations for change. In doing this work, the Board wants to be a reliable resource for the Council and the subcommittee. The Board is well-suited for the work. After all, reviewing probable cause statements, setting bail, and conducting the initial appearance are all district court functions.

We invite the Council and the subcommittee to consider the following information and recommendations related to bail procedures. The recommendations were unanimously approved at the Board meeting in May. If Board members can answer any questions or undertake any assignments to help further, we welcome that opportunity.

Non-Uniform Process Related To Bail

Bail is governed by constitutional law, state statute, and court rule. *See*, U.S. Const., amend. VIII; Utah Const., art. I, sec. 9; Utah Code § 77-20-1; URCrP 7. While the law and rules related to bail are the same, bail procedures throughout the State are not. In each district—and sometimes within different counties in the same district—different procedures are followed for presenting probable cause statements, judicial review of those statements, setting bail, release for failure to file, and scheduling the initial appearance.

There are many reasons for this non-uniformity. The setting of bail is a unique interaction between the executive and judicial branches. The process requires significant

cooperation among the arresting police agency, county jail staff, district and county attorneys, public defenders, and the courts. Much of this interaction occurs before a case is filed.

The different responsibilities and interests of these stakeholders create tension. Judges want an arrested person who cannot post bail to appear in court soon after arrest. Prosecutors want time to screen felony cases. Public defenders need time to meet with arrestees and an opportunity to argue the bail question. County sheriffs have limited resources to house people and to transport them to court. Accommodating these conflicting interests required compromise and there was no "one right answer." Stakeholders cooperated to find workable solutions and in this way non-uniform, local bail practices were born.

Geographic and demographic realities drove different bail practices too. In some rural counties, the district court convenes only twice per month to hear felony cases. The limited number of court days determines how quickly an arrested person appears for initial appearance and how quickly prosecutors are required to file. In metropolitan areas, jail crowding and transportation resources affect when people are released and brought to court.

Bail Practices and Procedures By Judicial District

The Board researched bail practices and procedures in each judicial district. Local bail practices are as follows:

First District

Arresting officers submit probable cause statements in PDF format by email to the signing judge. The signing judge determines if there was probable cause for the warrantless arrest, sets bail, and prescribes any additional conditions of release. The signing judge reviews probable cause statements twice daily, in the morning and at evening. If probable cause is found and the arrestee has not bailed, the arrestee appears at the next video arraignment calendar. These calendars are held two times per week on Monday and Thursday.

At the initial appearance, the judge informs the arrested person of the charges filed and determines whether counsel should be appointed. The judge revisits bail based on input from the State and defense counsel. If charges have not been filed, the arrested person is released unless the court grants the State an extension of time. Thus, the failure to file deadline in the First District is generally between 72-96 hours after arrest.

Second District

Weber County

The arresting officer prepares and submits the probable cause statement which is reviewed by a judge to authorize detention beyond 24 hours. The judicial review is for probable cause alone, not bail. If probable cause is found, the Defendant appears at the next video arraignment calendar. The jail sets an initial bail amount consistent with the uniform bail schedule in both felony and misdemeanor cases. The judge may revisit this initial setting of bail at the time of first appearance.

Davis County

Judges rotate on a weekly basis electronically reviewing officer-prepared probable cause statements, and setting bails or disapproving detentions based upon those statements. This is done at least every morning and evening, often more frequently. Bail is set electronically at the same time, typically without information as to the suspect's prior criminal history, but occasionally based upon aggravating circumstances provided by the officer. The probable cause statement includes a box which permits the officer to set forth aggravating circumstances. There is an option for a no-bail hold as well.

Within a few days of the probable cause statement being signed, the defendant appears before a rotating judge on a central arraignment calendar at which a prosecutor and a public defender are present. The central arraignment calendar is held every Monday, Wednesday, and Friday afternoon.

The Davis County Attorney's office apparently operates under its own 90 hour rule. The office will charge defendants within 90 hours of booking. If the defendant is not going to be charged within the 90 hours, the county attorney's office gives notice to the jail. The county attorney's office then requests that the defendant be released until charges are filed—a kind of pre-trial release.

Release apparently occurs as a matter of practice between the county attorney's office and the jail, without a court order, despite bail having been set by the judge at the time of the probable cause review. There are times when a defendant is not charged within the 90 hours, yet the county attorney does not request a release of the defendant. But in most (but not necessarily all) cases, the defendant is either charged or released within a week of booking. Thus it is the county attorney, pursuant to its 90 hour rule and this procedure, who follows through to make sure defendants are either charged or released and do not languish in jail prior to an information being filed and a district court case opened.

Third District

Third district judges set bail in class A misdemeanor and felony arrests. The jail will not accept a prisoner without a completed probable cause statement or outstanding warrant. Judicial review of warrantless arrests occurs within 24 hours.

There are two separate tracks used for the judge to set bail depending on the date and time of arrest. Track one involves all persons arrested between Sunday at 3:00 P.M. and Friday at 3:00 P.M. The jail emails the names of these prisoners, the probable cause statements, and booking summaries to the court on Monday thru Friday, at approximately 7:30 A.M. The court's criminal clerk prints this information and presents it to that week's signing judge. The signing judge sets bail amounts and failure to file (FTF) dates for each prisoner. The clerk retrieves the completed documentation, scans it into the computer, and emails the signed documents back to the jail. Jail personnel enter this information into the jail's computer system. The entire process is repeated again at approximately 3:30 P.M. to ensure that all bail is set within 24 hours of arrest.

Track two involves all persons arrested between Friday at 3:00 P.M. and Sunday at 3:00 P.M. The jail emails the names of the arrestees, the probable cause statements, and booking summaries directly to the on-call judge in PDF format. This occurs every Saturday and Sunday at 9:00 A.M. The judge downloads the documents into a PDF reader (usually on an iPad) and writes directly on the booking sheet the bail amount and the FTF date and time. The judge emails the documents back to the jail where the information is entered into the jail's computer. Again, the entire process is repeated at about 5:00 P.M.

As noted, the judge sets an FTF date and time when setting bail. The FTF date is usually within 72 hours of bail being set. If the District Attorney does not file charges by the FTF date and time, the jail's computer generates a "kick-out" notice. The prisoner is released from jail. In complicated cases or for good cause, the District Attorney may seek to extend the FTF deadline. In 2014, the jail released more than 14,000 people arrested without a warrant because the FTF deadline was not met. In 2015, the jail has released an average of 57 people per day because the FTF deadline has not been met.

This process is significantly impacted by the practice of overcrowding release. Overcrowding release is evidently based on a U.S. District Court ruling issued years ago and on the Sheriff's own claim to inherent authority to manage jail populations. Overcrowding release allows jail personnel to release people, even those arrested on warrants, if the history of bookings and offense combine to fit within a matrix classifying the person as not dangerous to the community. The release is without bail or supervision and occurs without input from the prosecutor or the courts. Overcrowding release occurs most often in the case of minor offenses, but in many instances people are released on felonies and felony probation violations, even when warrants have been issued. When a person is released in this way, the jail gives him a date and time to contact the appropriate court. The person then calls and schedules a court date, assuming he is cooperating with the process. If the released person does not call the problem is obvious—an information is filed, the person fails to appear and a new warrant issues for his arrest with a higher bail. The person is again arrested, but may well be given another overcrowding release.

This can go on indefinitely. The only remedy is for the judge to call the jail personally and ask the jail not to allow an overcrowding release of a particular arrestee.

Fourth District

In Utah County (the largest county in the District) the County has created an internet-based program for presenting probable cause statements and setting bail. Police officers and judges have access to the program. When an arrestee is booked into the jail, the arresting officer provides an affidavit of probable cause. The affidavit is placed in an electronic queue. An assigned judge accesses the queue twice daily to satisfy the newly adopted requirement for probable cause review within 24 hours.

The judge decides if probable cause has been established for some or all of the charges identified by the arresting officer. To comply with Rule 7, the judge sets a bail amount based on the charges for which probable cause has been found. Felony arrestees are set for first appearance one week from the next court day. The County Attorney is expected to have screened the case and filed an information by that date.

No date is scheduled for misdemeanor arrestees. There are so many different courts, prosecutors and schedules that the reviewing judge cannot determine which court and calendar should be named without more information. The Sheriff is responsible to transport misdemeanor arrestees to the appropriate court on the next available court day.

A PDF copy of the document noting the approval or denial of probable cause, bail and next appearance date is automatically sent by e-mail to a clerk of the Court. The document is maintained as a court record. In order to accommodate U.C.A. § 77-20-1, the Court has given standing notice to the Utah County Attorney and the Utah County Public Defender Office that bail will be reviewed, upon request of either party and without further notice at the first appearance before the magistrate.

Requests for a determination of probable cause upon warrantless arrest in Wasatch, Juab and Millard Counties are handled differently. For example, in Wasatch County written probable cause statements are prepared by police officers and then hand-delivered by staff to the Court for review. On weekends, jail staff contacts the assigned judge to review probable cause statements for arrests occurring after court hours on Friday through Sunday night.

Fifth District

In Washington County, the morning after a person is arrested the assigned judge reviews the probable cause statement provided to the courts by jail staff. Bail is set. Copies of the

approved probable cause statements are sent back to the jail so that jail staff can record the bail amount.

Arrested persons appear before the Court for first appearance or arraignment. Arrestees who have not bailed out appear by closed circuit television. At that time the magistrate reviews the charges, appoints counsel, and reviews the initial setting of bail. On weekends, jail staff sends copies of the probable cause statements to the assigned judge who sets bail. Arrestees who are unable to bail out appear for first appearance on Monday at 1:30 p.m.

Sixth District

The Sixth District covers a vast geographic area including San Pete, Sevier, Piute, Garfield, Wayne, and Kane counties. There are only two Sixth District Court judges. For this reason, probable cause statements in support of warrantless arrests are reviewed primarily by justice court judges in each county. To meet the 24-hour deadline in Rule 7, officers must sometimes contact the reviewing magistrate by telephone. The Sevier County justice court judge has an electronic system which allows him to review probable cause statements. But in all other parts of the Sixth District, probable cause review is a paper system. There is no deadline by which county attorneys must file charges after arrest, although this usually occurs within days. Once an information is filed, the defendant is placed on the next district court criminal calendar. At that time, the defendant can automatically readdress bail without filing a motion.

Seventh District

In the Seventh District, jail staff is responsible for presenting probable cause statements timely to the magistrate. In Grand and San Juan counties, the district court, juvenile court, and justice court judges rotate the probable cause review assignment monthly. The assigned judge reviews probable cause statement through a shared Google Drive folder and email. The clerk prompts the judge about pending probable cause statements by text messaging. In Emery and Carbon Counties, there is no organized rotation for reviewing judges, with the exception of weekend review which is shared in Carbon County between the district court and justice court judges. In these counties, jail staff calls until a signing judge can be found.

In the Seventh District, there is no failure to file deadline. Arrested persons appear on the next court calendar. In Grand, San Juan, and Emery Counties, there are only two criminal law and motion days per month. In Carbon County, criminal law and motion is conducted once per week. If charges have not been filed by the time of initial appearance and no extension is granted by the court, the arrested person is released.

Eighth District

The Eighth District judges review probable cause statements within the 24 hours required under the rule, but for probable cause only. Bail is not set by the court at that time. The jail automatically sets bail according to the bail schedule. For example, the jail sets a $5,000 bail for a third degree felony charge; for concurrent third degree felony and class "A" misdemeanor charges against the same person, the jail uses the bail schedule to set a combined bail amount of $7,500.00, and so forth. There is a standing order that the jail not set bail on first degree felony charges. Thus, for first degree homicide, rape, and child abuse charges, no bail is set until the inmate appears before a magistrate. Typically, this initial appearance occurs within 48 hours of incarceration, even if no charges have been filed.

Inmates who cannot make bail appear before a judge within five days of arrest or less. However, there is a standing requirement that charges be filed within 72 hours of arrest, absent a court order extending the time. The jail is responsible for identifying those inmates who have not been charged within 72 hours and releasing them.

At initial appearance, the judge explains the charge, determines if the defendant can afford an attorney, and finds out whether the defendant is likely to make bail. If the inmate does not have an attorney, the court will appoint one to represent the inmate regarding bail, even if the inmate does not otherwise qualify for the appointment of counsel. Usually, bail hearings are held the week following the initial appearance so that appointed bail counsel has time to prepare.

Recommendations

The Board recommends that the judiciary adopt a more uniform process for probable cause review and the setting of bail throughout the State. Any uniform process should include the following components:

- **Schedule for Probable Cause Review.** Probable cause statements for warrantless arrests should be reviewed electronically within 24 hours of arrest. URCrP 7(c)(1). To meet the twenty-four hour deadline, district court judges must review probable cause statements two times per day, once in the morning and once in the afternoon. This must occur both on weekdays and weekends.

- **Bail Set At The Time of Probable Cause Review.** If the judge finds probable cause, the judge shall immediately make a bail determination. URCrP 7(c)(3)(B). Any electronic system should allow (1) the reviewing magistrate to see the Uniform Bail Schedule amount for the offense; (2) the reviewing magistrate to enter a bail amount, and impose conditions of release; and (3) the arresting officer to enter information relevant to the setting of bail, including those factors

enumerated in the Utah Constitution and in the Utah Code. See, Utah Const., art. I, sec. 8; Utah Code § 77-20-1(2)(a)-(d).

- **Informations Filed Within 72 Hours of Booking (Failure to File Deadline).** If the prosecutor decides to file charges, she should do so within 72 hours of booking. Failure to file timely shall result in release of the detained person unless the prosecutor obtains from the Court an order extending the time to file.

- **Orders for Release Upon Declination of Prosecution.** If the prosecutor declines to file charges before the date scheduled for initial appearance, the prosecutor shall provide proof of declination to the clerk and the court should enter a written order authorizing the release of the arrestee.

- **Initial Appearance On The Next Court Day After The Information Is Filed.** An arrested person who is unable to post bail should appear before the court for initial appearance on the court day immediately following the date the information is filed In rural areas where court days occur only a few times per month, the same rule should apply. In these areas, initial appearances should be conducted by video-conferencing.

- **Automatic Right To Readdress Bail Set At Time of Probable Cause Review.** At the initial appearance, the arrested person shall have the right to readdress the bail amount set by the magistrate at the time of probable cause review or to wait to readdress bail upon notice to the prosecutor. This allows the arrested person the opportunity to be represented by counsel and to be heard regarding factors relevant to the setting of bail.

- **Subsequent Motions to Modify Bail.** After a bail hearing has been held and bail set, any further motion to modify the bail must be made in advance of a hearing, with notice to the prosecutor, and "may be made only upon a showing that there has been a material change in circumstances." Utah Code 77-20-1(5) and (6).

Other Concerns—Limited Information and Excessive Bail

Finally, the Board believes that two broader concerns merit consideration by the subcommittee and the Council.

- **Limited Information At The Time Bail Is Set.** When bail is set immediately upon a finding of probable cause, the reviewing magistrate has no information or indictment, no

recommendation from pre-trial release, and no other reliable records. By statute, conditions of release are imposed in the discretion of the magistrate to ensure the appearance of the accused, ensure the integrity of court processes, prevent contact with victims and witnesses by the accused, and ensure the safety of the public. But the probable cause statement alone generally includes little information that might guide the discretion of the magistrate in setting conditions of release designed to serve these important objectives.

- **The Uniform Bail Schedule and Excessive Bail.** The federal and state constitutions forbid the setting of excessive bail. Section 77-20-1 grants the court broad discretion in making bail determinations. However, Rule 7 requires that the bail amount coincide with the Uniform Bail Schedule absent a substantial cause for deviation. For an arrestee with no prior criminal history and substantial ties to the community, bail which coincides with the Uniform Bail schedule may be excessive.

The Board hopes these recommendations are helpful. Thank you for the opportunity to participate studying this important issue.

Sincerely,

Judge Derek P. Pullan

Chair, Board of District Court Judges

Tab 3

NATIONAL PRETRIAL LANDSCAPE
Pretrial "Ability to Pay" Analysis
September 3, 2019

Dear Committee:

This document is a work-in-progress. It is a very rough overview of many (but not all) cases across the country addressing the question of whether it is an unconstitutional deprivation of due process and equal protection rights under the 14th Amendment to set monetary conditions of pretrial release without first considering, among other things, an arrestee's ability to pay the amount set.

While none of the cases discussed below are precedential, I believe several are persuasive and I have become increasingly concerned that the application by Utah courts, and other criminal justices stakeholders, of some of the State's pretrial release laws and court rules may not be constitutionally upheld if challenged in court.

I believe this issue warrants prioritization, and careful investigation and analysis by the Committee to determine what, if any, next steps are necessary to ensure Utah is adequately protecting the constitutional rights of its citizens. In addition, I believe any changes to 'ability to pay' analysis procedures would necessarily affect the timing and infrastructure problems already identified in the Memo regarding changes to URCrP Rules 9 and 9A.

-- Keisa

CALIFORNIA – Buffin v. City and County of San Francisco, et al., Case: 4:15-cv-04959-YGR

- US District Court for the Northern District of California
- Court certified Class as: all pre-arraignment arrestees 1) who are, or will be, in the custody of the sheriff, 2) whose bail amount was set by the bail schedule, 3) whose terms of pretrial release have not received an individualized determination by a judicial officer, and 4) who remain in custody for any amount of time because they can't afford to pay
- Plaintiffs sued the sheriff, challenging the use of San Francisco's felony and misd. bail schedule as a basis for releasing detainees prior to arraignment when they can't afford to pay. Argued:
  - Plausible alternatives exist for release
  - Use of the schedule violates the Due Process and Equal Protection clauses of the 14th Amendment
- Sheriff refused to defend use of the schedule. Court granted California Bail Agents Association (CBAA) limited intervenor status. CBAA did not have a right to intervene.
- Plaintiff #1 was 19 yrs old and was arrested for grand theft of personal property. Bail amount set at $30,000 ($15,00 for each booking charge) pursuant to the bail schedule. She couldn't afford to pay. DA's office decided not to file charges and she was released after spending 46 hrs in custody. She was never taken to court for an initial appearance. She lost her job.

- Plaintiff #2 was 29 yrs old and was arrested for assault with force likely to cause great bodily injury. Bail was set at $150,000 ($75,000 each for 2 counts). She couldn't afford to pay. After 29 hrs in jail and prior to her initial appearance, she was release after her uncle paid an initial down payment to a bondsman of $1,500 on a $15,000 non-refundable premium. Her sister and grandmother co-signed. DA's office did not file formal charges. Her family members were still obligated to pay the $15,000 premium.
- Law when case was filed:
    - Superior court judges are required to prepare, adopt, and annually revise a uniform bail schedule for all bailable offenses and all misd and traffic offenses, except vehicle code infractions
        - A court may, by local rule, establish procedures to accomplish the above. If a court does not adopt a local rule, it shall be accomplished by a majority of the judges.
    - When creating the bail schedule, judges are required to consider the seriousness of the offense charged
    - Schedule must contain a list of the offenses and amounts of bail applicable for each as the judges determine to be appropriate, plus a general catchall clause for any offense not otherwise specifically listed.
    - Upon posting bail, the arrestee shall be discharged from custody as to the offense on which the bail is posted.
    - Sheriff consults the bail schedule to determine an arrestee's bail amount and releases the detainee upon payment of that sum, with no individualized assessment regarding public safety, flight risk, ability to pay, or strength of evidence
    - Some arrestees may apply to a judge for pre-arraignment release on lower bail or on own recognizance ("OR"). Application may be made without a hearing.
    - Ironically, individuals charged with certain offenses are ineligible to apply pre-arraignment, but if they pay the bail amount on the schedule they can be released.
    - In the majority of cases, individuals must be taken before a judge for arraignment within 48 hrs of arrest, not including Sundays and holidays. After a hearing in open court, a judge may order release on appropriate conditions.
    - In setting bail, a judge may consider information in a report prepared by an investigative staff employed by the court for determining OR release.
    - Pretrial Diversion project contracts with the sheriff to provide certain pretrial services, including the OR project.
    - April 2016 – the OR project staff began using the PSA and no longer interview detainees. Prepare a workup for each arrestee eligible for OR release including a summary of individual's personal and criminal history, criminal history printouts, police report, and the PSA – presented to duty judge or at arraignment. No timeline for when the workup is completed.
- Legislation Pending:
    - August 2018, Governor signed CA Money Bail Reform Act into law (SB 10), but a referendum to overturn it qualified for the November 2020 ballot. SB 10 now requires approval by a majority of voters before it can take effect.
    - SB 10 significantly reforms pretrial release in California, prohibiting monetary conditions of release

- March 4, 2019 – Court granted Plaintiff's motion for summary judgement
  - Sheriff's use of the bail schedule significantly deprives plaintiffs of their fundamental right to liberty
    - Plaintiffs established a significant deprivation with longer detention by sole reason of their indigence, but significance is measured by more than just a difference in hours
    - Must consider the real-world consequences of such a deprivation of liberty, such as:
      - loss of employment, housing, public benefits, child custody,
      - burdened by long-term debt due to a short period of detention,
      - many plead guilty (or no contest) at an early stage to secure release
  - A plausible alternative exists (use of the PSA) which is at least as effective and less restrictive for achieving the government's compelling interests in protecting public safety and assuring future court appearances. SB 10 serves as evidence that a plausible alternative to the current system exists.
    - Alternative "need not be more effective," but merely "at least as effective"
    - It need not rise to the level of scientific precision
    - Once Plaintiffs made that showing, gov't has burden of proof under strict scrutiny to show that proposed alternative would be less effective and/or more restrictive at serving govt's compelling interests.
    - When a court asks whether a proposed alternative is less restrictive, the challenged law must be shown to be "necessary" as a means to accomplishing the end. This requires proof that the law is the least restrictive or least discriminatory alternative.
  - Operational efficiency based on a bail schedule which arbitrarily assigns bail amounts to charges without regard to any risk factors or the governmental goal of ensuring future court appearances is insufficient to justify a significant deprivation of liberty.
    - Merely assigning a random dollar amount to a charge does not address an actual person's ability or willingness to appear in court or the public safety risk that person poses. Therefore, it cannot be deemed necessary.
    - This practice replaces the presumption of innocence with the presumption of detention.
    - *Footnote:* Such an arbitrary schedule may not even satisfy a rational basis analysis. The basic requirement of the rational basis test is that a law must be rationally related to a legitimate government purpose. The presumption of detention is not a legitimate government purpose.
  - Strict scrutiny applies in due process and equal protection claims. One's liberty is a fundamental right necessitating strict scrutiny review.
    - Court dismissed *Walker v. Calhoun* (11th Circ) and *ODonnell v. Goodhart* (5th Circ)("*ODonnell II*") cases as non-binding and distinguishable.
      - *Walker* and *ODonnell II* courts' reasoning regarding *procedural* due process does not bear on the analysis of Plaintiffs' equal protection and substantive due process claims here.
      - Court expressly stated it does not share the same view on the principle of liberty as the *Walker* court.

        - Court aligned with the dissenting opinions in *Walker* and *ODonnell II*. US Supreme Court recently reaffirmed that any amount of actual jail time is significant and has exceptionally severe consequences for the incarcerated individual and for society which bears the direct and indirect costs of incarceration (*Rosales-Mireles v. United States*)
    - Court found *In re Humphrey* (Cal.App.) to be contrary to Supreme Court precedent. Citing *San Antonio Indep. Sch. Dist. v. Rodriguez* (411 U.S. 1, 20 (1973)), indigent arrestees who are detained prior to their individualized hearings solely because they cannot afford secured money bail do not receive any meaningful consideration of other possible alternatives that would enable their pre-hearing release. Rather, they share 2 distinguishing characteristics which trigger heightened scrutiny: 1) because of their impecunity they are completely unable to pay for some desired benefit, and 2) as a consequences, they sustain an absolute deprivation of a meaningful opportunity to enjoy a benefit.
    - The "presumption of innocence, secured only after centuries of struggle" (*Stack v. Boyle*), should not vanish under the guise of the universal benefits of a bail option.
    - While "indigency," by definition, indicates a lack of wealth, the constitutional principle is what controls. That principle here is grounded in liberty.
    - The question is whether a significant deprivation of the fundamental right to liberty has occurred. The existence of a significant deprivation is not a threshold requirement which *triggers* strict scrutiny, but rather the first inquiry in a strict scrutiny analysis.
- Indigency determinations for purposes of setting bail are *presumptively* constitutional if made within 48 hrs, but that presumption is rebuttable
    - *Walker* reaffirms the notion that only a presumption exists
    - *McLaughlin* made clear the 48 hr presumption was rebuttable: a probable cause hearing held within 48 hrs may nonetheless be unconstitutional if the arrested individual can prove that his probable cause determination was delayed unreasonably.
        - In the dissent, Scalia said 48 hrs was arbitrary and argued that given the data available, law enforcement needed only 24 hrs to obtain probable cause review (perhaps excepting Sundays).
    - The 48-hr presumption must be viewed in context. Nothing stopped the court from taking Plaintiff #1 to court on Tuesday morning, 10 hrs after she was booked, or even on Wednesday. Had it done so, Plaintiff would have seen a judge who could have made a release determination. Holding her 4 ½ times longer and well after the court closed on Wednesday suggests that the gov't is unjustifiably taking advantage of the 48-hr window. Such delay for delay's sake has been condemned by the Supreme Court (*McLaughlin*).

    - Court enjoined the sheriff from using the bail schedule as a means of releasing a detainee who cannot afford the bail amount, but delayed the injunction pending briefing by the parties.
- Factual findings of note:
    - Over 99% of arrestees released on bail obtain surety bonds through contracts with bail agents, with the largest number ranging between $10,00-$50,000 (avg. $56K)
    - Bail agents are legally allowed to charge non-refundable premiums of up to 10% of the total bail amount
    - In 2017, 30% of custodial arrests will be declined for prosecution each year
    - Arrestees who post the full bail amount can secure release more quickly than any other category of arrestees – even when that individual is charged with a more serious offense than the indigent arrestee
        - Ex: Sheriff released, within several hours of arrest, a person charged with a serious assault case involving an axe and the SWAT team, while an indigent, disabled individual who was also arrested for assault (her "deadly weapon" was a cane) was held in custody for 5 days.
    - Arrestees who can afford secured money bail are released, on average, 12.8 hrs faster than arrestees who obtain release through the OR project. The latter spend, on average, more than twice as much time behind bars than those who are able to post bail.
    - 1/4 of arrests are dismissed or not rebooked prior to arraignment
    - 1-5 days in jail can take a mental and physical toll on arrestees, impact custody of their children, and lead to loss of employment

CALIFORNIA – <u>In re Kenneth Humphrey</u>, Case no: A152056

- Court of Appeal of the State of California, First Appellate Division, Division Two
- Plaintiff petitioned the Court for a writ of habeas corpus and asked that it either order his immediate release on his own recognizance or remand the matter to the superior court for an expedited hearing, with instructions to:
    - Conduct a detention hearing consistent with the CA Constitution and the procedural safeguards discussed in *Salerno*; and
    - Set whatever least restrictive, non-monetary conditions of release will protect public safety; or
    - If necessary to assure his appearance at trial or future hearings, impose a financial condition of release after making inquiry into and findings concerning petitioner's ability to pay.
- Plaintiff is a 63-yr-old retired shipyard laborer and lifelong resident. The victim was 79-yrs-old who used a walker. The victim claimed petitioner (who lived in the same senior home) followed him into his apartment and asked him about money. Petitioner told the victim to get on the bed and threatened to put a pillow case over his head, and took his cell phone and threw it on the floor. After the victim gave petitioner $2, petitioner stole $5 and a bottle of cologne and left. Petitioner was arrested without incident and charged with first degree robbery, first degree residential burglary, inflicting injury on an elder and dependent adult, and theft from an elder or dependent adult.
- Arrested on May 23rd, an arraignment was held on May 31st (9 days later), where petitioner requested release on own recognizance given his advanced age, community

ties, lifelong resident, unemployment and financial condition, minimal property loss he was charged with, absence of a criminal record for more than 14 years, and no previous failures to appear. He also invited to the court to issue a "stay-away" order for the victim

- The PSA recommended no release. Prosecutor requested $600,000 bail pursuant to the bail schedule. Judge ordered $600,000 bail and issued a protective order given the seriousness of the crime, vulnerability of the victim, and PSA recommendation.
- On July 10th (nearly 7 weeks post-arrest), Petitioner filed a motion for a formal bail hearing and an order releasing him OR or a bail reduction because the bail set is unreasonable and beyond his ability to pay. Claimed it violated the 8th and 14th Amend.
    - Plaintiff was accepted into a 6-week residential treatment program for chronically homeless senior citizens with substance abuse issues.
    - Defense argued release OR to the treatment facility would ensure supervision and community safety
- The lower court denied OR release due to the severity of the offense, but found that the defendant's willingness to enter treatment and his ties to the community qualified as unusual circumstances justifying deviation from the bail schedule and reduced bail to $350,000, with an additional condition that upon release he enters the residential treatment program.
- Law when case was filed:
    - Constitution confers an absolute right to bail except in a narrow class of cases
    - Person shall be released on bail by sufficient sureties, except for capital crimes, violent felonies, felony sexual assault on another person, and felonies after a finding of substantial likelihood of great bodily harm based on a clear and convincing standard.
    - Excessive bail many not be required. When fixing bail, court must consider the seriousness of the offense, previous criminal record, protection of the public, safety of the victim, and probability of his appearing in court. Public safety shall be the primary consideration.
    - Court has discretion to release on own recognizance.
    - Defendants charged with an offense not punishable with death may be admitted to bail before conviction, as a matter of right.
    - However, before a person charged with specified serious offenses may be released OR, or on a bail amount which deviates from the schedule, a hearing must be held at which the court must consider evidence of past court appearances, the maximum potential sentence, and the danger to the public if released.
    - If considering OR release, the court must additionally consider potential danger to other persons, including threats made and any past acts of violence, and any evidence offered by the defendant about ties to the community and ability to pay.
        - Court only required to consider ability to pay if the defendant raises the issue
    - If deviating from the bail schedule, the court must state the reasons for that decision and must address any threats made against the victims or witnesses on the record.
    - If after 5 days of the original bail order the defendant cannot post bail, they are entitled to an automatic review of the bail order.

    - Court must make findings on the record of the unusual circumstances justifying deviation from the bail schedule.
    - Nothing in the statute requires the court to consider less restrictive conditions as alternatives to money bail.
- January 25, 2018 – Remanded to lower court for new bail hearing
    - Lower court erred in failing to inquire into and make findings regarding ability to pay bail and less restrictive alternatives to money bail
        - A logical connection exists between money bail and failure to appear (if the defendant fails to appear, bail is forfeited). As long as appropriate inquiry and findings as to the amount necessary to protect against flight have been made, it is rational to determine that there are no less restrictive alternatives to satisfy the governmental interest in ensuring the defendant's presence.
        - However, money bail has no logical connection to protecting the public. Money bail will protect the public only as an incidental effect of the defendant being detained due to his inability to pay. And that effect will not consistently serve to protect the public because wealthy defendants will be released despite their dangerousness, while indigent defendants posing minimal risk of harm will be jailed.
        - Referring to the *Bearden* line of cases: when a person's freedom from governmental detention is conditioned on payment of a monetary sum, courts must consider the person's financial situation and alternative conditions of release when calculating the amount the person must pay to satisfy a particular state interest.
    - A court may not order pretrial detention unless it finds:
        - That the defendant has the financial ability but failed to pay the amount of bail the court finds reasonably necessary to ensure his appearance at future proceedings; or
        - That the defendant is unable to pay that amount and, upon a clear a convincing finding, no less restrictive conditions of release would be sufficient to reasonably assure such appearance; or
        - That, upon a clear and convincing finding, no less restrictive non-financial conditions of release would be sufficient to protect the victim and community.
    - A court which has not followed the procedures and made the findings required for an order of *detention*, must, in setting money bail, consider the defendant's ability to pay and refrain from setting an amount so beyond the defendant's means as to result in detention.
    - Liberty may be deprived only to the degree necessary to serve a compelling governmental interest.
    - Strict scrutiny analysis applies – Clear and convincing standard required
        - Referring to a 9th Circuit case (*Lopez-Valenzuela v. Arpaio*)
        - *Salerno* and the cases that followed have recognized that freedom from bodily restraint has always been at the core of the liberty protected by the due process clause from arbitrary governmental action (*Foucha v. Louisiana*).

        - Thus the institutionalization of an adult by the government triggers heightened substantive due process scrutiny (*Reno v. Flores*)
    - Bail determinations must be based upon consideration of individualized criteria
        - Failure to consider ability to pay before setting money bail is one aspect of the fundamental requirement that decisions which may result in pretrial detention must be based on factors related to the individual's circumstances
        - Bail schedules provide standardized money bail amounts based on offenses, without any inquiry into the individual defendant and the risk he currently presents.
        - Bail schedules are based on the inaccurate assumption that defendants charged with more serious offenses are more likely to flee and reoffend. They enable the detention of poor defendants and release wealthier ones who may pose greater risks. And they undermine the judicial discretion necessary to make individualized bail determinations.
    - The bail schedule is useful in the following ways:
        - Provides a measure of the relative seriousness of listed offenses
        - Functions in providing a means for individuals arrested without a warrant to obtain immediate release without waiting to appear before a judge
        - Starting point for the setting of bail by a judge issuing an arrest warrant
        - Starting point for a court setting bail provisionally in order to allow time for assessment of a defendant's financial resources and less restrictive alternative conditions by pretrial services
        - If a defendant does not oppose pretrial detention
    - However, unquestioning reliance on the bail schedule without consideration of a defendant's ability to pay, as well as other individualized factors bearing upon his dangerousness and/or risk of flight, runs afoul of the requirements of due process for a decision that may result in pretrial detention.
    - Court found that the Petitioner is entitled to a new bail hearing at which the lower court:
        - Inquires into and determines his ability to pay,
        - Considers non-monetary alternatives to money bail, and
        - If it determines petitioner is unable to afford the amount of bail the court finds necessary, follows the procedures and makes the findings necessary for a valid order of detention

ALABAMA – Kandace Kay Edwards v. David Cofield, et al., Case no. 3:17-CV-321-WKW

- Class action suit filed in US District Court for Middle District of Alabama, Eastern Division by ACLU, Southern Poverty Law Center (SPLC), and the Civil Rights Corp. in May 2017
    - Alleges violation of 14th Amendment due process and equal protection rights by jailing her solely on the basis of indigence
    - Seeks injunction against Sheriff from jailing arrestees unable to pay secured monetary bail without an individualized hearing with adequate procedural safeguards that includes an inquiry into and findings concerning:
        - their ability to pay,

        - the suitability of alternative non-financial conditions of release, and
        - a finding on the record that any conditions of release are the least restrictive conditions necessary to achieve public safety and court appearance.
- Law when case filed:
    - County sheriff and court use a court-created standard bail schedule based on the charge. Bail schedule states that amounts may be increase or reduced "on a case by case basis," but it is rarely deviated from.
    - No ability to pay analysis prior to the initial appearance
    - Initial appearances are held within 48hrs following a warrantless arrest or 72 hrs following an arrest by warrant.
    - Judges are supposed to determine conditions of release at initial appearance, but judges usually defer this decision up to 2-4 weeks
    - Defendants are unrepresented by counsel at initial appearance
- Judge issued TRO in favor of Plaintiff on May 18, 2017. Judge found:
    - Substantial likelihood that bail schedule violates 14th amendment rights
    - "The longstanding law in this circuit establishes the unconstitutionality of the sort of pretrial detention scheme…in which indigent arrestees are jailed because of their inability to make bond, while well-to-do arrestees are able to quickly purchase their release."
- In the middle of litigation, Randolph County amended its bond procedures:
    - Every person arrested in the county who cannot afford to pay the secured bond amount in the bond schedule is entitled to a bond hearing within 72 hours of arrest.
    - Before the hearing, arrestees complete an affidavit of indigency.
    - Judges now required to consider ability to pay in determining conditions of release.
    - Judges cannot require a secured bond that the defendant cannot afford, if there is a less onerous condition that would assure appearance and/or minimize public safety risk.
    - If a judge sets a secured bond amount, the Court must make written findings as to why posting bond is reasonably necessary to assure defendants presence at trial.
    - Procedures apply to both warrantless arrests and arrests with a warrant
- March 21, 2018 – Court denied Plaintiff's motion for preliminary injunction
    - Plaintiffs argued that the new system is still unconstitutional because the procedural protections at the hearing are insufficient and 72 hours is still too long to detain arrestees unable to post secured money bond before a hearing.
    - Plaintiffs argued the new bond procedures did not provide adequate procedural safeguards, and asked the court to:
        - 1) Require the court to hold an individualized hearing with adequate procedural safeguards for arrestees unable to pay secured bonds.
        - 72 hrs is too long to wait (didn't propose alternative timeframe)
        - 2) Hearings should include: a) ability to pay inquiry, b) inquiry and findings regarding alternative non-financial conditions of release, and c) finding on the record that any conditions of release are least restrictive necessary to achieve public safety and court appearance

        - 3) Require the presence of court-appointed counsel at hearing
        - 4) Opportunity to testify, present evidence, and cross examine witnesses
        - 5) Notice of the purpose of the bond hearing
        - 6) A clear and convincing evidentiary standard
    - Plaintiffs pointed to language in *Salerno* discussing procedural safeguards in the Bail Reform Act of 1984: presence of counsel at detention hearing, testify and present witnesses, proffer evidence, cross examination, if judge finds no non-monetary conditions of release can reasonably assure safety, must making findings of fact in writing and support with clear and convincing evidence.
    - Court held:
        - *Salerno* addressed only pretrial detention of arrestees charged with serious felonies found after an adverse hearing to pose a threat to public safety
        - *Salerno* did not find that the procedures in the Bail Reform Act were constitutional required, rather they were constitutionally sufficient. Those procedural safeguards go beyond what the Constitution actually requires
        - Might have right to appointed counsel under the 6th Amendment, but Plaintiff didn't raise it. No right under the 14th.
        - Plaintiff only cited to 5th Circuit opinions regarding notice, testimony, presenting evidence, and cross examination. Court didn't find it persuasive.
        - Plaintiff misquoted *Salerno* and her citation to *In re Humphrey* (CA Appellate Court) regarding the clear and convincing standard wasn't persuasive.
        - *Salerno* allowed at least a 72 hr delay before a bail hearing. The Bail Reform Act provides less protection than the new bond order because the former does not require release if the hearing isn't held within 72 hrs.
        - The new standing bond order arguably provides all of the relief the Plaintiff seeks in her motion for preliminary injunction. Not met requisite showing of substantial likelihood of success on the merits.
- August 28, 2018 – Judge denied Plaintiffs appeal of denial of preliminary injunction
    - Plaintiffs argued court erred by not applying heightened scrutiny to 14th Amendment claim.
    - Court referred to 11th Circuit opinion in *Walker v. City of Calhoun*, when it found that the new bond order need only pass rational-basis review and the new order survives that level of scrutiny

ALABAMA – Schultz, et al vs. State of Alabama, et al., Case No: 5:17-cv-00270-MHH

- US District Court for the Northern District of Alabama, Northeastern Division
- Class Action suit seeking a preliminary injunction preventing the Cullman County Sheriff from detaining indigent defendants who cannot afford to post a proper bond or surety bond as a condition of pretrial release.
- Plaintiff argues the County's procedures for setting a secured bond as a condition of pretrial release are constitutionally flawed, and the way in which the County implements those procedures is inequitable.

    - 14th amendment violation of fundamental rights by enforcing a post-arrest system of wealth-based detention, the result of which is that indigent defendants are kept in jail because they cannot afford a monetary amount of bail.
    - 14th amendment violation of fundamental rights because do not provide counsel for bail hearings, give arrestees adequate opportunity to testify or present evidence at bail hearings, apply a uniform evidentiary standard to determine whether a person should be detained prior to trial or require a judicial finding that no affordable financial or non-financial conditions of release will ensure appearance or public safety.
    - Defendants create de facto detention orders that apply to only indigent criminal defendants in Cullman County.
- County changed its bail practices during litigation with a standing order regarding pretrial appearance and the setting of bond issued by the presiding circuit court judge in Cullman County
- Judge granted preliminary injunction:
    - Criminal defendants have a constitutional right to pretrial liberty. That right is deprived when judges set unattainable bond amounts that serve as de facto detention orders for the indigent.
    - Unlike the defendants in *Walker*, Cullman County does not guarantee release to indigent individuals within 48 hrs. That guaranty is afforded only to defendants with the financial means to post bond at the time of arrest in an amount set by the bail schedule.
    - County's bail system discriminates against the indigent. The county's secured money bail procedures are not necessary to serve any of its three compelling state interests (release, appearance, safety). In fact, empirical evidence introduced suggests the county's system is less effective (or in the least, no more effective) at accomplishing the county's stated compelling interests.
    - Bail procedures violate constitutional right to substantive and procedural due process
        - Absence of adequate notice
        - Absence of opportunity to be heard
        - Absence of an evidentiary standard
        - Absence of factual findings
    - Individuals who are presumed innocent suffer irreparable injury when they are detained because they cannot afford to pay secured bond and are deprived of constitutionally adequate procedures for examining potential non-monetary conditions of release.
    - Judge granted injunction despite defendants' argument that no alternative systems are workable in Cullman county. Detaining every arrestee until an IA would put considerable strain on the county's resources. The circuit court's resources are already taxed to handle the 72-hr IAs, the county has no government-funded pretrial services staff, and the county needs one more judge just to keep up with the circuit court's current case load.
    - Court held that alternative pretrial detention policies are cost effective and identified 3 options readily available to the county at little or no cost:

        - If defendant may pose a significant flight risk or danger to the community, a judge could hold an IA within 48-hrs of arrest and, if necessary based on the evidence collected at the hearing, impose additional conditions for release such as court-appointed 3rd-party custodian or a requirement that the defendant periodically call one of the sheriff's court liaisons.
        - Defendants acknowledge that an unsecured bond would serve their purposes for non-violent arrestees.
        - County could adopt the *Calhoun* model and, within 48-hrs of arrest, release on own recognizance bonds all indigent defendants who prove their indigency on the basis of an objective standard.
        - County could have all arrestees complete a release questionnaire, updated to conform to the procedural requirements discussed in this opinion. The sheriff's office could review the questionnaires and release on unsecured bond all low-risk arrestees, and detain all high-risk arrestees, wealthy and indigent alike, for an IA at which a judge would assess the necessary conditions for pretrial release.
    - Holding procedurally sufficient IAs consistent with this opinion would not be overly burdensome. Defendants may be able to provide sufficient notice to arrestees by, for example, editing the affidavit of substantial hardship and release questionnaire and making sure arrestees who have difficulty understanding the forms receive assistance. Satisfying an evidentiary standard before setting bail should add no extra cost, and making actual findings when requiring bond may require very little extra time if any.

GEORGIA – Walker v. City of Calhoun, 4:15-CV-0170-HLM

- U.S. District Court for the Northern District of Georgia Rome Division
- Plaintiff challenged the use of fixed amounts of secured money bail that results in the detention of the poor in violation of the 14th Amendment.
- Plaintiff is 54-yr-old unemployed man with mental health disability, income of $530/mo in Social Security disability payments. Arrested for being a pedestrian under the influence of alcohol, misdemeanor, no possible jail sentence, fine not to exceed $500. He was held in jail on $160 cash bond for 5 days before filing suit.
- Law when case filed:
    - Secured money bail schedule with amounts based on charge
    - If can't pay, held until next court session on following non-holiday Monday
        - Here, the Monday after Walker's arrest was Labor Day, so he would have had to wait 11 days to see a judge for a bail hearing.
- After suit filed, city altered bail policy with a standing bail order:
    - Adopted a bail schedule for state offenses, with cash bail set at "amount representing the expected fine with applicable surcharges…should the accused later enter a plea, or be found guilty"
    - As an alternative to cash bail, arrestees could use their driver's license as collateral or to "make secured bail by property or surety" at an amount "twice that set forth in the schedule."

    - If they can't meet those conditions, they must see a judge within 48 hrs of arrest, shall be represented by court-appointed counsel, and will be given the opportunity to object to the bail amount, including on the basis of indigency
    - If the court finds the person indigent, he shall be subject to release on recognizance without making secured bail
    - If no hearing is held within 48 hrs, the accused shall be released on a recognizance bond
    - On charges of a violation of city code (vs. state law), arrestees shall be release on an unsecured bond in the amount established by the bail schedule
- January 28, 2016 - Court granted Preliminary Injunction in favor of Plaintiff, holding:
    - Plaintiff has substantial likelihood of success on the merits
    - Plaintiff suffered an improper loss of liberty by being jailed simply because he could not afford to post money bail which constitutes irreparable harm
    - "Any bail or bond scheme that mandates payment of pre-fixed amounts for different offenses to obtain pretrial release, without any consideration of indigence or other factors, violates the Equal Protection Clause."
    - Ordered city to release the Plaintiff and "any other misdemeanor arrestees in its custody, or who come into its custody, on their own recognizance or on an unsecured bond…"
- Court also certified class action suit for all arrestees unable to pay for their release who are or will be in the custody of the city as a result of an arrest involving a misd, traffic offense, or ordinance violation
- 11th Circuit vacate the preliminary injunction holding it violated federal civil rules of procedure was insufficiently specific, but declined to consider substantive arguments about whether the district court properly issued the injunction.
- June 16, 2017 - On remand, the district court again found the city's bail policy under the new bail order to be unconstitutional and entered a new preliminary injunction because the new policy still permits individuals with money to be released immediately, while individuals without money must wait 48 hrs for a hearing.
    - Enjoined the city from detaining indigent arrestees who are otherwise eligible for release but are unable to pay because of their poverty
    - District Court required arresting officers, jail staff, or the court – as soon as practicable after booking – to verify an arrestee's unable to pay secured or money bail via a sworn affidavit of indigency.
    - The affidavit of indigency must be evaluated within 24 hrs after arrest
    - Those found indigent shall be subject to release on recognizance without making secured bail, or subject to release on an unsecured bond.
- Court also found that generally, an individual's indigence does not make them a member of a suspect class. However, detention based on wealth is an exception to the general rule that rational basis review applies to wealth-based classification.
    - Because the new bail order treats those who can afford to pay the bail schedule amount differently than those who can't, it was subject to heightened scrutiny.
- Defendants appealed to the 11th Circuit

11th CIRCUIT COURT – Walker v. City of Calhoun, GA, Case 17-13139

- Defendants appealed the preliminary injunction in district court

- Argued the district court erred by analyzing the case under the 14th Amendment, rather than the 8th Amendment Excessive Bail Clause, and by applying too strict a scrutiny to the city's bail policy.
- Court held:
    - 8th Amendment doesn't apply because the right at issue here is equal protection, not the protection against excessive bail
    - If the 8th Amendment did apply, the Plaintiffs would lose because the 8th Amendment says nothing about whether bail shall be available at all, but is meant merely to provide that bail shall not be excessive in those cases where it is proper to grant bail (*Carlson v. Landon*, 342 U.S. 524 (1952)).
    - Bail is not excessive under the 8th amendment merely because it is unaffordable. The basic test for excessive bail is whether the amount is higher than reasonably necessary to assure the accused's presence at trial. As long as that's the reason for setting the bond, the final amount, type, and other conditions of release are within the discretion of the releasing authority.
    - District court correctly evaluated this case under due process and equal protection of the 14th Amendment.
    - In the case of indigents, equal protection standards require presumption against money bail. Imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible (*Pugh v. Rainwater,* 5th circuit case that the 11th circuit adopted as binding).
        - Resolution of problems concerning pretrial bail requires a delicate balancing of the vital interests of the state with those of the individual.
        - State has a compelling interest in assuring presence at trial of persons charged with crime, while individuals entitled to presumption of innocence and constitutional guarantees
        - Equal protection and due process prohibit depriving pretrial detainees of the rights of other citizens to a greater extent than necessary to assure appearance and security of the jail
        - Therefore, the incarceration of those who cannot meet a master bond schedule's requirements without meaningful consideration of other possible alternatives, infringes on both due process & equal protection
    - Walker's claim doesn't challenge the amount and conditions of bail per se, but rather the process by which those terms are set. This falls under the 14th Am.
    - Heightened scrutiny doesn't apply under the equal protection clause
        - The *Rainwater* court approved the use of a master bond schedule without applying any heightened scrutiny because it gave indigent defendants who could not make bail a constitutionally permissible secondary option: bail hearing at which a judge could consider all relevant factors
    - Under the new bail order, indigent defendants suffer no absolute deprivation of pretrial release, rather they must merely wait some appropriate amount of time to receive the same benefit as the more affluent
        - After such a delay, they arguably receive preferential treatment by being release on recognizance without have to provide any security
        - Such a scheme does not trigger heightened scrutiny under the Supreme Court's equal protection jurisprudence.

- Indigency determination for purposes of setting bail are presumptively constitutional if made within 48-hrs of arrest (24 hrs not required).
    - Relying on *County of Riverside v. McLaughlin* (500 U.S. 44, 55 (1991)) – making probable cause determinations within 48 hrs of arrest complies with the promptness requirement. Expressly rejected a 24hr bright-line limitation.
    - *McLaughlin* allows detention for 48 hrs before even establishing probable cause and expressly envisioned that one reason is so that PC hearings could be combined with bail hearings and arraignments. The city can take 48 hrs to set bail for someone held *with* probable cause.
    - The 5th Circuit in *ODonnell* recently imported the *McLaughlin* 48-hr rule to the bail determination context. They held that a 24-hr limit was a heavy administrative burden and therefore too strict.
    - The court expressly did not decide whether a jurisdiction could adopt a system allowing for longer than 48 hrs to make a bail determination because the city's system sets 48hrs.
- The city may use a judicial hearing to determine indigency. An affidavit-based system outlined in the preliminary injunction is not required. Federal courts should give States wide latitude to fashion procedures for setting bail.
    - The district court provided no justification for substituting its preferred policy for the city's.
    - Judicial hearings may offer more procedural due process
- Because the city did not establish that walker's suit for injunctive relief was moot and because it has effectively conceded that its original bail policy was unconstitutional, the district court may enjoin a return to that original policy.

- 11th Circuit remanded the case to district court

ILLINOIS – Lewis, et al., v. Martin, et al., Case No: 2016CH13587

- October 14, 2016 - Civil Rights Corps filed a class action complaint in the circuit court of Cook County, IL challenging the unconstitutional application of IL's bail statute in Cook County, Illinois.
- Plaintiffs alleged defendant judges were setting monetary bail for pretrial arrestees without a meaningful inquiry into the person's ability to pay, and in amounts in excess of what the person is able to pay – in violation of their rights under the equal protection and due processes clauses of the US and IL Constitutions, and under the excessive bail and sufficient sureties clauses of the US and IL Constitutions.
- Plaintiffs sought declaration that because this practice has a disparate impact on African American class members, it has the effect of discriminating against them because of their race in violation federal and IL law.
- Plaintiffs sought an injunction against their continued unlawful incarceration
- Plaintiffs allege that a lawful application of the statute requires that anytime a judge conditions an arrestee's pretrial release on a monetary payment, the judge must make an inquiry into the person's ability to pay and a finding of fact that the arrestee is presently capable of paying the ordered amount. Defendants are violating their duties under that statute.
- In July 2017, after the lawsuit was filed, the Chief Judge issued a new standing order requiring judges to determine whether a defendant has the present ability to pay prior to

setting monetary bail. Judges can still release defendants on their own recognizance, or to deny bail altogether because of flight risk or danger to the community.

- Civil Rights Corps reports that the Cook County jail has now reached its lowest daily jail population in recorded history.

LOUISIANA

- Caliste v. Cantrell, Case No.: 2:17-CV-06197-EEF-MBN
- United States District Court, Eastern District of Louisiana
- June 13, 2019 - Court ordered, through an agreement of the parties, a number of steps the magistrate judge must follow when determining conditions of pretrial release, including:
  - Notification of the right to pretrial liberty,
  - Providing counsel at the hearing where release conditions are determined, and
  - An inquiry into an ability to afford bail
- When determining conditions of release, judge must hear arguments and evidence from the government and defense counsel concerning the charged offense, need for conditions of pretrial release or detention, including potential danger to the community or risk of flight, and any conditions that could mitigate any risk posed. Arrestee shall have the opportunity to confront the government's evidence and present their own.
- Determine whether a non-financial condition of release, or combination of non-financial conditions, would satisfy the judge's concerns for public safety and/or appearance.
- If setting financial conditions, inquire into income, assets, expenses, and amount of bail defendant states he can afford. Inquiry may be made orally, or via written form sworn by the arrestee and entered into the record.
- If the person can't pay the amount the court determines to be necessary, the court must explain by clear and convincing evidence on the record why the government has demonstrated that no other alternative conditions of release are sufficient to reasonably guard against the person's flight from prosecution or to reasonably ensure the safety of the community during the pretrial period.
- If the defendant objects to the bail set, ask defense counsel whether the arrestee has additional evidence relevant to dangerousness, flight risk, or alternative conditions. If they answer affirmatively, give them more time to present such evidence by holding the hearing open until their attorney notifies the court that they are ready. Defense counsel shall have 72 hrs to notify the Court. On a showing of good cause, the court may allow an additional 48 hrs to collect evidence.
- The case shall be reset for hearing no later than 48 hrs after notice is received from counsel.

MASSACHUSETTS

- Brangan v. Commonwealth, 80 N.E.3d 949 (Mass. 2017)
- Plaintiff had been held at the county jail for more than 3 ½ years because he was unable to post bail in the amounts ordered by the court following his arrest for armed robbery while masked.
- Plaintiff argued that denial of his bail review request should be reversed because the judge's bail order is unconstitutional as it violates his right to due process because the judge failed to give adequate consideration to his financial resources, set bail in an

amount so far beyond his financial means that it resulted in his long-term detention pending resolution of his case.

- Court Held:
    - It is unconstitutional to use master bail bond schedules to set the same bail amount for everyone for a particular offense, without regard to individual financial circumstance or alternative conditions of release (*Pugh v. Rainwater*)
    - An bail or bond scheme that mandates payment of pre-fixed amounts for different offenses to obtain pretrial release, without any consideration of indigence or other factors, violates the equal protection clause (*Walker v. Calhoun*)
    - Judges must consider a defendant's financial resources, but are not required to set bail in an amount the defendant can afford if other relevant considerations weigh more heavily than the defendant's ability to provide the necessary security for is appearance at trial.
    - Where, based on the judges' consideration of all the circumstances, neither alternative non-financial conditions nor bail amount the defendant can afford will adequately assure appearance, the judge may set bail at a higher amount – but no higher than necessary
    - Although a defendant does not have a right to "affordable bail," "where a judge sets bail in an amount so far beyond a defendant's ability to pay that it is likely to result in long-term pretrial detention, it is the functional equivalent of an order for pretrial detention, and the judge's decision must be evaluated in light of the same due process requirements applicable to such a deprivation of liberty."
    - 3 corresponding due process standards applicable to such cases:
        - Judge may not consider a defendant's alleged dangerousness in setting the amount of bail, although it may be considered as a factor in setting other conditions of release. Using unattainable bail to detain a defendant because he is dangerous is improper.
        - Where it appears a defendant's indigency will likely result in long-term pretrial detention, the judge must provide written or orally recorded findings of fact and a statement of reasons for the bail decision.
            - Statement must confirm judges' consideration of financial resources, explain how the bail amount was calculated, and state why the risk of flight is so great that no alternative, less restrictive financial or non-financial conditions will suffice to assure appearance
        - When a bail order comes before a judge for reconsideration or review and a defendant has been detained due to inability to post bail, the judge must consider the length of the pretrial detention and the equities of the case. The justification for pretrial detention erodes the longer a defendant has been held.
- Remanded to trial court and directed judge to conduct a new bail hearing as soon as possible in accordance with the standards set out in the opinion.

MASSACHUSETTS

- Scione v. Commonwealth, MA Supreme Court
    - Struck down parts of the state's pretrial detention statute

- Under the statute, people who were charged with "a felony that, by its nature, involves a substantial risk that physical force against the person of another may result" could be eligible for pretrial detention.
- The Court found this clause to be unconstitutionally vague.
- Other parts of the statute, which allow prosecutors to motion for pretrial detention on charges that are explicitly listed in the statue, along with any "felony offense that has as an element of the offense the use, attempted use or threatened use of physical force against the person of another" were upheld.

1st CIRCUIT COURT

- United States v. Mantecon-Zayas, 949 F.2d 548 (1st Cir. 1991)
  - A court may impose a financial condition the defendant cannot meet *if* the court finds such condition of bail is reasonably necessary to ensure the defendant's presence at trial.
  - But "once the court finds itself in this situation – insisting on terms in a 'release' order that will cause the defendant to be detained pending trial – it must satisfy the procedural requirements for a valid *detention* order; in particular, the requirements in 18 U.S.C. §3142(i) that the court 'include written findings of fact and a written statement of the reasons for the detention.'"

MICHIGAN

- Ross v. Blount, Case No: 2:19-cv-11076-LJM-EAS
- US District Court for the Eastern District of Michigan, Southern Division
- Federal class action suit filed 4/14/19 against the 36th district court of Detroit for violating the constitutional rights of people who are locked up because they cannot afford bail
- Complaint alleges:
  - 85% of people who are arraigned while under arrest are required to pay cash bail in order to be released
  - Even though court rules require an ability to pay determination, these inquiries are not being made; operate as de facto orders of pretrial detention
  - Attorneys are not appointed or available at a hearing where bail is set
  - Routine use of secured cash bail to disproportionately detain indigent individuals, which occurs without a hearing at which an arrestee's ability to pay is considered and without the presence of a lawyer.
  - Violating equal protection and due process clause of the 14th Amendment, and the 6th Amendment right to counsel

MISSOURI

- Dixon v. St. Louis, Case No: 4:19-cv-00112-AGF
- US District Court, Eastern District of Missouri, Eastern Division
- Plaintiffs claimed the courts are failing to inquire about ability to pay, that people are subjected to de facto orders of detention because money bond is ordered in virtually all cases, and that people are not allowed any process to argue for liberty until they are assigned attorney (typically 4 weeks after arrested and charged).

- Asserted violations of constitutional rights to equal protection and substantive and procedural due process by detaining defendants after arrest without an opportunity to challenge the conditions of their release.
- Law when case filed:
    - Upon arrest, a bond commissioner employed by the city makes a recommendation to a duty judge to set bond to secure court appearance.
    - In formulating the recommendation the commissioner considers the charges and any prior convictions. No inquiry into ability to pay, risk of flight, or danger to public.
    - Duty judge then sets bond on the commissioner's recommendation.
    - If arrestee can afford to pay the cash bond in full, the city will release him upon payment.
    - If arrestee cannot afford to pay, he remains detained until a first appearance – held within 48 hrs of arrest and by video from the jail.
    - Plaintiff alleges the sheriff deputies who escort arrestees to the video hearings instruct them not to speak and specifically not to request a bond modification.
    - Hearing lasts 1-2 minutes and is not on the record.
    - Plaintiffs allege that if a defendant attempts to contest his bail amount, the judge informs them that they cannot request a modification until they obtain counsel and set a motion hearing. For indigent individuals eligible for a public defender, that process takes approx. 5 weeks. Individuals who don't qualify for a public defender but can't afford to pay a private attorney often remain in jail even longer.
    - Current Missouri Supreme Court Rule 33.01:
        - any person charged with a bailable offense shall be entitled to release pending trial
        - the court shall in all cases release the accused upon his written promise to appear, unless the court determines that such release will not reasonably assure appearance, in which case the court may impose release conditions including supervision, restrictions on travel, domicile, and associations, reporting requirements, or bond.
        - In determining which conditions of release will reasonably assure appearance, the court shall, on the basis of available information, take into account:
            - the nature and circumstances of the offense charged,
            - the weight of the evidence against the accused,
            - the accused's family ties, employment, financial resources, character, mental condition,
            - the length of his residence in the community,
            - his record of convictions, and
            - his record of appearance at court proceedings or flight to avoid prosecution or failure to appear at court proceedings.
- Amendments to law pending litigation:
    - Revised Missouri Supreme Court Rule 33.01 (scheduled to take effect 7/1/19)
        - Court should first consider non-monetary release conditions and only the least restrictive conditions as will secure the defendant's appearance

        - Court may order detention only upon clear and convincing evidence that other release conditions will not secure the safety of the community or other persons
        - A detained defendant has a right to a release hearing within 7 working days to present evidence of his financial status and ability to pay
        - At any hearing under Rule 33, the court must make findings on the record supporting detention or other conditions.
- June 11, 2019 - Federal District Court issued a preliminary injunction
    - Court cited *Bearden, ODonnell*, and *Pugh*, among others, in determining that detention solely due to a person's indigency because the financial conditions for release are based on predetermined amounts beyond a person's ability to pay and without any meaningful consideration of other alternatives is discriminatory and unconstitutional.
    - Excessive bail is unconstitutional, a person cannot be imprisoned solely due to indigence, and federal and state law require a prompt and individualized determination of pretrial release conditions.
    - Ample evidence in the record shows that the duty judge presiding over initial appearances rarely considers information about financial circumstances because the bond commissioner rarely provides it and arrestees are instructed not to speak.
    - Arrestees who can post bail are allowed to leave immediately. Those who cannot are detained.
    - Strict scrutiny applies (*ODonnell, San Antonio Indep. Sch. Dist., Buffin, Bearden-Tate-Williams* line of cases).
    - But even under rational basis, pretrial practices fall short of constitutional standards in that the State has failed to articulate *any* governmental interest in detaining indigent defendants while releasing moneyed defendants facing the same charges, without any consideration of individual factors.
    - Plaintiffs have not supplied binding authority supporting their demand for appointed counsel at initial appearances – request for that particular relief denied.
    - The threat of irreparable harm to plaintiffs is obvious, not only in the form of prolonged incarceration itself, but also in the form of its severe collateral consequences such as physical illness and injury, mental trauma, loss of employment, loss of benefits, and family crisis.
    - State provided no support for the suggestion that arrestees released without bail are more likely to commit crimes or less likely to appear in court than those released upon payment.
    - There is no evidence that financial conditions of release are more effective than alternatives for ensuring court appearances and public safety.
- Jail Commissioner enjoined from enforcing any monetary condition of release that results in detention solely by virtue of an arrestee's inability to pay, unless the order is accompanied by a finding that detention is necessary because there are no less restrictive alternatives to ensure appearance or public safety.
- The order must reflect:
    - A hearing was held on the record within 48 hrs of arrest or, for those currently detained, within 7 days of this order,

- The arrestee had an opportunity to present and rebut evidence as to whether detention is necessary, with the government bearing the burden of proof, and
- If financial conditions of release are imposed, the court made specific findings regarding ability to pay and found, by clear and convincing evidence, that no alternative conditions would reasonably assure the arrestee's future court appearance or the safety of others.

NEW MEXICO

- State v. Brown, 338 P.3d 1276 (2014)
- Plaintiff arrested on May 26, 2011. Indicted 2 weeks later on array of charges including felony murder in the first degree and, alternatively, murder in the second degree. District court imposed $250,000 cash or surety bond.
- Plaintiff spent more than 2 years in pretrial custody awaiting trial. Plaintiff moved district court to review his conditions of release and to release him under the supervision of pretrial services with appropriate non-monetary conditions. Plaintiff agreed to GPS monitoring, living with his father, making regular contact with pretrial services, and maintaining employment at a local restaurant who agreed to hire him.
- Plaintiff provided court with extensive information about his personal history and characteristics. 19th birthday was 2 months before arrest. He has always lived with his parents. He cannot live independently due to developmental and intellectual disabilities. He attended special education classes and has a 2nd grade comprehension level for math, writing, and reading. While in pretrial detention, he successfully completed a variety of educational and counseling programs and obtained a high school diploma.
- Plaintiff presented testimony from a psychologist with the pretrial service program who evaluated him to determine if he was an appropriate candidate for supervised release. Dr. Harrington testified that plaintiff was compliant, cooperative, and honest, exhibits none of the factors typically correlated with dangerousness or risk of flight, such as prior criminal history or history of mental illness or substance abuse. Dr. Harrington verified that Plaintiff had the capacity to understand and comply with pretrial conditions and was an appropriate candidate for release with GPS monitoring.
- District Court filed written order with detailed factual findings and found that based on the evidence, pretrial services could fashion appropriate non-monetary conditions of release and plaintiff could live with his father and return to his former job, the plaintiff's IQ was 70, he has longstanding ties to the community and support of parents, found plaintiff compliant for over 2 yrs of incarceration and had appeared at all hearings. Court explicitly found that the State presented no information indicating that plaintiff would commit new crimes, pose a danger to anyone, or fail to appear in court if released.
    - Despite these findings, the district court kept the $250,000 bond in place due to the "nature and seriousness of the alleged offense."
- Plaintiff filed second motion several months later. District court again denied non-monetary conditions of release based on nature of offense and potential sentence.
- Law when case filed:
    - NM Constitution guarantees all persons before conviction are entitled to be released from custody pending trial without being required to post excessive bail, subject to limited exceptions:

        - May deny bail to person charged with capital offense if the proof is evident or the presumption great
        - May deny bail for 60 days after incarceration by an order entered within 7 days after the incarceration, in the following circumstances:
            - Defendant accused of felony and was previously convicted of 2 or more felonies within the state, which did not arise from the same transaction or common transaction
            - Defendant accused of felony involving the use of a deadly weapon and has a prior felony conviction within the state.
            - Period of incarceration without bail may be extended by any period of time by which trial is delayed by a motion for continuance made by or on behalf of the defendant
    - A court cannot refuse to set bail and detain a defendant pending trial under either exception without first providing defendant with adequate procedural due process protections, including the right to counsel, notice, and an opportunity to be heard
    - Rules of Criminal Procedure – require that a defendant be released from custody on the least restrictive conditions necessary to reasonably assure both the defendant's appearance in court and the safety of the community.
    - In making that finding, the court must consider:
        - Nature and circumstances of the offenses, including whether it is a crime of violence or involves a narcotic drug,
        - The weight of the evidence against the person,
        - The history and characteristics of the person, including:
            - Family ties
            - Employment status, employment history, and financial resources
            - Past and present residences
            - Length of residence in the community
            - Any facts tending to indicate the person has strong ties to the community
            - Any facts indicating the possibility that the person will commit new crimes if released
            - The person's past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning court appearance
            - Whether, at the time of the current offense, the person was on probation, parole, or other release pending trial, sentencing, appeal, or completion of an offense under federal, state, or local law
        - The nature and seriousness of the danger to any person or the community posed by person's release, and
        - Any other factors tending to indicate the person is likely to appear
- November 6, 2014 – NM Supreme Court ruling
    - Plaintiff presented the district court with uncontroverted evidence demonstrating that non-monetary conditions of pretrial release were sufficient to reasonably assure that he was unlikely to pose a flight or safety risk.
    - Despite the evidence, the district court ordered $250,00 cash or surety bond, based solely on the nature and seriousness of the offense

- District court failed to explain any rational connection between the facts in the record and the ruling of the court.
- The district court's decision was arbitrary and capricious and the court abused its discretion by issuing a ruling contrary to both the record and its previous findings of fact, without articulating any principled reason or factual bases for the decision
- District court erred by requiring a $250,000 bond when the evidence demonstrated that less restrictive conditions of pretrial release would be sufficient
- Bail is not a pretrial punishment and it is not to be set solely on the basis of an accusation of a serious crime.
- Empirical studies indicate that the severity of the charge does not predict whether a defendant will flee or reoffend if released pretrial. Setting money bail based on the severity of the crime leads to either release or detention, determined by the defendant's wealth alone instead of being based on the factors relevant to a particular defendant's risk of nonappearance or re-offense.
- Intentionally setting bail so high as to be unattainable is simply a less honest method of unlawfully denying bail altogether. It is unconstitutional.
- Reversed district court's pretrial release order and instructed district court to release plaintiff on appropriate non-monetary conditions, including GPS monitoring and supervision by pretrial services.

NEW MEXICO

- Collins v. Daniels, Case No: 1:17-cv-00776-RJ-KK
- US District Court for the District of New Mexico
- Plaintiffs are the Bail Bond Association of New Mexico, 3 NM senators, 1 NM House Representative, and Darlene Collins – criminal defendant charged in state court with aggravated assault, a 4th degree felony, and released on non-monetary conditions pending trial after her first appearance.
- Defendants are the NM Supreme Court and all of its Justices, the 2nd judicial district court and its chief judge and court executive officer, the county metropolitan court and its former chief judge and court executive officer, and the board of county commissioners.
- Plaintiffs allege that in promulgating 2017 Rules, the NM Supreme Court violated the 8th Amendment's guarantee against excessive bail, and the due process clause of the 14th Amendment. The also assert that the implementation of a pretrial risk assessment tool which was authorized by the NM Supreme Court, violates the 8th amendment by prioritizing non-monetary conditions of release. Plaintiffs asked the court to declare the 2017 rules unconstitutional and enjoin enforcement of the rules, to award Plaintiffs monetary damages against all defendants individually, along with attorney's fees, and to certify this lawsuit as a class action on behalf of all NM criminal defendants "who are or will be subject to the liberty-restricting conditions of pretrial release permitted by the [2017] rules…without having the opportunity to be considered for release on secured bond."
- 2016 – Voters amended the NM Constitution to enshrine the *Brown* holding and give judges new authority to deny release to proven dangerous defendants – no matter how much they can pay for a bail bond – and ensuring that defendants who are neither a danger nor a flight risk may not be kept in jail before trial only because they cannot afford to buy a money bond.

- 2017 Pretrial Release Rule Amendments:
    - Sparked by *State v. Brown* decision and recommended by advisory committee.
    - The fundamental provisions requiring judges to set conditions of release based on assessments of individual danger and flight risk remain unchanged.
    - New rules:
        - Administer the new detention-for-dangerousness authority that the constitutional amendment conferred on the district courts
        - Provides early release mechanisms for low-risk defendants in place of the fixed bail schedule that had been created in various localities in apparent violation of the individual risk assessment required by other rules and principles of constitutional law
        - Clarifies unequivocally that local courts had no authority to create fixed money bail schedules in violation of court rules and equal protection requirements
        - Clarifies and strengthens the authority of courts to amend conditions of release or revoke release entirely for defendants who commit new crimes on release or otherwise will not abide with release conditions
        - Provide expedited appeals by both the prosecution and defense to review release and detention hearings
        - Promulgates equivalent rules for magistrate, metropolitan, and municipal courts.
    - The rules contain two provisions authorizing the use of validated risk assessments
        - In determining the least restrictive conditions of release that will reasonably ensure the appearance of the defendant as required and the safety of any other person and the community, the court shall consider any available results of a pretrial risk assessment instrument approved by the Supreme Court…, if any, and the financial resources of the defendant…"
    - NM has not precluded consideration of financially-secured bonds, including commercial bail bonds, where a court determines a money bond is necessary in a particular case to reasonably assure a defendant's return to court.
- December 11, 2017 – Federal court ruled:
    - **Standing:**
    - Bail Bond Association lacks first party standing. There is no invasion of the association's legally-protected interest. The 8th Amendment protects criminal defendants, not corporations who seek to provide bail bonds to them. Neither does the 14th amendment, despite alleged economic harm that may potentially result from the rules.
    - Bail Bond Association lacks third party standing. Even assuming criminal defendants are prevented from entering into contracts, and that those defendants have a constitutional right to that monetary bail, they still have not established a "close relationship." Not alleging any existing contractual relationship with any criminal defendant whose rights have been violated. And criminal defendants face no obstacles or hindrance in asserting their own claims (like Collins here).
    - Collins has standing because she claims that her injury did not solely result from restrictions on her liberty, but rather, an arraignment hearing that violated her rights under the 4th, 8th, and 14th amendments – by holding a hearing that afforded

her an alleged constitutional right to have "a non-excessive secured bond" considered on equal footing with other conditions of release.

- Individual legislators lack standing because the alleged injuries (encroachment upon the legislature's authority to pass laws and policy) are to the NM Legislature as a whole, and not to individual legislators, an institutional injury.
- **8th Amendment**
- The US and NM Constitutions prohibit excessive bail, but they do not guarantee an absolute right to bail or money bail. There is no right to money bail implied within the 8th amendments.
- *Salerno* recognized that the legislature can identify interests, such as assuring the safety of the community and persons, including victims or witnesses, which are considered in determining conditions of release aside from the setting of monetary bail.
- The 2017 rules do not forbid commercial bail. They explicitly contemplate that courts may require secured bonds after certain findings have been made. And the old 1972 rules likewise contained no provision guaranteeing the option of money bail to criminal defendants – nor does any other source of law.
- Plaintiffs failed to state a claim for any violation of the 8th amendment.
- **Procedural Due Process**
- For any preventative detention decision, the procedural due process inquiry turns on whether a criminal defendant enjoys procedures by which a judge evaluates the likelihood of future dangerousness that are specifically designed to further the accuracy of that determination (*Salerno*)
- Collins was arrested on July 2nd. Because she was charged with a violent felony, she was required to appear before a judge. Collins appeared on July 5th, where she was ordered released on her own recognizance subject to certain limited conditions set forth in the written order, conditions to which Collins agreed. The 2017 court rules required the court to conduct a hearing and issue an order setting conditions of release within 3 days after the date of arrest. Collins hearing was held and the order issued within that timeframe.
- Court rules require that judges evaluate and set appropriate conditions on a case-by-case basis.
- Plaintiffs never allege any actual condition of release was unconstitutional, nor do they argue the conditions are vague or unintelligible. They conceded that no conditions were imposed on Collins other than a verbal order that she was being released.
- Collins had a pretrial detention hearing with the opportunity to afford herself all of the protections under NM law and the Constitution, and Collins consented on the record to the non-monetary conditions in exchange for her release. Plaintiffs fail to state a claim for any violation of procedural due process.
- **Substantive Due Process**
- Purchasing pretrial release with monetary bail does not implicate fundamental rights under a substantive due process analysis
- Plaintiffs do not cite a single post-*Salerno* bail case describing monetary bail as a fundamental right, and present no grounds for finding that a criminal defendant's

option to obtain monetary bail is a fundamental right or implicit in the concepts of ordered liberty.

- Plaintiff failed to state a claim for any violation of substantive due process
- **4th Amendment**
- Plaintiffs allege that pretrial conditions such as home detention and mandatory reporting to pretrial services constitute 4th Amendment seizure, and because the 2017 rules prioritize non-monetary conditions, the rules necessarily violate the 4th Amendment.
- Once an individual has been arrested on probable cause for a dangerous offense that may require detention before trial, his expectations of privacy are reduced
- The state's interest in ensuring a potentially dangerous defendant's appearance at trial is strong, thus in the pretrial release context, release conditions such as electronic monitoring and home arrest may well be "reasonable" under the circumstances
- Where conditions of release restrict freedom of movement, the safeguard of a judicial determination on the record protects against unreasonable seizures by examining the totality of the relevant circumstances
- The 10th Circuit declined to adopt a continuing seizure analysis that would deem pretrial release conditions as "seizures" under the 4th Am. (*Becker v. Kroll*)
- Plaintiff fails to state a claim for any violation of the 4th Amendment
- **Separation of Powers**
- Plaintiffs argue that the 2017 court rules encroach on the legislature's authority by abridging or modifying the substantive rights of criminal defendants – a right conferred solely upon the legislature.
- Criminal defendants have never been guaranteed the option of monetary bail under NM law in existence before or after the 2017 rules.
- Plaintiffs have not identified any substantive rights that the rules allegedly abridge, enlarge or modify. Plaintiffs fail to state a viable separation of powers claim.
- Plaintiffs' claims that the NM Supreme Court modified statutory law without legislative authority are meritless. The NM legislature has long recognized the NM Supreme Court's authority to promulgate rules of criminal procedure.
- **PSA Tool**
- Plaintiffs claim the PSA deprives presumptively innocent pretrial defendants of their liberty rights and provides no room for discretion and consideration of bail instead of such deprivations.
- There is no constitutionally-protected liberty interest in securing release from pretrial detention through a commercial bond
- The careful process of gathering reliable information and risk assessments provides a valuable tool for the judge in determining the issue of detention and release, including the stringency of conditions of release.
- The use of such tool further supports the likelihood of a reasonable level of detention or release upon a spectrum of intrusion on freedom while awaiting trial.
- The PSA does not displace judicial discretion. Plaintiffs fail to state a claim that the PSA is unconstitutional.
- All claims were dismissed with prejudice.

January 4, 2018 – Court granted the judicial defendants' Rule 11 motion for sanction against the Plaintiff's attorney

- Judicial defendants moved the court to impose sanctions because Plaintiffs' attorneys ignore and actively misrepresent controlling law, and they filed this lawsuit not with any colorable prospect of obtaining a ruling in their favor, but for the improper purpose of advancing a local and national public relations campaign on behalf of the money bail industry against bail reforms in NM and nationally.
    - Any minimally qualified attorney conducting the most rudimentary research would have to be aware that Plaintiffs' claims under the 4th, 8th, and 14th amendments are both utterly unsupported and filed in direct contravention of governing law.
    - Any minimally qualified attorney would have to be aware that there is no legal basis for Plaintiffs' claims for money damages against any of the judicial defendants.
- Plaintiffs were allowed the 21-day safe harbor to withdraw any untenable claims without incurring sanctions. In addition, defendants consented to a 10-day extension to respond to the motion to dismiss, allowing ample time to conduct any inquiry into the law they may have omitted prior to filing suit.
- Plaintiffs did not voluntarily dismiss any parties or claims. Instead, they filed a motion to amend their complaint seeking to add additional parties and claims which this Court denied as futile.
- Plaintiffs' constitutional claims are not frivolous.
- The failure of Plaintiffs' counsel to identify a reasonable basis for standing of the legislator and bail bond plaintiffs prior to filing suit justifies rule 11 sanctions. Plaintiffs' counsel added those plaintiffs to this case for an improper purpose – for political reasons to express their opposition to lawful bail reforms in NM rather than to advance colorable claims for judicial relief.
- Plaintiffs' claims for money damages against judicial defendants are frivolous. Plaintiffs were made aware of the well-established immunity laws, yet refused to amend their complaint and continued with these groundless claims. Plaintiffs' counsel violated Rule 11 and is subject to sanctions.
- Conduct of Plaintiffs' counsel is trained in the law and his conduct was willful. He infected the entire pleading because the claims of legislator and bail bond plaintiffs were intertwined with and dependent upon the claims of Collins. Plaintiffs' counsel substantially increased the time and expense of the litigation because judicial defendants were required to raise their immunity defenses to every claim made by each Plaintiff.
- Imposing attorney's fees and costs is an appropriate sanction in this case. Court orders plaintiffs' counsel, Blair Dunn, to pay judicial defendants all of the reasonable attorney's fees and other expenses directly resulting from these violations.
- Sanctions are necessary to deter plaintiffs' counsel and other similarly situated individuals from repeating this sort of conduct.

10TH CIRCUIT COURT

- Collins v. Daniels, Case No. 17-2217 and 18-2045 (consolidated 2 related appeals)
    - Appeal 17-2217 – concerns the dismissal of Plaintiffs' case and denial of Plaintiffs' motion for leave to amend
    - Appeal 18-2045 – concerns the imposition of Rule 11 sanctions
- The bail bondsmen and legislators lack standing to assert the claims raised in this case.
- Collins has standing to seek damages and retrospective declaratory relief based on the alleged violations of her 8th and 14th Amendment rights, but her claim for prospective declaratory and injunctive relief are moot.
- Sovereign immunity bars Collins's claims against the state courts and state officials in their official capacities, Plaintiffs abandoned their argument regarding judicial immunity, which disposes Collins's claims against the state court chief judges and court executive officers in their individual capacities, and legislative immunity bars Collins's claims against the supreme court justices in their individual capacities.
- Collins is the only plaintiff with standing, but defendants are immune to her claims, so we do not address the merits of Collins's claims that the 2017 rules and the PSA violate the 8th and 14th Amendments.
- The parties stipulated in the district court that the Rule 11 sanction is $14,868.00 and the funds have been deposited with the district court.
- The district court did not abuse its discretion when it ordered Rule 11 sanctions
    - Plaintiffs' standing arguments ignored controlling precedent. When they were confronted with these binding authorities, Plaintiffs' unreasonably attempted to distinguish themselves from those cases.
    - This case is a prime example of the waste and distraction that result when attorneys disregard Rule 11's certifications.
    - The 1st Amendment does not protect the filing of frivolous claims, and it is in no way a defense to Rule 11 sanctions.

NEW YORK

- People ex rel. Desgranges, Esq. on behalf of Kunkeli v. Anderson, Case No. 90/2018
- Supreme Court of the State of New York, County of Dutchess
- Petition for writ of habeas corpus and an action for declaratory judgement.
- Petitioner claimed he was being unlawfully held as a result of bail, or excessive bail, set at arraignment on a charge of petit larceny. Petitioner was represented by an attorney at arraignment, and he did not subsequently challenge the bail either by objecting at arraignment, or by subsequent proceeding for another judge. Petitioner did not waive his constitutional rights to due process and equal protection.
- Petitioner has since been released, but this court applies an exception to mootness and considers the matter as an action for declaratory judgment.
- Petitioner asks that judges be required to consider a defendant's ability to pay when setting bail.
- January 31, 2018 - Court ruling:
    - It is clear that a lack of consideration of a defendant's ability to pay the bail being set at an arraignment is a violation of the equal protection and due process clause of the 14th Amendment and of the NY Constitution.
    - Discrimination on any basis, including on the basis of how much money someone has, is a violation of the equal protection clauses and due process claims of the

NY and US Constitutions. Freedom should not depend on an individual's economic status.
    - Evokes *Bearden* line of cases to find that strict scrutiny applies
    - The Court is not ruling upon whether or not it was appropriate for the judge to set bail in this case, or even have knowingly set bail the defendant could not afford, but only as to the propriety of the failure to consider whether the defendant had the ability to pay the sum of bail set.
    - While imposing bail under appropriate circumstances clearly serves an important and perhaps even compelling governmental objective, the failure to consider the economic status impede that interest.
    - Ordered that when imposing bail, the court must consider the defendant's ability to pay and whether there is any less restrictive means to achieve the State's interest in protecting individuals and the public and to "reasonably assure" the accused returns to court (*Pugh v Rainwater*).

PENNSYLVANIA

- Philadelphia Community Bail Fund v. Bernard (filed March 12, 2019)
- Class action complaint and petition for writ of mandamus against Philadelphia arraignment court judges filed in Pennsylvania Supreme Court
- Law at the time of filing:
    - Current rules of procedure safeguard the presumption of innocence.
    - Only if cash bail (release on monetary conditions) is necessary to ensure defendant's appearance at trial may an arraignment court judge impose monetary conditions of release – and even then, only after inquiring into the defendant's ability to pay.
    - Cash bail may never be used for the purpose of ensure that a defendant remains incarcerated until trial.
- Plaintiffs claiming Philadelphia's use of bail is unconstitutional. After observing more than 2,000 bail hearings over the course of a year, the plaintiffs found that PA rules of criminal procedure and the PA Constitution were routinely violated by disregarding the presumption of pretrial release and not reviewing a person's ability to pay prior to setting cash bail.
- Also claiming respondents don't consider alternative conditions, and with many cases involving more serious charges, respondents impose high cash bail specifically to ensure defendants remain incarcerated pending trial – thus using an illusory condition of release as a de facto detention order.
- Hearings conducted in violation of due process. Last 3 minutes on average. Defendants typically can neither hear nor be heard. Respondents threaten to impose higher bail on defendants who complain that they cannot afford the bail set.
- Petitioners seeking a writ directing respondent judges that they many not impose cash bail
    - Without exploring whether alternative conditions of release will ensure the defendant's appearance for trial
    - Without inquiring into the defendant's ability to pay the bail, or
    - For the purpose of ensuring that a defendant remains incarcerated until trial

- If prosecutors seek an order to detain a defendant pretrial, it must prove, at a hearing conducted with full due process, that no other condition or conditions can reasonably assure safety of any person and the community.

TEXAS

- ODonnel v. Harris County, Texas, et al., Case no 4:16-cv-01414
- Federal District Court in Texas - Ruling – April 2017
    - Denied motion for summary judgment
        - No "right to affordable bail" but, judges cannot set that bail on a secured basis requiring up-front payment from indigent misdemeanor defendants otherwise eligible for release, thereby converting the inability to pay into an automatic order of detention without due process and in violation of equal protection
        - You can set bail they can't afford, but only if you follow due process procedures: hearing, lawyer present, finding by clear and convincing or preponderance that no conditions or less restrictive conditions can reasonably achieve the goals of public safety or appearance.
        - This is fundamental right, strict scrutiny applies
    - Granted injunctive relief.
        - Likelihood of success on the merits.
        - County's bail system for people charged with low-level crimes violates the Constitution and disproportionately affects indigent residents.
        - Ordered Harris County to stop keeping people who have been arrested on misdemeanor charges in jail because they cannot pay bail.
    - Factual findings
        - Money bail is not effective. No reasonable basis for concluding that secured conditions perform any better than unsecured or non-financial conditions
        - Use of secured conditions has enormous and devastating consequences for arrestees, communities, and families. It leads defendants to plead guilty – coercive. Leads to the commission of future crime, loss of jobs, etc.
        - Detailed analysis of the history of money bail. Found that use of secured bonds was always intended to be coupled with an inquiry into whether the person can afford it. It is a modern perversion that allows money bail to result in detention.
        - Harris county actually called money bail orders "detention orders"
        - Judge made credibility findings of much of the national pretrial research
- Most of the judges in the original lawsuit lost their elections and the new judges chose to make changes
    - Most misd. defendants would be released within 48 hrs on personal recognizance bonds with not monetary condition. Depending on how busy the jail is, the county expects most misd. defendants to be released within several hours
    - Individuals facing certain types of misd., including DV and second or subsequent DUI charges, will have to appear before a magistrate to determine release
    - County must provide resources to help misd. defendants, including funding for legal representation and a text message reminder system

        - Exploring child care and transportation
- July 26, 2019 – Settlement reached – solidifies changes already put in place after federal ruling
- Settlement must be approved by the federal judge and will be overseen by a monitor for at least 7 years.
- New lawsuit filed to challenge the felony system

TEXAS – Daves, et al., v. Dallas County, Texas, et al., Case No.: 3:18-CV-0154-N

- US District Court for the Norther District of Texas, Dallas Division
- September 20, 2018 - Court granted a preliminary injunction enjoining defendant felony and misd judges, and Dallas County together with their respective officers, agents, attorneys, employees, and all those acting in active concert with them as follows:
    - Dallas County enjoined from imposing prescheduled bail amounts as a condition of release on arrestees who attest they cannot afford such amounts, without providing an adequate process for ensuring individual consideration for each arrestee of whether another amount or condition provides sufficient sureties.
    - Pretrial Service staff must verify an arrestee's ability to pay a secured financial condition of release by affidavit, and must explain to arrestees the nature and significance of the verification process.
    - The purpose of the explanation is to provide the notice due process requires
    - Affidavit of indigency must obtain specific details that would allow the county to make reliable determinations
    - Affidavit can be completed within 24 hrs of arrest
    - If individuals remain incarcerated due to inability to pay the reasonable amount set, the defendant is entitled to a hearing within 48 hrs of arrest in which an impartial decision maker conducts and individual assessment of whether another amount of bail or condition provides sufficient sureties.
    - At hearing, arrestee must have an opportunity to describe evidence in his favor, respond to evidence.
    - If the decision maker declines to lower bail or impose alternative conditions, they must provide written factual findings or factual findings on the record explaining the reason for the decision, and the County must provide the arrestee with a formal adversarial bail review hearing before a misd. or felony judge.
    - To enforce the 48-hr timeline, county must make a weekly report to the court of defendants for whom a timely individual assessment has not been held. County must also notify defense counsel and/or next of kin of the delay.
    - For defendants subject to formal holds who execute indigency affidavits, the sheriff must treat the limitations period on their holds as beginning the earlies of 1) after the PC hearing, or 2) 24 hrs after arrest.