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

WebEx Video Conferencing
July 2, 2020 – 12 p.m. (noon) to 1:30 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**	
Joanna Landau		**x**

GUESTS:

Marla Kennedy
Tucker Samuelsen
Dyon Flannery
Shane Bahr
Yvette Rodier-Whitbe
Jojo Liu

STAFF:

Keisa Williams
Minhvan Brimhall (recording secretary)

***NOTE: The recording wasn't started until 12:11 p.m., missing the first few minutes of the meeting. The summary below for that time period is based on notes and recollections.*

Welcome and Approval of Minutes (Judge Harmond):
Judge Harmond welcomed committee members and guests to the meeting. The committee considered the minutes from the March 7, 2020 meeting.

With no objections or further discussion on the minutes, Judge Robison moved to approve the minutes as drafted. Cara Tangaro seconded the motion. The minutes were unanimously approved.

Updates:

Judge Harmond: Due to COVID-19, the Court has been tasked with providing the legislature with proposed budget cuts. Budget discussions are ongoing so it is unclear at this time what effect that may have, if any, on the NCIC manual review agreement with SLCo Pretrial.

PC Programming

Ms. Williams: HB 206 goes into effect on October 1, 2020. Judges will be required to consider an individual's ability-to-pay a monetary bail amount if monetary bail is considered to be a least restrictive, reasonably available condition of release. Right now, judges do not have access to an arrestee's financial information at the PC phase. I have been working with the Department of Public Safety, BCI, the sheriff's association, the chiefs of police association, and the two jails with unique PC system programming on a resolution. All parties have agreed to add two questions to law enforcement's (LE) side of the PC system: 1) gross household income, and 2) number of dependents. If the arrestee agrees to provide that information, and has the capacity to do so, it will be presented to judges along with the PC affidavit. None of the participating agencies require funding to complete their portion of the project and all anticipate that they can get the changes in place by October 1st. The Court's side is a little more complex. I'll talk more about why later, but the programming time will be more extensive and a cost will be associated. Mike Drechsel and I have been talking to CCJJ and our hope is to qualify for a JAG grant for those one-time costs.

Unsecured Bond Procedures

Ms. Williams: Even if programming is in place by October 1st, arrestee's may not want to, or may not be able to, provide the information. At the May meeting we discussed the use of unsecured bonds. Briefly, HB 206 provides an exception to the ability-to-pay analysis for unsecured bonds. Under the code, courts are allowed to issue unsecured bonds ("written agreement without sureties"). That authority wasn't a change in HB206, it has been an option for as long as I can remember, we just haven't taken advantage of it. An unsecured bond is essentially an IOU. The defendant doesn't have to pay any money upon release from jail, but if they fail to appear in court, the bond may be forfeited and a judgement entered.

The question now is what the unsecured bond forfeiture process should look like. The portion of the code outlining the forfeiture process for secured bonds is not applicable to unsecured bonds. I created a skeleton forfeiture process as a place to start. I will be seeking feedback from the boards of judges. I ran it past the Third District Bench because I happened to be on their agenda for something else so it was good timing.

The proposed procedures I developed are very similar to the ones in the statute for secured bonds. It's important that defendants are provided notice and due process before a bond is forfeited. I will bring the proposed procedures back to this committee next month after I get feedback from the boards. In talking to judges, most really like the idea of unsecured bonds.

One of the major issues that we discovered in putting this together is that clerks cannot upload and file unsecured bonds in CORIS in a way that would differentiate them from secured bonds. We will want to be able to pull data and compare failure to appear and criminal activity rates

between the two. Taylorsville Justice Court has been using unsecured bonds for years, but from what I understand they are simply scanning them into the case file with a docket entry or note identifying them as unsecured and are only uploading them into the bond tracking system if the bond is going to be forfeited. When they've done that, it looks like a secured bond unless you open it or read the clerk's notes.

I put a working group together of judicial assistants, clerks of court, and Paul Barron from the IT department to identify the minimum amount of changes needed to resolve the issue. CORIS programming changes are time intensive. I am drafting proposed changes and will get an estimate from IT on costs and programming time. There is a workaround that would allow us to use unsecured bonds by October 1st without those changes, it just isn't ideal and would make pulling data very difficult. There will also be a training component for clerks and judges. I am meeting with the clerks of court to iron out the details.

Mr. Mauro: When do you expect to roll it out? How do we educate practitioners to let them know this is an available avenue going forward and what the criteria might be for making those kinds of arguments? I think that is critically important.

Ms. Williams: I agree. Another issue is the practical, logistical aspects. By statute, defendants have a choice of methods when posting monetary bail – secured bond, cash, credit/debit card – but unsecured bonds are only an option if a judge authorizes it. Judges will have to put that in their PC release order, jail staff will have to be trained to look for it, to know what it means, to explain the bond to the defendant, and send a signed copy to the court. There won't be a case file yet so clerks will have to wait to upload them into CORIS if/when a prosecutor files charges. I hadn't even considered how we should notify and train practitioners.

Mr. Mauro: SLLDA has been participating in first appearance court for about 8 months now. First appearance is an appropriate time to discuss unsecured bonds if one isn't issued before the hearing. The idea that unsecured bonds are an option would be an important consideration for defense attorneys. We have learned a lot of important things through COVID-19. I had a discussion with Judge Kouris about how so many people have been released from jail but the crime rate doesn't seem to be increasing, so this a good time for us to be discussing these issues and ensuring people understand what they mean and how they can best utilize the tools and keep people out of jail pretrial, because that is our goal.

Judge Harmond: Do you think it would be helpful to engage the defense bar association, as well as SWAP, and see if practitioners can be trained through those organizations?

Mr. Mauro: Our office is well aware of these issues. Ms. Tangaro and I can get the word out to the criminal defense attorney association.

Ms. Tangaro: I agree. We can get the word out once we know exactly what to say, how to say it, and what people should be looking for. The juvenile court judges have been handling first

appearance court in the 3rd district and I have been really impressed with them. They haven't been shy about addressing release.

Mr. Mauro: Our lawyers have found juvenile judges' willingness to discuss release mixed. Some will, and some send it to the assigned judge to deal with. Things may change as we get closer to October 1st. We are already seeing some improvement with judges considering the least restrictive conditions.

HB 206 Procedures

Ms. Williams: In the May meeting packet I included the step-by-step pretrial release decision making process for judges pursuant to HB206. First, the presumption is own recognizance release. If that isn't sufficient, judges must consider the least restrictive, reasonably available conditions necessary to ensure safety and appearance, etc. A monetary bail can be set but an ability-to-pay analysis must be conducted. There is a presumption of detention for criminal homicide and any offense for which the term of imprisonment may include life. There is also a process whereby prosecutors can file a motion for detention which could delay the pretrial release decision. The detention hearing process is pretty specific.

What I included in the May packet is the broad strokes version of the pretrial decision process. Now I'm getting into the weeds – for example, will judges create pretrial status orders or will one of the parties be required to submit a proposed order? I will be seeking your feedback on those processes. Because things are moving quickly I may be soliciting feedback via email. I am working on a first draft of proposed changes to the rules of criminal procedure related to HB 206, and will be presenting those to the Rules of Criminal Procedure Committee for consideration. I'm not sure if those proposed drafts will go through the Boards and the Council for consideration before going to the Supreme Court.

Some judges have expressed concern about their ability to hold indigent individuals in jail who have been charged with really serious offenses. It is especially concerning to those judges who do not have access to pretrial supervision. The no-bail eligible offenses haven't changed. They are charge-based (must be charged with a felony) but the most serious offenses are felonies so that should alleviate some of the concern. The other scary offenses are DV-related. Judges can hold on misdemeanor DV offenses. HB206 now allows justice court judges to issue no-bail holds.

Judges who expressed concern felt that the "substantial evidence to support the charge" and "clear and convincing" standards for no-bail holds, in many circumstances, cannot be met with what little information they are provided at the PC phase. Under HB206, judges can still set a monetary bail amount outside an individual's ability to pay, they just have to find it to be the least restrictive condition necessary to ensure public safety.

The judges' concerns are legitimate and it illustrates the point that money is arbitrary. Money has nothing to do with public safety risk. To assess risk and make the best decision, individuals should be brought before a judge for an initial appearance within 24-48 hours of their arrest.

Attorneys should be present and prepared. If pretrial detention is ordered, or is the result of a monetary bail set, the individual should be afforded due process and the right to be heard. We have talked a lot about New Jersey's model. I would love to see us move toward a system with pretrial services and an initial appearance within 24-48 hours. Judge Kouris has been working with the DA's office and SLCo jail on a potential change to the time-to-file and initial appearance process that would do just that. That is really exciting and if Salt Lake can make it happen, it would be a great model for other counties to emulate.

One positive thing to come out of COVID is that everyone has the capacity and is becoming accustomed to conducting hearings remotely. At this point, there is no reason defendants can't be seen remotely much earlier than before.

Mr. Mauro: Regarding concerns about not having enough information at the PC phase to determine "substantial evidence to support the charge" and "clear and convincing evidence," if you look at the Salt Lake County jail dashboard in the last month, 70% of the detainees are there on un-adjudicated cases and are presumed innocent. Some of those are people who should remain in jail, but many should be released because the only thing holding them is their inability to afford monetary bail. I am in favor of the new procedures and my office will help in any way we can.

Ms. Williams: From what I understand, several of the prosecutors are on board with holding hearings within 48 hours of arrest. I think everyone knows that money is not a proxy for risk, but money has been used as a means to hold someone until a prosecutor can talk to a judge, primarily because cases aren't filed and initial appearances aren't held for weeks at a time. It is unconstitutional to hold an individual in jail on the basis of money alone. We need to be working towards a more fair process, and a process that allows attorneys to give judges risk information before a release decision is made. If a person is deemed a public safety risk, they should stay in, but if they aren't, they should be released. Money shouldn't be a consideration unless someone has been deemed a failure to appear risk.

In New Jersey, release is the presumption and they have statewide pretrial supervision. The only time they consider holding someone is if the prosecutor files a motion for detention. With the new detention hearing process outlined in HB 206, prosecutors have an avenue to delay a pretrial decision until they have time to investigate and present risk information. I think that's a good framework and we should start using it. However, unless we begin holding hearings within 24-48 hours of arrest, prosecutors likely won't file motions until after the initial release decision has been made by judges at the PC phase. By rule, judges have to make those decisions within 24 hours of booking. That timeframe could probably be extended to 48 hours if the decision was made at a hearing.

Ms. Tangaro: I have two clients in Davis County on a no-bail hold who have been there over four days and still have not seen a judge. We should be conducting education statewide.

Judge Harmond: Have you seen a PC release order with a ruling from the judge on setting bail? Ms. Tangaro: No, nothing is in the case file. Judge Harmond: Those orders are publicly available in Xchange. Judge McCullagh offered to show Ms. Tangaro how to access release orders in Xchange after the meeting.

DATA COLLECTION SUBCOMMITTEE:

Judge Harmond: Data collection is a critical issue. We need data to ensure our pretrial processes work, and we need to identify data gaps and data-sharing issues. Other questions include: What is the cost of combining or streamlining data? What would an integrated system look like? I am forming a data subcommittee with specific directives and deadlines. Please email myself or Ms. Williams by next Wednesday to let us know if you are interested. I am considering the following members: Joanna Landau, Andrea Jacobsen, Representative Hutchings, Rich Mauro, Cpt. Kiddle, Sheriff Nielson from the Sanpete Sheriff's office, Jojo Lu from the Salt Lake County Criminal Justice Advisory Council, and Brent Packard from the Legislative Auditor's office. I will send out a follow-up email to the named individuals with an official invitation.

ABILITY-TO-PAY MATRIX:

Judge Harmond: Was the draft matrix developed for the juvenile court?

Ms. Williams: Yes. The matrix goes hand-in-hand with the two pieces of financial information that law enforcement has agreed to provide to the court, gross household income and number of dependents. The matrix in the packet is based on poverty guidelines and is used by the juvenile court to determine non-judicial fees and restitution. The recommended amounts are scaled based on the family's poverty level.

The issue in adapting this for adult criminal use in the pretrial context is the disconnect between where a person falls on the poverty guidelines and the amount of money the person can afford to pay to walk out of jail on a particular day. Without more information or the ability to talk to the individual or defense counsel, we don't know whether the amount across the bottom is, in fact, affordable. However, the matrix is better in the sense that the court would be conducting some kind of individualized assessment that is not completely arbitrary or charge-based. I also believe use of the matrix would align with the holdings in emerging pretrial case law. The issue with monetary bail in those cases was the use of a charge-based bail schedule with no individualized assessment about the individual's ability-to-pay. Here, the initial decision – albeit based on limited information – is an individualized financial assessment that can be revisited at initial appearance.

The larger policy question is, do we even want to use something like this matrix? Are we simply creating a new bail schedule with made up monetary bail amounts? Or is this necessary in order to provide judges with some sort of guidance and to ensure consistency in the bail amounts set across the state? One of the main reasons behind the creation of the old uniform fine and bail schedule was to ensure uniformity and fair treatment across jurisdictions. As far as the amounts, I set the maximum amount at $25,000 (because the maximum amount on the old bail schedule was $25,000 for a 1st degree felony), and then graduated the amounts down

based on the poverty level percentage. We could put a specific dollar amount in each box or list a range of amounts.

Mr. Mauro: I like the idea of using a matrix. Right now judges are looking at a probable cause statement and when concerns are raised in the PC (they may or may not have a PSA), judges are erring on the side of caution and imposing a larger monetary bail amount that keeps the person in jail at least until the first appearance, and maybe even the second appearance. I like this better. My question for the group is, how much will we be using this as a release tool when judges are supposed to impose the least restrictive conditions and other services are available? How would this be helpful if the other tools are available for pretrial release?

Judge Harmond: The way I interpret HB 206, monetary bail is something you consider after you consider everything else. If monetary bail is appropriate, judges will need something to assist them in setting monetary bail in a non-arbitrary manner. I don't see this as the first thing I would look at, but maybe one of the things I would take into consideration if I determine monetary bail is appropriate.

Judge McCullagh: We want to be sure to associate monetary bail amounts with failure to appear risk. The theory is that a person will lose their money if they don't show up to court. Money makes some logical sense if we are looking at the failure to appear score. I think the tool should be more sophisticated. A person's gross income in 2019 probably isn't the same now. In 2020, 20% of individuals are unemployed. We should really be asking about their last 2-3 months of income, rather than their gross annual income. We should be more focused on what they make right now, not what they made last month. What matters is what they have in the bank and what they can bond out on right now. As a general idea this is a good one, but we need to change it to reflect actual current income.

Judge Eddington: I would agree with both of those comments.

Shane Bahr: Are there other states using a similar matrix?

Ms. Williams: I know of a few other states using a similar concept, but I have never seen a matrix that looks exactly like this. The Vera Institute created an ability-to-pay calculator for NY that asks income-based questions and spits out an affordable monetary bail amount. It looks kind of like Turbo Tax and it calculates not only how much money the person can afford, but by what method (cash, secured bond, unsecured bond, partially secured bond, etc.).

It sounds like there is general consensus that we should be using a matrix. If that's the case, I agree with Judge McCullagh that the matrix should be tied to failure to appear risk and that it would be better to ask more questions. The problem is that I have no way to provide judges with more income information at the PC phase. The more nuanced information regarding current income will have to be determined at initial appearance. Understanding that, is the committee ready to move forward with this matrix?

Judge Robison made a motion to move forward with the ability-to-pay matrix. Mr. Mauro seconded. The motion passed unanimously.

Ms. Williams: Now that the policy decision behind using the matrix has been made, I'd like to seek the committee's help in developing a draft to take to the Boards. Are there any thoughts on the $25,000 maximum and whether we should use determined amounts in each box based on a % reduction, or whether we should incorporate a range of dollar amounts?

Mr. Mauro: Is the maximum amount $25,000 or $2,500? Ms. Williams: I used $25,000 because that was the maximum amount on our old bail schedule. I think that's high, especially if someone is charged with a low level misdemeanor. This shouldn't be charge-based, but maybe we could incorporate guidance that the higher amounts should only be used in serious cases, or maybe we account for that by using a range of amounts?

Mr. Mauro: We see a lot of bail amounts that are higher than they should be. The amounts aren't based on the charge or the danger posed by the individual, and sometimes a higher bail amount is set after the person has already bailed out. We need to standardize this so those sorts of things aren't happening.

Judge McCullagh: Prosecutors are supposed to include a person's pretrial release status in the Information, but they almost never do it. As a court, we can do a better job at enforcing that requirement. As part of the executive branch, prosecutors can get pretrial release information from the jail. That requirement was intended to ensure the assigned judge knew that the person was already out on pretrial release and under what conditions, including any monetary bail amount. A person shouldn't be posting monetary bail set by a previous magistrate and then having a warrant issued for a different amount. We have a mechanism in the criminal rules to ensure that doesn't happen and we need to utilize it.

There is Utah caselaw discussing unreasonably high bail amounts for minor offenses. It's a good idea to set lower amounts for petty offenses and infractions, and have a separate scale for district court cases. That would acknowledge the fundamental difference between infractions, misdemeanors, and more serious offenses.

Judge Harmond: We need to get away from tying monetary bail to the seriousness of the offense. HB206 includes a mechanism to deal with that. What we should be focusing on is whether the person is likely to show up to court, and considering ability to pay when setting amounts. Most of the cases we see are class A misdemeanors. I don't think we need to go as high as $25,000.

Mr. Mauro: That is a cultural shift we need to implement. We got used to the idea of equating monetary bail with the seriousness of the offense. The statute does allow a person who presents a danger to the community to be held longer. That should be considered separate and apart from their likelihood to appear at the hearing.

Judge McCullagh: I agree with Judge Harmond. The maximum amount should be lower and we should focus on the likelihood of failure to appear. There will be exceptions based on individual circumstances, but as a general idea the max should be $5,000.

Judge Harmond: We should include instructions on the bottom explaining under what circumstances the matrix should be used and referencing HB206, telling judges what they should be looking at first.

Judge Robison: I agree with the $5,000 max because we are only talking about appearance and not the severity of the charge. You can always issue a no-bail hold on more serious offenses.

Judge McCullagh: The matrix should also include a breakdown of the $5,000 based on the failure to appear risk score.

Mr. Mauro: I agree. Public safety risk should be considered separately from failure to appear risk.

Judge Harmond asked Judge McCullagh to assist Ms. Williams in developing a risk-based structure for the monetary amounts, and providing a mechanism for calculating the last four weeks of income.

Ms. Tangaro: I agree with the $5,000 max.

Ms. Rodier-Whitbe: I am a member of the Utah Council on Victims of Crime. I am concerned with the $5,000 amount. I understand that this is only related to appearance in court and that a no-bail order can be issued, but $5,000 sounds like such a low amount for victims who have been traumatized and are fearful of seeing the perpetrator in court. $5,000 may seem high for other individuals, but for victims it's really, really low.

Ms. Williams: Your point is well taken and I'm guessing you won't be the only one concerned with the amount. I think this will be a cultural shift for everyone. The reason that this makes people nervous is because money is arbitrary, money is not a proxy for risk. That's the case now for victims of domestic violence whose spouse can easily afford to bond out of jail. When HB 206 goes into effect, we will have to consider someone's ability to pay, but we should also be looking at an individual's public safety risk.

Ms. Rodier-Whitbe: I agree with you, but the crime victim's view is narrower and $5,000 is so small in comparison to the trauma they faced. I think the amount should be higher and closer to $15,000, but I'm only looking at this from the victim's point of view.

Representative Hutchings: When considering the dangerous or violent nature of the individual, how difficult is it to do a no-bail hold? It is my understanding that release is required except under the most egregious circumstances. There is a Constitutional right to be released from incarceration. How do we communicate information about whether or not someone is

dangerous? We ran into this when we first started screening individuals under JRI. Law enforcement was extremely upset and felt that people were getting out of jail that shouldn't be. How do we manage that concern and do we have the constitutional authority to broadly issue no-bail holds?

Judge Harmond: The court has to determine the least restrictive conditions necessary to ensure the safety of the public and the safety of victims. HB206 now includes a long list of factors that the court can consider when making those determinations. Ms. Rodier-Whitbe is right that this is something people will react to viscerally at first until they understand how the system is set up.

Representative Hutchings: I am not concerned about the visceral part, I am concerned about when a murder occurs after someone is released on a low bail amount causing a policy shift based on anecdotal stories - the scary factor. We received a lot of angry feedback from LE after JRI. Some included real life stories. We will be dealing with reality and perception.

Judge Harmond: The court is not bound by the matrix. Judges will have discretion and the matrix won't prevent a no-bail hold.

Ms. Williams: I agree. The fundamental issue is that money is arbitrary in relation to public safety risk. The matrix is putting a Band-Aid on a broken system. We need start transitioning to a better system. If Salt Lake is able to implement the 24-48 time-to-file and initial appearance changes, we will have a good template to model.

A majority of the committee has agreed to a maximum of $5,000, so I'll go with that and graduate it down. I will also incorporate the failure to appear risk information Judge McCullagh puts together.

Judge Harmond: Ms. Williams will meet with Board of District and Justice Court Judges to discuss the issue further. The final product may look somewhat different but this is a good place to start.

Adjourn:

There being no further business, the meeting was adjourned with no motion. The meeting adjourned at 1:30 pm. The next meeting is scheduled for August 6 at 12:00 p.m. via WebEx Video Conferencing.