Agenda
Pretrial Release & Supervision Committee Meeting
November 5, 2020
12:00 – 2:00 p.m.
Meeting held via WEBEX

12:00	Welcome and Approval of Minutes • October 1, 2020	Action	Tab 1	Judge George Harmond
12:05	PSA – next generation • SID numbers • Samples	Discussion	Tab 2	Judge George Harmond
12:25	Ability-to-Pay Matrix Revisions • Clarifying language • Match table columns	Action	Tab 3	Keisa Williams
12:55	Public Education Event(s) • Media/Press Releases	Discussion	Tab 4	Judge George Harmond
1:15	Grant bail commissioner authority on certain misd. using fine schedule	Discussion	Tab 5	Judge George Harmond Keisa Williams
1:35	URCrP Amendments: Form Subcommittee	Action	Tab 6	Judge George Harmond
1:45	LE providing more relevant, factual info in PC affidavit re appearance or public safety risk	Discussion		Judge George Harmond
2:00	Adjourn	Action		Judge George Harmond

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

2020 Meeting Schedule:
December 3, 2020

2021 Meeting Schedule:

January 7, 2021	April 1, 2021	July 1, 2021	October 7, 2021
February 4, 2021	May 6, 2021	August 5, 2021	November 4, 2021
March 4, 2021	June 3, 2021	September 2, 2021	December 2, 2021

Tab 1

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

Webex video conferencing
October 1, 2020 – 12 p.m. (noon) to 2 p.m.
DRAFT

MEMBERS:	PRESENT	EXCUSED
Judge George Harmond, Chair	x	
Heidi Anderson		x
Wayne Carlos		x
Judge Keith Eddington	x	
Josh Graves	x	
Rep. Eric Hutchings	x	
Andrea Jacobsen	x	
Brent Johnson	x	
Comm. Lorene Kamalu	x	
Judge William Kendall	x	
Cpt. Corey Kiddle	x	
Joanna Landau	x	
Richard Mauro	x	
Judge Brendan McCullagh		x
Judge Jeanne Robison	x	
Reed Stringham	x	
Cara Tangaro	x	

GUESTS:

Josh Esplin
Rep. Pitcher
Lt. Cole Warnick
Dyon Flannery (for Wayne Carlos)
Jojo Liu
Paul Barron (for Heidi Anderson)
Brody Arishita (for Heidi Anderson)
Yvette Rodier-Whitbe
Renae Cowley

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 August 6, 2020 meeting. With no objections or further discussion on the minutes, Judge Kendall moved to approve the minutes. Judge Robison seconded the motion. The minutes were unanimously approved.

Updates:

- **Various training sessions**
- **Feedback from stakeholders and training sessions**
- **Pretrial guide, forms, memos**
- **Unsecured Bond status**
- **JAG grant status**
- **Rules of Criminal Procedure**

Ideas for future Pretrial Reforms:

- **Data collection, sharing, and reporting issues**
- **Shorten time-to-file deadline**
- **Amend 77-20-1(2) to broaden categories of no-bail holds**
- **Hold initial appearances remotely within 48 hrs of arrest**
- **Community pretrial support**

Ms. Williams: I have been conducting various presentations and training sessions around the state over the last several weeks, including at the Annual Judicial Conference, local bench meetings, boards of judges, clerks of court, justice court clerks, the Department of Public Safety, Utah Association of Counties, Utah Prosecution Council, SLCo pretrial services, and with various other stakeholder groups. Ms. Landau will be hosting a CLE on October 30th for public defenders and criminal defense attorneys around the state.

Commissioner Kamalu: Ms. Williams' presentation on HB206 and Ms. Landau's presentation on the indigent defense commission were both effective. It was new to some of the rural counties but it was helpful for them to have an opportunity to express their thoughts with their peers.

Rep. Hutchings: In regard to training, when we were organizing real ID's with drivers' licenses, we made a bunch of videos. In-person training is great because you can ask questions, but it might be a good idea to create snippet videos or record of one of Ms. Williams' training sessions and post them somewhere so people could refer back to them.

Ms. Williams: I have a few videos of my trainings and I can send the links out to anyone who wants them. Please let your stakeholder groups know that I am happy to do local trainings for individual offices, local bar associations, etc.

Mr. Graves: Ms. Williams did a training for the SLDA's office. It was very insightful and the materials were great. We received many positive comments. A couple of weeks ago Will Carlson and I conducted an office-wide training covering what to expect starting today and I think it was well received. There is trepidation on our side given how significant of a shift this will be in how we approach prosecution, but I think everyone generally understands what is expected and required from our end of the bill. As far as implementation goes, it will just be a matter of

working out the unexpected problems that arise. I am developing a 10-15 minute presentation for dissemination across our law enforcement agencies, identifying the need for more detailed probable cause affidavits to assist magistrates making initial pretrial release decisions. That is something we hope to roll out in the next week or two.

Ms. Williams: Mr. Graves developed an amazing packet of materials for prosecutors that includes a guide, draft orders, etc., and he has been gracious enough to share those materials with all of the prosecuting agencies across the state.

Cpt. Kiddle: One of the biggest issues we've had is in getting arresting agencies to start providing SID numbers when they submit their PC affidavits. Last week we had 77% SID submission rate and we are working to get that number even higher.

Ms. Williams: I don't interact with arresting agencies as much as I do with the jails. I am happy to meet with them and provide the same training I did for the Department of Public Safety. I focused on the need for SIDs and explained how SIDs assist us in providing public safety and appearance information to judges. A lot of people don't realize that at the PC phase, judges don't have access to criminal history information. All judges have is the PC affidavit and a PSA if we can generate one.

Mr. Graves: I can incorporate some of the SID training materials in the presentation we are putting together for our officers. I'm not sure how many of them know where to locate the SID or if it is easily accessible.

Judge Kendall: When I'm on signing duty, having an SID streamlines the process. When I don't have a PSA or it's a questionable case and I'm considering detention, I can jump over to judicial workspace and look the defendant up to see their active cases and any warrants in our system.

Judge Harmond: Our bench has a bi-monthly meeting with defense attorneys, prosecutors, and jail staff from both Carbon and Emery counties. When we started talking about unsecured bonds and HB 206 there were a lot of blank stares. I think they have been working hard to be ready to go. Carbon County has a pretrial supervision program that has been a blessing because it gives us an option that we wouldn't otherwise have to release people who should be released.

Ms. Williams: All of the jails in the Seventh District are ready to process unsecured bonds. I have been surprised that many prosecuting agencies haven't trained or even informed their local law enforcement agencies on HB206 and related changes to pretrial practices. Law enforcement agencies have been upset, saying: Why didn't you tell us? Why did the courts wait until the last minute? Does anyone have thoughts on how we could improve communication to ensure the information is relayed, and relayed timely?

Mr. Graves: Our challenge in Salt Lake County is the sheer number of agencies. We hold a monthly meeting with all of the chiefs, where we pass down information, but we are relying on

15 different individuals to pass that information on to their staff. It doesn't always trickle down the way it needs to. It is certainly something that needs to be improved upon with training. Many of our agencies have their own counsel and they like to be included, but given their lack of connection to criminal prosecution, I'm not sure they are best suited to provide that type of training. I am hoping by releasing the 15-minute educational video that they can watch on their own time, we can start spreading the word better.

Commissioner Kamalu: The Davis County prosecutor may not see training law enforcement agencies as their responsibility. We also have 15 agencies and unless the county attorney is asked to do so, I'm not sure they would.

Ms. Williams: That makes sense, although if prosecutors aren't training their law enforcement agencies, it puts me in an awkward position. I cannot give legal advice. I provide information and then encourage them to talk to their county attorneys.

Ms. Tangaro: Look at the public comments for URCrP rule 16. Prosecutors from almost every agency responded. Each agency has identified a person in charge of legislative rules and changes.

Ms. Williams: I will take a look at that. That may be the answer. If I can get an email distribution list for those key people in agencies across the state, when something like this comes up I can send a mass email letting them know what we're working on and leave it in their hands.

I have been asking for and receiving substantive feedback on HB206-related reforms. Data is a common theme, with several people suggesting that we collect data and monitor the effects of the reforms on criminal activity, but not just criminal activity. The questions have been more granular – broken down by the charge type and severity, including what release decision was made. The data collection subcommittee will be studying those issues.

Rep. Hutchings: I haven't heard much or seen any data on crime rates, but one thing that keeps coming up is homelessness. Homeless individuals aren't being arrested as often, or maybe they are being booked and immediately released. If so, released to where? Released to the Jordan River? That is a pretty common threat and it hasn't slowed down. In a meeting this morning, people expressed concerns about 7200 South between State Street and the Jordan River. I don't know that there has been an uptick in crime, but people have been camped out everywhere. A lot of municipalities are frustrated. That element should be a part of the data we're tracking.

Judge Robison: It's difficult to get jurisdictions to become part of the solution. We run a homeless court and some jurisdiction won't participate. We are constantly working with centers to get that population into treatment, housing, employment, etc. So many of the municipalities want nothing to do with the homeless issue and they won't participate in such programs. It frustrates their efforts if they want those individuals out of their jurisdictions and off the streets. When people get housing vouchers, they can take advantage of employment offers. If

municipalities help us get cases resolved, those people won't come up with a warrant on a background check and things of that nature.

Mr. Mauro: I met with Chief Brown this morning to discuss those same issues. In conjunction with the DA's office, our office can do creative things to address the homelessness. Our initial meeting this morning was to discuss alternatives to the kinds of things Judge Robison is talking about. We need service providers in the same room to help us problem-solve on people who are habitually homeless and suffer from mental illness and drug addiction.

Mr. Graves: What specific data points do we need to capture to illustrate the outcomes? One concern I have is that the pandemic will skew the data. Jail spaces are opening up, but that's because of precautions related to booking. To the extent that we do collect data, we need to be aware that those numbers may not be entirely reflective of normal operations, and we may never get back to normal. I'd like to track the number of pretrial detention motions filed and the outcomes in those cases. One issue I'm curious about as it relates to the homelessness issue is how we are dealing with the lack of an address. We are asking for small monetary bail amounts as a means to notify those folks of a pending case, but we obviously don't have an interest in holding them. We need to figure out some kind of mechanism to address that issue, even if it's just a quick book and release to obtain their contact information.

Ms. Williams: I agree. It's going to be really hard to make a causal connection even if we get granular. Mike Jones, a prominent researcher in the pretrial field, has been working in conjunction with the National Institute of Corrections to update their "Measuring What Matters" document, and he was kind enough to send us a copy. The data collection subcommittee can use it as a guide to identify the outcomes that are important to Utah, and from that, determine what data is needed to accurately measure those outcomes.

One example of overlap between pandemic-related initiatives and HB206-related reforms are $119 warrants. In response to COVID-19 (and unrelated to HB206), the Third District bench began issuing $119 warrants. When a defendant fails to appear at their first remote hearing, the goal is to get them reengaged with the court. By issuing a warrant in the amount of $119.00, the court is instructing arresting agencies not to arrest the person, but to let the person know that they missed a court appearance and they need to contact the court. The problem has been in getting the word down to all of the line officers in the various arresting agencies in Salt Lake County. People are being arrested and taken to the jail, which has created a nightmare for the jail and pretrial services.

Ms. Jacobsen: The biggest problem is that $119 warrants usually aren't the only thing an individual is arrested for. They also incur new charges…and have an outstanding $5,000 warrant on another case, three AP&P holds, etc.

Mr. Graves: If a person is booked on a $119 warrant and they have other outstanding holds, you could release them on the $119 warrant, but they will be held until they can address the probation issue or the new offense. If they are booked solely on the $119 warrant, we should

get good contact information and just provide them with a promise to appear. It would be great to have case managers out in the community making contact with people, documenting that contact, and working with the court to get a hearing date scheduled.

Ms. Jacobsen: Our office is getting contact information from individuals brought in on a $119 warrant and letting the jail know that they can be released as soon as any other holds have been cleared, but we don't have court dates to give them. We just tell them they need to contact the court.

Mr. Mauro: We worked with Judge Kouris to develop the concept of $119 warrants. They are intended to be a solution to what Mr. Graves is talking about. In regard to data, it would be interesting to know how many people on $119 warrants are actually getting notice. The goal is to save jail days, get cases on calendars, and provide reasonable notice and time to report.

Judge Kendall: When someone doesn't show up, we issue a $119 warrant in conjunction with setting a court date six weeks out. Notice is sent using whatever information we have. If they don't show up on the second court date, we issue a more substantial warrant.

Ms. Williams: These are great ideas and not just for COVID. Any time a large-scale reform like HB206 is implemented, we should be paying attention to what's happening and be flexible enough to make adjustments. The victims' council and several prosecutors have expressed public safety concerns related to the gap of time between an initial release decision (24 hrs after booking) and an initial appearance (could be a week later). Judges making the initial release decision have very little information. That was an issue pre-HB206. The difference is that pre-HB206, high monetary bail amounts were commonly used as a method to detain. Prosecutors were less concerned about safety because there was a high probability that the person wouldn't be able to pay for their release. Now we know that practice is unconstitutional.

Because of the presumption of own recognizance release, least restrictive conditions, and ability-to-pay analyses, victims' advocates and prosecutors fear more people will be released, posing a significant danger to victims. That, to me, highlights the infrastructure issue we've been discussing. In the very least, I think the time-to-file deadline should be significantly reduced and initial appearances should be held within 48 hours of arrest. That would mean holding initial appearances 6 days a week, but judges could delay making that initial decision until all parties were present and they have much more information about the danger a person poses to a victim or the public. Under HB206, prosecutors could file a motion for detention in serious cases and, if granted, would have a little more time to prepare a case.

Another idea is something Judge McCullaugh brought up at the last meeting. A few years ago, the legislature expanded the no-bail hold eligible offenses to include misdemeanor DV offenses. Other states have expanded their ability to hold someone without bail by eliminating the charge-based component. Those states allow judges to hold someone without bail, regardless of the severity of the charge, provided the judge makes a substantial evidence/clear and convincing finding that the person poses a significant public safety or flight risk. I think if we

were going to make that recommendation, it would need to be coupled with the right to counsel and a very quick detention hearing with full due process rights.

Rep. Hutchings: I would love to see us explore that. With all of the stakeholders here, there is an opportunity to identify ways to move cases along with more timely appointments of counsel and more timely hearings. Counties would be the biggest benefactors of a streamlined system that frees up jail beds. This is a good time to look at the system as a whole and make improvements, but we need to be very specific with our "asks" at the legislature, including the amount of money required to accomplish it. We should also look to see whether grant funds are available.

Mr. Mauro: When a person is charged with a class B misdemeanor DV offense, or even a third degree felony domestic assault, what should the release/detention decision process look like under those circumstances, and what are the mechanisms a prosecutor needs to have in place (or wants to have in place) to indicate a public safety risk? How quickly can we accomplish everything? What are those hearings going to look like, and what kind of evidence is admissible? Our lawyers are really concerned about reasonable monetary bail sets. Before, monetary bail was set high as a means of detention because we don't know the answers to those questions. With the way HB 206 is written now, there must be consideration of reasonable bail very early in the process. If a public safety risk is alleged and detention is sought, the burden of proof should be on the prosecutor.

Judge Harmond: That seems to conflate the purpose of monetary bail with public safety risk. Those are two different things. Monetary bail is there to ensure someone will come to court. Public safety risks are addressed by other criteria set out in HB 206. We need information from prosecutors about criminal history and other factors to assess public safety. If a person is detained, it's because they pose a public safety risk. Monetary bail wouldn't be set because money only ensures appearance. Data collection will allow us to see how this works on the ground. Is it adequate or do we need a bit of time to see how it's going to work?

Mr. Mauro: I agree. They are supposed to be and should be two separate considerations, but judges are continuing to conflate the two and are setting high monetary bail amounts to address public safety. We are also seeing judges kick the ball down the road to the next hearing, which may be 10 days later.

Ms. Tangaro: I echo the same frustration. That has been my experience in Salt Lake as well. It is not my experience in a lot of other jurisdictions, but those jurisdictions have been issuing summonses. Salt Lake is unique in both how judges deal with it and how the DA's office deals with it.

Mr. Graves: Starting next week that should change. There will still be outstanding warrants with high bail sets from cases filed before October 1st, but not moving forward. The biggest challenge is getting the information to the court. In any criminal investigation, a patrol officer makes the arrest and someone is booked, but the officer isn't the detective. They aren't doing the follow-

up investigation, checking in with the victim 24 hours after the trauma has passed and they can reflect more clearly on what occurred to them, etc. The case takes time to build, especially in cases involving a violent crime or a sex case. I understand the 48-hour window and I think we need to work on the turnaround time to at least get the information needed for an educated decision. The question is how?

We also need to work out when the detention hearings are going to occur. Our interpretation is that if we file a motion for pretrial detention within the 96 hours of arrest, we need to make a proffer that states a reasonable case for detention. I am nervous about having detention hearings at initial appearance for several reasons. First, the assigned prosecutor, assigned defense attorney, and assigned judge aren't at initial appearance. How soon can the court get someone subject to these detention hearings before the assigned judge? Friday or the next Monday? These are the kinds of gaps that need to be addressed. I think the courts are generally good at getting a person on the next available scheduling conference before the assigned judge.

Ms. Williams: If I'm remembering correctly, New Jersey sets detention hearings 5 days following the initial appearance, but allows for a three-day extension. HB 206 doesn't address specific timelines. That may be something the committee could recommend for next session.

Ms. Tangaro: I think the court should hire special criminal magistrates that only handle detention hearings, and one or two magistrates to sign warrants. The hearings could be held remotely and could be statewide.

Committee members discussed concerns raised about the potential for an over-reliance on pretrial detention, or a continued use of high-bail sets as a means of detention, due to a lack of timely information.

Judge Kendall: There are certain categories in federal court that trigger the ability to request detention. In all my years of practice in federal court, I don't recall seeing monetary bail once. A person is either a risk to the public, a risk of nonappearance, or both, or neither. If they pose a risk they are detained, and if not, they are released with or without pretrial supervision. If we expanded the no-bail categories, it would help us get further away from using monetary bail as a mechanism to hold someone. The trick is in how to get information to the judge at 6 am Saturday morning for a booking Friday at midnight? Having a criminal magistrate or two, whose sole responsibility is to make those determinations and handle detention hearings, would be very helpful in getting people a timely hearing and quick determination of the issues.

Ms. Williams: Along with that would be a need for additional public defender resources. Holding initial appearances so quickly, all defendants would need representation at least provisionally.

Ms. Landau: The early appointment of counsel is extremely helpful, but not if defense counsel isn't given notice and time to prepare.

Judge Harmond: We need to a way to get information to the court, but we are much better off than we were a few years ago. I think we need to trust judges a little bit because they take these things seriously. From this discussion, it sounds like the real hang up is in getting information to the prosecutor and defense counsel. We probably ought to be thinking in terms of what data and mechanisms are available that would allow us to get as much information as possible about an individual defendant to those two parties so that they can, in turn, present that evidence to a judge in a manner that is consistent with the rules of evidence and whatever rules are appropriate at these hearings. What is your typical source of information? How can we modify that process or make it electronic and more efficient? That's where you're going to see some real improvement in early representation.

Ms. Williams: In looking at other states, one uses an on-call prosecutor that law enforcement can call to triage and help make arrest determinations, including whether to release the person on a summons or book them into jail. Law enforcement has a list of offenses that they can cite and release, and a list of offenses that they have to book. It was one way of streamlining the process. Another way is to have a 24/7 shop like SLCo pretrial that can research criminal history and provide information to all parties electronically.

Mr. Graves: I think the idea is workable in theory, but it's a resource issue and something that would need to be restructured. We have on-call attorneys to advise detectives and review warrants in the middle of the night.

Ms. Williams: I have been researching possible solutions to our lack of funding for statewide pretrial services. In one state, a non-profit community organization provides support and pretrial services (in a sense) at no cost. Volunteers from the community organization attend court proceedings. Before a defendant's case is called, the public defender stands up and says, "Who is here for defendant X?" The volunteer meets family and friends of the defendant in the hallway and uses a questionnaire to learn more about the defendant and his or her circumstances. Do they have a job? Are they the primary breadwinner? Do they have a place to stay? What are the consequences if they aren't released today? Is anyone willing to provide support to the defendant like rides to work, childcare, or rides to court? That is a way for defense counsel (who otherwise wouldn't have time to do it themselves) to humanize the defendant and provide the judge with much more information.

Adjourn:

There being no further business, the meeting was adjourned with no motion. The meeting adjourned at 2 pm. The next meeting is scheduled for November 5, 2020 at 12 pm (noon) via Webex video conferencing.

Tab 2

New Jersey Judiciary

Public Safety Assessment

Defendant: [redacted]	DOB: [redacted]	SBI #: [redacted]	FBI #: [redacted]
Complaint Number: [redacted]		PSA Run Date: [redacted]	

*** RECOMMENDATION TO COURT ***

RELEASE WITH CONDITIONS - WEEKLY REPORTING + HD/EM

Risk Scale: Failure to Appear

Low | 1 | 2 | 3 | 4 | **5** | 6 | High

New Violent Criminal Activity Flag: No

Risk Scale: New Criminal Activity

Low | 1 | 2 | 3 | 4 | **5** | 6 | High

Out of State Criminal History: **Yes**

Risk Factors:

1. Age at Current Arrest: **32**
2. Current Violent Offense: **No**
   - 2a. Current Violent Offense and 20 Years Old or Younger: **No**
3. Pending Charge at the Time of Offense: **No**
4. Prior Disorderly Persons (DP) Conviction: **Yes**
5. Prior Indictable Conviction: **Yes**
   - 5a. Prior Conviction: **Yes**
6. Prior Violent Conviction: **1**
7. Prior Failure to Appear Pretrial in Past 2 Years: **2 or More**
8. Prior Failure to Appear Pretrial Older Than 2 Years: **No**
9. Prior Sentence to Incarceration (14 Days or More): **Yes**

Number of Current Charges: 4

Case ID	Offense Date	Charge	Aux Charge	Degree	Violent	NERA	DV Related	Source
[redacted]	08/05/2017	2C:35-10A(3) POSS CDS - > 50G MARIJUANA, 5G HASHISH		4	NO	NO	NO	[redacted]
[redacted]	08/05/2017	2C:35-7.1A POSS/DIST WITHIN 500 FT CERTAIN PUBLIC PROPERTY		3	NO	NO	NO	[redacted]
[redacted]	08/05/2017	2C:36-2 USE/POSS W/INTENT TO USE DRUG PARAPHERNALIA		D	NO	NO	NO	[redacted]
[redacted]	08/05/2017	2C:36-2 USE/POSS W/INTENT TO USE DRUG PARAPHERNALIA		D	NO	NO	NO	[redacted]

New Jersey Judiciary

Criminal and Court History

Defendant: [redacted] **DOB:** [redacted] **SBI #:** [redacted] **FBI #:** [redacted]

Complaint Number: [redacted] **PSA Run Date:** [redacted]

Defendant Currently on Pretrial Monitoring: No

Pending Charge at the Time of Offense: No

Prior Disorderly Persons (DP) Conviction: Yes

Case ID	Disposition Date	Offense Date	Charge	Aux Charge	Degree	State	Source
[redacted]	02/19/2016	07/29/2015	2C:29-1B OBSTRUCT ADMIN OF LAW-OBSTRUCT CRIMINAL INVESTIGATION		D	NJ	[redacted]
[redacted]		07/14/2005	2C:29-2 RESISTING ARREST; ELUDING OFFICER		D	NJ	[redacted]
[redacted]		07/02/2004	2C:18-3A CRIMINAL TRESPASS-UNLICENSED ENTRY OF STRUCTURES		D	NJ	[redacted]

Prior Indictable Conviction: Yes

Case ID	Disposition Date	Offense Date	Charge	Aux Charge	Degree	State	Source
[redacted]	10/21/2016	11/05/2015	2C:35-10A POSS CDS/ANALOG - SCHD I II III IV		3	NJ	[redacted]
[redacted]	01/08/2016	11/06/2015	2C:35-10A POSS CDS/ANALOG - SCHD I II III IV		I	NJ	[redacted]
[redacted]	06/07/2010	05/19/2009	2C:5-2 CONSPIRACY	2C:12-1B(7) AGG ASSAULT-ATTEMPT/CAUSE SIGNIFICANT BODILY INJURY	3	NJ	[redacted]
[redacted]	02/19/2008	10/09/2006	2C:18-2 BURGLARY-NO BI AND/OR UNARMED		3	NJ	[redacted]
[redacted]	02/19/2008	10/17/2007	2C:35-7 CDS/ANALOG - DISTRIBUTE ON/NEAR SCHOOL PROPERTY/BUS		3	NJ	[redacted]
[redacted]	09/16/2005	02/27/2004	2C:39-10 VIOLATION OF REGULATIONS PROVISION - FIREARMS		4	NJ	[redacted]
[redacted]	09/16/2005	04/20/2004	2C:39-5B UNLAWFUL POSSESSION OF WEAPONS - AIR/SPRING PISTOL		3	NJ	[redacted]

Prior Violent Conviction: 1

Case ID	Disposition Date	Offense Date	Charge	Aux Charge	Degree	State	Source
[redacted]	06/07/2010	05/19/2009	2C:5-2 CONSPIRACY	2C:12-1B(7) AGG ASSAULT-ATTEMPT/CAUSE SIGNIFICANT BODILY INJURY	3	NJ	[redacted]

Prior Failure to Appear Pretrial in Past 2 Years: 2 or More

Case ID	FTA / Warrant Date	Offense Date	State	Source
[redacted]	01/22/2016	07/29/2015	NJ	[redacted]
[redacted]	08/31/2015	07/29/2015	NJ	[redacted]

Prior Failure to Appear Pretrial Older Than 2 Years: No

Prior Sentence to Incarceration (14 Days or More): Yes

Case ID	Sentence Date	Incarceration Length Years	Months	Days	Charge	Aux Charge	Degree	State	Source
[redacted]	06/07/2010	005Y	00M	000D	2C:5-2A(2) CONSPIRACY - AGREE/AID IN CONDUCT CONSITUTE A CRIME		2	NJ	[redacted]
[redacted]	02/19/2008	003Y	00M	000D	2C:18-2 BURGLARY-NO BI AND/OR UNARMED		3	NJ	[redacted]
[redacted]	02/19/2008	003Y	00M	000D	2C:35-7 CDS/ANALOG - DISTRIBUTE ON/NEAR SCHOOL PROPERTY/BUS		3	NJ	[redacted]
[redacted]	09/16/2005	000Y	00M	364D	2C:39-10 VIOLATION OF REGULATIONS PROVISION - FIREARMS		4	NJ	[redacted]
[redacted]	09/16/2005	000Y	00M	364D	2C:39-5B UNLAWFUL POSSESSION OF WEAPONS - AIR/SPRING PISTOL		3	NJ	[redacted]

Supplemental Information (Not Included in PSA Calculation)

Defendant Currently on Probation (CAPS): Yes **CAPS ID:** [redacted]

Defendant Currently on Parole: No

Parole information reflects latest status entered into OBCIS.

Final Domestic Violence (DV) Restraining Orders: No

Tab 3

ABILITY-TO-PAY MATRIX - PRETRIAL RELEASE

Calendar Year 2020

ANNUAL INCOME	Poverty Level			
Family Size	≤ 100%	101% - 150%*	151% - 199%	200+%
1	$ 12,760.00	$12,761 - $19,140	$19,141 - $25,519	$ 25,520
2	$ 17,240.00	$17,241 - $25,860	$25,861 - $34,479	$ 34,480
3	$ 21,720.00	$21,721 - $32,580	$32,581 - $43,439	$ 43,440
4	$ 26,200.00	$26,201 - $39,300	$39,301 - $52,399	$ 52,400
5	$ 30,680.00	$30,681 - $46,020	$46,021 - $61,359	$ 61,360
6	$ 35,160.00	$35,161 - $52,740	$52,741 - $70,319	$ 70,320
7	$ 39,640.00	$39,641 - $59,460	$59,461 - $79,279	$ 79,280
8	$ 44,120.00	$44,121 - $66,180	$66,181 - $88,239	$ 88,240
9	$ 48,600.00	$48,601 - $72,900	$72,901 - $97,199	$ 97,200
10	$ 53,080.00	$53,081 - $79,620	$79,621 - $106159	$ 106,160
For each add'l person add $4,480				
**78B-22-202*				

If monetary bail is deemed a least restrictive, reasonably available condition necessary to ensure appearance, below is the recommended amount:

	Poverty Level:	≤ 100%	101% - 150%	151% - 199%	200+%
PSA FTA Risk Score (Appearance Rate**):	FTA 1 (90%)	$0	$0	$0	$0
	FTA 2 (85%)	$0	$0	$0	$0
	FTA 3 (80%)	$0	$0	$0	$0
	FTA 4 (69%)	$100	$250	$750	$1,000
	FTA 5 (65%)	$250	$500	$1,250	$2,500
	FTA 6 (60%)	$500	$1,000	$2,500	$5,000

***Avg appearance rate for individuals with the same risk score in the PSA validation stu*

Notes:

Utah Code §77-20-1(4)(c): "If the court determines a financial condition, other than an unsecured bond, is necessary to impose on an individual as part of the individual's pretrial release, the court shall consider the individual's ability to pay when determining the amount of the financial condition."

"Ability-to-pay" is highly fact dependent. Judges continue to have the same discretion to deviate from the recommended amounts as they had under the Uniform Fine and Bail Schedule. If the defendant's income is higher than 200% and the circumstances surrounding the arrest or charge indicate a significant risk, a judge might determine that a much higher monetary amount is necessary to incentivize that particular defendant to appear in court. Defendants do not have a right to "affordable bail." Monetary bail amounts may be set in an amount that a defendant cannot afford, provided judges conduct an individualized assessment of ability-to-pay and risk.

The purpose behind all forms of financial release (secured bond, unsecured bond, cash, etc.) is to incentivize an individual to appear in court. There is no rational relationship between money and public safety, so the criminal activity scores on the PSA are not factored into the recommended dollar amounts. No financial condition is recommended when the FTA score is below 4 because the likelihood of appearance for scores 1-3 is very high (1 = 90%, 2 = 85%, 3 = 80%), compared to a significant drop starting at FTA 4 (4 = 69%, 5 = 65%, 6 = 60%).

If the individual and/or the circumstances surrounding the case indicate a public safety risk, non-financial conditions should be considered in lieu of or in addition to financial conditions of release. If the individual poses a *significant* public safety risk, determine whether they are eligible for a no-bail hold under Utah Code §77-20-1(2). Under Utah Code §77-20-1(8), there is a presumption of detention if the individual is charged with criminal homicide or any offense for which the term of imprisonment may include life. Judges may delay issuing a pretrial status order if a prosecutor files a motion for detention under Utah Code §77-20-1(6).

Note: Surety bail agents are only liable for bringing a defendant to court. They are not liable if the defendant commits a new offense. In fact, if the defendant commits a new crime while out on a secured bond, the agent may be released from its obligations.

The maximum recommended amount is $5,000 because:

1. There is a presumption of own recognizance release;
2. The court is directed to determine the "least restrictive" condition necessary to "reasonably ensure" appearance in court;
3. Even for those with the highest FTA risk (FTA 6), the likelihood of appearance is still relatively high at 60%;
4. Collateral consequences of an over-reliance on money can include loss of housing, loss of jobs, loss of custody, car repossession, interruption in medication and medical care, etc.;
5. Holding low-risk defendants for even 2-3 days increases their risk of recidivism by almost 40% compared those held no more than 24 hours; and
6. Public safety risk will be considered separately and, in addition to, failure to appear risk.

The ability-to-pay matrix may be used to determine monetary bail amounts for every financial condition type including cash, credit/debit cards, secured bonds, and unsecured bonds.

Tab 4

Justice: A vision for our future

Details

Written by Press Release

Category: Featured Articles (/index.php/features/featured-articles)

Created: 21 October 2020

In an effort to acknowledge Utah's dedication to youth involved in the juvenile justice system, Gov. Gary Herbert declared October, Youth Justice Action Month (YJAM). The Utah Board of Juvenile Justice (UBJJ) will host a free,public, virtual event (http://YJAM2020.eventbrite.com) to elevate the voices and perspectives of young people in Utah.
This year's theme centers around justice - an individual's personal commitment to equity and fairness, the role of young people in making change, and community action to become a more just and equitable place where everyone can have success and happiness.

The event is Thursday, October 22, 2020, 3-4 p.m. Register at YJAM2020.eventbrite.com (http://yjam2020.eventbrite.com/).

The event is organized in partnership with the Utah Division of Juvenile Justice Services, Utah Juvenile Court, the Racial and Ethnic Disparities Advisory Committee, the Utah Juvenile Defender Attorneys & Resource Center, Utah Division of Multicultural Affairs, Utah Division of Indian Affairs, Spy Hop, and Voices for Utah Children .

From: Cara Downs <cara@mediavistapr.com>
Sent: Monday, October 19, 2020 11:46 AM
To: Rosie Nguyen <RNguyen@abc4.com>
Subject: News Release: Utah Judicial Council's New Bail Rules Facing Challenge

Dear Rosie,

Please see the below press release regarding a challenge to Utah's newly implemented bail guidelines. The new rules, which were voted on in August by the Utah Judicial Council, effectively relaxes requirements for a defendant's release, which critics charge has created a threat to public safety. Simultaneously, risk assessment tools, which were put in place as part of the new rules, have been declared biased against minorities and disavowed by leading advocacy groups, including the Pretrial Justice Institute.

Since adoption of the new bail guidelines, a growing number of defendants charged with serious offenses, which include the rape of a child, as well as solicitation for sex of a minor, have been released on their own recognizance, with no safeguards in place to protect the public.

Opponents of the new bail rules, which includes the American Bail Coalition (ABC), a trade organization of the bail industry, charge that the guidelines are unconstitutional and compromise public safety. ABC has formally requested that Utah lawmakers and other state officials demand the Judicial Council to reverse its position.

I invite your coverage of this developing story. Jeff Clayton, Executive Director of the American Bail Coalition, is available to comment via telephone, satellite, Zoom or Skype.

Thank you.

Best,

Cara

Cara Downs

MediaVista Public Relations

Tel: (323) 316-5228

Email: cara@mediavistapr.com

Website: www.mediavistapr.com

AMERICAN BAIL COALITION

NEWS RELEASE

UTAH JUDICIAL COUNCIL'S NEW BAIL RULES FOR STATE MAY FACE CONSTITUTIONAL CHALLENGE

Critics Say Newly Implemented Guidelines Endanger Public Safety and Discriminate Against Minorities

FOR IMMEDIATE RELEASE:

Lakewood, CO (October 14, 2020) – The Utah Judicial Council's recent decision to implement new bail guidelines for the state is facing criticism that it is both unconstitutional and compromises public safety. The policy-making body of the court system voted in August to create a new statewide bail schedule and also to continue use of a widely-discredited risk assessment tool. The new rules took effect on October 1.

A key feature of the new rules, the revamped bail schedule dictates a $5,000 maximum felony bond for any offense, no matter how serious the charge. In addition, it is based solely on a defendant's income level, while ignoring other personal financial factors, including cash assets.

Ramifications of the Judicial Council's revised bail rules are already manifesting themselves in a number of cases in which individuals have been charged with particularly horrific crimes. For example, in Wasatch County, Dennis Early Skiby, a 60-year-old man, was arrested for the rape of an 11-year-old girl during a sleepover and subsequently released on his own recognizance.

Meanwhile, in Davis County, 49-year-old Mark Alma Slater was caught in a police sting, trying to lure someone he believed to be a 13-year-old girl to have sex with him. Following his arrest, he was also released on his own recognizance, rather than being held in custody as a danger to the community.

Besides being a threat to public safety, critics of the new bail rules say that they are illegal and violate the constitutional right to bail. They also cite the inherent flaws of risk assessment tools that were put in place as part of the Judicial Council's recent actions.

The American Bail Coalition, a trade organization of the bail industry, along with other opponents of the new bail guidelines, cites multiple independent university studies that have concluded the mandated use of risk assessment discriminates against minorities. It also charges that the new rules violate due process and unfairly focuses on annual income as the principle criterion for whether or not a person is eligible for a bond.

"The new rules are fatally flawed and unconstitutional, while also posing a danger to public safety," said Jeff Clayton, Executive Director of the American Bail Coalition. "We have formally requested that Utah's state leaders demand the Judicial Council to withdraw the new bond guidelines and to stop using the Arnold Foundation risk assessment tool as part of the decision-making process throughout the state."

Risk assessments were once regarded as the singular answer to bail reform, but have since fallen into disrepute and abandoned by its former champions, including the Pretrial Justice Institute. Earlier this year it declared that the tools “can no longer be a part of our solution for building equitable pretrial justice systems."

University studies have also determined that basing bail on income discriminates heavily against African-Americans, other minorities and recent-citizen defendants because they statistically have significantly less wealth than white defendants. In addition, the arbitrary $5,000 bond ceiling is also discriminatory against these groups because it will be nearly impossible for them to raise the money for release, while wealthy individuals will have no problem coming up with the cash.

About the American Bail Coalition

The American Bail Coalition is dedicated protecting the Constitutional right to bail and the promotion, protection and advancement of the surety bail profession in the United States. Comprised of the nation’s largest surety insurance companies, ABC works with local communities, law enforcement, legislators and other criminal justice stakeholders to utilizes its expertise and knowledge of the surety bail industry to develop more effective and efficient criminal justice solutions. www.ambailcoalition.org

# # #

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Utah Judicial Council Shifts Pretrial Release Rules In Favor of Felony Defendants – What You Need To Know

AMERICAN BAIL COALITION

Utah Judicial Council Uses Former Enron-Billionaire's Algorithm To "Fix" The Criminal Justice System as San Francisco Pushes Back

Dear Rep. Pitcher,

The Utah Judicial Council recently upended criminal justice in Utah by enacting a new statewide bail schedule that became effective on October 1, 2020. The bail schedule used to be based on the severity of the crime. Now it is based solely on two factors—how much annual income a person makes and the numeric risk score of the Arnold Foundation Public Safety Assessment, a bail algorithm crafted by a former Enron billionaire and hedge fund manager.

ABILITY-TO-PAY MATRIX - PRETRIAL RELEASE

Calendar Year 2020

ANNUAL INCOME	Poverty Level		
Family Size	100%	*150%	200%
1	$12,760	$ 19,140	$ 25,520
2	$17,240	$ 25,860	$ 34,480
3	$21,720	$ 32,580	$ 43,440
4	$26,200	$ 39,300	$ 52,400
5	$30,680	$ 46,020	$ 61,360
6	$35,160	$ 52,740	$ 70,320
7	$39,640	$ 59,460	$ 79,280
8	$44,120	$ 66,180	$ 88,240
9	$48,600	$ 72,900	$ 97,200
10	$53,080	$ 79,620	$ 106,160
For each add'l person add $4,480			
*78B-22-202			

If monetary bail is deemed a least restrictive, reasonably available condition necessary to ensure appearance, below is the recommended amount:					
	Poverty Level:	≤ 100%	101% - 150%	151%- 199%	200+%
PSA FTA Risk Score (Appearance Rate**):	FTA 1 (90%)	$0	$0	$0	$0
	FTA 2 (85%)	$0	$0	$0	$0
	FTA 3 (80%)	$0	$0	$0	$0
	FTA 4 (69%)	$100	$250	$750	$1,000
	FTA 5 (65%)	$250	$500	$1,250	$2,500
	FTA 6 (60%)	$500	$1,000	$2,500	$5,000

***Avg appearance rate for individuals with the same risk score in the PSA validation study.*

What the crime is or how much damage was done to a victim is simply not a consideration. In fact, with the enactment of the new schedule, Utah is now only one of five states that do not allow for consideration of public safety for purposes of setting bail. In addition, the Utah Judicial Council has capped the maximum bail at $5,000 in Utah, with most bails to be $500 or lower, even for the most severe or violent felonies, including forcible rape, assault, or prior felons in possession of firearms.

Governing Boards and Committees

Utah Judicial Council

Judicial Council Information

Chief Justice Matthew B. Durrant	Chair, Utah Supreme Court
Judge Kate A. Appleby	Vice Chair, Utah Court of Appeals
Judge Brian Cannell	First District Court
Judge Samuel Chiara	Eighth District Court
Judge Augustus Chin	Holladay Justice Court
Judge David Connors	Second District Court
Judge Ryan Evershed	Eighth District Juvenile Court
Judge Paul Farr	Alta, Herriman, and Sandy Justice Courts
Judge Michelle Heward	Second District Juvenile Court
Justice Deno Himonas	Utah Supreme Court
Judge Mark May	Third District Juvenile Court
Judge Kara Pettit	Third District Court
Judge Derek Pullan	Fourth District Court
Rob Rice	Attorney
Judge Brook Sessions	Lindon and Wasatch County Justice Courts
Judge Todd M. Shaughnessy	Third District Court
Judge Mary T. Noonan	Staff, Utah State Court Administrator - Administrative Office of the Courts

While prosecutors could theoretically attempt to deny bail, it just doesn't happen in Utah, and it is not going to happen. Utah Representative Eric Hutchings asked the Judicial Council this precise question on July 2, 2020: "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?"

The answer, from Judge Harmond, to the concern was: "The matrix will not prevent a no-bail hold." Which is a non-answer. Of course, Rep. Hutchings then pointed out that, "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 law enforcement after JRI [Justice Reinvestment Initiative]. Some included real life stories. We will be dealing with reality and perception."

In other words, Judge Harmond did not answer the question, can the courts broadly issue no bail holds? We'll answer for him: judges cannot do broad-based no-bail holds in Utah, meaning the most "egregious" of offenders will get out for $5,000 or less. Jeffrey Epstein and Harvey Weinstein come to mind, as does Bill Cosby, who would all be counted as low risk by the Arnold Foundation Public Safety Assessment tool.

The Judicial Council's lawyer, Keisa Williams, also answered Representative Hutchings question, by not answering, but instead admitting that Representative Hutchings was correct —that the new bond schedule and process was indeed fatally flawed: "The matrix is putting a Band-Aid on a broken system. We need start transitioning to a better system." But rather than transition to a "better system," the Judicial Council decided to implement this "band-aid" solution instead. Why?

The new "reality" is as Representative Hutchings forecasted: that hardened offenders are already walking free on bails that could be collected by simply searching for coins in the

couch cushions. Donald Kingston, arrested and charged with three Felony-1 counts of aggravated sexual assault of a minor on October 9, 2020, had bail set at $1,000 ($100 bail premium), and he promptly walked out of jail to go out and do it again pending trial. You have the Utah Judicial Council's new bail schedule and John Arnold to thank.

And what about this Public Safety Assessment (PSA)? The Arnold Foundation Public Safety Assessment is now under the microscope in none other than the crime ridden city of San Francisco, where the push back on it has begun in light of a statewide ballot initiative. A recent commentator called the results of the Arnold Foundation in San Francisco a "destructive experiment" that is "incentivizing the criminal trade." Somehow the Utah Judicial Council, Representative Stephanie Pitcher, and Judicial Council's lawyer Keisa Williams believe the results in Utah will be different. We don't think so, but sadly law-abiding citizens are now going to be part of this social experiment.

How does the Arnold Foundation Public Safety Assessment work in Utah? The Judicial Council, as a matter of pride, has allowed the Arnold Foundation unfettered access to the FBI's NCIC (National Crime Information Center) database through the Utah Courts portal.

Basically, the FBI's crime files track every arrest and police contact in the United States. Utah is the first and only state which has allowed the Arnold Foundation to do automated data pullsfrom the FBI's crime files to profile people in Utah for purposes of offering them bail. It is doubtful this is being done in a legal fashion, and no one seems to worry about a private foundation that has a specific agenda then being able to pull and store data from the FBI's database about potentially every human being living or working in the State of Utah. The Utah Judicial Council, in fact, thinks it is a great idea, which is why they signed a sole-source contract with John Arnold to give him the direct access. Originally, the Judicial Council contracted out judicial discretion—requiring state judges to follow what John Arnold's tool said 80% of the time, but they later removed that provision to protect judicial discretion when faced with criticism from us. Now, there is no judicial discretion whatsoever—the Arnold Tool will decide who gets out of jail before they even see a judge.

Once the FBI data is pulled, a score is generated based on nine factors that the Arnold Foundation say will help us predict what is going to happen in the future. In other words, will someone show up for court or commit a new crime? John Arnold thinks he can accurately predict human behavior before anyone sees or talks to a criminal defendant. And apparently so does the Utah Judicial Council, who is making the results of this criminal scarlet letter test mandatory as to what bail will be set in Utah.

In California, however, a recent commentator pointed out that John Arnold has a serious conflict of interest—he's funding a ballot initiative to force the State of California to use his Public Safety Assessment. In fact, John Arnold has spent $3.5 million to force judges to use his algorithm statewide by contributing to the campaign to pass Proposition 25. There's no reason to think if the Utah Legislature, Governor, or Attorney General were try to stop him, he would do the same thing to the State of Utah. As has been pointed out, in San Francisco, he is the sole-source provider as he is in Utah. They didn't take it out to bid or have any competition. John Arnold simply got the contract. It's also important to point that the Arnold Foundation was turned into a for-profit corporation, Arnold Ventures. Of course, then John Arnold donated nearly another $1 million to the City of San Francisco. So, it's no wonder they like him in the City on the Bay. Money talks.

In Utah, it's the same old song and dance for John Arnold, and you can bet if he doesn't get his way, he'll write an enormous check and force his way to become law. He's already shown that in Utah. In fact, John Arnold has already donated $6,533,761 in Utah to various groups, including $435,000 to "ensure an accurate vote count" on Proposition 4 in 2018, which was the proposition on redistricting. Thus, it should come as no surprise that state government bureaucrats love John Arnold and his money. He's paying them right now to do the job that judges should be doing, which is even more peculiar since John Arnold has spent over $50 million to eliminate public pensions for government employees throughout the United States.

In short, the Utah Judicial Council has embarked on an experiment that is destined to fail as their lawyer Keisa Williams points out. It is a band-aid solution in search of a problem. Lawsuits will be filed, people will be hurt, and a former Enron Billionaire, sitting in his large

mansion in Houston, will feel no pain or discomfort when it is shown that it didn't work. He'll just call up the Judicial Council and remind them what Keisa Williams told the Judicial Council: "You know the Arnold Foundation is pushing and they require us to do some sort of a community and media outreach plan and so how we do that delicately without getting some crazy litigation or legislation passed, not sure, but we're working on that."

So, if you hear the Judicial Council or state judges defend John Arnold, keep one thing in mind—they are required to defend him and his tool by the contract they signed. Why the legislature, law enforcement officers, the Governor, and local officials are putting up with this is beyond us. It's time for the legislature to step in and put an end to the destruction of criminal accountability and put the Utah Judicial Council on notice that these computer generated soft-on-crime policies will not stand in Utah.

Jeffrey J. Clayton, M.S., J.D.
Executive Director
American Bail Coalition

More about the American Bail Coalition...

The American Bail Coalition is the national trade association of commercial bail insurance underwriters whose members are responsible for underwriting criminal bail bonds throughout the United States of America.

The Coalition's primary focus is to protect the constitutional right to bail by working with local and state policymakers to bring best practices to the system of release from custody pending trial.

Jeff Clayton, Esq. is the Executive Director/Policy Director and can be reached at jclayton@americanbail.org or (877) 958-6628.

Visit the American Bail Coalition

Convicted Felon On Meth Who Killed 17-Year-Old Immediately Gets Out of Jail Free Thanks to Utah Judicial Council Policies

AMERICAN BAIL COALITION

Convicted Felon On Meth Who Killed A 17-Year-Old Boy At 7:25 am On Friday October 23 Immediately Gets Out Of Jail Free Thanks To The Utah Judicial Council

Dear Rep. Pitcher,

We previously warned that the new Judicial Council policy (as of October 1, 2020) setting the maximum bail in Utah at $5,000 and eliminating consideration of public safety for purposes of setting bail would result in tragic consequences. At 7:25 a.m. on Friday October 23, 2020, prior convicted violent felon Garrett Frank Harris, who was hopped up on meth and painkillers, crossed the center lane on Arrowhead Road (Route 164), and hit three other cars. Unfortunately, one of the drivers was killed: 17-year-old Landon Wilkerson.

IN THE
COUNTY OF UTAH, STATE OF UTAH

State of Utah vs. HARRIS, GARRETT FRANK Date Of Birth: 10/07/1976 1030 S 120 EAST SPANISH FORK. UT 84660 Arrestee	Affidavit of Probable Cause

On 10/23/2020 12:33 the defendant was arrested for the offense(s) of:

	Offense Date	Offense Description	Enhancement	Statute	Severity	Court
1	10/23/2020	AUTOMOBILE HOMICIDE		76-5-207	F3	DST
2	10/23/2020	DRIVE UNDER INFLUENCE W/PERSONAL INJURY		41-6A-503(1)(B)(I)	MA	DST
3	10/23/2020	FAILURE TO STAY IN ONE LANE		41-6A-710(1)	IN	DST
4	10/23/2020	POSSESSION OF A CONTROLLED SUBSTANCE SCHEDULE I/II/ANALOG		58-37-8(2)(B)(II)	MA	DST
5	10/23/2020	POSSESSION OR USE OF A CONTROLLED SUBSTANCE		58-37-8(2)(A)(I)	MB	DST
6	10/23/2020	USE OR POSSESSION OF DRUG PARAPHERNALIA		58-37A-5(1)	MB	DST

When asked by the police whether he was on meth, of course he denied it. In fact, blood toxicology results determined he had meth and painkillers in his system at the time of the crash ("measurable amounts of methamphetamine and amphetamine"). He had a meth pipe in his pocket at time, in addition to Subutex according to the report. He may have smoked meth while he was driving. Ostensibly, likely, he had been hopped up all night and was just returning home from what must have been one heckuva great party. But it was no great party for the victims of these crimes, and the drivers and passengers of the other two cars were very lucky to survive the crash.

A forensic nurse responded to the hospital where blood and urine were taken. A presumtive test showed that Garrett was posative for measurable amounts of Methamphetamine and apphetamine. I searched Garrett's clothing that were with him at the time of the accident and that he admitted to me were his. In those belongings i fond the glass pipe that the nurse referred to and appeared consistant with what I know to be a pipe used for the ingestion of methamphetamine, and a small cut straw was found with a half a pill inside. I asked what the pill was and Garrett advised it was his subutex that he had not taken yet fot the day.

To add insult to injury, Harris did not have to post a nickel of bail money to be released from jail. He was instead released on a signature bond, called an "unsecured bond" in Utah. He signed his name and was released. This means when he flees Utah, he will owe the state $5,000, which the state will likely never collect. Of course, the bond is only a $5,000 "I owe you," which is a scant sum of bail to be imposed for a person with a rap sheet a mile long. In fact, we were able to find no less than eighteen prior criminal cases involving Mr. Harris in the Utah State system dating back to 1996, including at least one prior violent felony. In addition, the booking information shows that Harris was already out on bond for a crime at the time the fatal accident occurred.

The Order of the Court is stated below:
Dated: October 23, 2020 02:39:05 PM **/s/** Derek P Pullan
District Court Judge

IN THE PROVO DISTRICT COURT
FOR UTAH COUNTY, STATE OF UTAH

STATE OF UTAH **v.** **Garrett Frank Harris**	**Order to Release with Conditions** **Probable Cause ID : 279524** **Submission ID : 1180271** **Judge : DEREK P PULLAN**

Based on the affirmation of David Spencer, the arresting officer, the undersigned magistrate finds that probable cause existed for the arrest without a warrant of Garrett Frank Harris. Garrett Frank Harris is to be released with conditions.

Garrett Frank Harris is hereby ordered to be released subject to the following conditions:

- Report your contact information and any change in address, phone or email to the Court and your attorney within 1 business day of the change
- Appear in court when required
- Avoid contact with the victim(s) of the alleged offense
- Commit no new offenses during the period of release
- DEFENDANT MAY BE RELEASED ON AN UNSECURED BOND
- Unsecured Bond Amount: $5,000.00.

Unsecured Bond Amount: $5,000.00.

This is but one more example of what United States Attorney John Huber said is wrong with Utah's criminal justice system—the courts and the system just let repeat offenders run wild. 18 prior criminal cases (and likely 19 since he was out on bond at the time of this case), he gets high on meth and painkillers, kills a man, and he walks out of jail for free. That doesn't sound like justice to us.

Search Results

County	Court Location	Case Type	Case Number ↑	Filing Date	First Name	Last Name	Birth Date	Party Code	Case History / Documents
UTAH	Spanish Fork District	MO	001300948	2000-12-11	GARRETT	HARRIS	1976-10-07	DEF	View
UTAH	Spanish Fork District	TN	005301323	2000-07-21	GARRETT	HARRIS	1976-10-07	DEF	View
UTAH	Spanish Fork District	MO	011300754	2001-10-11	GARRETT	HARRIS	1976-10-07	DEF	View
UTAH	Provo District	FS	011400030	2001-01-04	GARRETT	HARRIS	1976-10-07	DEF	View
UTAH	Provo District	FS	011400093	2001-01-08	GARRETT	HARRIS	1976-10-07	DEF	View
UTAH	Provo District	FS	011400517	2001-02-07	GARRETT	HARRIS	1976-10-07	DEF	View
UTAH	Provo District	PO	034401323	2003-06-16	GARRETT	HARRIS		RES	View
UTAH	Spanish Fork District	TN	045211161	2004-12-02	GARRETT	HARRIS	1985-05-05	DEF	View
UTAH	Provo District	FS	061403366	2006-08-25	GARRETT	HARRIS	1976-10-07	DEF	View
UTAH	Spanish Fork District	TN	065300526	2006-02-13	GARRETT	HARRIS	1976-10-07	DEF	View
UTAH	American Fork District	DC	080201889	2008-05-29	GARRETT	HARRIS		DEF	View
SALT LAKE	Salt Lake City District	FS	101909388	2010-12-23	GARRETT	HARRIS		AKA	View
UTAH	American Fork District	DC	139104908	2013-09-12	GARRETT	HARRIS		DEF	View
UTAH	Provo District	PA	174401684	2017-07-05	GARRETT	HARRIS		PET	View
SALT LAKE	Salt Lake City District	FS	181902491	2018-03-02	GARRETT	HARRIS		AKA	View
UTAH	American Fork District	DC	189104170	2018-08-03	GARRETT	HARRIS		DEF	View
UTAH	American Fork District	MO	961000373	1996-06-17	GARRETT	HARRIS	1976-10-07	DEF	View
UTAH	Provo District	DA	964400868	1996-04-25	GARRETT	HARRIS		PLA	View

How could this happen?

You can thank the Utah Judicial Council, State Court Administrator Mary Noonan, and Representative Stephanie Pitcher for all of this. Representative Pitcher ran a bill in 2020, House Bill 206, claiming at the time that it did nothing to change the current system, but then cut a secret deal with the Utah Administrative Office of the Courts to later change the statewide bail schedule based on the authority conferred in HB 206, which is exactly what the Judicial Council did at the urging of State Court Administrator Mary Noonan.

Importantly, the Judicial Council *removed public safety* as a consideration for setting bail. Utah is only one of a handful of states that do not allow consideration of public safety. So, while the "evidence-based" Arnold Foundation public safety assessment tool used by the judge setting bail said Mr. Harris was an "**elevated risk of committing a violent crime**" if released from jail, the judge was not able to consider that due to the Judicial Council rules pushed by Director Noonan and Representative Pitcher. In addition, the Judicial Council capped the maximum bail in Utah at $5,000. So even if the judge wanted to slap Harris with a $5,000 secured bail, meaning he would have actually had to post bail in order to be released, he could have walked free on a maximum $500 bail premium (and likely much less).

Public Safety Assessment Report

(Date Created: 10/23/2020 13:38:58)

SID:	631273	**Name:**	GARRETT FRANK HARRIS	**Gender:**	M
PC ID:	279524	**Arrest Date:**	10/23/2020	**Birth Date:**	10/07/1976

Elevated Risk of Committing Violent Crime: Yes

New Criminal Activity Scale

1	2	3	4	5	6

Failure to Appear Scale

1	2	3	4	5	6

Charge(s):

41-6A-503(1)(B)(I)	DRIVE UNDER INFLUENCE W/PERSONAL INJURY
41-6A-710(1)	FAILURE TO STAY IN ONE LANE
58-37-8(2)(A)(I)	POSSESSION OR USE OF A CONTROLLED SUBSTANCE
58-37-8(2)(B)(II)	POSSESSION OF A CONTROLLED SUBSTANCE SCHEDULE I/II/ANALOG
58-37A-5(1)	USE OR POSSESSION OF DRUG PARAPHERNALIA
76-5-207	AUTOMOBILE HOMICIDE - INCREASE ONE LEVEL

Risk Factors:

1. Age at Current Arrest	44
2. Current Violent Offense	Yes
a. Current Violent Offense & 20 Years Old or Younger	No
3. Pending Charge at the Time of the Offense	Yes
4. Prior Misdemeanor Conviction	Yes
5. Prior Felony Conviction	Yes
a. Prior Conviction	Yes
6. Prior Violent Offense	1
7. Prior Failure to Appear in Past 2 Years	0
8. Prior Failure to Appear Older Than 2 Years	Yes
9. Prior Sentence to Incarceration	Yes

So, that is apparently what a life is worth to the Utah Judicial Council, State Court Administrator Mary Noonan, and Stephanie Pitcher: kill someone while out on bond for another case, be high risk to violently kill or harm another person, and we will have the audacity to force you to *sign your name* that you are going to come back to court. I'm sure they are calling the family of the victim of this terrible homicide and explaining that in fact "Mr. Harris is presumed innocent," and that bail and the third parties that must be involved in order to post a bond have nothing to do with "public safety."

RELATED: Man Arrested on investigation of DUI and homicide after teen dies in Spanish Fork crash

RELATED: Utah Judicial Council Uses Former Enron-Billionaire's Algorithm to "Fix" the Criminal Justice System as San Francisco Pushes Back

We are sure Mr. Harris will take his responsibilities seriously in light of having to sign his name after killing someone while on meth, especially after 18 prior cases. You kill a man, you get free bail in Utah. That is the new normal.

At bottom, everyone needs to immediately start thanking the Utah Judicial Council (and their legal counsel Keisa Williams), State Court Administrator Mary Noonan and Representative Stephanie Pitcher for being the key architects of this new system. We are sure they will win many a national award for these thoughtful, progressive policies. Indeed, they are doing nothing short of a bang-up job of protecting the safety of the public. Just ask Garrett Frank Harris—he's likely safely in an apartment somewhere popping more painkillers and smoking meth.

Jeff Clayton, M.S., J.D.
Executive Director
American Bail Coalition

---------- Forwarded message ---------
From: **Marcos Ortiz** <MOrtiz@abc4.com>
Date: Fri, Oct 16, 2020 at 8:14 AM
Subject: BAIL GUIDELINES
To: Geoff Fattah <geofff@utcourts.gov>

I GOT THIS EMAIL FROM A NATIONAL BAIL COALITION ... WOULD COUNCIL OR YOU CARE TO COMMENT?

Please see the below press release regarding a challenge to Utah's newly implemented bail guidelines. The new rules, which were voted on in August by the Utah Judicial Council, effectively relaxes requirements for a defendant's release, which critics charge has created a threat to public safety. Simultaneously, risk assessment tools, which were put in place as part of the new rules, have been declared biased against minorities and disavowed by leading advocacy groups, including the Pretrial Justice Institute.

Since adoption of the new bail guidelines, a growing number of defendants charged with serious offenses, which include the rape of a child, as well as solicitation for sex of a minor, have been released on their own recognizance, with no safeguards in place to protect the public.

Opponents of the new bail rules, which includes the American Bail Coalition (ABC), a trade organization of the bail industry, charge that the guidelines are unconstitutional and compromise public safety. ABC has formally requested that Utah lawmakers and other state officials demand the Judicial Council to reverse its position.

Marcos Ortiz ABC 4
The Justice Files
e-mail: marcos@abc4.com
W: 801-975-4494
C: 801-831-0902

The Justice Files: No bail, no jail

ABC4.com

by: Marcos Ortiz
Posted: Oct 19, 2020 / 07:24 PM MDT / Updated: Oct 19, 2020 / 10:31 PM MDT

SALT LAKE CITY (ABC4 Utah) – Dennis Skiby is accused of raping an eleven-year old girl.

He was charged in Wasatch County last month but following his initial appearance Skiby was released from jail on his own recognizance. He didn't have to post any bond.

The same thing happened for Donald Kingston. He was charged with two counts of aggravated sex abuse of a child and two counts of sodomy. He too was released from jail after posting one-thousand dollar bail. Court records do not indicate if it was cash or if Kingston had to pay five percent.

Bail would normally be in the tens of thousands of dollars. But under a new law that went into effect October 1, bail is no longer set by the kind of crime committed but on one's ability to pay. Bail is now being set at much lower levels. In most instances, it capped at $5,000.

The legislature passed the law during the 2020 session because it was widely believed that wealthy defendants were the only ones who could pay larger bail amounts while the poor sat in jail awaiting trial.

"My job description is to defend people who have no money," said Bill Aldana, the Utah County public defender during a public hearing at the legislature.

Aldana like other public defenders, prosecutors, and law enforcement all supported the change in bail requirements. They believed the scales of justice were tipped against lower-income defendants.

"I have a lot of people who end up pleading guilty to a criminal offense because that's part of the plea bargain," Aldana told the legislative committee. "If you plead guilty to this, we will let you out of jail. That happens all the time. It's wrong. It shouldn't happen. This bill would help to fix it.

But three weeks after the law went into effect, some are viewing the change as a threat to public safety. Jeff Clayton, the executive director for American Bail Coalition said bad guys will be taking advantage of the change in the law.

"That's what's going to happen," he said. "If you go hit a cop you won't have to post bail. It's going to destabilize the system. Utah's attempt at justice reinvestment increased the amount of recidivism in the state of Utah. This is just going to fuel the fire.

Earlier this month, a Duchesne County man charged with domestic violence left jail on his own recognizance.

“I am going to allow your release on your own recognizance and I am going to lift the no-contact order between you and your wife,” Judge Sam Chiara told Ruben Campuzano at his initial hearing.

For his victim, she has gone missing for fear he will be looking for her.

A spokeswoman for an advocacy group said they inform victims that the defendant will at some point be released from jail. Liz Sollis said that’s why they advise victims to have a safety plan in place.

“The safety plan helps that individual to stay as safe as possible,” said Sollis with the Utah Domestic Violence Coalition. “It can also be used to keep them safe when they’re not with the perpetrator.”

Clayton said bail bondsmen have an advantage if they are the one’s posting bail on behalf of the defendant.

“If we posted the bond we could go arrest the guy if we don’t post the bond nobody is going to look for the guy,” he said.

The coalition also thinks the new law is unconstitutional and may challenge it in court.

Sent to the Legislature

Basic Summary—UTAH

WHAT HAS BEEN DONE BY THE UTAH JUDICIAL COUNCIL

The essence is that the Judicial Council is creating a right to an "affordable bail" in Utah.

An affordable bail means that when a judge sets a bail and they cannot "afford" it, they will get out on a lower bail, even if a judge set the bail due to public safety or flight considerations.

Consideration of public safety for purposes of setting bail has been eliminated in Utah. When setting a bail a judge can only consider risk of flight. This is contrary to the law in 45 other states, including every state that surrounds Utah.

In Utah, the presumptive largest bail on the schedule is now $5,000, and the recommendation from the Judicial Council is that all bonds be $5,000 or less (which is $500 bail premium or less). Most bonds will be $500 to $1000 for all felonies.

We fought with your Republican AG colleagues for the past five years against this so-called right to an affordable bail. In fact, 11 of your colleagues filed *amicus* briefs in US Courts of Appeal, and the US Department of Justice also filed an *amicus* brief in our favor, and won we ultimately won there IS NOT RIGHT TO AN AFFORDABLE BAIL.

We won in the *Walker* case in the US Court of Appeals for the 11th Circuit and the *ODonnell* case in the US Court of Appeals for the 5th Circuit.

Instead, the Utah Judicial Council is ignoring the law and creating a right to an "affordable bail" in Utah. They say the law is "emerging." Not so.

In addition, the Arnold Foundation tool rules the day on the bail schedule, and thus there is no judicial discretion until a judge is seen, and of course the judges are ordered to follow the Arnold Tool (Utah State Court Administrator contracted out Judicial Discretion to the Arnold Foundation tool requiring judges to follow the tool 80% of the time—we busted them—they later changed it).

The Arnold Foundation is accessing the FBI's NCIC crime database through the Utah Courts portal. The Foundation and the Utah Judicial Council is not following the proper regulations, is using the data for its own purposes (research and other non-allowed purposes), and is housing FBI data used to profile people on its own servers.

THE CONSEQUENCES

Unless prosecutors seek preventative detention, which they generally don't in Utah, everyone on every charge including the most serious of felonies is getting out on a bond of $5000 or less, which is a $500 bail premium.

This will include the Epsteins, Weinsteins, Cosbys, Child Sex Traffickers etc. There is no distinction based on the nature or type of charges. If the bond schedule is implemented, then in the 2-3 days before people see a judge, everyone in Utah can get out on a bond of $5000 or less (bond premium $500 or less). Most will get out on $100 or less. The maximum consideration of income is assumed to be twice the poverty level—Epstein, Weinstein, etc. made a little more than twice the poverty line.

Utah Judicial Council will say judges can deviate, but the problem is that this is the BAIL SCHEDULE, meaning that these people can bail and be long gone before seeing a judge. Two, judges will defer to the judicial council who wants all bonds at $5,000 or less regardless of schedule or set by judge.

Utah Judicial Council is going to say that prosecutors will just have to seek preventative detention, meaning a motion to deny bail, if they don't want everyone getting out for nearly free. Well, can they really seek detention in all cases where someone today doesn't post bond? No, because under federal law it requires an extensive mini-trial in each case. And legally can they? Not really because it's not currently used in Utah very often, is hard to get, and limited by the State Constitution.

Bottom line, everyone gets out unless preventative detention is used, which is limited by the Utah State Constitution. Judges and prosecutors are getting no resources to do these hearings.

This is going to turn into New Mexico, where prosecutors could only file for detention in 5% of all cases because they never got any money to implement this.

New Jersey spend $300 million to implement such a system because you could do it, but it's not cheap. The Judicial Council cannot and did not appropriate funds to this project.

Deseret News

State law moving Utah further away from use of cash bail takes effect

Utah joins several other states in directing judges to consider a person's finances

By Annie Knox@anniebknox
Oct 3, 2020, 5:30pm MDT

SALT LAKE CITY — A Utah law tightening the use of cash bail took effect last week, a change supporters say will ensure defendants don't remain jailed simply because they can't pay.

"Whether someone has $5,000 or $10,000 to bond out — or not — does nothing to keep our community safe," said Rep. Stephanie Pitcher, the Salt Lake City Democrat who sponsored the legislation. "It's really a wealth test."

The 2020 law directs judges to prioritize other sorts of nonmonetary requirements, and only those needed to make sure a person shows up to court and doesn't pose a threat to the public. When they do set bail, they must consider a person's ability to pay.

Previously, judges typically tied bail to the offense and not to any sort of risk analysis for the person appearing before them.

Richard Mauro, the executive director of the Salt Lake Legal Defender Association, said preparing a defense is easier for those released from jail. A person can more easily confer with attorneys, keep a job and stay connected with family.

"For people who are in custody, there's a powerful incentive to plead guilty for no other reason than to get out of jail," Mauro said.

Prosecutors and sheriffs also embraced the measure that creates a presumption of release for low-risk suspects on their own recognizance. But it drew strong opposition from bail bond companies that argued suspects will get out and reoffend.

Pitcher, a prosecutor in the Davis County Attorney's Office, said she has seen wealthy Utahns front the cost of bail and go home without batting an eye. Meanwhile, low-risk defendants remain jailed because they can't come up with an initial 10% for bail bond services.

The law will likely bring to bear tougher conditions for deep-pocketed defendants who pose a risk to the public, she said, such as an ankle monitor, drug and alcohol testing, or a curfew.

Monetary bail systems similar to Utah's existing program are facing constitutional challenges in several other states. Pitcher said her plan allows the state to avoid the cost of defending against such a lawsuit.

The measure also incorporated recommendations from a 2017 legislative audit and a separate 2015 report from a committee of judges, attorneys, lawmakers and others.

Years ago, Utah standardized bail across the state so that a person arrested in St. George wouldn't have to scrape together more than someone picked up for the same offense in Logan, said 3rd District Judge Todd Shaughnessy.

In recent years, however, Utah's court system has been trying to give judges more information about a particular defendant, in part because research shows those who are low-risk are more likely to carry out a new crime in the future if jailed for more than a day.

"Conversely, if you let high-risk individuals out on the street, there's a much greater likelihood that those individuals are going to commit crimes, that those individuals are going to not show up for court and those sorts of things," Shaughnessy said.

Under the changes, those to remain in jail include defendants facing first-degree felonies; anyone arrested while already on pretrial release, probation or parole; or a person charged with domestic violence who is deemed a danger to a victim.

The law also encourages transparency in the most serious cases, Shaughnessy said. It formalizes a process for prosecutors to request no chance of release for certain defendants, requiring them to make the case in a detention hearing.

A mechanism in the Utah measure funnels bail forfeiture money into local supervision programs for those awaiting trial outside the walls of a jail.

But longtime bail bondsman Gary Walton said he believes courts will struggle to hold defendants accountable if they are released and then fail to show up at further court dates.

"They call it criminal justice reform, but I call it elimination of responsibility for criminals," said Walton, with Salt Lake City-based Beehive Bail Bonds. "There probably will be some minimal bail continuing, but it's going to be smaller amounts and infrequently used."

Walton said most of Utah's bail bonds companies are small, family businesses.

"To sit there and see them destroyed, right or wrong, is kind of a sad thing for some of us," he said.

With the new law, Utah joins several others in requiring judges to consider a person's financial situation.

But it doesn't go as far as reforms in other states like New York, which has eliminated cash bail for most offenses and directs judges to only consider flight risk when setting pretrial conditions.

Utah's Commission on Criminal and Juvenile Justice will track the effects of the changes, but the analysis could be muddled by the pandemic, Pitcher said. The coronavirus has forced the release of many low-level offenders as counties seek to limit jail populations to reduce the spread of the virus.

"Because of COVID-19, we've already been making more thoughtful release decisions," Pitcher said.

From: donnatugs@grassrootsmessages.com <donnatugs@grassrootsmessages.com>
Sent: Saturday, October 31, 2020 2:10 PM
To: Evan Vickers <evickers@le.utah.gov>
Subject: Keep Communities Safe...

Dear Sen. Vickers; I am writing to express my strong opposition to "soft on crime" policies - specifically as it relates to the unaccountable pretrial release of criminal defendants. Criminal Justice Reform (including bail reform) is sweeping the country...most notably in states like New Jersey and New Mexico. Based on the premise of reduced costs to states and fairness to the "indigent", legislators and local officials are falling for it...and endangering their constituents and law enforcement in the process. Criminal Justice Reform has been marketed around the country as a cure-all for our increasing crime problem, but in reality these reforms end up weakening accountability in the criminal justice system by fundamentally making it easier for repeat criminals to get out of jail. Disguised under programs that promote fairness to the "indigent" with wide spread use of "personal bonds" and "sheriff's bonds," these unaccountable pretrial release programs are destroying criminal accountability and making our communities less safe. To compound the problem, new ”black box” computer algorithms are supposedly going to be able to predict who is going to commit another crime and who is going to flee. These computer algorithms have already been found to not only be ineffective but also have the potential to unfairly racially profile defendants. Ask New Jersey how well that is working out for them—their new bail computers, which began Jan 1, 2017, are handing “get out of jail free” cards to “low-risk” heroin dealers, child sex offenders, gun criminals, and hardened gang members. Even prior felons are being released on nothing more than a “promise” to appear. It is time to stop listening to the special interests, social advocacy groups, and judiciary who have been brainwashed into believing that coddling and protecting those that choose to harm and victimize citizens will make us safer all while expecting taxpayers to pay for it. We urge you to support giving judges the discretion to use proven accountable release options, stopping the use of faulty algorithm programs to determine pretrial release, ending the abuse and over-reliance of pretrial release programs, and ending the "soft on crime" agenda once and for all. Sincerely, Donna Tuggle 79 N 4250 W, Cedar City, UT 84720

Utah: Stop the Judicial Council's "Catch & Release" Bail Policies!

The Utah Judicial Council recently implemented new bail guidelines that create a new statewide bail schedule and continues the use of widely-discredited risk assessment tools.

These changes will make Utah less safe and must be stopped!

The policy-making body of the court system voted in August to revamp the bail schedule statewide by dictating that ALL felony bonds will now be capped at $5,000 for ANY offense. No matter how serious the charge, the bail is based solely on income level with a MAXIMUM bond of $5,000. This new policy is dangerous and eliminates judicial discretion. In making this policy change, the Utah Judicial Council falsely promised that their new rules would deny bail to the most dangerous offenders, but that's not happening. In fact, already those charged with very serious offenses, such as sexual assault of a minor and luring of a minor, have been released on their own recognizance with no accountability at all.

In addition, the new guidelines mandate the use of pretrial risk assessment tools to determine who gets released and who doesn't, which have been proven to be biased against protected classes by many academic scholars.

Take Action and email your local officials and demand that the Judicial Council rescind these new guidelines and stop legislating from the bench!

Act now!

Sign up with Facebook

Or Register Below

First Name

First Name

Last Name

Last Name

Address

Street Address, City, and State

Email

Email

Submit

St. George News

Sweeping bail reform measures in Utah raise questions of risk, public safety and privilege

Written by Cody Blowers
October 31, 2020

ST. GEORGE — Bail reform measures were recently implemented across Utah to address the pretrial justice system. Proponents of the measures say the system has been largely inequitable, where the wealthy, regardless of their risk, are released on bail while poorer individuals remain locked up despite the presumption of innocence until proven guilty.

However, the Utah Judicial Council's recent decision to implement new bail guidelines for the state, which became effective Oct. 1, is facing criticism that it is both unconstitutional and compromises public safety, according to a statement released by the American Bail Association.

The bill that spurred the reform, HB 206, was passed by the Utah Legislature in March with the support all Southern Utah lawmakers who were present for the vote when the bill came in front of the Utah House.

The legislation was designed to eliminate the disparity between those who have the financial means to post bail and be released, as opposed to those who have limited means and remain in jail solely based on their financial situation. In other words: same crime, same bail, completely different outcomes for the incarcerated.

According to the Libertas Institute, even though cash bail and bail bonds have been used in most pretrial hearings for decades, they have not been used with their intended level of individualization, largely due to the fact that in most cases, judges are not provided with adequate information to make a judgement on a particular individual when considering whether to incarcerate them.

The bill was introduced to address a bail system that "disproportionately harms the poor."

The sponsor of HB206, Salt Lake City Rep. Stephanie Pitcher, told St. George News in a previous interview the bill was introduced to address a bail system that "disproportionately harms the poor." That type of bail system, she said, is a contradiction to the premise a defendant is presumed innocent until proven guilty under the protections afforded by the U.S. Constitution.

Instead, Pitcher said, the bail system should serve to ensure that individuals are given "the least restrictive conditions of release" to both reasonably ensure their court appearance and uphold public safety.

However, the American Bail Association says the same constitutional benchmarks and safety goals the measures are attempting to achieve are actually being defeated by them. According to the association, the revamped bail schedule dictates a $5,000 maximum felony bond for any

offense, no matter how serious the charge, and they cite two examples of sex offenders released back into the community in northern Utah.

In addition, they say the new schedule is based solely on a defendant's income level, while ignoring other personal financial factors, including cash assets.

A question of public safety and criminal history

Washington County prosecutor Ryan Shaum told St. George News that bail functions as the safety net, and its primary function is to prevent an individual from fleeing or failing to appear. But more importantly, he said, it is to secure the safety of the victim and the community by detaining a suspect with a history of habitual or violent offenses.

That has always been the case to some degree, he said; however, those decisions were based primarily on the probable cause statements filed by arresting officers in support of the arrests and which outline the nature of the offenses.

With the changes associated with HB 206, the criminal history and nature of past offenses or the number of failures to appear carry more weight when it comes to custodial decisions, which also means that the judge establishing bail will need more than the probable cause statement outlining that particular incident or offense upon which the arrest was based.

In order to set appropriate bail, the criminal background and history is needed to determine if the suspect is either a danger or a flight risk. If neither exists, Shaum said, then bail should be set according to their ability to pay, and for low-risk individuals, a signed statement promising to appear is sufficient, and they should be released as their case moves through the court system.

To that end, the risk assessment and criminal history play an even more important role in establishing the pretrial custody requirements.

By the time the prosecutor's office gets wind of the arrest, the suspect is no longer in custody

A problem arises, Shaum said, when the county attorney's office gets the probable cause statement on a suspect who may have an extensive criminal history that involves violence, for example, but the particular offense the person was most recently arrested for did not require a high bail. In many cases, the individual posts a bond and is released, and by the time the prosecutor's office gets wind of the arrest, the suspect is no longer in custody and it is too late.

"It is very difficult to have an individual arrested for a second time because they should not have been released in the first place," Shaum said.

With the new changes, Shaum said officers are now tasked with making sure the probable cause statement includes the arrestee's criminal history and any risk factors, including whether they have a history of failing to appear in court.

“These officers now need to add more information that goes above the details concerning that particular offense,” he said.

While this will allow for a higher level of discretion when determining if a suspect should be held without bail, Shaum said it also means another job responsibility for law enforcement officers.

“It adds to their workload as well.”

However, despite some challenges associated with the changes, he said he believes that overall, bail reform is a move in the right direction.

But are the tools themselves risky?

To help advance bail reform statewide, the Utah Judicial Council voted in August to create a bail schedule that includes the use of a pretrial risk assessment tool that was introduced in 2018 and serves as a predictor of the probability of three future actions by the suspect: failing to appear in court, committing new criminal activity and further, any new violent activity.

The assessment takes into account the individual’s age at the time of their arrest, pending charges at time of offense, current violent offense and history of violent offenses. It also takes into account the person’s misdemeanor, felony and violent criminal history, any failures to appear over the last two-to-five years and how many times the individual has been incarcerated.

Once the risk level is established, bail is assigned accordingly

Those factors are calculated, and the results are used to determine the level of risk using a grid chart. Once the risk level is established, bail is assigned accordingly.

The American Bail Association says risk assessments are faulty, citing in their statement “multiple independent university studies that have concluded the mandated use of risk assessment discriminates against minorities.”

These type of assessments have fallen out of favor in recent years, the association said, even by the Pretrial Justice Institute, which in February stated the assessment tools “can no longer be a part of our solution for building equitable pretrial justice systems.”

Changes to an already shifting landscape

In between a patrol car and the courtroom is another location that is being affected by the changes: Purgatory Correctional Facility.

Previous to the new measures, if a person was arrested for a third-degree felony, for example, and there was not a specific bail order, the bail would be $5,000, payable at the jail.

Washington County Sheriff's Chief Deputy Jake Schultz told St. George News that since bail is no longer established by the offense, individuals are held until the judge assigns either a bail amount or a pretrial release order with conditions imposed by the court.

"We don't hold anyone without an arrest," Shultz said. "And we won't release anyone without a judge's order – it's as simple as that."

The process typically takes between two to four hours from the time a suspect arrives at the jail, unless the processing takes place in the middle of the night. Then, Schultz said, it can take up to eight hours, at which point the inmate is already processed through booking and in a housing unit.

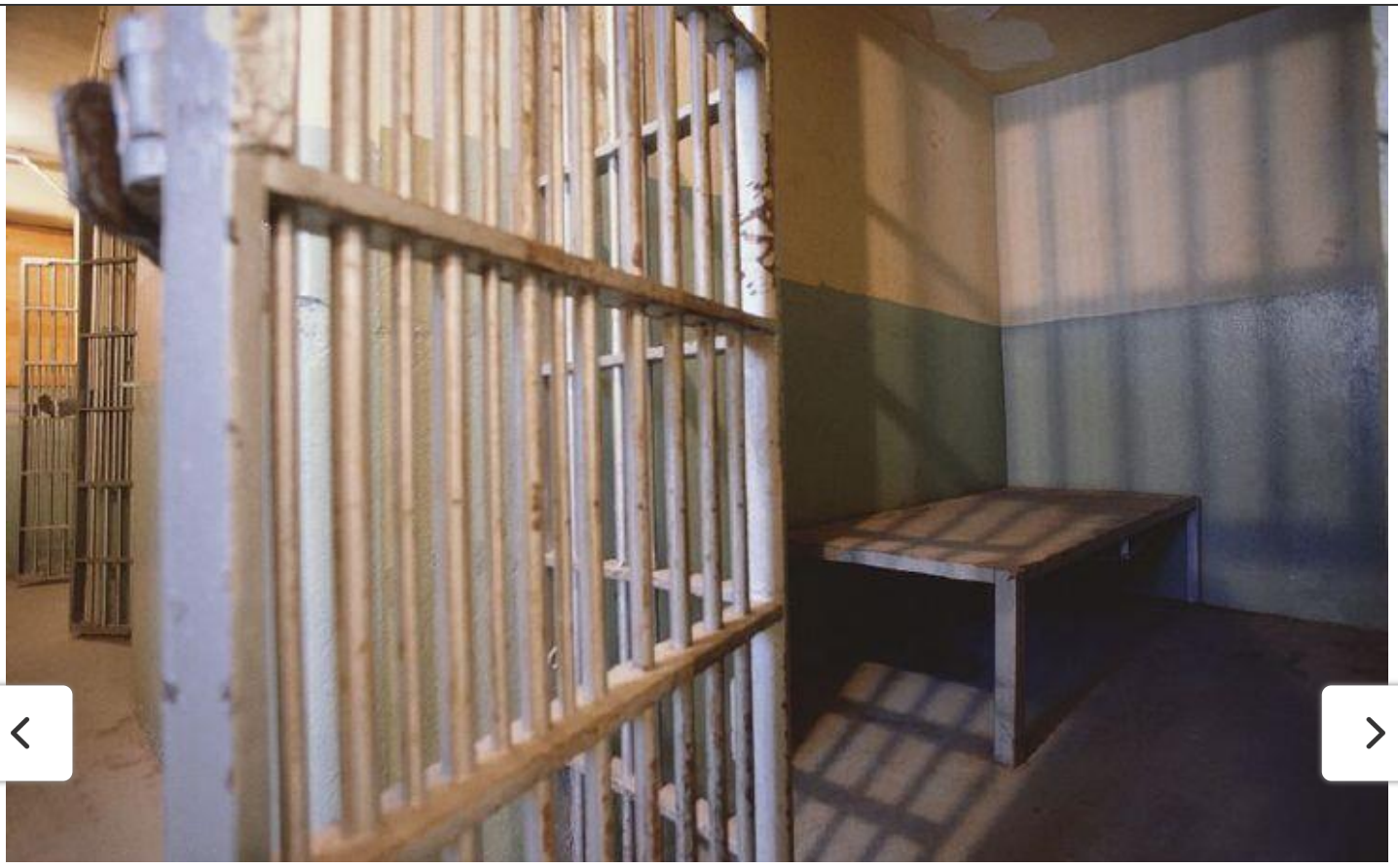
For the most part though, he said the judges have been very good about checking the arrests and assigning bail or release orders every few hours, even on the weekend. It is only during the off-hours that there is a delay, he said, which can create a bottleneck in booking, particularly when there is a high volume of arrests.

Schultz added that drastic changes mandated by the jail's COVID-19 restrictions are also still in play, so the reform measures hit a department that was already involved in a complete shift in jail operations.

However, much like Shaum, despite the difficulties, Schultz said the bail reform measures being implemented are important.

"Pretrial freedom should never be based on whether an inmate has a good job or a lot of money," he said.

The Richfield Reaper



Under review – Female inmate dies in Sevier County Jail

New law, no jail – Overhaul of Utah's bail system frustrating officials

By David Anderson
Editor

Oct 28, 2020 4:00 PM

Utah's bail system has been transformed, meaning fewer people will be going to jail following an arrest.

The worry is if bail is set higher than a person's ability to pay, it could be challenged constitutionally.

The new law also limits bail amounts as well as who can be kept in jail. Essentially anyone found to not pose an immediate threat to those around them or the community at large is eligible to be released, said Casey Jewkes, Sevier County attorney.

"You can understand what the law is trying to accomplish, but it has changed pretrial incarceration procedures for us substantially," Jewkes said. Under the new law most people will be released on their own recognizance without requiring posting of a monetary bond.

Under the new guidelines, if a person's own recognizance isn't deemed sufficient, judges can impose the least restrictive means, which can include a monetary bond or an ankle monitor.

"The judges still have discretion on what they can do under certain circumstances, but for the most part we expect new guidelines of pretrial release to be followed," Jewkes said.

A lot of offenses could result in people being released on their own recognizance within a few hours of arrest, according to Jewkes.

"We haven't had a lot of time to observe this in practice yet," Jewkes said. "We'll see what happens."

There are some circumstances where people can be held, such as committing felonies while being on felony release, or while on probation, as well as violent offenses.

"It's important to remember that that doesn't mean they aren't going to go to jail," Jewkes said. He said instead of people serving time before a trial and it being counted as time served following a conviction, the jail time will all be served after the case is adjudicated.

The changes have come with frustration to victims of crime, police officers and the community at large as well as the county attorney's office, Jewkes said.

"A lot of times people want to see someone go right to jail," Jewkes said.

said.

“When we put someone in jail, it’s for a good reason,” said Richfield City Police Chief Trent Lloyd. “We’re not out there just arbitrarily putting people in jail. That’d be a waste of our time.”

Lloyd said half or more of arrests are already done with a citation or a book and release, and changing the bail guidelines may have unanticipated results.

Lloyd said he’s already seen instances of people who otherwise would have been kept in jail being released before the ink dries on the paperwork under the new law.

“We had a sex offender who was charged with multiple offenses who was let out with an ankle monitor,” Lloyd said.

aid while the notion of protecting the rights of the accused is important, the new law is making it harder for ers to do their jobs.

In some instances, jail isn’t just a punishment; it’s the safest place for a person to be, according to Lloyd.

“There are times when people are a danger to themselves or others,” Lloyd said.

Tab 5

Effective 5/12/2015

17-32-1 Powers and duties of bail commissioners.

(1) The county executive, with the advice and consent of the county legislative body, may appoint one or more responsible and discreet members of the sheriff's department of the county as a bail commissioner.

(2) A bail commissioner may:

(a) receive bail for persons arrested in the county for a felony; and

(b) fix and receive bail for persons arrested in the county for a misdemeanor under the laws of the state, or for a violation of any of the county ordinances in accordance with the uniform bail schedule adopted by the Judicial Council or a reasonable bail for county ordinances not contained in the schedule.

(3) Any person who has been ordered by a magistrate, judge, or bail commissioner to give bail may deposit the amount with the bail commissioner:

(a) in money, by cash, certified or cashier's check, personal check with check guarantee card, money order, or credit card, if the bail commissioner has chosen to establish any of those options; or

(b) by a bond issued by a licensed bail bond surety.

(4) Any money or bond collected by a bail commissioner shall be delivered to the appropriate court within three days of receipt of the money or bond.

(5) The court may review the amount of bail ordered by a bail commissioner and may modify the amount of bail required for good cause.

Amended by Chapter 99, 2015 General Session

Tab 6

Feedback on URCrP and Pretrial Detention Procedures

September 30, 2020
Public Comment on URCrP Amendments:
Rule 10 line 13 – this line doesn't read well. "If the defendant has been released pretrial prior to arraignment…" Is this supposed to be referring to pretrial release conditions? If it's just referring to any release prior to a trial occurring, then it is redundant, since an arraignment is prior to trial. I also don't think it should matter if the defendant fails to appear before or after arraignment, once he has been released. If the defendant has been released and fails to appear, shouldn't a warrant of arrest be available?

In Rule 27, 27A, 27B the language switches back and forth between "any other individual, property and the community" and then in other paragraphs it says "any other person, property, or the community." And then in Rule 27 it talks about posing "danger to the physical, psychological, or financial and economic safety or well-being…." Again, it seems that when considering the dangers, it is the same regardless of which paragraph it is in. So either refer back to the subsection in Rule 27, or incorporate the language so it is consistent across all of the rules.

Arising out of statewide public defender/criminal defense CLE:

October 27, 2020
Public Comment on URCrP Amendments:
Having now dealt with initial appearances under the new statue and some issues related to detention hearings, I think there are few things that could be improved. I apologize for having written something of a dense essay.

A. Notice of ability to make bail argument prior to the hearing

The first time a defendant is notified that she has a right to address bail or release is *during* the initial appearance. Utah R. Crim. P. 7(a)(4). By that point, there is no opportunity to prepare. The rule states that a pretrial status order must be addressed unless either party needs a continuance, giving no indication that the defendant has the right to address the court, request release, present evidence, and make arguments, nor does it indicate that the defendant has the right to be represented by counsel in addressing the pretrial status order. The defendant may not even know what the bail amount is until she is facing the judge.

This process clashes with both the constitutional principles of notice elaborated above and Utah caselaw regarding bail hearings. State v. Kastanis, 848 P.2d 673, 675 (Utah 1993) (referring to hearings for which bail may be denied: "Defendant must be given adequate notice to prepare for the bail hearing.").

This problem has been noted in other jurisdictions, e.g. Schultz v. State, 330 F. Supp. 3d 1344, 1370 (N.D. Ala. 2018). In order for a defendant to prepare for the bail hearing, he must be given "constitutionally adequate notice." Id. at 1370. Schultz elaborates that such a notice "must be tailored, in light of the decision to be made, to the capacities and circumstances of those who are

to be heard, to insure that they are given a meaningful opportunity to present their case." Id. (quoting Mathews v. Eldridge, 424 U.S. 319, 349 (1976)) (quotation marks omitted).

Notice must also be given prior to the hearing, not at it. In Wolff v. McDonald, the U.S. Supreme Court held that notice to a parolee about a revocation proceeding was inadequate for three reasons: the notice was not written (it was given orally at the beginning of the hearing), the prisoner was not given the evidence to show what the revocation proceeding would be based on, and the notice did not explain the reasons for why the proceeding was initiated. 418 U.S. 539, 563-64 (1974). The Court held that written notice with sufficient information must be given 24 hours in advance to prepare for the proceeding. Id. The Court pointed out, "Part of the function of notice is to give the charged party a chance to marshal the facts in his defense and to clarify what the charges are, in fact." Id. Such notice would be no less important for a pretrial detainee preparing to argue for his release.

Utah R. Crim. P. 4(c)(1) requires that defendants charged with felonies and class A misdemeanors be provided a written Information that gives the reasons for requesting a warrant. Because the information for requesting a warrant relates to the same factors as the bail determination, see Utah R. Crim. P. 9(a)(2)(C)(i)-(iv), the reasons would presumably tell a defendant what the court will use to determine whether bail should remain. But even still, the rule falls short of ensuring actual notice: it does not set forth how early the Information should be provided to the defendant and in reality, most in-custody defendants are not provided the information until mere minutes before appearing before the judge.

Either this rule or another should provide for a defendant to be given notice of being able to address the pretrial status order *before* the hearing so that the defendant can prepare to address the court and make arguments on her behalf.

B. Appointment of Counsel Before Initial Appearance

The U.S. Supreme Court has held "that the right to counsel attaches at the initial appearance before a judicial officer." Rothgery v. Gillespie Cty., Tex., 554 U.S. 191, 199 (2008). By initial appearance, the Supreme Court meant a proceeding in which "the magistrate informs the defendant of the charge in the complaint, and of various rights in further proceedings, and determines the conditions for pretrial release." Id. (cleaned up); see id. at 213 (Concluding with: "We merely reaffirm what we have held before and what an overwhelming majority of American jurisdictions understand in practice: a criminal defendant's initial appearance . . . trigger[s] attachment of the Sixth Amendment right to counsel."). Notably, Nevada recognized this right in their recent decision on the constitutional requirements for bail hearings. Valdez-Jimenez v. Eighth Judicial Dist. Court in & for Cty. of Clark, 460 P.3d 976, 987 (Nev. 2020).

By comparison, Utah R. Crim P. 7 gives the appointment of counsel at the initial appearance. Because appointment of counsel does not occur prior to the hearing, counsel must prepare immediately to address bail or release. That's not possible in our world of remote hearings and sometimes lengthy Initial Appearance calendar. Although the procedure contemplates giving counsel a continuance to prepare for the hearing on a later date, the point of having counsel would necessarily be vitiated if the court did not give the defendant a reasonable opportunity to

meet and discuss with counsel his evidence and theory for arguing release. To the extent that the rule is ambiguous in allowing appointed counsel a meaningful opportunity to confer with an indigent defendant to address bail or release at the initial appearance, that ambiguity should be clarified so as not to be construed to give a court discretion to appoint counsel and delay addressing release if counsel indicates that he isn't immediately prepared to address release.

I understand that appointment of counsel prior to the Initial Appearance is a complicated issue, all-the-more-so because Utah fails to invest in public defense to the degree that other states do (even Idaho spends more than Utah does!). If the rule at least gave an option to have appointment occur prior to Initial Appearances so that courts may consider implementing a policy of pre-hearing appointments in some jurisdictions then that would be a clear improvement that would step towards a constitutionally adequate Initial Appearance.

C. Scheduling of Detention Hearings

Utah Code § 77-20-1(6)(b) requires that after a detention motion is filed, the court must schedule the hearing "as soon as practicable." Other jurisdictions have given more concrete directions. Helpfully, in February 2020, The National Center for State Courts published a white paper surveying five specific jurisdictions who have created detailed pretrial detention reforms. Pretrial Preventative Detention, NCSC, https://nvcourts.gov/AOC/Committees_and_Commissions/Evidence/Documents/Reports_and_Studies/Pretrial_Preventive_Detention_White_Paper_4_24_2020/ (February 2020).

These five jurisdictions—California, New Jersey, New Mexico, Arizona, and the District of Columbia—were surveyed for their robust statutory and rule requirements as models for Nevada to follow as it develops its pretrial detention reforms. Id. at 4.

In California, a pretrial detention hearing must be held within three days of the detention motion's filing. Cal. Penal Code § 1320.19(a) With good cause the prosecutor may receive up to three days for a continuance. Id. Same goes for New Jersey, also allowing the prosecutor up to three days. N.J. R. CR. R. 3:4A(b)(1). New Mexico requires that it be held within five days of the prosecutor's motion. NM R DIST CT RCRP 5-409(F)(1)(a). The prosecutor may receive a three-day extension either for extraordinary circumstances or if the preliminary hearing can also be done within three days of the extension. Id. at (b). Arizona also requires that the hearing be held within five days of the prosecutor's motion, allowing for only a 24-hour continuance for the prosecution if good cause is shown; if the motion is made orally at the Initial Appearance, the detention hearing must be held within 24 hours of the oral motion. AZ ST § 13-3961(E). In the District of Columbia, the detention hearing must be heard at the Initial Appearance, but the prosecution can receive up to a three-day continuance with good cause shown. D.C. Code Ann. § 23-1322 (d)(1). All of the above jurisdictions also allow for defense to request a continuance with varying limitations.

Rule 7 should give strict guidance on how late a detention hearing may be scheduled. It should also have specifications on how soon they must be scheduled in cases where the State files a motion at a later time than the Initial Appearance. I'd also recommend looking at each of those rules and statutes more closely because they include more nuance than I've described here (such

as differing times if a more relevant beginning point of the case is the arrest, rather than the filing of the motion). In any case, something along the lines of those jurisdictions should be implemented in Utah with a detention hearing occurring within either 3 or 5 days of the prosecutor's motion being filed.

D. Discovery Prior to Detention Hearings

Utah Code § 77-20-1 states nothing about a prosecutor's discovery obligations prior to detention hearings. And neither U. R. Crim. P. 7 nor rule 16 have been updated to specifically address discovery before detention hearings. Rule 16 does, however, state "The prosecutor shall make all disclosures as soon as practicable following the filing of charges. . .".

Other jurisdictions have created more detailed requirements. They are instructive because the right to an evidentiary means, under due process, a right to a meaningful hearing. More broadly, the right to a meaningful hearing includes the right to disclosures of evidence intended to be used at that hearing. Greene v. McElroy, 360 U.S. 474, 496 (1959), quoted with approval in Goldberg v. Kelly, 397 U.S. 254, 270 (1970). The Supreme Court specifically noted:

"Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue."

The rules in other jurisdictions are instructive to the degree that they set the standard for what a meaningful hearing must be under a standard of "fundamental fairness." See State v. Tiedemann, 2007 UT 49, ¶ 44 (noting that "fundamental fairness" is at the heart of due process under Utah Const. art. I, § 7).

Looking again to the same jurisdictions in section C. supra: New Jersey requires disclosures 24 hours in advance of the hearing all evidence it intends to introduce and all exculpatory evidence. N.J. R. CR. R. 3:4A(b)(1); 3:4-2. New Mexico has the same requirements as New Jersey but allows for additional evidence to be presented after the deadline if the evidence is discovered after the deadline. NM R DIST CT RCRP 5-409(F)(2). Arizona has nothing on disclosures in its statute for detention hearings, but it does state, "Testimony of the person charged that is given during the hearing shall not be admissible on the issue of guilt in any subsequent judicial proceeding," which lessens the potential harm of not being given the prosecutor's discovery. AZ ST § 13-3961(E). For the District of Columbia, the Jencks Act applies, requiring the government to disclose all "Jencks Act statements" prior to the hearing unless there is good cause not to. D.C. Super. Ct. R. Crim. P. 46; 26.2

For Utah, there's no reason for the prosecutor to be unable to send discovery to the defense at least 24 hours prior to a detention hearing (and having any evidence that isn't disclosed by then be excluded at the detention hearing). And the rule should also take other favorable aspects of other states, such as an explicit requirement to disclose exculpatory evidence prior to the hearing, and also a prohibition on using a defendant's testimony at a detention hearing against them at trial. Obviously, any testimony a defendant may give at a detention hearing can be used as

impeachment evidence, but it shouldn't be permitted for use as substantive evidence. That protection saves a defendant from making the horrible decision of having to choose between speaking at a detention hearing in order to avoid pretrial detention but risk self-incrimination prior to trial versus staying silent at the detention hearing in order to preserve her fifth amendment privilege against self-incrimination but risk being held in custody because of her failure to speak up and mitigate the relevant detention standards.

E. Ability to challenge the prosecutor's motion to detain at the Initial Appearance

In order to delay a pretrial status order, 77-20-1(3)(c) requires that the prosecutor file a motion that "states a reasonable case for detention; and detaining the defendant until after the motion is heard is in the interests of justice and public safety." What the statute doesn't make clear is that the defense can challenge a motion that fails to meet this prima facie showing. LDA has seen a number of prosecutor's motions that don't go anywhere near articulating the things stated in this requirement. It stands to reason that defense can object to a deficient motion and move to strike it, allowing the defendant to appear at his detention hearing while out of custody if the court agrees with defendant's objection. Of course, if detention hearings happen fairly quickly (under two weeks), then the typical timelines for motion litigation wouldn't apply. In other words, this requirement in the statute is potentially meaningless.

Rule 7 should specify that the court at Initial Appearance should have to rule on the prosecutor's motion to detain and ensure that it comports with the requirements of 77-20-1(3)(c). It's not as though the prosecutor's burden is particularly high with their motions to detain, but there should be some mechanism that instruct courts to determine whether the prosecutor has complied with the statute. That would be particularly important because of how new all of this is for the culture of our judicial system.

F. Timing Issues

Utah R. Crim P. 9 requires that a defendant be given an Initial Appearance within three days of arrest. Utah R. Crim P. 9A does not specify how soon an Initial Appearance must be given after arrest. I don't understand the rationale here. I will say that in my experience, it is not uncommon (even pre-COVID) to see a defendant sit in jail for a period greater than three days before seeing the judge. I suspect that the lack of a deadline for an Initial Appearance in Utah R. Crim P. 9A is partly the reason for this.

The committee should take this opportunity to change what appears to be an unexplained issue in the rule.

Final point: I'm excited to see the implementation of Rule 41!

<u>Feedback: October 8, 2020</u>
Prior to October 1st, many cases were filed via traditional means where the State would request, and the Court would approve, a warrant of arrest. As we know, many of those warrants were high in value (especially in our violent crime and sex offense cases). The high warrant value tended to reflect the State's assessment about whether the person should be released due to

public safety concerns. With this new statute, those high value warrants would now be treated as "pretrial detention requests."

Defense attorneys at initial appearance are making requests to reduce bond pursuant to the new statute. It is concerning if judges begin significantly reducing these warrants to nominal amounts based on ability to pay without providing the State a chance to notify the victim or argue for pretrial detention. Recent example: the bond was reduced to $100.00 in a case with charges that included Aggravated Kidnapping and Abuse of a Vulnerable Adult without notifying the victim. The State often does not receive the final IA calendar until the day before, when the State first becomes aware of someone being booked on an outstanding pre-October 1 warrant.

While reducing bond is certainly within the Court's power, such requests required notice to the opposing party under the former bail statute. That notice would give the State a chance to notify the victim and assess risk. Under the bail statute prior to HB206, Subsection 6 required (emphasis added):

> **(a) <u>A motion to modify the initial order may be made by a party at any time upon notice to the opposing party sufficient to permit the opposing party to prepare for hearing and to permit any victim to be notified and be present.</u>**

Further, the Victim's right statute still requires the prosecution, per 77-38-3(3)(a), to provide notice to a victim of crime: "for the important criminal justice hearings provided in 7a7-38(2)(5)(a) through (f)." These "important hearings" include "any court proceeding to determine whether to release a defendant…."

With all this in mind, the concern with this subset of cases where warrants were issued prior to Oct. 1st is the Court addressing bail at Initial Appearance without permitting the State to provide notice to the victim as required under the former bail statute (which was in effect at the time the warrant was issued) and the Victim Rights Statute.

Instead of addressing bail at IA, defense counsel and the Court should use the IA proceeding to put the State on notice that bail will be addressed at the first scheduling conference for this subset of cases. That would then provide the State an opportunity to assess whether a motion for pretrial detention is warranted and give the State the chance to file the motion and notify the victim. Bail would remain as originally set at the time the arrest warrant was signed until the scheduling conference/bail hearing, presumably on the next available SC calendar.

<u>Feedback: October 30, 2020</u>

I think we are running into 2 problems and attempts to amend the criminal rules have not been able to address them. First, the judges are finding that arrestees are not entitled to bail under Utah Code §77-20-1(2) and ordering pretrial detention at the PC stage even where the prosecutors have not filed a motion for pretrial detention under (6). Judges are denying release based entirely upon the PC statement alone and are not setting or holding a hearing, as described in (6)(b), (c), and (d). Thus, the initial pretrial status orders (PSO) to detain indefinitely are being made without a hearing and without any opportunity for the defendant, or even the state for that matter, to be heard on the PSO. I say indefinitely because if any of these defendants assert their right to

trial, and trial are suspended, there is no telling how long these individuals will be held without the right to bail and without a hearing. It seems to me that the protections described in (6) for pretrial detention orders are completely undermined if the judges reviewing PC can make the same findings about substantial evidence and clear and convincing evidence of danger or flight and order detention based solely on the PC statement.

And the second problem makes the first problem even worse. When these defendants are ordered detained, or even those held on some monetary bail that they can't pay, they stay in jail until they appear in court for their first appearance. At that hearing they are informed of the charges, and provided an opportunity to request the appointment of counsel. Very often at the first appearance, after counsel is appointed, the defendants ask for the judge to modify the PSO. The defendant wants the judge to consider details of his life, his job, his family or ties to the community, and compliance with prior orders to appear in court, all the things that help judges know whether the defendant is likely to come back to court or pose a danger to individuals or the community. In most instances none of this information has previously been considered since the PSO was made based solely on the PC statement immediately after the arrest. This is not the kind of evidence arresting officers put in PC statements. The problem comes when, at the first appearance, the prosecutors routinely object to addressing the PSO under (11) which provides that "A motion to modify the initial pretrial status order may be made by a party at any time upon notice to the opposing party sufficient to permit the opposing party to prepare for hearing and to permit each alleged victim to be notified and be present." Utah Code §77-20-1(11)(a). They are very reasonably claiming that the "initial pretrial status order" was made by the magistrate at the time the PC statement was filed and so defendants cannot ask the court to modify that order without filing a motion beforehand and giving enough notice to the prosecutor. Of course 90% of these defendants are indigent and do not have an attorney to file a motion and provide notice before the initial appearance. So the initial pretrial status order is set by the magistrate without a hearing and without any input from the defendant or counsel, then at the first appearance the pretrial status order cannot even be addressed because the defendant did not file a motion beforehand. So the defendant is continued to be held based entirely upon what the arresting officer wrote in the PC statement. What we end up with is sometimes weeks before the court has the opportunity to consider the relevant information and make an informed PSO.

The above scenarios seem to be the unintended consequences of a bill generally directed at improving fairness in the bail and pretrial process. Though the rules committee has recommended changes to the rules to ensure that the PSO should be addressed the initial appearance (see Rule 7(c)(1) which says the court must issue a PSO at the initial appearance and the parties should be prepared to do so), the notice requirement in 77-20-1(11) has convinced many of the judges that the rule does not interfere with the statutory requirement.

Relevant to the second problem described above, the Rights of Crime Victims Act lays out that prosecutors are required to provide notice to a victim of "important criminal justice hearings". Utah Code §77-38-3(3). This obligation stems from Article I, section 28 of the Utah Constitution which gives victims of crime, if they request it, the right to be "informed of, be present at, and to be heard at important criminal justice hearings related to the victim". Utah Code §77-38-2(5) defines the statutory, and in turn constitutional, term "important criminal justice hearings" and among other hearings they include "(d) any court proceeding to determine whether to release a

defendant or minor and, if so, under what conditions release may occur, excluding any such release determination made at an initial appearance". So under the constitution and the existing statutes, victims have the right to be informed of and right to participate in any hearing where the PSO is going to be considered, except when that occurs at the initial appearance. That means the State does not have the obligation to provide notice to victims prior to the initial appearance or ensure that the victim's have the opportunity to participate. It also means that the notice requirement discussed above in (11) does not apply to giving victims notice of PSO modification at the initial appearance.

It seems to be that the notice requirement in (11) should be clarified that it does not apply to first appearance modifications.

As for the first problem, I think an order to detain should only come after a motion by the prosecutor and a hearing as described in (6), in other words due process. The PSO for pretrial detention that arises from the magistrate's review of an ex parte request in the form of a PC affidavit should not be permanent without the due process described in (6).

Additional views on evidence at pretrial detention hearings:

November 3, 2020

Detention hearings under 77-20-1 can be conducted essentially in the same fashion as sentencing hearings. Detention hearings will usually (or at least often) include consideration of the following factors: (1) whether there's "substantial evidence" to support the current charges, when they fall within the various categories delineated in subsection (2) of 77-20-1; (2) whether the case is a first-degree felony case under subsection (8) of 77-20-1, warranting a presumption of detention; and (3) whether the factors delineated in subsection (3)(b) of 77-20-1 warrant releasing defendant with pretrial conditions or other terms that are less restrictive than detention. The defendant bears the burden of proof to show reasonable less restrictive alternatives under subsection (3)(b) in first-degree felony cases where there's a presumption of detention. The State bears that burden in other cases.

Under Rule 1101(c)(3) of the Utah Rules of Evidence, these hearings explicitly are not subject to the rules of evidence. That is the same rule that exempts sentencing hearings from the rules of evidence. When the new version of 77-20-1 initially passed, there was concern that at least the "substantial evidence" component of detention hearings would require complex and burdensome evidentiary hearings, which would be more robust than preliminary hearings and not much less involved than trials. That concern was based on *State v. Kastanis*, 848 P.2d 673 (Utah 1993), which (1) confirms that a defendant is entitled to bail under the Utah Constitution except in various categories of cases in which there is "substantial evidence" to support the current charges, and (2) states the defendant is entitled to robust evidentiary proceedings, including cross-examination of witnesses, in connection with the determination of the "substantial evidence" question. Considering that there will be many more of these hearings under the new bail statute, the elaborate procedural requirements described in *Kastanis* would make those hearings unwieldy and essentially impossible to handle on a large scale.

It appears there is no question that the component of *Kastanis* requiring a showing of "substantial evidence" prior to detaining a defendant without bail still applies. It is a state constitutional requirement. However, the procedure to which the defendant is entitled has changed. The *Kastanis* court based its holding concerning the procedures to be applied at detention hearings solely on the earlier Utah Supreme Court holding in *Chynoweth v. Larson*, 572 P.2d 1081 (Utah 1977). In fact, the *Kastanis* court's entire description of the procedural requirements that apply at detention hearings is a block quotation from *Chynoweth*. In turn, the *Chynoweth* court based its description of the procedures to be applied at detention hearings explicitly on the fact that the Utah Rules of Evidence at the time applied to detention hearings. 572 P.2d at 1083 ("The Utah Rules of Evidence are applicable to and controlling at bail hearings."). That is the reason the Utah Supreme Court held in *Kastanis* and *Chynoweth* that defendants were entitled to the elaborate procedures described therein.

Since *Chynoweth*, however, the Utah Rules of Evidence have been materially amended, and they now provide explicitly that they do not apply to, among other things, "sentencing" and "proceedings with respect to release on bail or otherwise." Utah R. Evid. 1101(c)(3). Thus, although the "substantial evidence" showing described in *Kastanis* is still required under the Utah Constitution and the bail statute, the procedure required to determine "substantial evidence" (or anything germane to a bail determination), has changed. The rule of evidence that was the basis for the *Kastanis* and *Chynoweth* has been changed 180 degrees.

Considering that exemption of bail hearings from the Utah Rules of Evidence is part of the very same sentence that exempts sentencing hearings from the rules of evidence, it seems appropriate that courts have the ability to conduct detention hearings using essentially the same procedures used at sentencing hearings, which include receiving hearsay evidence, accepting proffers from counsel, listening to victim statements, and all the other things we do at sentencing hearings. There is a fairly well-developed body of Utah Supreme Court case law endorsing the broad discretion of the trial courts in considering information at sentencing hearings. See, e.g., *State v. Moa*, 2012 UT 28, 282 P.3d 985, at paras. 34-45. As *Moa* and similar cases confirm, the rules of evidence do not apply at sentencing hearings, but defendants have a due process right not be sentenced based on "unreliable" or "irrelevant" information. Unless trial judges explicitly say they are relying on evidence or information the appellate courts find to be irrelevant or unreliable, the appellate courts presume trial courts can recognize and disregard unreliable or irrelevant information in making sentencing decisions. Absent a clear record to the contrary, the appellate courts assume trial judges assigned varying weights to the items of information and evidence received at sentencing hearings based on the respective reliability and relevance of the information, and disregarded unreliable or irrelevant information in its entirety. Since bail hearings are referenced in the same sentence of Rule 1101(c)(3) as sentencing hearings, it seems this same standard should apply, and detention hearings can be handled essentially the same way as sentencing hearings.

Kastanis and *Chynoweth* can no longer serve as precedent for what procedural rights a defendant has at a substantial evidence hearing. Since the Rules of Evidence no longer apply, the defendant's procedural rights now arise from statutes and rules, both with respect to sentencing and with respect to substantial evidence hearings. In the context of sentencing hearings, those rights arise from Rule 22 of the Utah Rules of Criminal Procedure and UCA 77-18-1(7), which

collectively provide that defendants have a right to present "evidence," "information," "testimony," etc. at sentencing hearings. In the context of detention hearings, those rights currently arise only from UCA 77-20-1(5), which is a non-exclusive list of things a court may consider in deciding whether to detain the defendant, and UCA 77-20-1(6), which requires that the defendant be given "the opportunity to make arguments and present relevant evidence at the detention hearing." The Rules of Criminal Procedure Committee might want to consider rules that would apply to detention hearings, just as Rule 22 applies to sentencing hearings. The Rules of Evidence explicitly do not apply at either type of hearing.

As the rules are written now, trial court judges have the same amount of discretion in the context of detention hearings as they do at sentencing hearings to dictate the form and manner in which evidence and information is received. A trial court judge would have discretion to allow live testimony at detention hearings if the case warrants it, just as a judge would have discretion to allow live testimony at a sentencing hearing. Indeed, any given trial court judges who felt inclined to allow live testimony at all detention hearings (or sentencing hearings) would likely be within their discretion to do so. But that doesn't mean they're required to allow the information they receive to be presented in any particular way.

The recent case of *State v. Tapusoa*, 2020 UT App 92, is instructive. The defendant in the case asked to have his mother address the court directly at his sentencing hearing, and the trial court judge refused to allow her to do so. He instead allowed defense counsel to tell him what the mother had to say (essentially, a proffer). The Court of Appeals affirmed, holding that although the defendant had the right to present his mother's views to court pursuant to Utah R. Crim. P. 22, the trial court judge was not required to allow the defendant to present that information in any particular manner. He acted within his discretion by requiring defense counsel to proffer the defendant's mother's views rather than having her speak directly to the court. The Court of Appeals held that was enough:

> Here, although the district court refused to hear directly from Mother during the sentencing hearing, it received the information Tapusoa intended to present from Mother through other means. The information was presented in the subsequent statements made by defense counsel expressing Mother's views—which Tapusoa admits relayed, “after a fashion, some of what [Mother] would have said”—and in the PSR, which contained additional information from Mother about Tapusoa's support in the community and his readiness to address his “criminogenic factors.” Accordingly, the court did not violate rule 22(a) by refusing to hear directly from Mother and did not abuse its discretion in requiring that the information Mother had to convey be presented through counsel.

2020 UT App 92 at par. 15. The essential holding of the case is that "as long as the defense has an opportunity to present mitigating information to the court, a court may in its discretion place limits on the manner in which such information is presented to it at sentencing." Id. at par. 14. Considering that the language of UCA 77-20-1(6) concerning the defendant's right to "make arguments and present relevant evidence" at a detention hearing is no more robust than the language in UCA 77-18-1(7) and Utah R. Crim. P. 22(a) concerning the defendant's right to present "evidence," "information," "testimony," etc. at a sentencing hearing, there is no reason to

conclude that the analysis of the Court of Appeals in *Tapusoa* shouldn't be read to afford similar discretion to trial courts at detention hearings.

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Under URE 1101(c), the Utah Rules of Evidence (other than with respect to privileges) do not apply to "proceedings with respect to release on bail or otherwise." And a pretrial detention hearing under Utah Code 77-20-1(7)--and the "bail hearing" discussed in *Kastanis*--fall within "proceedings with respect to release on bail or otherwise." So the Utah Rules of Evidence (other than with respect to privileges) do not apply to pretrial detention hearings or *Kastanis* substantial evidence hearings.

However, the court cannot conduct pretrial detention hearings the same way it conducts sentencing hearings. Rather, *Kastanis* and *Chynoweth* state that pretrial detention hearings should look more like preliminary hearings, albeit with a higher standard of proof. In short, a defendant is entitled to a pretrial detention hearing at which:

1. The prosecutor may present evidence in the form of live testimony, affidavits/declarations, or documents (presumably with proffers of foundation). It's not 100% clear that a prosecutor could merely proffer evidence (e.g., John Doe will testify to A, B, and C, and the documents will show X, Y, and Z...).
2. The defendant may cross-examine the State's witnesses (if any) and call witnesses of its own.
3. The issue to be decided by the court is whether the State's evidence, notwithstanding any contradiction of it by defense proof, warrants the conclusion that if believed by a jury it furnishes a reasonable basis for a verdict of guilt. Stated more plainly, whether the State's evidence, considered on its own, is sufficient to allow a properly instructed jury to find guilt beyond a reasonable doubt. The court can make credibility determinations regarding the State's witnesses.

In *State v. Kastanis*, 848 P.2d 673 (Utah 1993), the Utah Supreme Court considered what "substantial evidence" means, and what procedures should be afforded to a defendant at a bail hearing, and held:

> [*Chynoweth v. Larson*, 572 P.2d 1081 (Utah 1977)] clearly requires that defendant be allowed a bail hearing, at which he may bring his own evidence and witnesses and at which he may cross-examine the State's witnesses. Defendant must be given adequate notice to prepare for the hearing. At that hearing, the trial court may not revoke bail unless the facts adduced by the State furnish a reasonable basis for a jury finding of a verdict of guilty of [the crime charged].

Id. at 676. The *Kastanis* decision cites to and quotes from the following portion of *Chynoweth*:

> The prosecutor may present proof in affidavit form or, as in this case, in the depositional form described to oppose the release of those accused but not over the accuseds' objection. See *State v. Obstein*, 52 N.J. 516, 247 A.2d 5 (1968). In this

cited case, the New Jersey Supreme Court made the following pertinent remarks which we adopt:

> The bail hearing before the trial court is not a unilateral one. That is, the prosecutor cannot limit the testimony to his direct examination of the State's witnesses. The defendant has the right of cross-examination. In this connection it must be remembered that the proceeding is not a wide-ranging one for discovery, nor for exploration or determination of guilt or innocence. The prosecutor, however, cannot prevent the accused from producing witnesses to introduce facts pertinent to the inquiry. But the narrow and focal issue must be kept in mind by the trial court and the hearing tailored to that issue, i. e., whether the facts adduced by the State, notwithstanding contradiction of them by defense proof, warrant the conclusion that if believed by a jury they furnish a reasonable basis for a verdict of first degree murder. At 247 A.2d 9 (note cases cited therein).

The Utah Rules of Evidence are applicable to and controlling at bail hearings.

Chynoweth v. Larson, 572 P.2d 1081, 1082–83 (Utah 1977).

To be sure, the statements in *Chynoweth* that a prosecutor "may present proof in affidavit form ... but not over the accuseds' objection," and that "the Utah Rules of Evidence are applicable to and controlling at bail hearings," have been abrogated by URE 1101(c)(3). The Utah Rules of Evidence (other than with respect to privileges) are no longer applicable to bail hearings, and a prosecutor may present proof in affidavit form at a bail hearing notwithstanding the defendant's objections.

But *Chynoweth's* adoption of the New Jersey court's remarks--and, in turn, *Kastanis's* reliance on *Chynoweth's* adoption of those remarks--is still good law. Utah law, in its current form, requires that a defendant be allowed a bail hearing, at which he may bring his own evidence and witnesses and at which he may cross-examine the State's witnesses; that Defendant must be given adequate notice to prepare for the hearing; and at that hearing, the trial court may not detain (or continue to detain) the defendant unless the facts adduced by the State furnish a reasonable basis for a jury finding of a verdict of guilty of the crime charged (i.e., guilt beyond a reasonable doubt).

That sounds more like a preliminary hearing with a higher standard of proof, rather than a sentencing hearing. At sentencing, the defendant has either admitted guilt or been convicted; but at a substantial evidence hearing, the defendant is presumed innocent