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

WebEx Video Conferencing
May 7, 2020 – 12 p.m. – 1 p.m.

MEMBERS:	PRESENT	EXCUSED
Judge George Harmond *Chair*	x	
Wayne Carlos		x
Kimberly Crandall		x
Judge Keith Eddington	x	
Rep. Eric Hutchings	x	
Andrea Jacobsen	x	
Brent Johnson	x	
Comm. Lorene Kamalu	x	
Judge William Kendall		x
Cpt. Corey Kiddle	x	
Richard Mauro	x	
Judge Brendan McCullagh	x	
Judge Jeanne Robison	x	
Reed Stringham		x
Cara Tangaro	x	
Marshall Thompson	x	

GUESTS:

Mike Drechsel
Joanna Landau

STAFF:

Keisa Williams
Minhvan Brimhall (recording secretary)

Welcome and Approval of Minutes (Judge Harmond):

Judge Harmond welcomed committee members and guests to the meeting. The committee considered the minutes from the February 6, 2020 meeting. With no objections or further discussion, Judge Robison moved to approve the minutes. Judge Eddington seconded the motion. The minutes were unanimously approved.

HB 206 (effective October 1, 2020):

Judge Harmond: Circumstances have changed since the February meeting. Originally we had dedicated funding to contract with Salt Lake County Pretrial Services to manually-calculate PSAs with NCIC hits, increasing PSA generation rates by approximately 30% per week statewide. Due to budget cuts related to COVID-19, it is unclear whether that funding will be available. The legislature has asked every agency to review their budgets and identify cuts. The AOC and Judicial Council are engaged in regular budget meetings to make those determinations. We will have to wait and see how that shakes out.

HB 206 passed during the 2020 legislative session and will go into effect on October 1, 2020. Ms. Williams reviewed HB206 and the pretrial release decision-making process document included in the packet.

Ms. Williams: I've reviewed the decision-making document with Rep. Pitcher, Brent Johnson, and the Boards of Judges. HB206 doesn't provide a clear, step-by-step pretrial decision-making process. It jumps around. This document is intended to clarify the progression of decision points. For example, first and foremost there is a presumption of own recognizance release. If a judge determines that an own recognizance release is inadequate in a particular case, they then identify the least restrictive, reasonably available conditions of release. If a judge determines that a financial condition of release is necessary, they must consider an individual's ability to pay the amount set.

HB206 includes a long, non-exhaustive list of pretrial release conditions that judges may impose. In 77-20-1(4)(b)(viii), the statute expressly allows judges to compel treatment as a condition of release. Legally, I don't believe you can compel treatment in the pretrial context. That appears to be an oversight. The list of conditions in (4)(b) was cut and paste from the section of the statute discussing release conditions pending appeal (77-20-10). Once a defendant has been convicted, their rights are somewhat diminished so compelling treatment in the post-conviction context makes more sense. Mike Drechsel and I are making a list of minor clean-up issues that we will discuss with Rep. Pitcher next session.

Rep. Hutchings: Do judges have access to all of the information listed in 77-20-1(5) about a defendant's circumstances, their likelihood to flee, or whether they are out on parole, etc.? They are already missing at least 30% of PSAs right now, should a provision be added clarifying that the information will be considered if it's available? Will the court let the legislature know that there is a need for additional resources or information to actually make that possible?

Ms. Williams: No, judges do not have access to much of that information, at least not at the PC phase. They may get more information at the initial appearance when they are able to communicate with the defendant and attorneys. Right now, judges only have access to information from law enforcement in probable cause affidavits and PSAs if they're available. With the new legal findings required in HB206, access to a PSA will be even more critical.

Rep. Hutchings: What is the best case scenario for judges? What should be on the legislature's radar? If we are really going to do this right, what do judges need to see? Is that just the PSA?

Ms. Williams: Having a PSA in every case would be ideal. In order to conduct the ability-to-pay analysis required under HB206, judges will need financial information about the defendant.

Judge Harmond: The PSA is most ideal. The factors on the PSA provide information to judges about whether someone is a public safety risk and whether they are likely to appear in court.

Rep. Hutchings: Is it a fair assumption then that the PSA provides some sort of information about criminal history? There have been a couple of stories in the media lately about people with sizeable

rap sheets being released. I am wondering if the PSA is enough or whether additional information should be provided. If we just get a PSA to the judge in a timely manner, will that take care of it? Are we providing enough information in the PSA?

Ms. Williams: The PSA provides some synthesized information about criminal history and a specific individual's risk to public safety and risk of failing to appear in court, but it doesn't provide judges with all of the information they might want or need. As outlined in the thoughts/updates/highlights document, there are significant data gaps and timing and functionality issues that make providing critical information impossible right now. When a judge is reviewing a probable cause affidavit and PSA, they are only seeing a snapshot in time and the circumstances surrounding that particular arrest. They do not have comprehensive information about the person's recent or past criminal justice contact. There is an open question about how much information judges can be provided outside the adversarial process - what can the court itself "investigate" versus what must or should come from the parties?

Rep. Hutchings: It sounds like there may be areas of opportunity to gather and share data on the law enforcement side, especially in regard to fingerprinting and SIDs.

Judge Harmond: If the person has been screened, judges have access to recent probable cause statements through judicial workspace. We also have access to much more information than we used to because of the SID-linking functionality. That data is getting better all the time.

Judge McCullagh: I can access a defendant's booking sheet through a public-facing portal on the Salt Lake County Jail's website. If an officer didn't tell me in the probable cause affidavit whether the defendant was booked on a felony warrant, I will often look it up on the booking sheet. That will tell me if they've been booked on 14 other warrants. We ask the officers to provide more information in the probable cause affidavit when they book on a warrant.

Ms. Williams: Access to booking sheets may be one avenue of information. However, before we go down that road we should have a conversation with the boards of judges about what information they feel should or should not be provided to them at that point in time.

Brent Johnson: One thing that might be helpful and may provide some comfort to judges is to ask one of the boards to request an ethics advisory opinion on that issue.

Ms. Williams: I agree. I will talk to the boards about that. Rep. Hutchings, because law enforcement systems are different and disjointed, you might want to start a conversation with them about what it would take to share whatever information is deemed appropriate. If law enforcement agencies are all using different jail management vendors, and different versions of products from each vendor, that might make it difficult for them to share what they have.

Rep. Hutchings: I completely agree. A lot of them use Spillman, but not all of them. We could start the conversation about data sharing with Salt Lake County and if we can find a solution there, we could

open it up to other counties. I've made a note to look at early booking information, biometrics, and SIDs. We may need to have this conversation at the county level through UAC.

Ms. Williams: I am excited about the new ability-to-pay analysis provision in HB206 because emerging caselaw has found that to be constitutionally required, however, it creates an urgent issue because we do not have a way to provide judges with a defendant's financial information at the time they are making initial release decisions. HB206 allows for the use of unsecured bonds as an exception to conducting that analysis. If judges don't have financial information, they may have to presume indigence or not use monetary bail at all. It's possible to find that a financial condition is the least restrictive, reasonably available condition necessary to ensure appearance in court even though the individual is unable to pay. But that may be a difficult argument to make.

I created a financial declaration for monetary bail derived from the financial declaration for restitution, but it's pretty long. I talked to several sheriffs about how to get financial information to the judges. Requiring law enforcement to ask all of the questions on that form was a non-starter. They said it would be onerous and defendants won't want tell to officers that information - not to mention the impact on their staffing levels and funding, all of which is understandable. I met with some IT staff at the Department of Public Safety about various options. They recommended reducing the request to two fields in the arresting and booking officer screens in the probable cause system. Law enforcement would only have to ask defendants their gross household income and number of dependents. If the defendant refused to answer or was incapacitated, officers could click on a box that would allow them bypass that section.

Our IT department has already programmed a similar functionality in the juvenile case management system, CARE. The juvenile court uses a matrix derived from the poverty guidelines. Judges or probation officers ask the family about income and dependents and programmed calculations plot where the family falls on the matrix, providing judges with "affordable" fee and restitution amounts. I am wondering whether we could, or would want to, create a similar matrix for monetary bail. It could be programmed into judicial workspace upon receipt of the two data fields from law enforcement in the PC system. IT said they would have to put together a detailed estimate on how long programming would take and how much it would cost. We did not get a fiscal note on HB206. Mike Drechsel and I talked to CCJJ and there may be grant funds available. I'm just not sure if we can get it done by October 1st, even with funding. Judges - what is the bare minimum you would need to make an informed decision about an individual's ability to pay a specific bail amount?

Judge Harmond: Most of the people I see have little to no income. They haven't worked for a long time. It is rare that I see someone with a job.

Mike Dreschel: Are there economic differences between rural and urban areas that should be contemplated in a chart like this?

Mr. Mauro: Would the matrix be modified to replace the bail schedule? It looks like the matrix would provide judges with a range of affordable bail amounts, taking into account someone's income. Does

that trigger a right to counsel at that point because it is a determination of indigency, and how would those two be related?

Ms. Williams: If we decide to create a bail version of this matrix, that's something we'd have to talk about. In my mind, the judges would be making two separate decisions. The decision about affordable bail would be made electronically at the PC phase. I'm not sure if this matrix would also translate into an indigency determination for purposes of appointing counsel. Right now, the appointment of counsel decision may need to be made later at initial appearance.

Judge McCullagh: The data points in the matrix make up the calculation for appointment of counsel so we would know immediately if they qualified. We could green light the easy ones, the people who clearly fall below the poverty level, so that when they are charged and appear in court that first calculation is already done. Then the court would only be focusing on people requesting appointment of counsel who have demonstrated an income at 50% of poverty level or higher.

Mr. Mauro: If you use this matrix, the right to counsel would attach fairly easily. My sense is that any kind of challenge to, or review of, bail would happen pretty early in the proceedings because the defendant will have a right to counsel at first appearance. That's something we need to take into consideration.

Judge McCullagh: Under the current rule structure, if an individual is booked and a prosecutor doesn't file charges within 72 hours, or make a request to extend the filing deadline, the individual is released on their own recognizance at the end of 72 hours. If the prosecutor files charges within that time, the person is set for first appearance, so within 72 hours of filing, the person will have a right to counsel and can ask for a de novo bail review at initial appearance. The prosecutor and judge would have more information available at that time.

Mr. Mauro: But you are still setting bail before initial appearance when they have a right to counsel.

Ms. Williams: You asked if this would replace the bail schedule. Amendments to the Uniform Fine and Bail Schedule will be presented to the Council this month. The schedule will be renamed the Uniform Fine Schedule. The term "bail" will be removed from the title and schedule entirely because judges will be required to conduct an individualized assessment. The decision is no longer solely charge-based. Practically speaking, I imagine judges will refer to the schedule as a starting point when conducting the ability-to-pay analysis.

Judge McCullagh: Is the monetary bail amount only tied to a person's likelihood to appear?

Ms. Williams: HB 206 doesn't restrict the use of monetary bail to issues of appearance. Judges must determine whether the individual does (or does not) have the ability to pay the amount set, and then explain why that monetary amount is the least restrictive, reasonably available condition to ensure compliance with (3)(b)(i)-(iv). Those subsections cover appearance, public safety, and the safety of witnesses and victims. If your intent is to hold someone in jail, instead of setting a $2M bail, issue a no bail hold (if applicable under 77-20-1(2)).

Judge McCullagh: I developed a 12-question online form for the appointment of counsel and posted it on the West Valley City website. It shows a green light or red light to indicate that a person does or does not qualify for appointment of counsel. A green light means they qualify. A red light means they can still petition for counsel, but a bail amount can be set based on the information they provide to us.

Ms. Williams: Does the committee approve of my taking the 2-question/matrix ability-to-pay idea to the Judicial Council and boards for consideration so we can move the project forward?

After discussion, the Committee approved.

Rep. Hutchings: We need to be careful in how we couch these issues. If we say we are going to charge someone based on how much they can pay, especially when we talk about getting rid of the bail schedule, I think we need to be clear that we aren't discriminating against the rich as well.

Judge Harmond: If they pay by cash or credit/debit card, the bail is returned if they appear.

Ms. Williams: That's one of the reasons I'd like to change the statute so that release decisions are risk-based, not charge-based. What we really care about is whether the person is a danger to the public or not. Theoretically, money has some rational relationship to appearance because the person has some "skin in the game," but money has nothing to do with risk. To your point, money is arbitrary and potentially discriminatory on both sides depending on how it's applied. If you have money, I may set a higher amount for you than for someone who is poor. But if you're poor, you may sit in jail weeks longer than someone with money because you can't come up with $250. That doesn't make sense. If a person poses a danger, they should stay in. If they don't, they should be released. Money shouldn't be a factor.

Mr. Johnson: As long as money bail exists, there should be a baseline. The further down you fall on the poverty scale, the less you pay.

Ms. Williams: Emerging caselaw says the Constitution requires a hearing within 48 hours of arrest if the person is still in custody. The ultimate goal should be to find a way to comply with that requirement. In New Jersey, they hold initial appearances remotely 6 days a week. All parties, including pretrial services, are in attendance and are prepared to address indigency and pretrial release. In serious cases, prosecutors can file a motion for detention during the hearing and are most often granted an additional 5 days to prepare. The judge, defense counsel, and prosecutor are provided with a comprehensive packet compiled by pretrial services with the PSA and all of the defendant's criminal history and financial information.

Please review the financial declaration, poverty guideline matrix, and HB206 decision-making process in the packet and let me know if you have any feedback or recommendations. The Unsecured Bond idea has been presented to the boards in concept with more substantive discussions to follow. The statute (before and after HB206) allows for the use of unsecured bonds. An unsecured bond is essentially an IOU between the defendant and the Court. The defendant doesn't have to pay any

money to get out of jail, but if they fail to appear in court the bond can be forfeited and a judgement entered in the amount listed on the bond.

Rep. Hutchings: From a political and public appearance perspective, this is an easy argument to make. Do what you are supposed to do and there's no problem. If you don't, then you leave us no choice but to impose a fine. It feels like a good concept that a lot of people can get behind.

Pretrial Practices during COVID:

Ms. Williams: Since the COVID-19 quarantine began, pretrial practices have changed dramatically and are evolving daily. Some of the changes include a reduction in jail populations statewide, a reduction in probation supervision, and law enforcement are choosing to issue citations in lieu of arrest unless it's absolutely critical to protect the public. I'm pulling arrest and citation data in an attempt to compare numbers from April 2019 to April 2020. Warrantless arrests have decreased by 37%. Criminal case filings are down by about 50%. I am working with Court Services to double check those numbers for accuracy. I still need to pull and evaluate citation numbers. I'm trying to determine whether there was a corresponding increase in cite and release numbers or whether those numbers are also going down? The three goals of pretrial justice are to 1) maximize liberty, 2) maximize public safety, and 3) maximize court appearance. It appears we are succeeding at #1, but how are we doing on #2 and #3?

Ms. Williams reviewed the section in the updates/thoughts/highlights document discussing data, news articles, and lessons learned from other states.

Commissioner Kamalu reviewed slides created by the Director of Davis County Pretrial Services, Patty Fox. Davis County Pretrial Services began accepting clients in January 2019. The slides identify pretrial functions pre-COVID. Pretrial supervision in Davis County is working. Law enforcement is doing a good job with issuing more citations. Post-COVID, pretrial intake appointments are being held via phone. The majority of calls from clients surround concerns and confusion about rescheduled court dates. They are still drug testing and Davis County Behavioral Health is still conducting virtual treatment sessions. Patty tracks pretrial supervision numbers daily and has been working with the jail and the court to release as many individuals to pretrial supervision as possible to reduce the jail population.

Ms. Williams: I spoke with Patty yesterday. She said their compliance rates are just as high, if not a little higher, than they were pre-COVID. People are really engaged. The Weber County Sheriff's Office created their own pretrial program, without funding, in reaction to COVID. They are starting off small but so far they are having success and are offering services to district and justice courts. The Keisel Center is providing in-person check-ins and treatment.

Mr. Thompson: CCJJ has secured federal grant money specifically to create pretrial services at the county level in response to COVID. If any of the counties wish to expand, let them know there is potential grant money available to them. The grant money is part of the $5.5 million CARES Act funding.

Commissioner Kamalu: Davis County opened the first receiving center in the state and is doing well. We hope to continue that program and expand using funding allocated through the legislature. The receiving center is still accepting people in person at this time.

Ms. Williams asked the Committee to email her feedback on data-related issues.

Cancel or Reschedule July 2nd meeting due to 4th of July holiday:

Judge Harmond: The next meeting is scheduled for July 2nd, the day before the July 4th holiday. The Committee discussed holiday plans and whether to cancel or reschedule the July 2nd meeting.

Mike Drechsel: The Judicial Council will typically conduct their budget planning for August during the July meeting and will likely need a response towards the end of month. You may miss the opportunity to submit any requests if the July meeting is canceled.

Ms. Williams: I met with the Budget and Fiscal Management (B&F) Committee this week about funding for the NCIC contract. The B&F Committee supported a proposed 5-year contract with Salt Lake County but they intend to recommend to the Judicial Council that one-time funding be allocated for the first year, and require a termination clause in regard to unavailable funding. It's unclear yet if the Judicial Council will approve the request.

Rep. Hutchings: Circumstances depending, there may be a need to fast track a funding request to the Council. Canceling the July meeting may impact the committee's ability to do so. The legislature talked to the court about protecting parts of the budget.

Judge Harmond: The July meeting will be held via WebEx. Let's keep the meeting on the calendar for now. If things fall apart we can meet in August.

Adjourn:

There being no further business, the meeting was adjourned at 1:32 pm. The next meeting is scheduled for July 2, 2020 at 12 pm via WebEx.