

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

Webex video conferencing  
November 5, 2020 – 12 p.m. (noon) to 2 p.m.

<b>MEMBERS:</b>	<b>PRESENT</b>	<b>EXCUSED</b>	<b>GUESTS:</b>
Judge George Harmond, <i>Chair</i>	x		Sheriff Nathan Curtis
Heidi Anderson		x	Sheriff Paul Wimmer
Wayne Carlos		x	Brody Arishita for Heidi Anderson
Judge Keith Eddington	x		Paul Barron for Heidi Anderson
Josh Graves	x		Sheriff Kelly Sparks
Rep. Eric Hutchings	x		Dyon Flannery for Wayne Carlos
Andrea Jacobsen	x		Lt. Tyler Fails
Comm. Lorene Kamalu	x		Chief Matthew Higley
Judge William Kendall	x		Rena Cowley
Cpt. Corey Kiddle	x		Josh Esplin
Joanna Landau	x		Sheriff Chad Jensen
Richard Mauro	x		Rep. Stephanie Pitcher
Judge Brendan McCullagh	x		Sheriff Steve Labrum
Judge Jeanne Robison	x		Dep. Chief Shanda Gonzalez
Reed Stringham	x		Sheriff Tracy Glover
Cara Tangaro	x		Yvette Rodier-Whitbe
			Jojo Liu
			Lt. Shalon Shaver
			Lt. Roy Hall
			Mike Drechsel
			Scott Burns
			Judge Mary Noonan

*\*3 call-in numbers couldn't be identified*

**STAFF:**  
Keisa Williams  
Minhvan Brimhall

**1) Welcome and Approval of Minutes (Judge Harmond):**

Judge Harmond welcomed committee members and guests to the meeting. The committee considered the minutes from the October 1, 2020 meeting. With no objections or further discussion, Commissioner Kamalu moved to approve the minutes as drafted. Judge Robison seconded the motion. The minutes were unanimously approved.

## 2) PSA – next generation:

- SID numbers
- Sample PSAs

Judge Harmond: The committee materials include an example of the public safety assessment (PSA) in use in New Jersey. The New Jersey PSA shows a list of the cases or charges associated with the answers to each risk factor. That would give judges a lot more information and would streamline their review of criminal history and failures to appear. Is this something that the committee would like to pursue?

Judge Robison: I am supportive of it. Feedback from judges in my district is that they don't feel as though they have sufficient information to make the findings required under HB206. More information would result in more informed release decisions.

Ms. Williams: Because Utah's PSA doesn't list the source(s) behind the answer to each factor on its face, judges would have to spend an inordinate amount of time digging through the system to find it themselves. New Jersey's version would allow judges to see severity and charge information immediately. It would also be more transparent for attorneys. Everyone would know exactly where the information was coming from to ensure its accuracy, and the case citation would make the search quick and easy if the judge or parties wanted more information about a particular offense or case. However, with this level of detail, it's unlikely that the PSA could remain public.

Judge Harmond: As the committee knows, one of the problems we've had is matching a defendant's state identification number (SID) with all of the defendant's cases statewide. We've been working on getting more SIDs and increasing the match rate. One of the amendments to the rules of criminal procedure requires prosecutors to provide SID numbers in their Information if the defendant was arrested. Court clerks will copy those numbers into the case file. Part of the grant funds from CCJJ will cover programming to automate that process. A unique SID field will be added to the e-filing system for prosecutors and, if entered, the SID will be automatically added to the case file.

Ms. Williams: As you recall, the committee knew very early on that the SID number was critical, not just to generate PSAs, but also to make sure that every case is included in the PSA calculation. We've been working on those improvements since the beginning and are continuing to do so today. That work will be critical as we focus on the next generation of PSA.

Judge Harmond: Law enforcement has been working hard alongside us to increase their SID submission rates through the PC system. We really appreciate their efforts.

Representative Hutchings: The committee had a long conversation about the number of cases without good identifiers a couple of years ago and discussed a need to get fingerprints early on in the process. Should we reignite that conversation to ensure that when someone is arrested, we are gathering enough information to generate an accurate history?

Judge Harmond: One issue is that the SID number isn't generated by law enforcement. Law enforcement submits fingerprints to BCI, and BCI assigns or reports the SID back through the system. The problem lies in matching that SID up automatically when a case is filed by a prosecutor.

### **3) Ability-to-pay Matrix Revisions**

- Clarifying language
- Match table columns

Ms. Williams: We have received a lot of feedback about the Ability-to-Pay Matrix and it appears there may be some confusion. The proposed language clarifies that the recommended monetary bail amounts are not maximum caps. Those numbers are simply recommendations and judges have the discretion to deviate. These are fact-based decisions. As far as the changes in the chart on the left, those aren't substantive. In talking with the IT department, in order for the ability-to-pay programming to work properly, the ranges in the columns in the left-hand table need to match the ranges in the columns in the right-hand table. The numbers I added still match the federal poverty guidelines. Another comment we've received is that the \$5,000 amount seems too low. I think that results from a misunderstanding of the matrix. That amount is a recommendation, not a cap. Judges can set a number above \$5,000, including a number outside an individual's ability-to-pay.

Mr. Johnson: I suggested removing the term "affordable bail." That term isn't used elsewhere and I don't think it's clear. It makes more sense to say that monetary bail may be set in an amount that exceeds a defendant's ability-to-pay, provided the judge conducts an individualized assessment of ability-to-pay and risk.

Mr. Mauro: I have concerns about that. I think the general tenor and tone and intent of HB 206 is to make bail affordable. HB 206 seems to suggest that bail should be 1) affordable, and 2) imposed when someone is a flight risk. Now we appear to be backing away from HB 206's presumption of release and mandate to impose the least restrictive conditions. Ability-to-pay is a very important factor to consider. I understand that judges have discretion, but it confuses the issue to say that a higher amount may be set and these guidelines can be disregarded. I recommend that we not adopt the proposed language.

Judge Harmond agreed with Mr. Johnson and recommended deleting "defendant does not have the right to affordable bail."

Mr. Johnson: The important part of that statute is the requirement that judges consider ability-to-pay. A question that's come up is, do judges have to set an amount that a defendant can afford? I don't think that's necessarily the case. The message on the matrix should be that judges must consider ability-to-pay, but they have discretion to set bail over and above that amount.

Mr. Graves: I agree that we should strike the “affordable bail” language because I don’t think it’s necessary. To Mr. Mauro’s point, the sentence with the example about a defendant with an income higher than 200% alleviates any concern about ability to pay. Aren’t higher income defendants the primary focus? The 200%+ range is probably when an amount above ability-to-pay would be least the restrictive means to ensure appearance.

Judge Robison recommended amending the second sentence to: “Judges continue to have the same discretion to deviate from the recommended amounts as they had under the uniform fine and bail schedule, provided a judge conducts an individualized assessment of ability-to-pay and risk.” I agree that we need to stress that judges should be making individualized assessments, but I share other members’ concerns that when we say judges can set amounts higher than the defendant can pay, it seems like we are suggesting that judges do that.

Representative Hutchings: I have concerns with the way it’s worded because I don’t want to give the impression that we determine and set bail amounts in order to generate additional revenue. I like that we’re steering towards risk as the primary factor and I would recommend finding a way to emphasize that risk should be considered first, with ability-to-pay as a secondary consideration.

Ms. Tangaro: Risk can be managed in other ways, including pretrial services and GPS monitoring. I don’t think we should back down on the monetary bail issue.

Mr. Mauro recommended starting the first sentence with, “Judges should ordinarily impose bail based on a person’s ability to pay, which is highly fact dependent.” That comports with the intent of the legislation.

After further discussion, the committee made a few additional minor edits to the proposed language. Mr. Mauro moved to approve the Ability-to-Pay Matrix as amended. Judge McCullagh seconded the motion and it carried unanimously. The matrix will be reviewed by the Policy and Planning Committee on November 6<sup>th</sup>.

#### **4) Public Education Event(s)**

- Media/Press Releases

Judge Harmond pointed to the press releases and news articles included in the packet. It’s clear that the Ability-to-Pay Matrix and other reforms are not well understood. Does the committee think it’s a good idea to organize public education sessions around the state to explain HB 206-related reforms and answer questions? Are there other ways to educate the public? Are there other entities that might be willing to take this on, like CCJJ?

Mr. Mauro: I think that’s an excellent idea. This is a cultural shift. We need bail reform, but we need to do it in a meaningful way and in a way that makes sense. The SLLDA is willing to help in any way we can. The educational process is very critical.

Ms. Tangaro: I agree. I think the sessions should include a public defense attorney, a prosecutor, and a state representative.

Representative Hutchings: During these sessions, there will be a concern that dangerous people are being let out of jail and that the state is being reckless. We need to be able to provide evidence that reassures people that we are taking risk into consideration, and that the reform is focused on keeping dangerous people off the street and keeping non-dangerous people from being incarcerated. Even though judges are no longer setting massive bail amounts, we are keeping dangerous people where they need to be.

Mr. Mauro: SLLDA has seen a high number of motions for pretrial detention from prosecutors alleging that people are public safety risks. As we go forward, we need think about what constitutes a public safety risk and what detention hearings should look like. Prosecutors are filing motions for detention on most domestic and assault cases.

Representative Hutchings: Public safety should be managed in a very different way than monetary bail. We are moving away from using a dollar amount to ensure the safety of others. We are using other mechanisms to do that like pretrial detention. Constituents are asking for assurances that dangerous people won't get out while waiting for sentencing.

Judge Harmond: These are all important points. How are we going to educate the public and who should we ask to lead that effort and sponsor those events? How do we get the message out that bail reform is important, including the changes in caselaw and not just what the legislature has done? Who should be included on the panel?

Rep. Hutchings: I would recommend CCJJ. They have a broad stakeholder group and are high enough at the state level to sponsor those conversations.

Judge Robison: I think we learn better from each other. I recommend that judges educate judges and sheriffs educate sheriffs, etc. We should take leadership within our own groups.

Judge Harmond: I would like to see Commissioner Kamalu or someone from the county level on the panel.

Commissioner Kamalu: Data and science will be very important when educating others on the process and the reason behind those processes.

Ms. Landau offered to talk to Kim Cordova at CCJJ to see if they might be willing to help coordinate these efforts.

Judge Harmond: It is important for people to understand that we are implementing evidence-based practices. Please read the media and press release information in the packet. Much of that information is inaccurate. Each member represents a stakeholder group. I would ask you to talk with your stakeholders and explain the reforms.

Mr. Graves: The panel should include a crime victim advocate. We are filing a good amount of pretrial detention motions and we should provide some assurances to the crime victim groups that this is a workable bill for the reasons that we have already stated. I recommend reaching out to the legal clinic or domestic violence coalition members to see if anyone would like to comment on the impacts this has had on those services.

Ms. Rodier-Whitbe agreed and offered to speak to the Crime Victims Council.

Ms. Williams asked Ms. Rodier-Whitbe if the Crime Victims Council is it still concerned about the gap in time between when a judge's PC release decision is made, and the time-to-file deadline for prosecutors. Prosecutors don't file motions for pretrial detention until the time of filing.

Ms. Rodier-Whitbe: Yes, absolutely. That is probably the biggest concern. The gap in time is scary for victims in domestic violence cases. The \$5,000 amount isn't sitting well with victims, but I think that is more of an educational process.

Ms. Williams: Salt Lake County is working on narrowing that timeframe, getting cases screened and pretrial detention motions filed much more quickly. Would it be beneficial for the SLDA's office to put together some kind of CLE or have a conversation with prosecutors across the state about that new process? We know the gap in time issue is a critical piece of the puzzle, but appropriations and legislative changes will take some time. It may be helpful to start working on ways we could reduce that window sooner rather than later.

Mr. Graves: The SLDA's office is establishing small teams in each screening unit. Their objective will be getting an in-custody list from the jail every morning and putting the case and detention motions together as quickly as possible. We are dedicating attorneys and paralegals to that effort to improve turnaround times. Representative Pitcher and I are addressing HB 206 with district and county attorneys in a couple of weeks. I already planned to talk about some of the things we're working on. That would be a good place to start the conversation. Smaller jurisdictions may find it easier because their volume is lower and they may have closer relationships with their local law enforcement agencies.

Mr. Mauro: The SLLDA office is looking into how quickly we can hold pretrial detention hearings. The statute loses its value if defendants are waiting a long time. We would like to hold detention hearings within three days.

Judge Harmond asked all committee members to bring ideas to the next meeting about outreach to their stakeholder groups.

##### **5) Grant bail commissioner authority on certain misdemeanors using fine schedule**

Judge Harmond: An issue brought to us by some of our law enforcement partners is the delay between booking and a judge's review and release decision. Most jails are no longer using the old uniform fine and bail schedule to set bail on misdemeanors, which means that all

defendants must wait for a judge to log into the system and review PC affidavits. One idea for addressing that issue is amending the statute to allow bail commissioners the authority to set bail using the fine schedule for certain low-level misdemeanors. That may be a more efficient way to get low-risk individuals out of the jail more quickly. That is ultimately a policy decision for the legislature, but the section of the code granting bail commissioner authority already exists.

Ms. Williams: COVID is making this issue even more critical. The bail commissioner section of the code was not amended under HB 206 [Ms. Williams read relevant portions of 17-32-1]. The idea is to limit bail commissioner authority to exclude certain enumerated misdemeanor offenses (DUI, DV, etc.), and to limit the amounts to no more than the highest amount listed on the fine schedule. Two circuit court cases indicate that as long as the court conducts an ability-to-pay analysis within 48 hours of arrest, it is not a violation of Constitutional rights for indigent defendants to wait a little longer to receive a benefit bestowed upon wealthy individuals. Having said that, not all courts agree.

Cpt. Kiddle: The SLCo. jail no longer uses the bail schedule. Anyone coming into our facility must wait until we get a determination back from a judge before they are processed. So far, SLCo. judges have been really responsive. We are getting determinations back approximately 1-5 hours after submission. I don't think we would have a need to go back to using the bail schedule because people with low-level charges are usually taken out by pretrial services. The current process is working very well.

Judge McCullagh: If a bail commissioner sets bail and a person pays it, and then a judge reviews probable cause and says a financial condition of release isn't warranted, there is no way to reverse that process and get the money back.

Chief Perry (Weber County): We don't have the space in booking to hold onto individuals for very long. Prior to COVID, if individuals couldn't bail out we had to dress them in and send them back to housing. That involves a search process. Shortly after dressing them in we would get a response back from a judge and the person would be released. It would be beneficial for us if we had a quicker turnaround time from judges, and for bail commissioner to have the authority to release people in a couple of hours.

Judge Harmond: This may not be something that every jail would be interested in, but it would benefit a number of them.

Chief Higley (Utah County): We fall somewhere in between Salt Lake County and Weber County. It's difficult to accurately measure because of all the COVID restrictions. I can't say that we wouldn't want that authority. I understand the concern Judge McCullagh raised. From a booking perspective, when someone comes in on a low-level offense, we use a matrix to determine whether they are a danger to the community. If not, we let them out. As far as timely responses from judges, it sounds like we are a little better than Weber County, but not as good as Salt Lake County.

Sheriff Jensen (Cache County Sheriff, President of Sheriff's Association): Every jail in the state has different housing levels and circumstances. Generally speaking, some people on low-level misdemeanors need to be booked into jail because they are a danger to themselves or the public (i.e., domestic assault). I don't think there is one way to fix this issue. I accept people in my jail that Garfield County may not accept in theirs. We are certainly willing to look at the statute to see what it does for the sheriffs as individual agencies.

Judge Harmond: It sounds like every jail needs the flexibility or discretion to handle things in a way that works best for them. There is no one size fits all solution. We should be sensitive to that. Is it the consensus of the committee that we move forward and pursue this idea, to discuss it with law enforcement and maybe propose legislation to modify the statute? Are there any objections to pursuing that idea?

Lt. Hall (Cache County): Before HB206, most individuals arrested on low-level charges would be booked and released within a couple of hours. Now, individuals could sit in our jail for up to 20 hours waiting for a judge's release decision, meaning we end up taking individuals on Class B misdemeanors to housing. HB 206 has essentially turned some low-level offenses into a no-bail hold for 24 hours.

Judge Harmond: All of those points are well taken and we should look into ways to assist the jails. After further discussion, the committee agreed to pursuing a recommended amendment to the bail commissioner statute.

#### **6) URCrP Amendments:**

- Forms Subcommittee

Judge Harmond: The court received several public comments on HB 206-related amendments to the Rules of Criminal Procedure. The committee has received additional feedback on legal issues related to pretrial detention motions and hearings. The Rules of Criminal Procedure Committee asked that the Pretrial Committee take a stab at drafting proposed rule amendments in response to the public comments and feedback. I recommend creating a subcommittee to review the feedback included in the packet and to develop rule drafts and other recommendations for the committee's consideration.

The subcommittee will consist of the follow members:

- Rich Mauro (along with David Ferguson from his office)
- Josh Graves
- Brent Johnson
- Cara Tangaro
- Judge Kendall
- Cpt. Kiddle
- Andrea Jacobsen
- Keisa Williams, Staff Attorney

Commissioner Kamalu moved to create a subcommittee. Ms. Tangaro seconded and the motion passed unanimously.

**7) LE providing more relevant, factual information in PC affidavit re appearance or public safety risk**

Judge Harmond: Another question posed in feedback is whether it would be helpful for law enforcement officers to provide additional facts in PC affidavits related to appearance and public safety risk. Oftentimes, law enforcement has access to information on those two issues that is unavailable to judges at the time an initial release decision is made, but we would need to be extremely careful about what information is shared and it would need to be factual. What are some ideas to improve the information available to a judge at the PC phase?

Sheriff Jensen: The PC system includes a box where arresting officers can ask for no-bail or higher bail, but UCJIS doesn't allow us to disseminate criminal history information. Because the PC statement is a public record and is accessible to the media, law enforcement is limited in what information they can include.

Ms. Williams: The next generation PSA would include that kind of information and it would likely no longer be a public record. It might be helpful for a judge to know whether an individual is out on probation or parole. Currently, the PC on-call judge rarely has that information.

Sheriff Jensen: If someone is out with a private probation provider, we wouldn't know that. Law enforcement systems don't talk to each other so we don't always know if someone has been released from another jail.

Ms. Tangaro: The rules of criminal procedure committee is looking at making changes to Rule 16 and may be approaching the legislature about those changes. We may be able to do something similar on this issue.

Mr. Mauro: This is a complex question with interrelated issues.

Ms. Williams recommended adding this issue to the new subcommittee's charge. Judge Harmond agreed and added it to the subcommittee charge.

**Other Business:**

Judge Harmond: The data collection subcommittee will be meeting soon and Professor Paul Cassel will be presenting on his pretrial research in Cook County, IL, among other things.

**Adjourn:**

There being no further business, the meeting was adjourned at 1:37 pm with no motion. The next meeting is scheduled for December 3, 2020 at 12 pm (noon) via Webex video conferencing.